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An Agricultural Law Research Article

## **Agricultural Land Preservation: Washington's Approach**

by

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# COMMENTS

## AGRICULTURAL LAND PRESERVATION: WASHINGTON'S APPROACH

In November 1978 the residents of King County cast 177,484 votes in favor of a novel tax measure authorizing the sale of \$35 million in county bonds for the acquisition of farm and open space lands.<sup>1</sup> The measure failed, however, due to a total voter turnout that was less than the sixty percent required for validation.<sup>2</sup> The King County measure represents another in a myriad of efforts made by numerous government entities throughout the country to plan, program, and control urban growth so as to minimize the amount of encroachment upon rural and open space lands.<sup>3</sup>

The focus of this Comment is to identify the rationale underlying such preservation programs, especially those aimed at the urbanization of farmland and the shift toward corporate farming. Secondly, the Comment will examine methods of farmland preservation, including zoning and the Washington approach which embodies tax incentives and conservation futures. Finally, a forecast of the success of such farmland preservation programs will be attempted.

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1. Report of Citizens Study Committee to the Executive and Council of King County, *Saving Farmlands and Open Space 1* (rev. July 9, 1979) [hereinafter cited as *King County Study*].

2. *Id.*

3. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCE J. 119 (1979) noted: "[B]y 1975 all of the states except Alabama were engaging in programs of state land use policy development or management. Seventeen had completed growth plans or policy guidelines, twenty had ongoing Public Land Use Commissions, and five had private study commissions." *Id.* at 130 (footnotes omitted). See King, *Lost Farm Land Use Prompts U.S. Study*, N.Y. Times, June 18, 1979, § B, at 8, col. 3. A preliminary study made for the Council on Environmental Quality (CEQ) has shown that 48 states now have some form of authority to discourage the buying of agricultural land for other uses.

## I. REASONS FOR PRESERVATION

A. *Urbanization of Farmland*<sup>4</sup>

The most obvious reason for agricultural and open space land preservation programs is the continual loss or conversion of agricultural land to some other use. For example, New Jersey at one time lost farm acreage at a rate of 60,000 acres per year.<sup>5</sup> The State responded by enacting the Farmland Assessment Act of 1964 which reduced the annual farm acreage loss to 5,000 acres per year,<sup>6</sup> equivalent to the loss of only one farm every three days instead of three farms every day.<sup>7</sup> Pennsylvania has also experienced dramatic losses of farmland. Each year over 100,000 acres of Pennsylvania farmland, the most productive in the nation, is irreversibly lost to production.<sup>8</sup> Just as seriously, for every acre of farmland that is urbanized an additional acre of farmland is lost due to indirect effects of urbanization such as waste disposal and pesticide regulation.<sup>9</sup> Slightly more than a decade ago, Suffolk County in New York State had 88,000 acres of farmland which had dwindled to 55,000 acres by 1976.<sup>10</sup> Today, approximately sixty percent of the existing farmland in Suffolk County is owned by speculators who wait not for crops to become ripe, but for the time to be ripe for development.<sup>11</sup> Overall, it has been recognized that each year more than three million acres of United States farmland is lost to

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4. For the purposes of this article the terms "farmland" and "agricultural land" are used interchangeably.

5. *National Agricultural Land Policy Act: Hearings on H.R. 5882 Before the Subcomm. on Family Farms, Rural Development, and Special Studies, 95th Cong., 1st Sess. 39 (1977)* [hereinafter cited as *NALP Hearings*] (statement of Phillip Alampi).

6. *Id.* at 40. In the last 25 years the total amount of farm acreage in New Jersey has decreased from 1.7 million acres to 1 million acres. *Id.* at 79 (statement of William A. Haffert, Jr.).

7. *Id.* at 40 (statement of Phillip Alampi). The number of farms in New Jersey has shrunk from 25,000 to less than 7,500. *Id.* at 79 (statement of William A. Haffert, Jr.).

8. *Id.* at 90 (statement of Jack Brizius).

9. *Id.* at 90. These indirect effects have resulted in the loss of 100,000 acres of farmland between 1930 and 1970. *Id.* Professor Vogeler argues that for every acre of farmland urbanized one to two acres become a part of the urban shadow which inherently results in underutilization of farmland resulting in significantly greater loss of agricultural productivity. Vogeler, *The Necessity for Prime Farmland Preservation in Metropolitan Areas*, U.S.A. TODAY, Sept. 1978, at 52.

10. *NALP Hearings*, *supra* note 5, at 137 (statement of John V.N. Klein).

11. *Id.*

development.<sup>12</sup>

The severity of such loss or conversion must be carefully assessed. One commentator has argued the amount of agricultural land taken each year for urban uses has had little impact on the total supply of United States' cropland.<sup>13</sup> Agricultural economist Robert Otte maintains that between five and six times the quantity of cropland lost to urbanization is shifted to lower intensity agricultural or forestry uses or idled simply because active farming is not profitable.<sup>14</sup> The impact of the loss of agricultural land is arguably obscured as new croplands are developed in Florida, the lower Mississippi, the Corn Belt, and the Mountain and Pacific regions.<sup>15</sup> Otte's argument is premised upon the belief that a certain minimum amount of cropland is required to provide food for the nation's domestic and foreign requirements. Therefore, loss of farmland beyond that minimum number of acres is inconsequential.

Notwithstanding Otte's argument, it is apparent there has been a significant aggregate loss in cropland between 1949 and 1975.<sup>16</sup> Some have argued that the aggregate loss of land is somewhat offset by the increase of farmland classified as being within capability classes I through III.<sup>17</sup> This is somewhat deceptive since a great variance exists between cropland identified in capability class I and that identified in capability III. The United States Department of Agriculture has defined class I soils as having few limitations which restrict their use. Class III soils, however, have severe limitations that reduce the choice of plants or require special

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12. King, *supra* note 3, § B, at 8, col. 3.

13. U.S. DEP'T OF AGRICULTURE, *FARMING IN THE CITY'S SHADOW* iv (1974).

14. *Id.*

15. *Id.*

16. The United States Department of Agriculture statistics indicate that in 1949 total cropland measured 478 million acres. U.S. DEP'T OF AGRICULTURE, *CROPLAND FOR TODAY AND TOMMORROW* 2 (1975). In 1975 the Department of Agriculture stated: "About 79.2 million acres have gone out of cropland since 1967, but 48.7 million acres have been converted to cropland during the same period. The net loss to cropland has been 30.5 million acres, leaving a total of 400.4 million acres in cropland." U.S. DEP'T OF AGRICULTURE, *POTENTIAL CROPLAND STUDY 1* (1977) [hereinafter cited as *POTENTIAL CROPLAND STUDY*].

17. "The quality of cropland has been improved by shifts in land use. In 1975, 86% (344 million acres) of America's cropland . . . was in capability classes I-III, compared with 83% in 1967 . . ." *POTENTIAL CROPLAND STUDY*, *supra* note 16, at 2 (footnote omitted).

conservation practices or both.<sup>18</sup> If the quality of cropland has only improved to class III capability, it would be difficult to measure the benefit of such improvement against the loss of significant amounts of cropland.<sup>19</sup>

Agricultural Secretary Robert Bergland points out that of the three million acres lost annually, one million acres is the most productive land available.<sup>20</sup> Geography Professor Ingolf Vogeler indicates that only fifteen percent of the nation's 22.3 million acres of prime farmland is located in metropolitan areas.<sup>21</sup> The importance of prime soils in the various metropolitan areas varies from state to state. Pennsylvania is particularly sensitive to the problem of farmland conversion since all but eight of the state's twenty leading agricultural counties are in metropolitan areas where the pressure to urbanize is most acute.<sup>22</sup> In New York forty percent of the prime farmland is located in metropolitan counties.<sup>23</sup> In Oregon fifty-four percent of the cropland in metropolitan centers is prime cropland, while in Illinois eighty-five percent of the prime cropland lies in metropolitan counties.<sup>24</sup> Vogeler concludes that urbanization is a great threat to the limited amount of prime soils.<sup>25</sup>

It is beyond the scope of this Comment to delve into the minute, yet important, comparison of cropland loss versus improved yields or improved production per acre. There is, however, genuine concern throughout the country that the United States is continually losing prime agricultural land to other uses. One of the most frequent alternative uses is conversion to urban land. This increasing urban encroachment accounts for much of the belief that there is a need to protect agricultural and open space lands.

An equally pressing concern centers around the unique posi-

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18. *Id.* at 103. See also Vogeler, *supra* note 9, at 52. (Substantial differences exist between class I-II land and class III land as to crop yields).

19. Between 1958 and 1967 only four million acres of prime cropland was lost to urbanization. Vogeler, *supra* note 9, at 52. Numerous studies performed by the Soil Conservation Service document that presently we are losing our best farmland. *NALP Hearings*, *supra* note 5, at 110 (statement of the Sierra Club presented by Wilma Fry).

20. See King, note 3 *supra*.

21. Vogeler, *supra* note 9, at 52.

22. *NALP Hearings*, *supra* note 5, at 89-90 (statement of Jack Brizius).

23. Vogeler, *supra* note 9, at 52.

24. *Id.*

25. *Id.* See also Brown, *Vanishing Croplands*, *Environment*, Dec. 1978, at 8.

tion this country has achieved as the world's primary supplier of food. While nearly fifty million acres of American farmland have been idled for the last decade, this country has increasingly brought greater proportions of this idle land back into production. Based on this trend, idle crop acreage in the United States may disappear entirely in the next generation.<sup>26</sup> A disturbing question is then raised concerning our ability to continue increasing per acre yields to expand agricultural production in the face of rising international demand. Already, in some countries, increases in per acre yields show signs of slowing down.<sup>27</sup> Given continuing increases in third world population growth, fluctuating climatic patterns and droughts,<sup>28</sup> and the continuing trend in advanced nations toward reducing crop land,<sup>29</sup> this country must begin making important preservation decisions. The ability of the United States to continue exporting foodstuffs is, in large measure, determined by how wisely it preserves its agricultural land today.

### B. Corporations and Farming

Encroaching urbanization is not the only threat to the continued existence of the small family farmer. Large farming conglomerates and absentee corporate concerns have also contributed to the exodus from rural America.<sup>30</sup>

Corporate farms are not the incorporation of the family farm by the occupying owners. Rather, the interests are nonfarm, absentee interests, whose principal purpose is to generate profit, which contributes little to the local or regional economy. The economic and social consequences of the trend toward conglomerate, rather than family-owned and operated farms, must be considered by policy-makers in their attempt to formulate a comprehensive policy to preserve farmland for agrarian purposes. Such an attempt will be

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26. N.Y. Times, Oct. 1, 1973, at 35, col. 1.

27. Brown, *Population and Affluence: Growing Pressures on World Food Resources*, reprinted in *Growth and Its Implications for the Future, Hearings Appendix for the House Subcomm. on Fisheries and Wildlife Conservation and the Environment*, 93d Cong., — Sess. 1416 (1973) [hereinafter cited as *1973 House Hearings*].

28. Critchfield, *One-fourth of the World is Losing its Fight to Survive: What will America do About It?*, reprinted in *1973 House Hearings*, supra note 27, at 1463.

29. *1973 House Hearings*, supra note 27, at 1413-14.

30. Abourezk, *Agriculture, Antitrust and Agribusiness: A Proposal for Federal Action*, 20 S.D. L. REV. 499 (1975).

less than successful if the land is then purchased by corporate concerns more interested in profits than in the production of locally important agricultural commodities and the preservation of the rural community.<sup>31</sup>

The presence of large conglomerates in Washington does not appear pervasive at this time. Given the national trend toward corporate farming,<sup>32</sup> if this state should experience an increase in corporate acquisitions similar to the experience in other states, there is every reason to believe not only that the small family farmer would be displaced, but that rural communities would be exposed to the same economic and social decay that has followed nonfamily farming interests into other states.<sup>33</sup> Data from communities where large scale corporate farms and smaller family farms predominate show that the levels of age, education, and residential stability will decline,<sup>34</sup> as will the number and variety of volunteer organizations. Additionally, economic stratification will increase while the standard of living and the amount of revenue available in the local community will decline.<sup>35</sup> It is estimated that one small businessman becomes insolvent for every six farmers who stop farming<sup>36</sup> as a result of this altered state of affairs.

A comparative study<sup>37</sup> of the towns of Arvin and Dinuba in

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31. It is clear that there will be a larger proportion of the total profits generated by farm operations leaving the local community if the farms have absentee owners. Obviously, a higher proportion of the profit will go where the owner is located. If these owners are located in large metropolitan centers, the income and revenue is lost to the local community from which it emanated. *Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business on the Role of Giant Corporations in the American and World Economies*, 92d Cong., 1st & 2d Sess. 4003 (1972) [hereinafter cited as *1972 Senate Hearings*] (statement of Professor Richard D. Rodifeld).

32. See Abourezk, *supra* note 30, at 501.

33. Senator Abourezk has explained that "[c]onsumers both urban and rural, end up paying higher food prices when those prices are administered by a few giant corporations. Problems are created in urban areas by the influx of displaced rural inhabitants." *Id.*

34. *1972 Senate Hearings*, *supra* note 31, at 4003 (statement of Professor Richard Rodifeld).

35. *Id.*

36. *N.Y. Times*, Dec. 28, 1971, at 28, col. 1.

37. *Hearings Before the Senate Special Comm. to Study the Problems of American Small Business, Small Business and the Community*, 79th Cong., 1st & 2d Sess. 4465-4590 (1972) [hereinafter cited as *Arvin-Dinuba Study*]. The communities of Arvin and Dinuba were carefully selected to reflect the differences in size of enterprise while excluding extraneous factors. Agricultural production in the two communities was virtually identical in volume—2.5 million per year each—so that the resource base was comparable. Both communi-

the San Joaquin Valley of central California lends credence to the belief that expanding corporate farming will cause a significant decline in the social, educational, and economic well-being of thousands of small towns and cities in agricultural areas. In the Arvin and Dinuba study the small farm community supported sixty-two separate businesses while the large farm community supported only thirty-five.<sup>38</sup> This pattern held true when the volume of retail trade in the small farm community was compared to that in the large farm community. Retail trade in the small farm community was sixty-one percent greater.<sup>39</sup> The small farm supported twenty percent more people per dollar volume of agricultural production than an area devoted primarily to large-scale enterprises.<sup>40</sup> Overall, this study disclosed a variety of differences in the economic and social lives of the two communities, lending support to the belief that small farms provide a firmer basis for a rich community life than do industrialized farms.<sup>41</sup>

There are a number of explanations for the attractiveness of corporate farming. Part of the reason large firms enter agriculture can be traced to the large capital requirements of modern agricultural technology.<sup>42</sup> Government price supports, subsidies,<sup>43</sup> and tax structures are also incentives for investment. The graduated, progressive income tax and the preferential taxation of capital gains provide incentive to convert ordinary income into capital gain.<sup>44</sup> Though little or no value to the family-sized farmer, this is great value to a high income taxpayer who can use nonfarm income for

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ties produce specialized crops of high value and high production costs, are in the same climatic zone, are about equidistant from small cities and major urban areas, are similarly served by highways and rail lines, and had no significant advantages from nonagricultural resources, manufacturing or processing. *Id.* at 4476-77.

38. *Id.* at 4476.

39. *Id.*

40. *Id.*

41. *Id.* at 4476-77.

42. 1972 Senate Hearings, *supra* note 31, at 3968.

43. Since farm subsidies accrue roughly in proportion to sales, it follows that the bulk of subsidies go to that fifth of farmers with the highest average income . . . [to that small group of farmers with incomes averaging \$20,000]. [B]ecause the value of the subsidy tends to get reflected in farmland prices, the subsidies are gradually translated into capital gains for long-term holders of land . . .

Taylor, *Public Policy and the Shaping of Rural Society*, 20 S.D. L. REV. 475, 488 (1975) (quoting C. SCHULTZE, *THE DISTRIBUTION OF FARM SUBSIDIES* 3 (1971)).

44. 1972 Senate Hearings, *supra* note 31, at 3968.



agricultural investment and receive capital gain treatment.<sup>45</sup>

Since the tax shelter function of agriculture is intrinsically related to the land, the investment must include the rights to the real estate to ensure a relatively safe tax shelter.<sup>46</sup> The incentive for large firms purchasing farmland to the detriment of the small farmer must be addressed by a comprehensive policy of agricultural land preservation. Furthermore, any preservation policy can further guarantee a healthy supply of farmland close to urban centers by making farm products available at lower cost,<sup>47</sup> while avoiding the hidden costs of replacing and developing farmland lost to urbanization.<sup>48</sup> At the same time, a concerted policy objective aimed at reducing the attractiveness of land to nonfarm investors would go far in preserving the quality of life in rural communities, and benefitting rural and urban dwellers alike.

Large farms are not necessarily essential to achieve survivable economies of scale. Family farms can achieve optimal organization and production efficiency. Economic studies have shown that one- and two-person farms can achieve many economies of size;<sup>49</sup> while other studies, in various states, have shown that all of the economies of size could be achieved by modern and fully mechanized small farms.<sup>50</sup> Three studies have shown that one-person farms are able to achieve average costs as low as any larger farm.<sup>51</sup> Most studies show that the ultimate in efficiency is attained by such farms.<sup>52</sup> However, since total profits may frequently be increased by farms larger than necessary to be most efficient,<sup>53</sup> there is an incentive for corporations to engage in farming activities detrimental to both the rural community and the small family farmer, who is in a less favorable competitive position.

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45. *Id.*

46. *Id.* at 3969.

47. Vogeler, *supra* note 9, at 53.

48. *Id.*

49. Swackhamer, *The Growth of Corporate Farming*, MONTHLY REVIEW, May 1968, at 18, reprinted in *Hearings Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business*, 92d Cong., 1st & 2d Sess. 4334 (1972).

50. U.S. DEP'T OF AGRICULTURE, *ECONOMIES OF SIZE IN FARMING* (1967), reprinted in *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 170, 172 (1977).

51. *Id.* at 172.

52. *Id.* at 175.

53. *Id.* at 173.

The ability of large-scale operations to internalize benefits while simultaneously externalizing certain costs is the most important economic rationale for the large corporate farming structures. Size has the added benefit of increasing the bargaining power of these firms while large volume production makes possible the exercise of market power in the sale of products.<sup>54</sup>

Some of the more pervasive consequences of this situation have already been outlined. Decline in the quality of life and the economic position of the people living in rural communities dominated by corporate farms is not isolated to the central California valley region. Increased per capita costs of public services, deterioration in the quality of services, and the presence of poor schools, bad roads, deficient housing, and limited cultural opportunities, as a result of a shift to corporate farming, have been documented in California, Colorado, Florida, Texas, and the Mississippi delta states.<sup>55</sup>

Reformation of tax policy can play a major role in discouraging large firms from investing too heavily in the agricultural sector,<sup>56</sup> as evidenced by the variety of measures aimed at preserving the family farm which have been introduced in state legislatures. Some seek to limit corporate ownership or operation in general, only if beyond family membership in the corporation.<sup>57</sup> One pilot program in the San Joaquin Valley, assisted by private and public funding, was initiated to help the small farmer cope with rising expenses and allow him to retain his small farm. This program reported that one group of families, loaned \$5,000 to cover out-of-pocket crop expenses, grossed \$65,000, enough to repay the loan, purchase forty acres, and sink a well.<sup>58</sup>

Responsible public planners should not wait until these economic and social liabilities become problematic before they adopt comprehensive policies to cope with a situation which could have an adverse impact on so many people in Washington. The return on an investment in wheat-producing farmland in eastern Wash-

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54. 1972 Senate Hearings, *supra* note 31, at 3963 (statement of Philip M. Raup).

55. *Id.* at 3964.

56. *Id.* at 3970. See also Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Lands*, 15 GONZ. L. REV. 675 (1980).

57. Taylor, *supra* note 43, at 496.

58. *Id.* at 497.

ington, according to a study by two Washington State University economists, would have returned more after-tax earnings between 1963 and 1977 than a comparable investment in corporate bonds, common stock, municipal bonds, and United States government bonds.<sup>59</sup> This fact, coupled with the national trend toward corporate farming, could make Washington an attractive area for such investment. Absent foresight by our planning authorities and a considered policy of land preservation as well as controls on corporate acquisitions, the small farmers and rural agricultural communities of this state stand to suffer.

Recognizing there is a need for preservation of our farmland as a valuable resource which can be utilized for the benefit of Washington's citizens in rural and urban communities alike, our attention must turn to methods of preservation.

## II. METHODS OF FARMLAND PRESERVATION

### A. Zoning

Agricultural zoning seeks to restrict the landowner's ability to use his land for other than agricultural purposes by providing an incentive to farm the land.<sup>60</sup> Several states are experimenting with this form of zoning as one method of reducing the commercial development of prime agricultural land in urban fringe areas.<sup>61</sup>

Agricultural zoning typically requires large minimum parcel sizes of land<sup>62</sup> to be used exclusively for agricultural purposes.<sup>63</sup>

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59. Wohld, *Are Farmland Prices Getting Too High?*, WASH. FARMER-STOCKMAN, Oct. 4, at 7 (1979).

60. For a more complete discussion of the legal ramification of farmland preservation, see Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621 (1980).

61. CAL. GOV'T CODE §§ 51201(d)-(e), 51230 (West Supp. 1979); OR. REV. STAT. §§ 215.203-.273 (1977).

62. See *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974); *Morse v. County of San Luis Obispo*, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967) (upholding the constitutionality of minimum parcel size as a basis for regulation in California).

63. Whitman County Comprehensive Plan at 3 (adopted July 31, 1978). In 1976 the county adopted a 20-acre minimum parcel size requirement throughout all of Whitman County, except the Pullman area, to implement the plan's goal of protecting agricultural lands. See also Whitman County Regional Planning Council, *Agricultural Land Preservation* at 10 (Oct. 1, 1979), which indicates that this type of zoning is not always an effective method of retaining important farmlands, especially in areas of intense developmental interest.

There is little question that setting the minimum parcel size at a large number of acres will slow the rate of development while increasing the incentive to use the land for farming. However, the courts are split with respect to the constitutionality of this type of zoning. Washington courts have yet to rule on the issue. Some courts have upheld minimum lot zoning requirements<sup>64</sup> while others have held that minimum lot zoning is not a valid means of creating a "green belt."<sup>65</sup> Therefore, planning commissions contemplating the use of zoning for the purpose of preservation will be faced with a number of serious constitutional considerations.

The Washington Supreme Court has long recognized the principle that zoning ordinances are constitutional as a valid exercise of the police power of the modern state and will uphold such regulations, provided they have a "substantial relation to the public health, safety, morals or the general welfare" of the people affected by the ordinance.<sup>66</sup> Presumably an agricultural zoning ordinance would not offend Washington's reasonable basis standards if such regulation can be shown to have a substantial relation to the general welfare in light of the continuing need to control the loss of agricultural land. Beyond this justification, such a restriction on the permissible uses of private property would necessarily have to survive a constitutional challenge by the affected landowner that the regulation constitutes a taking without just compensation, which is inherent in the use of zoning as a means of land use control.

The validity of such an ordinance depends initially on whether the local planning and zoning authority promulgating the regulations has exceeded the authority delegated by the city council or board of county commissioners under Washington's zoning enabling act.<sup>67</sup> Provided the ordinance in question does not exceed the delegated authority, it will need to comport with the constitutional requirements of equal protection and due process set out in the

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64. *E.g.*, *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *Fischer v. Bedminister Township*, 11 N.J. 194, 93 A.2d 378 (1952).

65. *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

66. *McNaughton v. Boeing*, 68 Wn. 2d 659, 662, 414 P.2d 778, 780 (1966).

67. WASH. REV. CODE §§ 35.63.010-.120 (1979). *See also* *State v. Thomasson*, 61 Wn. 2d 425, 378 P.2d 441 (1963).

United States Constitution<sup>68</sup> and the Washington State Constitution.<sup>69</sup> Equally significant in this respect is adherence to the prohibition in the fifth amendment of the United States Constitution against taking private property without just compensation.<sup>70</sup>

The taking issue becomes most acute in the application of zoning regulations in urban fringe areas where the necessity for preservation of agricultural land is most pronounced. Continuing urban expansion causes the price of agricultural land in the path of this growth to rise, increasing its value to the farm owner and encouraging the speculative purchase of the land for future development.<sup>71</sup> This situation presents the issue of whether the imposition of, or continued adherence to, such a zoning scheme to preserve the agricultural character of this fringe region is a taking requiring compensation.<sup>72</sup> It also raises the concurrent question of whether this fringe area continues to be more suited for agricultural use than commercial development, thus laying the groundwork for application to the local zoning appeals board for a variance or a challenge in the courts.

Since all zoning provisions are in one way or another exclusionary, the state and federal courts must balance the public's right to regulate land for the public benefit with the landowner's right to utilize his property as he wishes. This concern with the taking issue stems from the high regard in American law for the right to own property. While the theoretical basis for the just compensation requirement of the fifth amendment is open to debate due to the absence of historical evidence by which the origin of this important concept can be traced,<sup>73</sup> the modern boundaries for cases involving takings were established in 1922<sup>74</sup> when the United

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68. U.S. CONST. amend. XIV, § 1 provides that no state shall "deprive any person of life, liberty, or property without due process of law." This prohibition has been interpreted by the United States Supreme Court as requiring just compensation for any public taking of private property. *See, e.g., Chicago, B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 235-41 (1897). *See also United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943).

69. WASH. CONST. art. 1, § 3.

70. U.S. CONST. amend. V provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation." *See also* WASH. CONST. art. 1, § 16 for language comparable to the United States Constitution.

71. *King County Study*, *supra* note 1, at 10.

72. M. CRANSTON, *A HANDBOOK FOR CONTROLLING LOCAL GROWTH*, 46 (1973).

73. F. BOSSELMAN, *THE TAKING ISSUE*, 99-100 (1973).

74. *Id.* at 138.

States Supreme Court handed down its landmark decision in *Pennsylvania Coal Company v. Mahon*.<sup>75</sup> *Mahon* requires the value of a given regulation to the public to be weighed against the loss the property owner stands to suffer by virtue of the regulation. It remains to be seen in the area of agricultural land preservation whether the balance of the public interest will become so significant as to ever be outweighed by a landowner's loss of property value.

Resolution of these issues by the courts will determine the initial success or failure of agricultural zoning as a means of preserving rural land for agrarian purposes. If the ordinance is adopted only after a thorough analysis by the local planning authority of the importance of farming to the regional and state economies, trends in agricultural use and urban expansion, environmental impact studies, soil and open space studies, and a showing that the goals of the zoning program are consistent with state and regional policies concerning agricultural land, then constitutional problems may be avoided.<sup>76</sup> Furthermore, regional, as opposed to local, implementation of management strategies is more likely to survive judicial scrutiny. The courts are more likely to accept regional regulation because state bodies are less likely to be influenced by powerful, private economic interests; there is also a recognition that resource management problems frequently transcend local political boundaries and interests.<sup>77</sup>

Perhaps the most significant potential disadvantage to the use of zoning as a means of preserving agricultural land is the ability of the responsible planning or zoning commission to grant variances.<sup>78</sup> Critics of zoning frequently contend that zoning boards not only

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75. 260 U.S. 393 (1922).

76. Keene, *supra* note 3, at 133.

77. Comment, *The Taking Issue: Potential Obstacle to Natural Resource Management Legislation*, 54 OR. L. REV. 78 (1975).

78. Conceptually, a variance is a "permitted violation" of a zoning ordinance; its grant does not involve a change of the law and is not governed by a list of specifically approved possible uses articulated within the statute. A variance is like an 'excuse' built into a system of rules known in advance to be too crude to be adequate, which is triggered by an authoritative body's perceiving a problem in the application of the rules.

SOUTHWESTERN LEGAL FOUNDATION, INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 176 (1979). See also WASH. REV. CODE § 35.63.080 (1979), which gives the city council authority to appoint boards of adjustment.

exceed the authority delegated to them,<sup>79</sup> but subvert overall community land use plans.<sup>80</sup> Statistics from numerous jurisdictions have shown the approval rates for variance applications consistently range from approximately fifty percent to well over seventy-five percent.<sup>81</sup> While judicial review of these decisions is generally provided, most of the decisions made by zoning boards are never challenged.<sup>82</sup>

This is not to say that judicial scrutiny is seldom justified. It has been reported in one examination of board decisions regarding use variances that sixty-five percent of those variances granted were subsequently reversed by the courts. Only twenty-five percent of the denials were reversed.<sup>83</sup> In Alameda County, California, the applicant for a variance was able to show the special circumstances necessary to justify granting the variance under the applicable legal standards in only fifteen out of 284 cases.<sup>84</sup>

An additional obstacle to the effectiveness of zoning as a means of preserving agricultural land is the permitted existence of nonconforming uses.<sup>85</sup> Such uses limit the effectiveness of a variety of land use controls to the extent their existence pressures a com-

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79. Walter H. Blucher, Professor of Planning at the University of Illinois and a consultant on planning problems believes that 50% of all the actions of zoning boards of appeal or adjustment in the United States are illegal acts because they constitute a usurpation of legislative power. Blucher, *Planning and Zoning Principles Validated*, 13 ARK. L. REV. 1, 7 (1958).

80. A study of the records of the Syracuse, New York City Planning Commission in 1955 disclosed that more than 600 of the over 1000 applications for granting of a conditional use exception to the local zoning ordinance were approved by the commission and that the Common Council had granted conditional uses to all but four of the applicants whose request had been given commission endorsement. Anderson, *The Board of Zoning Appeals—Villain or Victim?*, 13 SYRACUSE L. REV. 353, 369 (1962). A case study of the operation of the Alameda County Board of Zoning Adjustment covering the period from July 1, 1960 to June 30, 1961 found that of 322 variance applications, 284 were granted and only 48 denied. In none of the cases was the board's decision reviewed by a court. Bryden, *Zoning: Rigid, Flexible or Fluid?*, 44 J. URB. L. 287, 301 (1967).

81. Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 773 (1977).

82. See Blucher, *supra* note 79, at 7.

83. See Anderson, *supra* note 80, at 365.

84. Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L. REV. 101, 107-08 (1962).

85. Anderson defines "nonconforming use" as "a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the use restrictions applicable to the area in which it is situated." 1 R. ANDERSON, *AMERICAN LAW OF ZONING* 354 (1976).

munity into granting variances and special permits.<sup>86</sup> The courts in Washington have upheld the continuance of such nonconforming uses because the immediate cessation of such a use may be held unconstitutional as a deprivation of property rights out of proportion to the public benefit obtained.<sup>87</sup>

These situations should cause the concerned planner to seriously question any decision to utilize zoning as a means of implementing agricultural land preservation. Boards of adjustment are often composed of realtors and businessmen faced with making decisions beyond their expertise. Furthermore, these boards have a tendency to ignore legal criteria as well as the advice of professional planners.<sup>88</sup> Consequently, since expert training is seldom required for these board members<sup>89</sup> and expertise is necessary to fully evaluate the necessity for a deviation from the zoning ordinance, the tendency to grant an excessive number of variances can only contribute to the decreased utility of zoning as a means of preserving agricultural land near metropolitan areas.

Experiences in the Green River Valley highlight the problem of using zoning to preserve agricultural land for farming. While most of the valley was productive farmland in the 1950's, zoning changes between 1957 and 1979, have decreased land devoted to farm use to a relatively small area near Kent, Washington. This means that in the last twenty-five years nearly 20,000 acres of farmland have been replaced by warehousing, manufacturing, commercial, and housing uses.<sup>90</sup>

In this state agricultural zoning alone will not be sufficient to provide lasting protection for farmland, particularly in our growing metropolitan areas.<sup>91</sup> The existence of variances and the presence

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86. Essner, *Condemnation on the Installment Plan and the Doctrine of Nonconforming Uses*, 48 FLA. B.J. 490 (1974). See also Mandelker, *Prolonging the Nonconforming Use: Judicial Restriction of the Power to Zone in Iowa*, 8 DRAKE L. REV. 23 (1958).

87. *State ex rel. Miller v. Cain*, 40 Wn. 2d 216, 242 P.2d 505 (1952).

88. Bryden, *supra* note 81, at 775.

89. A study of fourteen major cities disclosed that only two cities had requirements that members of zoning boards of appeal receive training in city planning or architecture; and one of these two cities required that only one of the five members on the board have such training. See Note, *Variance Administration in Indiana-Problems and Remedies*, 48 IND. L.J. 240, 245 (1973).

90. *King County Study*, *supra* note 1, at 10.

91. *Id.* See also Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5



of nonconforming uses will invariably interfere with such preservation attempts.

Zoning, as a regulatory tool, is not without utility in a comprehensive policy of preservation of agricultural land. With reforms, careful drafting, and a system of checks and balances, zoning can help protect rural land, particularly in the short term if innovatively used in conjunction with other available techniques.<sup>92</sup>

### *B. Tax Incentive Plan: The Washington Approach*

In 1970 Washington enacted the Open Space Taxation Act (OSTA).<sup>93</sup> The legislative purpose of the Act is clear: to institute a tax program that would provide relief to the farmer from the best-use tax assessment, which in turn will encourage the farmer to keep farming the land, rather than selling or converting it to some other use.<sup>94</sup> By enacting this tax scheme, the legislature hoped that agricultural, open space, and wooded land would be preserved for the beneficial use and enjoyment of all the citizenry.<sup>95</sup>

Prior to the enactment of this tax reduction plan, farmland and open space land was assessed in the same manner as any other land. Assessment was based upon fifty percent of the property's true and fair value in money.<sup>96</sup> The "true and fair value in money" standard has been interpreted to mean market value,<sup>97</sup> which is the amount of money a purchaser willing, but not obligated to buy, would pay an owner willing, but not obligated to sell, taking into consideration all uses to which the property is adapted and might in reason be applied.<sup>98</sup>

The legislative intent of the phrase "true and fair value in money" is that "all property, unless otherwise provided by statute, shall be valued on the basis of its highest and best use for assess-

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ENV'TL AFF. 419, 423 (1976).

92. *See id.* at 422.

93. WASH. REV. CODE ch. 84.34 (1979). *See generally*, Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Lands*, 15 GONZ. L. REV. 675 (1980).

94. *Id.* § 84.34.010.

95. *Id.*

96. *Id.* § 84.40.030.

97. *Mason County Overtaxed, Inc. v. Mason County*, 62 Wn. 2d 677, 683, 384 P.2d 352, 356 (1963).

98. *Id.* at 683-84, 384 P.2d at 356.

ment purposes."<sup>99</sup> Highest and best use is the most profitable use to which the property can likely be put.<sup>100</sup> The Washington Supreme Court in *Bitney v. Morgan*<sup>101</sup> found the legislative clarification consistent with its market value approach as defined in *Mason County Overtaxed, Inc. v. Mason County*.<sup>102</sup>

This method of assessing farmland and open space areas is still the rule unless the owner of the farmland elects alternative statutory treatment providing for current-use assessment. The landowner, on a voluntary basis, must apply to the county assessor to have his lands assessed on a current-use classification.<sup>103</sup> The county assessor then makes a determination whether the lands qualify for current-use classification and, if so qualified, the tax rolls are amended to show a current-use status on a yearly basis.<sup>104</sup> If the assessor rejects the application for current-use status, the

99. WASH. AD. CODE § 458-12-330 (1977).

100. *Id.*

101. 84 Wn. 2d 9, 15, 523 P.2d 929, 933 (1974).

102. 62 Wn. 2d 677, 384 P.2d 352 (1963).

103. WASH. REV. CODE § 84.34.030 (1979) provides in pertinent part:

An owner of agricultural land desiring current use classification under subsection (2) of RCW § 84.34.020 shall make application to the county assessor . . . . Said application shall require only such information reasonably necessary to properly classify an area of land . . . and shall include a statement that the applicant is aware of the potential tax liability involved when such land ceases to be designated as open space, farm and agricultural or timber land.

104. *Id.* § 84.34.035. The criteria whether certain lands are deemed farm and agricultural lands are set forth in *id.* § 84.34.020(2) which states:

(2) "Farm and agricultural land" means either (a) land in any contiguous ownership of twenty or more acres devoted primarily to the production of livestock or agricultural commodities for commercial purposes; (b) any parcel of land five acres or more but less than twenty acres devoted primarily to agricultural uses, which has produced a gross income from agricultural uses equivalent to one hundred dollars or more per acre per year for three of the five calendar years preceding the date of application for classification under this chapter; or (c) any parcel of land of less than five acres devoted primarily to agricultural uses which has produced a gross income of one thousand dollars or more per year for three of the five calendar years preceding the date of application lands shall also include farm woodlots of less than twenty and more than five acres and the land on which appurtenances necessary to the production, preparation or sale of the agricultural products exist in conjunction with the lands producing such products. Agricultural lands shall also include any parcel of land of one to five acres, which is not contiguous, but which otherwise constitutes an integral part of farming operations being conducted on land qualifying under this section as "farm and agricultural lands."

*Id.* § 84.34.160 mandates publication of qualifications and manner of application to obtain current use classification.

landowner has a right of appeal to the legislative authority of the county.<sup>105</sup> To facilitate proper status classification, the law provides for a five member committee, representing the active farming community, to aid the assessor in his determinations.<sup>106</sup>

To ensure that the landowner has a genuine intent to preserve his land as farmland, the legislature designed the statute so that once land is classified for current-use assessment, the land may not be used for any purpose inconsistent with that classification for a period of not less than ten years.<sup>107</sup> The strength of the Act lies in the penalty that must be assessed against the landowner for withdrawal of his property from current-use classification. OSTA provides that the landowner will be liable for an additional tax<sup>108</sup> plus a penalty amounting to twenty percent of the calculated additional tax.<sup>109</sup> The additional tax and penalty become liens upon the land<sup>110</sup> and are payable in full on or before April 30 following the date of the treasurer's statement.<sup>111</sup> Consequently, an improvident decision by a landowner to place his farm under current-use assessment classification could be costly if the owner subsequently decides to put the land to alternative use. Likewise, a landowner should be particularly cautious in leasing land after placing land in current-use status. A restrictive covenant in the lease should indicate that the use of the land is restricted to farm or agricultural use. Failure to include such a covenant could leave the landowner without an avenue of relief should the lessee convert the use of the land to something other than agriculture.

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105. *Id.* § 84.34.035.

106. *Id.* § 84.34.145.

107. *Id.* § 84.34.070.

108. *Id.* § 84.34.108(3)(a), (b) state in pertinent parts:

(3) The assessor shall compute the amount . . . of such additional tax and the treasurer shall mail notice to the owner of the amount due. The amount of such additional tax shall be:

(a) The difference between the property tax paid as "open space land", "farm and agricultural land", . . . and the amount of property tax otherwise due and payable for the seven years last past had the land not been so classified; plus

(b) Interest upon the amounts of such additional tax paid at the same statutory rate charged on delinquent property taxes from the dates on which such additional tax should have been paid without penalty if the land had been assessed at a value without regard to this chapter.

109. *Id.* § 84.34.080.

110. *Id.* § 84.34.090.

111. *Id.* § 84.34.100.

Thus, the Washington farmer is faced with the dilemma of enrolling his land in current-use status and facing a substantial financial penalty for withdrawal or allowing his land to be assessed at its highest and best use which can result in significantly higher taxes. If the owner's intention is to keep the land as farm or agricultural land and the market value for such land is significantly greater than its value when used for farming or agricultural purposes, then enrollment in current-use classification should result in substantial savings.<sup>112</sup> Shortly after OSTA was adopted, it was believed that the impact of its preferential tax treatment would manifest itself in urban areas where there was likely to be extensive differences between market value and farm use value.<sup>113</sup> In traditional agricultural areas where urban pressures are nonexistent, farm value is usually the same as market value; thus the difference between property taxes with and without the current-use assessment option would be quite small.<sup>114</sup> The market value price of farmland in Washington, however, has increased on the average of fourteen to fifteen percent annually since 1971; increase in farm

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112. Barron, *The "Open Spaces" Act Can Cut Your Taxes*, WASH. FARMER at 6 (May 7, 1970) (this magazine later changed its name to *Washington Farmer-Stockman*). If the landowner stays in the current-use program with land value at a market value of \$2,000 an acre, valued at farm use for \$500 an acre and accounting for the seven year additional tax being assessed and assuming a 6% rate of interest on the annual savings per acre the following table shows the benefit per acre of enrollment in the current use assessment program:

COMPARISON OF TAX COSTS PER ACRE  
WITH AND WITHOUT PREFERENTIAL ASSESSMENT  
WHEN ALL CONTRACT PROVISIONS ARE MET

DOLLARS PER ACRE			
Year in Program	Preferential Tax Cost	Full Tax Cost	Landowner Saving
10	333.92	375.00	41.08
15	380.77	562.50	181.73
20	427.62	750.00	322.38
25	474.47	937.50	463.03
30	521.32	1,125.00	603.68

*Id.* Table 2.

113. Herdrich, *Open Space Enrollment Due Before April 30*, WASH. FARMER at 3 (Jan. 21, 1971).

114. *Id.*

income has not evidenced similar growth.<sup>115</sup> Thus, the initial assumption that in traditional farm areas the market and farm value would be roughly equivalent, is no longer valid. The value of the land for uses other than those associated with agricultural and farming is significantly greater.

Consequently, agricultural and farm acreage enrolled in the current-use assessment program has consistently grown.<sup>116</sup> In 1978 approximately ninety-nine percent of the acreage classified in the current-use program was agricultural-farm land.<sup>117</sup> Between 1977 and 1978, 1,133,922 acres of agricultural land were added to the current-use assessment rolls.<sup>118</sup> Roughly one-half of the increased enrollment took place in three counties: Lincoln (318,744), Walla Walla (138,163), and Whitman (125,240).<sup>119</sup> Slightly more than three-fourths of the total current-use acreage (76.7%) is located in eight counties: Lincoln, Whitman, Adams, Spokane, Benton, Okanogan, Yakima, and Klickitat.<sup>120</sup> Thus, the most significant enrollment of land in the current-use assessment program has occurred, with a few exceptions, in those counties which encompass the traditional agricultural areas in the state.<sup>121</sup>

By September 1979 an additional 1,138,273 acres were added

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115. Wohld, *supra* note 59, at 6.

116. The following chart indicates by year the amount of acres enrolled in the current-use assessment program from 1975 through 1978 collection years.

Year	Acres
1978	4,930,041
1977	3,415,975
1976	2,498,879
1975	2,179,051

Department of Revenue and Office of State Auditor, 1977 Property Tax Collections and Levies Due in 1978, at 11 (July 1978).

117. *Id.*

118. Wash. State Dep't. of Revenue, State of Washington 1978 Tax Statistics, at 33 (1979).

119. *Id.*

120. *Id.*

121. The following chart shows the total land acreage in the county named and the corresponding percentage of that acreage in farmland.

to the 1978 total.<sup>122</sup> It would appear that Washington farmowners have chosen to take advantage of the current use program. Within four years, 1975-79, the amount of acreage assessed at current-use value more than doubled.<sup>123</sup> The savings to the farm owner in regular property taxes in 1979 amounted to \$8.5 million,<sup>124</sup> while the average value reduction on the assessment rolls was 56.4%.<sup>125</sup>

The Washington farmer received additional tax relief in 1979 with the enactment of the Farm and Agricultural Land-Special Benefit Assessment (FAL-SBA).<sup>126</sup> The legislature recognized that, notwithstanding the enactment of OSTA, farmland in areas of urban encroachment was still subject to high levels of benefit assessments.<sup>127</sup> These high levels of assessment perpetuated the removal of land from farm use and stimulated its conversion to urban purposes.<sup>128</sup> To alleviate the pressure which benefit assessments placed upon farmlands, FAL-SBA provides that special benefit assessments levied for the purpose of providing sanitary or storm sewerage systems, domestic water service, and road improvements or construction shall not be applied to farm land enrolled in the current-use assessment program.<sup>129</sup> Naturally, should the land be removed from the current-use assessment program, the liability for the special benefit assessment would arise and become a lien upon

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County	Total Acreage	% of Acreage in Farmland
Adams	1,211,840	94.7
Benton	1,102,144	65.4
Klickitat	1,220,992	64.4
Lincoln	1,475,520	99.6
Okanagon	3,392,384	39.5
Spokane	1,125,312	61.1
Whitman	1,377,920	99.1

The table was compiled from statistics from the Bureau of the Census. U.S. DEP'T OF COMMERCE, 1974 CENSUS OF AGRICULTURE: WASHINGTON STATE AND COUNTY DATA (1974).

122. Wash. State Dep't of Revenue, Open Space Program, REVENUE at 15 (Sept. 1979).

123. *Id.*

124. See note 116 *supra*.

125. See Wash. Dep't of Revenue, Open Space Program, REVENUE, at 15 (Sept. 1979).

126. Farm and Agricultural Land—Special Benefit Assessment Act, ch. 84, 1979 Wash. Laws at 213 (to be codified as WASH. REV. CODE ch. 84.34 (1979)).

127. *Id.* § 1, at 213-14 (to be codified in WASH. REV. CODE ch. 84.34 (1979)).

128. *Id.*

129. *Id.* § 3, at 215 (to be codified in WASH. REV. CODE ch. 84.34 (1979)).

the land.<sup>130</sup>

The Washington programs for preserving farm and agricultural land seem to have achieved a measure of success.<sup>131</sup> Nevertheless, critics of similar plans point out that the shortcoming of current-use assessment programs is that the individual owner is the one who decides on the amount and location of the agricultural land to be preserved.<sup>132</sup> Likewise, the individual owner controls the quality of the land to be enrolled. This criticism may be well-founded. The state has declared that the preservation of this land inures to the benefit of all citizens. Thus, it seems reasonable that if all of the citizenry is to be benefitted by the preservation of the agricultural-farm land, then it should not be left to a small number of landowning individuals to decide which lands shall be preserved, and for how long. Conversely, it must be remembered that although the benefit inures to all citizens of the state, the land is owned by the few who have a right to use their property as they desire. This conundrum of preserving for the people that which is rightfully owned by a few lends itself to no easy solution. The vulnerable nature of zoning regulations as discussed previously makes that alternative inadequate.

### C. *Purchase of Development Rights*

Washington has not only chosen a taxing program which encourages farmowners to commit their land to a preservation program, but has also provided a program which allows counties, cities, towns, metropolitan municipal corporations, or nonprofit nature-conserving associations to purchase the fee simple or development rights to farm and agricultural land.<sup>133</sup> The rationale of the

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130. *Id.*

131. Bureau of Census, U.S. DEP'T OF COMMERCE, 1974 CENSUS OF AGRICULTURE, WASHINGTON STATE AND COUNTY DATA (1974). The total amount of farm-agricultural land in the State of Washington was 7,945,063 acres in 1974. Assuming that figure has remained constant, the percentage of farm-agricultural land enrolled in the current-use program is approximately 69% of the total farm-agricultural land in the state.

Method of Calculation: Ninety-nine percent of all land enrolled in the current-use program is farm-agricultural land. The total amount of acreage enrolled is 5,500,342 acres. Ninety-nine percent of 5,500,342 acres is 5,445,338 acres. Of the total 7,945,063 acres of farm-agricultural land in the state, 5,445,338 acres is approximately 69%.

132. Vogeler, *supra* note 9, at 52.

133. WASH. REV. CODE § 84.34.210 (1979) provides in pertinent part:

Any county, city, town, or metropolitan municipal corporation, or nonprofit nature

legislature in adopting this program is relatively clear—the preservation of such open spaces and areas constitutes a public purpose justifying the acquisition of interest or rights in real property by government units.<sup>134</sup> Thus, the legislature has devised a program whereby the local government can actively seek out and solicit the protection of agricultural and farmland located within its jurisdiction. Rather than waiting for a landowner to apply for the current-use assessment program, the local government can seek to purchase the development rights to the land it wishes to preserve.<sup>135</sup> The program provides that the local governing unit may purchase or acquire, except by process of eminent domain, future development rights in perpetuity of any farm or agricultural land.<sup>136</sup> The development rights purchased are “conservation futures.”<sup>137</sup> Once conservation futures are secured, the governmental entity can forbid and/or restrict the type of development occurring upon the land.<sup>138</sup> The land is still alienable but must be used by

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conservancy corporation or association, as such are defined in RCW 84.34.250, may acquire by purchase, gift, grant, bequest, devise, lease, or otherwise, except by eminent domain, the fee simple or any lesser interest, development right, easement, covenant, or other contractual right necessary to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve, selected open space land, farm and agricultural land . . . as such are defined in chapter 84.34 RCW for public use and enjoyment. . . . Any county, city, town, metropolitan municipal corporation, or nonprofit nature conservancy corporation or association, as such are defined in RCW 84.34.250, may acquire such property for the purpose of conveying or leasing the property back to its original owner or other person under such covenants or other contractual arrangements as will limit the future use of the property in accordance with the purposes of this 1971 amendatory act.

134. *Id.* § 84.34.200 provides:

The legislature finds that the haphazard growth and spread of urban development is encroaching upon, or eliminating, numerous open areas and spaces of varied size and character, including many devoted to agriculture, the cultivation of timber, and other productive activities, and many others having significant recreational, social, scenic, or esthetic values. Such areas and spaces, if preserved and maintained in their present open state, would constitute important assets to existing and impending urban and metropolitan development, at the same time that they would continue to contribute to the welfare and well-being of the citizens of the state as a whole. The acquisition of interests or rights in real property for the preservation of such open spaces and areas constitutes a public purpose for which public funds may properly be expended or advanced.

135. *Id.* § 84.34.220. Seventeen other states have similar programs. Those states are: California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Maine, Maryland, Michigan, Montana, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Rhode Island.

136. *Id.*

137. *Id.*

138. *Id.*



new owners in accord with the terms of the agreement creating the conservation futures. The funding required to purchase development rights is to be secured by a levy of 6¼ cent per \$1,000 of assessed valuation on all taxable property within the county.<sup>139</sup> The legislature envisioned that such funds would be placed in a conservation futures fund which would be used exclusively to acquire rights and interests in farm and agricultural land, as well as open spaces and wooded areas.<sup>140</sup> The statute does not provide guidelines or any implementation provisions other than those mentioned above. The legislature has left the method of implementation to the ingenuity of the local governing units.

The most significant effort made to acquire conservation futures, as of the time of this writing, was an effort in King County. Although King County was unsuccessful in its effort, the County Executive, along with the Chairman of the County Council, called for a study to review the ballot measure, as well as changing conditions and available alternatives to preserve farmlands in King County.<sup>141</sup> The findings of the study indicated that farm and agricultural lands in King County are subject to tremendous pressures of urbanization similar to those experienced in the Green River Valley area, located in southern King County.<sup>142</sup> The history of the valley shows that within the last twenty-five years, it has lost approximately 20,000 acres of farmland to warehousing, manufacturing, and other commercial uses.<sup>143</sup> The study also found that unless a development rights/conservation futures program was enacted within the county, agriculture as an industry would disappear from King County.<sup>144</sup>

Based on these findings, the committee recommended a \$50 million bond issue be presented to the voters accompanied by an

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139. *Id.* § 84.34.230.

140. *Id.* § 84.34.240.

141. *See King County Study*, note 1 *supra*.

142. *Id.* at 10, 17.

143. *Id.* The study found the other close-in valleys are now subject to the same urban pressure.

144. *Id.* at 13-14. The study concluded that the average age of the farmer in King County is 52 years. Thus, as farmers in the county die or retire, new younger farmers will not replace them unless they are assured of making enough money to amortize start-up costs which are extremely high. A conservation futures program would significantly lessen start-up costs and allow greater profits. The following chart compares the farm start-up costs both with and without a conservation futures program (CFP).

ordinance embodying administrative requirements for the acquiring of conservation futures.<sup>145</sup> The committee felt the experience of Suffolk County, New York would be instructive on what could be expected in King County.<sup>146</sup> The ordinance envisioned by the committee would allow the county to purchase the fee simple interest or conservation futures in those lands classified as a first priority.<sup>147</sup> The county would be prohibited from acquiring a fee simple interest in lands with priority classification ranking second or third.<sup>148</sup> The county would create a committee to advise the council as to the selection of eligible lands offered for acquisition by their owner.<sup>149</sup> This program's effectiveness depends upon the voluntary participation of the landowner since he must "offer" to the city the fee simple interest or the conservation futures. The tenor of the program militates against such an interpretation. The committee painstakingly identified those farm and agricultural areas

	DAIRY 150 Acres		VEGETABLES			
	[CFP]	[Non CFP]	10 Acres		75 Acres	
			[CFP]	[Non CFP]	[CFP]	[Non CFP]
FARM START-UP COSTS						
FARM EQUIPMENT	15,000	15,000	5,000	5,000	20,000	20,000
PROCESSING EQUIPMENT	400,000	400,000	1,000	1,000	50,000	50,000
COWS	50,000	50,000				
LAND	300,000	1,200,000	20,000	80,000	150,000	600,000
TOTAL INVESTMENT	776,000	1,665,000	26,000	86,000	220,000	670,000
20% DOWN	153,000	330,000	5,200	17,200	44,000	134,000
INCOME						
GROSS INCOME	150,000	150,000	30,000	30,000	225,000	225,000
OPERATING COST (including labor)	45,000	45,000	15,000	15,000	135,000	135,000
INTEREST 10%	77,500	165,500	2,600	8,600	22,000	67,000
NET INCOME	27,500	(-60,500)	12,400	6,400	68,000	23,000

*Id.* at 14.

145. *Id.* at 5.

146. *Id.*

147. King County, Wash. Ordinance 4341 (June 27, 1979). The complete text of the ordinance may be found in the exhibit section of the King County Study which is on file with the *Gonzaga Law Review*. Future references to the ordinance will refer to the pages of the exhibit on which the material appears (e.g., Exhibit 1, at 5).

First priority land is defined generally as farm and open space lands in the main valley of the Sammamish River, the lower Green River Valley near Kent, and the upper Green River Valley. The lands holding first priority status encompass approximately 6,000 acres. *King County Study*, Exhibit 1, *supra* note 1, at 5.

148. *King County Study*, Exhibit 7, note 1 *supra*. Second priority lands are primarily located in the lower Snoqualmie valley and on the Osceola and southeast Enumclaw portions of the Enumclaw plateau. This area encompasses the largest active farming areas and consists mostly of dairy farms. Other farmland areas containing 40 acres or more are also included because they are large enough to be economic farming units. *Id.* Exhibit 1, at 5.

149. *Id.* Exhibit 1, at 8.

within the county most likely to be lost to urbanization. The King County plan specifies that it is only those areas in priority class one in which conservation futures may be purchased in the initial phases of the purchasing program.<sup>150</sup> Thus, the program is directed to those areas where the need to preserve is greatest, and while the decision to offer the county conservation futures in those lands ultimately rests with the landowner, the county has carefully targeted its financial resources, so that the likelihood of such offerings is assured.

Once the offering of development rights has met the eligibility requirements and has been assigned a priority, the executive must initiate two appraisals of the land that is offered.<sup>151</sup> One appraisal will determine the fair market value of full ownership of the land exclusive of any buildings.<sup>152</sup> The other appraisal will determine the value of the conservation futures.<sup>153</sup> A third appraisal may be required if the owner disagrees with the value arrived at by the first two appraisals.<sup>154</sup> With knowledge of the appraised values, the landowner may submit sealed, firm written offers to the executive who shall review all such offers and make recommendations to the selection committee.<sup>155</sup> The selection committee must review the offerings along with the executive recommendations and generate recommendations for the County Council, which will take final action on all offers.<sup>156</sup>

On September 18, 1979 the \$50 million bond issue called for by the King County study failed due to an insufficient voter turnout to validate the election measure.<sup>157</sup> The measure did receive a seventy-seven percent favorable vote.<sup>158</sup> Undaunted and en-

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150. *Id.* at 9.

151. *Id.* at 9-10.

152. *Id.* at 10.

153. *Id.*

154. *Id.* The owner of land shall bear the cost of the third appraisal. This appraisal shall be conducted by a review appraiser appointed by the selection committee. "The review appraisal shall become the final appraisal." *Id.*

155. *Id.* at 11. In no circumstances will an offer be accepted which exceeds the appraised value. *Id.* at 5. Thus, an owner who is discontent with the appraisals may withdraw by failing to submit a written offer.

156. *Id.* at 11.

157. The Seattle Times, Sept. 19, 1979, § A, at 1, col. 1. The number of votes cast in favor of the bond issue was 93,362. Votes opposed numbered 27,689.

158. MacLeod, *Farmland-Preservation Bonds OK'd on Third Try*, *id.* Nov. 7, 1979, §

couraged by the favorable response, the King County Citizens' Committee offered the \$50 million bond measure to the voters in the November 6, 1979 general election. The third time proved to be the charm as the measure was approved.<sup>159</sup> The approved measure appears to have filled in the skeletal structure embodied in the state law.

*D. Will Washington's Approach Prove Successful?*

The issue is no longer whether to preserve farmland, but rather how to construct and implement effective farmland preservation programs. The type, magnitude, number, and goals of such programs are myriad. An equally difficult challenge lies in determining the success of certain preservation measures, whether standing alone or in conjunction with a comprehensive preservation program.

It appears that Washington is attempting a comprehensive approach by providing property tax incentives which allow for the current-use assessment of farmlands and which exclude such lands from special benefit assessments. Combined with property tax incentives, Washington has provided local governing units like King County the opportunity to initiate farmland preservation programs through the acquisition of conservation futures, thus assuring the preservation of farmland in perpetuity.

The current-use assessment program has met with unexpected success. The special benefit assessment measure is likely to encourage additional land being placed into the current-use assessment program. The success of the conservation futures program is as yet undetermined but in a large part will be measured by the success or failure of the King County program. The overall effect of Washington's comprehensive program is likewise undetermined at this time.<sup>160</sup> Therefore, it is instructive to look to other pro-

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A, at 16.

159. *Id.*

160. The King County study alludes to the conclusion that only a comprehensive program will be effective in preserving farmland. *King County Study, supra* note 1, at 10. Esseks indicates that there is an information gap which precludes meaningful analysis as to which programs ought to be implemented in various jurisdictions. Esseks advocates a need for federal intervention to assimilate, correlate and disseminate farmland preservation techniques that can be utilized in varying circumstances. *NALP Hearings, supra* note 5, at 102-04 (statement of John Esseks). Secretary of Agriculture Robert Bergland indicates that the

grams, similar in nature to the Washington approach, to view the success they have achieved.

The state of New Jersey adopted the Farmland Assessment Act of 1964 which provided agriculture with a more equitable taxing mechanism to aid in the reduction of farmland lost in New Jersey.<sup>161</sup> Phillip Alampi, Secretary of the New Jersey Department of Agriculture, maintains that the success of the agricultural tax preference program was not enough to cure the ongoing significant loss of farmland occurring in New Jersey.<sup>162</sup> New Jersey's next move was to adopt the Agricultural Preserve Demonstration Program Act (APDP) in 1976.<sup>163</sup> The APDP provided for the creation of an agricultural preserve composed of approximately 5,000 acres to be established through the state's purchase of development easements, comparable to conservation futures, on the land.<sup>164</sup> The mechanics of the program are almost identical to the Washington program for the purchase of conservation futures except that the administration of the program is on the state rather than county level.<sup>165</sup> A fund providing \$5 million was established to purchase development easements.<sup>166</sup> The county selected for the project was Burlington County. Anticipated participation far exceeded the 5,000 acre goal called for in the APDP.<sup>167</sup> Although it appeared that high expectations of success were warranted, not a single acre

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federal government has begun an 18 month study to seek effective remedies to the continual loss of farmland. King, *Lost Farm Land Use Prompts U.S. Study*, N.Y. Times, June 18, 1979, § B, at 8, col. 3.

161. *NALP Hearings*, *supra* note 5, at 40 (statement of Phillip Alampi).

162. *Id.*

163. N.J. STAT. ANN. § 4:1B-1 (West 1979).

164. *Id.* § 4:1B-5.

165. The New Jersey plan is similar to Washington's in the following areas: (1) program is completely voluntary and eminent domain may not be used, *id.* § 4:1B-7; (2) a steering committee shall be created to advise departments on guidelines and to provide local input concerning the implementation of the program, *id.* § 4:1B-9; (3) an appraisal program of suitable lands offered to the state shall exist, *id.* § 4:1B-8; and (4) the land within the agricultural preserve shall not be diverted to a use other than conservation without approval, *id.* § 4:1B-13.

166. *NALP Hearings*, *supra* note 5, at 41 (statement of Phillip Alampi). See *State Plan to Preserve Farmland Threatened By Dispute Over Costs*, N.Y. Times, Aug. 8, 1978, § B, at 21, col. 6.

167. In the four townships of Burlington County, the state received offers for participation from approximately 100 owners of farmland who asked to have roughly 13,000 acres included in the preserve. *NALP Hearings*, *supra* note 5, at 42 (statement of Phillip Alampi).

was purchased under the program.<sup>168</sup> The breakdown in the program is directly attributable to a belief by the legislature that the program would cost far in excess of the \$5 million envisioned.<sup>169</sup>

The New Jersey scenario could recreate itself in Washington. Washington has basically the same two-pronged approach to farmland preservation: preferential tax assessment and purchasing of development rights. The success of the preferential tax assessment is not guaranteed. If the pressures of urbanization continue to mount in rural areas, the "stick" in the assessment program of an additional tax coupled with a penalty will simply be another factor the farmowner and the developer will figure into the purchase price.<sup>170</sup> The conservation futures program, like the development easements in New Jersey, is tied directly to the local government's ability to finance the program. Senator Warren Magnuson of Washington indicated that in 1978 the estimated cost of the King County conservation futures program would be \$30 million for conservation futures covering 24,000 acres.<sup>171</sup> The measure actually passed by King County in 1979 required an additional \$20 million to secure conservation futures on only 12,000 acres, one-half of the 1978 estimated acreage.<sup>172</sup> The rapid escalation of the value of farmland will require increasingly greater cash outlays to entice farm owners to sell their development rights. Local revenues may not be able to meet such demands. The New Jersey experience involving development easements serves as a warning that short-term success may be achieved but significant fiscal pressures will preclude major achievements in farmland preservation. Furthermore, the New Jersey program, like the present Washington program, fails to provide a mechanism to discourage the invasion of

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168. The state was stymied in its efforts to buy development rights and spent only about \$200,000 on appraisals, technical services, and operating costs. Although legislation might have been signed extending the project, no development rights were to be purchased through next July (1979). *State Plan to Preserve Farmland Threatened By Dispute Over Costs*, N.Y. Times, Aug. 8, 1978, § B, at 21, col. 6.

169. Some legislators estimated the cost of acquiring development easements could go as high as \$10 billion. Consequently, a provision in the bill extending the project required a legislative committee to approve each purchase of development rights. *Id.*

170. Steiner, Wagner, & Theilacker, *Local Approaches for Farmland Preservation in Washington*, at 6 (Land Use Planning EM 4521 Wash. State U. Nov. 1979).

171. 124 CONG. REC. 3903-05 (daily ed. Mar. 16, 1978) (statement of Sen. Warren Magnuson).

172. See MacLeod, note 158 *supra*.

corporate farming. Thus, the specific goals of farmland preservation as delineated in the King County study, *i.e.*, the maintenance of strong local farm economies, providing low cost fresh vegetables and fruits, and the avoidance of the reduction in the quality of life, will not be guaranteed.

A review of the Suffolk County, New York program is also beneficial in assessing the merits of the Washington approach. Suffolk County is the easternmost county on Long Island, bounded to the north, south, and east by water and to the west by Nassau County, which is adjacent to New York City.<sup>173</sup> It is New York State's largest agricultural county, producing \$70 million a year in agricultural business.<sup>174</sup> The county adopted a plan to purchase development rights to 3,800 acres of farmland and appropriated \$21 million accordingly.<sup>175</sup> Farmers originally offered 17,948 acres to be enrolled in the program. The price per acre was to be determined by the difference between an appraisal of the land at market value and as farmland. Although some development rights were acquired, the Suffolk County farm acquisition program has faced political and economic snags.<sup>176</sup> The economic snag developed when market values of farmland started to decline, resulting in a lesser price per acre to be paid to the farmer for his development rights.<sup>177</sup> Political snags ensued when many of the politicians who supported the preservation legislation failed to return to office and also when political infighting over which farmlands to preserve occurred.<sup>178</sup> As a consequence of the economic problems, the future of the Suffolk County program is in doubt.

It is interesting to note that the King County study used Suffolk County as a model.<sup>179</sup> That study did not indicate when the 50 percent measure of success they referred to was achieved by Suffolk County. The critical factor is whether the measurement was made before or after the decline in farmland market values.

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173. Whitman County Regional Planning Council, *supra* note 63, at 12.

174. *NALP Hearings*, *supra* note 5, at 137 (statement of John V. N. Klein).

175. *Id.* at 139.

176. Delatiner, *Keeping Open Spaces Open*, N.Y. Times, Mar. 26, 1978, § 21, at 3, col.

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177. *Id.* at col. 2.

178. *Id.* at col. 2-3.

179. *King County Study*, *supra* note 1, at 5.

When the market value of farmland declines farmers believe that such declines are artificial, and therefore will not accept lower prices for the value of the land's development rights.<sup>180</sup> The Washington approach is not immune to these same problems. If market values decline, the counties will not be able to entice farmers into selling development rights at the necessarily reduced purchase prices. Conversely, if the cost of Washington farmland continues to climb, the purchase price of conservation futures may well surpass the fiscal capability of local government coffers, thereby abrogating the effectiveness of conservation futures in preserving Washington farmland.

### III. CONCLUSION

Washington is in the beginning stages of farmland preservation. It has enjoyed some initial success with a preferential tax assessment program related to farmland. This program relieves the symptoms of urban pressure on farmland, but fails to provide a cure. The Washington program of purchasing conservation futures is an approach that has just moved from theory to reality. The economics of a conservation futures program demands large capital outlays which the local citizenry are unlikely to be able to afford, again reducing the conservation futures concept to theory. The experience of farmland preservation programs in other jurisdictions does not provide hope for the Washington approach. While there have been initial successes, no program has been totally successful in curbing the loss of farmland over an extended period of time. Few programs, if any, address the problems of corporate farms and their devastating impact upon local economies. Admittedly, Washington has produced creative farmland preservation tactics. While these tactics alone will not halt development, they will stem the tide of urban encroachment in the short term. The larger task of turning the tide away from farmland development lies ahead as a legislative challenge throughout the coming years.

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180. Delatiner, *supra* note 176, at col. 2.