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Farmland Preservation: A Vital Agricultural Law Issue for the 1980's

by

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by Julian Conrad Juergensmeyer*

I. INTRODUCTION: PRIME AGRICULTURAL LAND AND THE PRESSURES OF URBANIZATION

One of the most perplexing problems facing agricultural interests today is the rapid conversion of prime agricultural land on the urban fringe to nonagricultural use.¹ Developers are constantly in search of large parcels of level land that are relatively free of vegetation and with adequate drainage. This description unfortunately also characterizes prime agricultural land and creates a tension between increasing urban development and demands for increased agricultural production.²

Statistically, a majority of the nation's land is classified as agricultural land.³ From a national agricultural land base of almost 2.25 billion acres, it is estimated that 35,000 acres are lost every week to development.⁴ Soil Conservation Service research indicates that

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1. No other area of agricultural law has been the subject of as much comment and debate. For a broad treatment of the farmland preservation issue, see Cotner, *Land Use Policy and Agriculture: A State and Local Perspective*, U.S. DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE (1974); NATIONAL ASSOCIATION OF COUNTIES RESEARCH FOUNDATION; *DISAPPEARING FARMLANDS: A CITIZEN'S GUIDE TO AGRICULTURAL LAND PRESERVATION* (2d ed. 1980); U.S. GENERAL ACCOUNTING OFFICE REPORT TO CONGRESS, *PRESERVING AMERICA'S FARMLAND: A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT* (1979); COUNCIL ON ENVIRONMENTAL QUALITY, *LAND USE, THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* (1979); *PRESERVATION OF PRIME AGRICULTURAL LAND, ENVIRONMENTAL COMMENT*, URBAN LAND INSTITUTE (Jan. 1978); REAL ESTATE RESEARCH CORPORATION, *THE COSTS OF SPRAWL* (U.S. Government Printing Office, Washington 1979); Blobau, *The Loss of Agricultural Land*, REPORT TO THE CITIZENS ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY (1974) (bibliography); Little, *Middleground Approaches to the Preservation of Farmland*, NATIONAL AGRICULTURAL LANDS STUDY (1980); Little, *Land and Food: The Preservation of U.S. Farmland*, AMERICAN LAND FORUM (1979); Little, *The Case for Retaining Agricultural Land*, LIBRARY OF CONGRESS (Nov. 8, 1977) (Workshop); Miner, *Agricultural Retention: An Emerging Issue in Environmental Comment*, URBAN LAND INSTITUTE (May 1975); Clark, *Conserving the Nation's Farmland* (1979) (background paper written for the Northeast-Midwest Institute, Washington D.C.).

2. Newton & Boast, *Preservation By Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENVT'L L. 189, 189 (1978); Hanson, *Research Issues and Results Pertaining to Preservation of Agricultural Land: The California Experience*, ECONOMIC ISSUES IN LAND USE PLANNING, April 1977, at 124.

3. Bonner & Sidor, *Issues in Land Use*, ENVT'L COM., May 1975.

[A]bout one-fourth of the land is in crops and one-third in grassland pasture and range. One-third of the land is in forests. Marsh, swamps, deserts, and barren lands account for about an eighth of the land area. Urban uses require about two percent of the land; roads, airports, and other transportation facilities utilize another one percent.

Id. at 2.

4. H.R. REP. NO. 1400, 95th Cong., 2d Sess. 7 (1978).

roughly five million acres⁵ of rural land are lost yearly through continued urban development, isolation as a result of urban development and construction of new water supply projects.⁶ If present trends continue, prime farmland equivalent in area to the entire state of Indiana may be withdrawn from agricultural production between 1980 and 2000.⁷

Rural lands are being urbanized at rates five to ten times faster than the population growth.⁸ Between 1950 and 1972 seventeen states lost 20% of their taxable farmland, nine states more than 30%, four states more than 40%, and New Hampshire and Rhode Island lost more than 50%.⁹ Between 1970 and 1972, twenty-five million more people moved to non-metropolitan areas than moved to metropolitan areas.¹⁰ The overall result of continued suburban migration has been the loss of 119 million acres of farmland—an area three times the size of New England—between the years 1954 and 1974.¹¹

When reduced to its lowest common denominator, the problem of farmland preservation is a question of protecting a low-density resource from the pressures of a high-density market.¹² Although the problem appears to be disarmingly simple, many factors are involved. A primary factor contributing to the loss of prime agricultural land is the current spiral in land values.¹³ In the past five years the average per-acre price for all farmland has increased approximately 65%.¹⁴ The farmer on the urban fringe is placed in a particularly uncomfortable position. Although possessing an understanding of the land, of the relationship of people to the land, and of the problems and costs of land ownership,¹⁵ the farmer may not hold such an affection for the soil that he will hold out in the face of massive profits. The temptation to sell is undoubtedly connected to the proximity of the farmland to the urban fringe. Since suburban land values average 1,800% more when utilized for building purposes than for cultivation or grazing,¹⁶ the farmer is

5. *Id.* at 8.

6. The figure varies greatly depending on the source. See, e.g., NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT (1981) (3 million acres) [hereinafter referred to as NALS FINAL REPORT]; Merriam, *Making TDR Work*, 56 N.C.L. REV. 77, 77 (1978) (1.4 million acres); Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 ENV'TL AFF. 419, 419 (1976) (1 million acres).

7. NALS FINAL REPORT, *supra* note 6, quoted in Blundell, *As World Needs Food, U.S. Keeps Losing Soil to Land Developers*, Wall St. J., Oct. 24, 1980, at 1, col. 6.

8. Bonner & Sidor, *Issues in Land Use*, LAND RESOURCES TODAY, Jan. 1975, at 4.

9. *Id.*

10. *Id.*

11. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 597 (95th ed. 1974).

12. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973).

13. Healy & Shurt, *New Forces in the Market for Rural Land*, 46 APPRAISAL J. 185, 190 (April 1978).

14. R. GLOUDEMANS, USE VALUE FARMLAND ASSESSMENTS: THEORY, PRACTICE AND IMPACT 4 (1974).

15. Northeast Regional Center for Rural Development, 12 RURAL LAND USE PROB. & POSSIBILITIES 1 (1976).

16. Healy & Shurt, *supra* note 13, at 190.

likely to take his profits and leave farming altogether.

Another factor which must be considered in evaluating preservation alternatives is the changing nature of farmland ownership. Urbanites, investors, syndicates, retirees and corporations are entering the agricultural land market in increasing numbers. In 1976 alone, 35% of farmland purchases were made by local nonfarmers, non-county residents and others.¹⁷ Investors, both foreign and domestic, view land acquisition as a hedge against inflation based on the proven expectation that land prices will outperform the general price index and the market for common stock.¹⁸ Urbanites and retirees, on the other hand, purchase suburban and rural land to escape the pace of urban life.¹⁹ Developers purchase rural land because it provides large, contiguous, relatively inexpensive parcels of land for commercial, industrial, recreational, and housing developments.²⁰ Finally, farmers and agricultural corporations purchase additional acreage to take advantage of economies of scale.²¹ On the other side of rural land demand is the slowly disappearing family farm. The family farmer is confronted with factors such as an inability to compete against the large agricultural corporations coupled with pressure to sell at a profit.²²

As the foregoing discussion suggests, whether or not a farmer will sell his land to buyers for non-agricultural use is determined by the interrelationship of complex socio-economic factors. These include: (1) demographic factors, such as the farmer's age, state of health and whether or not he has children who want to be farmers; (2) economic factors, including the fair market value of the land and the profit which can be made from the land if it is farmed; (3) transitional factors, such as the landowner's interest in pursuing a nonfarm occupation or moving to another climate; and (4) so-called secondary factors, such as nuisance complaints by nonfarm neighbors about farm odors and pesticides, decrease in the availability of farm labor, supplies, and services, and increase in government regulation of farming activities.²³

Although the greatest loss of farmland has occurred in California and the Northeast, loss of agricultural land anywhere in the United States has at least a potential effect on farming in the Midwest and elsewhere. For example, if a state such as Kansas were to suffer no significant loss of farmland,²⁴ Kansas farmers and other residents

17. *Id.* at 187.

18. *Id.* at 191.

19. *Id.* at 195.

20. Newton & Boast, *supra* note 2, at 195.

21. Healy & Shurt, *supra* note 13, at 188.

22. See Healy, *Public Policies in Relation to Farm Size and Structure*, 23 S.D.L. REV. 608 (1978).

23. Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621, 622-23 (1980).

24. Topeka Capital J., Aug. 9, 1981, at 11, col. 3.

would still be subjected to some or all of the following negative consequences: (1) an increase in prices of agricultural products formerly raised on the now lost agricultural land and now imported from abroad or in short supply; (2) an increase in the price of Kansas farmland because of increased demand caused by decreased supply of farmland in other areas of the country; (3) an influx of farmers and farm laborers seeking farms or employment because of the loss of their farms, or farm employment, in other states; (4) an increased demand for recreational access to Kansas farmland because of the loss of open recreational land elsewhere; and (5) increased pressures on the family farm structure in Kansas due to the increased demands of productivity caused by decreases in production in those states losing farmland.

The quest for farmland preservation must be balanced against the needs and demands of the nonfarm public and against the direct and indirect social costs which any viable program will involve. A multitude of land use planning concepts are currently in vogue as potential solutions to the problem. These include zoning, cluster zoning, compensable regulation plans, negative easements and purchase of development rights, land banking, large lot zoning, open space zoning, planned unit developments, purchase and leaseback programs, agricultural service districts, transferable development rights, differential taxation, eminent domain, public rights of first refusal, and public and private land trusts. This article will analyze and evaluate these various techniques, but remember that these techniques are frequently not responsive to the socio-economic considerations that create the problem. Great expectations should not be aroused with regard to the ability of these techniques to preserve prime agricultural lands unless they are part of an overall economic and social policy that is responsive to the causes of the agricultural-land-disappearance syndrome. In short, if farming is not economically profitable, no approach or combination of approaches to farmland preservation will be successful.

II. A DEFINITION OF "AGRICULTURAL LAND"

An initial consideration for any discussion of farmland preservation is the definition of the term "agricultural land." The effectiveness of any agricultural land use plan may depend upon the type of real estate for which protection is sought. If the protective legislation or enactment defines agricultural real estate generally in terms of rural or open space lands, the protective blanket may be so broad as to include lands that have no real value for cultivation and grazing.²⁵ If, alterna-

25. See, e.g., *Boehm v. Burleigh County*, 130 N.W.2d 170, 173 (N.D. 1964) (lands unplatted and outside the limits of any town or city used as a nursery were agricultural lands); *Eisenzimmer v. Bell*, 75 N.D. 733, 738, 32 N.W.2d 891, 893 (1948) (agricultural land, as envisioned by a North

tively, agricultural land is defined narrowly, buffer lands that effectively separate farmland from the urban fringe may not be protected.²⁶ The importance of seeking a definition of agricultural lands does not lie in developing a hard and fast meaning for the term or in developing any hierarchy of definitional preference. The true value of such an inquiry is found in the realization that the definition of agricultural land is only one variable that must be assessed in any given land preservation and use plan.

One study defines agricultural land as follows:

"Agricultural lands" are lands currently used to produce agricultural commodities, including forest products, or lands that have the potential for such production. These lands have a favorable combination of soil quality, growing season, moisture supply, size and accessibility. This definition includes about 590 million acres of land that has no potential for cultivated crop use but is now in agricultural uses including range, pasture, or forestland. There were 1.361 billion acres of agricultural land in 1977.²⁷

Another typical definition of "farmland" is "a piece of land consisting of a fixed number of acres which is used primarily to raise or produce agricultural products, and the customary buildings which accompany such activities."²⁸ The United States Department of Commerce in its 1969 census indicated that "'farmland' as defined in that census included all land contained within the physical boundaries of a farm including cropland, woodland, and pasture."²⁹ "A definition of 'farmland' stressing productivity and usefulness might include all land on which agricultural operations were conducted during a given period of time under the day-to-day control of an individual management and from which \$1000 or more of agricultural products were sold during the year."³⁰

Because many farmland preservation efforts concentrate on the protection of "prime farmland," that concept also merits definition. The United States Department of Agriculture's Soil Conservation Service defines "prime farmland" as

land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and

Dakota statute exempting farm structures and improvements located on farmland from taxation, was a generic term used merely to distinguish rural from urban or other properties); *Milne v. McKinnon*, 32 S.D. 627, 632, 144 N.W. 117, 118 (1913) (land covered by timber, underbrush, grass, and weeds that had little or no value for agricultural production was agricultural land for tax assessment purposes).

26. *See, e.g., Eisenzimmer v. Bell*, 75 N.D. 733, 739, 32 N.W.2d 891, 893 (1948) (buildings located on a lot within the platted portion of an incorporated city were not exempt from taxation as farm structures located in agricultural lands).

27. NALS FINAL REPORT, *supra* note 6, at xx.

28. Rohan, *Agricultural Zoning*, 3 ZONING & LAND USE CONT. (1978).

29. Comment, *Preservation of Florida's Agricultural Resources through Land Use Planning*, 27 U. FLA. L. REV. 130, 130 n.5 (1974).

30. Giron & Clayton, *Overview of Florida Agriculture from 1974 Agricultural Census*, 1974 U. FLA. FOOD & RESOURCE ECON. 1.

is also available for these uses (the land could be cropland, pastureland, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season . . . and few or no rocks Prime farmlands are not excessively erodible or saturated with water for a longer period of time, and they either do not flood frequently or are protected from flooding.³¹

The Soil Conservation Service of the United States Department of Agriculture is now involved in a nationwide program to map and identify prime farmland, but completion of the effort is not expected until 1986. Pending the completion of that project the Soil Conservation Service classifies rural land into eight categories on the basis of soil capabilities and limitations. Classes I, II and some class III land corresponds to "prime farmland." The balance of class III and all of class IV is considered marginal for production of crops, and classes V to VII land is unsuitable for growing ordinary field crops.³²

The following table summarizes the rural lands classification breakdown:

National Summary of U.S. Land Use by Capability Class³³

<u>Class</u>	<u>Cropland</u>	<u>Pasture/ range</u>	<u>Forest</u>	<u>Other lands</u>	<u>Total</u>
	(Millions of Acres)				
I & II	221.3	62.9	39.8	13.5	337.5
III	122.8	88.0	61.0	14.4	286.2
IV	39.9	70.7	57.7	8.5	176.8
V-VIII	<u>16.4</u>	<u>349.3</u>	<u>216.9</u>	<u>33.5</u>	<u>616.0</u>
Total	400.4	570.9	375.4	69.8	1,416.5

III. THE FEDERAL GOVERNMENT AND FARMLAND PRESERVATION

The concern of any federal agency with the agricultural lands preservation problem is not only of recent origin but represents a dramatic change of position. As late as 1974, a USDA study concluded that "although thousands of acres of farmland are converted annually to other uses . . . we are in no danger of running out of farmland."³⁴ A shift in USDA policy occurred the next year. By 1976, the Secretary of Agriculture announced a new USDA policy which would discourage

31. REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, CED-79-109, PRESERVING AMERICA'S FARMLAND—A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT 2 (Sept. 20, 1979) [hereinafter cited as COMPTROLLER GENERAL REPORT].

32. See SOIL CONSERVATION SERVICES, U.S. DEPARTMENT OF AGRICULTURE, STATISTICAL BULL. No. 578, POTENTIAL CROPLAND STUDY (1977).

33. Giron & Clayton, *supra* note 30, at 1.

34. U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, MISC. PUB. No. 1290 (1974), *quoted in* COMPTROLLER GENERAL REPORT, *supra* note 31, at 6.

federal government activities converting prime agricultural land to other uses and encourage state and local authorities to advocate the protection of such land.³⁵ In 1978, the USDA issued a revised and considerably stronger policy committing USDA agencies to intercede with all other federal agencies when conversion of prime farmland is threatened.³⁶ The most significant federal government policy revision in regard to farm land preservation, other than USDA actions, is the action taken in 1976 by the Council on Environmental Quality (CEQ) directing all federal agencies to consider the loss of prime farmland when preparing environmental impact statements required by the National Environmental Policy Act of 1969.³⁷

In spite of these changes in federal agency policies, federal government programs are still considered the cause of the loss of thousands of acres of prime agricultural lands.³⁸ Continuing concern over such government activities led to the establishment of the National Agricultural Lands Study (NALS) in June of 1979 to assess and propose remedies for the problem.³⁹ The recommendations contained in the final report of the NALS are directed toward five objectives:⁴⁰ (1) information sharing by state and local governments concerning successful agricultural lands preservation programs; (2) articulation of a national policy on agricultural lands preservation and its implementation; (3) federal support of state and local government programs; (4) financial assistance for protection programs; and (5) clarification of land information base statistics and data.⁴¹

To accomplish these five goals, the study makes five categories of recommendations. The first category concerns the characteristics of successful agricultural lands preservation programs and how they can serve as guidelines for development of new programs. The suggestions are: (a) that agricultural lands preservation programs should be combined with a comprehensive growth management system; (b) that state

35. "USDA will urge all agencies to adopt the policy that Federal activities that take prime agricultural land should be initiated only when there are no suitable alternative sites and when the action is in response to an overriding public need." COMPTROLLER GENERAL REPORT, *supra* note 31, at 7.

36. *Id.*

37. 42 U.S.C. § 4321 (1970). The CEQ directive stated, "Efforts should be made to assure that such farm lands are not irreversibly converted to other uses unless other national interests override the importance of preservation or otherwise outweigh the environmental benefits derived from their protection." COMPTROLLER GENERAL REPORT, *supra* note 31, at 35.

38. *Id.*

39. Furthermore, various members of Congress have introduced bills to establish a federal policy and federal programs to protect prime farmland. *See id.* at 49-52.

40. The NALS was issued on January 17, 1981. The study was co-chaired by the USDA and the CEQ. In addition, the following agencies participated: Department of Commerce, Department of Defense, Department of Energy, Department of Housing and Urban Development, Department of the Interior, Department of State, Department of Transportation, Department of the Treasury, Environmental Protection Agency, and the Water Resources Council. NALS FINAL REPORT, *supra* note 6.

41. *Id.* at 74.

governments should assume an active role in the programs; (c) that protection programs should be adopted before development patterns foreclose some or many options; (d) that accurate information should be used in developing the programs; (e) able political leadership should be sought as a key element of success; (f) that agricultural land protection programs should support the economic viability of agriculture in the area; and (g) that considerable attention should be given to assure that protection programs are legally defensible.⁴²

The second category of recommendations relates to "national policy and federal agency initiatives."⁴³ Most of these recommendations are vague and general. For example, the study supports a presidential or congressional statement of policy articulating the national interest in agriculture, inter-agency coordination, and the mandatory adoption of an agricultural lands policy by each federal agency whose programs result in conversion of agricultural lands to nonagricultural uses. More specifically, a review of the Federal Tax Code is called for to offer incentives for retaining agricultural land in production.⁴⁴

The three remaining categories of recommendations are technical assistance and education,⁴⁵ financial assistance,⁴⁶ and information and research needs.⁴⁷ These categories overlap and contain little that could be called new or innovative, with a few exceptions. The Soil Conservation Service is called on to give higher priority to the detailed soil survey previously discussed.⁴⁸ An "ombudsman" service is suggested, to act as an advocate for farmers and agricultural land protection.⁴⁹ Finally, a "statistical protocol" is advocated in the following terms:

A Statistical Protocol should be developed, led by the Office of Federal Statistical Policy and Standards. Federal agencies that collect and use natural resource data should participate in this effort. Components of the protocol should cover standards for data collection techniques and requirements for appropriate statements of data limitations in connection with data publication or public release.⁵⁰

42. *Id.* at 74-76.

43. *Id.* at 76.

44. *Id.* at 79.

45. *Id.* at 80.

46. *Id.* at 83.

47. *Id.* at 85.

48. *Id.* at 84.

49. *Id.*

50. *Id.* at 85. A recent development in this area is the passage of The Farmland Protection Policy Act, Pub. L. No. 97-98, 95 Stat. 1341 (codified at 7 U.S.C. § 4201 (1981)), which was passed "to minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses . . ." *Id.* This Act calls upon federal agencies to evaluate the effect of their programs on farmland and to propose changes in their programs which will further the policy of keeping farmland in agricultural use. The Secretary of Agriculture is charged with coordinating and overseeing the implementation of this Act and is required to report annually to Congress on his efforts. *Id.* For a brief discussion of this Act, see Farmland, Newsletter of the American Farmland Trust, Jan. 1982, at 1.

IV. ZONING: A POPULAR APPROACH TO PRESERVATION OF AGRICULTURAL LANDS

In spite of recent changes and innovations in the land use control area, zoning remains the most frequently used and potentially the most effective land use control device to protect and preserve agricultural lands. Nonetheless, serious limitations exist on the effectiveness of zoning, in its traditional format, as a solution to the preservation problem.

A. *Traditional Euclidean Zoning*

The key characteristic of use categories under traditional or euclidean zoning is that all use zones are "cumulative," meaning that all higher, *i.e.*, more preferred, uses are permitted in "lower" categories. Since the urban planners who traditionally drafted zoning ordinances were development oriented, "agricultural use" was ranked at or near the bottom, meaning that any and all uses ranked "higher" were permitted in agricultural zones no matter how inconsistent or competing they were with agricultural uses.

Even those traditional zoning ordinances that allow only agricultural and other specific uses in agricultural zones allow a mix of potentially inconsistent uses which can exist in agricultural use zones: (1) citrus and other fruit crops cultivation, production and horticulture; (2) truck farms; (3) plant nurseries and greenhouses not involved with retail sales to the general public; (4) poultry and livestock production excluding commercial swine raising; (5) grazing and pasturing of animals; (6) home occupations wherein products sold shall have been produced in major part by the permanent occupants thereof; (7) roadside stands of a temporary nature for the sale of fruits, vegetables and similar products produced on the premises, provided such stand is placed no closer than twenty-five feet to a property line; (8) government owned or operated building or use excluding public utility and service structures; (9) fish hatcheries or fish pools when approved in accordance with all applicable federal, state and county regulations and laws; (10) publicly owned or controlled parks and recreation areas; (11) bait production not involving retail sales; (12) stables, barns, sheds, silos, granaries, windmills and related agricultural structures; (13) dairies; (14) agriculture; (15) silviculture including timber production where such operation is first approved by the County Urban Forester; (16) single family dwelling and customary accessory uses including docks and boat houses; (17) neighborhood recreation areas when approved as part of a subdivision plat; (18) prefabricated or modular housing when approved by the State as complying with applicable

building codes; and (19) churches and structures appurtenant thereto.⁵¹

Some uses may be permitted only temporarily or subject to certain restrictions. For example, an ordinance might permit mobile home use only if the mobile home use only if it is to be used by night watchmen in an area where residential dwellings are under construction and where chronic vandalism occurs.

The following is a fairly typical list of special exception uses that may be permitted in an agricultural district: (1) cemeteries, mausoleums; (2) kennels, including the commercial raising or breeding of dogs; (3) hospitals, sanitariums and convalescent homes, veterinary clinics; (4) private nursery schools, kindergartens, primary schools, secondary schools and colleges; (5) temporary asphalt plants for the purpose of specific public road construction; (6) sawmills; (7) public utility and service structures; (8) fraternal clubs when chartered by the state; (9) borrow operations complying with all applicable county ordinances; (10) country and golf clubs, fishing clubs, fishing camps, marinas, gun clubs, or similar enterprises or clubs when located on lands comprising five or more acres and making use of land in its predominantly natural state; (11) privately owned and operated recreational facilities open to the paying public, such as athletic fields, stadiums, racetracks and speedways.⁵²

Traditional euclidean or cumulative zoning affords agricultural lands virtually no protection from interference by other uses. The impact of such zoning on the owner of agricultural land is almost entirely negative; the landowner frequently is thwarted in devoting the land exclusively to higher economic uses but receives very little protection from interference by other uses in return. Consequently, modern zoning ordinances are increasingly noncumulative in nature; all or specified use zones are to be devoted exclusively to the designated use, and even so-called higher uses are excluded. Given the failures of cumulative zoning to protect agricultural lands, it is not surprising to find that in many zoning ordinances of recent vintage, land zoned for agricultural purposes can be devoted only to agricultural and closely related uses.

B. *Exclusive Agricultural Use Zoning*

Exclusive agricultural zoning, unlike agricultural zoning under cumulative ordinances, not only restricts the landowner of agricultural land but confers protection to the farmer by excluding incompatible uses. Such zoning, in theory at least, is a definitive tool for preserving agricultural lands and preventing their conversion to non-agricultural

51. 3 J. JUERGENSMEYER & J. WADLEY, *ZONING: THE LAW IN FLORIDA* § 2-9 (1980).

52. *Id.* § 2-10.

uses.⁵³ Even if land speculators purchase farmland and take it out of agricultural production, strict enforcement of the zoning code would normally prevent any development on or changes in the land that would affect its ultimate suitability for agricultural production.

The problems encountered with exclusive agricultural use zoning as a farmland preservation tool result not from zoning principles but from zoning practice. The farmer himself may find the stringency of the zoning protection economically unacceptable, and he or his vendees may resort to the normal avenues for zoning flexibility—variances, special exceptions, and rezonings—to obtain permission for profitable but ultimately incompatible uses, thus undermining if not defeating the protective goals of such zoning approaches.⁵⁴

C. *Other Non-Euclidean Zoning Approaches*

One of the most serious dilemmas encountered by owners of agricultural land occurs when adjacent land is developed for residential commercial or other nonfarm uses. Once such development occurs, the farmer usually finds himself subjected to intense economic pressures to convert his farm to nonagricultural use because of an increase in value that results from neighboring development. He also frequently discovers that his land no longer is well-suited to agricultural uses, since the normal odors, noises, and pollutants accompanying many agricultural activities are now nuisances in the eyes of his new neighbors.⁵⁵ Cluster zoning, planned unit developments, and open space zoning are non-euclidean land use control techniques designed to alleviate such results of development by providing a land buffer on or between the developed land and the neighboring farmland.

1. *Cluster Zoning*

Cluster zoning involves development of a tract of land so as to allow the preservation of open space or buffer areas on all or certain borders but without changing the established maximum densities. As a result, new development need not abut agricultural land, and the development/farming conflict is lessened.

Local governmental use of the cluster concept to provide a buffer between areas of development and of agriculture is relatively simple in

53. See Juergensmeyer, *Introduction: State and Local Land Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463 (1980). Perhaps the most ambitious and innovative use of exclusive agricultural zones is found in Oregon, where Exclusive Farm Use Zones are mandatory under state law for agricultural land. They are combined with Urban Growth Boundaries to protect agricultural lands from development pressures. See Rochette, *Prevention of Urban Sprawl: The Oregon Method*, 3 ZONING & PLANNING L. REPORT 25 (1980).

54. Special exceptions and necessary uses discussed in connection with cumulative zoning can also exist under supposedly "exclusive" zoning ordinances.

55. See 1 J. JUERGENSMEYER & J. WADLEY, *AGRICULTURAL LAW* ch. 25 (1982).

the sense that little or no change in basic zoning codes is necessary to allow such an approach. Most courts have recognized the permissibility of such an approach, even pursuant to euclidean ordinances, since no variation of overall density or of permissible uses occurs. The developer who is required or encouraged to cluster his planned improvements is not usually in a position to assert constitutionally based objections since he is not denied the right to develop to the overall density maximum established by the local land use regulation. In fact, developers frequently seek permission to cluster since there often are economies of design, construction, and topographic advantages to such a development arrangement.⁵⁶

2. *Planned Unit Development*

The planned unit development (PUD) is grounded upon the cluster concept but constitutes both a refinement of that concept and a departure from traditional euclidean zoning approaches. The PUD combines uses within a development so that various housing types, high-rise apartments, townhouses, single family dwellings, and condominiums, for example, co-exist with open spaces, recreational areas, convenience type commercial uses business or professional uses.⁵⁷

The use of a PUD for the development of land adjacent to agricultural lands has various protective aspects. As with clustering, buffer areas that are not built upon can be placed between new improvements and neighboring farmland. Furthermore, unlike clusters, the provision for various commercial, recreational, business, or professional facilities within the PUD means that adjacent farmland is not needed as a location for supportive services which inevitably accompany development. By providing for such nonresidential uses, the PUD offers greater protection for adjacent agricultural land than simple cluster zoning does. Although PUDs frequently receive even greater developer enthusiasm than clusters, local land use control authorities are often less enthusiastic about the PUD since its combination of uses is in conflict with one of the sacred cows of traditional zoning—separation of uses. Additionally, approval for use of PUDs normally requires the existence of floating zones⁵⁸ within the zoning jurisdiction.

56. See House, *Policy Instruments for Shaping Land Use Choices*, 3 LAND RESOURCE TODAY 4 (1974); Merriam, *supra* note 5.

57. See I J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS ch. 12 (1979); Schneiderman, *Transferable Development Rights: An Idea in Search of Implementation*, 11 LAND & WATER L. REV. 339 (1976); Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 1 (1965).

58. The floating zone involves the creation of a land use category, for example, PUDs, and the designation of the criteria that must be met before a landowner may make the specified use. The zoning category then "floats" until a landowner wishes to use his land for the category in question. If the landowner makes the proper application and meets the specified criteria, the zone "sinks" to his land and replaces the preexisting zoning classification. The floating zone concept is

3. Open Space Zoning

Open space zoning is a more drastic way of providing the type of open space or land buffer between new development and neighboring agricultural land that results almost automatically from clusters and PUDs. The technique is much simpler, however, since land bordering agricultural area is designated in the relevant comprehensive plan as being unavailable for development and is zoned for only recreational or other nondevelopment uses.⁵⁹ The problem presented by open space zoning is that the economic value of land so zoned is nearly destroyed, thereby entitling the landowner to contest the zoning designation as an unconstitutional taking of property without compensation.⁶⁰

4. Large Lot Zoning

Another related zoning technique frequently advocated as an agricultural lands preservation device is "large lot" zoning. By establishing high minimum lot area requirements such as one acre, five, ten, fifteen, or, in one case, eighteen acres,⁶¹ residential development of rural land is discouraged by increasing the cost of and thereby decreasing the demand for such property.⁶² Furthermore, if the land is developed, the low density of such developments has a minimal deterrent effect upon the continued suitability of adjacent or nearby land for agricultural use. The major disadvantage of using large lot minimum zoning to protect agricultural land is the same encountered with open space zoning: the economic value may be so greatly decreased as to raise the taking issue.⁶³ Furthermore, the exclusionary effects of large lot minimum requirements provide still another basis for contesting its validity.⁶⁴

V. AGRICULTURAL DISTRICTS

California,⁶⁵ New York,⁶⁶ and Virginia⁶⁷ pioneered agricultural districting, which is designed to bring about, through voluntary compli-

antithetical to euclidean zoning, since mapping the location of each use was an essential element of euclidean zoning ordinances. To have a zone that was not located in terms of specific parcels of land was unthinkable. For discussions of the floating zone concept, see *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960); *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957). See also D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 453 (1973); 2 J. JUERGENSMEYER & J. WADLEY, *supra* note 51, § 11-4; Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963).

59. See 3 P. ROHAN, *AGRICULTURAL ZONING, ZONING & LAND USE CONTROLS* 19 (1978).

60. See notes 137-48 and accompanying text *infra*.

61. *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

62. Tuthill, *Rights in Land*, ENV'TL COM., May 1975.

63. See notes 137-48 and accompanying text *infra*.

64. See notes 156-57 and accompanying text *infra*.

65. The agricultural districting statutes of New York and Virginia currently are considered the prototypes of agricultural districting. Their precursor and inspiration is said to be California's Land Conservation Act, CAL. GOV'T CODE §§ 51200 to 51293 (West 1966 & Supp. 1981), which is known popularly as the Williamson Act. Meyers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1, 2 n.8 (1979). See also Gustafson & Wallace, *Differential Assessment as Land Use*

ance and local initiative, the same quality of protection to farmland afforded by exclusive agricultural zoning. Agricultural landowners who meet specified acreage minimums can voluntarily form special districts.⁶⁸ Such status, depending on the exact provisions of the relevant statute, creates a binding agreement between the landowner and local authorities for a specified number of years during which the landowner receives special tax treatment and freedom from eminent domain. The authority of public agencies to install growth stimulating public services in the area is limited, special assessments against the land are forbidden, and local governments are prohibited from enacting certain regulations of farming practices on the land unless public health and safety factors are involved.⁶⁹ If nonagricultural uses are made of the land during the "contract" period, heavy tax penalties are incurred.⁷⁰

The major advantage and appeal of the agricultural districting approach to farmland preservation lies in its emphasis on voluntary compliance and local initiative. Other strengths include the retention of land ownership in the farmer, the stringent restrictions its voluntary nature allows on land use without raising taking issue problems,⁷¹ and its emphasis on local control, which at least theoretically makes it responsive to local needs and problems.⁷² Given these advantages, the popularity of this approach to farmland protection and preservation is not surprising. In 1978, approximately one-half of the farmland in the state of New York was in agricultural districts.⁷³

In spite of this popularity, the approach is not without its disadvantages. The obvious disadvantage is the feature which has already been pointed out as a basis for the concept's appeal, *i.e.*, it is entirely voluntary. Study of the effectiveness of the approach is limited by the fact that only those lands relatively free from urban fringe development pressures, that is to say, those lands that need protection the least, are

Policy, The California Case, 41 AM. INST. PLAN. 379 (1975); Comment, *Condemnation of Agricultural Property in California*, 11 U. CAL. D.L. REV. 555 (1978).

66. N.Y. AGRIC. & MKTS. LAW §§ 300-377 (McKinney 1972 & Supp. 1981-82).

67. VA. CODE §§ 15.1-1506 to 15.1-1513 (1981).

68. Any owner of agricultural land who meets the statutory acreage requirements (in New York the greater of 500 acres or 10% of the land to be included in the district and in Virginia at least 500 acres and no more than 3,500 acres to be included in agricultural districts) may apply to the local governing body, which seeks the opinion of a planning body, holds public hearings, and then adopts, modifies, or rejects the proposal. In New York, the Commission on Environmental Conservation also has the power to create agricultural districts. For details of the New York and Virginia procedure, see Myers, *supra* note 65.

69. *Id.* See FLA. FOOD & RESOURCE ECONOMICS DEPARTMENT, LAND FOR FLORIDA AGRICULTURE (1977); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri Farmland*, 42 MO. L. REV. 369 (1977).

70. In New York, for example, conversion to nonagricultural uses during the contract period results in a penalty equal to twice the taxes levied against the property in the year following conversion. N.Y. AGRIC. & MKTS. LAW § 306 (McKinney Supp. 1981-82).

71. See notes 137-48 and accompanying text *infra*.

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

73. See Myers, *supra* note 65.

placed in districts. Secondly, the special tax treatment, which constitutes the major advantage to the landowner, hampers the revenue raising authority of local governments and provides dubious incentives to retain agricultural district status. Finally, the limitations placed on governmental power to regulate the land in question and the location of public facilities, may hamper local government comprehensive planning and result in less desirable growth patterns in the long run.⁷⁴

VI. TRANSFERABLE DEVELOPMENT RIGHTS

The application of the transferable development rights (TDR) approach to agricultural land preservation is of recent origin. In fact, "development rights" as a separate element of land ownership was not appreciated in this country until lately,⁷⁵ even though it has been the key to land use control in Great Britain for some time.⁷⁶

The TDR approach designates certain land areas within a given jurisdiction as subject to severe regulation and designates other land areas within the jurisdiction as appropriate for development. Owners of the severely restricted land are allowed to sell their rights to develop, which they cannot exercise because of the land use restrictions, to the owners of land permitted to be developed. The purchasing landowners may be required to purchase the rights of the restricted landowners before they may develop, or the purchase of development rights may authorize them to develop at greater density than otherwise would be permitted.⁷⁷

74. See Geier, *supra* note 72.

75. See D. MERRIAM & A. MERRIAM, BIBLIOGRAPHY OF THE TRANSFER OF DEVELOPMENT RIGHTS, COUNCIL OF PLANNING LIBRARIANS EXCHANGE BIBLIOGRAPHY NO. 1338 (1977); Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Merriam, *supra* note 6; Schneiderman, *supra* note 57.

76. Great Britain sees development rights as created and allocated by society and "ownership" as only the right to continue using the land as it currently is being used. The owner is seen as having no inherent right to develop. The Town and Country Planning Act of 1947 effectively nationalized all development rights. The Act repealed all zoning laws, established a permit system for development, expanded eminent domain powers based on existing use-value as the measure of compensation, and, most important, vested all development rights in the government. See Merriam, *supra* note 6, at 88. The Act nearly stopped development altogether, and nationalization was repealed in 1953. The 1947 Act was criticized because of its economic distortions, its elimination of incentives to develop, its complexity, its costly administrative processes, the excessive discretion it gave to local authorities, and the over-politicizing of the entire system. In 1975, Great Britain passed the Community Land Act, which was to "enable local authorities and certain other authorities to acquire, manage and deal with land suitable for development and to make other provisions for land in connection with public ownership." V. MOORE, COMMUNITY LAND: THE NEW ACT 1 (1976). The Act in effect renationalizes development rights by giving the government the power to acquire at current use price all land needed for development. See also Carroll, *Rural Land Use Control in Great Britain*, 19 NAT. RESOURCES J. 145 (1979).

77. See Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119, 136 (1979). Four methods of TDR application have been suggested: (1) the New York plan allows transfers of unused development rights only to adjacent parcels; (2) the Chicago plan allows transfers within a designated district; (3) the Puerto Rico and New Jersey plans permit transfers of rights from nonurban areas to urban areas in order to permit

Some of the considerations which must be dealt with in order to establish developmental rights transfer plans include: (1) the establishment of a planning district; (2) definition of the nature and number of rights; (3) allocation of rights; (4) issuance and taxation of rights; (5) merger of rights with the land on which it is attached; (6) release of rights in case of natural disaster and structural damage; (7) retirement of rights if no one within the transfer districts wants to exceed the zoned maximum limit without rights; (8) issuance of additional rights; (9) coordination of transfers; and (10) insurance that density transfer does not create design abuse.⁷⁸ There is also some question as to whether state enabling legislation is required before a jurisdiction can establish a TDR plan.⁷⁹

Although considerable support exists for using the TDR concept as an agricultural land preservation device,⁸⁰ the NALS treats the idea rather negatively.

Transfer of development rights (TDR) programs have been instituted by 10 municipalities and two counties, but developers have shown little inclination to participate in them. It is possible that the newer programs, which have been adopted by large suburban counties, may include development locations where the market will support higher densities and where the county government will provide sufficient facilities and public services so that developers will find it profitable to purchase and transfer rights. But so far, the right combination of factors has not been present.⁸¹

In evaluating the usefulness of TDRs, it first should be noted that the statistics used by the NALS are inaccurate. Actual experience with TDRs is considerably broader and more positive.⁸² Furthermore,

agricultural or environmentally sensitive lands; and (4) the uniform plan assigns rights to all lands within the jurisdiction. Lapping, Bevins & Herbers, *supra* note 69, at 398-99.

78. Schneiderman, *supra* note 57, at 364.

79. See 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 57, ch. 18; Merriam, *supra* note 6, at 109-10.

80. See Merriam, *supra* note 6; Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DE PAUL L. REV. 447 (1977); Richman & Kendig, *Transfer Development Rights—A Pragmatic View*, 9 URB. LAW. 571 (1977).

81. NALS FINAL REPORT, *supra* note 5.

82. Examples of TDRs include Collier County, Florida, which in 1974 adopted a TDR plan for its cypress swamp and designated 84% of the county's land as a special treatment zone requiring special permission prior to development. New Jersey has had the most activity with its TDR plan. The 1976 legislature approved five million for an agricultural preserve demonstration project. An estimated 10,000 acres will be preserved, which calculated at \$500 a preservation acre, is relatively cheap.

St. George, Vermont, and Buckingham Township, Pennsylvania, are examples of TDR's potential as a land use technique. In St. George, the town bought 50 acres for a downtown center. In order to build, a developer must transfer to the town an equal number of development rights from an unimproved parcel away from the town center. The town, in exchange for the right to develop, gets a permanent restriction on the land donated by the developer and maintains control over the town's central area. To date, 18 rights have been transferred. Merriam, *supra* note 6, at 112-13. The Buckingham Township plan, designed with agricultural preservation in mind, gave each landowner in the agricultural district one development certificate per acre owned. Each owner could sell his rights to landowners in three higher density residential districts. "Conveyance of development rights requires the seller to restrictively covenant his land and rezones the land into an agricultural preservation district permitting only one residence in every twenty-five

whatever complexities and difficulties are encountered in regard to implementation of TDR programs, their potential advantage over virtually all other approaches to agricultural lands preservation is that restricted landowners receive compensation for their losses without the need for appropriation of public funds. The compensation comes from payments made in an open market context by landowners economically benefitted by land use restrictions. In short, TDRs allow payment of compensation without cost to the taxpayer. Judicial approval of this concept has been encouraged by the United States Supreme Court's comments in *Penn Central Transportation Co. v. City of New York*⁸³ on New York City's transferable density plan.

In *Penn Central*, the Court held that New York's Landmarks Preservation Law was a valid exercise of police power and thus rendered moot the need to determine whether a TDR could be considered just compensation. The Court nonetheless discussed the matter. The majority stated, "[W]hile these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."⁸⁴

VII. CONSERVATION EASEMENTS

Conservation easements merit special attention as an agricultural lands preservation technique, even though their use is frequently part of the transferable development rights plan approach,⁸⁵ or of the land banking or public and private trusts approach.⁸⁶

A conservation easement is created when a landowner restricts his rights to develop his own land in ways that would be incompatible with its use as farmland of a general or specified type. The landowner burdens his land in the form of a negative restriction, thereby creating a negative easement in favor of other parcels of land or for the benefit of public or private agricultural lands preservation organizations. Unless the negative restriction is in some way limited, it will bind all fu-

acres." *Id.* at 114. Twelve development rights have been sold at \$1,800 each. Their experience, however, does not have a happy ending, since "a Bucks County, Pennsylvania, court has declared the Buckingham zoning ordinance invalid" based upon exclusionary principles. *Id.* at 114-15 n.232.

83. 438 U.S. 104 (1978).

84. *Id.* at 137. The dissent sets forth several reasons for refusing to automatically view TDRs as just compensation. They stress that just compensation requires "a full and perfect equivalent for the property taken." *Id.* at 150 (Burger, C.J. & Stevens, J., joining Rehnquist, J., dissenting). The concern of the dissent is that the TDRs involved had an uncertain and contingent market value. Implicit in the criticism is the presumption that if the TDRs given to the owner of the restricted property do, in fact, have sufficient and certain market value, they will constitute just compensation.

85. See notes 75-84 and accompanying text *supra*.

86. See notes 97-122 and accompanying text *infra*.

ture owners of the land. Negative easements are created as gifts, tax deductions, or salable rights.⁸⁷ Although such arrangements are generally referred to as conservation or preservation "easements," the same goals can be accomplished from a property law viewpoint through real covenants or equitable servitudes.⁸⁸ Perhaps the greatest advantage to the use of conservation easements is that the farmer remains owner of all interest in the land in question except the right to use the property in a manner inconsistent with the restriction.

VIII. ZONING BY SPECIAL ASSESSMENT FINANCED EMINENT DOMAIN (ZSAFED)

In situations where protective zoning or other land use regulation of agricultural lands so severely restricts the landowner as to raise the taking issue,⁸⁹ the landowner will have to be compensated for the severely decreased value of his agricultural property. Ordinarily the flaw in this approach is the lack of public funds to pay the compensation. One possible source of such funds is the landowners whose property values are substantially increased. In short, as expressed by the scheme's best known proponent, "wipe-outs" (decrease in economic value through land use regulation) are compensated through the recapture of "windfalls" (increases in land values caused by land use regulation).⁹⁰

Here is a typical agricultural lands preservation scenario in which the ZSAFED or "windfall/wipe-out" approach forestalls any taking issue arguments: Farmers *A* and *B* own contiguous and comparable 1,000 acre tracts of land in the path of urban sprawl emanating from a nearby metropolitan area. Both landowners, succumbing to visions of an early and prosperous retirement, apply to have their lands rezoned from agricultural to multifamily use. The land use control authority decides that farmer *A*'s tract is needed for urban development and rezones it for a high density residential development; it decides not only to deny the rezoning request of farmer *B* but to strengthen the restrictions on his land to guarantee its continued role as open space and agricultural use land. It would not be unrealistic for this rezoning to result in a tenfold increase in the value of farmer *A*'s land, because of the more stringent restrictions and concurrent lack of development

87. Dawson, *Compassionate Taxation of Undeveloped Private Land (Part II)*, 3 *Zoning & Plan. L. Report* 57 (1980). For an analysis of conservation easement and a bibliography, see National Trust for Historic Preservation, Information Sheet No. 25, *Establishing an Easement Program to Protect Historic Scenic and National Resources* (Washington, D.C. 1980). See also Netherton, *Environmental Conservation and Historic Preservation through Recorded Land Use Agreements*, 14 *REAL PROP. PROB. & TR. J.* 540 (1979).

88. See Dawson, *supra* note 87, at 59.

89. See notes 137-48 and accompanying text *infra*.

90. See Hagman, *ZONING BY SPECIAL ASSESSMENT FINANCED EMINENT DOMAIN (ZSAFED)*, 28 *U. FLA. L. REV.* 655 (1976).

value of farmer *B*'s land. Simply stated, ZSAFED would remedy the inequities by playing Robin Hood and collecting some of *A*'s profit and paying it to *B* as "compensation" for the restriction of his land.

The actual use of the ZSAFED concept generally has been in the urban rather than rural context. Kansas City's variation of the concept was enacted in 1893⁹¹ and was most recently examined in 1969,⁹² when it was applauded "for its usefulness in preserving a residential neighborhood and for its method of compensating landowners for any substantial damages that were suffered."⁹³ Under former Minnesota law,⁹⁴ residents could petition and on a 50% vote of the persons living in the area could create restricted urban districts. When such a district was created, the city could condemn nonconforming uses and pay compensation obtained from assessing other landowners in the district.⁹⁵ The problems encountered in using ZSAFED in an agricultural context were numerous. The Minnesota district approach was inappropriate because of the large area generally involved in an agricultural lands protection situation. An even more important drawback was that preservation of agricultural land normally did not cause an economic benefit to other land, at least not in the direct way necessary to identify and assess the benefitted land for the funds to compensate the owners of the restricted agricultural land.⁹⁶

IX. LAND BANKING

The land banking technique of preserving agricultural land involves the purchase of farmland by governmental or public organizations for the purpose of insuring that the land remains in agricultural production. The use of land banking to control urban land development patterns has long been practiced in Europe, but one of the most ambitious uses of the concept in the agricultural context has occurred in Canada, particularly in the province of Saskatchewan.⁹⁷

In recent years, several American states have expressed interest in the Canadian land bank idea and considered the possible applicability of the concept to this country. To date, however, there is no widespread acceptance of the idea. Where it has been adopted, it has been used principally as a device by which farmland may be made available

91. *In re* Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S.W. 404 (1923); Annot., 28 A.L.R. 295 (1924) (power to establish building line along street).

92. *See* City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969); Annot., 41 A.L.R.3d 636 (1972) (validity and construction of "zoning with compensation" statutes). *See also* *In re* Coleman Highlands, 401 S.W.2d 385 (Mo. 1966) (companion case).

93. Hagman, *supra* note 90, at 657 (citing City of Kansas City v. Kindle, 446 S.W.2d 807, 816 (Mo. 1969)).

94. MINN. STAT. ANN. § 461.11 (1963) (repealed 1976).

95. MINN. STAT. ANN. § 462.13 (1963) (repealed 1976).

96. For a general evaluation of ZSAFED, *see* Hagman, *supra* note 90.

97. Young, *The Saskatchewan Land Bank*, 40 SASK. L. REV. 1 (1975).

to specific groups of individuals rather than as a farmland preservation technique. It is also significant to note that interest in the idea has been more intense at the state or local level and is only recently finding significant support at the federal level.⁹⁸

The American Law Institute (ALI) Model Land Development Code defines land banking as a "system in which a governmental entity acquires a substantial fraction of the land in a region that is available for future development for the purpose of controlling the future growth of the region"⁹⁹ The ALI definition requires that the land acquired not be committed to a specific future use at the time of acquisition and is sufficiently large in amount to have a substantial effect on urban growth patterns.¹⁰⁰

The ALI definition of land banking presumes governmental involvement, and in many cases the government is involved very directly. However, land banking may be done on a private as well as a public basis. There has been some significant use of private land trusts in attempting to accomplish, on a private basis, the same goals the land banking idea envisions on a public basis.¹⁰¹ Three kinds of trusts exist for the purpose of holding full title on various property rights to agricultural trusts:¹⁰² (1) private (non-profit) trusts;¹⁰³ (2) public trusts;¹⁰⁴ and (3) community trusts.¹⁰⁵ The latter two types closely resemble the land banking arrangements and programs discussed elsewhere in this article¹⁰⁶ so they will be mentioned only briefly at this point. Public trusts and community trusts use existing or specially formed governmental agencies or entities to hold title to land or interests in land.

98. In August of 1979, then Secretary of Agriculture Bergland announced a six-year program to promote small farm ownership in Alabama, Florida and Louisiana. The program is being managed by the Farmers Home Administration, and a corporation known as the Small Farm Development Corporation has been established to manage field operations. To qualify, applicants must be economically disadvantaged, in school, or unemployed, and must satisfactorily complete a training program. Successful applicants are given tracts of land and financial assistance. The (Kansas City) Packer, July 19, 1980, § 13A.

99. MODEL LAND DEV. CODE § 6-101, Commentary at 254 (1975).

100. *Id.* The state of Minnesota was the first state to formally recognize a need for a family farm program. The fact that the price for agricultural land in that state has tripled and the credit situation generally was tight made it very difficult for a person interested in buying a farm as an occupation to enter the agricultural land market. As a result, the state passed the Family Farm Security Act of 1976, which was designed specifically to aid persons who wanted to enter farming but who were unable to obtain credit. The basic thrust of the program is to insure adequate credit for individuals seeking to enter farming on a family farm basis. MINN. STAT. ANN. §§ 41.51 to 41.61 (1981). See B. JONES, FINANCING FAMILY FARMS IN MINNESOTA (1979).

101. See Fenner, *Land Trusts: An Alternative Method of Preserving Open Space*, 33 VAND. L. REV. 1039 (1980); McClaughry, *A Model State Land Trust Act*, 12 HARV. L. LEGIS. 563 (1975); Roe, *supra* note 5.

102. See Fenner, *supra* note 101.

103. Lapping, Bevins & Herbers, *supra* note 69, at 402.

104. *Id.* at 402-03. See Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1067.

105. Lapping, Bevins & Herbers, *supra* note 69, at 403. See Ruter, *Preserving Farm Land Through Zoning and a Community Land Trust*, 1971 LAND-USE CONT. ANN. 169, 171-73.

106. See notes 97-100 and accompanying text *supra*.

Under the terms of the purchase by or donation to the public trustee, title is held to accomplish agricultural preservation purposes. The administration of the trust property can fluctuate, depending upon changing political goals and the varying administrative ability of public officials who from time to time control the trust.¹⁰⁷ Consequently, the major efforts of agricultural lands preservation advocates are directed to private trusts.

The private land trust is a charitable organization that acquires and holds interests in agricultural land for preservation purposes. To qualify as charitable, the trust must exist for a charitable purpose and operate for the benefit of an indefinite group of persons.¹⁰⁸ Additionally, the trust must satisfy various state laws relating to charitable organizations and numerous federal and state tax laws and regulations in order to qualify for receipt of tax deductible or tax exempt "charitable" donations.

Land trusts need not be organized as "trusts" in the technical legal meaning of the term. In fact, "land trusts" can and do exist as unincorporated associations, charitable trusts or charitable corporations.¹⁰⁹ The last two of these—charitable trusts and charitable corporations—are clearly the preferable form of organization.¹¹⁰ The charitable corporation format has been chosen by the most significant agricultural lands trust—the newly formed American Farmland Trust (AFT).¹¹¹ The AFT was incorporated in 1980 pursuant to the District of Columbia Nonprofit Corporation Act and received its original sponsorship and funding from the Conservation Foundation, the Rockefeller Brothers Fund, and the Sherman Foundation. The following statement of purpose of the AFT illustrates the goals and approach of this organization:

The American Farmland Trust intends to address the issues posed by rapid alteration and depletion of the nation's agricultural land base, including the diminution of farming opportunities occasioned by escalating land costs. Farmland is now being lost to urbanization and other development at a rate of three million acres each year. If this trend continues, our nation will suffer significant reductions in gross agricultural output as well as serious economic and social dislocations in the hardest-hit rural regions. As a national, nonprofit membership organization, AFT will inform Americans about the gravity of this threat to agricultural viability nationwide, and will undertake projects, both directly and through affiliated organizations, which demonstrate techniques by farming opportunities developed

107. See generally Fenner, *supra* note 101, at 1044, 1098; Roe, *supra* note 6, at 445.

108. Fenner, *supra* note 101, at 1047.

109. *Id.* at 1047-53.

110. *Id.*

111. The AFT was exempted from federal income tax under I.R.C. § 501(c)(3) on September 10, 1980. American Farmland Trust, Statement of Purpose (1980).

Either directly, or through state and local affiliates, AFT will demonstrate the variety of free market techniques which can be utilized by a nonprofit organization. These include the establishment of a national revolving fund and lines of credit for use by affiliates. AFT will also participate directly in the protection of critical farm parcels through acquisition of fee title, development rights or easements, either by purchase, bargain sale or donation. Such techniques may also include, on a demonstration basis, participation in limited development of farmland, to accommodate needed housing (or other uses), while protecting adjacent farmland. Special effort will be made to preserve unique agricultural lands and to provide assistance to minority and limited resource farmers whose land base is threatened by trends to consolidation.

On-going economic development projects for minority and limited resource farmers, such as the Southern Agriculture Corporation and the Southern Cooperative Development Fund, provide opportunities for collaboration with AFT to demonstrate farmland preservation techniques, along with other commercial incentives, which will promote long-term land tenure by small farmers. These projects will serve as models for similar enterprise nationwide, and their results will be widely disseminated by AFT.¹¹²

One land-banking approach to agricultural lands preservation is the purchase and lease-back arrangement. Under this approach, public authorities or private nonprofit corporations purchase land and then lease the land back to the original owners under long-term leases for agricultural purposes.¹¹³ The supposed advantages of such an arrangement include: (1) a reduction in cost of outright purchase, since the revenues of the capital expended on the purchase price are adjusted downward to reflect nominal lease payment and the purchase price reflects only development value; (2) a reduction in the farmer-vendor-lessee's ad valorem and estate tax problems, since he now has a leasehold rather than a fee interest; and (3) a payment to the farmer for foregoing the development of his land—an action that he otherwise might have gratuitously foregone or been denied without compensation by land use control measures.¹¹⁴

The problems with such an approach seem staggering. Most important, the concept can be put into operation only if the public authority or private organization has funds for purchasing agricultural land—a very large “if.” Furthermore, the smooth operation of the scheme assumes consistent, responsible actions by the public or private authorities who now own the land. Additionally, farmers who merely lease the land they farm may be unable or unwilling to maintain and improve it in the same way they would treat land they actually owned.¹¹⁵

112. American Farmland Trust, Statement of Purpose at 1-2 (1980).

113. See Newton & Boast, *supra* note 2, at 202-03.

114. See Lapping, Bevins & Herbers, *supra* note 69, at 394.

115. *Id.*

X. SERVICE DISTRICTS AND CAPITAL IMPROVEMENT AUTHORITIES

Using service districts or capital improvement authorities as part of agricultural lands preservation plans controls development through the availability or unavailability of government services such as water, sewage treatment, and electricity supplies. Theoretically, if farmland has no access to such services, its development and change from agricultural use will be impossible.¹¹⁶

This concept is doubtless one of the most effective ways of discouraging the development of urban fringe land. Unfortunately, however, its practical and legal effectiveness depends upon careful and consistent planning and implementation. The practical effectiveness of this approach is made especially difficult. Landowners frequently oppose it because it eliminates the development-potential-based appreciation of their land values. Even where popular support exists, intergovernmental conflicts can thwart the effectiveness of this approach, because several levels of government and many agencies are usually involved with licensing and regulating privately or publicly owned utilities which may seek to supply the development-oriented services.¹¹⁷

Finally, even if the motive for restricting the availability of governmental services, such as water, sewage treatment and electricity, is to preserve farmland rather than to limit urban growth, the use of a governmental services moratorium and comparable concepts arguably raise most if not all of the issues inherent in the current "growth control" controversy. A detailed examination of growth control is outside the scope of this article, but the major issues cannot be ignored.¹¹⁸ The key issues raised in all "growth control" programs are: (1) due process;¹¹⁹ (2) taking of property without compensation;¹²⁰ (3) equal protection;¹²¹ and (4) the right to travel.¹²²

116. See Keene, *supra* note 23, at 668-73.

117. *Id.*

118. See Juergensmeyer & Gragg, *Limiting Population Growth in Florida and the Nation: The Constitutional Issues*, 26 U. FLA. L. REV. 758 (1974).

119. See *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972); *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972); *In re Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

120. See *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972); Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Governmental Action*, 25 U. FLA. L. REV. 635 (1973).

121. Compare *James v. Valtierra*, 402 U.S. 137 (1971) with *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970).

122. *Construction Indus. Ass'n of Sonoma Co. v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Note, *The Right to Travel: Another Constitutional Standard for Local Land Use Regulations?*, 39 U. CHI. L. REV. 612 (1972).

XI. AD VALOREM TAXATION: THE DIFFERENTIAL ASSESSMENT OR DIFFERENTIAL TAXATION CONCEPT

Often the primary source of revenue for local governments is the ad valorem tax levied on real property, and in most states, agricultural land is given special treatment regarding ad valorem taxes or property taxes, as they are often called. The justification given for "special treatment" or the "differential taxation" approach usually combines two arguments.

The first argument is the farmland preservation theory. Agricultural land tax breaks save farmers money and make agricultural activities more profitable, consequently giving farmers an economic incentive to continue farming. The second justification given for treating farmers differently for property tax purposes is that agricultural activities do not make the demands on governmental services that urban land uses make. Farmers are therefore entitled to tax breaks because they otherwise would be paying more than their fair share of the costs of governmental services. Under this approach, any farmland preservation effects are merely incidental.

Whatever the justification given, the differential taxation or assessment approach is the most commonly used. In fact, at least forty-eight states have statutory or constitutional provisions falling under generally accepted definitions of special taxation or assessment.¹²³ Not surprisingly, differential taxation is also one of the most frequently written about issues in all of agricultural law.¹²⁴ It is also one of the most controversial. The most recent evaluations suggest that differential taxation for ad valorem tax purposes has little, if any, effect on

123. The most recent survey of states found only Georgia and Mississippi without such statutes or constitutional provisions. Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Land*, 15 GONZ. L. REV. 675, 696-97 (1980).

124. See R. GLOUDEMANS, *supra* note 14; J. WERSHOW, *FLORIDA AGRICULTURAL LAW* chs. 2 & 3 (1981); Adamson, *Preferential Land Assessment in Virginia*, 10 U. RICH. L. REV. 111 (1975); Cooke & Power, *Preferential Assessment of Agricultural Land*, 47 FLA. B.J. 636 (1973); Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 219 (1978); Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975); Ellingson, *Differential Assessment and Local Government Controls to Preserve Agricultural Lands*, 20 S.D.L. REV. 548 (1975); Hady & Sibold, *State Programs for the Differential Assessment of Farm and Open Space Land*, 256 AGRIC. ECON. REP. 6 (1974); Henke, *Preferential Property Tax Treatment for Farmland*, 53 OR. L. REV. 117 (1974); Juergensmeyer, *supra* note 53; Keene, *supra* note 23; Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCES J. 119 (1979); Lapping, Bevens & Herbers, *supra* note 69; Myers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1 (1979); Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 KAN. L. REV. 215 (1977); Wershow, *A British Answer to Ad Valorem Assessment Problems in Florida*, 53 FLA. B. J. 490 (1979); Wershow & Juergensmeyer, *Agriculture and Changing Legal Concepts in an Urbanized Society*, 27 U. FLA. L. REV. 78 (1974); Wershow, *Ad Valorem Assessment in Florida-Whither Now?*, 18 U. FLA. L. REV. 324 (1965); Wershow, *Agricultural Zoning in Florida-Its Implications and Problems*, 13 U. FLA. L. REV. 479 (1960); Wershow, *Ad Valorem Assessment in Florida-The Demand for a Viable Solution*, 25 U. FLA. L. REV. 49 (1972); Wershow, *Recent Developments in Ad Valorem Taxation*, 20 U. FLA. L. REV. 1 (1967); Note, *The California Land Conservation Act of 1965 and the Fight to Save California's Prime Agricultural Lands*, 30 HASTINGS L.J. 1859 (1979).

keeping land in agricultural production. Differential taxation for estate, gift, and inheritance tax purposes is much more important and considerably more effective in accomplishing preservation goals.¹²⁵ Perhaps the most balanced evaluation of differential taxation programs is that of the NALS:

Although many states have used property tax relief as a tool in protecting agricultural land, only a small fraction of farm estates or farms which enjoy the tax benefits of differential assessment meet all the conditions necessary to make this incentive effective. The benefits of reduced taxation, however, are conferred broadly, with no proof required of each recipient that the public policy of protecting farmland is being promoted. For this reason, tax policy is often viewed as a shotgun approach. Furthermore, unless differential assessment programs are combined with agricultural zoning and/or with agreements that restrict the land to agricultural use and/or purchase of development rights, there is no assurance that the beneficiaries of tax reduction or abatement will keep their land in agricultural use. Owners may simply enjoy reduced taxes until the time comes when they want to sell. In the case of death taxes, significant tax benefits are made available to large farm estates, even those that are not in serious jeopardy of being converted because of high death taxes.

In isolation, then, differential assessment is largely ineffective in reducing the rate of conversion of agricultural land. It does not discourage the incursion of non-farm uses into stable agricultural areas; it simply enables owners of land under development pressure to postpone the sale of their land until they are ready to retire. The incentives are not keyed into actual need, except in the case of the tax credit programs of Wisconsin and Michigan.

Nevertheless, differential taxation is a valuable component of a comprehensive agricultural land protection program. As a matter of equity, if a program prevents agricultural land from being developed, the owner should pay taxes only on its agricultural use value. Further, benefits such as these may serve as incentives to encourage farmers to participate in an integrated agricultural land protection programs.¹²⁶

An initial constitutional issue is raised in many states by such favorable tax treatments; many state constitutions require uniformity of taxation. Frequently, state constitutions have had to be amended to specifically authorize differential assessment.¹²⁷

There are three basic approaches to differential taxation for ad valorem tax purposes; pure differential assessment, deferred taxation and restrictive agreements.

A. *Pure Differential Assessment*

Under the pure differential assessment approach, the assessed

125. See 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 55.

126. NALS FINAL REPORT, *supra* note 6, at 55.

127. See Annot., 98 A.L.R.3d 916 (1980); Keene, *supra* note 23, at 657-60.

value of agricultural land is based on its value if used only for agricultural purposes rather than its actual market value, even if the true market value is many times that of its current use value. Since no recapture of taxes is provided for, there is no penalty if the land is developed or sold for development. The tax reduction while the land is used for agricultural purposes is the only incentive to the landowner to retain the land in agricultural production.

The key concept and source of most litigation under differential assessment statutes is the requirement that the land be used for genuine or bona fide agricultural purposes. Landowners have attempted, and courts have sometimes accepted, contrived approaches to the identification problem. Some state statutes contain lists of factors to be considered in determining eligibility. For example, the Florida statute lists the following: (1) the length of time the land has been so utilized; (2) whether the use has been continuous; (3) the purchase price paid; (4) size, as it relates to specific agricultural use; (5) whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforestation, and other accepted agricultural practice; (6) whether such land is under lease and, if so, the effective length, terms, and conditions of the lease; and (7) such other factors as may from time to time become applicable.¹²⁸

B. *Deferred Taxation*

Over one-half of the states have a program under which agricultural land is eligible for tax deferral. The programs vary considerably from state to state, but the basic format is to start with the differential or special use value rather than market value assessment discussed above. Similar problems arise in identifying bona fide agricultural uses.

Unlike the so-called pure differential assessment programs, some

128. FLA. STAT. § 193.461(3)(b) (Supp. 1982). For recent Florida Supreme Court decisions interpreting this provisions *see*, *Bass v. General Dev. Corp.*, 374 So. 2d 479 (Fla. 1979); *Roden v. K & K Land Management, Inc.*, 368 So. 2d 588 (Fla. 1978).

Professor Wershow points out that preferential assessment is basically a two-step process. The first step is to determine the eligibility of the land for agricultural assessment, and, if it is deemed eligible, then the second step is to determine the value of the land for agricultural use. The Florida statute is again exemplary since it requires the tax assessor to consider only the following factors:

1. The quantity and size of the property;
2. The condition of said property;
3. The present market value of said property as agricultural land;
4. The income produced by said property;
5. The productivity of land in its present use;
6. The economic merchantability of the agricultural product; and
7. Such other agricultural factors as may from time to time become applicable.

FLA. STAT. § 193.461 (b)(a) (Supp. 1982). *See* J. WERSHOW, *supra* note 124, § 3.03.

or all of the tax savings derived from deferred taxation have to be repaid if the land ceases to be used for agricultural purposes. The number of years for which the tax savings must be repaid ranges between two and ten years and generally is referred to as the "rollback" period.¹²⁹ Another variation is whether or not interest must be paid on the tax savings when they are repaid.¹³⁰

Implementation of a tax deferral program requires considerable precision in assessment and in recordkeeping, since the "recapture" amount is usually calculated as the difference between the taxes paid pursuant to the special assessment and the taxes that would have been paid if the land had been assessed at market value. This calculation is made for each year of the roll-back period. The complexity of this calculation has led some states to recapture tax savings simply by levying a "conveyance tax" at the time the land is transferred for nonagricultural uses.¹³¹ A somewhat similar approach is the much discussed Vermont capital gains tax,¹³² which seeks to discourage speculation by levying a capital gains tax that is quite high if the land has been owned for short periods of time but which decreases with the increase in the time the land has been owned by the seller.

C. Restrictive Agreements

The restrictive agreements approach to differential taxation for agricultural lands is closely related to and usually combined with the agricultural districting concept discussed earlier in this article.¹³³ Agricultural landowners who meet specified acreage requirements voluntarily form special districts. A binding agreement between the landowner and the appropriate governmental unit is entered into. Such an agreement limits the land use control powers of the government and gives tax concessions to the landowner, who is committed to continuing specified agricultural uses during the contract period. A breach by the landowner subjects him to heavy tax penalties.

The prototype statute for restrictive taxation and agricultural districting agreements is California's Williamson Act.¹³⁴ Under this Act, there is a minimum ten-year contract period with automatic yearly renewals and ten-year notification requirements for non-renewal. Although almost one-half of California's farmland has been enrolled in this program, its effectiveness as a land preservation tool seems questionable, since it seems to have attracted only land that would have

129. Dunford, *supra* note 123, at 685-86 (1980); Keene, *supra* note 23, at 661-62.

130. Dunford, *supra* note 123, at 685-86.

131. See, e.g., N.H. REV. STAT. ANN. § 79-A: 7 (Supp. 1981).

132. VT. STAT. ANN. tit. 32, §§ 10001-10010 (Supp. 1981).

133. See notes 65-74 and accompanying text *supra*.

134. CAL. GOV'T CODE §§ 51200-51205 (Deering Supp. 1977).

been committed to continued use for agricultural purposes without special treatment.¹³⁵

XII. CONSTITUTIONAL LIMITATIONS ON AGRICULTURAL LANDS PRESERVATION TECHNIQUES

The power of state and local governments to use land use planning and control techniques to protect and preserve agricultural lands is based upon the police power. It therefore is subject to the same constitutional limitations and requirements that apply to all exercises of the police power.¹³⁶ Although the constitutional requirements, and consequently limitations, are closely interrelated, the issues traditionally are separated as follows; the taking issue, the arbitrary, capricious, and unreasonable standard, the requirement of conformity to comprehensive plans, the unlawful delegation of legislative authority issue, the contract zoning prohibition, and the exclusionary zoning prohibition.

A. *The Taking Issue*

Agricultural lands preservation techniques based on the exercise of the land use control power restrict the use the landowner can make of his own land. Landowners traditionally attack such restrictions by contending that the regulations and restrictions constitute a "taking of property." This "taking issue" limitation on the validity of police power based land use restrictions is founded upon state and federal guarantees that no property shall be taken without due process of law.¹³⁷ In essence, this limitation distinguishes those situations in which the use of the police power is proper and therefore no compensation need be paid the landowner from those situations where only the power of eminent domain can be used and the landowner must be compensated.

Determining which circumstances require payment of compensation and which do not has not been easy for the courts. Thus far, they have formulated no definitive theory that can be used to clearly separate permissible regulations from takings that require compensation. The development of such a formula is unlikely to occur in the foreseeable future. In fact, the United States Supreme Court recently noted

135. Dawson, *Compassionate Taxation of Underdeveloped Private Land*, 3 ZONING & PLAN. L. REP. (July-August 1980).

136. If a land use control measure has no basis in the police power, it can be accomplished only through the exercise of the power of eminent domain and the payment of just compensation. Courts are reluctant to hold that a land use control measure is void as a general principle as long as it is related to the general welfare. Compare *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) with *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

137. U.S. CONST. amend. V. The fifth amendment provisions of the United States Constitution were made applicable to the states through the fourteenth amendment. *Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."¹³⁸

The threshold requirement for a landowner who seeks to attack agricultural lands preservation land use restrictions is to establish that the "rights" that have been restricted are his "property rights." The recognition by the Supreme Court in *United States v. Willow River Power Co.*¹³⁹ that not all "economic interests" are "property rights"¹⁴⁰ emphasized the importance and the weight of this burden. *Just v. Marinette County*,¹⁴¹ which has received considerable national attention, further emphasizes this point.

In *Just*, the Supreme Court of Wisconsin was faced with a challenge to the validity of shorelands zoning regulations that the landowner contended destroyed the economic value of his lakefront land. The economic loss to the landowner notwithstanding, the court upheld the ordinance on two bases. First, the court concluded that the preservation of wetlands, arguably comparable to preservation of prime agricultural land, was designed to prevent a harm rather than create a public benefit and was therefore an exercise of police power rather than an eminent domain action. Second, the court held that the prohibited uses, filling of wetlands, was not a reasonable use and consequently was not a "property right" entitled to constitutional protection. In an oft-quoted statement arguably relevant to many agricultural lands preservation programs, the court stressed that the landowner had no inherent right to change the natural state of the land at the expense of harm to the public.

The Justs argue their property has been severely depreciated in value. But this depreciation is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.¹⁴²

A recent decision of the Supreme Court of the United States, *Penn Central*, further illustrates the need for landowners who attack land use restrictions first to establish the existence of a property right. The effect of the law challenged in this case was to prevent the owners of Grand

138. *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See generally F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973).

139. 324 U.S. 499 (1945).

140. *Id.* at 502.

141. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

142. *Id.* at 23, 201 N.W.2d at 771.

Central Station from constructing a fifty-five story office building above the terminal. The Court refused to recognize a taking, holding that the challenged regulations still permitted the same use of the land that had been made for more than half a century. The Court further held that the mere showing by landowners that they had been deprived of their ability to exploit a property interest that they theretofore believed was available to them did not constitute a property right. In deciding the existence or nonexistence of a property right, the Court focused on the effect of the government action on the parcel of land as a whole: it refused to divide the ownership into segments (such as land, air space, etc.) in order to decide whether or not individual elements of ownership had been too seriously interfered with by the complained of government action.¹⁴³

Once the landowner successfully establishes that the agricultural lands preservation restriction of which he complains affects a "property right," the determination of whether a taking has occurred will turn on the individual facts and circumstances of each case and is susceptible to varying legal analyses. Most federal and state courts continue to repeat Justice Holmes' amorphous test from *Pennsylvania Coal Co. v. Mahon*;¹⁴⁴ only if a police power "regulation goes too far will it be recognized as a taking."¹⁴⁵ The courts, however, have identified a number of factors they consider significant in applying Holmes' test. For example, when the economic impact of the challenged regulations interferes with justifiable investment-backed expectations, courts are inclined to grant relief.¹⁴⁶ Similarly, when the governmental regulations result in a physical invasion of the property, relief generally is granted.¹⁴⁷ Courts have been reluctant, however, to find a taking when the action is clearly grounded in the promotion of the health, safety, welfare, or morals of the community.¹⁴⁸

B. *The Arbitrary, Capricious, and Unreasonable Standard*

The concept that zoning or any other land use control action used to protect and preserve agricultural land will not be upheld if it is arbitrary, capricious, or unreasonable is well established. The use of this doctrine, however, is complicated by the way most courts approach the issue. Courts rarely label a zoning action "unreasonable" without also calling it arbitrary and capricious, suggesting that there is only one

143. For a more detailed discussion, see Keene, *supra* note 23, at 635-45.

144. 260 U.S. 393 (1922).

145. *Id.* at 415.

146. See *Pennsylvania Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

147. See *United States v. Causby*, 328 U.S. 256 (1946).

148. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976); *Gorrie v. Fox*, 274 U.S. 603 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

standard composed of three parts. Generally, at least, the test is viewed as one of "reasonableness." Unreasonableness can be shown in several ways; for example, an arbitrary action is by its very nature unreasonable. The same can be said of an action designated as "capricious." However, not all "unreasonable" restrictions on agricultural land are necessarily arbitrary or capricious.¹⁴⁹ One way of viewing the reasonableness requirement is as a continuum that ultimately leads into the taking issue discussed above. At the "valid" end of the continuum, the land use restriction is upheld because unreasonableness cannot be established and the presumptions of validity to which all properly enacted land use restrictions are entitled,¹⁵⁰ cannot be overcome by the attacking landowner. Toward the middle of the continuum, evidence of unreasonableness is considerable, yet the governmental authority demonstrates such a close relationship between the restriction and police power goals that the "fairly debatable" rule restrains the court from substituting its judgment for that of the land use control authority and the agricultural lands restrictions are upheld. Further along the continuum, the evidence of unreasonableness is greater and the relationship of the restriction to police power objectives questionable so that the action is invalidated as "arbitrary, capricious or unreasonable." At the far end of the continuum are those cases in which the evidence of unreasonableness is so substantial, the effect on the landowner so severe, and the relationship of the restriction to police power goals so tenuous that the action will be invalidated as a taking.

Thus, the determination of whether a land use control measure designed to preserve or protect agricultural land is "unreasonable" is largely a balancing process. The benefits to the community are weighed against the detriments inflicted on the landowners. If in the opinion of the judges public benefits outweigh the private detriment, the restriction is labeled reasonable; if otherwise, the measure is considered unreasonable.

C. *The Requirement of Conformity To Comprehensive Plans*

Comprehensive planning is playing an increasingly important role in land use planning.¹⁵¹ The general requirement, which all agricultural lands preservation measures based upon the police power must

149. 1 J. JUERGENSMEYER & J. WADLEY, *supra* note 51, § 8-2.

150. Since the enactment of land use control measures is a legislative act, the courts, pursuant to the separation of powers doctrine, presume validity. This concept is frequently referred to as the "fairly debatable" rule which was made applicable to land use control actions by the Supreme Court of the United States in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). There the Court stated, "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388 (quoting *Radice v. New York*, 264 U.S. 292, 294 (1924)).

151. Juergensmeyer, *supra* note 53.

meet, is that such regulations must be enacted pursuant to a comprehensive plan. The basis and purpose of the rule is to avoid arbitrary, unreasonable, or discriminatory use of power that would inevitably result were land use control measures conceived and adopted on a parcel by parcel basis.

The definition of "comprehensive plan" varies considerably from state to state. In those states with mandatory local government comprehensive planning acts, all land use control measures must conform to and be consistent with detailed comprehensive plans in order to be considered valid. In other jurisdictions, the requirement that land use control measures affecting agricultural lands must be in conformity with a comprehensive plan simply means that the plan for that jurisdiction must cover all land within the jurisdiction.¹⁵²

Regardless of a given jurisdiction's definition of comprehensive plan, the requirement that land use restrictions must be in accordance with such plans affords considerable protection to landowners whose land has been singled out and treated differently from comparable, similarly situated land. This principle places a heavy burden on public authorities in the formulation of agricultural lands preservation programs in regard to uniform treatment landowners.

D. *The Unlawful Delegation of Legislative Authority Issue*

The day-to-day implementation of agricultural lands preservation programs inevitably requires execution of details of the plan by persons other than the "legislative" officials who have the power to enact them. Without delegation of authority by elected legislative officials, all government programs, including agricultural lands preservation programs, would doubtless come to a standstill. Certain limitations, however, have been placed by the courts on the delegation of land use control power by the legislative bodies that possess that power.

As previously discussed, the authority to control the use of land is derived from the police power. Generally, the states delegate the power to zone and otherwise control the use of land to their units of local government. Such a delegation may be found in statutes, in state constitutional provisions that create local governments, or in special or general enabling acts. Once delegated, the general (county or city commission) or specially constituted legislative body of the local government has the power to exercise land use control. This does not mean that the local legislative authority must do everything itself. Delegation is proper, subject to restrictions designed to protect the public.

The issues of improper or unlawful delegation may be raised in

152. *Id.*

three situations: (1) when the land use control authority attempts to exercise a power not delegated to it by the state; (2) when the delegation of power is not properly safeguarded with adequate standards; and (3) when there is an apparent delegation of authority to individuals outside the government structure itself. The most important of these situations for agricultural lands preservation programs is the well-settled requirement that when a legislative body delegates discretionary authority, such delegation must be accompanied by sufficient standards. The test of whether the standards are accurate is twofold: (1) the standards must be set forth in the ordinance or other legislative measure that makes the delegation; and (2) the standards must reasonably insure that those exercising the delegated powers will be prevented from making capricious or arbitrary decisions.¹⁵³

E. *Contract and Conditional Zoning*

Successful formulation of agricultural lands preservation programs requires considerable flexibility and creativity. However, the widespread prohibition against "contract" zoning limits the flexibility of public authorities to negotiate agricultural preservation programs pursuant to zoning and other traditional land use control devices. "Contract zoning" refers to the situation in which a landowner and a zoning authority enter into an agreement or contract on a zoning decision. Ordinarily, such agreements involve a landowner who agrees to restrict the use of his land in some way required of all land so zoned in order to get the land use control authority to agree to the requested change. Contracts of this nature generally are struck down by the courts on the theory that public authorities have "contracted away" the police power and thereby violated the prohibition against unrestricted delegation of legislative authority.¹⁵⁴

In spite of the prohibition against "contract zoning," the courts recognize the need for flexibility in land use situations such as agricultural lands preservation programs, and most allow "conditional zoning." The distinction between contract and conditional zoning is one of the finer lines encountered in an area of the law in which lines are so faint they are frequently invisible. It is of some help in distinguishing the two that most, but by no means all, courts allow as "conditional zoning" rather than "contract zoning" situations in which: (1) the city acts to rezone after a landowner has promised to restrict his land; (2) the agreement is between a landowner and a planning commission that has only the power to recommend zoning changes but not the power to make them; (3) the local government is not a party to the

153. See generally K. DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 2 (1970 & Supp. 1976).

154. See Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A. L. REV. 897 (1965).

agreement; and (4) there is no formal agreement, the vote to rezone is unconditional, and the restrictions assured by the landowner are merely the result of voluntary action.¹⁵⁵

F. *The Exclusionary Zoning Prohibition*

Certain types of exclusionary zoning were developed in answer to urban problems and involved attempts to exclude nonresidential or commercial uses from suburbs or to exclude high density housing, which tends to bring minority groups into the community.¹⁵⁶ Such problems are of only general societal interest to the agricultural community.

Unfortunately, however, the exclusionary zoning concept and cases are relevant—at least in principle—to many agricultural lands preservation programs since many communities have sought to implement their exclusionary motives through large lot zoning or agricultural use zones (so-called rural or residential estates classifications). When such methods are employed to preserve the agricultural use of land through discouraging subdivision, the racial and economic discrimination cases should be clearly distinguished.¹⁵⁷ The taking issue will often be determinative of the validity of the program, however.

XIII. CONCLUSION

However one evaluates the failure of existing agricultural lands preservation programs to appreciably alleviate the severity of the problem, lack of diversity does not seem a valid criticism. In fact, perhaps the great diversity of approaches compounds the problem by diluting and confusing efforts towards meaningful solutions from a national viewpoint. Certainly lack of coordination is a serious defect in most regions.

It should again be noted that the withdrawal of land from agricultural production is the result of complex socio-economic factors not capable of solution by mere changes in the law. This does not mean that many of the legal concepts discussed and evaluated in this article cannot help alleviate the problem. The current weakness and ineffective-

155. See Shapiro, *The Case for Conditional Zoning*, 41 TEMPLE L.Q. 267 (1968); Strine, *The Use of Conditions in Land-Use Control*, 67 DICK. L. REV. 109 (1963); Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825 (1972); Comment, *Zoning and Concomitant Agreements*, 3 GONZ. L. REV. 197 (1968); Comment, *Toward a Strategy for Utilization of Contract and Conditional Zoning*, 51 J. URB. L. 94 (1973).

156. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 51, 336 A.2d 713, cert. denied, 423 U.S. 80 (1975); Margolis, *Exclusionary Zoning: For Whom Does Belle Terre Toll*, 11 CALIF. WEST. L. REV. 85 (1974); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969); Note, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches*, 4 FORDHAM URB. L.J. 147 (1975).

157. Keene, *supra* note 23, at 655-56.

ness of legal concepts in this area are due not to conceptual inadequacy, but to ineffective coordination and implementation. As comprehensive land use planning becomes more common in rural and urban-fringe areas, the opportunity to coordinate and implement the concepts evaluated in this article will become more meaningful and more appropriate. Until then, partial solutions and temporary victories will be the most that can be expected.