Circumscribing the Reduction of Open Space by Scattered Development: Incorporating a German Concept in American Right-to-Farm Laws

by

Terence J. Centner

Originally published in JOURNAL OF LAND USE & ENVIRONMENTAL LAW
8:2 J. LAND USE & ENVTL. L. 307 (1993)

CIRCUMSCRIBING THE REDUCTION OF OPEN SPACE BY SCATTERED DEVELOPMENT: INCORPORATING A GERMAN CONCEPT IN AMERICAN RIGHT-TO-FARM LAWS

TERENCE J. CENTNER*

I. INTRODUCTION

To foster economic growth, governmental policies have encouraged the expansion of commercial, industrial, and residential development.[1] Much of this expansion has occurred outside of urban areas, destroying open space, and disrupting existing agricultural land uses.[2] Factors such as lower land prices, development costs, property taxes, the availability of communication and transportation linkages, and other incentives have encouraged the development of open areas.[3] In some cases, the less exacting development provisions of rural communities provide locational advantages over more urban settings.[4] Rural communities have often embraced development in anticipation that accompanying growth and increases in their tax base would have a beneficial impact on the community. American zoning provisions and land use regulations generally have facilitated development in open areas,[5] although exceptions exist for special areas and for the few states that have adopted special land use restrictions.[6]

The expansion of scattered development into open areas is controversial; assignment of development costs and the disruption of existing rural activities are frequently debated issues. New scattered development often burdens existing property owners and the

* Terence J. Centner is a professor, University of Georgia, Athens. The author acknowledges the assistance of the *Institut für Landwirtschaftsrecht* and Dr. Wolfgang Winkler, *Universität Göttingen*, and thanks the Alexander-von-Humboldt-Stiftung, Bonn, for their financial support for this research.

1. William A. Fischel, *The Urbanization of Agricultural Land: A Review of the National Agricultural Lands Study*, 58 LAND ECON. 236, 252-53 (1982).

2. ROBERT E. COUGHLIN & JOHN C. KEENE, NATIONAL AGRICULTURAL LANDS STUDY-THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 16 (1981).

3. *See, e.g.*, Fischel, *supra* note 1, at 252.

4. *Id.*

5. Due to the relative ease of altering local zoning regulations, developers generally are able to secure permission to build in open areas despite the existence of more appropriate areas for development and growth.

6. *See, e.g.*, FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971); Thomas G. Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URB. LAW ANN. 3 (1980).

general public with development costs,[7] suggesting a fairer apportionment of costs is needed. New development also disrupts existing agricultural operations and other rural land uses. The nonspecificity of property rights and the ability under nuisance law to enjoin activities may place inordinate burdens on existing property owners.[8] Although forty-nine states have responded with right-to-farm laws that address some nuisance issues,[9] a further mechanism to protect additional property rights is desirable.

This article proposes a new state land use mechanism to reduce the loss of open space in communities that desire to preserve their undeveloped character and land uses. The justification for a new mechanism is established through an analysis of development costs and property rights in Sections II and III. Existing property owners, especially agricultural producers, lack adequate protection against competing land uses and new municipal assessments. Section III introduces a concept from German federal law to constrain competing land uses, the exclusion of incompatible development in designated rural districts. The American right-to-farm legislation and the German concept provide the basis for a

7. *See generally* Steven B. Schwanke, *Local Governments and Impact Fees: Public Need, Property Rights, and Judicial Standards*, 4 J. LAND USE & ENVTL. LAW 215 (1988). *See infra* notes 10-37 and accompanying text.

8. *E.g.*, COUGHLIN & KEENE, *supra* note 2, at 34.

9. ALA. CODE § 6-5-127 (Supp. 1992); ALASKA STAT. § 09.45.235 (Supp. 1991); ARIZ. REV. STAT. ANN. §§ 3-111 to -112 (Supp. 1991); ARK. CODE ANN. §§ 2-4-101 to -107 (Michie 1987); CAL. CIV. CODE § 3482.5 (West Supp. 1992); COLO. REV. STAT. §§ 35-3.5-101 to -103 (1984); CONN. GEN. STAT. ANN. § 19a-341 (West 1986); DEL. CODE ANN. tit. 3, §1401 (1985); FLA. STAT. § 823.14 (1991); GA. CODE ANN. § 41-1-7 (Michie 1991); HAW. REV. STAT. §§ 165-1 to -4 (1985 & Supp. 1991); IDAHO CODE §§ 22-4501 to -4504 (Supp. 1992); ILL. ANN. STAT. ch. 5, paras. 1100-05 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-1-52-4 (Burns 1986); IOWA CODE ANN. §§ 172D.1-.4, 176B.1-.13 (West 1990); KAN. STAT. ANN. §§ 2-3201 to -3203 (1991); KY. REV. STAT. ANN. § 413.072 (Michie/Bobbs-Merrill 1992); LA. REV. STAT. ANN. §§ 3:3601-:3607 (West 1987); ME. REV. STAT. ANN. tit. 17, § 2805 (West 1983 & Supp. 1991); MD. CTS. & JUD. PROC. CODE ANN. § 5-308 (1989); MASS. GEN. L. ANN. ch. 111, § 125A (West 1983 & Supp. 1992); MICH. COMP. LAWS ANN. §§ 286.471-.474 (West Supp. 1992); MINN. STAT. ANN. § 561.19 (West 1988); MISS. CODE ANN. § 95-3-29 (Supp. 1992); MO. ANN. STAT. § 537.295 (Vernon Supp. 1992); MONT. CODE ANN. §§ 27-30-101, 45-8-111 (1991); NEB. REV. STAT. §§ 2-4401 to -4404 (1991); NEV. REV. STAT. §§ 40.140, 202.450 (1987); N.H. REV. STAT. ANN. §§ 432:32-:35 (1991); N.J. ANN. ANN. § 4:1C-26 (West Supp. 1992); N.M. STAT. ANN. §§ 47-9-1 to -7 (Michie Supp. 1992); N.Y. PUB. HEALTH LAW § 1300c (McKinney 1990); N.C. GEN. STAT. §§ 106-700 to -701 (1988); N.D. CENT. CODE §§ 42-04-01 to -05 (1983); OHIO REV. CODE ANN. §§ 929.04, 3767.13 (Anderson 1988 & Supp. 1992); OKLA. STAT. ANN. tit. 50, § 1.1 (West 1988); OR. REV. STAT. §§ 30.930-.947 (1988); PA. STAT. ANN. tit. 3, §§ 951-57 (Supp. 1991); R.I. GEN. LAWS §§ 2-23-1 to -7 (1987 & Supp. 1991); S.C. CODE ANN. §§ 46-45-10 to -60 (Law. Co-op. 1987 & Supp. 1991); S.D. CODIFIED LAWS ANN. §§ 21-10-25.1 to -25.6 (Supp. 1992); TENN. CODE ANN. §§ 44-18-101 to -104 (1987); TEX. AGRIC. CODE ANN. §§ 251.001-.005 (West 1982); UTAH CODE ANN. §§ 78-38-7 to -8 (1992); VT. STAT. ANN. tit. 12, §§ 5751- 53 (Supp. 1991); VA. CODE ANN. §§ 3.1-22.28-.29 (Michie 1983); WASH. REV. CODE ANN. §§ 7.48.300-.310 (West Supp. 1992); W. VA. CODE §§ 19-19-1 to -5 (1991); WIS. STAT. ANN. §§814.04(9), 823.08 (West Supp. 1991); WYO. STAT. §§ 11-39-101 to -104 (1989).

legislative proposal establishing a land use mechanism that recognizes current property rights and authorizes development exactions to provide for a more equitable apportionment of development costs. The general policy of the mechanism is, therefore, to exclude development in open areas and require mandatory development exactions, but to allow local communities to make decisions regarding land use and zoning.

II. DEVELOPMENT COSTS

Costs associated with property ownership often increase with the development of open space as growth tends to cause citizens to desire additional services.[10] For some existing services, however, expansion of the service to provide small numbers of additional users results in a decrease of service costs.[11] This may occur for public utilities where capital investments for the development of the utility have already been made so that the addition of more users lowers marginal costs. This has led some communities to grant local incentives to attract development.[12] The general consequence of new development, however, is increased municipal and service costs.

Increased municipal costs have prompted communities to examine mechanisms for transferring development costs from taxpayers to developers and consumers.[13] Development exactions in the form of cash assessments, concessions, or in kind contributions levied against builders or developers by local communities have evolved from land use regulations.[14] Developers of new property uses are required to make a fair contribution toward the costs of municipal services and to help fund additional needed facilities.

10. The literature on development fees reports this tendency. *See* David L. Callies, *Developers' Agreements and Planning Gain*, 17 URB. LAW. 599 (1985); Charles J. Delaney & Marc T. Smith, *Impact Fees and the Price of New Housing: An Empirical Study*, 17 AM. REAL EST. & URB. ECON. J. 41 (1989); Bernard V. Keenan, *A Perspective: New York Communities and Impact Fees*, 7 PACE ENVTL. L. REV. 329 (1990); Terry D. Morgan et al., *Drafting Impact Fee Ordinances: Legal Foundation for Exactions*, 9 ZONING & PLAN. REP. 49 (1986); Schwanke, *supra* note 7, at 246-47; Michael A. Stegman, *Development Fees for Infrastructure*, 45 URB. LAND 2 (1986).

11. Paul P. Downing & Thomas S. McCaleb, *The Economics of Development Exactions*, *in* DEVELOPMENT EXACTIONS 42, 56 (James E. Frank & Robert M. Rhodes eds., 1987).

12. Jay A. Reich, *Local Incentives to Development*, 17 REAL PROP. PROB. & TR. J. 506 (1982).

13. Downing & McCaleb, *supra* note 11, at 46; Louis F. Weschler et al., *Politics and Administration of Development Exactions*, *in* DEVELOPMENT EXACTIONS, *supra* note 11, at 15, 16.

14. Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992 (1989) [hereafter *Municipal Exactions*]; Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 196 (1989).

Such exactions are intended to relieve existing residents from paying for newly developed areas.[15]

Another method entails contributions by new service users for their share of capital service costs that have already been paid. Existing property owners would pay more than their share of costs whenever part of the capital costs have already been paid. To avoid overpayment of capital service costs, services can be funded through bond financing where the debt service will be paid by future fees or taxes.[16] Development exactions have broadened into requirements concerning impact fees for off-site capital improvements,[17] affordable housing,[18] and other improvements and services.[19]

The costs of scattered development center around the dispersion of services, uses, and needs of new users. Scattered development often entails higher costs for electricity, water, gas, sewage, mail, road maintenance, and cable television due to the distances among dispersed users.[20] Studies have shown that as the density of development decreases, the cost of providing services increases.[21] Furthermore, low-density or scattered development involves greater operating costs.[22] One estimate contends that low-density family housing is five times as expensive to serve as high-density multifamily apartments.[23]

Relevant development exactions may reduce the loss of land and costs of scattered development in rural areas. Research suggests that exactions slow the development of open areas because the added development costs lessen opportunities for profitable new property uses.[24] Shifting these indirect costs to developers

15. The infliction of costs on existing property owners occurs whenever the marginal cost of providing services to new property owners are greater that the average costs of providing services to existing property owners. *See* Weschler et al., *supra* note 13, at 17; Downing & McCaleb, *supra* note 11, at 48-49.

16. Downing & McCaleb, *supra* note 11, at 49.

17. Impact fees generally involve a payment at the time of development approval to cover a part of the overall cost of providing services or the anticipated costs of trunk facilities. Delaney & Smith, *supra* note 14, at 197; Weschler et al., *supra* note 13, at 19. Impact fees may also be used as a method to control growth. Delaney & Smith, *supra* note 14, at 197.

18. Delaney & Smith, *supra* note 14, at 195.

19. Kenn Munkacy & Tom Sargent, *Strategies for Dealing with Development Exactions*, 3 REAL EST. FIN. J. 6 (1987). Although developers have contested various exactions as unconstitutional takings, a rational nexus test has facilitated broad local governmental requirements concerning exactions. *Municipal Exactions*, *supra* note 14, at 995-96.

20. *See, e.g.*, Downing & McCaleb, *supra* note 11, at 47 (citing PAUL B. DOWNING, LOCAL SERVICE PRICING POLICIES AND THEIR EFFECT ON URBAN SPACIAL STRUCTURE, Table 8 (1977)).

21. *Id.* at 46.

22. *Id.*

23. *Id.* at 47.

24. *Id.* at 57.

makes the development of profitable new property uses more difficult. The resulting decrease in the development of new areas means that less land is required and land prices appreciate more slowly. The result may be that more land remains in open space or agricultural uses.[25]

Exactions tend to encourage the development of more efficient lower cost sites, meaning that sites with existing services or those proximate to services take priority over more distant sites.[26] Exactions also transfer development to jurisdictions without exactions. This may move development to existing communities or areas with existing services where the exaction charges would be less, or may shift development to areas desiring developement.[27] Moreover, the additional capital costs imposed on developers and new property users by exactions presumably means that less land will be developed.[28]

It is unknown how many rural communities have availed themselves of local legislation incorporating exactions to reduce taxpayer costs or achieve other goals. A 1984 survey showed that more than eighty-eight percent of all communities in the United States required some type of land dedication, eighty-nine percent required developers to build or install facilities, and fifty-eight percent required some form of cash payment.[29] The imposition of the costs of scattered development on existing property owners constitutes a justification for advocating additional land use options to reapportion such costs. Rural communities should have greater flexibility in determining whether to incur these costs and who should pay for the costs.

Research suggests that scattered development also increases the operational costs of agricultural land users and reduces the efficiency of agricultural producers.[30] Operational costs often are higher due to increases in property taxes to pay for services,[31]

25. *Id.* at 56-57.

26. Presumably sites that already have services or are proximate to services are encouraged to be developed before more distant sites. This would occur because the proximate sites would not incur exaction charges or the local government places higher exaction charges on properties that impose higher external costs on the community. *Id.* at 57.

27. *Id.* at 56-57.

28. Munkacy & Sargent, *supra* note 19, at 12.

29. Elizabeth D. Purdum & James E. Frank, *Community Use of Exactions: Results of a National Survey, in* DEVELOPMENT EXACTIONS, *supra* note 11, at 123, 126, 136, 137. These figures, however, address the existence of exactions rather than the frequency of usage. Furthermore, over 41% of the surveyed communities never required developers to make a cash payment, and over 10% of the communities had no land dedication requirements or no requirements for developers to build or install facilities. *Id.*

30. William Lockeretz, *Secondary Effects on Midwestern Agriculture of Metropolitan Development and Decreases in Farmland*, 65 LAND ECON. 205 (1989).

31. COUGHLIN & KEENE, *supra* note 2, at 16.

especially if the local government has not enacted development exactions.[32] The dispersal of agricultural land and loss of a critical acreage increase the costs of remaining producers.[33] Farm machinery and other farm vehicles may need to travel greater distances between scattered fields.[34] Producers may be restricted in the timing or performance of selected activities that generate unpleasant noise, smells, or dust.[35] Vandalism may increase.[36] Producers also reduce capital investment expenditures that may negatively affect their economic viability.[37]

III. ANTI-NUISANCE LEGISLATION AND DEFINING PROPERTY RIGHTS

Although zoning allows communities to establish zones with guidelines concerning permissible uses, the broad uses often available to open areas and the relative ease of changing zoning suggest that a more specific assignment of property rights may assist property owners in planning long-term investments.[38] Many property owners of open space are agricultural producers, so that special consideration for agricultural uses may be required to help preserve open space. Agriculture is unique in that it is more dependent upon soil, climate, and location than other land uses, and may

32. The problem of high property taxes for agricultural holdings near urban areas is underscored by the state differential tax assessment programs and circuit breaker programs. In the past 25 years, every state has embraced some type of differential tax assessment program for qualifying agricultural uses. *See* John E. Anderson & Howard C. Bunch, *Agricultural Property Tax Relief: Tax Credits, Tax Rates and Land Values*, 65 LAND ECON. 13 (1989); David L. Chicoine & A. Donald Hendricks, *Evidence on Farm Use Value Assessment, Tax Shifts, and State School Aid*, 67 AM. J. AGRIC. ECON. 266 (1985); David L. Chicoine et al., *The Effects of Farm Property Tax Relief Programs on Farm Financial Conditions*, 58 LAND ECON. 516 (1982). An additional response to high property taxes is a circuit breaker program that provides a refundable income tax credit for property taxes in situations where property taxes are excessive relative to household income. *See* Richard Barrows & Kendra Bonderud, *The Distribution of Tax Relief under Farm Circuit-Breakers: Some Empirical Evidence*, 64 LAND ECON. 15 (1988).

33. Judith Lisansky, *Farming in an Urbanizing Environment: Agricultural Land Use Conflicts and Right to Farm*, 45 Human Organization 363 (1986); Lockeretz, *supra* note 30, at 205.

34. Lockeretz, *supra* note 30, at 205.

35. *Id.*; COUGHLIN & KEENE, *supra* note 2, at 16.

36. Howard E. Conklin & William G. Lesher, *Farm-Value Assessment as a Means for Reducing Premature and Excessive Agricultural Disinvestment in Urban Fringes*, 59 AM. J. AGRIC. ECON. 755, 756 (1977).

37. *Id.*; Rigoberto A. Lopez et al., *The Effects of Suburbanization on Agriculture*, 70 AM. J. AGRIC. ECON. 346 (1988); Donn Derr et al., *Criteria and Strategies for Maintaining Agriculture at the Local Level*, 32 J. SOIL & WATER CONSERVATION 118 (1977).

38. Researchers have found that agricultural producers are less likely to make capital investments near urban areas due in part to the unclear definition of property rights. Lopez et al., *supra* note 37, at 121-22.

generate positive amenities in scenic views and open space.[39] At the same time, objectionable activities during limited periods, such as annual manuring of fields, may need special consideration in order for agricultural production to continue.

Long-term capital investments of producers in agricultural structures constitute another distinction between agriculture and other land uses.[40] If a given production activity is precluded, the specialized structures may be worthless. These conditions support the adoption of a mechanism to protect existing agricultural land through a more definitive assignment of property rights.[41] Agricultural land users would benefit from a land use mechanism that remedies conflicts and unnecessary development costs, facilitates planning and investments regarding future property usage, and establishes rights for existing agricultural land users against future incompatible neighboring uses. This may involve precluding non-agricultural development based upon the unique location of the land, or for aesthetic and cultural reasons.[42]

A. Anti-Nuisance Legislation

Anti-nuisance legislation, also known as right-to-farm laws, has helped delineate such property rights by granting agricultural producers an affirmative defense against nuisance actions.[43] An extensive body of literature addresses these laws and provides a good analysis of the provisions as they relate to state nuisance law.[44] The general inference from the literature, as well as from

39. *See* John C. Bergstrom et al., *Public Environmental Amenity Benefits of Private Land: The Case of Prime Agricultural Land*, 17 S.J. AGRIC. ECON. 139 (1985).

40. *See* Alan Randall, *Market Solutions to Externality Problems: Theory and Practice*, 54 AM. J. AGRIC. ECON. 175, 178 (1972).

41. The assignment of property rights to private individuals would allow the individuals to allocate the resources to the highest valued uses. Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LIT. 1137, 1141 (1972).

42. This idea is similar to adopting special land use regulations for areas of critical state concern. *See* Pelham, *supra* note 6, at 15-28.

43. John C. Bergstrom & Terence J. Centner, *Agricultural Nuisances and Right-to-Farm Laws: Implications of Changing Liability Rules*, 19 REV. REGIONAL STUD. 23 (1989).

44. COUGHLIN & KEENE, *supra* note 2; Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95 (1983); Neil D. Hamilton, *Right-to-Farm Laws*, *in* 13 HARL, AGRICULTURAL LAW, ch. 124 (1989); Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & LAW 99 (1988); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289 (1984); Randall Wayne Hanna, *Right to Farm Statutes--The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U. L. REV. 415 (1982); John C. Keene, *Managing Agricultural Pollution*, 11 ECOLOGY L.Q. 135 (1983); Mark B. Lapping et al., *Right-to-Farm Laws: Do they Resolve Land Use Conflicts*, 26 J. SOIL & WATER CONSERVATION 467 (1983); Note, *Agricultural Law: Suburban Sprawl and the Right to Farm*, 22 WASHBURN L.J. 448 (1983); Edward

amendments to these laws, is that this legislation has been helpful in barring persons from using nuisance law to preclude established objectionable agricultural practices and operations.[45]

A majority of the right-to-farm laws provide for the partial derogation of the equity considerations of state nuisance law; neighbors may no longer be able to use nuisance law to enjoin qualifying established agricultural operations.[46] Most right-to-farm laws adopt a statutory "coming to the nuisance" doctrine[47] so that only future neighbors are precluded from bringing nuisance actions.[48] The laws often provide that any agricultural operation that was not an actionable nuisance one year after it began shall not become an actionable nuisance by reason of new land uses or changed conditions in the vicinity.[49]

Thompson, Jr., *Case Studies in Suburban/Agricultural Land Use Conflict, in* 1982 ZONING & PLAN. L. HANDBOOK (Fredric A. Strom, ed.), ch. 15; Edward Thompson, Jr., *Defining and Protecting the Right to Farm*, 5 ZONING & PLAN. L. REP. 65 (Part II) (1982) [hereinafter Thompson, Part II]; Edward Thompson, Jr., *Defining and Protecting the Right to Farm*, 5 ZONING & PLAN. L. REP. 57 (Part I) (1982) [hereinafter Thompson, Part I]. For specific analysis of individual state legislation, *see* Terence J. Centner, *Agricultural Nuisances Under the Amended Georgia `Right-To-Farm' Law*, 25 GA. ST. B.J. 36 (1988); Terence J. Centner, *Agricultural Nuisances Under the Georgia `Right-To-Farm' Law*, 23 GA. ST. B.J. 19 (1986); David Schwartz, *The Arizona Agricultural Nuisance Protection Act*, 1982 ARIZ. ST. L.J. 689 (1982); C. Andrew Scheiderer, *Chapter 93A: Right-to-Farm Protection for Iowa*, 35 DRAKE L. REV. 633 (1985-1986); Jennifer B. Todd, *The Right to Farm in Oregon*, 18 WILLAMETTE L. REV. 153 (1982).

45. Generally, the right-to-farm laws simply serve as an affirmative defense. Some right-to-farm laws, however, contain a provision that requires plaintiffs to pay defendants' costs and expenses for frivolous actions. *E.g.*, MO. ANN. STAT. § 537.295(5) (Vernon Supp. 1992).

46. *See* statutes cited *infra* note 49.

47. The statutory adoption of the "coming to the nuisance" doctrine is often more powerful than an equitable "coming to the nuisance" defense because it enables qualifying agricultural land users to defeat a nuisance action without weighing other equities. *See* Grossman & Fischer, *supra* note 44, at 118; Keene, *supra* note 44, at 164-66; Thompson, Part II, *supra* note 44, at 59.

48. Existing neighbors with property rights in land uses that predate the agricultural operation have the right to use nuisance law to abate objectionable operations. *E.g.*, Flansburgh v. Coffey, 370 N.W.2d 127, 130 (Neb. 1985).

49. Except where noted, the following states have a one year provision: ALA. CODE § 6-5-127 (Supp. 1991); ALASKA STAT. §09.45.235 (Supp. 1991) (3 years); ARK. CODE ANN. § 2-4-107 (Michie 1987); CAL. CIV. CODE § 3482.5 (West Supp. 1992) (3 years); COLO. REV. STAT. § 35-3.5-102 (1990); CONN. GEN. STAT. ANN. § 19a-341 (West 1986); DEL. CODE ANN. tit. 3, § 1401 (1985); FLA. STAT. § 823.14 (1991); GA. CODE ANN. § 41-1-7 (Michie 1989), IDAHO CODE § 22-4503 (Supp. 1992), ILL. ANN. STAT. ch. 5, para. 1103 (Smith-Hurd Supp. 1992); IND. CODE ANN. § 34-1-52-4 (Burns 1986); KY. REV. STAT. ANN. § 413.072 (Baldwin Supp. 1991); MD. CTS. & JUD. PROC. CODE ANN. § 5-308 (1989); MINN. STAT. ANN. § 561.19 (West 1988) (6 years); MISS. CODE ANN. § 95-3-29 (Supp. 1991); MO. ANN. STAT. § 537.295 (Vernon Supp. 1992); N.H. REV. STAT. ANN. § 432:33 (1991); N.M. STAT. ANN. §§ 47-9-1 to -7 (Michie Supp. 1991); N.C. GEN. STAT. § 106-701 (1988); N.D. CENT. CODE § 42-04-02 (1983); PA. STAT. ANN. tit. 3, § 954 (Supp. 1992); S.C. CODE ANN. § 46-45-30 (Law. Co-op. Supp. 1991); TEX. AGRIC. CODE ANN. § 251.004(a) (West 1982) ; UTAH CODE ANN. § 78-38-7 (1992) (3 years); VA. CODE ANN. § 3.1-22.29 (Michie 1983).

Another qualification involves the exclusion of negligent or improper operations from the protection offered by right-to-farm laws.[50] In addition, the laws generally do not preclude enforcement of health and safety statutes,[51] may limit their coverage to commercial facilities[52] or need for agricultural land,[53] and may establish limits on the protection afforded to changes in farming operations and significant expansion of facilities.[54] Thus, the general provisions of the right-to-farm laws provide for assistance for agricultural pursuits against nuisance actions rather than protection against circumstances or encroachments that may denigrate the profitability of agricultural production.

Notwithstanding the success of limiting nuisance actions, the right-to-farm laws have been ineffective in preserving agricultural land or open space.[55] Right-to-farm laws only grant the right to

50. This qualification grants some leeway in precluding objectionable activities, as local courts may decide what is negligent or improper. *E.g.*, ILL. ANN. STAT. ch. 5, para. 1103 (Smith-Hurd Supp. 1992); Hand, *supra* note 44, at 316-19; Lapping et al., *supra* note 44, at 466-67.

51. This includes compliance with all environmental regulations and local ordinances based upon health considerations. *E.g.*, Peck v. Hoist, 396 N.W.2d 536 (Mich. Ct. App. 1986).

52. *E.g.*, the North Carolina statute only concerns "production for commercial purposes." N.C. GEN. STAT. § 106-701 (1988). *See* Bergstrom & Centner, *supra* note 43, at 3-4.

53. Some statutes recognize that agricultural land is not needed in urban areas. Thus, the statutory anti-nuisance protection is not available for "agricultural operation[s] located within the limits of any city, town or village . . . ." MO. ANN. STAT. § 537.295(4) (Vernon Supp. 1991).

54. Some laws afford protection to nearly all expansion. For example, Georgia's amended right-to-farm law provides that whenever physical facilities are subsequently expanded or new technology is adopted, "the established date of operation for each change is not a separately and independently established date of operation and the commencement of the expanded operation does not divest the agricultural operation of a previously established date of operation." GA. CODE ANN. § 41-1-7 (Michie 1989). Other laws establish qualifications for protection. For example, Minnesota provides that a subsequent expansion or significant alteration of an established operation commences a new date, the date of commencement of the expanded or altered operation. MINN. STAT. ANN. § 561.19 (West 1988). *See* Grossman & Fischer, *supra* note 44, at 127-29; Bergstrom & Centner, *supra* note 44, at 3-4, 7-8.

55. Preservation of farmland has been touted as a major goal of the right-to-farm laws. *See* Hand, *supra* note 44, at 329; Thompson, Part II, *supra* note 44, at 66. Nevertheless, the incorporation of the "coming to the nuisance" doctrine in a majority of the right to farm laws suggests that the laws were primarily intended to protect existing agricultural uses from nuisance actions. Commentators have noted that right-to-farm laws merely provide one method to limit the loss of farmland due to the problem of nuisance; other programs are required to provide for the preservation of farmland. *See* Grossman & Fischer, *supra* note 44, at 161; Hand, *supra* note 44, at 329; Thompson, Part II, *supra* note 44, at 66; Scheiderer, *supra* note 44, at 654; *see also* James E. Holloway & Donald C. Guy, *Rethinking Local and State Agricultural Land Use and Natural Resource Policies: Coordinating Programs to Address the Interdependency and Combined Losses of Farms, Soils, and Farmland*, 5 J. LAND USE & ENVTL. LAW 379 (1990); David Mulkey & Rodney L. Clouser, *Market and Market-Institutional Perspectives on the Agricultural Land Preservation Issue*, 18 GROWTH & CHANGE 72 (1987); Teri E. Popp, *A Survey of Governmental Response to the Farmland Crisis: States' Application of Agricultural Zoning*, 11 U. ARK. LITTLE ROCK L.J. 515, 516 (1988-1989).

continue with preexisting agricultural activities; they do not preclude incompatible new uses. Consequently, the laws do not prevent non-agricultural uses from extending into agricultural areas.[56] As a result, development costs and nebulous property rights continue to denigrate agricultural production.[57]

B. Defining Property Rights

Under right-to-farm laws, agricultural producers are able to continue with qualifying nuisance activities that are objectionable to new neighbors.[58] This introduces a zero liability rule for the qualifying activities, which may be superior to a full liability rule because of the capital investments by farmers.[59] At the same time, producers are limited in the changes they can make in their business activities and still qualify under the right-to-farm laws. A recent Indiana case, *Laux v. Chopin Land Assocs., Inc.*,[60] held that a change of use is not protected and suggests that owners of property in agricultural areas might benefit from more defined rights concerning future property usage to preclude unsuitable uses.[61]

In *Laux*, a plaintiff's action seeking abatement of a hog operation under nuisance law[62] prompted an analysis of the rights afforded agricultural producers regarding changes in operations. The plaintiff, Chopin Land Associates, Inc., owned approximately 113 acres of rural land that had been purchased from the defendants for residential development.[63] The defendants, Robert and Laura Laux, were owners of ten acres that were being used for a

---

56. As noted by Thompson, only if the development of farmland for non-agricultural uses are precluded will there exist a real right to farm. Thompson, Part II, *supra* note 44, at 66.

57. Legal certainty of the rights of property owners may increase wealth. *See* Omotunde E. G. Johnson, *Economic Analysis, the Legal Framework and Land Tenure Systems*, 15 J. LAW & ECON. 259, 260-61 (1972); Louis De Alessi, *Property Rights, Transaction Costs, and X-Efficiency: An Essay in Economic Theory*, 73 AM. ECON. REV. 64 (1983).

58. Only new neighbors are affected because of the "coming-to-the-nuisance" provision incorporated in most right-to-farm laws. *See supra* notes 7-9 and accompanying text; *see also* Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985); *Flansburgh*, 370 N.W.2d at 130.

59. Producers are not liable for damages or their activities cannot be enjoined under nuisance actions. *See* Randall, *supra* note 40, at 178.

60. 550 N.E.2d 100 (Ind. Ct. App. 1990).

61. These limitations may be noted in reported cases, such as Laux v. Chopin Land Assocs., Inc., 550 N.E.2d 100 (Ind. Ct. App. 1990), and Pasco County v. Tampa Farm Serv., Inc., 573 So. 2d 909 (Fla. 2d DCA 1990). Perhaps more significant, however, are the recent amendments to numerous state right-to-farm laws that attempt to delineate their coverage in more explicit terms. *E.g.*, GA. CODE ANN. § 41-1-7 (Michie 1989); HAW. REV. STAT. §§ 165-1 to -4 (Supp. 1991).

62. *Laux* involved equitable considerations, "but the [lower] court entered no findings or conclusions concerning estoppel." 550 N.E.2d at 103.

63. *Id.* at 101. Title was placed in the name of Chopin, which was subsequently incorporated into plaintiff corporation.

hog operation. The plaintiff had not begun any residential construction on its property, but had lost a sale due to the smells from defendants' hog operation.[64] The plaintiff had made an offer to buy the 113 acres on August 14, 1986, and sale was consummated on December 2, 1986.[65] In late July or early August 1986, two of the defendants' sons introduced twenty-nine feeder hogs to defendants' ten acres.[66] Additional hogs were added before December of 1986, and in March of 1987 construction of a hog confinement facility was initiated.[67] Over 300 hogs were on the defendants' property the month prior to the commencement of plaintiff's lawsuit in 1988.[68]

The *Laux* defendants claimed the court could not enjoin them from raising hogs because of the statutory anti-nuisance protection of the Indiana Right-to-Farm Act:[69]

> No agricultural or industrial operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in the vicinity of the locality after the agricultural or industrial operation, as the case may be, has been in operation continuously on the locality for more than one year, provided: (1) There is no significant change in the hours of operation; (2) There is no significant change in the type of operation; and (3) The operation would not have been a nuisance at the time the agricultural or industrial operation, as the case may be, began on that locality.[70]

The court recognized the statute as a non-claim statute that limited nuisance actions in situations where activities or property uses came to the nuisance.[71] An agricultural operation that has been in existence for more than one year, and was not a nuisance when commenced, will not become a nuisance due to the fact that neighboring property uses have changed.[72] Persons who introduce new land uses may not employ nuisance law to abate the existing agricultural activities.[73]

---

64. *Id.* The court noted that the lost opportunity to sell property "alone would appear insufficient to ground a determination that there had been such a change in conditions in the vicinity as to make hog raising an actionable nuisance and terminate the running of the statutory one year clock." *Id.* at 103.

65. *Id.* at 101.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. IND. CODE ANN. § 34-1-52-4(f) (Burns 1986).

71. *Laux*, 550 N.E.2d at 102.

72. *Id.*

73. *Id.*

The court found that a change of use from grain farming to raising hogs was a significant change in the type of operation.[74] The statutory right-to-farm protection afforded to defendants' grain farming did not apply to defendants' hog operation.[75] To be protected under the right-to-farm law, defendants' hogs must not have been a nuisance when introduced and must have existed one year prior to the changed conditions in the vicinity that had subsequently caused the hogs to become a nuisance.[76] The court's interpretation of the right-to-farm law demonstrates that only specific existing activities and uses, not agriculture in general, are protected by the right-to-farm law.[77] Producers cannot change uses with impunity if there are neighbors who object to the new uses.[78] Property rights of existing neighbors are protected, as the anti-nuisance protection is not afforded to new agricultural activities and uses.[79]

The proposed intrusion of residential land uses next to the Lauxes' hog operation exposes a limitation on the protection afforded by the right-to-farm laws. Right-to-farm laws only protect existing agricultural operations and reasonable agricultural expansion against nuisance actions of future property users.[80] Other property rights are either unaffected,[81] reserved for neighboring land users under nuisance law,[82] or are undefined.[83] This limited

74. *Id.* at 102-03.

75. *Id.* at 103.

76. IND. CODE ANN. § 34-1-52-4 (Burns 1986).

77. A similar conclusion was reached in Herrin v. Opatut, 281 S.E.2d 575 (Ga. 1981). If agriculture in general was protected, then parcels of property in urban areas used for innocuous agricultural activities, such as hay fields, could be developed with objectionable activities but could not be abated under nuisance law. *See id.* at 578.

78. *Accord* Herrin v. Opatut, 281 S.E.2d 575 (Ga. 1981); Cline v. Franklin Pork, Inc., 361 N.W.2d 566 (Neb. 1985); Flansburgh v. Coffey, 370 N.W.2d 127 (Neb. 1985).

79. The Nebraska Supreme Court even went so far as to say that "[t]he right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself." *Flansburgh*, 370 N.W.2d at 131.

80. Actually, the Alabama and Indiana laws also offer anti-nuisance protection for existing manufacturing and industrial establishments. ALA. CODE § 6-5-127(a) (Supp. 1992); IND. CODE ANN. § 34-1-52-4 (Burns 1986). These laws suggest that nuisance law may be too pervasive. *See, e.g.*, Born v. Exxon Corp., 388 So. 2d 933 (Ala. 1980).

81. Rights of existing neighbors are not impacted by most right-to-farm laws; they may maintain nuisance actions. *See, e.g.*, Mayes v. Tabor, 334 S.E.2d 489, 489-90 (N.C. Ct. App. 1985). Under some right-to-farm laws, injured plaintiffs may recover monetary damages. *See, e.g.*, Weida v. Ferry, 493 A.2d 824, 827 (R.I. 1985). Furthermore, municipalities may enact building codes or other local legislation that restrict agricultural activities. For example, a right-to-farm law may not constitute a valid defense to a nuisance suit arising out of a violation of a building code. Northville Township v. Coyne, 429 N.W.2d 185 (Mich. Ct. App. 1988).

82. Neighboring property owners have the remedy of nuisance for agricultural uses that have not yet commenced. *See, e.g.*, Herrin v. Opatut, 281 S.E.2d 575, 577 (Ga. 1981). Owners of farmland that is rezoned for residential uses may not be able to later claim the

protection may not be sufficient in facilitating agricultural pursuits[84] or in retaining agricultural areas. The introduction of incompatible land uses in the form of non-agricultural development may lead to increased property and service taxes,[85] new health provisions, and other local ordinances that preclude or denigrate agricultural activities.[86] Moreover, the current assignment of property rights may not be rational in view of the mechanisms used to pay for new public services. Existing agricultural uses may be paying some of the external costs for new development.[87] The further definition of property rights for rural areas to limit incompatible development may be beneficial in reducing overall costs and improving general welfare.

IV. GERMAN *AUSSENBEREICHE*

Germany's success in preserving rural areas[88] suggests that German institutions[89] might be instructive in the preclusion of incompatible development in selected open areas. The German

---

right-to-farm law as a defense to justify a new agricultural use that is precluded by the zoning ordinance. Jerome Township v. Melchi, 457 N.W.2d 52, 55 (Mich. Ct. App. 1990).

83. Undefined rights include the right to commence future property uses that are not compatible with agricultural pursuits.

84. The Florida decision in Pasco County v. Tampa Farm Service, Inc., 573 So. 2d 909 (Fla. 2d DCA 1990), highlights the problem of defining property rights for agricultural producers. A poultry producer changed from a dry manure to wet manure distribution process that caused a substantial increase in odors. *Id.* at 910. Citation of violations of county disposal ordinances led the producer to request a declaratory judgment and injunction against enforcement of the ordinances based upon the protection afforded by the Florida Right to Farm Act. *Id.* at 910-13; FLA. STAT. § 823.14 (1989). The court found that the change in the manure distribution process was a change in farm operation. *Id.* at 911. Under Florida law, a change in operation on any farm adjacent to an established homestead or business on March 15, 1982 is afforded statutory protection only if the change is not "to a more excessive farm operation." *Id.*; FLA. STAT. § 823.14(5) (1989). If the producer's changed operation was a more excessive operation, then it would not qualify for protection. The cause was remanded to the trial court to determine whether the producer's change in manure distribution resulted in a substantial degradation of the locale and whether the county's regulations constituted a valid response to the activity. *Id.* at 912.

85. For example, farmers may be required to connect to a public sewer system. Village of Peck v. Hoist, 396 N.W.2d 536, 538 (Mich. Ct. App. 1986).

86. A building code may restrict the construction of farm buildings, Northville Township v. Coyne, 429 N.W.2d 185, 187 (Mich. Ct. App. 1988), or a zoning ordinance may preclude certain agricultural uses, Jerome Township v. Melchi, 457 N.W.2d 52, 55 (Mich. Ct. App. 1990).

87. *See supra*, text accompanying notes 30-37.

88. Germany has large expanses of rural areas despite the relatively high population density, and the policy for *Aussenbereiche* appears to provide an important institution for helping preserve significant acreages of forested and agricultural land from scattered development.

89. Institutions collectively refers to legislation, constitutional provisions, regulations, and legal precedents.

federal building act, the *Baugesetzbuch*,[90] enables local communities to thwart development in special rural areas called *Aussenbereiche*.[91] The most stringent regulations for *Aussenbereiche* provide that buildings and development are prohibited, with exceptions for farm purposes.[92] Thus, the German regulations afford protection to rural areas that constrain local land use activities, and designated German rural areas are not being used to any notable extent for the expansion of suburbs or the growth of new business or industrial land uses.

The German provisions may be contrasted with the United State's legislation that assist producers in continuing agricultural activities.[93] American producers have the nuisance protection afforded by the American right-to-farm legislation and other legislative encouragement such as preferential assessment provisions.[94] American legislation, however, does not restrain development, and therefore has not been successful in thwarting the development of rural areas.

V. LEGISLATIVE PROPOSAL TO LIMIT DEVELOPMENT COSTS

1. The German regulations obstructing incompatible development suggest that property rights defining land use do not have to favor development at the expense of other land uses. If existing legislation fails to equitably apportion costs of services to areas being developed or to sufficiently address the issue of precluding unnecessary and incompatible development, American property rights might be redefined.[95] The expansion

90. Bundesgesetzblatt, Teil I [BGBl. I], 1988, pp. 2253-2316 (F.R.G.). These provisions interact with two other institutions, Article 14 of the German Constitution, Grundgesetz, and the public law of neighborhood, to support rural law uses.

91. BGBl I., *id.* The federal regulations concern land use planning at the local level and are set forth in the federal building act, the Baugesetzbuch. While § 8 of the Baugesetzbuch allows for zoning through local alignment plans in urban and rural areas, the most prevalent regulations concerning the uses of rural areas are the provisions of § 35 for *Aussenbereiche*. *Id.*

92. *Id.* § 35. This summary of the German provisions does not completely describe the nuances of the provisions; rather it serves to offer an idea for further consideration.

93. Perhaps Americans have a stronger affinity for the freedom of individuals to use their property; the right to use or develop property should be abridged only in unusual situations. In addition, the abundance of agricultural lands in the U.S. suggests that there may not be as much concern over the loss of this resource.

94. Encouragement may also come from circuit breaker programs, public acquisition of development rights, inheritance and estate tax reforms, and agricultural districting or zoning provisions. COUGHLIN & KEENE, *supra* note 2, at 37-38.

95. Property rights were changed by the right-to-farm laws. Ownership of land is not absolute, and is being redefined to respond to the needs of society. James B. Wadley, *The Emerging 'Social Function' Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues*, 28 WASHBURN L.J. 22, 26 (1988). Recent legislation on liability also shows a legislative willingness to alter property rights for agricultural produc-

of state right-to-farm laws is proffered as a more objective response to apportion development costs more equitably, define property rights, reconcile conflicts involving agricultural and development activities, and assist in the preservation of open space. The advocated proposal involves three major components: (1) the legislative identification of "open space rural reserves;" (2) state legislation constraining development and mandating local development exactions in the reserves; and (3) local ordinances or laws implementing the state requirements. These components would be implemented through the addition of sections or subsections to a state right-to-farm law and through local legislation for local governments having lands in the reserves.

A. Open Space Rural Reserves

The first component for expanding state right-to-farm laws is to establish a mechanism for the identification and designation of select rural areas known as the open space rural reserves.[96] A new section or subsection to the right-to-farm law would establish regional committees to identify areas that would qualify for inclusion in the reserves. Depending on the state, the regional committee would oversee an area sufficient in size to minimize undue local political influence yet small enough to enable all committee members to have enough knowledge of lands under review to make a meaningful designation of open space for inclusion within the reserves.[97]

The legislation would also set forth appropriate criteria for identifying special open space deserving protection against incompatible development that would be designated as part of the

---

ers. For example, approximately one-half of the states amended the liability provisions of their implied warranty laws for latent animal diseases. Margaret R. Grossman, *Choice of Law in Interstate Livestock Sales: Nonuniform Warranty Provisions Under the U.C.C.*, 30 S.D. L. REV. 214, 217 (1985). Several states have recently amended their groundwater contamination liability statutes, thereby altering property rights between agricultural producers and injured contamination victims. Michael E. Wetzstein & Terence J. Centner, *Regulating Agricultural Contamination of Groundwater Through Strict Liability and Negligence Legislation*, 22 J. ENVTL. ECON. & MGMT. 1 (1992); *see also* Daniel W. Bromley & Ian Hodge, *Private Property Rights and Presumptive Policy Entitlements: Reconsidering the Premises of Rural Policy*, 17 EUR. REV. AGRIC. ECON. 197 (1990).

96. Some states already have adopted land preservation measures and may already have identified quality rural areas. *See* IOWA CODE §§ 176B.1-.13 (West 1990); N.Y. AGRIC. & MKTS. LAW §§300-09 (McKinney 1991 & Supp. 1992).

97. Due to the differences in sizes of American states, this might occur at different levels: county, regional or state. A restriction could be included requiring consultation with existing county or district planning agencies.

reserves.[98] Criteria would be related to the location of the land in a rural area, the need to continue to maintain the open space use of the land, the quality of the land, the need for the type of agricultural production, and the threat of development.[99] The regional committee would be charged with identifying appropriate lands for inclusion in the reserves and would be given a time frame to report their findings to the legislature. The legislature would review the recommendations and, through state law, would designate the reserve.

B. State Provisions Constraining Development

The second component for the legislative proposal is the adoption of state provisions that mandate the general preclusion of nonagricultural development on lands in the open space rural reserves and enumerate guidelines for development exactions.[100] Reports of the regional committees documenting the problems of development costs, the need for the state to provide for the preservation of state open space resources, and the public welfare gains from protecting lands in the reserves would constitute the basis for the legislation.

The state legislative provisions would outline the general guidelines for mandatory development exactions and minimal fee schedules that could be instituted by local governments.[101] The actual decisions concerning permitted development and the scope of development exactions would be made by local governments. In this manner, the state legislation would make available the apparatus for protecting open space without usurping the zoning and planning authority of local governments.[102] Local governments that desired to encourage permitted development could set low fees, but the general preclusion against development

98. Planning legislation regulating areas of critical state concern could serve as a model. *See* Pelham, *supra* note 6, at 22. Or legislation establishing special provisions for unique natural resources, such as the Adirondack Park in New York, could be used to more succinctly describe criteria for deserving agricultural lands. N.Y. EXEC. LAW §§ 800-20 (McKinney 1982 & Supp. 1992).

99. European countries have proceeded further with their classification of rural lands. For a British classification, see Current Topics, 1989 J. PLAN. & ENVT'L. LAW 1, 1-2 (1989).

100. This draws upon the German provisions for *Aussenbereiche*. *See supra* text accompanying notes 90-92.

101. Such provisions would not only put rural communities on notice of their ability to use development exactions, but would force them to give consideration to such exactions.

102. Local jurisdictions are better able to make specific decisions on the significance of safeguarding particular agricultural lands. Moreover, local governments may have a constitutional power to zone that cannot be abridged. *See, e.g.*, GA. CONST. art. IX, § 2, cl. 4. Justification for the restrictions of the expanded right-to-farm law would include state authority to enact provisions on planning and the conservation of natural resources.

delineated by the state legislation would limit growth. State legislatures would be free to continue existing programs granting reduced property taxes or other assistance for rural districts, to coordinate existing state programs with the new legislation,[103] or to include preferential assessment provisions for such lands due to the restricted use of property in the reserves.[104]

C. *Local Ordinances or Laws*

Local governments with lands in the open space rural reserves would implement the state requirements concerning mandatory development exactions. In most cases, this would entail the revision of local ordinances or laws for lands within the reserves. The new local provisions would implement development exactions accounting for local needs. The local provisions would establish conditions, rates, and other requirements for lands within the reserves consistent with the objectives and goals of the community. Since the state legislation only provides for the general preclusion of development in the reserves, the local provisions could establish criteria for development in particular situations. Thus, local governments would retain the authority to adopt local ordinances and laws, yet their provisions ultimately would be tempered by the state legislation.

VI. CONCLUSION

To circumscribe the further reduction of open space, American land use policies might be reexamined to assist in the preservation of areas that are not really needed for development. Rural communities are not encouraging the wise and economical use of real estate thereby wasting a valuable resource. Existing land use regulations allow or even encourage[105] open areas to be developed in a scattered fashion despite the existence of vacant parcels proximate to existing utility services. The production of some agricultural products has become more expensive due to the non-agricultural development of nearby acreage as scattered

103. This would include differential tax assessment programs and circuit breaker programs.

104. Another possibility would be a cost sharing arrangement whereby the state and/or county governments could transfer funds to local governments for the diminishment of local property tax revenues on lands within the Open Space Rural Reserves.

105. Encouragement may come from the absence of development exactions. Developers seek to develop parcels they own before the community adopts regulations that would force them to pay for more of the development costs. In other cases, a community may desire more users of an existing service, and thus grant encouragement to development despite its scattered nature.

developments impose unnecessary costs on agricultural property owners and others.[106] Through the adoption of new land use provisions, states and communities might be encouraged to reassign development costs so that existing landowners are not charged for costs of neighboring development.

State right-to-farm laws offer protection to agricultural producers against nuisance actions, but the laws do not preclude the denigration of agricultural operations by encroaching non-agricultural development or preserve open space. To address these issues, a land use mechanism drawing on a German concept is advanced to expand the protection afforded rural land uses. The legislative proposal would identify valuable open space and agricultural lands for inclusion in an open space rural reserves. Property in the reserves would be protected by state legislation specifying a general policy of exclusion of non-agricultural development and by the implementation of mandatory development exactions. Enactment of a fee schedule for development exactions and decisions concerning the development of specific parcels in the reserves would be at the local level. In this manner, state legislation would encourage local communities to preserve open space in the reserves without usurping local control of land use issues.

106. Once farmland has been used for residential or commercial development, it may be costly to return to profitable agricultural production. Unnecessary costs emanate from scattered development.