Agricultural Law Update

VOLUME 23, NUMBER 12, WHOLE NUMBER 277 DECEMBER 2006

Official publication of the American Agricultural Law Association

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Administrative and legislative developments in administrative law

National Organic Program regulations amended

On June 7, 2006, the Agricultural Marketing Service (AMS) issued a final rule that amended in several ways the National Organic Program (NOP) regulations.[1] The NOP amendments were instituted in response to the First Circuit's decision in *Harvey v. Veneman*[2] and amendments made to the Organic Foods Production Act of 1990[3] in November of 2005.[4] According to the AMS, the final rule "restores the National List of synthetics used in products labeled as 'organic' to the pre-lawsuit status made by the 2005 amendments to the Act."[5] In addition, the final rule amends the NOP regulations "to clarify that only nonorganically produced agricultural products listed in the NOP regulations may be used as ingredients in or on processed products listed as 'organic.'"[6] The final rule also terminates the so-called "80/20" rule set forth at 7 C.F.R. 205.236. Consequently, after June 9, 2007, milk cannot be labeled organic or enter the stream of commerce if it has been produced in accordance with the "80/20" rule. Finally, the final rule is modified to permit a dairy farm in its third year of organic management to feed crops and forage from land included in the dairy system plan to a dairy herd converting from nonorganic to organic.

EPA issues proposed rule to revise regulations affecting concentrated animal feeding operations

On June 30, 2006, the Environmental Protection Agency (EPA) issued a proposed rule titled "Revised National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations and Standards Guidelines for Concentrated Animal Feeding Operations."[7] EPA issued the proposed rule in response to the Second Circuit"s decision in *Waterkeeper Alliance, et al v. EPA*.[8]

The proposed rule would revise the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluents Limitations Guidelines and Standards (ELGS) for Concentrated Animal Feeding Operations (CAFOs) in several

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Louisiana's catfish statute and Cajun statute held invalid

In *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744 (5th Cir. 2006), the United States Court of Appeals for the Fifth Circuit held that Louisiana's Catfish Statute and Cajun Statute were both invalid and could not be enforced against Piazza's Seafood World, LLC (Piazza), a Louisiana company that imports seafood, mainly from overseas.

While Congress attempted to protect the domestic catfish market by enacting a federal catfish labeling law, 21 U.S.C. §§ 321d and 343(t), requiring that only fish classified within the family *Ictaluridae* could be labeled or advertised under the name "catfish," Louisiana discovered that fish within the same family were also farmed in China and sold in the U.S. as catfish. *Piazza's Seafood World*, 448 F.3d at 746. Therefore, Louisiana enacted the Catfish Statute requiring that "only *Ictaluridae* grown in the United States could be labeled 'catfish.'" *Id.* (citation omitted). The Commissioner of the Louisiana Department of Agriculture and Forestry ordered some of Piazza's customers to stop selling any of Piazza's catfish on the ground that it violated the Catfish Statute. *See id.* at 747. Furthermore, state law also prohibited Piazza from selling its products under a "Cajun" trade name because the catfish was coming from overseas, and the statute specifically prohibited the use of the word "Cajun" for

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ways. Two ways that the proposed rule would revise NPDES and ELGS rules are that only owners and operators of discharging CAFOs would be required to seek coverage under a permit and that CAFOs seeking coverage under a permit would be required to submit their nutrient management plan with their permit application or notice of intent to be authorized under a general permit.

Animal and Plant Health Inspection Service proposes amendments to rule on BSE-minimal risk regions

On August 9, 2006, the Animal and Plant Health Inspection Service published a proposed rule that would revise the final rule APHIS issued on January 4, 2005 that established a category of regions that present a minimal risk of introducing Bovine Spongiform Encephalopathy (BSE) into the United States.[9] The January 4, 2005 rule was at issue in *R-CALF II*, discussed more fully in the November, 2006, issue of the *Agricultural Law Update*, *Ninth Circuit developments in agricultural law*, page 1. The proposed rule would abolish several restrictions regarding the identification of animals and the processing of ruminant materials from BSE-minimal risk regions.

Legislative developments

The most significant legislative development is that most provisions of the Farm Security and Rural Investment Act of 2002,[10] commonly referred to as the 2002 Farm Bill, are set to expire in 2007. Debate over the next Farm Bill has begun and will intensify throughout 2006 and 2007. In light of World Trade Organization developments,[11] federal budget pressures, and other domestic political influences, the next farm bill may be historically significant.[12]

—*Harrison M. Pittman, Research* Assistant Professor of Law and *Co-Director, National Agricultural Law Center.*

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[1] National Organic Program C Revisions to Livestock Standards Based on Court Order (*Harvey v. Johanns*) and 2005 Amendment to the Organic Foods Production Act of 1990 (OFPA), 71 Fed. Reg. 32803 (June 7, 2006) (final rule) (to be codified at 7 C.F.R. pt. 205).

[2] 396 F.3d 28 (1st Cir. 2005).

[3] 7 U.S.C. 6501-6523.

[4] *See* H.R. 2744 , 109th Cong. (1999). *See also*, Stephen R. Viña, Cong. Res. Serv., *Harvey v. Veneman* and the National Organic Program: A Legal Analysis, http://www.nationalaglawcenter.org/assets/crs/RS22318.pdf. Additional legal and policy information regarding the National Organic Program is available at http://www.nationalaglawcenter.org/readingrooms/organicprogram/.

[5] USDA, Agric. Marketing Serv., AMS News Release: USDA Publishes Final Rule To Revise National Organic Program Regulations, http://www.ams.usda.gov/news/138-06.htm.

[6] National Organic Program C Revisions to Livestock Standards Based on Court Order (*Harvey v. Johanns*) and 2005 Amendment to the Organic Foods Production Act of 1990 (OFPA), 71 Fed. Reg. 32803 (June 7, 2006) (to be codified at 7 C.F.R. pt. 205).

[7] Revised National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations and Standards Guidelines for Concentrated Animal Feeding Operations, 71 Fed. Reg. 37744 (June 30, 2006) (proposed rule) (to be codified at 7 C.F.R. pts. 122 and 412). On August 4, 2006, EPA extended the comment period for the proposed rule through August 29, 2006, which was initially scheduled to end on August 14, 2006. *See* 71 Fed. Reg. 44252 (Aug. 4, 2006) (proposed rule) (to be codified at 40 C.FR. pts. 122 and 412).

[8] 399 F.3d 486 (2d Cir. 2005).

[9] Bovine Spongiform Encephalopathy; Minimal-Risk Regions, Identification of Ruminants and Processing and Importation of Commodities, 71 Fed. Reg. 45439 (Aug. 9, 2006) (proposed rule) (to be codified at 9 C.F.R. pts. 93, 94, and 95).

[10] Pub. L. No. 107-171, 115 Stat. 134 (codified in scattered sections of U.S.C. titles 7, 15, 16, and 21 of the U.S.C.).

[11] *See generally*, Randy Schnepf, Cong. Res. Serv., U.S. Agricultural Policy Response to WTO Cotton Decision, http://www.nationalaglawcenter.org/assets/crs/RS22187.pdf (explaining and analyzing WTO developments and their potential impacts on U.S. agricultural policy); Randy Schnepf, Cong. Res. Serv., Background on the U.S.-Brazil WTO Cotton Subsidy Dispute, http://www.nationalaglawcenter.org/assets/crs/RL32571.pdf (discussing WTO Cotton decision); and Jasper Womach, Cong. Res. Serv., Previewing a 2007 Farm Bill, http://www.nationalaglawcenter.org/assets/crs/RL33037.pdf (discussing possible changes to current farm bill legislation).

[12] Comprehensive information regarding past, current, and future farm bills and debate over the next farm bill is available at the National Agricultural Law Center, http://www.nationalaglawcenter.org. *See, e.g.,* the Center's Farm Commodity Programs Reading Room, http://www.nationalaglawcenter.org/readingrooms/commodityprograms/, the Farm Bills Page, http://www.nationalaglawcenter.org/farmbills/, and the Congressional Research Service Reports Page, http://www.nationalaglawcenter.org/crs/,which features an extensive database of agriculture-related Congressional Research Service reports.

Agricultural Law Update

VOL. 23, NO. 12, WHOLE NO. 277 DECEMBER 2006
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Letters and editorial contributions are welcome and should be directed to Linda Grim McCormick, Editor, 2816 C.R. 163, Alvin, TX 77511, 281-388-0155.

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Federal Register Summary: 12/2/2006 to 12/26/2006

CROP INSURANCE. The FCIC has adopted as final regulations amending the Common Crop Insurance Regulations, Nursery Crop Insurance Provisions by amending the definition of "liners." The regulations also finalize the Nursery Peak Inventory Endorsement to clarify that the peak amount of insurance is limited to 200 percent of the amount of insurance established under the Nursery Crop Insurance Provisions. The amendments will be applicable to the 2008 and succeeding crop years. **71 Fed. Reg. 74455 (Dec, 12, 2006)**.

HORSES. The APHIS has issued proposed regulations amending the regulations pertaining to the importation of horses to establish standards for the approval of permanent, privately owned quarantine facilities for horses. This proposed rule replaces a previously published proposed rule, which was withdrawn, that contained substantially different restrictions on ownership and substantially different requirements for the physical plant, operating procedures, and compliance date. **71 Fed. Reg. 74827 (Dec. 13, 2006)**.

MEAT AND POULTRY PRODUCTS. The FSIS has announced the receipt of a petition from Hormel Foods to establish a definition for the voluntary claim "natural" and to delineate the conditions under which the claim can be used on the labels of meat and poultry products. The FSIS is inviting comments on the issue generally and on the petition and, to facilitate the comment process, is announcing that it will hold a public meeting to discuss the petition. After the comment period closes, FSIS will initiate rulemaking on the claim "natural." **71 Fed. Reg. 70503 (Dec. 5, 2006)**.

SUGAR. The CCC has announced eligibility criteria and application procedures that will be used to conduct Section 3011 of the Emergency Agricultural Disaster Assistance Act of 2006 which authorizes the 2005 Louisiana Sugarcane Hurricane Disaster Assistance Program. The 2005 Program required the CCC to provide compensation totaling $40 million to Louisiana sugarcane producers and processors who suffered economic losses from the cumulative effects of Hurricanes Katrina and Rita in August and September of 2005. CCC will make $29 million in payments for 2005-crop (Fiscal Year 2006) losses to affected sugarcane processors, who shall share these payments with affected producers in a manner reflecting current contracts between the two parties. In addition, CCC will make payments of $10 million to compensate affected sugarcane producers for losses that are suffered only by producers, including losses due to saltwater flooding, wind damage, or increased planting, replanting, or harvesting costs. The funds for "producer-only losses" will be paid to processors, who will then disburse payments to affected producers without regard to contractual arrangements for dividing sugar revenue. CCC is reserving $1 million in the event of appeals and will disburse the residual, if any, to processors, who will then disburse payments to producers in a manner reflecting current contracts between the two parties. **71 Fed. Reg. 70735 (Dec. 6, 2006)**.

—Robert P. Achenbach, Jr., AALA Director

Officer "responsibly connected" under PACA

In *Thames v. USDA*, No. 06-11609, 2006 WL 2351839, at *1 (11th Cir. Aug. 15, 2006), the United States Court of Appeals for the Eleventh Circuit affirmed the final decision of the USDA determining that James E. Thames, Jr. was "responsibly connected" to a tomato re-packing company when it violated the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 449b(4), thereby subjecting him to licensing and employment restrictions under PACA.

At the time of the PACA violations, Thames served as both vice president and a member of the board of directors and owned 16.2 percent of the outstanding stock. *Id.* at *1-*2. Under PACA, a rebuttable presumption arose that Thames was "responsibly connected" because he was affiliated with the violating company as an "officer, director, or holder of more than 10 per centum of the outstanding stock." *Id.* at *3 (*quoting* 7 U.S.C 499a(b)(9)).

To overcome the presumption, Thames argued that he was only a nominal officer and director who occupied his positions at the whim of the president because the company by-laws gave the president "the unqualified authority to elect and remove directors or corporate officers." *Id.* Nevertheless, in light of Thames extensive experience in the produce packing industry in general and his more than decade-long service as an officer and director for the violating company, the court concluded that Thames failed to demonstrate he was only a nominal director and officer at the plant. *Id.* at *4.

Because Thames did not use his knowledgeable oversight and governance powers to prevent the plant's PACA violations, the court found that he was "responsibly connected" to the company for purposes of licensing and employment restrictions. *Id.*

—Amy K. Miller, National AgLaw Center Graduate Assistant, Fayetteville, AR

Private insurers' failure to exhaust administrative remedies not excused by common law exceptions

In *Ace Property and Cas. Ins. Co. v. Federal Crop Ins. Corp.*, 440 F.3d 992 (8th Cir. 2006), thirteen insurance companies (Insurance Providers) alleged that the Federal Crop Insurance Corporation (FCIC) breached a 1998 Standard Reinsurance Agreement (SRA) and filed an action in federal district court without exhausting all available administrative remedies under the governing administrative provisions of the Federal Crop Insurance Reform and Department of Agriculture Act of 1994, 7 U.S.C. §§ 6901-7014 (Act). *Id.* at 994. The Eighth Circuit held that the applicable administrative provisions of the Act are non-jurisdictional and, if excused under common law, do not require all administrative remedies to be exhausted. *Id.* at 1000. The Eighth Circuit held that no common law exceptions were applicable and, therefore, all administrative remedies need to be exhausted. *Id.* at 1001-02.

The FCIC reinsures private insurance providers for federal crop insurance provided to producers through an SRA agreement. *See id.* at 994. The Act mandates and governs the administrative appeals process for SRA disputes. *See id.* at 995. Under the Act, a party may request a final agency determination, which may be appealed to the Department of Agriculture Board of Contract Appeals (Board) with exclusive jurisdiction to the federal district courts after all administrative remedies have been exhausted. *See id.* The court concluded that § 6912(e) of the Act is nothing more than "a codified requirement of administrative exhaustion" and is thus not jurisdictional and may be excused by the exceptions to the common law exhaustion principle. *Id.* at 999.

The court explained that a party may be excused from exhausting administrative remedies if there exists a legitimate constitutional claim, if exhaustion would cause

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Goldilocks, the Three Bears and Transfer of Development Rights

By Jesse J. Richardson, Jr.

In theory, Transfer of Development Rights (TDR) programs represent an ideal, market-based approach to managing growth. Many farmland protection advocates promote TDR programs as a farmland protection tool.

This article begins with a general discussion of TDR programs and the use of TDR programs around the United States, including the benefits and drawbacks. The author then discusses the use of TDR programs to protect farmland. The discussion concludes with a look at the future of TDR programs to protect farmland in the United States.

TDR programs generally

Creation of a TDR program involves several changes to the local zoning ordinance. Note also that a TDR program should be closely tied to the local comprehensive plan.

The locality designates an area or areas of the locality that contains resource lands worthy of protection as a "sending area". The sending area may be environmentally sensitive lands, including farmland, historic districts, or urban areas where a TDR program can shape development in a positive way.

A downzoning restricts the allowable development in the sending area. However, the locality grants to the landowners in the sending area certain "paper" development rights upon the downzoning.[1]

Landowners in the sending area may sell these paper development rights to owners of land in areas designated by the local governing body as "receiving areas". Receiving areas represent areas deemed appropriate for dense development. Even better, the local government, in theory, expends no funds in this process.[2]

The of-right zoning in the receiving area allows a certain (usually residential) development density. The zoning ordinance also provides for increased of-right development within the receiving area(s) upon the purchase of a designated number of development rights per acre or according to some other formula set out in the zoning ordinance.

Note that the development rights granted to sending area landowners should not necessarily be tied to the prior development allowed on the parcel. The most important consideration in determining the amount of development rights will be the incentives provided for landowners in the receiving area to develop more densely. Likewise, the incentives to landowners in the receiving area need not, and probably should not, be based on an absolute development right-for-development right tradeoffs. In other words, the purchase of one development should not necessarily give the purchaser the right to build one more home. The number of development rights proves less important to the landowners than the dollar value of the development rights on the market.

Example: As a every simple example, Pristine County may designate an area consisting of prime farmland and working farms in the southwest portion of the county as the sending area.[3] The present zoning allows residential development on 5-acre lots. Pristine County downzones the area to allow one home every 50 acres, clustered on 2-acre lots, and gives the affected landowners a certain number of paper development rights, based on a formula contained in the ordinance (usually 1 development right for every "x" number of acres).

At the same time, Pristine County amends the zoning ordinance so that landowners within the limits of Busytown, a growing area within the county, retain the right to develop homes on ½-acre lots by-right. However, a formula is added to the ordinance so these landowners may increase the densities to ¼-acre lots by purchasing a certain number of development rights under the formula. In addition, by purchasing even more development rights, densities may be increased to 1/6-acre lots.

TDR programs across the United States

TDR programs theoretically promise the best of all worlds. A downzoning instantly protects resource lands. However, the downzoned landowners receive valuable development rights that may be sold to and used by landowners in settings more appropriate to dense development. Further, in a perfectly formed TDR program, no public monies are expended (with the exception of administrative costs).

In practice, however, TDR programs prove less numerous and less successful than one would expect. A June 2004 Brookings Institution report[4] found that 134 different local governments and regional authorities have implemented TDR programs. Further, this report finds that the overwhelming majority of existing TDR programs have goals pertaining to environmental protection (42 programs) or farmland protection (23 programs) or a combination of the two (30 programs). Only 7 programs focused on urban design or revitalization, while 11 programs focused on historic preservation.[5]

Many of the programs noted by Brookings are inactive.[6] The American Farmland Trust estimates that almost 90,000 acres have been protected with TDR programs. However, over 40,000 acres derive from one program—Montgomery County, Maryland.[7] Only eight programs, according to AFT, protect more than 1,000 acres.

Obstacles to establishing a successful TDR program

In practice, establishing a successful TDR program involves a number of obstacles. Development of a program essentially involves creating a market (some would say from whole cloth) in development rights.

First, the local government must locate communities willing to accept designation as a receiving area for higher-density development. The political difficulties inherent in this exercise thwart many programs. TDR programs should not reduce the build-out of a community. Instead, the program should affect the location and form of the development.

The most technically challenging aspect of a TDR program centers on calibrating the number of development rights to grant to sending area parcels and the incentives to give landowners in the receiving areas to purchase development rights. This task proves, at best, difficult. The number of rights and incentives, along with the real estate market, determines the price of the development rights and, hence, whether a market in those rights will exist.

Many programs find it necessary to create a "TDR bank" to ensure that an active market in development rights exists. With a bank, the local government essentially expends tax money to purchase development rights at a relatively high price and then sells those rights to landowners in the receiving area for a relatively low price in order to "make a market". In addition to this cost, costs of administering the program are relatively high.

Finally, since housing markets and job markets are regional, local TDR programs encounter difficulties unless the local government can coordinate and collaborate with other local governments in the region. Only a few regional TDR programs exist within the United States, perhaps contributing to the lack of success.

Jesse J. Richardson, Jr., is Associate Professor of Urban Affairs and Planning, Virginia Tech, Blacksburg, Virginia.

Essential components of a successful TDR program

A successful TDR program must contain several elements. First and foremost, the program should set out measurable, objective, and realistic goals. If one fails to set out clear goals, "success" becomes very subjective and problematic.

These goals, and the program itself, should be intimately connected to the local comprehensive plan. Essentially, the program must be one part of an overall smart growth plan.

Throughout the process, the inherently complex nature of a TDR program hinders adoption. The locality must create a program that is simple enough to understand and administer, but detailed and sophisticated enough to be fair.

TDR programs essentially create a market in development rights. In order for this market to operate effectively, landowners in the sending area must have adequate incentives to send and landowners in the receiving area must have adequate incentives to buy development rights.

Finally, the local government must develop community support to insure that the program is used. Without community support, the program will flounder.

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Additional TDR program issues

In some areas, land trusts and other groups attempt to acquire and permanently retire the development rights being traded in a TDR program. Unless these actions are part of a careful plan to calibrate the market for development rights, these actions defeat the purpose of the TDR program by decreasing potential densities in the receiving areas, causing sprawl. TDR ordinances should prevent such circumvention.

Additionally, treatment of the transferable development rights may prove problematic for local taxation purposes. Are the TDRs realty, subject to the real property tax? Or are they personalty subject to the personal property tax? How are the TDRs valued, particularly if an active market does not exist?

TDRs and farmland protection

As reported in the Brookings Report referenced, *supra,* the vast majority of TDR programs seek, at least in theory, to protect farmland. Further, 27 of the 53 programs that include farmland protection as a goal are located in the Mid-Atlantic (New York, New Jersey, Pennsylvania and Maryland).[8] The Montgomery County, Maryland TDR program, which seeks to protect farmland, accounts for almost half of the acres preserved in TDR programs.

No one has investigated whether these programs actually promote and aid farm production. Anecdotal evidence suggests the opposite in Montgomery County, Maryland, where wealthy hobby farmers and country estate owners find refuge.

When we measure TDR programs against the standards for successful farmland protection programs, TDR programs fail. A successful farmland protection policy must "…acknowledge that a farm is more than land. A program that focuses on land, but overlooks the management part of the farm is bound to fail. It may keep land from being developed but will not retain economical, viable, open land with the opportunities and incentives that make land a farm. Open, unattended land, with no economic return, will not long resist development nor should it."[9]

Significant factors contributing to a farm operator's decision to retain farmland include farm operation profitability, farm operator age, farm operator plans for the land at his retirement.[10] TDR programs fail to address any of these issues.

The availability of land does not by itself ensure the continuation of farming.[11] Programs that enact substantial measures to protect not just land, but agricultural operations themselves, represent a step forward.[12] "Whatever the level of sophistication, however, these programs share a common denominator: they treat the protection of agricultural land, even the protection of agriculture itself, as a land use issue."[13] This focus is far too narrow.[14] Land is but one input in the agricultural production process.[15] Farm production needs other resources, such as water, in order to be successful.[16] Furthermore, in many critical agricultural areas like the Midwest, the land supply does not appear to be threatened.[17]

Programs to set aside land for agricultural production fail to maintain viable commercial farmland operations.[18] Until land protection policies and commercial farmland viability policies are consciously linked, state and local farmland policies will more likely protect open spaces than the economic vitality of the working rural landscape.[19]

Ironically, TDR programs have been primarily effective in urban areas.[20] The author hypothesizes that the relatively small number of sending parcels and receiving parcels reduces the complexity, hence increasing success.

TDR programs suffer from a common malady afflicting programs that attempt to protect farm and other working lands. Merely prohibiting development on working lands fails to increase profitability or otherwise enhance the economic activity which communities, at least rhetorically, seek to protect.

A survey of county agricultural departments in Washington State revealed that most planning departments felt that the significant factors contributing to a farm operator's decision to retain farmland were farm operation profitability, farm operator age, and farm operator plans for the land at his retirement.[21] TDR programs fail to address any of these issues.

Libby asserts that a successful farmland protection policy must "…acknowledge that a farm is more than land. A program that focuses on land, but overlooks the management part of the farm is bound to fail. It may keep land from being

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TDRs/ cont. from page 5
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Conclusions

The theoretical beauty of TDR programs lures many to the tool. However, the complexity makes implementation difficulty.

Prior to instituting a program, local governments must undertake an enormous amount of comprehensive land use planning. The pursuit of a TDR program may, however, yield unexpected and positive results. After struggling to find adequate politically acceptable areas to serve as receiving zones and grappling with the difficulty of creating markets for development rights, communities may well decide to simply pursue good land use planning.

TDR programs suffer from a common malady afflicting programs that attempt to protect farm and other working lands. Merely prohibiting development on working lands fails to increase profitability or otherwise enhance the economic activity that communities, at least rhetorically, seek to protect.

To protect farmland and promote the industry of agriculture, however, much more than good land use planning is required. Although a significant step forward, land use planning must be linked to holistic approaches that improve farm profitability.

Goldilocks and the Three Bears

For communities that attempt to draft TDR ordinances, the fable of Goldilocks and Three Bears proves instructive. Just as Goldilocks sought the porridge, chair, and bed that were "just right", little or no margin of error exists when localities decide how many development rights to issue to landowners in the sending area and when crafting the incentives for landowners in receiving areas to purchase development rights.

If too many development rights are created or if the incentives in the receiving areas are insufficient, the price of the development rights will be too low. The local government risks successful takings lawsuits from landowners in the sending areas, and will not achieve increased densities in the receiving areas.

If not enough development rights are distributed or if the incentives in receiving areas are too great, the price of development rights will be very high. Again, the local government risks successful takings lawsuits from landowners in the sending areas, and will not achieve increased densities in the receiving areas.

The number of development rights and the incentives for both sides must be "just right". Unlike Goldilocks, most localities cannot sample several different ordinances until the right mix is found. A TDR bank may be created to make a market in development rights, however, tax revenues will have to be expended in this effort, which may not be politically palatable.

Local governments may well find that assuming the role of Adam Smith's "magic hand" in the market proves so difficult that creation of a TDR program would not be worthwhile. Certainly, attorneys and consultants will reap the greatest benefits from TDR programs than any other group as these groups attempt to "fine tune" this tool.

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[1] Legal literature debates whether these paper rights represent "just compensation" for the reduction in value resulting from the downzoning or should be included in the calculus in determining whether a "taking" exists. This debate lies beyond the scope of this article.

[2] This assumption fails to hold true if a TDR bank is created. In addition, TDR programs prove costly to administer, and tax money will pay for the administration. Finally, note that developers do not ultimately pay for the development rights. The cost is merely added to the price of new homes built in the receiving area. Developers will not purchase development rights if the purchase will reduce profits. Developers are likely to increase profits under PDR programs (or the developers will not purchase development rights).

[3] The author is not advocating the use of a TDR program or a downzoning by use of this example. In fact, as this article sets out in later sections, farmland protection is not likely to be a good goal for a local TDR program. Fairness issues relating to downzoning abound. See, e.g., Richardson, Jr., Jesse J., *Downzoning Fairness and Farmland Protection*, 19 J. of Land Use & Envtl. L. 59 (2003).

[4] Fulton, William, Jan Mazurek, Rick Pruetz, and Chris Williamson, *TDRs and Other Market-Based Land Mechanisms: How They Work and Their Role in Shaping Metropolitan Growth*, The Brookings Institution Center on Urban and Metropolitan Policy, 46 pp. (June 2004).

[5] *Id*.

[6] Kopits, Elizabeth, Virginia McConnell, and Margaret Walls, *Making Markets for Development Rights Work*, Discussion Paper 05-45, Resources for the Future, 27 pp. (October 2005).

[7] American Farmland Trust (AFT), *Transfer of Development Rights*, Fact Sheet, 4 pp. (2001).

[8] Fulton, et al., *supra*, note 4.

[9] Libby, Lawrence W., *Farmland Protection Policy: An Economic Perspective*, American Farmland Trust Center for Agriculture in the Environment. DeKalb, Illinois. Working Paper CAE/WP 97-1. January 1997, pp. 6-7.

[10] Klein, Linda R. and John P. Reganold, *Agricultural Changes and Farmland Protection in Western Washington*, J. of Soil and Water Cons. (January-February 1997), pg. 12.

[11] Duncan, Myrl L., *High Noon on the Orgallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone*, 27 Washburn L.J. 16, 18 (Fall, 1987).

[12] *Id*.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*, pp. 18-19.

[17] *Id*, pg. 19.

[18] *Id*.

[19] *Id*.

[20] Lawrence, Timothy J., *Transfer of Development Rights*, Ohio St. U. Fact Sheet CDFS-1264-98.

[21] Klein, Linda R. and John P. Reganold, *Agricultural Changes and Farmland Protection in Western Washington*, J. of Soil and Water Cons. (January-February 1997), pg. 12.

[22] Libby, Lawrence W., *Farmland Protection Policy: An Economic Perspective", American Farmland Trust Center for Agriculture in the Environment*. DeKalb, Illinois. Working Paper CAE/WP 97-1. January 1997, pp. 6-7.

[23] Duncan, Myrl L., *High Noon on the Orgallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone*, 27 Washburn L.J. 16, 18 (Fall, 1987).

[24] *Id*.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*, pp. 18-19.

[29] *Id*, pg. 19.

[30] *Id*.

[31] *Id*.

Catfish/Cont. from p. 1
products not "substantially transformed by processing in Louisiana." *Id.* at 748 n.7.

Piazza brought suit in the United States District Court for the Eastern District of Louisiana seeking injunctions against the Commissioner to prevent his enforcing the Catfish Statute and the Cajun Statute against the company, arguing that 21 U.S.C. § 343(t) preempted the Louisiana Catfish Statute and that the Statute was unconstitutional in part because it violated the Commerce Clause. *See id.* at 747. Later Piazza amended its complaint to assert that the Cajun Statute violated the company's First Amendment rights. *See id.* at 747-48. The district court granted partial summary judgment in favor of Piazza, holding that the Cajun Statute violated Piazza's First Amendment rights and denied the Commissioner's motion for a new trial by holding that the "Catfish Statute was preempted and ... in the alternative that it violated the dormant *Commerce Clause* by discriminating against foreign commerce." *Id.* at 748. The Commissioner appealed. *See id.*

The Fifth Circuit first looked at the Catfish Statute and circumvented the Commissioner's argument that the law did not violate interstate commerce by holding instead that the Catfish Statute discriminated against foreign commerce as it treated "domestic catfish differently from foreign catfish to the benefit of the former and the detriment of the latter." *Id.* at 750. Furthermore, the Fifth Circuit dismissed Commissioner Odom's argument that Congress had condoned Louisiana's legislation because none of the relevant federal statutes expressly allowed Louisiana to enact legislation that would otherwise violate the Commerce Clause. *See id.* at 751. Therefore, because the law facially discriminated against foreign commerce, the court presumed the Catfish Statute to be invalid. *See id.* The Commissioner was unable to rebut this strong presumption by showing that the Catfish Statute "serve[d] a legitimate local purpose that [could not] be adequately serviced by reasonable nondiscriminatory alternatives." *Id.*

The Fifth Circuit then turned to the Cajun Statute and affirmed the district court's ruling that the Cajun Statute violated Piazza's First Amendment right to use the trade names "Cajun Boy" and "Cajun Delight" but held the statute invalid only as applied to Piazza. *See id.* at 752-53. Applying the *Central Hudson* test, a test established by the Supreme Court to determine whether government regulation of commercial speech is impermissible, the Fifth Circuit held the Cajun Statute failed the test: first because the trade names Piazza used were not inherently misleading since Piazza mainly sold its products to wholesalers and those products bore labels with their country of origin, and second, because the Cajun Statute was broader than necessary to serve the interest it was created to serve, which was protection of Louisianans. *See id.*

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Poultry contract does not violate PSA and is not fraudulent

In *Adkins v. Cagle Foods, JV, LLC*, 411 F.3d 1320 (2005), the United States Court of Appeal for the Eleventh Circuit upheld a grant of summary judgment in favor of Cagle Foods, JV (processor) by holding that the chicken growers failed to establish a violation of the Packers & Stockyards Act (PSA), failed to identify a false representation necessary for a state fraud claim, and that the fraud claim was barred by the Georgia four-year statute of limitations.

Growers under contract with processor since the early 1990's alleged the processor violated the PSA, the Agricultural Fair Practices Act (AFPA), and state law claims relating to fraud, the Georgia RICO statute, fraudulent inducement and promissory estoppel. *Id.* at 1321-23. First, in order for the growers to proceed with their PSA claim, the court stated they would need to show a discriminatory or deceptive practice that subjected them to an unreasonable prejudice or disadvantage that adversely effects competition or is likely to have such an adverse effect. See *Id.* at 1324. The court granted summary judgment on this PSA issue because the growers were not able to establish that they received a substantial number of inferior birds, that the processor provided them insufficient or inferior feed, that the processor engaged in any illegal weighing practices, or that the arbitration provisions contained within the new production contracts were inherently unfair. *Id.* at 1324-25. Similarly, the court dismissed the claim under the AFPA because the growers were unable to point to an occurrence where the processor discriminated against them for the growers' involvement with the growers' association or establish that their involvement lead to a systematic decrease in the quality of the birds or feed that they received. *Id.* at 1326-27.

Finally, the growers' AFPA and state law claims were dismissed on procedural grounds. See *Id.* at 1325-27. The AFPA claim, which arose three years before the filing of the lawsuit, was barred by its corresponding two-year statute of limitations, while the state law fraud claims, arising from alleged representations that occurred eight years before the suit began, were barred by a three-year statute of limitations. *Id.* at 1327. In addition to the statute of limitations restrictions, the state law fraud claims were not actionable because the growers could not establish false representations on the part of the processor relating to the intentional misweighing of birds or guaranteeing future returns with pro forma financial statements. *Id.* at 1325. Since the growers could not establish these necessary elements of fraud for the RICO, fraudulent inducement, and promissory estoppel claims, these causes of action were dismissed. *Id.* at 1325-26. Also, the growers were prohibited from continuing with their cause of action for breach of contract because they could not identify any contract provisions that were violated by the processor. *Id.* at 1327. As a result, the Eleventh Circuit upheld summary judgment on the PSA, the AFPA, and the state law claims. *Id.*

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Failure to exhaust/Cont. from page 3
irreparable harm, if further administrative procedures would be futile, or if the issues to be decided are primarily legal rather than factual and therefore not suitable for administrative resolution and are more properly resolved by the courts. *Id.* at 1000. The Insurance Providers claimed that the futility and legal issue exceptions applied. *Id.*

The court concluded that the Insurance Providers did not demonstrate that their administrative remedies within the agency would be futile because the Board has jurisdiction over the dispute and the power to award monetary relief. *Id.* at 1000-01. Furthermore, even though some of the issues involved were legal, the court concluded that the legal issues exception is extremely narrow and should only be invoked if the issues involved are ones in which the agency has no expertise or which call for factual determinations. *Id.* at 1001(citing *Jewel Companies, Inc. v. Fed. Trade Comm'n*, 432 F.2d 1155, 1159 (7th Cir.1970)).

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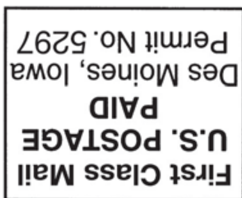

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