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# The Perils of Rural Land Use Planning: the Case of Canada

Michael I. Krauss\*

## INTRODUCTION

**ANYONE** who has travelled the roads of North America (or in Canada, where over fifty percent of the land mass is still inaccessible by road, anyone who has flown via bush plane) knows that the vast majority of the continent remains undeveloped and, in the northern part of the continent, even uninhabited. The North American land mass could clearly support populations well in excess of the 275 million<sup>1</sup> who presently live there, as evidenced by the tremendous amount of food that North America exports to foreign lands. Shipping costs would be reduced if foreign consumers came here to live.

William Fischel has observed that if every family in the contiguous forty-eight United States occupied one acre of land,<sup>2</sup> only three percent of the U.S. land mass would be occupied by humans.<sup>3</sup> In Canada, with ninety percent less population and ten percent more land area than in the United States, the comparable figure is one quarter of one percent.<sup>4</sup> This statistic is perhaps less meaningful than its American counterpart because of the uninhabitability of the northern third of Canada. However, even excluding this huge land mass, only three quarters of one percent of Canada's territory would be occupied under a one-acre-per-family rule.

Accordingly, the majority of land in North America is rural and is destined to stay that way. The chosen urban destinations of immigrants to Canada and the United States, as well as the continuous decline in rural population, illustrate a preference for living in urban areas. For

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\* Professor of Law, George Mason University, Arlington Virginia; member of the Quebec and American Bar Associations. This paper was originally delivered at a Donner Foundation conference on comparative approaches to environmental preservation, sponsored by the Foundation for Research in the Economics of the Environment (F.R.E.E.) in Bozeman, Montana. Thanks are due to the Sara Scaife Foundation as well as to the above-named groups for their support. Mark Galbraith provided valuable research assistance.

<sup>1</sup> Excluding Mexico.

<sup>2</sup> This demographic change would be considerably more scattered than present-day suburban sprawl, even considering non-residential uses such as shopping centers and other commercial uses, and would be much less dense than present urban living conditions.

<sup>3</sup> Fischel, *Urban Development and Agricultural Land Markets*, in *THE VANISHING FARMLAND CRISIS* 79 (J. Baden, ed. 1984).

<sup>4</sup> .03 \* .1/1.1 = .25 \* .01.

most citizens, the advantages of life in a relatively congested setting outweigh the costs of city and suburban life. As Jane Jacobs has insightfully revealed,<sup>5</sup> cities and suburbs have produced the wealth responsible for our increased health, safety and prosperity.<sup>6</sup>

As North America has urbanized, cities have grown and have encroached on contiguous, formerly rural, land. Inner rural land, because of its proximity to the growing city market, was much more likely to be actively used for agricultural purposes than more distant rural land.

The economic consequences of city expansion on the optimal use of rural land are, intuitively, quite clear. However, these consequences merit a brief review. On one hand, expansion of the consumer market for produce raises the value of farm land.<sup>7</sup> On the other hand, the continuing approach to cities raises the attractiveness of rural land as a residential area (previously only desirable for those who wished to live far from cities) to people who want to be near cities. Such people compete for land use with those seeking to raise crops or livestock.

Sometimes the optimal land use will become, over time, residential so the land will be sold and subdivided; however the typically desired farm is larger than the typically desired back yard. Quite often farming (which will have become more valued because of the proximity of larger markets) will remain the most valuable land use, depending upon the agricultural potential of the land. If market prices reflect only development possibilities and not agricultural potential, urban expansion may continue unchecked.

Both civil and common law courts have recognized that optimal land use can change over time. In the law of nuisance, where courts have generally refused to sanction the "coming-to-the-nuisance" defense<sup>8</sup>, polluters' claiming the right to unduly damage neighboring land by virtue of temporal priority have typically been unsuccessful.<sup>9</sup> On the other hand, a resident's move to an industrial or agricultural zone does not necessarily give him the right to halt noisy or malodorous activity.<sup>10</sup> Courts are clearly hesitant to find the complained-of activity unreasonable in the

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<sup>5</sup> J. JACOBS, *CITIES AND THE WEALTH OF NATIONS: PRINCIPLES OF ECONOMIC LIFE* (1985).

<sup>6</sup> A. WILDAVASKY, *SEARCHING FOR SAFETY* (1988).

<sup>7</sup> From a strictly agricultural perspective, the value of the land is the present value of the future stream of agricultural earnings. As demand for agricultural goods rises, price and the present value of the future income stream will also rise.

<sup>8</sup> See Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance"*, 9 J. LEGAL STUD. 557 (1980).

<sup>9</sup> See, e.g., *Drysdale v. Dugas*, (1896) 26 S.C.R. 20, 25 (Quebec civil law case in which stable surrounded by expanding city judged to be a nuisance even though the stable was there first); *Spur Industries, Inc. v. Del Webb Development Corp.*, 108 Ariz. 178, 494 P.2d 700 (1972) (encroaching suburban development transforms agricultural use of land into a nuisance).

<sup>10</sup> *Roy c. St. Lawrence Warehouse* (1973) C.A. code case: Quebec civil Purchaser of loft in industrial area complains of industrial activity: one cannot ask that activities cease, if he knows of

absence of evidence that "normal activities" in the neighborhood have changed. Of course, parties remain free to purchase servitudes over neighboring land (requiring it to receive smoke or odors, or conversely prohibiting it from emitting smoke or odors).<sup>11</sup> The purchase of such a limited property right indicates that value maximization has been attained. If servitudes have not been purchased, courts will endeavor to determine what constitutes reasonable, wealth-maximizing behavior.

To recapitulate, in North America rural land is the rule, and urban land the exception. Yet most people prefer to live in an urban environment. This leads to the expansion of cities and, at the margin, to the urbanization of those very narrow fringes of rural land that are undergoing transformation.

If the price mechanism is allowed to function, it transmits signals that induce economic factors to transform land use only where appropriate. Misunderstanding the decentralized information processing of the price system leads many erstwhile land use planners to advocate direct coercive implementation of the limited and imperfect scientific knowledge they possess.<sup>12</sup>

In contrast to the fluid scenario sketched above are views, both in Canada and in the United States<sup>13</sup>, that rural land must be protected from urban encroachment by non-market, political mechanisms. Beginning with Maryland in 1956, all fifty American states have enacted some agricultural and/or open space provisions.<sup>14</sup> As will be explained in further detail, Canadian protection of agricultural land is significantly more intensive than its American counterpart.

Advocates of land use decision politicization see various "market failures" as a justification for a more "scientific," planned, centralized and less spontaneous approach to this question. The voluminous "market failure" literature indicates the following imperfections.

First, market failure advocates argue that the "best" agricultural land happens to be located very close to cities. Thus, even if quantitatively little farmland is urbanized, the harm to agriculture is qualitatively significant. This is especially true because transformation is asymmetric.

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the industrial nature of the area upon moving in. Presumably, if enough loft-dwellers moved in so that the industrial use became secondary, a solution like that of *Drysdale* would be reached.

<sup>11</sup> See generally, Krauss and Valcke, *Conceptions of Property: The Numerous Clauses of Property Rights at Civil and Common Law* (forthcoming unpublished manuscript); see also B. SIEGAN, *LAND USE WITHOUT ZONING* (1972).

<sup>12</sup> See Pasour, *Lessons from the Economic Calculation Debate*, in *THE VANISHING FARMLAND CRISIS* 99 (J. Baden, ed. 1984).

<sup>13</sup> See, e.g., Bryant & Russwurm, *The Impact of Non-Farm Development on Agriculture*, 19 *PLAN CANADA* 122 (1979) (an example of the argument made in Canada); See, e.g. NAT'L AGRIC. LANDS STUDY, FINAL REPORT (1981) (an example of the argument made in the United States).

<sup>14</sup> Note, *Farmland and Open Space Preservation in Michigan: an Empirical Analysis*, 19 *U. MICH. J. L. REF.* 1107, 1107 (1986)[hereinafter *Farmland and Open Space Preservation*].

Land can be easily transformed from farmland to residential use,<sup>15</sup> but the reverse transformation is expensive.

This argument is suspect. The reasons for prime agricultural land tending to be located near cities are complex, and pose something of a chicken-egg problem.<sup>16</sup> It may well be, as indicated above, that if cities happened to be located elsewhere, prime farmland would "relocate" as well. The productivity of farmland depends not only upon local land and weather conditions, but also and increasingly, on relatively mobile capital investments.<sup>17</sup>

Even if the amount of "good" agricultural land was somehow fixed, market failure would not be inevitable. Economic theory indicates that private ownership of depletable resources results in socially optimal use.<sup>18</sup> This use rate is governed by the relationship between the price of the resource (agricultural land) and the interest rate. At socially optimal exploitation levels, the price growth rate equals the interest rate. If urban land prices increase faster than interest rates, rural landowners, at the margin, should sell less. This raises prices in the current year, and lowers them in the future, until the margin between the prices becomes equal to the interest rate.

A second market failure argument suggests that and market transactions resulting in the transformation of rural land often fail to account for external costs. For example, current city and suburban dwellers become upset when new dwellers arrive and occupy adjoining space that was once open and enjoyable to view. This disutility to neighboring urban dwellers is presumably an externality not captured in the negotiations between farmer and developer, and is possibly greater than the surplus derived from the contracting parties combined. Neighboring urbanites may be prepared to pay the farmer not to sell his land, but a large number of problems provoke holdouts, creating "transaction costs" precluding a potentially wealth-enhancing deal. This market failure supposedly justifies state intervention achieving the optimal goal of protecting the agricultural land.

This argument does not address negative externality but, from a jurisprudential standpoint, should be viewed as the disappearance of a posi-

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<sup>15</sup> Indeed, farmland, because it is cleared, has a comparative advantage over forest land for residential development.

<sup>16</sup> An unresolved question is whether cities located near prime agricultural land, or whether the best farms and the most talented farmers locate near city markets?

<sup>17</sup> *E.g.* fertilizer, machinery and hired labor. Indeed, as transportation and processing have become more efficient, proximity to markets has become less of a determinant factor for farm location. Consequently, one would expect that some farms having located near cities when transport systems were primitive could profitably relocate further out, for example, on presently forested areas.

<sup>18</sup> See Hotelling, *The Economics of Exhaustible Resources*, 39 J. POL. ECON. 137 (1931). Many other articles over the years have applied Hotelling's crucial insight.

tive externality. City dwellers, having benefitted from the privacy and scenic views provided by nearby farms, become deprived of a benefit, not a property right, to which they had become accustomed. City dwellers now protest, demanding that the state provide them with such a right at a cost borne by all. Therefore, the costs are partially externalized to others. This argument for politicization of the land use process actually advocates the externalization of private costs, while purporting to rectify them.

In conclusion, the existence of a positive externality (the neighboring farmland for urban dwellers) does not mean that insufficient open spaces will be provided. If open spaces are an urban public good, the city government is a most convenient mechanism to circumvent free-rider problems by paying for a park, or buying a farm, with tax dollars.<sup>19</sup>

Finally, a problem referred to as either impermanence, abandonment, or (in French literature) "destructuration," that is often discussed by market failure advocates, ultimately relates to farmer rationality.<sup>20</sup> The starting point for this argument is the observation that, almost by definition, more land has a potential for development than will ultimately be developed. If a farmer near an urban center feels his land may be developed, he might not make capital improvements or perform required soil and building maintenance necessary to maintain the farm as a going concern. However, if the anticipated development fails to materialize, he will find himself still wishing to sell his land (now at a much lower price, to attract those who had previously passed over the property), because through underinvestment, his land has become less valuable for farming. Thus, from an economic point of view, too much land will be prematurely pulled out of agriproduction.

This market failure argument also appears to be flawed. One hopes that farmers will not foolishly invest in buildings that developers do not want, as such investment would be socially wasteful. Some farmers may optimistically feel that their land is next on the list for development. Farmers (like all investors) will not always correctly anticipate future demand, and their errors will not always lie systematically on the side of disinvestment (as opposed to over-investment). According to relevant theories, the impermanence syndrome is sometimes empirically borne out, and sometimes not.<sup>21</sup> Finally, even if uncertainty systematically causes underinvestment, it is not clear that impairment of a farmer's property rights is an appropriate solution to the problem. Life is full of

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<sup>19</sup> Governmental purchases of land for park use is, while perhaps problematic, a topic distinct from the one examined in this article.

<sup>20</sup> See, e.g., Wolfe & Sack, *Land Abandonment in the Rural-Urban Fringe: The Case of Laprairie County*, 4 URB. F. 12 (1978). Berry, *Idling of Farmland in the Philadelphia Region, 1930-1970*, 88 REGIONAL SCI. RES. INST. 1 (1976) (discussion paper).

<sup>21</sup> Fischel, *supra* note 2, at 90.

uncertainty, yet substitution of certainly bad events by government fiat is not preferable. According to one author, "[m]aking certain that each of us will die on our fiftieth birthday would allow us to optimize our life-time paths of consumption, but it is not a very good way to increase well-being."<sup>22</sup>

### PROGRAMS TO PROTECT RURAL LAND IN THE UNITED STATES

Despite the dubious theoretical grounds for doing so, state and federal farmland preservation programs abound.

#### *State Programs*

In the United States,<sup>23</sup> state programs can be placed in several categories.

#### Preferential Assessment Programs

Forty-five states classify real property and give different tax treatment to each class. Under the typical Preferential Assessment Program (PAP), land used for agriculture will be assessed for property tax purposes according to its agricultural value, even if it is actually more valuable for residential or industrial development. In other words, notwithstanding a realtor's maxim,<sup>24</sup> location is irrelevant in the assessment of agricultural land. This provides marginal incentive to keep land in its current agricultural use.<sup>25</sup>

Twenty-five of the above forty-five states add an additional disincentive to their PAP, compelling the owner of newly developed land to "refund" the amount of taxes "saved" over a given number of years before the development, due to the preferential agricultural treatment. Obviously, this makes agricultural land less valuable to a developer and discourages some efficient developments.

Four states, on the other hand, impose such penalties "voluntarily." A farmer will receive preferential tax treatment only if he agrees not to develop his land for a given number of years.<sup>26</sup> This is the functional equivalent of the purchase of a servitude. To the extent that property tax is legitimate, such voluntary restrictive agreements may not pose

<sup>22</sup> *Id.* at 91.

<sup>23</sup> The author's main purpose is to describe Canadian initiatives, therefore, this article is deliberately brief in its sketch of the American situation.

<sup>24</sup> *E.g.* that value depends only on three things: "location, location and location."

<sup>25</sup> More precisely, it removes the clear signal sent by an increase in property taxes based on market value. This type of tax is a signal that transforms the opportunity cost of agriculture *i.e.*, the benefit lost by not selling to a developer, into a more tangible expenditure.

<sup>26</sup> See *Farmland and Open Space Preservation*, *supra* note 3, at 1107.

problems of justice,<sup>27</sup> although they may have perverse allocative effects as described above.

### Circuit Breakers

Michigan and Wisconsin offer, through refunds issued by the state, complete relief from all municipal or county property taxes exceeding a percentage of the landowner's income if the landowner maintains the rural character of the land. These programs disproportionately assist poor, usually less efficient, farmers more than efficient, usually wealthy ones, and thus seem particularly inappropriate for agricultural enhancement. Unlike PAPs, circuit breakers allocate the cost of such incentives to the whole state. Under PAPs, the local taxing district internalizes the expense of the program acutely, in contrast to the circuit breaker's relatively diluted direct price. From the standpoint of Public Choice theory,<sup>28</sup> this is distinctly disadvantageous. The more acutely taxpayers feel that they are paying for a rent-seeking program, the more likely they are to protest. The greater the dilution, the lesser the incentive to protest.

### Zoning and Districting

Although hundreds of municipalities have "agricultural zones,"<sup>29</sup> only Hawaii and Oregon have statewide rural zoning. In a sense, the Hawaiian law<sup>30</sup> is a dead letter, as Hawaii's Land Use Commission has little power to prevent the subdivision that has rapidly occurred as non-agricultural uses have increased in value.<sup>31</sup> A recent Oregon statute<sup>32</sup> is more comprehensive, and seems to prevent efficient development in rural areas. Provisions permitting urban growth in low-productivity areas temper the law's negative effects, as well as permit non-commercial

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<sup>27</sup> There is a "your money or your life" sense to these agreements that makes their "voluntary" nature somewhat suspect, and in any case significantly different from the purchase of servitudes. See R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974).

<sup>28</sup> See J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962); A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

<sup>29</sup> See Nelson, *Agricultural Zoning: A Private Alternative*, in *THE VANISHING FARMLAND CRISIS* 113 (J. Baden, ed. 1984).

<sup>30</sup> Land Use Commission Act, HAW. REV. STAT. § 205 (1985).

<sup>31</sup> Under the Hawaiian statute, landowners may have their agricultural land, of a least one acre, assessed at its use value (as opposed to its market value) if they agree not to develop for ten years. They may have it assessed at fifty percent of its use value if they agree not to develop for twenty years. This is equivalent to the purchase of a temporary easement.

<sup>32</sup> Agricultural Land Use Act, OR. REV. STAT. § 215.203 (1983) (permits the establishment of exclusive farm zones).



building in farming zones.<sup>33</sup> Several states<sup>34</sup> have farming districts initiated by the farmers themselves. Categorization of an area as a farming district results in limits on use and also in limited tax assessment. In this sense, the districting program resembles the voluntary restrictive agreements outlined above, with the additional feature, as a collective action, of tending to eliminate holdout problems<sup>35</sup> when public goods are involved. It is also more likely to result in oppression when the good is private, and a majority desires to expropriate a property right from a dissenter.<sup>36</sup> Presumably, a farmer's acquiescence to redistricting is more likely if he feels that impending development is improbable. It is not clear that non-farmers benefit from redistricting, making it look suspiciously like a subsidy from urbanites.

### Public Acquisition of Development Rights

Twenty-three states have programs permitting the state government to purchase development rights from landowners, or authorizing local governments to do so. To such an extent<sup>37</sup> that state action accurately reflects a near-unanimous desire to keep land open—as opposed to a private desire to receive amenities at no direct personal cost, but a great cost to taxpayers generally. This type of purchase of a servitude can be efficient and equitable. However, money is often in short supply for these programs. Some jurisdictions have created Transferable Development Rights (TDRs).<sup>38</sup> Under this system, zoning restrictions are imposed on rural landowners without cash compensation. The latter are however given TDRs, for example at the rate of one TDR per five acres of land affected by the new zoning. Rural landowners may sell TDRs to urban developers, who may then use them according to a prescribed formula<sup>39</sup> to build in the urban zone at a greater density than allowed by urban

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<sup>33</sup> See Duncan, *Agriculture as a Resource: Statewide Land use Programs for the Preservation of Farmland*, 14 *ECOLOGY L.Q.* 401, 466-67 (1987).

<sup>34</sup> The New York program is the most well-known. N.Y. AGRIC. & M. LAW, § 300-07 (McKinney 1972 & Supp. 1990). This act empowers any owner or owners of at least five hundred acres of land to submit a proposal to the county legislature for the creation of an agricultural district. The creation of such a district entails low agricultural property tax assessments for any owner of at least ten acres of land who produced at least \$10,000 in agricultural products in the preceding year.

<sup>35</sup> If unanimous assent were required for the change, some farmers would probably "hold up" others by requiring a transfer payment before agreeing, even if they actually preferred the deal, in order to extract more of the joint surplus for themselves.

<sup>36</sup> Obviously, whether the move in a given case represents a private or a public good for farmers is impossible to know in advance.

<sup>37</sup> See *supra* text accompanying notes 1-21.

<sup>38</sup> Montgomery County, Maryland is one of the nation's heading T.D.R. proponents.

<sup>39</sup> For example, one TDR would allow building a home on a quarter acre, instead of the half acre required in the zoning regulation. A sixty home development on a fifteen acre former farm in the one half acre urban zone can be constructed, without any zoning change, if fifteen TDRs were purchased on the open market.

zoning.<sup>40</sup> Thus developers appear to pay farmers for the privilege of leaving their land open to benefit all the urbanites. These urbanites will in turn buy their homes from the developers, who will obviously integrate the cost of TDRs into the price. Although it may seem like residents are getting something for nothing, such is not the case. The previous urban zoning<sup>41</sup> may have been appropriate, in which case over-density is imposed on current hapless residents of the "receiving area." Alternatively, these receiving areas were inappropriately upzoned,<sup>42</sup> in which case their owners bear the impact of the TDR law, and must pay for the entire county's public enjoyment of the open space. The constitutionality of such TDR legislation is questionable.<sup>43</sup>

### Right-to-Farm Statutes

All fifty states have adopted a version of a right-to-farm statute which, to some extent, validates the "coming to the nuisance" defense<sup>44</sup> by preventing courts from declaring farming activity a nuisance.<sup>45</sup> For reasons set forth above, such statutes are inefficient because they contribute to freezing existing land uses that are obsolete.<sup>46</sup>

### Federal Programs

The federal role in agricultural land preservation is incoherent and inconclusive. Until the mid-1970s, the Department of Agriculture tried to take farmland out of production, undoubtedly to counteract perverse incentives to overproduce created by its own farm subsidies. Since 1979, following the National Agricultural Lands Study (NALS)<sup>47</sup>, the Department has publicly espoused an opposite goal—increasing available farm

<sup>40</sup> See Marcus, *Transferable Development Rights: A Current Appraisal*, 1 PROB. & PROP. 40, 41 (1987); Giordano, *Overstuffing the Envelope: The Problems with Creative Transfer of Development Rights*, 16 FORDHAM URB. L.J. 43 (1988); Strugar, *Transferable Development Rights: Robbing Peter to Pay Paul?*, 62 U. DET. L. REV. 633 (1985).

<sup>41</sup> One half acre, in our example.

<sup>42</sup> One quarter acre was the optimal lot size, and one half acre was stipulated in the regulation solely to stimulate the purchase of TDRs.

<sup>43</sup> Is this not a "taking" of the urbanite developer's land, just as it would have been an uncompensated "downzoning" of the farmer's rural land? Compensating the farmer, but not the developer, seems a clear denial of equal protection of the laws under the Fourteenth Amendment of the Constitution, as well as a possible violation of the Fifth Amendment. See R. EPSTEIN, *TAKINGS* 95 (1988); Marcus, *supra* note 40, at 42; Fischel, *Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581 (1988)(symposium introduction).

<sup>44</sup> See *supra* text accompanying notes 1-21.

<sup>45</sup> See Burgess-Jackson, *The Ethics and Economics of Right-to-Farm Statutes*, 9 HARV. J. L. & PUB. POL'Y 481, 520-23 (1986) (listing state right-to-farm statutes).

<sup>46</sup> *Contra*, Kwong & Baden, *Comment: The Ethics and Economics of Right to Farm Statutes*, 9 HARV. J. L. & PUB. POL'Y 524 (1986).

<sup>47</sup> See NAT'L AGRIC. LANDS STUDY, *supra* note 12

land. This policy has been implemented in the following ways:<sup>48</sup>

- (i) environmental statements prepared by the federal government must now emphasize the impact of federal projects on prime agricultural land;
- (ii) a "Farmland Protection Policy," for which final regulations were issued in 1984, requires federal agencies to consider farmland conversion impacts, but mandates no changes if there is an impact; and
- (iii) a 1985 bill allows state governors to bring action in federal courts in particular instances to enforce farmland protection laws.

Predictably, in 1982, the President's Commission on Housing asked for a repeal of the Farmland Protection Policy on the grounds that farmland protection has had a detrimental impact on the cost and subsequent availability of housing.

### PROGRAMS TO PROTECT RURAL LAND IN CANADA

Notwithstanding Canadian complaints against U.S. agricultural protectionism during negotiations leading to the historic Free Trade Agreement<sup>49</sup>, federal and provincial distortions of free markets in Canadian agriculture and agricultural land are so numerous that only the most consequential will be described in this article.<sup>50</sup> Canadian constitutional law is ambiguous with respect to jurisdiction over agriculture,<sup>51</sup> so that inter-jurisdictional duplication can be expected. All jurisdictions apparently share the conviction that rural land requires scientific, state-mandated control and protection.

Only Quebec, Ontario and British Columbia have any degree of advanced urbanization, and these three provinces have expressed a belief

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<sup>48</sup> See Schnidman, *The Evolving Federal Role in Agricultural Land Preservation*, 18 URB. LAW. 423 (1986).

<sup>49</sup> See Krauss, *The Canada-U.S. Free Trade Agreement: Now or Never*, CATO INST. POL'Y ANALYSIS (1988)[hereinafter CATO INST.].

<sup>50</sup> Thus, for example, federal laws applying to agriculture in only one part of Canada will not be discussed in this article. See, e.g., *Prairie Farm Assistance Act*, CAN. REV. STAT. ch. P-16 (1970); see also, *Canadian Wheat Board Act*, CAN. REV. STAT. ch. C-12 (1970); see also, *Two Price Wheat Act*, ch. 54, 1974-1976, CAN. STAT. 1189; see also, *Temporary Wheat Reserves Act of 1956*, CAN. REV. STAT. ch. 31 (2d Supp.)(1970); see also, *Prairie Farm Rehabilitation Act*, CAN. REV. STAT. ch. P-17 (1970).

Because Quebec's legislation is so much more severe than that of other provinces, and because it is more unknown due to language problems, that province's legislation will be the main focus of this article.

<sup>51</sup> See *Constitution Act, 1867*, Art. 95, CAN. REV. STAT. App. II, no. 5 (1970). This statute gives joint competence over agriculture to Federal and Provincial legislatures. Case law has determined that Parliament has jurisdiction over agricultural issues relevant to interprovincial trade while the provinces have exclusive competence over lands and property. See, e.g., P. HOGG, *CONSTITUTIONAL LAW OF CANADA* 267-75, 295-99 (Carswell Co. ed. 1977). These rubrics are interrelated, but legislating the protection of rural land essentially falls to the provinces.

that an agricultural crisis is imminent.<sup>52</sup> British Columbia was the first province to intervene directly, when its socialist<sup>53</sup> government adopted the Environment and Land Use Act in 1971.<sup>54</sup> A 1973 Executive Order in Council, authorized by the Act, prohibited any subdivision of "land suitable for agriculture." A definition of "farm land" followed,<sup>55</sup> and by 1973 a definitive Land Commission Act<sup>56</sup> authorized the Cabinet to designate distinct "agricultural land reserves." All non-agricultural activity, including subdivision and removal of topsoil, on these reserves is forbidden without the express permission of the Land Commission. Modifications to the Act, after the electoral defeat of the socialists by the conservative Social Credit Party, reduced the Land Commission's power and increased that of the Cabinet.<sup>57</sup>

Ontario's agricultural land preservation policy is decentralized and non-coercive, more like that in the United States. An executive policy statement in 1978 indicated that the Provincial Cabinet would impose some restrictions on a local government's development plans if it encroached unduly on farmland. Intellectual urban interest groups exerted interest,<sup>58</sup> and various discrete interventions in regional government affairs occurred, but not on a systematic or all-encompassing basis.<sup>59</sup> These "Policy Guidelines" were not followed by major government legislation until 1983, when the Planning Act was amended to require that the government protect "the natural environment, including the agricultural resource base of the Province."<sup>60</sup>

Quebec's socialist, separatist *Parti Québécois* government, elected in 1976, envisioned agricultural self-sufficiency in defiance of comparative

<sup>52</sup> Quebec: see, e.g., Department of Agriculture, *Document de Consultation sur la Protection du Territoire Agricole Québécois*, 1978 [hereinafter *Protection du Territoire Agricole*]; Ontario: see Rodd, *The Crisis of Agricultural Land in the Ontario Countryside*, 16 *Plan Canada* 160 (1976).

<sup>53</sup> E.g. New Democratic Party.

<sup>54</sup> Environment and Land Use Act, B.C. REV. STAT. ch. 110 (1979).

<sup>55</sup> Order in Council 157, 46 B.C. Gaz. (part II) (Feb. 8, 1973). The definition of "farm land" includes:

any land of 2 acres or more that is . . . designated as Class 1, 2, 3, or 4 of the classification of soil capability for agriculture developed as part of the Canada Land Inventory under the *Agricultural and Rural Development Act* (ARDA) (Canada).

*Id.* at 47.

<sup>56</sup> Agricultural Land Commission Act, B.C. REV. STAT. ch. 9 (1979).

<sup>57</sup> See, e.g., *id.* § 13 (as amended).

<sup>58</sup> It is interesting to note that much of the legislative thrust in Ontario for the protection of agricultural land has come from "Private Members' bills," rather than from government-sponsored legislation, contrary to the norm in a Parliamentary context. One such bill, The Non-resident Agricultural Land Interest Registration Act, ONT. STAT. ch. 26 (1980), passed. Others, including the *Foodlands Protection Act* [P.M. Bill 112, 31st Legisl., 2d Sess.] did not.

<sup>59</sup> See Glenn, *Approaches to the Protection of Agricultural Land in Quebec and Ontario: Highways and Byways*, 11 CAN. PUB. POL'Y 665 (1985).

<sup>60</sup> An Act to Revise the Planning Act, ONT. STAT. ch. 1, § 2(a) (1983).

advantage principles. This plan never materialized; even in Colonial days, Quebec's inhabitants defied governmental orders and specialized in the fur trade instead of cultivating the province's rocky soil.<sup>61</sup> Of the province's 135 million square kilometers of land, more than about two and one half percent has never been cultivated at any given time.

In December 1978, the *Parti Québécois* government intervened to protect its agricultural land in a direct, centralized manner that is without parallel in North America. The *Loi Sur la Protection du Territoire Agricole*<sup>62</sup> authorized the government to establish "designated agricultural regions," and it did so from 1978 to 1981, covering virtually all of settled Quebec. Nearly every non-urban parcel of land was designated as "Green" (agricultural) by government decree, subject to slight modification after consultation with the municipalities concerned. "White" (non-agricultural) zones were essentially the existing urban areas of each municipality, along with the estimated area necessary to meet short-term needs as defined by provincial government planners.<sup>63</sup>

Within a Green zone, permission of the *Commission de Protection du Territoire Agricole*<sup>64</sup> (CPTAQ) is necessary to use a lot for any non-agricultural new purpose, except that an owner of vacant land at the time of the agricultural zoning has the right to build one residence thereon. No sugar maple trees may be cut down, no topsoil removed, and no subdivision undertaken without CPTAQ approval. This permission is rarely granted.<sup>65</sup> However, the Cabinet has the power to decide upon an individual application in place of the CPTAQ. If the bureaucratic process belies a methodologically flawed belief in pseudo-scientific planning,<sup>66</sup>

<sup>61</sup> See, e.g., M. TRUDEL, *HISTOIRE DE LA NOUVELLE FRANCE* (1966); V. FOWKE, *CANADIAN AGRICULTURAL POLICY: THE HISTORICAL PATTERN*, ch. II (1947).

<sup>62</sup> L.R.Q., c. P-41 (Act for the protection of agricultural territory) [hereinafter LPTA].

<sup>63</sup> Within a White area, municipal bylaws remain fully applicable. These bylaws include zoning bylaws, which may well restrict urban land to quasi-rural uses.

<sup>64</sup> Agricultural Territory Protection Commission.

<sup>65</sup> When requests are made to use land for non-agricultural purposes, the act requires the CPTAQ to base its decision upon only the following criteria:

The biophysical conditions of the soil and of the environment, the possible uses of the lot for agricultural purposes and the economic consequences thereof, and the repercussions that the granting of the application would have on the preservation of agricultural land in the municipality and the region, and on the homogeneity of the farming community and farming operations.

[§ 12, translation by author].

Legislation adopted in April 1989 modified the basic structure of the law, essentially establishing a 100 acre zoning rule in rural areas, making the minimum lot size one hundred acres. *Loi modifiant la Loi sur la Protection du Territoire Agricole*, L.Q. 1989, ch. 7, § 15 [hereinafter LMLPTA].

<sup>66</sup> See Delogu, *A Comprehensive State and Local Strategy to Preserve the Nation's Farmland is Unnecessary and Unwise*, 34 U. KANSAS L. REV. 519 (1986).

the potential political usurpation of this bureaucratic power<sup>67</sup> exposes the whole plan as a transfer of valuable property rights from individuals to the government. Such practice becomes evident considering that the area zoned "Green" is over twice as large as the maximum area ever farmed in the history of the province.<sup>68</sup> Unlike many American farmland preservation policies, the Agricultural Zoning Act explicitly rejects any compensation for the many citizens whose land has been rendered significantly less valuable by the legislation.

The effects of the Agricultural Zoning Act have been rather predictable:

(1) Since fewer buyers are interested in Green zones, prices of such land have dropped. The reduction has been calculated at up to thirty five percent in certain counties with attractive alternate uses, and much greater for individual lots within these counties.<sup>69</sup> This price reduction benefits younger farmers, who can expand their farms more cheaply, and hurts older ones whose land, with its alternative uses, often serves as a "pension plan." Younger farmers dominate the farmers' union<sup>70</sup> and tend to support the *Parti Québécois*, while older farmers traditionally vote Liberal. Age displacement at "fire sale" prices can be expected, as can bargain sales of prominent homes by fleeing Anglophones to Francophone *Parti Québécois* supporters. *The percentage of younger farmers (under thirty-six years old) in Quebec increased forty percent between 1971 and 1981, reversing earlier trends and supporting this analysis.*<sup>71</sup>

(2) *Prices for existing expensive city, suburban, country and weekend homes and land has increased, since Green zone land is no longer in competition with it.*<sup>72</sup> *Parti Québécois* leaders and cadres are, much more likely to own such homes than is the average citizen.

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<sup>67</sup> LMPTA, *supra* note 65, ch. 7, § 46, 66 & 96. The government has not hesitated to use this power, as when it granted a special exception to Texas' Bell Helicopters just before a provincial election allowing it to build a giant manufacturing plant on prime farmland in Mirabel, QC.

<sup>68</sup> Seven million hectares (17.5 million acres) are zoned Green. Acreage actually used for agricultural purposes in Quebec peaked at about 3.5 million hectares in 1951. By 1986, only 2.1 million hectares were being farmed (about thirty percent of the Green zone). See Canada Farm Credit Corporation, "Trends in Farmland Value," Economic Report #21, Dec. 1987.

<sup>69</sup> See, e.g., Vaillancourt & Monty, *The Effect of Agricultural Zoning on Land Prices, Quebec 1975-1981*, 61 LAND ECON. 36 (1985).

<sup>70</sup> All farmers in Quebec must join the *Union des Producteurs Agricoles* (UPA) in order to qualify for tax breaks and other benefits (some to be discussed *infra*) bestowed by the government on farmers. The UPA, unlike farmers' associations in British Columbia, came out in support of the Agricultural Zoning Act, and has supported the *Parti Québécois* at each election.

<sup>71</sup> *Canada Census, Agriculture, Quebec, 1971, 1981.*

<sup>72</sup> More accurately, the cost of competition is now higher due to, for example, claims to the CPTAQ and costs of lobbying Cabinet and bureaucrats. Many White zone lots contiguous to Green zone lots more than doubled in value in the first two years of the Act's existence. See THIBODEAU, GAUDREAU, & BERGERON, *Le Zonage Agricole: Un Bilan Positif*, Quebec 1986, at 112.

(3) If enough resources can be marshalled to pay for it, dezoning at the political level is easily accomplished.<sup>73</sup> Speculation and impermanence<sup>74</sup> are not eliminated, which increases citizens' perception that the ultimate allocation of goods is determined more by access to politicians than by properly enforced and applied property right laws.

(4) Agriculture is largely a part-time business in Quebec, because of the province's poor soils and severe climate. By precluding urban expansion in outlying areas, the law has actually hindered urban development in the hinterland and has contributed to emptying outlying areas.<sup>75</sup> Emptying these farms also results in the elimination of rural competition for small-city builders and maintenance people.<sup>76</sup>

(5) Transaction costs for all purchases of land or buildings in rural areas have increased significantly, as the historic legality of all non-agricultural use must be painstakingly researched through the chain of title. As time passes, these costs are likely to increase.

(6) Finally, there is some question as to whether the Act has preserved agriculture in Quebec. Total improved farm acreage in the province has dropped by twelve percent since its adoption, compared with a drop of only five percent in relatively unregulated Ontario. Capital investment per hectare remains far lower than in Quebec's sister province.<sup>77</sup> Quality of farmland and extent of economic growth<sup>78</sup> are more important determinants of agricultural activity than government planners suspected.

Agricultural zoning is not the only rural land protection scheme in Quebec.<sup>79</sup> Quebec<sup>80</sup> is not the only province to impose a hefty thirty-three percent tax on agricultural and non-agricultural land transfers<sup>81</sup> to non-residents in Canada. If the land is in a Green zone, the transfer cannot even be registered without prior CPTAQ authorization unless the Cabinet overrules the Commission,<sup>82</sup> even if the foreign owner maintains

<sup>73</sup> See Descotcaux, "Québec a accepté plus de 45% des demandes de dezonage agricole" ("Quebec Cabinet accepts over 45% of rezoning requests") [compared with less than 5% at the CPTAQ], *Le Devoir* [Montreal], Sept. 7, 1988, 1, 10.

<sup>74</sup> See *supra* text accompanying notes 1-21.

<sup>75</sup> See Vachon, *L'avenir de la Campagne québécoise dans le contexte du nouveau Droit de L'aménagement* 28 CAHIERS DE GÉOGRAPHIE DU QUÉBEC 223 (1984)(The Future of Rural Quebec in Light of Recent Zoning Legislation).

<sup>76</sup> See THIBODEAU, *supra* note 72, at 80.

<sup>77</sup> Canadian Census, Agriculture, 1981, 1986.

<sup>78</sup> Economic growth has been stagnant in Quebec precisely because of collectivizing legislation like the Agricultural Protection Act.

<sup>79</sup> Quebec and the federal government offer provincial farmers long-term credit at below-market rates. However, complex direct subsidy laws are not the prime focus of this article.

<sup>80</sup> *E.g.*, Land Transfer Tax Act, ONT. STAT. ch. 20, § 2 (1983).

<sup>81</sup> Land Transfer Duties Act, QUE. REV. STAT. ch. D-17 (1977).

<sup>82</sup> *Loi sur l'acquisition de Terrains par des Non-residents*, L.R.Q., ch. A-4.1.

the agricultural use. The government claims that this is a rural land protection measure since foreign owners are "more likely to be land speculators."<sup>83</sup> This type of legislation has been ruled constitutional, but its fate under the Free Trade Agreement seems precarious.<sup>84</sup> Paradoxically, however, if the province modifies the act to regulate purchases by all out-of-province residents, whether Canadian residents or foreigners, it will withstand both constitutional and FTA attack.<sup>85</sup> Such blocks to mobility have clear Public Choice implications<sup>86</sup>. They would, however, be unconstitutional if adopted by an American state.

Several provinces, but not yet Quebec, have limited the total number of acres of agricultural<sup>87</sup> land that any individual resident or non-resident can own.<sup>88</sup> The "family farm" is not perceived as being in danger in Quebec, where only thirteen percent of the (principally dairy) farms are larger than 400 acres. As concentration increases,<sup>89</sup> partially due to the Zoning Act, it is expected that this further hindrance to agricultural efficiency will be adopted in Quebec.

Similar to New Brunswick, Prince Edward Island, and Saskatchewan, Quebec has a "land bank" program, whereby the Minister of Agriculture may purchase land on the open market, and lease (but not sell) it to farmers at agricultural rates. However, only leases to small family farms may be made, and no assemblage of parcels into large farms by the province is allowed.<sup>90</sup> Thus, this negates the only possible efficiency argument for the land bank.<sup>91</sup>

Quebec recently adopted<sup>92</sup> right-to-farm legislation,<sup>93</sup> voiding mu-

<sup>83</sup> *Protection du Territoire Agricole*, *supra* note 52, at 18-19.

<sup>84</sup> CATO INST. *supra*, note 49.

<sup>85</sup> *Morgan v. Attorney Gen. of P.E.I.*, 2 S.C.R. 349 (1976), validating a law of Prince Edward Island prohibiting non-islanders from buying more than ten acres of land, or five "chains" bordering the sea, without the permission of the provincial Cabinet. Saskatchewan and Manitoba have similar legislation. Manitoba's law covers only non-residents of Canada, Saskatchewan's law covers non-residents of Saskatchewan. Alberta allows foreigners to buy up to twenty acres of rural land before seeking Cabinet approval. See Saskatchewan Farm Ownership Act, SASK. STAT. ch. S-17, § 7 (1978); Agricultural and Recreational Land Ownership Act, ALTA. REV. STAT. ch. A-9, § 3 (1980); Agricultural Lands Protection Act, C.C.S.M., c. A-17. The non-discrimination clauses of the Free Trade Agreement do not invalidate the more restrictive legislation, since it treats Americans and Canadians, outside their province, equally.

<sup>86</sup> Out-of-province people may have been less influenced by provincial government propaganda.

<sup>87</sup> Saskatchewan (ten acres), Manitoba (ten acres), Prince Edward Island (ten acres, or five chains of land bordering the sea). See *supra*; also the Prince Edward Island Lands Protection.

<sup>88</sup> Prince Edward Island (1000 acres).

<sup>89</sup> The thirteen percent figure quoted, as of 1986, is double the corresponding 1971 figure. See Canada Census, Agriculture, Quebec, 1971, 1986.

<sup>90</sup> Regulation Respecting the Arable Land Bank, QUE. REV. REGS. ch. M-14, div. 4 (1981).

<sup>91</sup> Transaction costs might, in some limited cases, prevent private assemblages, although this seems highly doubtful. See SIEGAN, *supra* note 10.

<sup>92</sup> LMLPTA, *supra* note 65 ch. 7, § 26.



municipal nuisance bylaws and the basic civil law as applied to farms in the Green zone. Consequently, adjacent White zone, non-rural, land users no longer have recourse against a polluting farmer-neighbor. The new system makes an efficient Coasian buy-out<sup>94</sup> prohibitively expensive, since any purchased Green land may not be used for non-agricultural purposes.

In a PAP variation,<sup>95</sup> farmers defined as such<sup>96</sup> are reimbursed forty percent of their property taxes by the province if their farm is located in a White zone, and seventy percent if located in a Green zone, regardless of level of income or wealth. Furthermore, taxes on farms located in a Green zone may not exceed two percent of the farm's taxable value, which itself may not exceed \$152.00 per acre if the farm is in a Green zone. Therefore, total taxes on a farm in a Green zone may not exceed three dollars per acre per year, and seventy percent of this small sum is refunded by the province.<sup>97</sup> However, if the property is ceded to a person for subdivision purposes (which must have been authorized by CPTAQ) or for "speculation," the tax advantages no longer exist. Additionally, the value of the past five years' worth of these tax advantages must be paid to the province by the purchaser. If a farm is excluded from the Green zone by the CPTAQ, then ten years' worth of back tax payments become immediately due.<sup>98</sup> Such prohibitive penalties are powerful disincentives to convert often valueless agricultural land to more valuable uses.

Quebec's system of agricultural quotas is very similar to those in other provinces.<sup>99</sup> If ten producers propose collective sales through a marketing board, a vote is taken by all provincial producers of the product. If a majority concurs, then much like a closed-shop union, the plan becomes compulsory for all.<sup>100</sup> Seventeen such plans exist today. Those respecting milk, eggs, and turkey include severe quotas. Prices for such

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<sup>93</sup> See *supra* text accompanying notes 1-21.

<sup>94</sup> Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (if the law transfers the right from the urbanite to the farmer, the urbanite can always buy the farmer's land, or at least an easement thereon).

<sup>95</sup> See *supra* text accompanying notes 1-21.

<sup>96</sup> The candidate must be a dues-paying member of the official farmers' union. See *supra* text accompanying notes 1-21. The primary requirement for membership is that a farmer produce at least \$3000.00 worth of goods for sale per year. *Loi sur les Producteurs Agricoles*, L.R.Q., c. P-28, art. 1(g).

<sup>97</sup> *Loi sur la Fiscalite Municipale*, L.R.Q., ch. F-2.1, § 214-20. The province reimburses municipalities for the lost revenue.

<sup>98</sup> *Id.*, §§ 216, 219, 220, 220.1.

<sup>99</sup> Federal marketing plans exist for several products in interprovincial trade. See *Farm Products Marketing Agencies Act*, CAN. REV. STAT. ch. F-4 (1985). In all fields though, the federal government has delegated its power to create and enforce agricultural cartels to the provinces.

<sup>100</sup> *Farm Products Marketing Act*, QUE. REV. STAT. ch. M-35 (1977).

products are quite high in Quebec,<sup>101</sup> and production is correspondingly reduced in the classic monopoly model. No new production of eggs or milk (the most likely agricultural activities considering Quebec's poor soil) is allowed without the purchase of a quota, thus defeating one of the prime purposes of the Agricultural Protection Act. In 1980, an egg quota brought \$CDN 114,000.00 and a milk quota brought \$CDN 166,000.00<sup>102</sup> Both prices have surely increased since then.

As is the case for every quota system, benefits have been captured by the first generation of producers. Their successors in title, whose cost of entry discounts the future income stream created by the quota system, do not benefit. Once they have bought quotas, title successors are ardent defenders of the quota system for obvious reasons.<sup>103</sup> This is contradictory, given the government's stated desire to increase agricultural advantage, as land will remain unused or underused. The program also makes start-up costs for a young farmer quite high, even if he has been able to buy low-cost land from a quasi-expropriated older farmer.

### CONCLUSION

Virtually none of the Canadian programs examined, and very few of their American counterparts, are coherent efforts to protect truly valuable farmland. Yet the farmland protection movement in Canada enjoys a degree of popular support that is hard to explain. Julian Simon is surely correct<sup>104</sup> in saying that the emotional appeal of the agricultural preservation issue is the product of half-truths and buzz words that politicians unaware of real policy implications, are reluctant to challenge.<sup>105</sup> Rural land preservation legislation, especially in a massively underdeveloped country like Canada, is a bad idea. It is time to expose its fallacies, and to eliminate such needless legislation.

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<sup>101</sup> A gallon of milk costs about \$CDN3.75, or \$US2.90; a dozen large eggs typically sell for about \$US1.50.

<sup>102</sup> See Green, *Agricultural Marketing Boards in Canada: An Economic and Legal Analysis*, 33 U. TORONTO L.J. 407, 416 (1983).

<sup>103</sup> See Bertin, *Subsidies for Farmers May be an Intractable Dilemma*, *The Globe and Mail* (Toronto), Jan. 12, 1987, at B11, col. 1 (nat'l ed.).

<sup>104</sup> Simon, *Some False Notions About Farmland Preservation*, in *THE VANISHING FARMLAND CRISIS* 59 (J. Baden ed. 1984).

<sup>105</sup> For liberal usage of these buzzwords in relation to recent efforts to modify Quebec legislation, see, Lesage, "Le dezonage de bonnes terres: Page est ebranlé par les hauts cris des organismes agricoles" ("The De-zoning of good land: Mr. Page is shaken by the cries of agricultural organizations"), *Le Devoir* March 25, 1987, 2; Lesage, *Le tapage autour du dézonage agricole: "Démagogie!" sécrient les MRC* (The Trouble Surrounding Agricultural De-zoning: "Demagoguery!" Cry the Regional Municipalities), *Le Devoir* July 15, 1988, at 1, col. 1.

