University of Arkansas
System Division of Agriculture
NatAgLaw@uark.edu • (479) 575-7646

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Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland

by

Myrl L. Duncan

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*Myrl L. Duncan***

> While the farmer holds title to the land, actually, it belongs to all the people because civilization itself rests on the soil.[1]
>
> —Thomas Jefferson

INTRODUCTION

Confronted with a tide of farmland conversion that threatens the nation's agriculture, a number of states have come to realize that their agricultural land base is a vital natural resource that cannot be taken for granted. Accordingly, numerous farmland protection programs have been enacted around the nation. Four states have addressed the problem by including farmland preservation mechanisms within their statewide or regional comprehensive land use control and planning schemes. This Article reviews and evaluates those programs. The analysis reveals that those states that have the best chance of succeeding attempt to do more than simply protect parcels of agricultural land: They undertake to protect agriculture itself.

I
FRAMING THE PROBLEM

A. The Problem of Disappearing Agricultural Land

Every year in the United States nearly three million acres of agricultural land—an area almost three times the size of the State of Dela-

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** Professor of Law, Washburn University School of Law; LL.M. 1981, Columbia University; J.D. 1975, Georgetown University; B.A. 1970, University of Kansas.

1. *Reprinted in* Comment, *Agricultural Land Preservation: Can Pennsylvania Save the Family Farm?*, 87 DICK. L. REV. 595, 595 (1982-1983) (citing YORK COUNTY PLANNING COMM'N, AGRICULTURAL LAND PRESERVATION STUDY 72 (1975)) (original source not located).

ware[2]—disappears.[3] (In relative terms, three million acres represents 0.22% of the 1.36 billion acres of agriculture land that were privately owned in 1977.)[4] Between 1967 and 1975, some 23.2 million acres of farmland, an area equal to slightly less than the combined land area of Vermont, New Hampshire, Massachusetts, Rhode Island, New Jersey, and Delaware,[5] were converted to nonagricultural use.[6] Approximately one-third of the land converted each year is prime farmland, land possessing the best combination of physical and chemical characteristics needed to preserve sustained high yields.[7] No one is predicting that the United States is running out of farmland, but the landmark report of the National Agricultural Lands Study (NALS), an interagency study group established to examine all aspects of the problem, concludes that "the conversion is a cause for serious concern."[8]

The concern of the NALS stems from its long-term projections of demand for food, fiber, gasohol production (which the report openly acknowledges to be an "unconventional" demand), and exports.[9] The group estimates that over the next twenty years the demand for United States agricultural products will increase 60% to 85% above the 1980 level;[10] it also concludes that future demands will be met through the

2. Delaware contains 1,236,704 acres of land. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 CENSUS OF AGRICULTURE: DELAWARE AND FLORIDA 1 (1984).

3. NATIONAL AGRICULTURAL LANDS STUDY (NALS), FINAL REPORT 35 (1981) [hereinafter FINAL REPORT]. The study defines agricultural land as that "currently used to produce agricultural commodities including forest products or lands that have the potential for such production." *Id.* at 21. The figure includes 675,000 acres of cropland, 537,000 acres of range and pastureland, 825,000 acres of forestland, and 875,000 acres of "other" land uses. *Id.* at 35.

4. *Id.* at 29. The 1977 figure includes 413 million acres of cropland, 414 million acres of rangeland, 133 million acres of pastureland, 376 million acres of forestland, 11 million acres of farmsteads, and 12 million acres of "other lands in farms." Also included are 127 million acres of high and medium potential cropland. *Id.* Not included are approximately 500 million acres of federally owned agricultural land, virtually all of which are used for grazing or forestland. *Id.* at 27-29.

5. The total land area of these states is 23,388,800 acres. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1980 CENSUS OF POPULATION, pt. 1, 1-47 (1983).

6. FINAL REPORT, *supra* note 3, at 36.

7. Keene, *Agricultural Land Preservation: Legal and Constitutional Uses,* 15 GONZ. L. REV. 621 (1984) (citing U.S. COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL QUALITY—1979, TENTH ANNUAL REPORT ON ENVIRONMENTAL QUALITY 396 (1979)). Prime farmland

> has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and is also available for these uses (the land could be cropland, pastureland, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable farming methods.

7 C.F.R. § 657.5(a) (1986). Like the NALS study, this Article will focus not only on prime farmland but instead on the broader land base.

8. FINAL REPORT, *supra* note 3, at 85.

9. *Id.* at 53-55.

10. *Id.* at 55. Because the high and low figures reflect more extreme conditions, the midrange 72.7% figure is considered "most probable." *Id.*

"full and efficient utilization of the agricultural land resources base,"[11] rather than through advances in farming technology. NALS thus estimates that between 77 and 113 million additional acres of principal crops will be needed to meet the projected demand.[12] Because shifting either pasture and hay land or potential cropland into crop production involves significant direct and indirect costs,[13] the study concludes that the projected demand can be met only by controlling the conversion of agricultural land to nonagricultural uses. Growth need not stop, but it must be "channel[ed] . . . onto less productive agricultural land."[14] Therefore, meeting the demand for productive land will involve reducing farmland's vulnerability to the typical cycle of land development.

Agricultural land is converted to nonagricultural uses when it comes within a community's potential zone of expansion. Conversion occurs characteristically on land nearest the city, but because competition for land at the immediate urban fringe increases its purchase price, development costs there are substantial. Thus, speculators and developers are attracted to more distant farmland that carries a smaller price tag and provides greater profit. As a consequence, development often is scattered throughout the urban-rural fringe. The market value of land near newer development increases, and the cycle repeats itself. "Urban sprawl, then, tends to produce more sprawl."[15]

Government actions, such as the extension of services, often compound the problem. For example, sewers financed by the Environmental Protection Agency (EPA) under the Clean Water Act[16] often serve as "magnet[s] for growth" that might not have occurred if local governments had been required to pay the bill.[17] Similarly, the Farmer's Home Administration provides money for rural sewer and water facilities.[18] Housing subsidies accompanied by new or better roads soon follow, and eventually considerable amounts of farmland unwittingly have been destroyed.[19]

As policymakers at all levels of government have come to under-

11. *Id.* at 60.

12. *Id.* at 59. The midrange figure is 95 million. The high and low estimates assume, respectively, 0.75% and 1.5% annual gains in crop yield while the midrange estimate assumes a 1.25% gain. Constant real prices are assumed.

13. *Id.* at 61; *see* Duncan, *Toward a Theory of Broad-Based Planning for the Preservation of Agricultural Land,* 24 NAT. RESOURCES J. 61, 67 (1984).

14. FINAL REPORT, *supra* note 3, at 18.

15. Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Lands,* 15 GONZ. L. REV. 675, 678 (1980).

16. 33 U.S.C. §§ 1281-1292 (1982 & Supp. III 1985).

17. Anthan, *How U.S. Policies Help Gobble Up The Farm Land,* Des Moines Reg., July 12, 1979, at 1A, col. 5, 4A, col. 1.

18. *Id.;* 7 C.F.R. § 1942.351 (1986).

19. Anthan, *supra* note 17, at 4A, col. 2. For a more in-depth discussion of the land development cycle, see Duncan, *supra* note 13, at 62-78.

stand the consequences of this land development cycle, numerous programs aimed specifically at the protection of farmland have been devised. Like many other states, the four whose programs are reviewed in this Article—Hawaii, Vermont, California, and Oregon—acknowledge the importance of preserving agricultural land. However, these four also recognize that goal's interrelationship with other land use questions of state or regional significance, especially questions concerning the growth and development of cities. This Article examines the balances between accommodating urban growth and preserving agricultural land that have been struck by the four programs. It contends that farmland and, by extension, agriculture itself can be protected most effectively when the two goals are treated as equally important.

B. Responses to the Problem

A number of public and private groups have acted to preserve farmland.[20] At the national level, Congress, having been unsuccessful on a number of occasions in addressing the farmland conversion problem,[21] finally attempted to remedy the problem by focusing attention on federal actions that have contributed to the conversion of farmland. The Farmland Protection Policy Act of 1981 (FPPA)[22] directs all federal agencies to evaluate the adverse effect their actions will have on farmland preservation and to consider alternatives that will lessen those effects.[23]

Accordingly, for example, the Farmer's Home Administration (FmHA) now refuses to assist projects that adversely affect important farmlands when a practicable alternative exists.[24] When no practicable alternative exists, applicants must consider ways of mitigating the adverse impact, for example, by increasing the density of use and thereby decreasing the amount of land affected.[25] The FmHA also suggests the use of Agricultural Land Evaluation and Site Assessment (LESA) systems, like those now being developed by many local governments,[26] to

20. One method of preserving agricultural land is the creation of land trusts. Duncan, *supra* note 13, at 69 n.72.

21. *Id.* at 62-63.

22. 7 U.S.C. §§ 4201-4209 (1982 & Supp. III 1985).

23. *Id.* § 4202(b). Although the law does not require the preparation of agricultural impact statements, its purpose resembles that of the National Environmental Policy Act (NEPA), which requires federal agencies to examine the environmental impact of their actions and to consider ways to minimize any adverse effects. 42 U.S.C. § 4332 (1982).

24. Departmental Regulation 9500-3, 49 Fed. Reg. 3746, 3751 (1984).

25. *Id.*

26. *Id.; see, e.g.,* TOPEKA-SHAWNEE COUNTY METRO. PLANNING COMM'N AND SHAWNEE COUNTY SOIL AND WATER CONSERVATION DIST., AGRICULTURAL LANDS EVALUATION AND SITE ASSESSMENT SYSTEM—SHAWNEE COUNTY, KANSAS (1983); *see also* Wright, Ziztmann, Young & Googin, *LESA—Agricultural Land Evaluation and Site Assessment,* 38 J. SOIL & WATER CONSERVATION 82 (1983) (describing the LESA process and its use in planning).

discourage nonfarm projects located outside existing rural settlements. Under such a system, a tract is evaluated according to its soil quality (land evaluation) and the degree of community development (site assessment); the latter category assesses such factors as land uses surrounding the site, the existence of agricultural and urban support systems, and the effect the land use change would have on agriculture in the area.[27] Under such a scheme, a tract's likelihood of being developed decreases as the quality of the land and its distance from existing settlements increase.

While one can hope that the implementation of FPPA will reduce federally encouraged conversion of agricultural land, the primary responsibility for the preservation of farmland remains, as it did prior to 1981, with state and local governments.[28] This Article examines and evaluates one major category of state responses to the problem: farmland preservation programs that are components of statewide comprehensive land use planning and control systems. The programs, which are found in Hawaii, Vermont, California, and Oregon, share a common genesis. In each state, severe development pressure caused legislators to realize that the problems that attend large-scale growth often radiate far beyond the local communities that traditionally have exercised control over land use. The enacting states have recognized that all land use decisions are interrelated and, in particular, that decisions determining the direction and timing of a community's growth raise both urban and rural concerns. Those states understand that scattered, unplanned development unnecessarily converts valuable farmland and is costly to local governments that must supply necessary services. Accordingly, they have concluded that the public interest demands that growth be directed into patterns that will protect farmland.[29]

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27. 49 Fed. Reg. 3750 (1984). The Soil Conservation Service (SCS) of the United States Department of Agriculture (USDA) also requires that all federal agencies utilize the LESA system in evaluating the impact their actions will have on farmland. 7 C.F.R. §§ 658.3-.5 (1987). The agency was accused of dragging its feet because the proposed regulation, 48 Fed. Reg. 31,863 (1983), had been published over a year earlier. *USDA Releases Farmland Rules: Senator Breaks Impasse,* American Farmland (newsletter of the American Farmland Trust), Aug. 1984, at 1, col. 1.

28. The Act states that one of its purposes is to assure that federal programs will be administered in a manner compatible with state and private farmland protection programs and policies. 7 U.S.C. § 4201(b). FPPA further encourages USDA to provide technical assistance to state and local governments or private groups wishing to establish preservation programs. *Id.* § 4204. Finally, the Act specifically "does not authorize the Federal Government in any way to regulate the use of private or non-Federal land, or in any way affect the property rights of owners of such land." *Id.* § 4208.

29. Even the Urban Land Institute, a harsh critic of the NALS data, acknowledges the interrelationship of all land use decisions, although its priorities have an urban emphasis:

> The conversion of these prime farmlands needs to be treated as a serious issue and examined in terms of legitimate competing uses, not solely in terms of protecting these lands for agricultural use . . . .
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> . . . .
>
> It is also necessary that land must remain available to meet urban development

Such programs must be distinguished from the other major category of farmland preservation schemes. Whereas the programs reviewed in this Article are comprehensive, other programs treat farmland preservation as a more or less isolated goal.[30] Those more focused programs are directed primarily at small, financially-strapped farmers who are selling off their land to developers. Accordingly, their effectiveness depends on the degree to which they combine land use control with benefits that encourage the small farmer to resist development.[31] In contrast, comprehensive systems depend more heavily upon regulation;[32] they emphasize the use of a stick, rather than a carrot. Because of the compulsion involved, programs that regulate stand a better chance of successfully preserving farmland. Whether these programs are able to fulfill that potential, however, depends primarily on the role that farmland preservation plays in the overall planning scheme, and secondarily on the commitment of local administrators to preservation goals.

Land use planning is "the process of consciously exercising rational control over the development of the physical environment, and of certain aspects of the social environment, in the light of a common scheme of values, goals and assumptions."[33] It stands to reason that the comprehensiveness of a plan, as well as the number of tradeoffs required to produce it, will increase with the number of "values, goals, and assumptions" that go into the process. The focused systems are aimed essentially at preserving farmland; to the extent that it is considered at all, growth management is a secondary goal. Thus, the "values, goals, and assumptions" addressed by the most effective narrow programs are principally those of the small farmer. In contrast, comprehensive programs concern themselves with a variety of growth-related problems, only one of which is farmland preservation. Hence, these programs must

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needs. In many communities it is possible and feasible to direct urban development to non-prime lands which have a suitable environment, without adding substantially to the cost of development. In other communities, where urban development cannot avoid use of prime lands, development should be encouraged to take place in contiguous patterns and at efficient densities to make the most effective use of land. This, however, should not require harsh restrictions and elaborate regulations that would drive up land prices. Use of such incentives to encourage higher densities of land use and timely provision of infrastructure would go far to promote more effective urban use of land.

Urban Land Inst., *Policy Statement, The Agricultural Land Preservation Issue: Recommendations for Balancing Urban and Agricultural Land Needs,* URB. LAND, Jul. 1982, at 18, 22, 25.

30. *See* Duncan, *supra* note 13, at 78-135 (reviewing five types of programs: preferential taxation, agricultural districting, agricultural zoning, purchase of development rights, and transfer of development rights).

31. *Id.* at 70-72, 95-96, 104, 134-35.

32. Comprehensive programs are not, nor can they be, insensitive to the aspirations of small farmers. In fact, such programs usually incorporate benefits similar to those of the more focused programs, e.g., differential assessment or exemptions from benefit districts. *Id.*

33. Williams, *Planning Law and Democratic Living,* 20 LAW & CONTEMP. PROBS. 317, 317 (1955).

reflect the "values, goals, and assumptions" of a much broader group. Because interests differ from place to place, the four states with comprehensive plans have struck different balances between the protection of farmland and the enhancement of growth. The programs represent a continuum: Hawaii's is the most conducive to development, while Oregon's places equal emphasis on farmland protection and rational growth.

The primary difference between these programs is best illustrated by examining whether agricultural land is treated from an isolated or an integrated perspective. Hawaii and Vermont, the more development-oriented states, treat farmland as a resource to be protected on a tract-by-tract basis. Individual land use decisions in those states are made with little consideration for the effects on agriculture as a whole. In contrast, California and Oregon, which treat the preservation of farmland and the enhancement of development as essentially equal aims, view farmland as part of the larger agricultural picture. There, agriculture as a whole is the resource to be protected, and individual land use decisions are required to be compatible with its continued viability. As the discussion will show, the latter approach is more likely to protect farmland effectively.

This Article will discuss the four comprehensive programs in the order in which they were enacted: Hawaii's Land Use Law, Vermont's Act 250, California's Coastal Act, and Oregon's Land Use Planning Act. This chronological arrangement also reflects a pattern of increasing efforts to accord farmland preservation emphasis equal to that given growth enhancement. To understand fully the programs in question, however, it is necessary to consider briefly the unique place state and regional planning occupy in the land use field.

C. Planning and the Preservation of Farmland

1. The Quiet Revolution

Comprehensive statewide and regional land use planning and control programs first received widespread public attention in 1971 when Bosselman and Callies wrote that land use control in the United States was in the midst of a quiet revolution. *The Quiet Revolution in Land Use Control*,[34] now a classic in the field, reported that local governments, the traditional land use decisionmakers, were being asked to share their power with state and regional bodies. While the specific catalyst had been different in each state, the shift generally came about for two reasons.

First, the movement

> resulted from a growing awareness on the part of both local communities

34. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971) (prepared for the Council on Environmental Quality).

> and statewide interests that states, not local governments, are the only existing political entities capable of devising innovative techniques and governmental structures to solve problems such as pollution, destruction of fragile natural resources, the shortage of decent housing, and many other problems which are now widely recognized as simply beyond the capacity of local governments acting alone.[35]

Thus, the revolution was a response to such phenomena as the threat to the sugar cane and pineapple industries posed by the City of Honolulu's rapid expansion onto the rich farmland of Oahu's central valley;[36] the loss of more than 240 square miles of the San Francisco Bay attributable to filling and diking by various Bay Area communities;[37] and the sudden appearance in the Vermont countryside of numerous recreational developments, many of which used septic tanks inappropriate for the area's shallow soils.[38]

In sanctioning these developments, each local community was expanding its own economic and tax base, but at the expense of other communities, other sectors of the economy, or sensitive areas of the environment.[39] Moreover, because land development is exceedingly profitable for local landowners, developers, contractors, businesses, lawyers, and bankers, there was great political pressure on local governments to continue to ignore the adverse regional effects of local action. Thus, to prevent one community from selfishly injuring another, to minimize the effects of developments having regional impact, and, in general, to ensure that development occurred rationally, a number of states enacted comprehensive land use legislation.[40] The programs reflected the *realpolitik* that it was necessary to create a level of authority above the politically vulnerable local jurisdictions.

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35. *Id.* at 3.

36. *Id.* at 6.

37. *Id.* at 108.

38. *Id.* at 54-55.

39. *See* Lowry, *Evaluating State Land Use Control: Perspectives and Hawaii Case Study,* 18 URB. L. ANN. 85, 86-87 (1980).

40. Innumerable books and articles have been written on the general topic. A sampling includes R. HEALY & J. ROSENBERG, LAND USE AND THE STATES (2d ed. 1979); R. LINOWES & D. ALLENSWORTH, THE STATES AND LAND-USE CONTROL (1975); NATURAL RESOURCES DEFENSE COUNCIL, LAND USE CONTROLS IN THE UNITED STATES (1977); T. PELHAM, STATE LAND-USE PLANNING AND REGULATION: FLORIDA, THE MODEL CODE, AND BEYOND (1979); F. POPPER, THE POLITICS OF LAND-USE REFORM (1981); N. ROSENBAUM, LAND USE AND THE LEGISLATURES: THE POLITICS OF STATE INNOVATION (1976); Godwin & Shepard, *State Land Use Policies: Winners and Losers,* 5 ENVTL. L. 703 (1975); Hess, *Institutionalizing the Revolution: Judicial Reaction to State Land-Use Laws,* 9 URB. LAW. 183 (1977); Comment, *State Land Use Statutes: A Comparative Analysis,* 45 FORDHAM L. REV. 1154 (1977); Note, *State Land Use Regulation—A Survey of Recent Legislative Approaches,* 56 MINN. L. REV. 869 (1972).

The American Law Institute's A MODEL LAND DEVELOPMENT CODE, arts. 7 & 8 (1975) [hereinafter MODEL LAND DEVELOPMENT CODE] suggests a framework for state land use legislation.

No less importantly, the programs reflected new awareness, generated by the environmentalism of the 1960's and 1970's, of the scarcity of natural resources. "Land resources were recognized as elements of intricate and fragile natural systems that transcended local political boundaries, and required planning and regulation appropriate to their scale and complexity; parochialism . . . g[a]ve way to the holistic view. . . ."[41] In short, society was beginning to see land as a resource rather than as a commodity.

Yet simply treating land as a resource and locking it up for future generations runs counter to other deep-seated values found in the United States.

> It is essential that land be treated as *both* a resource and a commodity.
>
> The right to move throughout the country and buy and sell land in the process is an essential element in the mobility and flexibility our society needs to adjust to the rapid changes of our times. Conservationists who view land only as a resource are ignoring the social and economic impact that would come with any massive restrictions on the free alienability of land. But land speculators who view land only as a commodity are ignoring the growing public realization that our finite supply of land can no longer be dealt with in the freewheeling ways of our frontier heritage.[42]

Comprehensive land use programs address this duality by providing for both control and growth. They incorporate significant planning requirements as an acknowledgement that while growth will, and must, occur, it should take place in a rational manner, after careful study, and "in the light of a common scheme of values, goals, and assumptions."[43]

2. *Planning up to the Present*

Planning is such an integral aspect of these programs that it cannot be detailed separately; however, it should be noted that its inclusion was revolutionary in at least two senses. First and most significant is the fact that the programs require planning at all.

> Under a rational system of public action, the basic policy decisions should be made first, on a coordinated basis (planning); and then the appropriate tools (including the various land use controls) should be selected to carry out these decisions. In a word, these two should be successive steps in dealing with the same material.[44]

Unfortunately, the above describes an ideal rather than reality. Even though the Standard State Zoning Enabling Act (SSZEA) incorporates

41. A. DAVIS, STATE LAND USE PROGRAMS: REALITY OR ILLUSION? 1 (Land Policy Roundtable Policy Analysis Series No. 203, 1979); *see also* Mandelker, *The Quiet Revolution Reconsidered,* 31 LAND USE L. & ZONING DIG., Aug. 1979, at 4, 7.

42. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 315-16.

43. Williams, *supra* note 33, at 317.

44. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW 3 (1974).

that ideal—that "regulations shall be made in accordance with a comprehensive plan"[45]—planning remains optional in most states. All too often the zoning map is the "plan," and government officials update their "plan" by amending the map.[46] The piecemeal development over time of land use control schemes accounts for this irrational state of affairs. Because there were few city planning departments in the early years of land use regulation, cities often moved directly to the enactment of zoning ordinances.[47] Perhaps as a consequence of the fact that substantial zoning already existed, the Standard City Planning Enabling Act, which was not formalized until two years after the SSZEA, made planning optional.[48]

Recognizing this history, judicial decisions have solidified the status of planning as optional.[49] While a number of courts now are willing to evaluate planning's place in the zoning process, e.g., by examining the substantive criteria used to support a zoning ordinance,[50] the role of planning is far from universally understood. Commentators have urged the adoption of mandatory local planning,[51] but only a small number of states other than those having comprehensive land use programs have enacted such requirements.[52]

The planning elements of the state comprehensive programs also break new ground by mandating state and regional participation in the planning process. Previously, what little planning occurred took place at the local level; therefore, it is useful to ask what prompted such a revolutionary change. The answer is found in another phenomenon of the times—the revolution in federal-state relations that began with the New Deal.[53]

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45. STANDARD STATE ZONING ENABLING ACT § 3 (U.S. Dep't. of Commerce rev. ed. 1926).

46. *See generally* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation,* 74 MICH. L. REV. 900 (1976); Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955).

47. Mandelker, *supra* note 46, at 901.

48. STANDARD CITY PLANNING ENABLING ACT § 2 (U.S. Dep't of Commerce 1928).

49. Mandelker, *supra* note 46, at 904-05; *see, e.g.,* Kozesnik v. Montgomery Township, 24 N.J. 154, 166, 131 A.2d 1, 7-8 (1957):

> "Plan" connotes an integrated product of a rational process and "comprehensive" requires something beyond a piecemeal approach, both to be revealed by the ordinance considered in relation to the physical facts and the purposes authorized by [statute]. Such being the requirements of a comprehensive plan, no reason is perceived why we should infer the legislature intended by necessary implication that the comprehensive plan be portrayed in some physical form outside the ordinance itself. A plan may readily be revealed in an end-product—here the zoning ordinance—and no more is required by statute.

50. N. WILLIAMS, *supra* note 44, §§ 26.10 to .13.

51. Mandelker, *supra* note 46; Haar, *supra* note 46.

52. *See, e.g.,* WYO. STAT. §§ 9-8-301 to -302 (1977).

53. Earlier, narrowly defined programs had little lasting effect. Limited state planning, dealing primarily with the location and layout of new towns, occurred in colonial America. R. LINOWES & D. ALLENSWORTH, *supra* note 40, at 22. In 1908, a conservation conference

Pursuant to the National Industrial Recovery Act (NRA),[54] President Roosevelt, in 1934, established the National Resources Board—also known as the National Planning Board and the National Resources Committee—as an agency under the Public Works Administration (PWA).[55] The Board encouraged state planning to facilitate the development of public works programs, and PWA provided funds to hire consultants for state agencies. PWA further encouraged state activity by making funding for certain types of projects contingent upon approval by a state planning board. By 1938, forty-seven states had planning boards, and a new planning model had been established, even though the state agencies generally did not survive the withdrawal of federal funds that occurred as a result of World War II.[56]

Federal funding programs resurrected state and regional planning in the 1950's. Initially, state governments served as conduits for federal urban redevelopment dollars to be used for metropolitan and regional planning under section 701 of the Housing Act of 1954.[57] A 1959 amendment to that Act specifically provided funds for state planning,[58] and during the 1960's, state planning consistently was made a prerequisite for the receipt of federal funding. By 1969, approximately one hundred grant programs had requirements relating to state plans.[59]

At the same time that Congress was mandating that state planning be an integral part of the implementation of federal policy, it also was establishing a role for regional planning. The Housing Act of 1961[60] established area-wide planning as a prerequisite for the receipt of grants to acquire open space in urban areas.[61] Similar requirements were established piecemeal by a number of federal acts in the early 1960's.[62] The

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sponsored by President Theodore Roosevelt prompted the creation of comprehensive resource management agencies in forty-one of the forty-six states. MODEL LAND DEVELOPMENT CODE, *supra* note 40, at 291. The introductory commentary to the *Model Code's* chapter 8 provides an excellent historical overview of the topic.

54. Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933) (repealed 1935).

55. MODEL LAND DEVELOPMENT CODE, *supra* note 40, at 292-93.

56. *Id.* at 293-96.

57. Pub. L. No. 83-560, § 701, 68 Stat. 590, 640 (1954) (repealed 1981).

58. Pub. L. No. 86-372, § 419, 73 Stat. 654, 678 (1959) (repealed 1981).

59. *See* PUBLIC ADMINISTRATION SERVICES, STATE PLANNING AND FEDERAL GRANTS 25 (1969) [hereinafter STATE PLANNING AND FEDERAL GRANTS] (prepared for the Council of State Governments).

60. Pub. L. No. 87-70, § 703, 75 Stat. 149, 184-85 (1961) (repealed 1982).

61. NATIONAL ACADEMY OF SCIENCES, REVENUE SHARING AND THE PLANNING PROCESS 17 (1974) (prepared for the Department of Housing and Urban Development).

62. *E.g.*, Federal Aid Highway Act of 1962, Pub. L. No. 87-866, § 9(a), 76 Stat. 1145, 1148 (codified as amended at 23 U.S.C. § 134 (1982)) (highway funds for urban areas); Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, § 3, 78 Stat. 302, 303 (codified as amended at 49 U.S.C. § 1602 (1982 & Supp. III 1985)) (mass transportation funds); Housing and Development Act of 1965, Pub. L. No. 89-117, §§ 702-704, 79 Stat. 451, 490-92 (codified as amended at 42 U.S.C. §§ 3102-3104 (1982)) (funds for sewer and water facilities, neighborhood facilities, and acquisition of land for future public works construction). The 1965 Act

Demonstration Cities and Metropolitan Development Act of 1966[63] took a more comprehensive approach. In addition to providing funds for metropolitan planning, the Act required that all applications for federal funds for the acquisition of open spaces or for the planning or construction of numerous public facilities such as hospitals, airports, and sewage and waste treatment plants, be submitted to metropolitan or regional planning agencies.[64]

These acts established a loose framework that was formalized by the Intergovernmental Cooperation Act of 1968,[65] which directed the Bureau of the Budget (BOB), now the Office of Management and Budget (OMB), to promulgate regulations governing the review of federal programs having an area-wide impact.[66] The regulations took the form of *Circular A-95*,[67] which required applicants for federal funds under certain specified programs to permit state and regional clearinghouses (A-95 agencies) to review their proposals.[68] While all fifty states have established agencies of one form or another with state-wide A-95 review and comment responsibilities, the procedures have been implemented primarily at the metropolitan and regional levels[69] through bodies known as Councils of Government. Although participation in the councils was usually voluntary, the availability of HUD planning funds served as an enticement for involvement.[70] By 1975, approximately forty-five states had substate districting programs that in varying degrees influenced responses to regional planning.[71]

In summary, by the mid- to late-1960's federal requirements had

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also expanded the § 701 planning assistance program, *supra* note 57 and accompanying text, to include metropolitan and regional groups. Housing and Development Act of 1965, Pub. L. No. 89-117, § 1102, 79 Stat. 451, 502 (repealed 1981).

63. Pub. L. No. 89-754, 80 Stat. 1255 (1966) (codified as amended at 42 U.S.C. §§ 3301-3339, 12 U.S.C. §§ 1709-1749, and in scattered sections of U.S.C. (1982 & Supp. III 1985)).

64. *Id.* § 204, 80 Stat. 1255, 1262-63 (repealed 1982).

65. Pub. L. No. 90-577, 82 Stat. 1098 (1968) (repealed 1982).

66. *Id.* §§ 401, 403, 82 Stat. 1098, 1103-04 (repealed 1982).

67. BUREAU OF THE BUDGET, CIRCULAR A-95 (July 24, 1969) [hereinafter CIRCULAR A-95].

68. A step-by-step review of the procedure is set out in Myhra, *A-95 Review and The Urban Planning Process*, 50 J. URB. L. 449 (1973).

> The circular sought to establish a
> "network of State, regional and metropolitan planning and development clearinghouses" to receive and disseminate information about proposed projects; to coordinate applicants for Federal assistance; to act as a liaison between Federal agencies contemplating Federal development projects; and to perform the "evaluation of the State, regional or metropolitan significance of Federal or Federally-assisted projects."

Mogulof, *Regional Planning, Clearance, and Evaluation: A Look at the A-95 Process*, AM. INST. PLANNERS J., Nov. 1971, 418, 418 (quoting CIRCULAR A-95, *supra* note 67, attachment A).

69. NATIONAL ACADEMY OF SCIENCES, *supra* note 61, at 26 n.60.

70. *See* Mogulof, *supra* note 68, at 418-19.

71. MODEL LAND DEVELOPMENT CODE, *supra* note 40, at 311. Regarding the legal basis for Council of Government formation, see *id.* at 310.

created a network of state and regional planning programs. While in many ways these programs were of limited effectiveness,[72] they provided a conceptual framework for resolving complex land use problems. As rapid growth in the late 1960's and early 1970's coincided with, and in part precipitated, increased environmental consciousness, states were guided by this model as they engineered the quiet revolution.

In the 1980's, there are those who have suggested that the revolution is over, based on the fact that state and regional planning was undertaken voluntarily in only a small number of states.[73] Nevertheless, the concept of centralized planning, which is the movement's dominant feature, has altered the way people in the United States view land use planning. We will never again be able to consider it a strictly local endeavor. The farmland preservation programs in Hawaii, Vermont, California, and Oregon symbolize that changed perspective.

II
THE HAWAII LAND USE LAW

A. History

The historic people of Hawaii[74] depended on their small, isolated islands for sustenance; as a result, they developed a special relationship with the land. "[T]he life of the people and the life of the land [were] inseparable . . . . [the] users [were also] stewards responsible for its . . .

72. At the state level, agencies were often merely local coordinators that administered programs under the federal acts. Likewise, many of the state plans required by federal statute were actually only administrative agreements, whereby the state agencies accepted federally imposed conditions. STATE PLANNING AND FEDERAL GRANTS, *supra* note 59, at 28. At the regional level, the problems were even more significant. Councils of Government were unwilling to exercise even their limited authority. "The grossest and most overwhelming failure of the A-95 process is its great difficulty in distinguishing between good and bad applications from a regional point of view. On a de facto basis almost everything is good—because the system finds that almost nothing is bad." Mogulof, *supra* note 68, at 420. While the advisory structure of the process, MODEL LAND DEVELOPMENT CODE, *supra* note 40, at 311, may have contributed to that impotency, the political reality was that the local governments comprising the councils—not wanting to surrender any of their own power—wished to keep it that way. Moreover, regional councils were seen primarily as "insurance device[s] for the continued flow of federal funds to local governments." Mogulof, *supra* note 68, at 419.

In fairness it should be noted that one regional body that continues to operate effectively is the Twin Cities Metropolitan Council in Minneapolis/St. Paul, Minnesota. *See* F. BOSSELMAN & D. CALLIES, *supra* note 34, at 139-53; Note, *Metropolitan Government: Minnesota's Experiment with a Metropolitan Council,* 53 MINN. L. REV. 122, 156-61 (1968); *see also* Mogulof, *supra* note 68 (discussing the achievements of the A-95 process).

73. *E.g.,* A. DAVIS, *supra* note 41; Callies, *The Quiet Revolution Revisited,* 46 AM. PLAN. A.J. 135 (1980); Mandelker, *supra* note 41.

74. The Hawaiian Islands first were populated by Polynesians in the 12th Century. Because the islands are further from a land mass than any other archipelago, Hawaiians lived in isolation until the arrival of whites. P. MYERS, ZONING HAWAII: AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND CLASSIFICATION LAW 16 (1976).

preservation."[75] The continuing special relationship was reflected in the 1961 State Land Use Law's[76] focus on the protection of agricultural land. With the passage of that Act in Hawaii, the quiet revolution began.

Hawaii's land resources and the structure of its agriculture are unique in the United States. Even though mainlanders consider Hawaii a lush island paradise, great variations in rainfall, even upon a single island, mean that not all land is suitable for farming. Large areas of mountainous terrain limit agricultural activity even further. At the time *The Quiet Revolution* was published, only about one and one-half million of the state's roughly four million acres were suitable for agriculture, and of those, approximately three-fourths were used for dry land grazing.[77] Consequently, only about 400,000 acres, ten percent of the state's land area, were suitable for crops.[78] Nonetheless, agriculture was Hawaii's most important industry for many years. In 1959, when it entered the Union, thirty-nine percent of Hawaii's population was employed in the agricultural sector.[79]

Hawaiian land ownership patterns reflect both feudalism and colonialism. As a product of the tribal culture, control of the land traditionally was centralized in powerful chieftains or a monarch.[80] The notion of private property began to emerge only in the mid-1800's, as great numbers of white settlers began to arrive in Hawaii.

> As a result, for the first time land was bought and sold, stolen, married into, and bequeathed. The spoils went to the adventurers who married Hawaiian princesses, to the crafty who advised the kings, to the dreamers who craved the barren, unpeopled, seemingly useless lands. By 1890, when the monarchy was overthrown, a small number of Westerners owned over half of all the private lands in Hawaii and leased or controlled even more.[81]

By the late 1950's, seventy-two landowners held title to forty-seven percent of Hawaii; title to one-third of the land was held by seven landowners.[82] The scarcity of agricultural land and the concentration of its

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75. Dinell, *A Brief Critique of Hawaii's State Land Use Law*, 2 THIRD WORLD PLAN. REV. 195, 195 (1980).

76. HAW. REV. STAT. §§ 205-1 to -37 (1985).

77. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 5 (citing A. CHING & I. SAHARA, LAND USE AND PRODUCTIVITY RATING, STATE OF HAWAII, 1968, at 18 (Land Study Bureau, Univ. of Hawaii, Circular No. 15, 1969)).

78. *Id.*

79. P. MYERS, *supra* note 74, at 52.

80. *See generally* Dinell, *supra* note 75; Selinger, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L.Q. 639, 681 n.181 (1978).

81. P. MYERS, *supra* note 74, at 17.

82. *Id.* at 19. The situation has not changed. In 1971, the Bishop Estate, an education trust, owned 370,000 acres or 9% of the land in the state, and 16% of Oahu; the Estate of James Campbell owned 41,000 acres, or 1% of the state, and 13% of Oahu. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 13-14.

Hawaii moved to break up large estates by enacting the Land Reform Act of 1967, HAW.

ownership, combined with a perception that local governments would be unable to deal with the growth that was sure to accompany statehood, brought about the revolution of 1961.[83]

In keeping with the Hawaiian tradition of centralized government, the 1957 legislature created a planning office to produce a general plan.[84] The plan, published in 1961 but never enacted, served as the catalyst[85] for Act 187, the Hawaii Land Use Law,[86] enacted later that year. The purpose of the Act was to protect agricultural land and to restrict uncontrolled development.[87]

Although zoning measures[88] like the Hawaiian Act often are not popular with farmers,[89] this revolutionary measure met with little opposition in the agricultural community. Under Hawaii's highly concentrated landownership system, much of the land is leased to the growers,

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REV. STAT. §§ 516-1 to -83 (1976 & Supp. 1984), which was recently upheld by the United States Supreme Court. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). Under the act, tenants living on single-family residential lots of at least five acres may ask the Hawaii Housing Authority (HHA) to condemn the land on which they live. When HHA receives petitions from the requisite number of tenants in a tract, it may purchase all or some of the lots in the tract, at prices set by condemnation trial or by negotiations between lessors and lessees. HHA then is authorized to sell a fee simple interest in the land to the tenant, lending 90% of the purchase price if necessary. It also may sell to third parties after public notice has been given.

In refusing to accept allegations that resale to private persons was not a public use, the Supreme Court noted that the Hawaii Legislature believed that the land oligopoly "was responsible for skewing the state's residential fee simple market, inflating land prices, and . . . , forc[ing] thousands of individual homeowners to lease, rather than buy, the land underneath their homes." *Id.* at 232, 242. The Court held that "[r]edistribution of fees simple to correct deficiencies in the market . . . is a rational exercise of the eminent domain power." *Id.* at 243.

83. *See* Dinell, *supra* note 75, at 197-98; P. MYERS, *supra* note 74, at 19-22.

84. P. MYERS, *supra* note 74, at 20. The 1957 legislature also established the Land Study Bureau (Act 35) and enacted a comprehensive forest and water reserve law (Act 234). Dinell, *supra* note 75, at 197 n.26.

85. P. MYERS, *supra* note 74, at 20.

86. *See supra* note 76.

87. Myers states categorically, "the impetus for the law was protection of Hawaii's agriculture." P. MYERS, *supra* note 74, at 20. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 6, discuss the state's desire to avoid a Los Angeles-type sprawl in Honolulu. Section 1 of the Act reads in part:

> *Findings and declaration of purpose.* Inadequate controls have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy. . . . Scattered subdivisions with expensive, yet reduced, public services; the shifting of prime agricultural lands into nonrevenue producing residential uses when other lands are available that could serve adequately the urban needs; failure to utilize fully multiple-purpose lands; these are evidences of the need for public concern and action.

Act 187, *reprinted in* ECKBO, DEAN, AUSTIN & WILLIAMS, INC., STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW 174 (1969) [hereinafter ECKBO]. This section was never codified. Lowry, *supra* note 39, at 106.

88. The legislation was entitled "A Bill for an Act Relating to the Zoning Powers of the State and the Assessment of Real Property Based upon Zones Established by the State and Making an Appropriation therefor." 1961 Haw. Sess. Laws 299.

89. P. MYERS, *supra* note 74, at 20; Duncan, *supra* note 13, at 112.

i.e. plantation corporations. The interests of the landowners and the growers are not always the same.[90] As is true in any urban-fringe area, farmland near Honolulu is worth considerably more for development than for agricultural purposes. This increased development value raises the farmer's tax rate while offering a source of substantial profit to those who sell the land for development.[91] Unlike the usual land-development scenario, in which the farmer succumbs to an irresistible offer and pockets the profits,[92] proceeds from the sale of Hawaiian farmland go to the absentee landowner, and the grower's livelihood is lost. Thus, as development moved toward the prime agricultural land of Oahu's central valley,[93] growers feared that large landowners who had no vested interest in agriculture might withdraw their leases and sell to developers. Plantation corporations, accordingly, joined forces with several other constituencies supporting Act 187.[94]

Despite broad-based support, the bill survived only after its sponsors added a provision to permit preferential assessment of dedicated agricultural and conservation land.[95] Under the current version of that provision, landowners can have their land assessed at its use value[96] in return for agreeing not to develop for ten years, or at fifty percent of its use value in exchange for a twenty-year commitment.[97] It is easy to see why large landowners favored the provision: Like other differential assessment programs,[98] the Hawaiian scheme is not a farmland protection device, but a measure that permits owners to reduce taxes while they await development.[99]

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90. Sometimes, however, the plantation corporations are merely subsidiaries of the landowning corporations. *See* P. MYERS, *supra* note 74, at 20-21.

91. For a discussion of the use value—development value distinction, see Duncan, *supra* note 13, at 79.

92. *Id.* at 74.

93. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 6.

94. A new alliance of have-nots, a politically powerful force since the 1950's, supported the legislation, as did those, including the governor and legislative leadership, who had a genuine interest in land use planning. P. MYERS, *supra* note 74, at 21.

95. *Id.* at 22; Telephone interview with Paul Schwind, Chief Planner, Hawaii Department of Agriculture, Office of Planning and Development (July 6, 1984) [hereinafter Schwind Interview].

96. Its fair market value for development purposes is much greater than its use value. *See supra* text accompanying note 91.

97. HAW. REV. STAT. § 246-12(a) (1985).

98. Forty-nine states give some sort of preferential tax treatment to farmland, but because tax savings do not begin to approach the profits that can come from development, the programs have been singularly ineffective at preservation. Duncan, *supra* note 13, at 78-96.

99. Although written prior to 1973 amendments that increased the benefits, P. MYERS, *supra* note 74, at 58-59, the first five-year review declared: "For all its innovative qualities, the Hawaii dedication law in its present form cannot be considered a device to preserve agricultural lands in agricultural use in the face of increasing land values. It is, in fact, a license to profit for a time." ECKBO, *supra* note 87, at 137.

B. Structure of the Act

Act 187[100] created the state Land Use Commission (LUC)[101] that divides land into agricultural, rural,[102] urban, or conservation districts.[103] The Act provides that agricultural district boundaries shall be drawn so that "the greatest possible protection shall be given to those lands with a high capacity for intensive cultivation."[104] Lands are designated on the basis of productivity data compiled by the Land Study Bureau at the University of Hawaii.[105] Agricultural uses include generally the growing of crops; orchard and forestry cultivation; animal husbandry; and a variety of related activities, including the operation of roadside stands for the sale of agricultural products grown on the property.[106] The minimum agricultural lot size is one acre,[107] but the Act permits counties to establish larger minimum requirements.[108] The is-

100. Although some historical references are necessary, this section, to the extent possible, will describe current provisions. The Land Use Act is codified at HAW. REV. STAT. §§ 205-1 to -37 (1985). Because most of the decisionmaking with which this Article is concerned involves agricultural-urban tensions, discussion generally will be limited to those two categories.

101. *Id.* § 205-1. LUC is composed of nine appointed members, one from each county and the remainder at large. *Id.*

102. The rural classification, used exclusively on islands other than Oahu, was added in 1963. P. MYERS, *supra* note 74, at 24.

Rural zones are characterized by low-density residential lots of not more than one dwelling per half acre mixed with small farms. HAW. REV. STAT. § 205-2. As of 1980, only about 1% of Hawaii's land was contained in rural zones. Callies, *Hawaii State-Wide Zoning*, 2 THIRD WORLD PLAN. REV. 187, 188 (1980).

103. HAW. REV. STAT. § 205-2. Conservation lands originally included considerable state-owned forest and water reserve lands. P. MYERS, *supra* note 74, at 22. Private land, much of it having a slope of more than 20%, was added in 1969. One-third of the conservation land was privately owned in that year. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 8. Pursuant to authority granted in 1970, HAW. REV. STAT. § 205-32, LUC has added to the conservation zone a forty-foot strip of shoreline along the entire coast of Hawaii. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 8. Conservation lands are under the control of the State Department of Land and Natural Resources. HAW. REV. STAT. § 205-5(a). As of 1980, approximately 45% of Hawaii land was zoned for conservation. Callies, *supra* note 102, at 188.

104. HAW. REV. STAT. § 205-2.

105. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 7-8; ECKBO, *supra* note 87, at 81. The allowed uses of "A" and "B" lands, the most productive, are somewhat more restricted than those permitted on other agricultural lands. *See* Neighborhood Bd. v. State Land Use Comm'n, 64 Haw. 265, 269 n.7, 639 P.2d 1097, 1101 n.7 (1982). For example, on "A" and "B" lands, "farm dwellings" are restricted to single family homes, HAW. REV. STAT. § 205-4.5, whereas more broadly defined "living quarters or dwellings" are permitted on other agricultural land, *id.* §§ 205-2, 205-4.5.

106. HAW. REV. STAT. §§ 205-2, 205-4.5. Recreational uses are permitted on all agricultural lands but are more restricted on "A" and "B" lands where, for example, golf courses and driving ranges are prohibited. *Id.* The recreational provisions have long been the subject of criticism. *See* ECKBO, *supra* note 87, at 80.

107. An acre equals 4,840 square yards or 43,560 square feet. The one-acre provision has spawned troublesome "agricultural subdivisions" that are basically residential. *See infra* text accompanying notes 196-203.

108. HAW. REV. STAT. § 205-5.

land of Hawaii requires a minimum of two to ten acres for agricultural uses, for example.[109] By 1980, approximately fifty percent of the state's land was zoned agricultural.[110]

Urban boundaries enclose areas currently in urban use as well as a sufficient reserve for foreseeable growth.[111] In contrast to agricultural land, for which the statute itself sets out permitted uses, development of urban land requires both state and local approval. Once LUC zones an area for urban use, control of individual tracts is left to county zoning and subdivision regulations.[112] The urban designation means only that counties may permit development under their local laws; counties are also free to deny permission to develop urban land.[113] In addition, they can, and have, placed urban land into agricultural districts.[114] As of 1980, only about five percent of Hawaiian land was zoned urban.[115]

Act 187 provided two ways to change a classification. One way was a comprehensive review process that was to occur every five years.[116] The second, and ultimately most used, reclassification mechanism permits individual landowners and state and county governments to petition LUC for a boundary change.[117] The petitioner first must show that the land is needed for other than its designated use, and then must show either that it is not usable or adaptable for the designated use or that changing conditions and development trends have made the original classification unreasonable.[118]

Where reclassification would not be appropriate, the statute provides for special use permits for certain unusual and reasonable uses that would "promote the effectiveness and objectives" of the Act.[119] The au-

109. P. MYERS, *supra* note 74, at 50.

110. Callies, *supra* note 102, at 187-88. The agricultural zone includes lava flows and other lands unsuitable for agriculture but not thought appropriate for conservation zone status. HAW. REV. STAT. § 205-2; F. BOSSELMAN & D. CALLIES, *supra* note 34, at 8.

111. HAW. REV. STAT. § 205-2.

112. *Id.* § 205-5(a); F. BOSSELMAN & D. CALLIES, *supra* note 34, at 8; Callies, *supra* note 102, at 188.

113. Callies, *supra* note 102, at 188. Whether land can be developed depends, therefore, on local planning and development regulations. In Honolulu, for example, zoning ordinances must conform to a comprehensive plan. *See infra* note 147.

114. P. MYERS, *supra* note 74, at 72.

115. Callies, *supra* note 102, at 188.

116. *See* Act 187 § 12, *reprinted in* ECKBO, *supra* note 87, at 175. Two such reviews were conducted: the first in 1969, ECKBO, *supra* note 87, and the next in 1974, HAWAII STATE LAND USE COMM'N, SECOND FIVE YEAR DISTRICT BOUNDARIES AND REGULATIONS REVIEW (1975) [hereinafter SECOND FIVE YEAR REVIEW]. The original expectation that most reclassifications would be accomplished in this manner proved false. Lowry, *supra* note 39, at 95 n.61. The five-year review process was repealed in 1975. *Id.*

117. HAW. REV. STAT. § 205-4. LUC itself may initiate a boundary change. *Id.*

118. Act 187 § 6, *reprinted in* ECKBO, *supra* note 87, at 174-75. Because the right to develop a parcel still depends on local zoning, *supra* notes 112-13 and accompanying text, a reclassification by LUC is not dispositive.

119. HAW. REV. STAT. § 205-6.

thority to issue such permits, including the power to place restrictions on them, originally was vested in LUC[120] but since has been transferred to the county planning commissions.[121] Nevertheless, a county planning commission is required to notify LUC of the time and place of a special use hearing, and special permits for areas greater than fifteen acres are subject to approval by LUC.[122]

While the Hawaii Land Use Law has evolved over the years, the Act as originally conceived was little more than a statewide zoning ordinance.[123] As in any such scheme, the zoning authority (LUC) established districts and had the power to rezone and issue special permits. Accordingly, the Act's effectiveness at preserving agricultural lands must be measured by evaluating how the commission carried out its responsibilities.

C. Evaluation: Does the Land Use Law Protect Farmland?

In assessing LUC's efforts to preserve agricultural land, one must remember that it was charged with both preserving farmland and providing adequate space for urban growth. Although these conflicting objectives can be harmonized, there often must be a tradeoff between them. The commission had separate decisionmaking criteria for each category and "soon learned that its . . . criteria were in conflict with one another."[124] LUC had no written guidelines for making tradeoffs, and resulting difficulties were exacerbated by a flood of individual petitions for reclassification. Instead of being able to make coherent tradeoffs through the five-year review process, LUC was forced to set policy on a case-by-case basis.[125]

Nonetheless, early assessment of LUC's efforts to protect agricultural land was complimentary. The first five-year review[126] reported that, while petitions filed from September 1964 to September 1968 asked that a total of 2,647 acres of prime agricultural land be reclassified as

120. Act 187 § 7, *reprinted in* ECKBO, *supra* note 87, at 175.

121. HAW. REV. STAT. § 205-6.

122. *Id.* The Hawaii Supreme Court discussed the differences between the reclassification and special permit processes in Neighborhood Bd. v. State Land Use Comm'n, 64 Haw. 265, 639 P.2d 1097 (1982). Noting that "unlimited use of the special permit to effectuate essentially what amounts to a boundary change would undermine the protection from piecemeal changes to the zoning scheme guaranteed landowners by the more extensive procedural protections of boundary amendment statutes," 64 Haw. at 272, 639 P.2d at 1102-03, the court reversed the granting of a special permit to the developer of a major amusement park. The park would have occupied 103 acres of agricultural land and would have attracted 1.5 million visitors per year. 64 Haw. at 272, 639 P.2d at 1103.

123. *See supra* note 88.

124. Dinell, *supra* note 75, at 198-99.

125. *Id.*

126. ECKBO, *supra* note 87.

urban,[127] only 285 acres were rezoned.[128] Moreover, of the total 4,097 agricultural acres reclassified, over half were rated unsuitable for farming.[129] Lastly, eighty percent of the orders reclassifying land as urban covered tracts adjacent to already urbanized areas.[130] The report concluded that "prime Agriculture and Conservation District lands have been protected from urbanization by Land Use Commission denial of rezoning applications."[131] The enthusiastic reviews continued, notwithstanding the fact that between 1968 and 1970, 2,021 acres of prime agricultural land were rezoned, 1,989 of them on Oahu.[132]

Soon, however, reviews became more critical. For example, a 1973 open space study prepared by former Secretary of the Interior Stewart Udall reported that "[t]he law appears to be losing its effectiveness."[133] A more recent study also concludes that LUC policies fail to emphasize the preservation of agricultural land.[134] The study examined all petitions to reclassify agricultural, conservation, or rural lands into the urban zone for the periods 1964-74 and 1974-78.[135] Each decision was evaluated on the basis of factors such as whether the land involved was prime, whether it was close to employment and commerce, and whether its reclassification would contribute to scattered urban development.[136]

For the 1964-74 period the study concluded that, in spite of the

127. The original agricultural zone included 2,124,400 acres. P. MYERS, *supra* note 74, at 49. The original urban zone encompassed 119,100 acres, *id.*, including 700 acres of Oahu's best Central Valley farmland. After the establishment of temporary boundaries, which classified the acreage as agricultural, Castle & Cooke, one of the most influential of the big landowners, proposed a new town, Mililani, on agricultural land thirty miles from the center of Honolulu. The community was to house 65,000 people and occupy 3,000 acres of prime farmland. In setting permanent boundaries, LUC approved 700 acres for Mililani. "Although this was only a fraction of what was requested, many say this was the price paid to prevent the repeal of the law." *Id.* at 23. When Myers wrote in 1976, Mililani had expanded to 1,000 acres and "many believed its presence had an adverse domino effect on Oahu's best agricultural land." *Id.* at 24.

128. ECKBO, *supra* note 87, at 9. About 10,000 acres were reclassified from other uses to urban use as a result of the 1969 review. P. MYERS, *supra* note 74, at 36.

129. ECKBO, *supra* note 87, at 160.

130. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 24; ECKBO, *supra* note 87, at 8.

131. ECKBO, *supra* note 87, at 9.

132. P. MYERS, *supra* note 74, at 51. Dr. Shelley Mark, first Director of the Hawaii Department of Planning and Economic Development, reported in 1973 that from 1964 to 1970 LUC received requests to reclassify more than 100,000 acres as urban. Yet of the 30,000 acres actually rezoned, only 3,500 were considered prime agricultural lands, and those parcels either were surrounded by urban uses already or were devoted to immediate housing needs. Dr. Mark concluded that the Act had given plantation owners the incentive to plan for long-term stability and growth in agriculture operations. Mark, *It All Began in Hawaii,* 46 STATE GOV'T 188, 191 (1973).

133. P. MYERS, *supra* note 74, at 51 (quoting OVERVIEW CORPORATION, STATE OF HAWAII COMPREHENSIVE PLAN 33-34 (1974)).

134. Lowry, *supra* note 39, at 106-10.

135. *Id.* at 108, 119.

136. *See id.* at 107.

Act's express mandate to protect agricultural land,[137] LUC consistently failed to treat agricultural suitability as a major factor in its decisionmaking.[138] At the same time, however, one of the Act's other express purposes, that of restricting urban sprawl,[139] played a major role in decisionmaking.[140]

The study also revealed that a minor policy of LUC, that of partially approving reclassification of land units of several hundred acres, violated the intent of the Act and had a negative impact on prime agricultural land.[141] LUC had let an informal tradeoff criterion aimed at the regulatory goal of ensuring an adequate supply of land for new development, particularly low cost housing, interfere with the Act's express goal of protecting agricultural land.[142] Finally, although the 1975-78 analysis does not focus on agricultural land, it concludes that the same major decisionmaking pattern prevailed during that period.[143]

The results of the study reflect the frustration that was building in the early 1970's: "[T]he commission was coming under increasing public criticism for such contrary phenomena as the high cost of housing,[144] urban sprawl, and the disappearance of prime agricultural land. . . ."[145] LUC also found itself in conflict with county planning commissions that, with the infusion of HUD section 701 grant money,[146] had become sophisticated and believed they could better control their own growth.[147]

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137. *See supra* notes 87 & 104 and accompanying text.

138. Lowry, *supra* note 39, at 109. Myers reported that prior to 1974, 155,673 acres were transferred out of the agricultural zone. P. MYERS, *supra* note 74, at 51.

139. *See supra* note 87.

140. Lowry, *supra* note 39, at 109.

141. *See id.* at 110, 123-24.

142. *Id.*

143. *See id.* at 119, 123. Not everyone agrees with Lowry's assessment. In a recent interview, David Callies rejected Lowry's pro-development thesis. Callies acknowledges that the protection of agricultural land is no longer the core of the Land Use Act, and he describes LUC as "not pro-agriculture." Nonetheless, he believes that the fact that well over 40% of the state is still zoned for agriculture demonstrates that LUC policy "just has not made that much difference." Telephone interview with David Callies, Professor, William S. Richardson School of Law, University of Hawaii at Manoa (Feb. 14, 1984).

144. *See* F. BOSSELMAN & D. CALLIES, *supra* note 34, at 25-27; P. MYERS, *supra* note 74, at 80-86; Lowry, *supra* note 39, at 123-24.

145. Dinnell, *supra* note 75, at 199. During the same period, LUC came under attack for failure to provide for adequate public participation and for alleged political favoritism. P. MYERS, *supra* note 74, at 36-39, 151-52.

146. *See supra* text accompanying note 57.

147. P. MYERS, *supra* note 74, at 40, 78; *see also* Lowry, *supra* note 39, at 101-03 (discussing the growing power of the City and County of Honolulu and the likelihood of their increased conflict with LUC). In 1969, the Charter of the City and County of Honolulu was interpreted to prohibit "zoning ordinances which do not conform to and implement the general plan." Dalton v. City & County of Honolulu, 51 Haw. 400, 415, 462 P.2d 199, 208 (1969). The requirement that planning precede zoning no doubt contributed to the growth of Honolulu's planning staff, which, by 1976, was the fifth largest in the country and many times larger than the staff available to LUC. P. MYERS, *supra* note 74, at 78.

It is interesting to note, however, that during the period from 1964 to 1978, LUC deci-

The attacks continued into 1975, even though the revisions that took place as a result of the second five-year review[148] were seen by some as a "reasonable compromise."[149]

Underlying a great deal of the controversy was the problem inherent in most zoning schemes: Regulation had not been "in accordance with a comprehensive plan."[150] Because the "plan" changed with each amendment and there were no adequate guidelines to assist decisionmaking,[151] overall land use policy was lacking. LUC, rather than the system itself, became the scapegoat. The authors of the first five-year review were struck with the "level of generality [of the criticisms of LUC] and the frequency of *ad hominem* attacks," when, in reality, critics' frustration grew out of trying "to come to grips with the problem of land use control itself."[152]

The 1975 Hawaii Legislature's response to this criticism was to reduce LUC's authority to make land use policy. That reduction was accomplished through a series of acts[153] that established a framework for setting more specific decisionmaking standards.[154] The acts required the new guidelines to be the product of comprehensive planning. The revisions most important for agricultural land preservation were encompassed in substantive amendments to the Land Use Act.

The legislature found that there was "a need to improve the planning process in this State, to increase the effectiveness of public and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide

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sions were consistent with county recommendations 72% of the time. Lowry, *supra* note 39, at 100. While acknowledging that this statistic might reflect state-county consensus, Lowry also hypothesizes that it may mean simply that LUC had succumbed to the same real estate and development interests that dominate local decisionmaking. *Id.*

148. SECOND FIVE YEAR REVIEW, *supra* note 116. The commentators do not seem to agree on how many acres were transferred to the urban zone during the review process. Mandelker sets the figure at fewer than 2,000. D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 302 (1976). Myers states that 4,731 acres were transferred from the agricultural to the urban zone, although she also notes that 36,657 acres were transferred from other districts into the agricultural zone. P. MYERS, *supra* note 74, at 51.

149. *Reasonable Compromise,* Honolulu Star Bull., Dec. 21, 1974, at A-12, col. 1, *cited in* P. MYERS, *supra* note 74, at 41 n.8.

150. *See supra* text accompanying notes 44-46.

151. *See supra* text accompanying notes 124-25.

152. ECKBO, *supra* note 87, at 153-54.

153. In addition to the revision of the Land Use Act, the legislature enacted the Hawaii Environmental Protection Act (HEPA), HAW. REV. STAT. §§ 343-1 to -8 (1985), the Shoreland Protection Act, HAW. REV. STAT. § 205A-21 to -33 (1985), and the Coastal Zone Management Act, HAW. REV. STAT. §§ 205A-1 to -6 (1985).

154. The amendments to the Land Use Act were in part a response to a decision by the Hawaii Supreme Court that zoning amendment proceedings were, by nature, quasi-judicial rather than legislative and thus were covered by the "contested case" provisions of the Hawaii Administrative Procedure Act. Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974). The revisions abolished LUC's legislative function—its five-year review authority.

the future development of the State."[155] Accordingly, a planning council, working under the Department of Planning and Economic Development, was charged with the preparation of a long-range comprehensive state plan that was to be completed by January 1, 1977.[156]

While land use was only one area to be governed by the plan, the legislature specifically noted

> that there is an urgent need for substantive State land use policies to guide and govern the Land Use Commission in determining land use district boundaries. The standards of Hawaii's existing Land Use Law, although laudable, lack sufficient specificity to guide the Commission in the exercise of its very important functions.[157]

Therefore, LUC decisions were to be governed by interim guidelines pending the preparation and adoption of the state plan.[158] Unless injustice or inequity would result, LUC was authorized to approve boundary changes only when it found "upon the clear preponderance of the evidence that the proposed boundary was reasonable, not violative [of the statutorily designated uses and activities] and consistent with interim policies and criteria."[159] LUC decisions were to be governed by the same standard of proof when the state plan superseded the interim guidelines.[160]

Ironically, the interim guidelines accorded the protection of agricultural land, one of the primary purposes behind the original Land Use Act,[161] only passing mention. Land use amendments were to be approved when reasonably necessary for growth and development, provided there were no significant adverse effects upon a number of resources; agricultural resources were simply one type among the several mentioned.[162] Instead, the guidelines stressed the Act's other major purpose—the avoidance of scattered urban development.[163]

This change in emphasis reflects a declining agricultural economy in

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155. HAW. REV. STAT. § 226-1 (1985). Although this language appears in the preamble to the State Plan, not enacted until 1978, the 1975 legislation created the state planning mechanism.

156. *Id.* §§ 225-1 to -26 (repealed 1978).

157. SENATE OF THE STATE OF HAWAII, STANDING COMMITTEE REP. 708, Regular Sess. of 1975, *reprinted in* JOURNAL OF THE SENATE OF THE EIGHTH LEGISLATURE OF THE STATE OF HAWAII 1097, 1098 (1975).

158. HAW. REV. STAT. § 205-16.1 (repealed 1985).

159. *Id.* § 205-4(h) (1985).

160. *Id.* § 226-52(b)(2)(D). The interim policies expired in 1980. *Id.* § 205-16.2 (repealed 1985).

161. *See supra* note 87.

162. "(1) Land use amendment shall be approved only as reasonably necessary to accommodate growth and development, provided there are no significant adverse effects upon agricultural, natural, environmental, recreational, scenic, historic, or other resources of the area." HAW. REV. STAT. § 205-16.1 (repealed 1985).

163. The rest of the guidelines state:

which there is a decreasing need for farmland.[164] The proportion of Hawaii's income derived from federal military expenditures and tourism had moved ahead of that generated by agriculture by the mid-1960's.[165] A decade later, the amount of land planted in the state's two principal crops had dropped significantly.[166] While agriculture was declining, construction and development were on the rise;[167] military personnel and employees needed housing and services, and tourists needed hotels and other services. Thus, in addressing growth management problems, the interim policies were not unrealistic. In the short run, the question was not which lands would be protected but which would be developed.

Consistent with that new philosophy, from 1977 through late 1980, when the interim guidelines were in force, LUC reclassified from the agricultural to the urban district 4,000 acres (about half of the number requested), 1,400 acres of which were on Oahu.[168] Twelve hundred of the reclassified acres were prime or unique; 900 were on Oahu.[169] The statewide success rate for petitions to reclassify prime land was approximately 50% (up from approximately 30% for the period 1962-74); on Oahu nearly 65% of such requests were approved.[170]

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(2) Lands to be reclassified as an urban district shall have adequate public services and facilities or as can be so provided at reasonable costs to the petitioner.

(3) Maximum use shall be made of existing services and facilities, and scattered urban development shall be avoided.

(4) Urban districts shall be contiguous to an existing urban district or shall constitute all or a part of a self contained urban center.

(5) Preference shall be given to amendment petitions which will provide permanent employment, or needed housing accessible to existing or proposed employment centers, or assist in providing a balanced housing supply for all economic and social groups.

Id.

164. Bosselman and Callies predicted this turn of events. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 17.

165. P. MYERS, *supra* note 74, at 52.

166. Land in sugar cane production declined from 329,800 acres in 1967 to 220,700 acres in 1977. STATE OF HAWAII, DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT DATA BOOK 292 (1978), *cited in* Lowry, *supra* note 39, at 124. Land in pineapple production declined from 64,000 to 47,000 acres during the same period, *id.*, as producers shifted their operations to Taiwan, the Philippines, and Puerto Rico. P. MYERS, *supra* note 74, at 55.

167. P. MYERS, *supra* note 74, at 52.

168. HAWAII DEPARTMENT OF AGRICULTURE, STATE AGRICULTURAL PLAN: TECHNICAL REFERENCE DOCUMENT II-116 (1982) [hereinafter TECHNICAL REFERENCE DOCUMENT].

169. *Id.* The level of quality was measured by the Hawaii Department of Agriculture's ALISH (Agricultural Lands of Importance to the State of Hawaii) scale. The ALISH system—which rates land as prime, unique, or other—was adopted by the Board of Agriculture in 1977 as an informational tool for use in agricultural preservation, land use planning, and development. *Id.* at II-94.

170. *Id.* at II-115 to -116. As previously noted, Lowry reports that LUC continued its pro-growth policies during the 1975-78 period, although he does not make specific findings about their impact on agricultural land. *See supra* text accompanying note 143.

D. Collateral Developments

1. The Constitutional Amendment

The increased pace of reclassification and development affected a number of Hawaii's resources, not just agricultural land.[171] Therefore, while the state plan was being prepared,[172] the people of Hawaii in 1978 passed a constitutional amendment mandating protection of the environment.[173] The new section explicitly protecting agricultural lands[174] declares:

> The State shall conserve and protect agricultural lands. . . . The legislature shall provide standards and criteria to [accomplish that goal].
>
> Lands identified by the State as important agricultural lands . . . shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.[175]

Notwithstanding the state's declining agricultural economy, Hawaiians urged caution with respect to the development of agricultural land.[176]

The constitutional mandate was carried out partially by the Hawaii State Plan,[177] signed into law on May 22, 1978.[178] The plan sets out the state's ambitious and comprehensive long-term policy objectives for virtually all aspects of Hawaiian public life.[179] With regard to agriculture, it declares that state policy shall be directed toward two "objectives": increasing the viability of the sugar and pineapple industries and continuing the growth and development of diversified agriculture.[180] To accomplish those objectives, the plan sets out certain "policies," among which

171. *See, e.g.*, P. MYERS, *supra* note 74, at 31-45.

172. *See supra* text accompanying notes 153-56.

173. HAW. CONST. art. XI. The 1978 amendment, which provides for the management of all the state's natural resources, explicitly protects agricultural lands, *id.* § 3, marine resources, *id.* § 6, and water resources, *id.* § 7.

174. Some of the amendment's sections were modifications of preexisting constitutional provisions; others, including the agricultural lands section, were new. HAW. CONST. art. XI.

175. *Id.* § 3.

176. *Id.* § 1.

177. HAW. REV. STAT. §§ 226-1 to -105 (1985).

178. HAWAII DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, THE HAWAII STATE PLAN 3 (1978).

179. The plan sets out three broad-based goals:

> (1) A strong, viable economy, characterized by stability, diversity, and growth, that enables the fulfillment of the needs and expectations of Hawaii's present and future generations.
>
> (2) A desired physical environment, characterized by beauty, cleanliness, quiet, stable natural systems, and uniqueness, that enhances the mental and physical well-being of the people.
>
> (3) Physical, social, and economic well-being, for individuals and families in Hawaii, that nourishes a sense of community responsibility, of caring and of participation in community life.

HAW. REV. STAT. § 226-4.

180. *Id.* § 226-7. The agricultural objectives fall under goal (1).

are 1) fostering attitudes conducive to maintaining agriculture as a major sector of the state's economy, and 2) assuring the availability of agricultural lands to accommodate present and future needs.[181] The plan also establishes "priority directions" focused on major problems that require immediate attention.[182] Priorities include providing adequate land to ensure the viability of the sugar and pineapple industries[183] and protecting prime agricultural land through the development of "affirmative and comprehensive programs."[184] In short, at every policy level the state plan emphasizes the protection of agricultural lands.

The agricultural policies, objectives, and priorities discussed above govern all state and county decisionmaking.[185] State functional plans, the implementing mechanisms for the Hawaii State Plan, must be prepared for defined policy areas.[186] These functional plans are to be used by the counties in preparing county general or development plans[187] that are likewise required to conform to the State Plan.[188]

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181. To achieve its agricultural objectives, the state's policies include:

(1) Foster attitudes and activities conducive to maintaining agriculture as a major sector of Hawaii's economy.

. . . .

(4) Support research and development activities that provide greater efficiency and economic productivity in agriculture.

(5) Enhance agricultural growth by providing public incentives and encouraging private initiatives.

(6) *Assure the availability of agriculturally suitable lands with adequate water to accommodate present and future needs.*

(7) Increase the attractiveness and opportunities for an agricultural education and livelihood.

(8) Expand Hawaii's agricultural base by promoting growth and development of flowers, tropical fruits and plants, livestock, feed grains, forestry, food crops, aquaculture, and other potential enterprises.

Id. § 226-7 (emphasis added).

182. HAWAII DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, *supra* note 178, at 24.

183. HAW. REV. STAT. § 226-103(c)(1).

184. *Id.* § 226-103(d)(1). This section specifically gives priority to the continued development of agricultural parks. *See also id.* § 226-103(d)(9)-(12); *infra* note 191 and text accompanying notes 196-203.

185. *Id.* § 226-52(a)(1)-(2). At the state level, decisions by LUC are to be "in conformance with the overall theme, goals, objectives and policies [of the State Plan]," and are to use the priority guidelines and state functional plans adopted pursuant to the State Plan. *Id.* § 226-52(b)(2)(D). The State Plan also requires that the state A-95 clearinghouse, *see supra* text accompanying notes 68-71, evaluate all projects requiring federal funding for compliance with the plan, any state functional plan, and the county general or development plan. *Id.* § 226-52(b)(3). The State Plan establishes a policy council to function as a forum for discussing conflicts between and among the various objectives, functional plans, county, general, and development plans, and state programs. The council is also charged with conducting periodic reviews of the State Plan. *Id.* §§ 226-53, 226-54. When completed, the plans will be submitted to the legislature for approval. *Id.* §§ 226-58, 226-59.

186. *Id.* § 226-52(a)(3).

187. Thus, Hawaii joins the growing number of states that mandate local planning. *See supra* text accompanying notes 51-52.

188. The State Plan contains a "catch 22" in that county plans are to serve as guidelines for the preparation of state functional plans, HAW. REV. STAT. § 226-52(a)(3), while at the

2. *The State Agricultural Plan*

The State Agricultural Plan,[189] the functional plan for agriculture, was published by the Hawaii Department of Agriculture in October 1982. While reporting that 1980 was the best year ever for Hawaiian agriculture,[190] the *Technical Reference Document* that accompanies the State Plan makes numerous proposals to bolster the agricultural economy.[191]

The report concludes that LUC decisions have been unnecessarily inconsistent and have not taken into account state land use policy. Assessing the 1977-80 reclassification figures, which indicate an acceleration in rezonings,[192] the report states:

> the value of prime agricultural lands as an irreplaceable resource has not been a sufficiently important factor in all land use redistrictings involving such lands. In particular, the amount of prime land available for agricultural use has been steadily decreasing, whereas . . . the additional acreage potentially required for export and local self-sufficiency crops would exceed the total acreage of prime and unique ALISH[193] lands.[194]

Responding to that state of affairs, the plan makes a series of recommendations. It first recommends an inventory of agricultural and aquacultural areas and ecological zones suitable for individual agricul-

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same time the functional plans are to be used as guidelines in the preparation of county plans, *id.* § 226-52(a)(4). There is apparently no answer to the question of which takes precedence. Callies, *supra* note 102, at 192.

189. HAWAII DEPARTMENT OF AGRICULTURE, STATE AGRICULTURAL PLAN (1982) [hereinafter STATE AGRICULTURAL PLAN].

190. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-49. In addition to pineapple and sugar cane, Hawaii produces macadamia nuts, other fruits, vegetables, flowers, coffee, and taro. Livestock and agricultural processing also are an important part of the agricultural economy. *Id.* at II-49 to -55.

191. This Article focuses only on those relating to the use of privately held land. The plan also urges the continued increase in the availability of public land for use by agricultural lessees. STATE AGRICULTURAL PLAN, *supra* note 189, at I-21; TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-106. As of June 1980, over 300,000 acres of public land were under lease. *Id.*

The plan also suggests expansion of the already existing agricultural park program. HAW. REV. STAT. §§ 171-111 to -118. STATE AGRICULTURAL PLAN, *supra* note 189, at I-21 to -22; TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-107 to -111. Agricultural parks attempt to take advantage of production and distribution economics by combining and concentrating activity in common locations. HAW. REV. STAT. § 171-113. Created jointly by the Departments of Agriculture and Land and Natural Resources, the parks contain lots that are leased to farmers; preference is given to new farmers and to those displaced from other locations. *Id.* § 171-114; STATE AGRICULTURAL PLAN, *supra* note 189, at I-21. As of 1982, eight such projects were in varying degrees of development. The Department of Agriculture is preparing an Action Plan for the extension of the program. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-111.

192. *See supra* text accompanying notes 168-70.

193. The plan recommends replacing the Land Study Bureau's "A" and "B" classification system with the new ALISH system. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-113.

194. *Id.* at II-116.

tural commodities.[195] Next, the plan responds to a concern that agricultural subdivisions provided for by the Act are, in fact, residential.[196]

The Land Use Law permits single-family dwellings in agricultural districts with prime land when they are "located on and used in connection with a farm or where agricultural activity provides income to" the occupants.[197] The problem is that the Act also gives counties the right to subdivide agricultural land, subject to a one-acre minimum lot size.[198] The first five-year review had warned that:

> One acre lots are not agricultural in emphasis, although agricultural practices may be conducted within the confines of such a small area. If Agriculture Districts are freely subdivided into one acre lots and used for residential purposes, then clearly the objective of preserving prime agricultural land will not be fulfilled and the term Agriculture District would be a misnomer. Furthermore, to permit extensive residential development at such low density is the surest way to devour Hawaii's landscape and aggravate, beyond repair, the land shortage problem.[199]

Because the average size of a farm devoted to diversified agriculture was 5.8 acres, the report urged the adoption of a five-acre minimum as an approximation of the minimum area in which any agricultural endeavor could function economically.[200]

The advice has not been heeded; some counties have permitted extensive one-acre agricultural subdivisions "which clearly violate the statutory intent. Residential dwellings are allowed in agricultural districts provided some minimal farming activity is associated with the residence, which in Hawaii may mean only the growing of fruit trees."[201] The

195. *See* STATE AGRICULTURAL PLAN, *supra* note 189, at I-19 to -20; TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-105.

196. The State Plan establishes as a priority the monitoring of agricultural subdivisions to ensure the presence of agricultural activity. *See supra* note 184.

197. HAW. REV. STAT. § 205-4.5(4).

198. *Id.* § 205-5(b).

199. ECKBO, *supra* note 87, at 80.

200. *Id.*

201. D. MANDELKER, *supra* note 148, at 281.

To the extent such dwellings, in Hawaii or elsewhere, are principal residences or second homes, they qualify for the mortgage interest deduction under federal tax law. 26 U.S.C. § 163 (1982 & Supp. III 1985). Such operations, however, do not necessarily provide their owners with the tax breaks accorded farmers. Taxpayers engaged in not-for-profit farming, commonly called hobby farming, can deduct expenses incurred only up to the amount of income realized from that activity. Treas. Reg. § 1.183-1(b) (1986). Thus, unless they are willing to make sufficient commitment and investment to run a for-profit operation able to experience tax losses, there is no farm-related tax reason to convert agricultural land.

Moreover, demonstrating that the farm is being operated for profit is not easy. In determining the taxpayer's intent, IRS examines such factors as the businesslike manner in which the farm is run, the expertise of the farmer or farm advisors, the time and effort expended, the taxpayer's success with other farming operations, the amount of occasional profits, the taxpayer's financial status and the amount of personal pleasure or recreational value he or she receives from farming. *Id.* § 1.183-2(b). Suburbanites who want a home in the country from which to commute to their city jobs—the group for whom much farmland has been con-

problem has been compounded further by LUC's approval of numerous low-density subdivisions pursuant to its special permit powers.[202]

The State Agricultural Plan responds to the subdivision problem by urging the adoption of zoning and subdivision regulations requiring 1) that agriculture be the predominant economic use on a subdivided lot, and 2) that before approving a subdivision, the county find that the proposed lot sizes constitute "economically feasible production units for the intended agricultural use."[203] In a similar vein, the plan suggests amendments expressly to permit agricultural cluster developments.[204]

Such proposals demonstrate that agricultural planners recognize that the protection of agricultural land is only one element in a comprehensive land use scheme. The plan acknowledges that growth will occur but seeks to ensure that it be compatible with agriculture.[205] To that end, the plan also attempts to transform LUC's increasingly permissive reclassification policies. It proposes to amend the state's constitution[206] to require, in essence, that

> important agricultural lands, once identified, shall not be reclassified or rezoned except under exceptional circumstances. Such circumstances would include (1) substantial injustice or inequity (i.e., when a small property owner would be denied development of a parcel for personal use or when no alternative site exists for a project with unique locational

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verted—are unlikely to be treated as bona fide for-profit farmers. The regulations provide that substantial income from other sources may indicate that the farm is not being operated for profit, especially when the "farmer" obtains substantial personal pleasure or recreation from the activity. *Id.* § 1.183-2(b)(8). In short, those able to realize tax advantages from farming are almost certain to be involved in substantial, active farming. That is not to say that some hobby farmers do not have operations just large enough to be considered for-profit, or that others do not take loss deductions to which they are not entitled. It is to say that tax rules regarding hobby farms achieve a result consistent with the farmland preservation movement, which aims to keep agricultural land in the hands of the agricultural community.

202. NATIONAL AGRICULTURAL LAND SUMMARY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS, 238 (1981) [hereinafter GUIDEBOOK].

203. STATE AGRICULTURAL PLAN, *supra* note 189, at I-22; TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at III-113.

204. One proposed amendment suggests that: "[a]n agricultural condominium, for example, could allow limited residential development in cluster configurations, . . . while having as its fundamental purpose the preservation and agricultural use of viable economic units . . . within the overall project." TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-114. These agricultural tracts could be established either as common areas to be managed by an owners' association, or as elements appurtenant to individual units, to be used and managed by their respective owners. The agricultural tracts would be rented to working farmers. *Id.*

205. The agricultural planners urge those drafting the other functional plans to reciprocate. For example, housing planners are urged to "[e]ncourage housing developments (1) on vacant or undeveloped Urban District lands, (2) in areas where water supply is sufficient for both agriculture and domestic uses, (3) in areas where adjacent agricultural and residential activities will be compatible, and (4) away from important agricultural lands to the maximum extent possible." *Id.* at II-119.

206. STATE AGRICULTURAL PLAN, *supra* note 189, at I-23 to -24; TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-118.

requirements); or (2) overriding public interest (i.e., when a facility is required at a certain location for the public health or safety, or when housing units committed to gap-group or low-income households are to be constructed).[207]

The measure attempts to alter LUC treatment of agricultural land. Instead of permitting "individual tracts to be developed if . . . ," the proposal would require that all important farmland "remain undeveloped unless. . . ." By emphasizing a presumption against development, the proposal is similar to provisions of the California and Oregon acts discussed later in this Article. Those acts, which provide ample opportunity for growth yet strictly limit the development of farmland, declare, in effect, that agricultural land is a natural resource, the protection of which is a value no less important than the enhancement of growth.

It may be argued that Hawaii already has made a similar dual commitment. The Land Use Law has evolved into a growth management scheme that makes adequate provision for growth and development. The State Land Use Plan attempts to encourage agriculture, and, like the 1978 constitutional amendment,[208] stresses the importance of protecting farmland. Enactment of the Agricultural Plan's reclassification proposal would connect the two policies logically.

E. Conclusion

Despite the pro-agriculture sentiments expressed in the State Land Use Plan, Hawaii does not as yet appear sufficiently committed to preserving farmland to impose on LUC the restrictions embodied in the Agricultural Plan's reclassification proposal. Although county governments are acting to preserve farmland, in some instances using devices suggested by the State Agricultural Plan,[209] the state legislature has refused to adopt the plan.[210] The functional plans prepared to implement the

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207. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-118. The important agricultural lands covered by the proposed amendment include, but are not limited to:

> Lands classified by the State according to the quality of soil as Agricultural Lands of Importance to the State of Hawaii (ALISH); [l]ands needed to provide the total acreage for the long-term economic viability of an agricultural operation; [l]ands needed to further the development of the agricultural economy of the State; [l]ands with available irrigation water, or with the potential for irrigation system development; [l]ands for which transportation services, other infrastructure, and labor for agriculture are accessible; and [l]ands which, though desirable for urban development, are not immediately needed for that purpose.

Id. at II-119. The planners believe those lands can be designated through a county/Department of Agriculture cooperative effort or through the use of SCS's LESA system. *Id.* For a description of LESA, see *supra* notes 26-27 and accompanying text.

208. *See supra* text accompanying note 175.

209. *E.g.*, agricultural performance standards, to ensure that agricultural-zone lots are nonresidential, and agricultural parks, *see supra* note 191. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-32 to -42.

210. Schwind Interview, *supra* note 95.

state plan were submitted to the legislature in 1980;[211] after two years of legislative inaction they were adopted as administrative documents by executive order.[212] In 1984, on their fourth submission to the legislature, ten of the twelve were approved; the agricultural and education plans were rejected.[213] For the agriculture plan, the stumbling block was the constitutional amendment proposing strict limits on reclassification.[214]

The defeat of the plan resulted primarily from concern about the future of the state's two major crops.[215] Despite increased productivity,[216] the two crops continue to decline in overall importance.[217] In three years, the number of acres devoted to sugar cane production plummeted from 220,700 in 1977[218] to only 97,400 in 1980.[219] While the number of acres in pineapple production did not drop nearly as sharply,[220] the decrease is smaller only because many pineapple plantations had been abandoned earlier.[221]

Hawaiian agriculture is not limited to sugar cane and pineapple production.[222] Nonetheless, the decline of these two principal crops is causing many Hawaiians to question the viability of agriculture in their state.[223] Maintaining a large constituency devoted to preserving agricultural land is difficult in such a pessimistic climate. Instead, there appears to be a growing consensus that government policies should encourage development that will create jobs. Pro-growth pressure from the major landowners who stand to reap greater profits from development than from agriculture reinforces that sentiment.[224]

Nonetheless, the legislature seems to recognize a valid need for plan-

211. *Id.*

212. D. MANDELKER, *supra* note 148, at 121 (Supp. 1982).

213. Schwind Interview, *supra* note 95.

214. *Id.; see supra* notes 206-07 and accompanying text.

215. Schwind Interview, *supra* note 95.

216. From 1970 to 1980 the average annual rate of production increased 7.5% for sugar cane and 0.4% for pineapple. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-61. Together the two crops accounted for 73% of the state's 1980 agricultural production. *Id.* at II-55.

217. Schwind Interview, *supra* note 95. Bosselman and Callies predicted the declining agricultural economy in 1971. *See supra* note 164 and accompanying text.

218. STATE OF HAWAII, *supra* note 166.

219. TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-49.

220. Pineapple acreage went from 47,000 to 43,000 acres during the same period. P. MYERS, *supra* note 74, at 54-55.

221. *See supra* note 166.

222. *See supra* note 190.

223. Schwind Interview, *supra* note 95.

224. While he acknowledges that the legislature is moving to protect farmland further, Paul Schwind, Chief Planner of the Hawaii Department of Agriculture's Office of Planning and Development believes, "If agricultural land gets in the way of development, it's going to go." *Id.*

ning to preserve farmland.[225] In 1983, as it rejected the functional plan for the third time, the legislature created a committee charged with preparing LESA-type legislation[226] to assist in identifying important agricultural land.[227] Some predict the establishment of a statewide LESA program, perhaps to be implemented by the counties.[228]

A LESA program would be an improvement over the current system in that it would provide LUC with the formal tradeoff criteria it now lacks.[229] Such a program also would comply with the 1978 constitutional amendment, which requires only that the legislature enact guidelines for reclassification.[230] Conceptually, however, enactment of a LESA scheme would represent a continuation of the "an individual tract may be developed if . . ." philosophy that has proven troublesome.

As discussion of the California and Oregon programs will demonstrate, it is possible for rapidly developing areas to create programs that both enhance growth and development and protect agricultural land effectively. Oregon's program has been a success, despite development-minded county commissioners who often ignore regulations, because it is premised on a philosophy that takes realistic account of both farmland protection and development. The system provides adequate space for growth yet declares that "farmland shall not be developed except in a manner consistent with the long-term viability of agriculture."

Hawaiians recognize, albeit separately, the importance of those same two values. While they appear to favor growth-oriented policies, they have made a simultaneous commitment to preserve agricultural land. Nevertheless, the Hawaii Land Use Act remains structurally biased against farmland protection. So long as LUC is free to rezone agricultural land at will, private forces favoring development will prove more compelling than agricultural protection, and the state's operative "values, goals, and assumptions" will remain development-oriented. If Hawaii is committed to preserving its agricultural land base, it will consider enacting legislation that realistically integrates farmland protection and growth enhancement.

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225. Paul Schwind believes the planning process got ahead of the political process, which then had to catch up. *Id.*

226. *See supra* text accompanying notes 26-27.

227. 1983 Haw. Sess. Laws ch. 273, § 72. The Act was not codified. HAW. REV. STAT. Tables of Disposition (Supp. 1984).

228. Schwind Interview, *supra* note 95.

229. *See supra* text accompanying notes 124-25. The Hawaii Department of Agriculture believes that one reason for the recent acceleration in reclassifications is the fact that LUC is permitted to exercise undue discretion because the Act gives "insufficient policy and procedural guidance." TECHNICAL REFERENCE DOCUMENT, *supra* note 168, at II-116.

230. *See supra* text accompanying note 175.

III
THE VERMONT LAND USE ACT

A. History

In contrast to the Hawaiian zoning scheme, Vermont controls development through a permit system; this system is administered at the regional level and overseen by a state agency. Unlike Hawaii, Vermont has rejected the concept of a state-wide plan. Hawaii, a state with a heritage of centralization, responded to increased development pressure with a state land use act; it is not surprising that individualistic Vermont did not react in the same way.

In the 1960's, Vermont saw its way of life threatened. Dairy farming, a mainstay of the economy, was becoming less profitable as new refrigeration methods reduced the demand for fresh milk in northeastern cities.[231] Between 1935 and 1964, the number of small farms decreased from 27,000, occupying 4 million acres, to 9,000, occupying 2.5 million acres.[232] By the early part of the 1960's, people outnumbered cows for the first time in the state's history, and by the end of the decade Vermont showed a fourteen percent population increase, the largest in over a century.[233] Moreover, the influx showed no signs of easing; a 1969 survey in the Wilmington-Dover area found seventy-three developers doing business, one for every twenty-five residents.[234]

Many new residents, former city dwellers with increased access to Vermont via new interstate highways, lived in second-home developments that were built on farmland and threatened to overwhelm community services.[235] Consistent with their tradition of Yankee independence, most towns lacked either zoning regulations or subdivision controls.[236] A 1968 law did authorize local governments to enact interim emergency zoning regulations, but the ill-equipped towns were simply no match for major developers.[237] The straw that threatened to break the camel's back was a proposal by a subsidiary of International Paper Company to develop 20,000 acres near Stratton in the southern part of the state. Construction was to occur on hilly slopes with thin soils inappropriate for the planned septic tanks.[238] Public outcry was so great that the governor

231. P. MYERS, SO GOES VERMONT 9 (1974).

232. *Id.* On the decline of Vermont agriculture, see generally Little, *Looking for Deane Hoisington,* AM. LAND FORUM, Fall 1986, at 25 (anecdotal, with some statistics); WOOD SMOKE PRODUCTIONS, VOICES OF VERMONT (1984) (oral history).

233. P. MYERS, *supra* note 231, at 9.

234. R. HEALY & J. ROSENBERG, *supra* note 40, at 41.

235. *Id.* at 41-43. One project, slated to be built near Wilmington, in southern Vermont, would have added 2,000 condominium units to a locality with an existing population of only 1,200. *Id.* at 41.

236. *Id.* at 43.

237. P. MYERS, *supra* note 231, at 10.

238. *Id.* at 10-11.

asked the company to abandon the project.[239]

Even though it was never built, the project became the catalyst for the appointment of a commission that made recommendations to the 1970 legislature. In substance, the commission's report became Act 250, Vermont's land use act.[240] Essentially a measure to control the effect of development on the environment and on governmental services,[241] the original Act did not contain specific provisions protecting farmland.[242] Act 250 did provide, however, that the Environmental Board, the overseeing agency, would prepare a series of three plans that, when approved by the legislature, would have the effect of law.[243]

The first plan, the Interim Land Capability Plan, adopted in 1972, was a general policy statement accompanied by maps showing areas that had physical limitations, were unique or fragile, or were well-suited to agricultural or forest use.[244] The second plan, the Land Capability and Development Plan adopted in 1973, was, in large measure, a series of

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239. *Id.*

240. *Id.* at 11-12. The Act is codified at VT. STAT. ANN. tit. 10, §§ 6001-6092 (1984 & Supp. 1986). For additional general discussion and consideration of nonagricultural aspects of the plan, see F. BOSSELMAN & D. CALLIES, *supra* note 34; F. POPPER, *supra* note 40, at 79-206; Eastman, *Vermont's Land Use and Development Law—Act 250—1983,* VT. B.J. & L. DIG., Oct. 1983, at 30; Heeter, *Almost Getting It Together in Vermont,* in D. MANDELKER, *supra* note 148, at 323; Levy, *Vermont's New Approach to Land Development,* 59 A.B.A. J. 1158 (1973); Simson & Bair, *Two Sides of a Pyramid,* PLANNING, May 1980, at 24; Note, *Vagueness and Overbreadth: The Constitutional Challenges to Vermont's Land Use Development Law (Act 250),* 5 VT. L. REV. 329 (1980); Note, *Leaving the Scene: Aesthetic Considerations in Act 250,* 4 VT. L. REV. 163 (1979); Note, *Party Status and Standing Under Vermont's Land Use and Development Law (Act 250),* 2 VT. L. REV. 163 (1977).

241. Act 250's uncodified statement of purpose reads in part:

> It is necessary to regulate and control the utilization and usages of lands and the environment to insure that, hereafter, the only usages which will be permitted are not unduly detrimental to the environment, will promote the general welfare through orderly growth and development and are suitable to the demands and needs of the people of this state;. . . .

Findings and Declaration of Intent, *reprinted following* VT. STAT. ANN. tit. 10, § 6001 (1984).

242. Like all but one state, Vermont permits farmland to be assessed at use value. VT. STAT. ANN. tit. 32, §§ 3751-3760 (1981 & Supp. 1986). As previously noted, such measures generally are ineffective as farmland protection devices. Duncan, *supra* note 13, at 83-88. Vermont also permits towns to enter into contracts that stabilize farm taxes. VT. STAT. ANN. tit. 24, § 2741 (1975 & Supp. 1984); *id.* tit. 32, § 3846 (1981 & Supp. 1986). Because towns are reluctant to give up revenues, R. HEALY & J. ROSENBERG, *supra* note 40, at 43, only twenty-eight towns had entered into such contracts as of 1980. Note, *The Effect of Act 250 on Prime Farmland in Vermont,* 6 VT. L. REV. 467, 468 n.6 (1981) [hereinafter Note, *Effect of Act 250*]. Finally, in a unique attempt to slow development by discouraging speculation, Vermont has enacted a capital gains tax on land held for fewer than six years. VT. STAT. ANN. tit. 32, §§ 10001-10010 (1981 & Supp. 1986). *See generally* Baker, *Controlling Land Uses and Prices by Using Special Gain Taxation to Intervene in the Land Market: The Vermont Experiment,* 4 ENVTL. AFF. 427 (1975); Note, *State Taxation—Use of Taxing Power to Achieve Environmental Goals: Vermont Taxes Gains Realized from the Sale or Exchange of Land Held Less Than Six Years,* 49 WASH. L. REV. 1159 (1974) [hereinafter Note, *State Taxation*].

243. VT. STAT. ANN. tit. 10, § 6041 (1984) (omitted as obsolete); *id.* § 6042; *id.* § 6043 (repealed 1983).

244. R. HEALY & J. ROSENBERG, *supra* note 40, at 59.

amendments both clarifying and expanding Act 250.[245] The agricultural criteria discussed below were part of those revisions.[246] The third plan, the State Land Use Plan, was presented to the legislature in 1974 and was soundly defeated.[247] That plan would have controlled development strictly by setting development densities for most of the state and by requiring local governments to formulate plans for the rest.[248] Watered-down versions of the plan were defeated again in 1975 and 1976, and the concept of a state plan has not been revived.[249]

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245. The uncodified statement of intent and the findings are set out following VT. STAT. ANN. tit. 10, § 6042 (1984).

246. The legislative findings most relevant to agriculture read as follows:

> (2) UTILIZATION OF NATURAL RESOURCES
>
> Products of the land and the stone and minerals under the land, as well as the beauty of our landscape are principal natural resources of the state. Preservation of the agricultural and forest productivity of the land, and the economic viability of agricultural units, conservation of the recreational opportunity afforded by the state's hills, forests, streams and lakes, wise use of the state's non-renewable earth and mineral reserves, and protection of the beauty of the landscape are matters of public good. Uses which threaten or significantly inhibit these resources should be permitted only when the public interest is clearly benefited thereby.
>
> . . . .
>
> (4) PLANNING FOR GROWTH
>
> (A) Strip development along highways and scattered residential development not related to community centers cause increased cost of government, congestion of highways, the loss of prime agricultural lands, overtaxing of town roads and services and economic or social decline in the traditional community center.
>
> (B) Provision should be made for the renovation of village and town centers for commercial and industrial development, where feasible, and location of residential and other development off the main highways near the village center on land which is other than primary agricultural soil.
>
> . . . .
>
> (16) PUBLIC FACILITIES OR SERVICES ADJOINING AGRICULTURAL OR FORESTRY LANDS
>
> The construction, expansion or provision of public facilities and services should not significantly reduce the resource value of adjoining agricultural or forestry lands unless there is no feasible and prudent alternative, and the facility or service has been planned to minimize its effect on the adjoining lands.

Id.

247. *See generally* R. HEALY & J. ROSENBERG, *supra* note 40, at 61-66.

248. Local plans would have been subject to state approval, and failure to act would have resulted in the state stepping in to do the planning. *Id.* at 63. Opposition to the plan was strongest in the largely undeveloped northeastern counties, the Northeast Kingdom. *See, e.g.*, McClaughry, *The New Feudalism*, 5 ENVTL. L. 675 (1975); McClaughry, *The Land Use Planning Act—An Idea We Can Do Without*, 3 ENVTL. AFF. 595 (1974). Yet Vermonters throughout the state would not stand for what amounted to statewide zoning, even though they continued to support Act 250. (The only amendment to Act 250 during the 1974 legislative session strengthened it slightly by closing a loophole involving subdivision into ten-acre or larger lots. The legislature also refused to repeal the 1973 land gains tax.) R. HEALY & J. ROSENBERG, *supra* note 40, at 65 n.80. Then-Governor Slamon stated:

> The plan was denounced as a Communist plot, a socialist plot, the work of "traitorous whoremasters," and the cause of nearly all Vermont's development and economic ills. It was blamed on New Jerseyites, this governor, former Gov. Deane Davis, the devil, state bureaucrats, planners, and a bevy of architects. Law and order during the hearing were maintained by the narrowest of margins.

Id. at 64.

249. R. HEALY & J. ROSENBERG, *supra* note 40, at 65.

The prevailing attitude in the legislature has been that responsibility for planning growth should remain at the local level;[250] communities have the authority to plan and to zone,[251] but they are not required to do so.[252] Thus, Vermont is the only state among the four reviewed in this Article that does not mandate local land use regulation. However, Act 250 requires that any community that has adopted a plan must conform development to it.[253]

B. Structure of the Act

In outlining the structure of Act 250's farmland protection provisions, a threshold issue is the determination of what development the Act covers. Although the Act's definition of development that requires a permit is extensive, those portions most relevant to farmland cover: (1) the construction of improvements for commercial or industrial purposes on a tract or tracts of more than ten acres or on a tract of more than one acre within a municipality that has not adopted permanent zoning and subdivision regulations; (2) housing projects, such as cooperatives and condominiums, with ten or more units; and (3) subdivisions of ten or more lots within a radius of five miles of any point on any lot, created within any continuous period of ten years.[254]

Believing that large-lot subdivisions posed no serious environmental problems, the Vermont Legislature initially exempted from the Act 250 process subdivisions with lots of ten acres or more.[255] That assumption proved to be wrong.[256] The exemption became a popular loophole, with roadside signs advertising ten-plus-acre lots for sale.[257] On most of these "spaghetti lots"—lots that have fifty to eighty feet of roadway frontage and extend back as many thousand feet as necessary to total ten-plus acres—houses have been built near the road while the elongated back portions of the lots remain undeveloped.[258] The size and shape of these lots make farming virtually impossible. To amass a farmable tract, the farmer would have to negotiate leases with a number of different own-

250. VERMONT ENVTL. BD., ACT 250: A PERFORMANCE EVALUATION 7 (1981).

251. VT. STAT. ANN. tit. 24, § 4321 (1975 & Supp. 1986).

252. "Of the 311 municipalities in the state, 221 have adopted land use plans, and of those, 179 have permanent zoning ordinances." Note, *Effect of Act 250, supra* note 242, at 497 n.168.

253. VT. STAT. ANN. tit. 10, § 6086(9) (1984).

254. *Id.* § 6001(3), (11), (19).

255. *Id.* § 6001(11), (19) (1973) (amended 1984).

256. VERMONT ENVTL. BD., *supra* note 250; Note, *Effect of Act 250, supra* note 242, at 501 n.184.

257. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 81; R. HEALY & J. ROSENBERG, *supra* note 40, at 48. These developments have had negative impacts on schools, town roads, scenic and natural areas, and water and energy supplies. VERMONT ENVTL. BD., *supra* note 250.

258. Telephone interview with Margaret Garland, Chairperson of the Vermont Environmental Board (July 20, 1984) [hereinafter Garland Interview].

ers.[259] Like the Hawaiian exemption for one-acre agricultural lots, which has facilitated the development of agricultural subdivisions that effectively have destroyed farmland,[260] Act 250's exemption for larger lots "contribut[ed] to the loss of productive agricultural and forest acreage."[261]

To the delight of the Vermont Environmental Board,[262] the 1984 legislature removed any mention of acreage from the definition of a lot.[263] Instead of turning on technicalities, Act 250's ability to protect farmland now depends on specific agricultural provisions and the willingness of administrators to enforce them.

The enforcement process requires that one who proposes a development that falls within the Act must obtain a permit from the appropriate District Environmental Commission.[264] In deciding whether to issue the permit, the three-member commission reviews each application for compliance with Act 250. The commission may hold public hearings at which interested parties may make presentations.[265] The commission may grant, deny, or impose conditions on permits; most are issued with conditions.[266] Nearly all cases are resolved by the district commissions,[267] but appeals may be taken to the Environmental Board, to the superior court, and ultimately to the Vermont Supreme Court.[268]

1. Applying Act 250

Vermont's Act 250 sets out relatively specific criteria that must be met before a permit to develop agricultural land will be granted.[269] The criteria focus on the land itself, the owner of the particular tract, and the impact the proposed development will have on the larger agricultural community. Act 250 would seem to be structured to protect farmland effectively. However, the Act has not been enforced consistently. Its ambiguities have been resolved to the detriment of farmland preservation. As a result, there is "general agreement that the Act has not been effective in deterring conversion of agricultural land to nonagricultural

259. *Id.*

260. *See supra* text accompanying notes 196-202.

261. VERMONT ENVTL. BD., *supra* note 250, at 15.

262. Garland Interview, *supra* note 258.

263. "Lot" now means "any undivided interest in land, whether freehold or leasehold, including but not limited to interests created by trusts, partnerships, corporations, cotenancies and contracts." VT. STAT. ANN. tit. 10, § 6001(11) (1984).

264. *Id.* §§ 6026, 6081.

265. *Id.* §§ 6084, 6085.

266. Note, *Effect of Act 250, supra* note 242, at 471.

267. Ninety-six percent are so resolved. GUIDEBOOK, *supra* note 202, at 226.

268. VT. STAT. ANN. tit. 10, § 6089 (1984 & Supp. 1986).

269. The Act stands in contrast to the Hawaii Land Use Act, which currently has no criteria to guide LUC in deciding whether to transfer agricultural land to the urban zone. *See supra* text accompanying note 125.

uses."[270]

To grant a permit, the commission must find that the proposed development satisfies numerous criteria, two of which apply to agricultural land. A proposal to develop or to subdivide primary agricultural soils[271] will be approved only if it can be shown that (1) the proposed project will not degrade significantly the agricultural potential of the soils or, if it does, that (2) the applicant only can realize a reasonable return on the land by developing it; he or she does not own other land suited to the proposed purpose; the project has been designed to minimize the amount of farmland that will be converted; and the project will not interfere significantly with the continuation of agricultural activities on adjoining lands.[272] Similar rules govern the development of secondary agricultural soils.[273] The application of these criteria shows that while farmland protection efforts have had some success up to this point, the system's design hampers its overall effectiveness.

At the outset, the District Environmental Commission must determine whether the land involved contains agricultural soils;[274] unless that question is answered affirmatively, the subcriteria are inapplicable. Some commissioners have demonstrated a lack of commitment to the protection of farmland by simply deciding that a site is inappropriate for farming, and then for a variety of statutorily extraneous reasons, concluding that soils are not agricultural.[275]

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270. VT. ENVTL. BD., *supra* note 250, at 15.

271. Primary agricultural soils are:

> soils which have a potential for growing food and forage crops, are sufficiently well drained to allow sowing and harvesting with mechanized equipment, are well supplied with plant nutrients or highly responsive to the use of fertilizer, and have few limitations for cultivation or limitations which may be easily overcome. In order to qualify as primary agricultural soils, the average slope of the land containing such soils does not exceed 15 percent, and such land is of a size capable of supporting or contributing to an economic agricultural operation. If a tract of land includes other than primary agricultural soils, only the primary agricultural soils shall be affected by criteria relating specifically to such soils.

VT. STAT. ANN. tit. 10, § 6001(15) (1984).

272. The precatory language of the section reads:

> A permit will be granted for the development or subdivision of primary agricultural soils only when it is demonstrated by the applicant that, in addition to all other applicable criteria, either, the subdivision or development will not significantly reduce the agricultural potential of the primary agricultural soils; or, [the applicant meets the four subcriteria].

Id. § 6086(a)(9)(B).

273. *Id.* § 6086(a)(9)(C).

274. *Id.* § 6086(a)(9)(B). The Act's agricultural provisions played a de minimis role in decisions until relatively recently. As of March 1, 1977, district commissions had discussed agricultural land in only eight cases. GUIDEBOOK, *supra* note 202, at 226. The Environmental Board's first denial of an application for failure to satisfy the criteria did not occur until 1978. *In re* Davison, No. 5L0444-EB (Vt. Envtl. Bd., July 28, 1978). However, during the six-month period ending in November 1978, approximately 10% of decisions (19 of 180) rendered by the district commissions discussed primary or secondary agricultural soils, and the percentage apparently has increased since then. GUIDEBOOK, *supra* note 202, at 227-28.

275. Note, *Effect of Act 250, supra* note 242, at 475-76. For example, a permit for seventy

Such decisions ignore the fact that the Environmental Board has set out the proper analytical framework for agricultural cases. In *In re Davison,*[276] the applicant contended that the soils in question were not primarily agricultural because the land was not very productive, was surrounded by recreational development, and was too valuable to support profitable farming. The Board held that the commission first must decide whether the site contains agricultural soils as defined in Act 250, including whether it is capable of "supporting or contributing to an agricultural operation."[277] If agricultural soils are involved, the commission then must find that the development "will not significantly reduce the agricultural potential of" the soils.[278] If it will, then the applicant must satisfy the four additional subcriteria. The *Davison* decision establishes that factors such as the character of the area or the profitability of farming relative to alternative uses of land are not relevant to the threshold question of whether the soils in question are agricultural.[279]

Commissioners who disregard the *Davison* mandate not only allow the conversion of valuable agricultural land,[280] but they also stand the statutory process on its head. A finding that the soils are not agricultural means that the applicant never has to satisfy the statutory subcriteria. Consequently, the hard questions embodied in the Act never are addressed.[281]

We can speculate about why some commissioners act in this manner. In an area like Vermont, where farmers are in financial difficulty,[282] decisionmakers probably are influenced by the economic injury that may be suffered by a landowner who is not permitted to sell his land. At the same time, officials are keenly aware that Vermont is a poor state[283] that

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condominiums on twenty-seven acres, presumably containing agricultural soils, was issued because:

> [T]here are no adjacent operating farms. The location in a commercially and residentially developed area, the relatively small portion of the site which could be suitable for agriculture, and ownership patterns are not conducive to a viable commercial agricultural operation in the vicinity; therefore, we find that the soils on the project are not primary or secondary agricultural . . . soils.

Note, *Effect of Act 250, supra* note 242, at 477 n.64.

276. No. 5L0444-EB (Vt. Envtl. Bd., July 28, 1978).

277. VT. STAT. ANN. § 6001(15). This aspect of the case is discussed in Note, *Effect of Act 250, supra* note 242, at 476.

278. VT. STAT. ANN. § 6086(a)(9)(B).

279. Note, *Effect of Act 250, supra* note 242, at 476.

280. *Id.* at 477. The student author, Kaplan, notes that one unfamiliar with Chittenden County would conclude incorrectly from District Commission No. 4 decisions that there was little farmland in the district. *Id.* at 477 n.65.

281. For example, in the case noted *supra* note 275, the applicant avoided having to show that he owned no nonagricultural land suited to the development.

282. *See supra* text accompanying notes 231-32.

283. In 1984, Vermont ranked 38th among the states in average personal income. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S.: 1986, at 440 (106th ed. 1986).

needs an expanded tax base and that a decision to deny development works against such expansion. Act 250's farmland protection provisions thus are seen as running against the grain. Accordingly, some commissioners may make pro-development decisions without regard to their legality.

Such actions are not to be condoned. Nevertheless, it must be acknowledged that their underlying economic "values, goals, and assumptions" no doubt are widespread; they also are understandable. In addition to influencing individual decisionmakers, those assumptions may have influenced the structure of Act 250's agricultural land provisions. By legislating to protect farmland, Vermont seems to have chosen to go against the grain, but, as the following discussion will demonstrate, the standards established to accomplish that goal are too susceptible to pro-development interpretations.

2. *Satisfying the Subcriteria*

Act 250 provides that once it has been determined that land is agricultural and that the proposed development will reduce its agricultural potential, a permit will be granted only if four subcriteria are met. The first two subcriteria focus on the landowner.

First, the applicant must demonstrate that he or she can realize a reasonable return on the fair market value of the land only by developing it.[284] The inclusion of this provision was a political compromise designed to allow farmers to sell off small tracts to raise needed cash.[285] In practice the provision generally has supported developers. When a developer buys land and pays an inflated price for its favorable location, the purchase price is, arguably, the fair market value.[286] Consequently, the developer can successfully contend that a reasonable return can only be realized by developing the property. This contention technically satisfies the first subcriterion but renders it meaningless for the protection of farmland.[287]

At least one district commission has recognized this paradox. In denying a permit to develop an industrial park, the Second District Commission in *In re Windsor Improvement Corporation Industrial Park*[288] accepted, arguendo, the applicant's purchase price (roughly $2,000 per acre) as the fair market value. It determined, however, that that amount was only an expectation value—that is, the price paid for the express

284. VT. STAT. ANN. tit. 10, § 6086(a)(9)(B)(i).

285. Note, *Effect of Act 250, supra* note 242, at 478.

286. For discussion of the difference between use value and development value, see generally Duncan, *supra* note 13, at 73-75.

287. Note, *Effect of Act 250, supra* note 242, at 479.

288. No. 250455 (Dist. Envtl. Comm'n No. 2 Aug. 11, 1980), *cited in* Note, *Effect of Act 250, supra* note 242, at 480.

purpose of building an industrial park. The commission's interpretation ultimately was disregarded. In overturning the commission's denial of the permit, the superior court not only failed to note the problem, but also accepted as the fair market value the appreciated value of $2,700 per acre.[289]

The court's construction is at odds with the position taken by the Environmental Board. Drawing on constitutional takings principles, the Board has made clear that the mere fact that land is more valuable for nonagricultural than for agricultural purposes does not mean a permit must issue. Rather, "[t]he subcriterion is satisfied only when the applicant is unable to realize a reasonable return on fair market value of his land in agricultural use."[290] Strict observance of that standard no doubt would solve the problem.[291]

Effectively piercing the transactional veil also would allow meaningful enforcement of the second of the two owner-focused subcriteria. Section 6086(a)(9)(B)(ii) provides that a permit will not be issued if the applicant owns nonagricultural or secondary agricultural lands that would be reasonably suited to the project.[292] So far that provision has presented only a minor problem, but one that if left unchecked could provide a loophole for major developers.

For example, in a 1981 case[293] five co-owners of a tract, three of whom were principals in a real estate company, purportedly conveyed the land to a holding company, when in actuality the deed never was recorded. When application for a development permit was made by a firm whose option derived from the holding company, the three real estate company directors were the owners of record. Because the commission ruled that the development would not reduce significantly the agricultural potential of primary agricultural soils,[294] the commission was not required to address this subcriterion nor to rule on a neighbor's motion to join the owners of record as co-applicants. This case demonstrates the possibility that persons with large holdings could transfer title to a holding company, that, because it owned no other property, would

289. *In re* Windsor Improvement Corp., No. 523-80-WRM (Windsor Super. Ct. Jan. 25, 1983).

290. *In re* La Brecque, No. 660217-EB (Vt. Envtl. Bd. Nov. 17, 1980), *cited in* Note, *Effect of Act 250, supra* note 242, at 481-82.

291. Kaplan, author of the most comprehensive commentary on Vermont's farmland protection effort, urges that the Act be construed to mean that an applicant's inability to realize a reasonable return on undeveloped land should be disregarded when he or she bought the land with the intent of developing or subdividing it. *See* Note, *Effect of Act 250, supra* note 242, at 482. Her proposal is taken from an argument put forth in a 1977 case, *In re* John A. Russell Corp., No. 1R0257-EB (Vt. Envtl. Bd. Aug. 31, 1977).

292. VT. STAT. ANN. tit. 10, § 6086(a)(9)(B)(ii).

293. *In re* Mitel Semiconductor, No. 4CO473 (Dist. Envtl. Comm'n June 19, 1981), *discussed and criticized in* Note, *Effect of Act 250, supra* note 242, at 483-85.

294. *See supra* text accompanying note 272.

be protected inadvertently by the subcriterion. Such attempts to sidestep the guideline's purpose dilute the Act's effectiveness; the alternative site guideline should be applied with true ownership in mind.

The limited success of the Vermont Act is attributable primarily to the third subcriterion, which requires that development be planned to consume the minimum amount of farmland.[295] For example, one development, which was to occur on a 511-acre tract, received approval after it was designed to carve the proposed 82 parcels out of only 101 acres, leaving 410 acres of open space that could be leased for agricultural purposes.[296] Other development has been allowed on a portion of land on the condition that the remainder be developed only with commission approval.[297] In another case, an applicant was persuaded to redesign his campground so that all permanent structures would be built on the tract's less productive soils. Locating the campsites themselves on the most productive soil allowed temporary use but avoided permanent development.[298]

Some developers have used conventional private land use control devices to comply with section 6086(a)(9)(B)(iii). One project included covenants requiring that open lands continue to be used for hay production.[299] Another created an agricultural landowners' association, with agricultural and forest lands managed for the mutual benefit of the members.[300]

Such techniques are aimed at mitigating the adverse effects of development and are meaningful attempts to balance the preservation of farmland and development. Nevertheless, by definition, such devices are used only after the decision to develop has been made. Thus, to protect farmland more effectively, it is also necessary to ask whether there might be a less adverse impact on the overall agricultural community if the project were diverted to another site.

District commissions have failed to address that question in a meaningful way. This failure is manifested primarily in the narrow interpretation given the last subcriterion, section 6086(a)(9)(B)(iv), which mandates that permitting authorities evaluate a proposal's effect on the broader agricultural community.[301] Protecting farmland in the broader

295. The third subcriterion reads: "(iii) the subdivision or development has been planned to minimize the reduction of agricultural potential by providing for reasonable population densities, reasonable rates of growth, and the use of cluster planning and new community planning designed to economize on the cost of roads, utilities and land usage . . . ." VT. STAT. ANN. tit. 10, § 6086(a)(9)(B)(iii).

296. GUIDEBOOK, *supra* note 202, at 227.

297. Note, *Effect of Act 250, supra* note 242, at 488.

298. GUIDEBOOK, *supra* note 202, at 227; Note, *Effect of Act 250, supra* note 242, at 487.

299. Note, *Effect of Act 250, supra* note 242, at 488.

300. *Id.*

301. The fourth subcriterion reads as follows: "(iv) the development or subdivision will not significantly interfere with or jeopardize the continuation of agriculture or forestry on

context requires that regulators not only understand the structure of Vermont agriculture but also possess a commitment to its continued viability, not on this or that tract but in the community as a whole. The interpretation given section 6086(a)(9)(B)(iv) causes one to question whether such understanding and commitment exist.

That criterion requires the applicant to demonstrate that the proposed development will not endanger the continuation of or the potential for agriculture on "adjoining lands."[302] The guideline's potency depends on the interpretation of "adjoining lands." On its face, the term can be construed as meaning contiguous or abutting; district commissions generally give this interpretation.[303]

Such an interpretation, however, is inconsistent with the goal of farmland preservation, given the patchwork structure of many farms in Vermont. Many of the state's farmers rent additional land that is not contiguous to their home farms. Loss of noncontiguous tracts can affect farmers just as severely as loss of home farms.[304] More importantly, because Vermont agriculture in general is in financial trouble,[305] the loss of even a single farming operation can drop a community below the critical mass of eleven to fifteen[306] farms needed to maintain farm support businesses.[307]

Given the scattered, small-tract nature of Vermont agriculture, its economic viability can be preserved only by looking beyond contiguous land.[308] The Act encompasses primary agricultural soils on land "capable of . . . contributing to an economic agricultural operation."[309] This language recognizes the nature of Vermont agriculture, and the Environmental Board has construed it accordingly. "[F]ew, if any, agricultural operations in this state rely solely upon contiguous parcels for their land base. Therefore, the Board believes it is not necessary for the soils to *support* an economic agriculture operation on a given site in order to meet the definition" of an agricultural operation.[310]

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adjoining lands or reduce their agricultural or forestry potential." VT. STAT. ANN. tit. 10, § 6086(a)(9)(B)(iv).

302. *Id.*

303. *See* Note, *Effect of Act 250, supra* note 242, at 491 n.135 (and cases cited therein).

304. *Id.* at 491.

305. *See supra* text accompanying notes 231-32.

306. Note, *Effect of Act 250, supra* note 242, at 492 n.142.

307. One example of such a support business is equipment dealerships. *See generally* Duncan, *supra* note 13, at 76.

308. *See* Memorandum of Law by Ottauquechee Natural Resources Conservation District (ONRCD), *In re* Windsor Improvement Corp. Indus. Park, No. 250455 (Dist. Envtl. Comm'n No. 2 Aug. 11, 1980), *quoted in* Note, *Effect of Act 250, supra* note 242, at 493. Moreover, unless the provision is interpreted more broadly, a developer simply could deed abutting portions of land to nonfarmers, thus eliminating adjoining farmland. *Id.*

309. VT. STAT. ANN. tit. 10, § 6001(15).

310. Spear Street Assoc., No. 4C0489-1-EB (Vt. Envtl. Bd. Oct. 26, 1982).

Construing "adjoining" to mean merely contiguous puts the definition of "agricultural operation" and the definition of "adjoining" in conflict. In determining if the land could support gainful agriculture, a commission would be required to look beyond the site, but would be precluded from doing so when determining the impact of a proposed development. The principle of *in pari materia* argues against this limited interpretation.

The Second District Commission rejected the narrow interpretation of section 6086(a)(9)(B)(iv) in *In re Windsor Corporation*.[311] In that case the applicant argued that adjoining meant physically touching, even though there was substantial evidence that construction of the proposed industrial park on forty-four acres of primary agricultural soil, in the middle of a 160-acre tract farmed a year earlier, would undermine farming in the area.[312] The commission disagreed, declaring that "due to the nature of Vermont farming operations (a home with rented supplemental land usually at some distance from the home farm) it is unreasonable to limit impacts on agricultural potential to lands physically touching the property of any particular project."[313]

The superior court overruled the commission, stating, without analysis, "[t]he applicant contends that the word 'adjoining' as used in criterion (9)(B)(iv) means touching and abutting the land of the Applicant. We so conclude."[314] Applying its standard, the court found that the construction of industrial parks in Vermont had not led to the development of adjoining lands; it did not anticipate a different scenario for the case at hand.[315] The court did not ignore all possible effects on nearby farmland, however. Seeming to ignore its own holding, the court found that the development would have no impact on a dairy farm some three and one-half miles away.[316] Moreover, the court affirmatively protected nearby farmland: It conditioned the grant of the permit on the execution of covenants prohibiting the extension of sewer and water lines off the site.[317]

Although the *Windsor* decision sends mixed signals, the court's con-

311. No. 250455 (Dist. Envtl. Comm'n No. 2 Aug. 11, 1980). *See supra* text accompanying notes 288-89. This aspect of the case is discussed in Note, *Effect of Act 250, supra* note 242, at 492-94.

312. For example, ten parcels immediately to the north were removed from the farm-property market because of the proposal. The development also endangered sixteen other farms, partly because its sewer and water systems would serve as growth magnets. Note, *Effect of Act 250, supra* note 242. For general background on the growth management issue see Duncan, *supra* note 13, at 75-76.

313. Note, *Effect of Act 250, supra* note 242, at 493-94.

314. *In re* Windsor Improvement Corp., No. 523-80-WRM, slip op. at 13 (Windsor Super. Ct. Jan. 25, 1983).

315. *Id.* at 9.

316. *Id.* at 10.

317. *Id.* at 14.

clusion that adjoining means touching is evidence of Act 250's ambiguity and its failure to reflect adequately the distinctiveness of Vermont agriculture. While development proposals must be considered one by one, their impact cannot be evaluated in a vacuum. Although one can argue that Act 250 was not meant to be narrowly construed,[318] it should be amended to make the broader, more protective interpretation mandatory.[319]

C. *Evaluation: Does Act 250 Protect Farmland?*

Vermont's Act 250 fails to protect farmland because it does not balance long-term preservation with short-term development. Even though Act 250 contains specific trade-off criteria, the lack of which impairs the Hawaii Land Use Act, the criteria are ambiguous and, thus, have done little to protect agricultural land. Furthermore, the amount of farmland protected might not increase dramatically even if the ambiguities were removed. The Act still would represent the "land may be developed if . . ." philosophy, which is inconsistent with effective farmland preservation.

Act 250's agricultural subcriteria are sensitive to landowners' needs, making them the primary focus. The first two guidelines—which provide that to obtain a development permit a landowner must show that he or she cannot make a reasonable agricultural return on the land and that he or she owns no nonagricultural or secondary agricultural lands suitable for the proposed project—set the stage for a double-barrelled, short-term analysis that promotes the development of farmland.

In Vermont's depressed economy, decisionmakers will be reluctant to deprive farmers of opportunities to profit from the sale of land. Decisionmakers also will want to facilitate the economic growth and expanded tax base that come from development. Accordingly, they often will lose sight of the long-term health of the agricultural community and

318. *See supra* text accompanying notes 308-10.

319. If adjoining lands were defined broadly, the relevant area would differ from locale to locale. However, one of the reasons for employing district commissions is their familiarity with local conditions. The various commissions should be able to devise common sense approaches. Note, *Effect of Act 250, supra* note 242, at 495. In essentially farming communities, a single development is unlikely to harm drastically the agricultural economy. The more developed the community, the more likely it is that the farm economy will be precarious, and agricultural tracts will be less numerous and more scattered. Accordingly, a larger area would need to be considered.

Better still, if local governments were encouraged, or indeed required, to plan for the protection of farmland, district commissions would be bound by those plans. Development in communities that have adopted a plan is required to be in conformance therewith. *See supra* note 253 and accompanying text. Because local land use regulation currently is permissive, not all towns have plans or zoning ordinances, *id.;* even in those that do, the plans often are "too general or vague to be considered." VT. ENVTL. BD., *supra* note 250, at 7; Note, *Effect of Act 250, supra* note 242, at 497.

allow farmland to be converted to nonagricultural uses by insisting on a narrow interpretation of the adjoining-land criterion. It is only after they authorize a project that officials focus on the need to protect the farmland base by invoking the standard that requires adverse impacts to be minimized. Therefore, while the frequency with which the standard is invoked makes it "the most effective of the four subcriteria,"[320] its very success highlights the failure of the other subcriteria and the overall program.

More successful programs illustrate that it is difficult to prevent local administrators from ignoring state guidelines when faced by farmers in tough economic straits.[321] Even if Vermont were to alter the balance that Act 250 strikes between development and farmland protection, district commissioners might continue to favor development by deciding that land is nonagricultural and thus exempt from the Act. Nonetheless, the impact of such recalcitrance on the long-term preservation of farmland can be reduced. Oregon's program, for example, has prevented large-scale conversion by requiring development-minded administrators to work within a structure that, having made ample provision for growth and development, declares that farmland shall not be developed except in a manner consistent with long-term viability of agriculture.[322]

As construed, Act 250's farmland protection provisions are development-oriented. Given Vermont's serious economic troubles, its controlling "values, goals, and assumptions" may well be growth-oriented, and its legislation may reflect a judgment that protecting farmland is not as important as facilitating growth. If, on the other hand, the provisions represent a decision to protect farmland, even though doing so runs against an essentially development-oriented economic grain,[323] then Act 250 needs to be amended. Vermont needs to reject a system that encourages the conversion of farmland and move toward one that protects the agricultural community by harmonizing development and farmland preservation.

IV

THE CALIFORNIA COASTAL ACT

A. History

The first legislation recognizing the need to conserve the California

320. Note, *Effect of Act 250, supra* note 242, at 485.

321. *See infra* text accompanying notes 532-62.

322. *See infra* note 508.

323. Vermont may choose to protect farmland for reasons that go beyond its productivity. Kaplan reminds decisionmakers that much of the State's economy is dependent on tourism and recreation based in part on Vermont's rural character. Thus, the development of large amounts of farmland may be self-defeating. Note, *Effect of Act 250, supra* note 242, at 499.

coast was enacted in 1931.[324] However, it was not until the 1960's, when oceanfront development began to threaten the beauty of California's coast and access to its beaches,[325] that Californians seriously considered controlling development along the state's 1,000-mile-plus coastline.[326]

Coastal development also threatened agricultural activity, the largest single land use in coastal counties.[327] Coastal county farms contributed nearly $0.5 billion to the state's economy in 1980,[328] and of the 1.3 million acres in the now-protected coastal zone, one-third (440,000 acres) are agricultural.[329] In 1980, farmers produced $205 million worth of flowers, $54 million worth of strawberries, $20 million worth of artichokes, $15 million worth of brussels sprouts, $10 million worth of lemons, and $90 million worth of assorted vegetables on the 90,000 acres of prime agricultural land in the coastal zone.[330] In the same year, ranchers

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324. REPORT TO THE ASSEMBLY JOINT LEGISLATIVE COMM. ON SEACOAST CONSERVATION, Cal. Assembly J., 48th Sess. 461-62 (1931), *cited in* Adams, *Proposition 20—A Citizens Campaign,* 24 SYRACUSE L. REV. 1019, 1020 (1973). The legislature appropriated $5,000 to study coastline conservation. *Id.*

325. The question of beach access figured prominently in advertisements that appeared in the campaign to approve Proposition 20. PROTECTING THE GOLDEN SHORE 13 (R. Healy ed. 1978). CAL. CONST. art. X, § 4 declares that all tidelands—lands between mean high and low tides—are in the public domain and subject to the public's right to use them. *See* Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). Many recreational beaches are on tidelands. Submerged lands—those three miles seaward of the mean high tide line—are also subject to the public trust doctrine. Eikel & Williams, *The Public Trust Doctrine and the California Coastline,* 6 URB. LAW 519, 526 (1974); Comment, *Public Access and the California Coastal Commission: A Question of Overloading,* 21 SANTA CLARA L. REV. 395, 404 (1981).

326. Concern first focused on San Francisco Bay, which infilling had reduced by 240 square miles. F. BOSSELMAN & D. CALLIES, *supra* note 34, at 108. Responding both to fears that the bay ultimately might become little more than a ship channel, and to the reality that the public had access to fewer than ten miles of its 276-mile shoreline, the 1965 legislature created the San Francisco Bay Conservation and Development Commission (BCDC). Act of July 13, 1965, 1965 Cal. Stat. 2940 (codified at CAL. GOV'T CODE §§ 66600-66661 (Deering 1979 & Supp. 1987)); *see* F. BOSSELMAN & D. CALLIES, *supra* note 34, at 108-35. The commission wrote a plan for controlling future development of the bay. The 1969 legislature enacted the plan and granted the now-permanent commission the power to enforce it by requiring that anyone wishing to develop in the bay or along its shoreline first obtain a BCDC permit. Act of Aug. 7, 1969, 1969 Cal. Stat. 1395 (codified at CAL. GOV'T CODE §§ 66600-66661 (Deering 1979 & Supp. 1987)).

For general background on California coastal regulation, see R. HEALY & J. ROSENBERG, *supra* note 40, at 80-125; PROTECTING THE GOLDEN SHORE, *supra* note 325; P. SABATIER & D. MAZMANIAN, CAN REGULATION WORK? THE IMPLEMENTATION OF THE 1972 COASTAL INITIATIVE (1979); Adams, *supra* note 324; Finnell, *Coastal Land Management in California, 1978,* AM. B. FOUND. RESEARCH J. 647 (1978).

327. Liebster & Scott, *Agriculture on the Coast,* 6 COASTAL NEWS 2 (Jan.-Feb. 1983). In 1975, 3.5 million acres in coastal counties were devoted to agriculture, GUIDEBOOK, *supra* note 202, at 230, and agricultural activity within five miles of the coast employed 350,000 people, Douglas & Petrillo, *California's Coast: The Struggle Today—A Plan for Tomorrow,* 4 FLA. ST. U.L. REV. 177, 220-21 (1976).

328. Liebster & Scott, *supra* note 327, at 2.

329. Interview with Mark Wheatley, California Coastal Commission (Feb. 3, 1987) [hereinafter Wheatley Interview].

330. Liebster & Scott, *supra* note 327, at 2.

and dairy farmers produced over $100 million worth of beef and dairy products on the 350,000 acres of nonprime farmland in the zone.[331] Despite the land's value for agricultural purposes, one out of every twelve acres of coastal county farmland was converted to other uses during the 1960's.[332] Those losses generated sufficient concern for the long-term viability of coastal agriculture that protection of farmland also played a role—albeit a supporting one—in the coastal land use program that emerged.

The 1970 legislature considered several proposals to regulate the coastline to preserve valuable coastal resources, including agricultural land, but the proposals all were defeated.[333] In response, conservationists formed the California Coastal Alliance and drafted a coastal regulatory scheme that became known as Proposition 20.[334] Following the defeat of all coastal legislation by the 1971 legislature,[335] the Alliance obtained the signatures necessary to put the proposal before California voters.[336] An expensive and hard-fought campaign resulted in approval of Proposition 20 by 55.1% of the voters in 1972.[337]

The California Coastal Zone Conservation Act of 1972,[338] enacted by Proposition 20, provided for six regional commissions and the statewide California Coastal Zone Conservation Commission.[339] The commissions had two functions. First, each of the regional bodies, after consultation with affected cities and towns and after public hearings, drafted a long-term plan for balanced utilization and preservation of its section of the coastal zone, which was defined as an area extending up to five miles inland.[340] Each plan addressed a variety of specific issues, in-

331. *Id.*

332. Douglas & Petrillo, *supra* note 327, at 220-21. The greatest conversion occurred in Southern California where, for example, during the period from 1960 to 1970, development incident to the doubling of Orange County's population (from 719,500 to 1,432,900) destroyed large areas of citrus groves and ranches. P. SABATIER & D. MAZMANIAN, *supra* note 326, at II-4.

333. Adams, *supra* note 324, at 1023-24; *see* R. HEALY & J. ROSENBERG, *supra* note 40, at 85; Finnell, *supra* note 326, at 653.

334. Adams, *supra* note 324, at 1024-29.

335. *Id.* at 1029-32.

336. *Id.* at 1032-36; Finnell, *supra* note 326, at 654. California's constitution permits voters to enact legislation by initiative and referendum. CAL. CONST. art. II, §§ 8-9.

337. Adams, *supra* note 324, at 1036-42; Finnell, *supra* note 326, at 654.

338. CAL. PUB. RES. CODE §§ 27000-27650 (Deering 1976). The entire 1972 Act was automatically repealed in 1977, *id.* § 27650, and replaced by the California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30000-30900 (Deering Supp. 1987). For simplicity of citation, individual references to the 1972 Act will not repeatedly indicate repeal and reenactment.

339. CAL. PUB. RES. CODE §§ 27200-27201 (Deering 1976).

340. The coastal zone consisted of land and water from the state's seaward jurisdictional boundary inland to the highest elevation of the nearest coastal mountain range. In the three southernmost counties, the zone extended inland to the highest elevation of the nearest coastal range or five miles from the mean high tide line, whichever was shorter. *Id.* § 27100.

cluding population density, transportation, recreation, and land uses.[341] The regional plans then were submitted to the state commission that was charged with preparing the California Coastal Zone Conservation Plan for presentation to the 1976 legislature. The key recommendations of the plan were adopted by the legislature in the form of the California Coastal Act of 1976.[342]

The second function of the regional commissions was to act as interim permit-granting authorities for development within their sections of the permit area of the coast, the narrow strip extending inland 1,000 yards from the seaward boundary of the state.[343] Virtually any development activity, including major improvements to existing dwellings,[344] required a permit from the regional commission after local approval had been obtained.[345] The permit could be granted only if the activity (1) would not have a "substantial adverse environmental or ecological effect,"[346] (2) would be consistent with the "maintenance of the overall quality of the coastal zone environment,"[347] and (3) would avoid the "irreversible and irretrievable commitment of coastal zone resources."[348] Proposals adversely affecting certain resources, including agricultural land, required approval by a two-thirds majority of a full regional commission.[349] Appeals by applicants or persons aggrieved by the grant or denial of permits could be taken to the state commission and, ultimately, to the courts.[350]

The Proposition 20 permit process controlled land use decisions during the four years before the Coastal Act of 1976 became effective. During the period from 1973 to 1975, 97% of the 24,825 permit applications were granted.[351] While that figure would seem to suggest that the regional commissions were not protecting coastal resources, it appears that the overwhelming majority of projects had only a minor impact on coastal resources.[352] Moreover, the figure includes cases in which the

341. *Id.* § 27304.
342. *Id.* §§ 30000-30900 (Deering Supp. 1987).
343. *Id.* § 27103 (Deering 1976).
344. *Id.* § 27405.
345. *Id.* § 27400.
346. *Id.* § 27402.
347. *Id.*
348. *Id.* § 27302(d).
349. *Id.* § 27401.
350. *Id.* §§ 27423, 27424.
351. GUIDEBOOK, *supra* note 202, at 229; Sabatier, *State Review of Local Land-Use Decisions: The California Coastal Commissions,* 3 COASTAL ZONE MGMT. J. 255, 259 (1977).
352. P. SABATIER & D. MAZMANIAN, *supra* note 326, at V-8 to -11; Sabatier, *supra* note 351. Virtually no data have been compiled with respect to how regional commissions treated proposals affecting agricultural land or any other particular resource. Descriptions of a few individual cases may be found in the sources cited *supra* note 326. One article on beach access does exist. Crandall, *Shoreline Development Controls and Public Access to the Ocean's Edge,* 1 COASTAL ZONE MGMT. J. 451 (1974).

commissions granted permits only after adding conditions.[353] Finally, many developers may have abandoned projects for which they believed permits would not be granted.[354] There is a consensus among program proponents that, on the whole, the regional commissions carried out Proposition 20's mandate.[355]

Data on the actions of the state commission, while sparse, give a much clearer picture of how various coastal resources fared during the Proposition 20 years. A study of a random sample of cases appealed to the state commission from February 1973 to June 1975 found that, of the permit applications affecting agricultural land or open land, the state commission approved 6% as submitted, added conditions to 41%, and denied 53%.[356] The first two figures fall only in the middle range of the eleven Proposition 20 factors analyzed by the study.[357] However, protection of agricultural and open land was the fourth most frequently cited reason for outright denial of a permit,[358] ranking only one percentage point behind denials based on public access, concern over which was a moving force behind the legislation.[359] These findings are consistent with a 1983 report of the California Coastal Commission (CCC), the body currently operating under the 1976 Act. That report states that during 1972-82, when first Proposition 20 and then the 1976 Act were in effect, fewer than 1,000 coastal zone acres were converted to nonagricultural use.[360]

The obvious conclusion to be drawn is that the commission followed its mandate to protect agricultural land. Consistent with Proposition 20's direction, the agency used the permit system as a holding mechanism to ensure that any development would be compatible with the 1976 plan.[361] California voters declared that short-term development was to be strictly controlled so that long-term options would not be foreclosed.

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353. For example, conditions were attached to approximately 13% of permits in the San Diego District and 50% of permits in the North Central District. Sabatier, *supra* note 351, at 259.

354. GUIDEBOOK, *supra* note 202, at 229; Finnell, *supra* note 326, at 688.

355. Sabatier, *supra* note 351, at 259.

356. *Id.* at 272.

357. The eleven factors and their respective approval and conditions-added percentages are: landslide and erosion, 6%, 58%; water quality, 6%, 64%; sewage/septic, 0%, 51%; habitat destruction, 7%, 64%; transportation, 5%, 46%; cumulative impacts, 4%, 36%; consistency with existing development, 5%, 38%; preservation of agricultural and open lands, 6%, 41%; aesthetics, 3%, 48%; public access/recreation, 8%, 38%; foreclosing planning options, 10%, 36%. *Id.* at 271-73.

358. *Id.*

359. The two factors accounting for an even greater denial rate were cumulative impacts (61%) and inconsistency with existing development (57%). The denial rate for the other seven factors was: landslide and erosion, 37%; water quality, 29%; sewage/septic, 49%; habitat destruction, 28%; transportation, 49%; aesthetics, 49%; foreclosing planning options, 44%. *Id.*

360. Liebster & Scott, *supra* note 327, at 2.

361. Sabatier bases this conclusion on the high priority given to minimizing cumulative

Because the program was seen as striking a realistic balance[362] between the interim and the future, the commission made a conscientious effort[363] to enforce the program's underlying "values, goals, and assumptions," including the desire to protect farmland.[364]

B. Structure of the California Coastal Act of 1976

During the period from 1972 to 1975, the state and regional commissions hammered out the plan mandated by Proposition 20. Because regional commissions and their constituencies had different long-term concerns, regional responses to the state proposals were diverse. The North Central Commission, responsible for the relatively affluent San Francisco area,[365] urged a broader definition of coastal resources and stricter protection of the environment than the state proposal.[366] In stark contrast, the North Coast Commission,[367] located in an economically depressed area where residents favored development, proposed abolishing the coastal commissions and putting implementation of the plan into the hands of local governments.[368]

A compromise was struck and approved by the legislature in the form of the California Coastal Act of 1976.[369] Under the Act, each community within the narrow coastal zone[370] must prepare a Local Coastal

impacts on land, to protecting agricultural and open land, and to concerns about foreclosing planning options. Sabatier, *supra* note 351, at 274.

362. *See* P. SABATIER & D. MAZMANIAN, *supra* note 326, at I-2 table 2-2.

363. *Id.*

364. Sabatier believes that the effectiveness of the process was enhanced by the appointment of state commissioners and staff members sympathetic to the legislation, and by the fact that interest groups such as the Sierra Club had organizational standing, CAL. PUB. RES. CODE § 27105 (Deering 1976), and could ensure that critical cases were appealed to the state level. *Id. Cf.* NRDC v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 76, 129 Cal. Rptr. 57 (1976) (two environmental organizations challenged validity of Coastal Zone Conservation Commission's actions in issuing 15 construction permits for subdivision without considering environmental impact of final buildout of subdivision; Commission's actions upheld).

365. Sonoma, Marin, and San Francisco Counties. CAL. PUB. RES. CODE § 27201(b).

366. P. SABATIER & D. MAZMANIAN, *supra* note 326, at VIII-9.

367. Del Norte, Humboldt, and Mendocino Counties. CAL. PUB. RES. CODE § 27201(a).

368. P. SABATIER & D. MAZMANIAN, *supra* note 326, at VIII-16.

369. The commission's 443-page report became the 1976 act, CAL. PUB. RES. CODE §§ 30000-30900 (Deering Supp. 1987). The Coastal Act is one element of California's Coastal Zone Management Plan, enacted pursuant to the federal Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1464 (1982 & Supp. III 1985). Comment, *Land Use Planning In the Coastal Zone: Protecting A Sensitive Ecosystem with Transferable Development Credits,* 21 SANTA CLARA L. REV., 439, 440 n.2 (1981).

370. The zone extends, generally, from the state's seaward jurisdictional limit to 1,000 yards inland from the mean high tide line. In significant estuarine and habitat areas, it extends to the first major ridgeline or five miles from the mean high tide line, whichever is less. In developed areas, it generally extends inland less than 1,000 yards. CAL. PUB. RES. CODE § 30103. The zone encompasses 1.3 million acres. Wheatley Interview, *supra* note 329. Legislators did not respond to pleas for the protection of broader swaths of coastal farmland because

Program (LCP) that must be approved by the California Coastal Commission (CCC).[371] Once an LCP is approved, control over land use decisionmaking passes to the local government, which is required to follow its LCP.[372] Development not yet covered by an LCP requires a state permit.[373]

The California Coastal Act articulates numerous goals, including the frequently competing desires to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment," and to "assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state."[374] The dual commitment to protecting natural resources and to facilitating growth is found in all the programs reviewed in this Article. However, unlike the Hawaii and Vermont acts, which attempt to protect farmland with systems that are basically development-oriented, the California Coastal Act accords the protection of agriculture, including its land base, equal status with the enhancement of development.

The Act focuses on maintaining the agricultural economy of the entire area. California has not gone as far as Oregon, which requires that all farmland be zoned for exclusive farm use;[375] nonetheless it clearly has rejected a "farmland may be developed if . . ." philosophy in favor of the view that "farmland should not be developed except in a manner consistent with the long-term viability of agriculture."[376] This more protective philosophy is apparent in the treatment of both prime[377] and nonprime[378] agricultural land.

While anticipating development, the Act declares that in order to

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they expected to consider a comprehensive farmland retention bill the next year. The bill failed to pass in both 1977 and 1978. R. HEALY & J. ROSENBERG, *supra* note 40, at 112.

371. CAL. PUB. RES. CODE § 30512. Until they expired on July 1, 1984, the approval of the appropriate regional commission also was required. *Id.* § 30305.

372. *Id.* § 30519.

373. *Id.* § 30600. Originally issued by the now-defunct regional commissions, *id.* § 30305, permits currently are granted by CCC. *Id.*

374. *Id.* § 30001.5(a)-.5(b).

375. *See infra* text accompanying notes 477-515.

376. *See infra* text accompanying note 516.

377. The Act borrows its definition of prime land from the Williamson Act. CAL. PUB. RES. CODE § 30113. That Act sets out five alternative definitions, the foremost of which is land rated Class I or II by the Soil Conservation Service of the United States Department of Agriculture. CAL. GOV'T CODE § 51201 (Deering 1974 & Supp. 1987).

378. "Nonprime" agricultural land is not defined by the act, but CAL. PUB. RES. CODE § 30241 outlines the steps to be taken to protect prime agricultural land, and § 30242 provides that:

> All other lands suitable for agricultural use shall not be converted to nonagricultural uses unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with Section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands.

"assure the protection of the areas' agricultural economy," "the maximum amount of prime agricultural land shall be maintained in agriculture production. . . ."[379] Accordingly, the Act strictly limits the situations in which conversion can occur and otherwise strives to minimize conflicts between agricultural and urban land use.

Conversion to nonagricultural uses is restricted to infilling situations, i.e., where the land's economic viability[380] for agricultural purposes already is severely limited by conflicts with urban uses or where development would complete a logical and viable neighborhood and help create a stable limit for urban development.[381] To minimize urban/rural land use conflicts, the Act, in addition to calling for the establishment of stable boundaries between the two areas, requires efforts to ensure that neither the expansion of services and infrastructure nor the development of land adjoining prime agricultural land impair the latter's productivity.[382]

Where true expansion, as opposed to infilling, of urban areas is necessary, it is directed to nonprime lands.[383] Nevertheless, the provision governing the development of nonprime lands explicitly incorporates the

379. *Id.* § 30241. The coastal zone contains 90,000 acres of prime agricultural land. Liebster & Scott, *supra* note 327, at 2.

380. In determining economic viability, California attempts to avoid the difficulties experienced by Vermont in determining whether an applicant can "realize a reasonable return." *See supra* text accompanying notes 284-91. Section 30241.5 of the California Act provides that in making a viability determination decisionmakers shall analyze at least the revenue from agricultural products grown in the area, as well as the operational expenses associated with that production for the preceding five years. CAL. PUB. RES. CODE § 30241.5(a).

381. The restrictions are elaborated as follows:

> [C]onflicts shall be minimized between agricultural and urban land uses through all of the following:
>
> . . . .
>
> (b) By limiting conversions of agricultural lands around the periphery of urban areas to the lands where the viability of existing agricultural use is already severely limited by conflicts with urban uses or where the conversion of the lands would complete a logical and viable neighborhood and contribute to the establishment of a stable limit to urban development.

CAL. PUB. RES. CODE § 30241(b). Section 30242 permits conversion that is consistent with § 30250, which sets forth a general policy of developing land only near existing development. Section 30241(c) mandates the conversion of lands not suited for agriculture prior to that of agricultural lands.

382. The statute requires that conflicts be minimized through the following:

> (a) By establishing stable boundaries separating urban and rural areas, including, where necessary, clearly defined buffer areas to minimize conflicts between agricultural and urban land uses.
>
> . . . .
>
> (e) By assuring that public service and facility expansions and nonagricultural development do not impair agricultural viability, either through increased assessment costs or degraded air and water quality.
>
> (f) By assuring that all divisions of prime agricultural lands, except those conversions approved pursuant to subdivision (b), and all development adjacent to prime agricultural lands shall not diminish the productivity of prime agricultural lands.

Id. § 30241.

383. *See* GUIDEBOOK, *supra* note 202, at 232.

"shall remain undeveloped unless . . ." philosophy applied to prime lands:

> All other lands suitable for agricultural use shall not be converted to nonagricultural uses unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands.[384]

Together, these provisions protect the best farmland and concentrate development.[385] Generally, prime agricultural land is not to be developed, but when already surrounded by development it can become an appropriate growth site. In such situations its conversion is unlikely to affect other agricultural operations. This approach to conversion helps establish stable urban/rural boundaries, thereby indirectly preserving other farmlands.[386] Similarly, viable nonprime farmland generally will remain undeveloped, but if conversion will protect prime farmland or will help concentrate development, thus benefitting both urban and rural interests, then the nonprime land is the most logical site for urban expansion.

Where California allows development on agricultural land, the most important consideration is how the proposed development will affect agriculture as a whole—the question effectively avoided by the structure and interpretation of the Hawaii and Vermont statutes. Because it approaches land use questions from an integrated perspective, the California Coastal Act stands a better chance structurally of protecting farmland than acts taking a piecemeal approach. Whether the California Act is more effective in practice depends on how conscientiously it is enforced. Assessment of enforcement must address two levels of decisionmaking: permitting and planning.

1. Permitting

Available data on the grant or denial of permits under the 1976 Act

384. CAL. PUB. RES. CODE § 30242. Specific reference is made to § 30250, discussed *supra* note 381. The coastal zone contains 350,000 acres of nonprime agricultural land. Liebster & Scott, *supra* note 327, at 2.

385. A third provision protects all agricultural land but only in a limited context. It gives development of facilities designed to enhance the public's recreational use of the coast priority over residential, industrial, or commercial development, "but not over agricultural or coastal-dependent industry." CAL. PUB. RES. CODE § 30222. The three provisions were taken virtually unchanged from the plan submitted to the 1976 legislature. Interview with Jack Liebster, Special Projects Manager, California Coastal Commission (June 6, 1984) [hereinafter Liebster Interview].

386. Moreover, the infilling will permit municipalities to provide more cost efficient services, an important concern for any unit of government, but a major priority for California cities financially pinched by Proposition 13. CAL. CONST. art. XIIIA, § 1.

are insufficient to generalize about the process.[387] However, anecdotal evidence[388] indicates that "the commission is taking seriously its responsibility to protect agricultural land."[389]

In two cases, owners of greenhouses requested permits to expand their operations onto prime land; both facilities were in the water-scarce Carpinteria Valley. In an appeal brought by the South Central Coast Watch, CCC overturned the South Central Coast Regional Commission's grant of the permits. CCC found that the greenhouses,

> 'due to associated paving . . . do not assure that the maximum amount of prime agricultural land is kept in agricultural use,' because of their heavy water use, 'threaten the entire agricultural viability of the Valley,' . . . [and that their indiscriminate siting] could result in increased assessments on open field parcels and threaten the agricultural economy.[390]

Similarly, CCC overturned the North Central Regional Commission's grant of a permit for the construction of a number of commercial buildings on a 3.4-acre site near the center of a six-mile square area used for grazing beef cattle, where neighboring pastures contained prime soils. In the appeal brought by the Sierra Club, the state commission found that the proposal "would result in the extension of commercial development across [a major road], a feature which serves now as a boundary between the existing businesses and open lands," and would endanger adjoining farmland by "contribut[ing] to increased assessment pressures."[391]

These examples indicate that CCC has acted consistently with the Act by denying permits; in addition, it has granted permits when appropriate. In Port Hueneme, the owners of a fifty-acre tract of prime agricultural land surrounded by condominium and apartment complexes, a shopping center, two major roadways, and other intense development were granted a development permit.[392] Even though prime land was converted, the decision made sense as an attempt to concentrate development.

In summary, as an appellate permitting authority, the California Coastal Commission conscientiously has enforced the agricultural provisions of the Act.[393] Its decisions both facilitate the preservation of farmland and concentrate growth. Consistent with the Act, the cases reflect a

387. Liebster Interview, *supra* note 385.

388. GUIDEBOOK, *supra* note 202, at 233-35.

389. *Id.* at 233.

390. California Coastal Comm. Appeal Nos. 289-78 & 352-78, *discussed in* GUIDEBOOK, *supra* note 202, at 233.

391. California Coastal Comm. Appeal No. 180-77, *discussed in* GUIDEBOOK, *supra* note 202, at 233.

392. Liebster & Scott, *supra* note 327, at 2.

393. As previously noted, fewer than 1,000 acres of agricultural land were converted in the 1972-82 period. *See supra* text accompanying note 360.

commitment to consideration of a proposal's long-term effect on the surrounding agricultural lands and economy.

2. *Planning*

Although few published statistics exist, it appears that the Local Coastal Programs (LCP's)[394] developed by cities and counties in the coastal zone attempt to preserve agricultural land in conformance with the Act. Each LCP consists of two parts, a land use plan (LUP) and a zoning ordinance implementing the LUP.[395] Most local governments prepare them separately, although some are combining the two as a package.[396] An LCP is not effective until both elements have been certified by CCC, but once certification occurs, local governments assume permitting authority.[397] Sixty-nine cities and counties are covered by the Act, but since many have chosen to divide their jurisdictions into geographic segments, 129 LCP's are being prepared.[398]

As of October 8, 1986, CCC had acted upon 109 LUP's (84% of the total), certifying ninety and denying or certifying with suggested modifications the remaining nineteen. The commission also had acted upon seventy-eight zoning ordinances (60% of the total), approving fifty-two and rejecting or rejecting with suggested modifications the other twenty-

394. An LCP is defined as a local government's land use plans, zoning ordinances, zoning district maps, and implementing actions "which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." CAL. PUB. RES. CODE § 30108.6. *See supra* text accompanying notes 370-73.

395. Implementing actions are defined as: "the ordinances, regulations, or programs which implement either the provisions of the certified local coastal program or the policies of this division." CAL. PUB. RES. CODE § 30108.4.

396. Memo from Douglas & Holloway, California Coastal Comm'n, Triannual LCP Status Report 1 (Mar. 23, 1984). It is likely that each of the two phases will be preceded by a work stage in which coastal conservation problems and issues are identified and an outline of work necessary to address them is proposed. The work phase is not mandatory, but state funding is available to local governments that undertake it. The funds are derived from federal grants available to California through the Coastal Zone Management Act. *See* CALIFORNIA COASTAL COMM'N, LOCAL COASTAL PROGRAMS: ADDRESSING LAND USE CONFLICTS [hereinafter LOCAL COASTAL PROGRAMS] (undated explanatory brochure).

397. CAL. PUB. RES. CODE § 30519. CCC retains appellate power; appeals are limited to those cases in which the local government has approved (1) development on the immediate shorefront or along coastal bluffs, wetlands, streams, etc.; (2) a major public works or energy facility; (3) a project in a specially designated "sensitive coastal resource area;" or (4) any development not designated as the principal permitted use under the certified zoning ordinance or map. *Id.* § 30603. Other appeals, as well as those from CCC, go directly to the courts. *Id.* §§ 30800-30808. For the period from April 1, 1982 to June 30, 1986, local governments approved 2,678 permits. Of that number 1,798 were appealable to the commission; appeals were pursued in only 63 cases. CALIFORNIA COASTAL COMM'N, LCP STATUS REPORT 2 (Oct. 8, 1986) [hereinafter LCP STATUS REPORT].

Local units of government may amend LCP's, but only with CCC approval and no more than three times in a calendar year. CAL. PUB. RES. CODE § 30514.

At least every five years, the CCC is required to review each certified LCP to determine whether its implementation is consistent with the act. *Id.* § 30519.5.

398. LCP STATUS REPORT, *supra* note 397, at 1.

six. All told, forty-nine LCP's (38% of the total 129) effectively have been certified, giving the localities involved the power to issue coastal development permits.[399]

CCC regulations instruct local governments preparing LCP's to determine the kind, location, and intensity of land and water uses that will be compatible with the protection of coastal resources such as agriculture.[400] Santa Barbara County's LCP illustrates the creativity of some of the responses.[401] Its plan seeks to protect the huge ranches[402] that comprise a large percentage of its coastal zone land through the use of large minimum lot sizes, clustering, and agricultural easements.

Along the county's North Coast, nonprime agricultural land in tracts greater than 2,000 acres may be subdivided into small ranches of 320 acres or more (one-half square mile), provided the owner bars further development by granting a protective easement.[403] Such agricultural easements must be granted to the county and to a third party,[404] such as the California Coastal Conservancy.[405] Put simply, in exchange for the right to subdivide the land, the owner is required to relinquish the right to further divide or develop the land. Absent such restrictions, owners of the 320-acre parcels, which are not large enough to be econom-

399. *Id.* at 1-2. Three more LCP's were expected to be complete by Jan. 1, 1987, bringing the total to 52, or 40% of the 129. *Id.* at 2.

400. LOCAL COASTAL PROGRAMS, *supra* note 396, at 1.

401. SANTA BARBARA COUNTY COASTAL PLAN (Jan. 1980). The county's LUP and implementing ordinances were certified by CCC on Aug. 11, 1982. *See* LOCAL COASTAL PROGRAMS, *supra* note 396, at 16.

402. Although the farmland preservation movement generally has sought to protect cropland, NALS points out that 537,000 acres of pasture and rangeland are being converted each year. *See supra* note 3. In California, ranches and dairy farms contributed $100 million to the coastal zone's agricultural economy in 1980. *See supra* text accompanying note 331. Thus, protecting ranchland clearly falls within the act's purpose of protecting the total agricultural economy.

403. SANTA BARBARA COUNTY COASTAL PLAN, *supra* note 401, at 110-d (Minimum Parcel Size).

The 2,000-acre limit is based on a University of California Agricultural Extension Service study, conducted in two other counties, which concluded that 1,680 to 1,800 acres are required for a viable cattle operation. Memo from Brown, Cal. Coastal Comm'n, Recommendation and Findings on Resubmittal of Santa Barbara County Local Coastal Land Use Plan 10 (Mar. 6, 1981) [hereinafter Recommendation and Findings]. If ranches are to be preserved, then tracts of that size merit heightened protection; the provision permits only very restricted development. Smaller ranches also may be viable, but that determination must be made on an individual basis. *Id.* at 11; *see infra* note 411.

404. Recommendation and Findings, *supra* note 403, at 11.

405. The conservancy functions as a land trust. *See generally* Fenner, *Land Trusts: An Alternative Method for Preserving Open Space,* 33 VAND. L. REV. 1039 (1980). It has the power to acquire fee title, development rights, easements, or other interests in coastal land "in order to prevent loss of agricultural land to other uses and to assemble agricultural lands into parcels of adequate size permitting continued agricultural production." CAL PUB. RES. CODE § 31150. The conservancy is to take "all feasible action to return to public use or ownership, with appropriate restrictions," all acquired land. *Id.* Subject to legislative appropriation, profits from the sale or lease of land are utilized to acquire more land. *Id.* § 31155.

ically viable ranches,[406] well might argue that continued agricultural use is "not feasible"[407] and that development should be allowed. CCC has stated that "[w]ithout such restriction the speculative economic interests in owning such parcels . . . would be greater, and the equitable claim of right to conversion . . . would be stronger. With these assurances, however, the Commission can find the County's policies consistent with the policies of . . . the Coastal Act."[408]

As a way of further protecting land that has been divided into small ranches, Santa Barbara's plan also provides that if "necessary to maintain continued agricultural use on the balance of the parcel,"[409] a portion may be converted to a use given priority under the Act, i.e., coast-dependent industry, public recreation, or a commercial use for visitors.[410] Although at odds with the agricultural easement provision, this exception recognizes that the supplemental income obtained from such activities may allow the rest of the parcel to remain in agricultural use.[411] The exception is somewhat analogous to a system of transferable development rights (TDR). This system limits landowners' rights to develop land and, in exchange, allows them to sell development rights, which cannot be used on their land, for use in a growth zone.[412] Like the Santa Barbara system, a TDR system allows landowners to obtain some of the development value from their land even though their development of it is limited strictly. The Santa Barbara multi-use exception, which makes no provision for monetary compensation, is the less generous of the two schemes. Nonetheless, it recognizes that in exceptional cases the only way to save the farm may be to expand its income potential.

The multi-use principle is adopted on a large scale in other provi-

406. The Santa Barbara County LUP acknowledges that 320 acres is well below the minimum required for viability, but affirms, nonetheless, that the use of "one-half mile square parcel[s] . . . [will] strengthen agricultural use and reduce the number of potential new parcels and attendant residences by 70 percent." SANTA BARBARA COUNTY COASTAL PLAN, *supra* note 401, at 219.

407. CAL. PUB. RES. CODE § 30242; *see supra* text accompanying note 384.

408. Recommendation and Findings, *supra* note 403. Thus, the provision avoids the "no reasonable return" argument that Vermont developers are making successfully. *See supra* text accompanying notes 284-91.

409. SANTA BARBARA COUNTY COASTAL PLAN, *supra* note 401, at 110-d.

410. *Id.*

411. *Id.* CCC recognizes that the multi-use principle also helps account for the viability of ranches of fewer than 2,000 acres.

> Many smaller parcels [less than 2,000 acres] are maintained in agriculture successfully due to individual circumstances which lessen costs . . . , produce supplemental reserves (e.g., supplemental specialty crops, commercial recreation facilities such as campgrounds, agricultural support business), and provide offsetting benefits to the operator or owner. . . . While these techniques . . . cannot be depended upon to justify fragmentation of larger ranches, they can be employed to keep smaller parcels in agricultural production.

Recommendation and Findings, *supra* note 403, at 11.

412. *See generally* Duncan, *supra* note 13, at 121-35.

sions of the Santa Barbara LUP. Policy 8-8[413] establishes that on ranches of 10,000 acres or more, residential development may occur at a density greater than that permitted by the 320-acre rule, but only if it is clustered on no more than 2% of the gross acreage.[414] An additional 1% must be "dedicated for public recreation and reserved for commercial visitor-serving uses."[415] To authorize a project, the county must certify that the proposal will be compatible with the long-term preservation of the ranch's operation, that its site and design will avoid and buffer prime agricultural areas,[416] and that development rights to the remaining 97% of the property have been granted to the county and to a third party, such as the California Coastal Conservancy.[417] The provision states categorically that those agricultural and/or open space lands "shall not be further divided."[418] Finally, the remaining 97% of the land must be held in common by the landowners, who are required to belong to a homeowners' association that will be responsible for the permanent maintenance of agricultural and open space areas. An assessment system or other form of subsidy is required to ensure compliance.[419] This policy has been described as the California Coastal Act's "high water mark" for the protection of agricultural land.[420]

The mixed-use concept is not unique to Santa Barbara County; it is used in San Mateo County as well. The San Mateo LUP[421] provides that on nonprime lands[422] conditional permits may be issued for the establishment of commercial facilities, including country inns, stables, riding academies, campgrounds, rod and gun clubs, private beaches, wineries, and commercial woodlots.[423] Such divisions are prohibited unless it can be shown that the agricultural potential of the residual farmland will not be diminished.[424] Moreover, before any such division can occur, the landowner must file a Master Land Division Plan designating which par-

413. SANTA BARBARA COUNTY COASTAL PLAN, *supra* note 401, policy 8-8.

414. The maximum density allowed in the two-percent area is one dwelling unit per two acres; that figure may be increased to one unit per acre if the county makes a number of findings amounting to an ultimate finding that "there is no potential for significant adverse environmental effects." *Id.*

415. *Id.*

416. *Id.* finding (c).

417. *Id.* condition (c). The conservancy is discussed *supra* note 405.

418. SANTA BARBARA COUNTY COASTAL PLAN, *supra* note 401, condition (d).

419. *Id.* condition (b).

420. Liebster Interview, *supra* note 385. A study prepared for CCC and the California Coastal Conservancy encourages the adoption of the concept in other jurisdictions. ANGUS MCDONALD & ASSOC., ENHANCEMENT OF COASTAL AGRICULTURE (1981).

421. The San Mateo County LCP (1980) was certified by CCC as of April 1, 1981. Memo from Douglas & Holloway, *supra* note 396, at 8.

422. SAN MATEO COUNTY LOCAL COASTAL PROGRAM HEARING DRAFT § 5.6(b) (1980).

423. *Id.* § 5.6(b) at 5.2P; § 6353(B)(6) at B-4. Uses conditionally permitted on prime land are far more limited. *Id.* § 5.5(b) at 5.2P.

424. *Id.* § 5.9 at 5.3P.

cels will be used for agricultural and which for nonagricultural uses.[425] A Master Land Division Plan cannot be approved until the landowner has granted to the county an agricultural easement protecting remaining agricultural lands.[426] Finally, all development on a parcel must be clustered.[427] The San Mateo County plan is another example of an innovative response to the mandate of the Coastal Act to protect agricultural lands.

C. Evaluation: Does the California Coastal Act Protect Farmland?

It is too early to predict whether the local governments that have drafted innovative programs will enforce them conscientiously as they go about making individual land use decisions. However, the local coastal plans, like CCC decisions, are consistent with the agricultural provisions of the California Coastal Act. In denying permits, CCC has focused on a proposal's adverse impact on surrounding agricultural activity. Similarly, at least some counties have drafted LCP's that attempt to keep as much land in farming as possible. When they allow for development, the plans integrate protection of agriculture. In these counties, development is limited to a small portion of a tract, and landowners must file easements preventing development on the remaining agricultural land.

Implementation of the farmland preservation provisions of the California Coastal Act reflects the Act's purpose with regard to agriculture: the protection of the agricultural community. The Act anticipates and provides for urban growth but declares that it shall not occur at the expense of the agricultural community. Farmland may not be converted to nonfarm uses unless the conversion is consistent with the continued viability of the agricultural economy. The California Act's integrated approach stands in sharp contrast to the Hawaii Land Use Act and Vermont's Act 250. Those Acts focus almost entirely on individual tracts of farmland rather than on the larger agricultural community, and they embody a "farmland may be developed if . . ." philosophy. The "values, goals, and assumptions" of those two Acts are development-oriented, and the Acts generally have not been successful in protecting agricultural land. Because the "values, goals, and assumptions" embraced by the California Coastal Act treat the facilitation of urban growth and the protection of agriculture as equally important, that Act will be more successful in preserving farmland.

425. *Id.* § 5.14 at 5.4P; § 6361(A) at B-9.
426. *Id.* § 5.16 at 5.5P; § 6361(B) at B-9.
427. *Id.* § 5.15(b) at 5.5P; § 6355(A)(2) at (B-4).

V

THE OREGON LAND USE PLANNING ACT

A. History

Oregon's Land Use Planning Act, known as Senate Bill 100 (S.B. 100),[428] is the nation's most comprehensive land use scheme.[429] As with the California Coastal Act, mandatory planning and implementation occur at the local level but are overseen by, and ultimately are subject to, a powerful state agency. Unlike the California scheme, which applies only to the coast, Oregon's program covers the entire state. Oregon differs in another respect from California, and Vermont, where farmland preservation was an afterthought; protection of agricultural land was the driving force behind the Oregon Act.[430]

Agriculture and timber are the mainstays of Oregon's economy. A recent study by the College of Business Administration at the University of Oregon reports that the agricultural sector generates $7.1 billion worth of economic activity per year, making it the number one contributor to the state's economy.[431] Agricultural activity is not uniformly distributed, however. Eastern Oregon, the vast area east of the Cascades, produces large quantities of grain and livestock,[432] but the state's most

428. 1973 Or. Laws 80 (codified at OR. REV. STAT. §§ 197.005-.855 and scattered sections of OR. REV. STAT. chs. 215, 227 (1985)).

429. For general background on the Oregon program, see J. DE GROVE, LAND GROWTH AND POLITICS ch. 6 (1984); GUIDEBOOK, *supra* note 202, at 239-46; H.J. LEONARD, MANAGING OREGON'S GROWTH: THE POLITICS OF DEVELOPMENT PLANNING (1983); C. LITTLE, THE NEW OREGON TRAIL (1974); Furuseth, *The Oregon Agricultural Protection Program: A Review and Assessment,* 20 NAT. RESOURCES J. 603 (1980) [hereinafter Furuseth, *Review*]; Furuseth, *Update on Oregon's Agricultural Protection Program: A Land Use Perspective,* 21 NAT. RESOURCES J. 57 (1981) [hereinafter Furuseth, *Update*]; Gustafson, *The Oregon Land Use Act,* 48 J. AM. PLAN. A. 365 (1982); Huffman & Pantico, *Toward a Theory of Land Use Planning: Lessons From Oregon,* 14 LAND & WATER L. REV. 1 (1977); Macpherson & Paulus, *Senate Bill 100: The Oregon Land Conservation and Development Act,* 10 WILLAMETTE L. REV. 414 (1974); Morgan & Shonkwiler, *Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues,* 11 URB. LAW. 1 (1979) [hereinafter Morgan & Shonkwiler, *Housing Issues*]; Morgan & Shonkwiler, *Urban Development and Statewide Planning: Challenge of the 1980's,* 61 OR. L. REV. 351 (1982) [hereinafter Morgan & Shonkwiler, *Challenge*]; Comment, *Oregon's New State Land Use Planning Act—Two Views,* 54 OR. L. REV. 203 (1975).

430. *See infra* text accompanying notes 435-46. Oregon has a long and distinguished history of protecting its environment. It declared state ownership of coastal beaches in 1911. Furuseth, *Review, supra* note 429, at 603. During the 1960's and early 1970's, it enacted the so-called B bills. The nation's first *b*ottle *b*ill banned pulltabs and required a deposit on beverage containers. OR. REV. STAT. §§ 459.810-.890, 459.992, 459.995 (1985). Other acts set highway funds aside for *b*ike paths, *id.* § 366.514; authorized *b*onds for pollution abatement expenses, OR. CONST. art XI-H, implemented OR. REV. STAT. §§ 468.195-.260; extended public access to *b*eaches to the vegetation line, not just the mean high tide line, *id.* § 390.605; and provided for the removal of highway *b*illboards, *id.* §§ 377.700-.992.

431. *Oregon B-School is Bullish on Farming,* American Farmland (newsletter of the American Farmland Trust), Nov. 1984, at 2, col. 3.

432. The livestock industry contributes about $1 billion annually to the state's economy.

productive farmland is confined to the narrow strip of the Willamette Valley, which is fifty miles wide, one hundred miles long, and runs between Portland and Eugene. The valley contains some of the most fertile soil in the world for the production of vegetables and high-yield specialty crops.[433] In 1980, Oregon led the nation in the production of winter pears, filberts, fresh plums, prunes, peppermint oil, blackberries, and boysenberries.[434]

It was the threat to Willamette Valley farmland that led to the passage of S.B. 100. The valley's population exploded in the postwar period: From 1950 to 1970, the valley absorbed 80% of the state's growth.[435] Currently, nearly 80% of Oregon's population of 2.6 million lives in the Willamette Valley.[436] Of the valley's total of about two million acres of farmland,[437] 10,000 acres (about 1/2%) were being converted annually to urban use by the end of the 1960's.[438] The area near Portland was hardest hit.[439]

A 1961 act[440] granting use-value assessment to farmland in exclusive farm use (EFU) zones did little to curb the conversion of agricultural land.[441] Likewise, Senate Bill 10,[442] a 1969 act that mandated the adoption of comprehensive plans and zoning regulations by local governments, had little effect on the rate of development.[443] The local plans and ordinances reiterated the goals[444] but in reality simply reflected the status quo. The state did not exercise enforcement or supervisory power to require more. Conversion continued, and in 1973 alone, 30,000 acres of land in the Willamette Valley were developed.[445]

This failure of S.B. 10 and the farmland tax assessment program to preserve Oregon's best farmland inspired the passage of S.B. 100.[446] As

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A New Look at Eastern Oregon Ranching, 1000 Friends of Oregon Newsletter, June 1984, at 1, col. 1.

433. H.J. LEONARD, *supra* note 429, at 63.

434. *Id.*

435. *Id.* at 1, 4-5.

436. *Id.* at 5.

437. The valley contains approximately 8.5 million acres, over 5 million of which are forest land. *Id.* at 65.

438. *Id.* at 6.

439. Between 1954 and 1969, the farmland base in Clackamas County, on the southern edge of Portland, was reduced by 34%—from 319,000 to 210,000 acres. *Id.*

440. OR. REV. STAT. § 308.345 (1986).

441. *See generally* Roberts, *The Taxation of Farm Land in Oregon,* 4 WILLAMETTE L.J. 431 (1967); Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use,* 9 WILLAMETTE L.J. 1 (1973). Tax preference laws generally have been unsuccessful at protecting farmland. Duncan, *supra* note 13, at 78-94.

442. OR. REV. STAT. § 215.515 (repealed 1977).

443. H.J. LEONARD, *supra* note 429, at 66-67; C. LITTLE, *supra* note 429, at 10.

444. H.J. LEONARD, *supra* note 429, at 7.

445. *Id.* at 65.

446. *Id.* at 67. The legislation was supported by Gov. Tom McCall who, in a now-famous speech to the 1973 legislature, described, among other things, the "shameless threat to our

originally proposed, the legislation provided for the creation of fourteen regional planning districts to operate as councils of government[447] for the coordination of local plans.[448] Following the example of the American Law Institute's Model Land Development Code,[449] a state agency would have been granted permit authority over areas and activities of critical state concern.[450] However, legislators favoring as much local control as possible blocked most of the regional council provisions[451] and the provisions for control over areas of critical state concern.[452]

B. Structure of the Act

As finally enacted, S.B. 100 provided that land use planning would take place at the local level but within a framework set by the state.[453]

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environment . . . the unfettered despoiling of the land . . . and the ravenous rampage of suburbia in the Willamette Valley." He went on to state that "[t]he interests of Oregon for today and in the future must be protection from the grasping wastrels of the land." *Cited in* J. DE GROVE, *supra* note 429, at 237.

447. H.J. LEONARD, *supra* note 429, at 8-10.

448. *Id.* at 9; C. LITTLE, *supra* note 429, at 14.

449. Article 7 of the MODEL LAND DEVELOPMENT CODE, *supra* note 40, provides for the designation by a state agency of areas of critical state concern (ACSC). *Id.* § 7-201. Areas that might be covered by the designation are not limited to environmentally sensitive lands, but also might include lands of historical or natural importance or ones significantly related to existing or proposed major public facilities. *Id.* § 7-201(3). The code provides that the state agency will establish general principles for guiding development in ACSC. *Id.* § 7-201(1)(d). The guidelines will be implemented by local regulation, *id.* § 7-203, or by the state if the local government fails to act, *id.* § 7-204.

Article 7 also provides for the designation of Developments of Regional Impact (DRI), whose nature or magnitude present issues of state or regional significance. *Id.* § 7-301. Examples of such projects include ones that will generate significantly increased traffic, that have the potential to pollute the air or water, or that simply change the use of a large land area. *Id.* § 7-301 note. Under the Code, DRI's are allowed only when the local government has enacted a development ordinance or when the state agency has either appointed a special reviewing agency at the request of the developer or failed to do so within 90 days of receipt of notice from the developer. *Id.* § 7-302. In either case, the required development permit can be issued only if the project's benefits outweigh its detriments. *Id.* § 7-304.

The Model Code's Article 7 proposals have been enacted in Florida. Florida Environmental Land and Water Management Act, FLA. STAT. ANN. § 380.012-.12 (West 1974 & Supp. 1987). *See* R. HEALY & J. ROSENBERG, *supra* note 40, at 126-76; T. PELHAM, *supra* note 40; Finnell, *Coastal Land Management in Florida,* 1980 AM. B. FOUND. RES. J. 303; Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972,* 11 URB. L. ANN. 103 (1973); Pelham, Hyde & Banks, *Managing Florida's Growth: Toward an Integrated State, Regional and Local Comprehensive Planning Process,* 13 FLA. ST. U.L. REV. 515 (1985).

450. H.J. LEONARD, *supra* note 429, at 9; C. LITTLE, *supra* note 429, at 15.

451. One regional council, encompassing the Portland metropolitan area, was preserved. H.J. LEONARD, *supra* note 429, at 10.

452. *Id.*

453. OR. REV. STAT. §§ 197.030-.060 (1985). Further demonstrating how seriously it took the threat to farmland, the 1973 legislature also passed S.B. 101, 1973 Or. Laws 503, a revision of the 1961 exclusive farm use value assessment act. That Act provided:

The Legislative Assembly finds and declares that:

(1) Open land used for agricultural use is an efficient means of conserving nat-

The body charged with establishing that framework and overseeing its implementation was the Land Conservation and Development Commission (LCDC). The seven appointed members of the commission were entrusted with three principal tasks.

First, LCDC was to formulate statewide planning goals and guidelines that would govern all land use decisions.[454] The goals adopted by LCDC would become "in effect the 'constitution' for local government comprehensive plans"[455] required by S.B. 100.[456]

LCDC's second major function was to review those plans and to acknowledge[457] their compliance with the goals.[458] Once acknowledged, the plans govern all local land use decisions, including annexations and the enactment of zoning ordinances and subdivision regulations.[459] Originally appealable to LCDC or to the courts, depending on whether the decision was legislative or quasi-judicial,[460] individual land use decisions, both pre- and post-acknowledgement, today may be appealed first to the Land Use Board of Appeals (LUBA), a kind of land use court created in 1979.[461] Further appeal may be taken to the courts.[462] LCDC continues

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ural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutritious food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.

OR. REV. STAT. § 215.243. Although counties were not required to establish EFU's and eligibility for preferential tax treatment did not require EFU status, it was hoped that the benefits attached to EFU's would encourage their creation.

454. OR. REV. STAT. §§ 197.040(2), 197.230.

455. 1000 Friends of Oregon v. Board of County Comm'rs, 32 Or. App. 413, 575 P.2d 651, 656 (1978).

456. OR. REV. STAT. § 215.050. Counties are responsible for coordinating all planning affecting land uses within the county, including those of cities, special districts, and state agencies. *Id.* § 197.190(1).

457. " 'Acknowledgment' means a commission order that certifies that a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with the goals." *Id.* § 197.015(1).

458. *Id.* §§ 197.040(2), 197.251.

459. *Id.* §§ 197.10, 197.175.

460. For a discussion of this distinction and the confusion it caused, see Parker & Schwab, *Forecast: Cloudy but Clearing—Land Use Remedies in Oregon,* 15 WILLAMETTE L. REV. 245, 255-62 (1979).

461. OR. REV. STAT. §§ 197.80-.855. For a discussion of LUBA, see generally Comment, *The Future of Oregon's Land Use Appeals Process: Sunset on LUBA,* 19 WILLAMETTE L. REV.

to monitor informally the work of LUBA and may appear before it as a party.[463]

Once a plan is acknowledged, LCDC's control over planning diminishes. While the commission can elect to participate in a local proceeding to amend a plan or regulation,[464] appeals from the adoption of amendments go to LUBA rather than to LCDC. In some situations, LCDC itself may file an appeal.[465] LCDC's remaining power lies in its mandatory formal reviews of local plans, conducted every three to five years, and in its power to order revisions at that time.[466]

Third, S.B. 100 gives LCDC the authority to enforce state land use goals while plans are being prepared for acknowledgement.[467] Its compliance powers are considerable, extending even to ordering complete building moratoria.[468] In utilizing that power, and its appeals authority, LCDC created a substantial body of case law on which LUBA and the courts now can rely.[469]

In January 1975, after more than a year of public workshops and hearings, LCDC fulfilled its first major responsibility by adopting statewide planning goals.[470] Given the overriding concern with farmland preservation, the most important and specific goals dealt, appropriately, with agricultural lands (Goal Three), forest lands (Goal Four), and urbanization (now Goal Fourteen).[471] Although all nineteen goals are

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109 (1983); Note, *Review of Oregon Legislation: The Land Use Board of Appeals,* 16 WILLAMETTE L. REV. 323 (1979). Although LUBA issued the final order, from 1979 to 1983 it was required to refer all goal interpretation and application issues to LCDC for determination. LCDC's decision then was incorporated into LUBA's order. Comment, *supra*, at 116. In 1983, LUBA was given sole authority over such decisions. OR. REV. STAT. § 197.825.

462. OR. REV. STAT. § 197.850.

463. *Id.* § 197.830.

464. *Id.* § 197.610. The commission's role appears to be advisory. It can express any concerns it has and can make recommendations regarding actions it considers necessary to meet those concerns.

465. *Id.* § 197.620.

466. *Id.* §§ 197.640, 197.645, 197.647.

467. *Id.* § 197.320.

468. H.J. LEONARD, *supra* note 429, at 15-16.

469. *See* cases collected in 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 160.15-.27, at 607-82 (1985). Cases dealing with agricultural land in particular are collected in Benner, *Rural and Coastal Resource Protection Goals—Goals 3 and 4, 16-19,* in OREGON STATE BAR COMM. ON CONTINUING LEGAL EDUCATION, LAND USE §§ 4.1-.26 (rev. ed. 1982).

470. OR. ADMIN. R. § 660-15-000(1) (Appendix A). The goals are entitled: 1) Citizen Involvement; 2) Land Use Planning; 3) Agricultural Lands; 4) Forest Lands; 5) Open Spaces, Scenic and Historical Areas, and Natural Resources; 6) Air, Water and Land Resources Quality; 7) Areas Subject to Natural Disasters and Hazards; 8) Recreational Needs; 9) Economic Development; 10) Housing; 11) Public Facilities and Services; 12) Transportation; 13) Energy Conservation; 14) Urbanization; 15) The Willamette River Greenway; 16) Estuarine Resources; 17) Coastal Shorelands; 18) Beaches and Dunes; and 19) Ocean Resources. Sections relevant to this Article may be found in H.J. LEONARD, *supra* note 429, at appendix and N. WILLIAMS, *supra* note 469, §§ 160.15-.26, at 607-81.

471. H.J. LEONARD, *supra* note 429, at 12.

designed to work together, the urbanization and agricultural goals are particularly interconnected.

1. Urban Growth Zones

Goal Fourteen, "Urbanization," provides for the establishment of urban growth boundaries (UGB's) "to identify and separate urbanizable land from rural land" in order to "provide for an orderly and efficient transition from rural to urban land use."[472] UGB's include land already in urban use plus enough land to accommodate growth through the year 2000.[473] While the primary purpose behind the UGB concept is to avoid unplanned and scattered development, the device also is intended to protect farmland. Hence, once local planners establish the need for vacant urban land, the actual boundary is determined by both urban and agricultural factors. Officials are instructed to consider the orderly and economic expansion of public facilities, the retention of the best agricultural land, and the compatibility of proposed urban uses with nearby agricultural activities.[474] Thus, urban growth is directed toward the least productive farmland.

The creation of urban growth zones demonstrates that the protection of farmland is not the program's only goal. When combined with the program's effort to ensure adequate supplies of housing and public facilities and services,[475] UGB's facilitate growth.[476] UGB's also play a

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472. *Id.* at 157-58.

473. *Id.* at 158.

474. *Id.* at 157-58.

475. Goal 10 (Housing) provides:

> Goal: To provide for the housing needs of citizens of the state.
>
> Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

Reprinted in N. WILLIAMS, *supra* note 469, at 649. Goal 11 addresses Public Facilities and Services.

476. This assertion is accepted by a group that vigorously opposed the passage of S.B. 100. Initially, the construction industry was convinced that limiting the amount of land available for development would drive up the cost of individual lots and, in turn, depress the housing market. *See* Morgan & Shonkwiler, *Challenge, supra* note 429. Oregon did experience the nation's greatest increase in lot cost (127%) between 1976 and 1980, but studies since have suggested that a lack of serviced land, rather than the UGB's themselves, was the culprit. H.J. LEONARD, *supra* note 429, at 104. As LCDC has recognized the importance of housing issues and has begun to place more emphasis on them, builders have reduced their opposition to the program. In 1976, the business community supported a measure to repeal S.B. 100, but by 1978, the board of directors of the Home Builders Association of Metropolitan Portland, which voted 30-1 to oppose another attempt at repeal, was influential in preventing repeal. *Id.* at 110.

(S.B. 100 has been the subject of four repeal attempts. An early attempt, soon after its passage in 1973, failed for lack of signatures. The 1976 measure was defeated by 57%-43% and the 1978 measure by 61%-39%. The 1978 result showed a significant increase in the breadth of support for the Act. In 1976, opposition to repeal was concentrated in the Willamette Valley, while in 1978 the repeal measure carried only six of 36 counties. Finally, in 1982,

direct and significant role in the designation of agricultural land.

2. *Exclusive Farm Use Zones*

Under Goal Three, "Agricultural Lands,"[477] the creation of exclusive farm use (EFU) zoning is no longer voluntary but is required.[478] With limited exception,[479] land that meets Goal Three's definition of agricultural land, is located outside an urban zone, and does not fall within another Goal must be zoned EFU.[480]

While the designation of land for EFU presumptively means that it will be used only for farming, some development is allowed. The Act permits outright certain nonfarm uses that are not inconsistent with farming, e.g., schools, churches, and utility facilities.[481] By special permit, other nonfarm uses also may be established.[482] The Act further permits residences and other buildings "customarily provided in conjunction with farm use" and, in limited situations, homes occupied by close rela-

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in the midst of a severe recession that some blamed on the land use law, voters rejected repeal by 55%-45%. *Id.* at 35-37.)

Like the farmer whose land is restricted by EFU zoning but who receives compensatory benefits, *see infra* text accompanying notes 492-99, the builder who is subject to locational restrictions is compensated by knowing that construction will be allowed within the UGB. Presentation by Henry Richmond, Director of 1000 Friends of Oregon, at National Agricultural Lands Conference, Chicago, Ill. (Feb. 9-10, 1981).

> The fear that a lot of us [developers and realtors] have is that this thing [the process of drawing a UGB] has begun to affect the market; not because of the existence of a band around the city, but simply because of the uncertainty about where the city, and LCDC are finally going to plop that band down. Now, at last, as the boundary looks secure in some places, there may come a degree of certainty. At last maybe our people will know where they can target for building and development.

Statement by Jack Murno, Lobbyist for Associated Industries of Oregon and Oregon Association of Realtors, *quoted in* H.J. LEONARD, *supra* note 429, at 94-95.

477. Goal Three provides, in part:

> Agriculture lands shall be preserved and maintained for farm use, consistent with existing and future needs for agricultural products, forest and open space. These lands shall be inventoried and preserved by adopting exclusive farm use zones pursuant to ORS Chapter 215. Such minimum lot sizes as are utilized for any farm use zones shall be appropriate for the continuation of the existing commercial agricultural enterprise with the area. Conversion of rural agricultural land to urbanizable land shall be based upon consideration of the following factors: (1) environment, energy, social and economic consequences; (2) demonstrated need consistent with LCDC goals; (3) unavailability of an alternative suitable location for the requested use; (4) compatibility of the proposed use with related agricultural land; and (5) the retention of Class I, II, III and IV soils in farm use. A governing body proposing to convert rural agricultural land to urbanizable land shall follow the procedures and requirements set forth in the Land Use Planning goal (Goal 2) for goal exceptions.

Reprinted in H.J. LEONARD, *supra* note 429, app.

478. *Id.* at 67-68. Discussion of voluntary EFU zoning appears in *supra* text accompanying note 441 and in note 453.

479. *See infra* text accompanying notes 511-15.

480. *See supra* note 477.

481. OR. REV. STAT. § 215.283(1).

482. E.g., recreational areas, personal-use airports, boarding stables, golf courses, and facilities for the primary processing of forest products. *Id.* § 215.283(2).

tives who assist with the management of the farm.[483] However, new farm dwellings are restricted by Goal Three's requirement that parcels "shall be appropriate for the continuation of the existing commercial agricultural enterprise within the area."[484] This restriction, which applies with equal force to divisions of EFU land,[485] is necessary to protect the large blocks of farmland that are required for the overall health of the agricultural economy.[486] Without such a restriction "counties would be powerless to prevent conversion of tens of thousands of parcels now farmed as part of large-scale, commercial farms into 'hobby farms'—nonfarm residences posing as farms."[487]

Such restrictions have great potential for protecting farmland and the agricultural community. Yet rigid controls always have been unpopular with farmers.[488] As Hector MacPherson, the legislator most responsible for the passage of S.B. 100[489] noted, "Scratch a farmer, and you'll find a subdivider."[490] The legislation could not have been enacted without provisions giving the farmer something in return.[491] The Oregon Land Use Planning Act offsets the burdens imposed by mandatory zoning and planning with benefits that respond to the "values, goals, and assumptions" of the small farmer.[492] Land zoned EFU is entitled automatically to use-value assessment,[493] and generally it is exempted from special benefit district assessments[494] that finance urban sprawl.[495] It also is exempt from regulations that reasonably would restrict farm practices that may offend suburbanites: Local governments are not to regulate noise, dust, odor, or other materials carried in the air as long as such conditions do not extend into an urban growth area or affect the health, safety, or welfare of the citizenry.[496]

Although restrictions imposed on EFU land may limit farmers' options, they are beneficial to farming as a whole. Unlike most agricultural zoning ordinances, which permit nonfarm development as a matter of

483. *Id.* § 215.283(1)(e)-(f).

484. *See supra* note 477.

485. OR. REV. STAT. § 215.263.

486. *Id.* § 215.243.

487. R. BENNER, FARMLAND IN JEOPARDY: COUNTY ADMINISTRATION OF EXCLUSIVE FARM USE ZONING 3 (Report to Joint Legislative Committee on Land Use, 1982). For a discussion of the tax aspects of hobby farming see *supra* note 201.

488. Duncan, *supra* note 13.

489. C. LITTLE, *supra* note 429.

490. *Id.* at 26.

491. Senate Bill 101, enacted along with S.B. 100, explicitly recognized that benefits were needed to offset the burdens. OR. REV. STAT. § 215.243(4).

492. The Oregon program, thus, is similar to the most successful farmland preservation programs that rely on incentives rather than compulsion. Duncan, *supra* note 13.

493. OR. REV. STAT. § 308.370(1).

494. *Id.* § 308.401.

495. Duncan, *supra* note 13, at 74-76.

496. OR. REV. STAT. § 215.253.

right,[497] Oregon permits nonfarm dwellings only when they are compatible with farm uses.[498] Moreover, all land divisions, even those for farm purposes, must be of a size appropriate for continued agriculture.[499]

Taken together, the benefits and restrictions protect agriculture as a resource, thus helping to create a sense of certainty that stabilizes the agricultural community. When farmers are uncertain about the future, they are reluctant to engage in activities that will be beneficial only over the long term. A farmer may choose, for example, not to plant an orchard or not to construct a building because he or she is unsure the area will remain agricultural long enough for the activity to pay for itself. Such decisions, which are at odds with the long-term viability of the agricultural economy, will be made much less frequently now that S.B. 100 has reduced uncertainty about the future of farming in EFU zones.[500]

Counties may act to maintain commercial agriculture in several ways.[501] Following the lead of Goal Three's reference to minimum lot sizes, they may establish a uniform lot size large enough to accommodate the type of agriculture common to the area. The minimums are usually based on the size of commercial farms already in the area.[502] Because, for example, a viable orchard requires less land than a viable hay farm, different sizes for different terrains and crops may be required.[503] Consequently, counties are not obliged to set minimum lot sizes; they also may enforce the viable-agriculture provisions by establishing criteria to be applied on a case-by-case basis.[504] The method chosen, however, must ensure the continuation of existing commercial agriculture in the area.[505]

Dwellings proposed on parcels that do not meet the "commercial agriculture" standard are treated as nonfarm dwellings,[506] and are permitted on EFU land only in limited circumstances. A nonfarm home may be justified only upon written findings that it is compatible with statutorily defined farm uses and is consistent with the state's effort to preserve the maximum amount of agricultural land,[507] that it does not interfere seriously with accepted farming practices, that it does not materially alter the stability of the overall land use pattern of the area, and that it is situated upon land generally unsuitable for the production of

497. Duncan, *supra* note 13, at 106.

498. *See infra* text accompanying note 508.

499. *See supra* text accompanying notes 484-87.

500. Gustafson, *supra* note 429, at 370. The point is part of an argument advocating larger minimum lot sizes. *Cf.* Duncan, *supra* note 13, at 99 (New York Agricultural Districting Law creates "an atmosphere of confidence").

501. Benner, *supra* note 469, §§ 4-7 to -18.

502. Lane County v. City of Eugene, 54 Or. App. 26, 633 P.2d 1306 (1981).

503. Benner, *supra* note 469, §§ 4-14 to -15.

504. *Id.* § 4-16.

505. *Lane County*, 633 P.2d at 1311 n.7.

506. Benner, *supra* note 469, § 4-18.

507. OR. REV. STAT. § 215.243.

crops and livestock.[508] In reaching those conclusions, a county must consider all reasonable agricultural uses and management options.[509] That land is suitable for one type of agriculture, but not for others, does not mean that it is "generally unsuitable for the production of crops and livestock." Nor does a parcel meet the statutory standard simply because it is too small to be self-supporting; the county must consider whether it can be sold or leased to another farmer.[510]

3. *Exceptions to EFU Zoning*

The above-discussed provisions are addressed to activities permitted in EFU zones, but the Oregon statute designates a means by which land outside UGB's, ordinarily zoned EFU, can be designated otherwise.[511] Known as the "exceptions process," the mechanism permits exclusion of land that is no longer available for farm use because it is developed already or of land that is "irrevocably committed" to nonfarm use because existing adjacent uses make the application of the agricultural lands goal

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508. A nonfarm home may be justified only upon written findings that it

(a) Is compatible with farm uses described in ORS 215.203(2) [which defines uses permitted in EFU's] and is consistent with the intent and purposes set forth in ORS 215.243;

(b) Does not interfere seriously with accepted farming practices, as defined in ORS 215.203(2)(c), on adjacent lands devoted to farm use;

(c) Does not materially alter the stability of the overall land use pattern of the area;

(d) Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract; and

(e) Complies with such other conditions as the governing body or its designate considers necessary.

OR. REV. STAT. § 215.283(3).

Under the Marginal Lands Bill (S.B. 237), 1983 Or. Laws 826 (codified at OR. REV. STAT. §§ 215.253, 215.288, 215.317-.327 (1985)), an exceedingly complex piece of legislation enacted in 1983, counties may choose to designate low-productivity lands and lands already divided into small parcels, regardless of productivity, as marginal. Participating counties also may permit development on small lots-of-record created prior to July 1, 1983. OR. REV. STAT. § 197.247. A recognition that EFU zoning requirements may have been too all-encompassing, the bill generally allows much greater residential use of EFU land than otherwise would be permitted under Goals 3 and 4. Nonetheless, counties that avail themselves of those "relaxed alternatives" are required to enact standards for both farm and nonfarm dwellings that are more precise, and in some cases more restrictive, than those required in counties that do not opt to come under the provisions of the Marginal Lands Bill. *Compare id.* §§ 215.213(4)-.213(8) *with id.* §§ 215.283, 215.288. However, the latter counties may adopt the new dwelling standards if they so desire. *Id.* § 215.288. For a more detailed understanding of the Marginal Lands Bill see Memo from James J. Ross, Director, Dep't. of Conservation and Dev., to LCDC (Sept. 16, 1983). It is evident that the Act has had little impact because, as of January 1985, only two counties had designated marginal lands. Interview with Richard Benner, Staff Attorney, 1000 Friends of Oregon (Jan. 3, 1985) [hereinafter Benner 1985 Interview].

509. Benner, *supra* note 469, §§ 4-9 to -11.

510. *Id.* § 4-10.

511. *See supra* note 477.

impracticable.[512] An exception also is available (a) if there is a justification for not applying state policy, (b) if the proposed use can be accommodated only in an area that is otherwise ineligible for an exception, (c) if the adverse effects that will result from the use at the proposed site are not significantly greater than would occur at another excepted site, and (d) if the proposed use is, or can be made, compatible with adjacent uses.[513] Most of the land excepted from EFU zoning has been designated for residential development.[514] However, because UGB's are supposed to provide adequate land for most future growth, a simple market demand for rural housing does not establish a need. "Land is not excepted from the agricultural goal merely because somebody wants to buy it for a house."[515]

C. *Evaluation: Does the Oregon Land Use Planning Act Protect Farmland?*

The Oregon law is the nation's most comprehensive farmland preservation system and, as such, has the greatest potential to protect agricultural land. The Act's strength lies in its essential philosophy that protection of the land is a goal as important as the encouragement of growth. Accordingly, decisions about farmland are made not on a parcel-by-parcel basis but rather in consideration of the whole agricultural economy. Instead of declaring that individual parcels "may be developed if . . . ," Oregon, by requiring that essentially all farmland outside the urban growth boundaries be zoned for exclusive farm use, effectively has announced that "farmland shall not be developed except in a manner consistent with the long-term viability of agriculture."[516]

In general, observers agree that the EFU-UGB requirement has succeeded in stopping major urban sprawl onto farmland. As of 1987, sixteen million acres, about half the privately owned land in Oregon,[517] and nearly ninety percent of the acreage that LCDC had projected would be zoned EFU when all plans were completed,[518] had been so designated. According to Ron Eber, Legal Policy Coordinator for LCDC, the figure

512. OR. REV. STAT. § 197.732(1)(a)-.732(1)(b).

513. *Id.* § 197.732(1)(c); *see* 1000 Friends of Oregon v. LCDC, 69 Or. App. 717, 688 P.2d 103 (1984).

514. Gustafson, *supra* note 429, at 367.

515. Still v. Board of County Comm'rs of Marion County, 42 Or. App. 115, 600 P.2d 433, 437 (1979).

516. *See supra* note 508 and accompanying text.

517. Interview with Ron Eber, Legal Policy Coordinator for LCDC (Feb. 10, 1987) [hereinafter Eber 1987 Interview]. Eber states that the most recent survey reveals that the figure essentially has not changed since 1984. *See* Eber, *Oregon's Agricultural Land Protection Program,* in PROTECTING FARMLANDS 164 (Steiner & Theilacker ed. 1984).

518. It is estimated that by the time all 36 county plans are acknowledged, some 17.8 million acres will be zoned EFU. R. BENNER, ADMINISTRATION OF EXCLUSIVE FARM LANDS IN TWELVE OREGON COUNTIES: A STUDY OF COUNTY APPLICATION OF STATE

includes the "overwhelming majority of Oregon's best farmland."[519] Acknowledging that much of that land was unlikely to have been developed with or without EFU zoning, Eber still believes the requirement has made a difference in the Willamette Valley. Given the pressure in that area for small-tract rural development, he believes massive urban sprawl would be occurring without the combination of UGB's and EFU zoning that essentially have "put the brakes on."[520]

Similarly, Richard Benner, Staff Attorney for 1000 Friends of Oregon, probably the state's leading environmental group,[521] recently reported that while normal expansion of UGB's has occurred, there has been "no genuine loss of EFU land to residential subdivisions in the last seven years."[522] Benner attributes that success primarily to the compulsory aspects of the Act: The decision whether to protect farmland is not left entirely to the judgment of local governments.[523]

For example, when Polk County, in the central Willamette Valley, attempted to circumvent the EFU requirement by placing 53,000 acres of agricultural and forest land in a special zone in which five-acre residential parcels were permitted, LCDC refused its approval. After the county tried again, this time using the exceptions process,[524] the commission granted rural residential status to 12,000 acres that generally were not suitable for farming because they contained hilly terrain, poor soils, and some existing development.[525] LCDC insisted, however, that the county apply the goals[526] to the other 41,000 acres and issued an enforcement order barring all land divisions until appropriate zoning was in place.[527] Similarly, when Curry County commissioners refused to create EFU and timber-conservation zones unless landowners were compen-

STANDARDS TO PROTECT OREGON FARMLAND 1 (prepared for 1000 Friends of Oregon, 1980) [hereinafter R. BENNER, ADMINISTRATION OF FARMLANDS].

519. Interview with Ron Eber, Legal Policy Coordinator for LCDC (Jan. 16, 1985) [hereinafter Eber 1985 Interview]. Eber reiterated his comments in 1987. Eber 1987 Interview, *supra* note 517.

520. Eber 1985 Interview, *supra* note 519.

521. 1000 Friends of Oregon was formed in 1975, primarily by outgoing Governor Tom McCall and Henry Richmond, who became and remains the group's Director. Organized primarily to oversee the initial implementation of S.B. 100, the group has continued to function as a watchdog by, for example, filing suits, taking appeals, and preparing reports. Moreover, it has been successful in obtaining the support of original opponents. Although it has its enemies, everyone agrees that 1000 Friends has played a pivotal role in Oregon's planning process. *See* H.J. LEONARD, *supra* note 429, at 20-25.

522. Interview with Richard Benner, Staff Attorney, 1000 Friends of Oregon (Feb. 11, 1987) [hereinafter Benner 1987 Interview]. *Cf.* Furuseth, *Update, supra* note 429.

523. Benner 1985 Interview, *supra* note 508.

524. *See supra* text accompanying notes 511-15.

525. As of June 1983, approximately 750,000 acres had been designated for rural residential development statewide, 200,000 acres of which were in the Willamette Valley. Eber, *supra* note 517, at 165.

526. *See supra* note 470 and accompanying text.

527. H.J. LEONARD, *supra* note 429, at 16.

sated, LCDC imposed a building moratorium, and for two years no development was permitted on rural land.[528]

Thus, the Oregon Land Use Planning Act is working at the aggregate level.[529] But LCDC control of the comprehensive decisions notwithstanding, full effectiveness of the Act depends on the degree to which those charged with implementation are conscientious about following the mandate of the Act. Without minimizing the successes of LCDC, both Eber and Benner point out that a serious breakdown in implementation is occurring at the county level.[530]

The gap between the theory of the Act and the reality of its implementation at the county level has been documented by three separate reports compiled by 1000 Friends of Oregon.[531] The 1980 study of permits issued in twelve counties, nine of which are in the Willamette Valley, revealed that during a six-month period not only had ninety percent of the applications for development been approved, but also seventy percent of the approvals had been improper. Either the required findings had not been made or they were obviously inadequate.[532]

For example, the average size of new farm parcels approved in Lane County[533] was eighteen acres. Yet the average size of farms in the county was 156 acres,[534] and the average size of farms producing $2,500

528. *Id.* at 15-16.

529. It is worth noting, however, that there has been considerable recalcitrance even at the level of basic compliance. For example, in reporting its actions for inclusion in the 1982 report, Klamath County declared that it had made no EFU decisions. In reality, there had been no EFU decisions because the county, seven years after the passage of S.B. 100 and S.B. 101, had not created an EFU zone. R. BENNER, *supra* note 487, at 9-10.

Similarly, Malheur County regularly missed planning deadlines; its inventory data, reported complete in 1978, was still in rough draft form in 1982. A comprehensive plan was finally approved by LCDC in February 1983, but one month later, county voters repealed the comprehensive plan and zoning ordinance. In October 1983, the county agreed to adopt a plan drafted by a special "land use task force," but only if voters approved. One month later, the plan was defeated in an election in which 20% of the electorate voted. Mills, *Seven Years of Foot-Dragging Demand LCDC Toughness,* 1000 Friends of Oregon Newsletter, Fall 1983, at 5.

As of January 1985—eight years after the passage of S.B. 100—256 of 278 local comprehensive plans had been acknowledged in whole or in part, Eber 1985 Interview, *supra* note 519, yet the plans of 9 of 36 counties remained unapproved. Benner 1985 Interview, *supra* note 508.

530. Benner 1985 Interview, *supra* note 508; Eber 1985 Interview, *supra* note 519. Both men confirmed in February 1987 that problems at the county level remain unaltered. Benner 1987 Interview, *supra* note 522; Eber 1987 Interview, *supra* note 517.

531. R. BENNER, ADMINISTRATION OF FARMLANDS, *supra* note 518; R. BENNER, FARMLAND IN JEOPARDY: COUNTY ADMINISTRATION OF EXCLUSIVE FARM USE ZONING (Report to Joint Legislative Committee on Land Use, 1982) [hereinafter R. BENNER, FARMLAND IN JEOPARDY]; R. BENNER, OREGON'S FARMLANDS PROTECTION PROGRAM: IS IT WORKING? 9 (Report to LCDC, 1985) [hereinafter R. BENNER, OREGON'S FARMLANDS].

532. R. BENNER, ADMINISTRATION OF FARMLANDS, *supra* note 518, at 17-19.

533. Lane County is at the southeastern end of the Willamette Valley; Eugene is its county seat.

534. S.B. 100 requires that new farm parcels be large enough to accommodate the type of

in sales was 231 acres.[535] In one case, a 140-acre tract was broken into three parcels despite the county extension agent's belief that the parcels were too small to justify the purchase and operation of equipment.[536] Two of these parcels, each forty acres in size, were approved for grain production notwithstanding the fact that the average tract producing $2,500 in grain sales contained 115 acres.[537] County commissioners simply failed to comply with Goal Three's requirement that new parcels "be appropriate for the continuation of the existing commercial agricultural enterprise within the area."[538]

Similarly, when a Clackamas County[539] resident discovered that he could not build a nonfarm dwelling on his 2.5-acre tract (a 200-acre farm had been subdivided and platted years before) because it was not unsuitable for farming, he applied for a farm dwelling permit. He planned to grow Christmas trees on 1.8 acres. Finding simply that growing Christmas trees was a farm use, the county approved the application, ignoring that all commercial farms in the area were very large.[540]

Even more blatant violations of the Act were committed by Coos County, which approved thirty farm dwellings. In one instance, the county planning department wrote a landowner that he could qualify for a farm dwelling simply by stating he would make an attempt to farm: "This could range from raising and selling a couple of chickens, cows, etc., to selling berries." The county's letter was written six months after LCDC issued a "Common Questions" paper reminding counties of the "commercial agriculture" standard.[541]

The effect of these actions was that, while the number of farms in the already critically endangered Willamette Valley was increasing, their average size was decreasing.[542] By indiscriminately approving "hobby farms," one of the principal evils the land use act sought to avoid, counties were "eat[ing] away at the foundations of commercial agriculture in Oregon."[543] Having subjected the counties' record to savage criticism, the report concluded: "If commercial farming is to be protected as the

agriculture in the area. Minimum parcel sizes are required to correspond to the size of commercial farms that exist in the area. *See supra* text accompanying notes 501-05 and note 502.

535. R. BENNER, ADMINISTRATION OF FARMLANDS, *supra* note 518, at 23.

536. *Id.*

537. *Id.*

538. *See supra* note 477 and text accompanying notes 484-505.

539. Clackamas County is on the southern edge of the Portland metropolitan area.

540. R. BENNER, ADMINISTRATION OF FARMLANDS, *supra* note 518, at 25.

541. *Id.* at 27.

542. *Id.* at 9. *But cf.* Furuseth, *Update, supra* note 429, at 64, wherein the author concludes that from 1974 to 1978 the Willamette Valley showed only a slight decrease (.007%) in farm acreage. That conclusion is based on misleading data from the *1978 Census of Agriculture.* BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1978 CENSUS OF AGRICULTURE at vii (1978). By including under "land in farms" tracts that produce $1,000 in gross sales, the census encompasses "hobby farms."

543. R. BENNER, ADMINISTRATION OF FARMLANDS, *supra* note 518, at 28.

Legislature and LCDC intended, the Legislature must change the process by which farm and non-farm dwellings and land divisions are approved."[544]

Although county officials responded that improper findings were not tantamount to bad decisions,[545] the legislature required counties to submit data on land use decisions made during the period from September 1981 to September 1982.[546] Examining the data collected during the first four months, the 1982 study by 1000 Friends of Oregon negated the counties' argument. The study showed that 86% (228 out of 265) of residences and divisions were approved without findings or with improper findings.[547] In addition, the study scrutinized decisions in five counties[548] and found large-scale substantive violations. Not only did 93% (133/142) of the decisions made in those counties suffer from deficient findings, 65% (93/142) violated farmland protection standards.[549] "That is, in just four months, these five counties approved 38 new residences and 55 land divisions they should have denied, and would have denied if they had applied state standards properly."[550] The problem was not just bad findings, it was bad decisions.

In 1985, the third report[551] showed little improvement. From October 1983 to August 1984, state and/or county EFU criteria were misapplied in 56% (304/540) of approval cases.[552] In the Willamette Valley, 58% of the permits were granted improperly, and five of the valley's nine counties misapplied the law at least 70% of the time.[553] Based on adjustments to a twelve-month period, the study projected that 15,000 new dwellings would be added to EFU zones statewide over the twenty-year planning period, 7,000 in the Willamette Valley alone.[554] While it is not possible to determine accurately the size of parcels created, the report concludes that the majority are small farms that are not commercially viable.[555]

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544. *Id.* at 29.

545. R. BENNER, FARMLAND IN JEOPARDY, *supra* note 531, at 7.

546. *Id.*

547. *Id.* at 9.

548. All five counties—Clackamas, Yamhill, Polk, Marion, and Linn—are located in the Willamette Valley. *Id.* at 10.

549. *Id.*

550. *Id.*

551. R. BENNER, OREGON'S FARMLANDS, *supra* note 531, at 9. This study also is based on data the legislature required counties to submit. OR. REV. STAT. § 197.060 (1985).

552. R. BENNER, OREGON'S FARMLANDS, *supra* note 531, at 9. Performance was not uniform, however: Twelve counties (accounting for 46% of approvals) misapplied criteria in 70% of approvals, while twelve other counties (responsible for 36% of approvals) applied criteria correctly in 70% of approvals. *Id.* at 9 n.4.

553. *Id.* at 10.

554. *Id.* at 7. Making similar adjustments, the study projects 5,000 divisions over the 20-year planning period, 2,800 in the Willamette Valley. *Id.* at 8.

555. *Id.* at 11. That conclusion is based on the *1982 Census of Agriculture,* which reports

The three reports demonstrate clearly that while the Oregon Land Use Planning Act effectively has stopped large-scale urban sprawl, spot development continues at an alarming rate. As one commentator puts it, "The question is, how much 'nickel and dime' development can the farm economy . . . tolerate?"[556] While the absence of large-scale development lessens the negative impact that rural development has on agricultural communities,[557] spot development is harmful in its own way. When dwellings are built, land is removed from commercial agricultural production and the lot essentially becomes residential. Even if the new resident were to rent out the land, farming efficiency would be reduced.[558]

Parcelization, the division of land into small dwellingless parcels,[559] creates the same logistical problems. Divisions reduce the land available to commercial farmers even though the tract is not yet residential. While in theory these parcels are available for purchase by farmers who wish to expand their operation or to young farmers beginning their operations, small parcels are costlier because they have development value.[560] While farmers cannot afford to buy the small tracts, these parcels often attract hobby farmers, with much larger incomes,[561] who then decline to lease

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that 97% of Oregon's new farms are between 1 and 49 acres, 45% between 1 and 9 acres, and that over 50% of the new small farms are found in the Willamette Valley. *Id.* at 11, 12. Perhaps most significantly, 95% of the new small farms produced under $10,000 in sales. *Id.* at 12.

556. H.J. LEONARD, *supra* note 429, at 128.

557. Duncan, *supra* note 13, at 74-76.

558. Already roughly 40% of Willamette Valley farmland is rented by the operator, and nearly 35% of those leased parcels are not attached to the farmer's home operation. R. BENNER, FARMLAND IN JEOPARDY, *supra* note 531, at 2. Working small, scattered tracts not only increases energy and transportation costs, it also makes farming more difficult. *See* R. Benner, LCDC in *Goracke:* Farmland Divisions Must Not Harm Area's Agriculture (undated memo prepared for 1000 Friends of Oregon) (on file with author). For example, plowing an 80-acre parcel requires the farmer to negotiate four corners; two 40-acre parcels require eight such turns. *Id.* at 2.

559. OR. REV. STAT. § 215.263.

560. In 1982, Benton County parcels in the 40-acre range sold for $700 to $800 per acre more than those in the 80-acre range. R. BENNER, OREGON'S FARMLANDS, *supra* note 531, at 14.

561. Gustafson, *supra* note 429, at 368-69, reports that in 1980, the average price paid for parcels of 20 to 50 acres was $3,500 to $4,000 per acre in Clackamas County and $3,000 to $3,500 per acre in Marion County. Because both counties required minimum lots of 20 acres in EFU zones, the smallest allowable parcel sold for $70,000 to $80,000 in Clackamas County and for $60,000 to $70,000 in Marion County. The Clackamas County assessor reported that the 20-acre lot had "only slowed the rate of acceleration in the growth in the market for hobby farm parcels—a substantial number of households seem willing to pay $70,000 to $80,000 for a twenty acres site in an EFU zone." *Id.* By contrast, in Washington County, which had a 38-acre minimum lot size, and parcels selling for $140,000 to $160,000, "recent market activity for small EFU parcels has been negligible." *Id.* at 368. The author uses the data to argue for larger minimum lot sizes in EFU zones. This argument is best addressed to counties: Even though the Marginal Lands Act sets a 20-acre minimum where counties have not adopted their own minimum lot size, OR. REV. STAT. § 215.313, a state mandate for lots of 40 acres would run counter to Oregon's desire to take advantage of local governments' knowledge of local agriculture.

the land for farming.[562]

The Oregon Land Use Planning Act declares that the long-term continuation of commercial agriculture is vitally important to the state.[563] But locally elected officials must make decisions in situations where the short-term and local consequences are more tangible.[564] Such short-run analysis weighs both the economic injury that will befall a landowner if he or she is not permitted to sell or divide land, as well as the economic benefits, such as the increased tax base, that will be foregone if development is denied. Other farmers are unlikely to protest decisions to develop because they too want to be able to dispose of their land if or when it is in their interest to do so.[565] At the urban fringe, where the most pressure exists, the priorities of the local community further tilt the decisionmaking process toward development. As a result, the cumulative effect of development on agricultural land as a resource is ignored.

Despite the presence of statewide legislation aimed at preserving agricultural land, the tilt toward development exists in each of the states discussed in this Article. Yet Oregon decisionmakers work within a system that treats the protection of the agricultural community as a goal

562. Between 1978 and 1982, 30,000 acres of rented farmland disappeared in seven Willamette counties, while land in small farms (1 to 49 acres) increased by 22,000 acres. R. BENNER, OREGON'S FARMLANDS, *supra* note 531, at 14. In two more demographically stable counties—Hood River and Tillamook—there was only a slight increase in rented acreage and little change in the acreage devoted to small farms. *Id.*

563. *See supra* note 453 and text accompanying notes 477-80.

564. One possible way to take the pressure off county commissioners is to designate hearing officers to make individualized land use decisions, leaving only policymaking decisions (zone changes and plan amendments) to political officials. Noting that nine counties already used hearing officers for some or all EFU decisions, the 1982 survey by 1000 Friends recommended that the state mandate such a program. R. BENNER, *supra* note 487, at 13. The proposal was not adopted. The group may ask the legislature to create a system whereby state-appointed hearing officers would decide all nonpolicymaking land use issues. Interview with Richard Benner, Staff Attorney, 1000 Friends of Oregon (Feb. 15, 1985).

1000 Friends also recommends tightening the standards for construction of dwellings in EFU zones. R. BENNER, OREGON'S FARMLANDS, *supra* note 531, at 25. Instead of allowing farm dwellings on lots that, under Goal Three's vague language, are "appropriate for commercial agriculture," *supra* note 477, 1000 Friends proposes that they be approved only when in compliance with a more precise set of definitions meant, in fact, to guarantee continued agricultural viability. Under those standards, taken from the 1983 Marginal Lands Bill, *supra* note 508, farm homes are permitted on lots of at least 20 acres, so long as the tract is not smaller than the average farm in the county that produces $2,500 in annual gross sales. On lots smaller than that, farm homes are permitted only if the farm produced $10,000 in annual gross income two of the previous three years or is already planted in crops that, upon harvest, are capable of producing $10,000 in annual gross income. OR. REV. STAT. § 215.213(2) (1985). The group also urges that applications for nonfarm dwellings, now judged by criteria that are "redundant, ambiguous and nearly impossible to apply case-by-case," R. BENNER, OREGON'S FARMLANDS, *supra* note 531, at 9, be judged instead by other, more precise, Marginal Lands standards. One of those standards, for example, protects the larger agricultural community by prohibiting nonfarm dwellings on Class I, II, and III soils. OR. REV. STAT. § 215.213(3)-(7).

565. Benner 1985 Interview, *supra* note 508.

every bit as significant as the enhancement of growth. In Oregon, communities are free to set aside land that will be needed for future growth. All land not so designated, however, must be zoned exclusively for farm use and may not be developed except in a manner consistent with the long-term viability of agriculture. Oregon facilitates growth but also ensures that the actions of local officials who permit development in farm zones will be scrutinized closely by administrators and courts duty-bound to consider impacts on agriculture.[566] Thus, although there is evidence of abuse at the county level, the very fact that this abuse is being uncovered and examined in light of the state standards signals that the Oregon Land Use Planning Act is basically sound. In other words, the Act minimizes the injury to the agricultural community that can be caused by development-oriented local decisionmakers. The Oregon Land Use Planning Act will succeed where others have failed because it embodies "values, goals, and assumptions" that attach the same importance to the future of agriculture as to the future of cities.

CONCLUSION

Beginning with Hawaii in 1961, a number of states have adopted comprehensive land use planning systems that contain farmland preservation components. The programs recognize agricultural land as an important natural and economic resource that merits long-term protection. They all have achieved at least a modicum of success by declaring that farmland may not be developed without the approval of a public body. Nevertheless, because the programs also recognize that development must occur as cities grow, the actual degree of success depends upon the balance each program strikes between farmland preservation and growth enhancement.

The four programs discussed in this Article—adopted by Hawaii, Vermont, California, and Oregon—all protect farmland through broad, long-range policies established at the state level. Yet, these policies typically are undermined when applied to individual situations in which short-range consequences overshadow general policies. The pressure to convert farmland to nonfarm uses is greatest at the urban fringe, where land tends to be worth far more for developmental than for agricultural purposes. Accordingly, it is there that the negative impact on the farmer who is not permitted to develop his land will be the most acute. It is also

566. For example, the courts recently halted the practice of allowing farm dwellings on EFU land based merely on the owner's expressed intent to engage in farming once he or she was in residence. Matteo v. Polk County, 11 Or. LUBA 259 (1984), *aff'd* by unpublished opinion, Or. Ct. App.; Benner 1987 Interview, *supra* note 522. Farmland was being converted to residential use because, having built their farm homes, many landowners were abandoning their agricultural efforts. LUBA interpreted Goal 3, *supra* note 477, to permit new farm dwellings only when land is currently in farm use. *Matteo*, *supra*.

there that development most readily can expand a community's economic and tax bases. Sensitive to both realities, those charged with enforcing state farmland protection policies often permit development despite its detrimental long-term effects on agriculture. A program's potential for success, therefore, depends on the degree of emphasis it places on farmland protection. Success is a function of the importance of farmland protection among the "values, goals, and assumptions" that go into the planning process. The most effective programs are those that treat agricultural protection and growth enhancement as equally important values.

The farmland protection programs of Hawaii and Vermont are Janus-like. They seem as if they would preserve agriculture, but actually they encourage short-term analysis biased toward development. The fact that Hawaii and Vermont have established protection programs demonstrates that many of their citizens believe agricultural land must be protected from large scale conversion. On the other hand, the development-oriented structure of these programs reflects, perhaps, the sagging agricultural economies in those states. Thus, the long-term viability of agriculture, which is seen as uncertain, is subordinated to the short-term economic growth that accompanies development. The "farmland may be developed if . . ." approach, the result of this indecisiveness, has not been particularly successful at preserving agricultural land.

Hawaii's Land Use Law was enacted in 1961 both to protect agricultural land and to restrict uncontrolled growth. The law, under which the entire state is zoned, is administered by the Land Use Commission (LUC). In its early years, LUC made rezoning decisions consistent with its statutory mandate to give high quality agricultural land the greatest possible protection, but by the early 1970's LUC's decisions were becoming more and more development-oriented. Part of the reason for this shift lies in the structure of the Land Use Law itself.

The law does not spell out criteria the commission is to use in making necessary tradeoffs between the protection of agriculture and the enhancement of growth. LUC is free to invoke short-term analysis and to rezone at will land from agricultural to urban uses. Thus, as the state's two major crops, sugar cane and pineapple, declined in economic importance while income from growth-inducing tourism and federal military expenditures increased, LUC favored urban development at the expense of farmland protection. Moreover, as if to confirm LUC's development bias, 1975 amendments to the Land Use Law de-emphasized the protection of farmland and made growth management the Act's principal focus.

Still, Hawaiians did not abandon their efforts to preserve farmland. In 1978, Hawaiian voters passed a constitutional amendment, aimed at protecting the state's overall environment, that specifically called for the

conservation of agricultural land. Similarly, the Hawaii State Plan, also enacted in 1978, declares that to maintain agriculture as a major sector of a diversified economy, the state must assure the availability of farmland. Thus, Hawaiians have made a dual commitment—to enhance growth and to preserve agricultural land.

In practice, however, their land use program remains weighted in favor of development. The legislature has rejected a proposal that would implement the constitutional amendment and the state plan through a significant restriction of the terms on which agricultural land can be rezoned. The measure would replace the current "farmland may be developed if . . ." philosophy with a specific standard declaring that it "shall remain undeveloped unless. . . ." The legislature's unwillingness to enact the proposal demonstrates that, regardless of the farmland protection policies officially voiced in 1978, Hawaii's operative "values, goals, and assumptions" remain development-oriented. Because sugar cane and pineapple cultivation are declining, LUC is left free to make pro-growth decisions that make sense in the short run but ignore the long-term goal of maintaining agriculture as an important part of Hawaii's economy. The latter goal can be accomplished only if LUC is required to consider the impact of its decisions on the long-term viability of agriculture.

Vermont's Act 250 also is geared in favor of development. Under its provisions, farmland that will lose some of its agricultural potential because of a proposed development can be converted to a nonfarm use only if a permit is issued by a District Environmental Commission. There is general agreement that the Act has not been effective in deterring the conversion of agricultural land. As in Hawaii, the reason lies in the very structure of Act 250's farmland protection program.

Vermont's economic situation, like Hawaii's, is conducive to land use decisions based on short-term analysis. The decline of dairy farming, traditionally the mainstay of Vermont agriculture, has contributed significantly to the state's generally depressed economic condition. The development of agricultural land thus is seen as a boon to both financially strapped farmers and tax- and job-hungry cities and towns.

Act 250 reflects Vermont's economic reality. Even though it establishes the tradeoff criteria lacking in Hawaii's Land Use Law, the criteria embody a growth-oriented "farmland may be developed if . . ." philosophy. Two of the four guidelines focus on allowing the farmer to make a reasonable return on his or her property, an inevitably pro-development perspective. A third criterion, directed toward growth management, has preserved farmland by concentrating development, but it is invoked only after a decision to develop has been made. In addition, because a threshold requirement—the presence of agricultural soil—has proven easy to manipulate, this subcriterion may be avoided completely. Only one criterion, which requires analysis of the impact development will have on the

agriculture potential of adjoining lands, emphasizes the long-term viability of agriculture. It has been construed narrowly to encompass only contiguous lands, notwithstanding the fact that in Vermont most farmers work scattered tracts that do not abut one another. At every turn, Act 250 engenders a short-term analysis.

There is another side to the Act's farmland protection provisions, however. Although they are not as pro-agriculture as the Hawaiian constitutional amendment and state plan, Vermont's provisions nonetheless place restrictions on the conversion of farmland. They were enacted in spite of the fact that the ability to develop farmland was the financial ace-in-the-hole to struggling farmers and towns. In light of the obvious costs, the provisions must be seen as a deliberate choice to go against the growth-oriented grain. Thus, Vermont is ambivalent about farmland protection. The state's operative "values, goals, and assumptions," however, will continue to be developmental in nature so long as Act 250 remains weighted toward short-term analysis.

The farmland protection programs created by the California Coastal Act and the Oregon Land Use Planning Act stand in stark contrast to the Hawaii and Vermont programs. California and Oregon have rejected the "farmland may be developed if . . ." philosophy that has fostered the short-term analysis characterizing the programs in the other two states. No doubt because agriculture plays an essential role in the California and Oregon economies, their programs have as their central focus the agricultural community itself. They provide reasonable opportunities for growth, but they declare in effect that "farmland may not be developed except in a manner consistent with the long-term viability of agriculture." The California and Oregon programs embrace "values, goals, and assumptions" that afford the protection of agricultural land an importance equal to that afforded the enhancement of growth.

The California Coastal Act, passed in 1976, protects a narrow strip of land along the entire length of the state's coastline. One-third of the area is farmland that, each year, produces agricultural commodities worth millions of dollars. The Act requires each local government within the coastal zone to establish a Local Coastal Program (LCP) that, when approved by the California Coastal Commission (CCC), will govern all future land use decisions. Pending completion of an LCP, development in the coastal zone requires a permit from CCC.

What little formal data are available indicate CCC is preserving agricultural land effectively through the interim permitting process. Until LCP's are in place, it is impossible to know whether local governments similarly will carry out their mandate. It is clear, however, that the LCP's now being prepared employ innovative land planning devices to protect farmland. This creativity suggests that some counties may understand the importance of preserving agriculture. Nevertheless, their

success, like CCC's, also is attributable to the structure of the Coastal Act's farmland protection provisions.

The Act provides opportunities for growth but declares that development will not occur at the expense of the agricultural community. Development is allowed on prime farmland in areas where conflicts with urban uses already severely limit agricultural activity or where infilling would help establish stable urban/rural boundaries. Any such development is, however, subject to the Act's declaration that "in order to assure the protection of the area's agricultural economy . . . the maximum amount of prime agricultural land shall be maintained in agricultural production."

Similarly, urban expansion is accommodated but only on nonprime farmland. Even in that context the Act declares that farmland "should not be converted to non-agricultural uses unless" continued agricultural activity is not feasible or conversion would help to concentrate existing development. As with prime land, any such development must be compatible with the continuation of surrounding agricultural uses. In short, the California Coastal Act successfully preserves farmland because it treats the need for urban growth and the desire to protect the long-term viability of coastal zone agriculture as equally important planning considerations.

The Oregon Land Use Planning Law, which similarly protects agricultural land, is the nation's most comprehensive land use act. Passed in 1973, the Oregon Act's primary impetus was to protect the Willamette Valley, which produces great quantities of vegetables and specialty crops, from a tide of development. The Act is implemented through goals established by the Land Conservation and Development Commission (LCDC). LCDC approves comprehensive plans prepared by local governments and is an interim permitting authority.

The Oregon Act protects farmland through the interplay of its Urban Growth and Agricultural Lands Goals. Oregon's cities and towns are required to establish Urban Growth Boundaries (UGB's) around land they reasonably believe will be needed for development over the next twenty years. With limited exception, all land outside UGB's then is required to be zoned for Exclusive Farm Use (EFU). Development within EFU zones is strictly limited, and any development that does occur must be consistent with the "continuation of the existing commercial agricultural enterprise within the area."

The Oregon Land Use Planning Act has a mixed record with regard to the preservation of agricultural land. At the aggregate level, observers report that there have been no serious losses of farmland to residential development in a number of years. On the other hand, there exists a pattern of decisions in which local officials have sidestepped the Act to allow development of farmland. The decisionmakers are relying on the

same short-term, inevitably pro-development analysis used by officials in Hawaii and Vermont.

In Hawaii and Vermont, the short-term analysis is consistent with the "farmland may be developed if . . ." structure of those states' acts; in Oregon, however, such analysis is at odds with the "farmland may not be developed unless . . ." structure of the Land Use Planning Act. This key difference means that errant local officials in Oregon are subject to reversal because the Act dictates the use of long-term analysis. Oregon's Urban Growth Goal adequately provides for developmental needs, so they are excluded when considering proposals to develop farmland. When a proposal is reviewed, the primary consideration is the continued viability of the agricultural community. The recent criticism and review of local deviations from the Act are evidence of the Act's success.

The Oregon Land Use Planning Act, like the California Coastal Act, treats the protection of farmland and the enhancement of growth as equally important values. Both Acts provide adequate opportunity for urban growth but insist that "farmland shall not be developed except in a manner consistent with the long-term viability of agriculture." The California and Oregon programs will fare well because they acknowledge, as the Hawaii and Vermont programs do not, that farmland preservation occurs most effectively in the larger agricultural context. This perspective serves as a constant, overarching standard against which local decisions, driven by local pressures, may be judged. Foremost among the agriculturally related "values, goals, and assumptions" implemented by the California and Oregon programs is the recognition that agriculture itself is the resource that must be protected.