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State and Local Measures for Preserving Illinois Farmland: An Assessment and Proposal

by

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Comment

STATE AND LOCAL MEASURES FOR PRESERVING ILLINOIS FARMLAND: AN ASSESSMENT AND PROPOSAL

I. INTRODUCTION

Illinois farmland is being irreversibly converted to nonfarm uses at a rate of more than 100,000 acres annually.[1] This loss has prompted the Illinois General Assembly, Governor Thompson, and some Illinois counties to enact measures to reduce the rate of conversion. Cumulatively, however, these measures are insufficient to significantly affect the rate of conversion.

At the state level, owners of farmland are given property tax advantages;[2] they are protected from nuisance suits,[3] local governmental regulations,[4] and the imposition of fees for urban improvement.[5] Also, state agencies are required to modify their policies and procedures to encourage agricultural use.[6] The General Assembly has amplified this general policy directive by creating an Interagency Committee on Farmland Preservation, which has the power to prepare agricultural land preservation policies. The Committee also is empowered to prescribe measures that state agencies must implement to reduce conversions of farmland.[7]

At the local level, a minority of Illinois counties have enacted exclusive agricultural zoning ordinances to protect against subdivision

1. ILLINOIS INST. OF NATURAL RESOURCES, GOVERNOR'S CONFERENCE ON THE PRESERVATION OF AGRICULTURAL LANDS 1 (1980) [hereinafter cited as CONFERENCE].

2. ILL. REV. STAT. ch. 120, ¶ 501a-1 (1981).

3. *Id.* ch. 5, ¶¶ 1101-1105.

4. *Id.* ¶ 1018. This provision applies only when an "agricultural area" is first established. For the procedures necessary to establish an "agricultural area," see *infra* text accompanying notes 55-59.

5. ILL. REV. STAT. ch. 5, ¶ 1020 (1981). This provision applies only when an "agricultural area" is first established. For the procedures necessary to establish an "agricultural area," see *infra* text accompanying notes 55-59.

6. ILL. REV. STAT. ch. 5, ¶ 1019 (1981). This provision applies only when an "agricultural area" is first established. For the procedures necessary to establish an "agricultural area," see *infra* text accompanying notes 55-59.

7. Act of Aug. 19, 1982, Pub. Act. No. 82-945, §§ 3-4, 1982 Ill. Legis. Serv. 2262 (West) (to be codified at ILL. REV. STAT. ch. 5, ¶¶ 1303-1304).

development in farming areas. These agricultural zoning ordinances employ either exclusive use limitations or large minimum lot size restrictions to control density.[8] The ordinances have been relatively effective in retarding the rate of farmland conversion within the localities.[9] Such local zoning measures, however, are relatively scarce,[10] because local governments often over-encourage industrial and residential development in order to promote local employment and increase the property tax base of the local community.[11]

The indirect means utilized at the state level and the paucity of local zoning measures cannot be expected to conserve a substantial amount of Illinois farmland. Consequently, this Comment proposes that Illinois recapture some of the zoning power traditionally delegated to local government. Through a state-wide perspective, not subject to purely local concerns, Illinois will be able to adequately control conversion.

II. Growing Concerns Accompanying the Loss of Farmland

From 1967 to 1975, 23.4 million acres of United States farmland were irreversibly converted to nonfarm use.[12] The loss of Illinois farmland during that period was approximately one million acres.[13] This rate of conversion causes deepening concerns about economic disruptions that accompany such loss, the decline in the rural way of life, increased energy requirements that result from the use of less fertile lands in order to maintain a high level of food supply, and, most importantly, the ability of agriculture to supply the world's future food needs.[14]

The annual loss of 100,000 acres of Illinois farmland represents an annual reduction of $21 million in farm income and a yearly loss of 719

8. R. Coughlin, J. Keene, J. Esseks, W. Toner & L. Rosenberger, National Agricultural Lands Study, The Protection of Farmland: A Reference Guidebook for State and Local Governments 104-46 (1981) (A report to the National Agricultural Lands Study from the Regional Science Research Institute) [hereinafter cited as NALS].

Traditionally, large amounts of land outside urban areas remained unregulated. Even in those areas that did have zoning ordinances, zoning changes were freely granted regardless of the effect on agriculture. Thus, the exclusive agricultural zone was neither exclusive nor necessarily agricultural. R. Healy, Land Use and the States 10 (1976).

9. Conference, *supra* note 1, at 146.

10. *Id.* at 121.

11. Agricultural land produces less tax revenue than developed property. Consequently, local governments generally favor development because it increases tax revenue. *See* R. Healy, *supra* note 8, at 9-11; R. Linowes & D. Allensworth, The Politics of Land Use 40-41, 77-80 (1973); Williams, *The Three Systems of Land Use Control*, 25 Rutgers L. Rev. 80, 83-85 (1970).

12. NALS, *supra* note 8, at 16.

13. *See* Conference, *supra* note 1, at 1.

14. NALS, *supra* note 8, at 16.

farm workers' jobs.[15] Because of these reductions, authorities fear that the current rate of conversion will "ultimately undermine agriculture as a major economic activity in Illinois."[16] Concomitant to the loss of farmland to an area is the loss of local agricultural businesses, such as farm machinery and fertilizer dealers. This loss of industry makes it difficult for the remaining farmers to continue to farm competitively. Such a rationale for preserving farmland, however, ignores the economic benefits that result from the substitute uses to which the land is put. Thus, as a practical matter, an economic rationale merely reflects the second rationale mentioned earlier, which is to preserve the rural character of the community.

The annual shift of 100,000 acres of farmland to nonfarm use is equivalent to losing 373 average-sized Illinois farms as of 1979.[17] A landscape of well-tended farms is often more visually attractive than even an entirely natural scene. For reasons deeply embedded in American tradition, farming is considered a virtuous enterprise.[18] Thus, the loss of farmland is a social loss, which many citizens consider a loss of heritage and aesthetic pleasure.

Much of the land being lost is of the best quality.[19] Applying additional fertilizers and pesticides to the remaining land base, or cultivating new, less naturally productive lands, easily compensates for the loss in productivity of the best farmlands. But both alternatives present problems. More intensive farming of a smaller land base requires greater use of scarce fossil fuels. Bringing new land into production destroys wildlife habitat and accelerates soil erosion.[20]

The most important concern accompanying diminishing farmlands is doubt about the ability of agriculture to continually supply the world's food needs. So far, the loss in farmland has been unaccompa-

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15. CONFERENCE, *supra* note 1, at 5.

16. Act of Aug. 19, 1982, Pub. Act No. 82-945, § 2, 1982 Ill. Legis. Serv. 2262 (West) (to be codified at ILL. REV. STAT. ch. 5, ¶ 1302).

17. CONFERENCE, *supra* note 1, at 5.

18. [T]he importance of farming during the early years of the Republic led to an irrational but persistent blending of the virtues of democracy with those of agrarianism. Those themes are so deeply rooted in the American experience that they are applied to many non-farm contexts. The creation of parks, wildlife reserves, and open spaces in urban centers is justified by lawmakers and politicians in terms of agrarian ideology—a continuing belief that the best in American private and social character is to be found in the preservation of rural life and the wilderness experience.

Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426, 435 (1975); *see* Myers, *Farmland Preservation in a Democratic Society: Looking to the Future*, 3 AGRIC. L.J. 605, 606-07 (1982).

19. CONFERENCE, *supra* note 1, at 1.

20. Pimentel, *Ecological Aspects of Agricultural Policy*, 20 NAT. RESOURCES J. 555, 563-64 (1980).

nied by a reduction in quantity of food production.[21] In fact, technological advances and recent ideal growing conditions have increased agricultural production so that surpluses are the rule rather than the exception.[22] However, even with perfect growing conditions, the increase in productivity per acre will eventually reach its peak.[23] Thus, generations unborn may suffer from the failure to regulate farmland use today.

III. The Conflict Between Private and Public Rights

Regulating farmland use is inconsistent with the traditional notion of private property rights. As Blackstone asserted in 1782,

> [t]he third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution . . . . So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.[24]

According to the historical view of property rights, only the interests of the landowner were to be considered.

Prompted by hostility toward feudalism experienced in Europe, our forefathers structured a land tenure system that emphasized individual freedom in the ownership, control, and use of land.[25] However, this view of property rights evolved during the pioneer period when natural resource exploitation was well-accepted in an aggressive growth oriented nation. As Professor Philbrick noted as early as 1938, "the concept of property never has been, is not, and never can be of definite content."[26] Rather, it is highly relative to economic and social factors.[27] Currently, greater restrictions on the use of land are being imposed in the interest of preservation and are being upheld in the courts against attacks based on the taking clause of the fifth amendment.[28] Thus, once viewed only as a source of income for its owners, land has

21. H. Schnepf, Farmland, Food and the Future 106-10 (1979).

22. *Id.*

23. *Id.*; R. Fellmeth, Politics of Land 29 (1973).

24. 1 W. Blackstone, Commentaries *138-39.

25. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 Wis. L. Rev. 1039, 1082; Philbrick, *Changing Conceptions of Property in Law*, 86 U. Pa. L. Rev. 691, 695-96 (1938); *see* Cribbet, *Property in the Twenty-First Century*, 39 Ohio St. L.J. 671, 671 (1978).

26. Philbrick, *supra* note 25, at 696.

27. *Id. passim*; *see also* F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control 314-15 (1971).

28. The fifth amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. *See* Agins v. City of Tiburon, 447 U.S. 255 (1980); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) ("The land belongs to the people . . . a little of it to

become viewed more as a resource of the nation, the use of which affects its future.[29]

While a few counties in Illinois have recognized this view of land, most have not. Nor has the Illinois General Assembly espoused this view. Cumulatively, the measures adopted in Illinois are insufficient to preserve farmland for future generations.

IV. Current Efforts to Preserve Illinois Farmland

The necessity of preserving Illinois farmland has been acknowledged by the General Assembly,[30] by Governor Thompson,[31] and by nine counties.[32] The means adopted at the state level consist of improving the profitability of farming and offsetting problems generated by nearby urbanization that ordinarily would make the continuation of farming difficult. At the local level, farmland is preserved directly via the police power. However, neither state nor local efforts are significantly effective in preserving farmland.

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those dead . . . some to those living . . . but most of it belongs to those yet to be born." *Id.* at 24 n.6, 201 N.W.2d at 771 n.6); Joyce v. City of Portland, 24 Or. App. 689, 546 P.2d 1100 (1976).

29. I foresee a property law more fashioned to serve the needs of a relatively free people, with less reification of the "thing" . . . and more emphasis on the rights of society as a whole. The winds of doctrine are not all blowing in that direction, but enough of the signs are emerging so that I, for one, do not despair.

Cribbet, *supra* note 25, at 671. *See also* Large, *supra* note 25; Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 Wm. & Mary L. Rev. 759 (1974).

30. It is the policy of the State to conserve, protect, and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It is also the policy of this state to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds as well as for aesthetic purposes.

Ill. Rev. Stat. ch. 5, ¶ 1002 (1981).

31. The conversion . . . of agricultural land has diminished Illinois' cropland base and affects environmental quality. The supply of land most suitable for farming is finite. Conversion of this land to urban development and other nonfarm uses reduced future food production capability and may ultimately undermine agriculture as a major economic activity in Illinois. . . . It shall be the policy of the State of Illinois to protect, through the administration of its current programs and regulations, the State's prime agricultural land from irreversible conversion to uses which result in its loss as an environmental or essential food production resource.

Exec. Order No. 80-4, 4 Ill. Reg. 62 (1980) (order of Gov. James Thompson). This executive order has been superceded by the enactment of a statute with similar policy directives, Act of Aug. 19, 1982, Pub. Act. No. 82-945, § 2, 1982 Ill. Leg. Serv. 2262, 2262 (West) (to be codified at Ill. Rev. Stat. ch. 5, ¶ 1302).

32. Boone, DeKalb, Henry, Kane, Kendall, McHenry, Stephenson, Tazewell, and Washington Counties have enacted ordinances for the purpose of preserving farmland. Telephone interview with Ron Dardon, Chief of the Bureau of Farmland Protection, Division of Natural Resources, Illinois Department of Agriculture (Apr. 6, 1983). Fifty-two Illinois counties have enacted zoning ordinances. *Id.* However, only those nine counties listed above have enacted ordinances for preservation purposes, and are strictly enforcing the ordinances. *Id.* For a comprehensive discussion of county zoning, see NALS, *supra* note 8, at 104-46.

A. *State Legislation*

Indirect measures promulgated at the state level include property tax advantages for farmland owners and protection from nuisance suits, local governmental regulations, and the imposition of fees for urban development. Also, state agencies are required to modify their policies and procedures to encourage agricultural use. Each indirect measure addresses a specific problem that may force a farmer to discontinue farming. Thus, the legislation is oriented toward improving the viability of farming in an effort to influence the owner's decision to keep farmland in production.

(1) Preferential Taxation of Farmland

An inordinately high property tax bill is one potential reason for a farmer to discontinue farming. Where property tax assessments are based on potential land development value, taxes may substantially exceed income from the agricultural use of the land, thus forcing the owner to sell the land for development.[33] This is particularly true when the land is located on the urban fringe or other growth areas where development pressure, and thus development value, is high.[34]

To negate high property taxes as a reason for conversion of farmland, Illinois, along with the vast majority of other states,[35] has required by statute that the property tax rate for farmland be assessed on the land's value as farmland instead of its full market or developmental value.[36] By reducing taxes on farmland in this manner, the statute increases the profitability of farming in an effort to keep farmland in production. It further encourages continued farm use by mandating the recovery of some of the taxes saved if and when the land is converted from agricultural use. Upon conversion, three years' back taxes plus five percent interest are recovered.[37]

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33. NALS, *supra* note 8, at 56; *see also* Henke, *Preferential Property Tax Treatment for Farmland*, 53 OR. L. REV. 117 (1974).

34. NALS, *supra* note 8, at 56; Henke, *supra* note 33.

35. One report noted that only Georgia and Kansas have not enacted preferential tax laws. NALS, *supra* note 8, at 56, 73 n.1.

36. ILL. REV. STAT. ch. 120, ¶ 501a-1 (1981).

37. *Id.* ¶ 501a-3.

The constitutionality of Illinois's preferential assessment legislation was challenged in Hoffman v. Clark, 69 Ill.2d 402, 372 N.E.2d 74 (1977). The Illinois Supreme Court refused to hold that the legislation violated the Illinois Constitution's mandate that "taxes upon real property shall be levied uniformly by valuation." ILL. CONST. of 1970 art. IX, § 4(a). The court also rejected the contention that the roll-back provision violated equal protection:

> The general recognition of the need for some special effort for the preservation of farmland and open space demonstrates that there exists a rational basis for the creation by the legislature of a class of taxpayers from whom an additional tax is required when the land no longer qualifies for the special treatment . . . .

This method's effectiveness in preserving farmland, however, is dubious. The goal of preserving farmland is achieved only in those instances in which the property owner is firmly committed to farming and needs the tax break to continue to farm.[38] Otherwise, the reduced tax encourages speculation by reducing the expenses of owning land until the time for development is ripe, at which time the roll-back penalty is merely passed on to the buyer in the price of the land.[39] Commonly, the landowner's commitment to agriculture is compromised by the lure of profit that accompanies development. Thus, the effect of preferential taxation, standing alone,[40] is to shift the tax burden to nonfarmland owners without providing any assurances that farmland will be preserved.

(2) Mitigating the Adverse Effects of Nearby Urbanization

One potential reason for a farmer to discontinue farming is a feeling of frustration or impermanence in the area caused by encroaching urbanization. The adverse spillover effects of urbanization on agriculture are substantial. Urbanization on nearby farmland interferes with natural drainage patterns, often resulting in decreased productivity. Also, the presence of nonfarmers in a farming area often results in intentional crop damage, harassment of livestock, or interference with farm equipment by increased traffic on the roads.[41] It may also cause

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69 Ill. 2d at 426-27, 372 N.E.2d at 86.

38. One report found that differential assessment probably deterred only one percent of all farmers from selling their land for development. COUNCIL ON ENVTL. QUALITY, UNTAXING OPEN SPACE 9 (1976).

Any measures directed at aiding the owner-operator as a means of preserving land are partially undermined by the fact that only 54% of farmland owners are active farmers. Wunderlich, *Farmland Ownership: Past, Present and Future*, 3 AGRIC. L.J. 671, 675-76 (1982).

39. A New Jersey court commented upon its preferential assessment legislation:

> [T]he typical situation occurs wherein a speculator will purchase farmland and lease it back to the farmer in order to continue to qualify for the preferred tax treatment under the act. If an immediate development is contemplated, the cost of roll-back taxes is added to the sale price of the land and is passed along from farmer to speculator to developer and ultimately to the home purchaser. However, immediate development is not the usual situation in that land speculation involves a period of years . . . . The three-year roll-back tax will present a small setback in comparison to the money saved during the years the land qualified for the preferred tax treatment under the act . . . .
>
> It is apparent, then, that the tax benefits . . . serve to entice speculation . . . .

Paz v. DeSimone, 139 N.J. Super. 102, 107, 352 A.2d 609, 612 (1976). *See also* Note, *Differential Assessment for Agricultural Land Creates A Tax Haven for Speculators*, 34 U. FLA. L. REV. 848 (1982).

40. Some states grant preferential taxation to owners only when regulations are first imposed on the land. "Any land which is within an agricultural use zone and which is used exclusively for agricultural use shall be assessed at its actual value for agricultural use . . . ." NEB. REV. STAT. § 77-1344(1) (1981). *See also* HAWAII REV. STAT. § 246-10(a) (1976); OR. REV. STAT. § 308.345 (Repl. Pt. 1981).

41. ILLINOIS DEP'T OF ENERGY & NATURAL RESOURCES, SECOND GOVERNOR'S CONFER-

the new urban neighbors to complain about dust, noise, odors, or other byproducts of farming. These complaints often result in nuisance suits.

Many farmers adapt to these annoyances, but some prefer to discontinue farming. Then, the remaining farmers become more convinced that the area is inevitably changing and thus reduce long-term capital investments for farm improvements.[42] Eventually the speculative streak is kindled,[43] the land is sold for development, and the farmer's financial needs are satisfied. To increase the viability of farming in this situation, legislation is designed to protect against nuisance suits, local government regulations that restrict farming practices, and the imposition of fees on farmland for urban improvements.

(a) *Limiting nuisance suits*

"Since 1908, agriculture has been losing [lawsuits] to urban uses when a nuisance suit is filed."[44] Because nuisance suits can cause the forcible removal of land from agricultural use,[45] the Illinois General Assembly enacted Public Act 82-509 to "reduce the loss to the State of its agricultural resources by limiting the circumstances under which farming operations may be deemed to be a nuisance."[46] The Act provides that

> [n]o farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation, provided, that the provisions of this Section shall not apply whenever a nuisance results from the negligent or improper operation of any farm or its appurtenances.[47]

The Act attempts to elevate the principle of priority of use, which has traditionally been only one factor to be considered,[48] to a status of pre-

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ENCE ON THE PROTECTION OF ILLINOIS FARMLAND 15-19 (1982) (summarizing the results of a survey of farmers located adjacent to rural subdivisions); NALS, *supra* note 8, at 34; CONFERENCE, *supra* note 1, at 31-32.

42. NALS, *supra* note 8, at 34-35.

43. *Id.* As a former Oregon dairy farmer put it, "Scratch a farmer, and you'll find a subdivider." C. LITTLE, THE NEW OREGON TRAIL 26 (1974).

44. CONFERENCE, *supra* note 1, at 26.

45. *See generally* Spur Indus. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972).

46. 1981 ILL. LAWS 2599 (codified at ILL. REV. STAT. ch. 5, ¶ 1101 (1981)).

47. *Id.* ¶ 1103. The Act is inapplicable to nuisance actions involving water pollution or flooding. *Id.* ¶ 1104.

48. RESTATEMENT (SECOND) OF TORTS § 840D (1979); Annot., 42 A.L.R.3d 344 (1979).

The common-law rule may appear unjust to the agricultural landowner. Unless the doctrine of priority of use is the determinative factor in nuisance suits, owners of farm operations are imposed with a burden of foreseeability. Upon locating in what was originally a rural area, they are required to anticipate the possibility that subsequent urban development will cause the origi-

eminence in nuisance suits against farmers. The Act cannot, however, be expected to sweepingly exonerate farmers from nuisance liability.

As one report notes, the Act presents several questions for which there are yet no answers due to lack of judicial interpretation.[49] The Act requires that the farm, to be protected from nuisance, must not have been a nuisance when it began operating. The Act does not specify which party has the burden of proof as to that requirement nor which legal principles govern—those in effect when the operation began or those in effect when the suit is commenced.

The Act allows plaintiffs a one-year period after the commencement of the farming operation within which to attempt to have it declared a nuisance. However, it is unclear whether a plaintiff would prevail if a farmer, after one year of farming, adopts significantly different farming techniques that produce more noise, dust, or pollution. If the plaintiff can successfully sue under these circumstances, technological growth of agricultural methods may be inhibited. Also, the issue arises regarding the amount of change necessary before the protection provided by the Act ceases.

The Act provides no protection for the "improper operation" of a farm, but fails to define that term. One report notes that "maintaining a nuisance is a good example of improper activity,"[50] implying that such an interpretation would render the entire Act meaningless.

Even if the language of the Act is interpreted to protect against nuisance suits, the Act is open to constitutional attack. If the right to bring a nuisance action is viewed as a property interest under the fifth amendment, the legislature may not confiscate that right without pay-

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nally harmless operation to become a nuisance. RESTATEMENT (SECOND) OF TORTS § 840D comment b (1979). *See generally* Wittman, *First Come, First Served: An Economic Analysis of "Coming to the Nuisance,"* 9 J. LEG. STUDIES 557 (1980). Then, even though the landowner has made substantial capital investments in the land for farming purposes, a court may still enjoin the operation, and the farmer must bear the cost of relocation. However, the landowner is at least partially, if not fully, reimbursed for the relocation cost. The price at which his land is sold will reflect the increased value of the land caused by the urban encroachment. Thus, the apparent unfairness of the common-law rule is mitigated.

On the other hand, according determinative stature to the doctrine of priority of use arguably provides the farmland owner with a windfall. Comment, *The Arizona Agricultural Nuisance Protection Act*, 1982 ARIZ. ST. L.J. 687, 694-95 & n.53. The adjoining landowners would be unable to enjoin the nuisance through litigation, because of the farm operator's priority of use defense. This defense increases the farmland owner's bargaining power in negotiating the sale price of the land. The nonagricultural user is required to pay the farmland owner for the right to remove the nuisance, resulting in a windfall to the farmland owner. *Id.*

49. NALS, *supra* note 8, at 100. Similar statutes have been enacted in North Carolina, Alabama, Delaware, Florida, Georgia, Kentucky, and Louisiana. However, no court has yet interpreted its statute. For a comprehensive comparison of the statutes, see Comment, *"Right to Farm Statutes"—The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. L. REV. 415 (1982).

50. NALS, *supra* note 8, at 101.

ing for it.[51]

If given effect, the Act may tend to make farming "psychologically more tolerable,"[52] so that farmers will be less likely to sell the land for development purposes. To the extent that disenchantment with the effects of nearby urbanization is a reason for developing farmland, the Act may reduce marginally the rate of conversion of Illinois farmland. However, a significant reduction in the rate of conversion is unlikely.

(b) *Agricultural Areas Conservation and Protection Act*

The Agricultural Areas Conservation and Protection Act[53] is similarly designed to indirectly reduce the rate of conversion by encouraging farm use and discouraging other uses. However, two major problems inhibit the Act's effectiveness. First, the Act imposes no restrictions on the landowner if he converts the land to other uses. Second, a municipality can unilaterally exclude farmland from the protection of the Act if the farmland is within one and one-half miles of its borders.[54]

Under the Act, any landowner or landowners of 500 acres or more, individually or in groups, may submit an application to the county board for the creation of an agricultural area.[55] If the proposed area includes land within one and one-half miles of a municipality, the county board must notify the municipality, and the municipality has thirty days to object.[56] If it does so, the land is excluded from the area.[57] If the municipality does not object, the county board, after receiving reports of a county committee, composed of four active farmers and a member of the board,[58] and after holding a public hearing, may adopt the proposal or any modified version of the proposal that it deems appropriate.[59] Once the area is established, the Act is designed to protect farmland[60] in three ways.

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51. McCarty & Matthews, *Foreclosing Common Law Nuisance for Livestock Feedlots: The Iowa Statute*, 2 AGRIC. L.J. 186, 201-07 (1980). *Accord* 1976 Op. Iowa Att'y Gen. 451, 455 (opining an analogous statute unconstitutional). Early Illinois cases indicate in dicta that a public nuisance at common law cannot be legalized by the legislature. People v. Anderson, 355 Ill. 289, 189 N.E. 338 (1934); Durand v. Dyson, 271 Ill. 382, 111 N.E. 143 (1915).

52. CONFERENCE, *supra* note 1, at 66.

53. ILL. REV. STAT. ch. 5, ¶¶ 1001-1020 (1981).

54. *Id.* ¶ 1009. This provision was an amendment to the original bill. The Illinois Municipal League successfully lobbied to secure the amendment. NALS, *supra* note 8, at 94-95.

55. ILL. REV. STAT. ch. 5, ¶ 1005 (1981).

56. *Id.* ¶ 1009.

57. *Id.*

58. *Id.* ¶ 1004.

59. *Id.* ¶¶ 1007, 1010.

60. "It is the purpose of this Act to provide a means by which agricultural land may be

First, local governments are forbidden to regulate farming practices within a district "in a manner which would unreasonably restrict or regulate farm structures or farming practices" unless the regulations "bear a direct relationship to the public health and safety."[61] One commentator contends that this provision insulates landowners from the regulation of farm odors.[62] By the language of the Act, however, the local government may still pass laws that "reasonably" restrict farming practices. Also, the local government may *unreasonably* restrict farming practices if the restriction bears a direct relationship to the public health and safety. Thus, the provision merely restates the police power of local governments[63] and is therefore unlikely to aid in insulating farmland owners from these regulations or in preserving Illinois farmland.

As a second measure to conserve farmland, the Act limits local government power to impose special assessments on farmland covered by the Act.[64] Local governments normally finance capital investments such as water and sewer lines, roads, and street lighting when residential developments begin in an area. If the lines run along or cut across farmland, the farmland owner is taxed for the improvement costs regardless of whether the improvement immediately benefits the farmland, the theory being that the sewer or water line will increase the value of the property for development purposes.[65] With limitations on the ability of the local government to impose such tax assessments on farmland, the legislature intended to reduce urban sprawl by imposing the public cost of scattered growth entirely on the developers.[66] Concomitantly, the legislature intended to improve the viability of farming where the farmland owner desired to continue farming. The provision is ineffective, however, because it directly conflicts with an Illinois con-

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protected and enhanced as a viable segment of the State's economy and as an economic and environmental resource of major importance." *Id.* ¶ 1002.

61. *Id.* ¶ 1018.

62. Lappings, Bevins & Herbers, *Differential Assessments and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369, 404-05 (1977).

63. Myers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1, 35 (1979-80); *see* NALS, *supra* note 8, at 98.

64. No political subdivision providing public services such as sewer, water or lights or for non-farm drainage may impose benefit assessments or special ad valorem levies on land used for primarily agricultural production within an agricultural area on the basis of frontage, acreage, or value, unless such benefit assessments or special ad valorem levies were imposed prior to the formation of the agricultural area, or unless such service is provided to the landowner on the same basis as others having the service.

ILL. REV. STAT. ch. 5, ¶ 1020 (1981).

65. NALS, *supra* note 8, at 81.

66. *See* Myers, *supra* note 63, at 25-33.

stitutional home rule provision.[67]

The last provision of the Agricultural Areas Act directs all state agencies "to encourage the maintenance of viable farming in agricultural areas."[68] The agencies are required to modify their regulations and procedures to encourage agriculture so long as the modifications are consistent with the promotion of public health and safety.[69] This declaration of public policy could prove significant when courts review actions affecting farmland, even though the Act does not mandate any specific modifications in agency procedures.[70]

Subsequent legislation has added at least some substance to the legislature's general policy directive by requiring each of ten state agencies[71] to prepare and submit to the Governor and the Illinois Department of Agriculture an agricultural land preservation policy.[72] The policy must include "an analysis of the impact of agricultural land conversions attributed to the agencies' programs, regulations, procedures, and operations" and must "detail measures that can be implemented to mitigate conversions to the maximum extent practicable."[73] Each agency must submit the policy statements to the Illinois Department of Agriculture and secure its approval every three years.[74] As a result of the legislation, state agencies will be required to more carefully consider the impact and possible alternatives of proposed activities affecting farmland. The agency might still conclude that its original proposal best serves the public interest. But the public policy directives will add another factor to the "judicially enforceable checklist of considerations that agencies must include in the decisionmaking

67. The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

ILL. CONST. of 1970 art. VII, § 6(*l*). *See* Myers, *supra* note 63, at 35.

68. ILL. REV. STAT. ch. 5, ¶ 1019 (1981).

69. *Id.*

70. Myers, *supra* note 63, at 36-37; Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 209-19 (1972).

71. The agencies are the Capital Development Board, the Department of Conservation, the Department of Agriculture, the Department of Commerce and Community Affairs, the Environmental Protection Agency, the Department of Energy and Natural Resources, the Department of Mines and Minerals, the Department of Transportation, the Bureau of the Budget, and the Illinois Commerce Commission. Act of Aug. 19, 1982, Pub. Act. No. 82-945, § 3, 1982 Ill. Legis. Serv. 2262 (West) (to be codified at ILL. REV. STAT. ch. 5, ¶ 1303).

72. *Id.*

73. *Id.*

74. *Id.*

processes."[75]

Through these measures, Illinois has begun its efforts to preserve farmland. Each indirect measure addresses a specific problem that threatens to convert farmland. Cumulatively, the measures may result in an environment hospitable to farming and capable of offsetting some of the disruption caused by nearby urbanization. However, where development pressure is moderate or strong, it is unlikely that the current measures will prevent conversion, because the lure of profit will often entice farmers to develop the land. Also, it is estimated that only approximately half of all farmland is owned by farmers, who presumably are more dedicated to keeping the land in production.[76] Consequently, direct regulation of farmland use is necessary.

B. *Local Efforts to Preserve Farmland Via Police Power*

Traditionally, large amounts of farmland remained unregulated by local governments, which were vested with the power of zoning.[77] Gradually, counties adopted large-lot requirements in farming areas and limitations on nonagricultural uses. In the past, large-lot exclusive zones suffered from two major flaws. First, the minimum lot size was only two to ten acres.[78] This was generally too small to support a working farm and not large enough to deter rural subdivisions.[79] Consequently, nonagricultural uses were commonly injected into the farming community. Second, local zoning boards rarely interpreted their zoning ordinances literally. Requests for zoning changes were freely granted, regardless of the effect of the change in agricultural use.[80] Thus, the exclusive agricultural zone was neither exclusive nor necessarily agricultural. The local officials commonly were more interested in increasing the tax base of the community than in preserving agricultural land.[81]

Recently, a few Illinois counties[82] have partially overcome these flaws by increasing the lot sizes permitted and by specifically defining

75. Howard, *supra* note 70, at 217. *Cf.* County of Freeborn v. Bryson, 309 Minn. 178, 243 N.W.2d 316 (1976) (in response to a similar policy directive under an environmental rights act, the court required the county to use an alternate highway route that would not adversely affect a unique marshland).

76. Wunderlich, *supra* note 38, at 671, 675-76.

77. R. HEALY, *supra* note 8, at 10.

78. CONFERENCE, *supra* note 1, at 122; NALS, *supra* note 8, at 107.

79. CONFERENCE, *supra* note 1, at 122; NALS, *supra* note 8, at 107.

80. R. HEALY, *supra* note 8, at 11.

81. *Id.*

82. For a list of the counties, see *supra* note 32.

when rezonings may be granted.[83] Those responsible for making the zoning decisions now treat agricultural land as a permanent rather than a transitional resource.[84] The cause of this change in view at the local level is concern about the economic loss of agriculture to the communities.[85] Consequently, it is much more difficult to secure a zoning change in such counties. DeKalb County has adopted this change, and there, statistics show that the annual loss of farmland has been reduced from over 600 acres in 1972 to 150 acres in 1978.[86] However, these individual efforts at preservation have tended to divert development to the outlying farmland of neighboring jurisdictions rather than to existing urban areas.[87] As a result, the net saving of farmland is minimal.

(1) The Courts' Response

Traditionally, the Illinois courts have been more likely than any other state courts to invalidate zoning ordinances.[88] Predictably, then, the Second and Third Districts of the Illinois Appellate Court were unimpressed by Boone, DeKalb, and Henry counties' attempts to preserve farmland in *Smeja v. County of Boone*,[89] *Pettee v. County of DeKalb*,[90] and *Pierson v. Henry County*.[91]

In *Smeja*, Boone County zoned a fifty-acre tract for exclusive agricultural use.[92] The tract consisted of fifteen acres of marginal farmland and thirty-five acres of woodlands, and was surrounded on three sides by farmland. However, because the County had authorized a subdivision to be built on farmland only two miles away,[93] the Illinois Appellate Court, Second District, held that the exclusive agricultural zoning

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83. In Boone County, nonfarm dwellings are absolutely prohibited within a farm area. Rezoning applications are subject to the following criteria:

> 1. No tract of land with a 25 percent or greater percentage of its soils classified as Class I or Class II soils . . . [or with] a 50 percent or greater percentage of its soils classified as Classes I, II, and III shall be rezoned unless it meets the requirements of 2 and 3 below;
> 2. The tract of land may be rezoned if the slope of the tract is 6 percent or greater;
> 3. The tract may be rezoned if man-made or physical features act as barriers to farm operations.

NALS, *supra* note 8, at 124. For descriptions of the various soil classifications, see *infra* note 150.

84. *See supra* note 29 and accompanying text.

85. *See supra* notes 16-18 and accompanying text.

86. CONFERENCE, *supra* note 1, at 146.

87. *Id.* at 140.

88. N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER § 6.17, at 143-48 (1974) [hereinafter cited as N. WILLIAMS]; R. LINOWES & D. ALLENSWORTH, *supra* note 11, at 81-85. *See* Siegel, *Illinois Zoning: On the Verge of a New Era*, 25 DEPAUL L. REV. 616 (1976).

89. 34 Ill. App. 3d 628, 339 N.E.2d 452 (2d Dist. 1975).

90. 60 Ill. App. 3d 304, 376 N.E.2d 720 (2d Dist. 1978).

91. 93 Ill. App. 3d 320, 417 N.E.2d 234 (3d Dist. 1981).

92. 34 Ill. App. 3d at 631-32, 339 N.E.2d at 454.

93. *Id.* at 632, 339 N.E.2d at 454.

regulation "bore no real or substantial relation to the public health, safety, morals, comfort, or general welfare."[94] The County's purpose in channeling urbanization away from farming areas was thereby frustrated by the court.

Similarly, in *Pettee*, the Illinois Appellate Court, Second District, granted the owner's application for a zoning change in DeKalb County's agricultural zoning ordinance. The court allowed the construction of a subdivision on a tract surrounded entirely by farmland. The subject farmland was an eighty-acre tract characterized by the court as "largely unsuitable for farming, or is at best marginal farmland, because approximately 25 acres suffer from a serious drainage problem."[95] Although the land could have been made highly productive, by correcting the drainage problem at a cost of $30,000,[96] the court implicitly deemed it unfair to impose the cost of improving the drainage upon the landowner. Accordingly, DeKalb County's effort to preserve the tract was thwarted.

In *Pierson*, a twenty-acre tract, ten acres of which were woodlands, was surrounded predominantly by farmland, but with several residences in the area.[97] The owner appealed the county zoning board's denial of rezoning from agricultural to residential use. The Third District of the Illinois Appellate Court reversed the board's decision, thereby allowing the construction of the subdivision. In response to the County's efforts to preserve the farmland and channel development away from the agricultural area, the court said, "This Court fails to see how the public will benefit by the continuation of agricultural zoning to this agriculturally miniscule 20 acre tract, less than half of which is suitable for its zoned use."[98]

The appellate court's Second District, which frustrated preservation goals in *Smeja* and *Pettee*, upheld such goals in *Wilson v. County of McHenry*.[99] In *Wilson*, two landowners challenged McHenry County's agricultural zoning ordinance. The land was located in a predominantly rural area, but with scattered residential subdivisions nearby.[100] Although the evidence conflicted as to the quality of the land for farming purposes, expert testimony indicated that the land contained eighty-seven to ninety percent prime soils.[101] The court used this fact

94. *Id.* at 631, 339 N.E.2d at 454.
95. 60 Ill. App. 3d at 310, 376 N.E.2d at 725.
96. *Id.* at 310, 376 N.E.2d at 723.
97. 93 Ill. App. 3d at 321, 417 N.E.2d at 235.
98. *Id.* at 323, 417 N.E.2d at 236.
99. 92 Ill. App. 3d 997, 416 N.E.2d 426 (2d Dist. 1981).
100. *Id.* at 999-1000, 416 N.E.2d at 428.
101. *Id.* at 1000-02, 416 N.E.2d at 428-29.

to distinguish the case from *Smeja* and *Pettee*,[102] where the land had been characterized by the court as marginal farmland. Thus, although the zoning classification significantly reduced the value of the property, the "obvious public interest in preserving *good* farmland must be balanced against this consideration of loss in value and profit."[103]

In *Wilson*, a seventy-five to eighty percent reduction in value that resulted from the zoning was insufficient to outweigh the public benefit in preserving *good* farmland.[104] In *Smeja*, *Pettee*, and *Pierson*, it was unnecessary to balance hardship since the zoning was arbitrarily aimed at "marginal" farmland.[105] Thus, these cases can be viewed as authorizing local efforts to preserve Illinois farmland, but only if the subject land is highly productive land in its present state.[106] Although the location of the land is a factor to be considered, the overriding factor is the land's suitability for farming purposes. This result is undesirable for two reasons.

First, much of the State's interest is in maintaining a high aggregate level of agricultural production.[107] Both prime and marginal land may be needed to supply the food needs of the future. Consequently, the concern should be with the total amount of land preserved rather than the quality of the land. Second, preserving only prime lands leads to haphazard spot development, thus multiplying the number of urban uses within rural areas and compounding the adverse effects of urbanization on agriculture.[108] Illinois has taken measures to mitigate such adverse effects,[109] but the measures are of dubious effectiveness.[110]

(2) Inadequacy of Local Regulation

Even though *Wilson* authorizes local zoning to preserve farmland, only nine Illinois counties have enacted and adhered to such measures.[111] Local officials' failure to act probably results from their preoccupation with local matters, as well as their general inattention to state or national preservation issues.

Locally controlled zoning is vulnerable to the abnormally strong

102. *Id.* at 1002-03, 416 N.E.2d at 430.

103. *Id.* at 1002, 416 N.E.2d at 430 (emphasis added).

104. *Id.*

105. *Id.* at 1003, 416 N.E.2d at 430.

106. *Accord* Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973) (agricultural zoning held invalid when applied to lands clearly unsuitable for agricultural use).

107. *See supra* text accompanying notes 21-23.

108. CONFERENCE, *supra* note 1, at 140. *See supra* text accompanying notes 41-43.

109. *See supra* text accompanying notes 30-76.

110. *Id.*

111. NALS, *supra* note 8, at 107, 115-16. *See supra* note 32 and text accompanying notes 82-87.

influence of Illinois developers.[112] Local zoning boards, being close to their constituents, are more likely to accede to the development requests.[113] Unless agriculture has a very strong political base in the community, any concern for preservation is compromised in response to pressures from private interest groups.[114] Additionally, local officials often over-encourage development because it increases the property tax base of the community and promotes local employment.[115] Thus, local government cannot be depended upon to preserve Illinois farmland.[116]

C. *Summary of State and Local Approaches to Preserving Illinois Farmland*

State measures to reduce the rate of conversion are directed toward increasing the profitability of farm operations by granting property tax advantages and reducing pressures that may induce a farmer to discontinue farming. Cumulatively, the measures might result in an environment hospitable to farming and capable of mitigating some of the disruption caused by nearby urbanization. Regardless of the effectiveness of incentives for agriculture, if an agricultural area has potential for development, developers will likely be able to purchase some farms, and urban development will be injected into the farming community. Consequently, indirect measures are not enough to decrease the rate of conversion significantly.

At the local level, a small number of counties have changed their approach from encouraging urban growth to preserving farmland for future generations. These measures have proven effective in reducing the rate of conversion within the communities, but have only diverted

112. R. LINOWES & D. ALLENSWORTH, *supra* note 11, at 81-83.

113. Anyone familiar with zoning procedures knows why it is difficult for local officials to protect broad public interests. A friend or customer comes before the local board, makes his request and explains that his livelihood depends on the approval of the request. If the board members do not comply, they have made an enemy for life—not one that lives in Raleigh, either, but one that lives close by.

R. HEALY, *supra* note 8, at 10.

114. "[Local] zoning is too susceptible to economic and political pressures and is too easily altered to be an effective tool for the preservation of . . . agricultural land." Ellingson, *Differential Assessment and Local Government Controls to Preserve Agricultural Lands*, 20 S.D.L. REV. 548, 571 (1975).

115. R. HEALY, *supra* note 8, at 11.

116. Local officials . . . are likely to recognize that new development means income, in purchases at local stores, in construction by local contractors, in mortgages by local banks and services by local lawyers and surveyors. But they may be oblivious to the later costs that experienced localities know about—the dollar costs of providing roads and sewers and other services for scattered projects, the personal costs of congestion and changed lifestyles and disruption of cherished countryside, and the social costs of a new urban and affluent population settling among small town people and farmers.

Id.

urban sprawl to the farmland of neighboring communities rather than to existing urban areas.[117] Thus, the net saving of Illinois farmland is minimal. Consequently, Illinois should recapture some of the zoning power traditionally delegated to local government. Through a state-wide perspective, not subject to purely parochial concerns, it will be possible to adequately control conversion.

V. A Proposal for State-Wide Agricultural Land Preservation

Because of the inadequacy of state-wide measures, standing alone, to preserve farmland, and because of the scarcity of county zoning measures in Illinois, this Comment proposes that all counties be required via state legislation to prepare comprehensive plans for preserving farmland, and to enact exclusive agricultural ordinances to implement the plans. These initial plans would then be subject to approval by a state land use planning agency. Subsequent amendments to the plans would also be subject to approval by the agency. When determining if approval of the initial plans and subsequent amendments are appropriate, the agency would be required to give priority not only to prime agricultural lands, but to all agricultural lands. This proposal is based upon the statutory scheme of Oregon.[118] The comprehensive state-wide land use planning system of Oregon was enacted in 1973, specifically in response to the loss of agricultural land, and has been particularly effective in preserving Oregon's farmland.[119]

A. *The Strength of the State Role in Land Use Decisions*

The power to regulate the use of land has traditionally been delegated to local government.[120] The effects of land use were viewed as entirely local and local governments were believed to be the most competent in evaluating the propriety of a particular use of land.[121] However, recent decades have seen a shift in this view as the inadequacies of local control have become apparent.[122] Consequently, land use deci-

117. *See supra* text accompanying note 87.

118. Or. Rev. Stat. §§ 197.175(2), 197.225, 197.230(2)(j), 215.203(1), 215.243 (Repl. Pt. 1981).

119. NALS, *supra* note 8, at 239-46; Conference, *supra* note 1, at 103-07; Furuseth, *Update on Oregon's Agricultural Protection Program: A Land Use Perspective*, 21 Nat. Resources J. 57 (1981).

120. N. Williams, *supra* note 88, § 18.01, at 355 (1974).

121. Comment, *State Land Use Statutes: A Comparative Analysis*, 45 Fordham L. Rev. 1154, 1157 (1977).

122. The assumptions that the effects of land development are limited and that the local community has superior competence to evaluate land use issues have been subjected to increasing skepticism. The emergence of environmental controversies and chronic problems such as the need for low-cost housing have revealed the inadequacies of local

sionmaking authority has been transferred, in varying degrees, from local to state government.[123]

The strength of the state role in planning decisions is directly related to the effectiveness of a land preservation program. Disadvantages of local control remain when the state assumes a minor role.[124] An example of a scheme granting only a minor role to the state is the American Law Institute's Model Land Development Code.[125] Under the Model Code, which prompted the enactment of much state legislation,[126] the state does not mandate comprehensive local planning; rather, local planning remains optional.[127] State administrative review of local decisions extends only to limited geographical "areas of critical State concern"[128] and to "developments of regional impact."[129] Although the state agency has considerable discretion in determining the

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control. While most land use activities have geographically limited effects, certain activities may have widespread social, economic and environmental impact. In such cases, not only the immediate community but all affected areas have an interest in the land use decision. Furthermore, while individual developments may have only marginal impact outside the local community, the cumulative effect on the region or the state may be substantial. However, regional and state interests may not be asserted because the authority to regulate has been exclusively delegated to local governments. Finally, the ramifications of certain land use activities may be very complex and require technical knowledge for proper assessment. Local governments may not possess the resources or information necessary to evaluate these developments effectively. Even assuming that local governments have such capability, critics have been concerned that municipalities will weigh local goals and interests above the welfare of the state.

Id. at 1157-58 (citations omitted).

Recapturing local government's zoning power is further justified by the corruption that often accompanies local government's control over land use decisions. Because of the large financial gains and losses involved in land use decisions, the landowner is encouraged "to share his land value prize with the decisionmaker." Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 45 (1981). The inherent politics behind local zoning decisions "frequently results in untaxed windfalls or uncompensated wipeouts, where the 'friends of the house' enjoy a definite advantage on an imperfectly warped roulette wheel." *Id.* at 46.

123. For comprehensive discussions of the various approaches used to redelegate authority to state government and the degree to which the authority is asserted, see R. HEALY, *supra* note 8; D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION (1976); Comment, *supra* note 121.

124. *See supra* note 122.

125. MODEL LAND DEV. CODE (1975).

126. Comment, *supra* note 121, at 1171.

127. MODEL LAND DEV. CODE § 1-102 (1975); D. MANDELKER, *supra* note 123, at 402.

128. The Model Code defines "critical areas" as areas that have a "significant impact upon historical, natural, or environmental resources of regional or statewide importance." MODEL LAND DEV. CODE § 7-201(3)(b) (1975). The intent of the drafters is that "critical areas" encompass only a small percentage of the state's land base. *Id.* art. 7 Commentary.

129. *Id.* § 7-301. The following factors are to be considered by the administrative agency in designating developments of regional impact: (1) environmental problems that the development would cause; (2) amount of traffic generation; (3) size of the site; (4) number of persons who would be attracted to the development; (5) likelihood of subsequent development; and (6) unique qualities of the area. *Id.* § 7-301(2).

extent of its own jurisdiction,[130] local government retains complete control over areas not so designated. Thus, under this plan, the state's authority to plan land use is limited.[131]

In contrast to the Model Code, Oregon's legislation mandates a strong state role in the planning process. In Oregon, local governments are required to prepare comprehensive land use plans and to adopt land use ordinances to implement the plans.[132] The plans and ordinances must conform to general land use goals promulgated by the legislature[133] and by the state agency, the Land Conservation and Development Commission (LCDC).[134] The initial comprehensive plan and subsequent amendments to the plan must be approved by the LCDC before the local plans are given effect.[135] To ensure continued compliance with state goals, the LCDC reviews the plans two years after the initial approval and at least once every five years thereafter.[136]

By subjecting local planning to stringent state review, the legislature has ensured that the state role in Oregon is substantial. Local governments' participation in the planning process is retained to the extent that they have the initial responsibility to draft the plans. Their familiarity with the surrounding area provides valuable input into the planning process.[137] Yet, the State's power is strong enough that state interests are not subjugated to local control.[138] Requiring Illinois counties to adopt comprehensive plans and land use ordinances in accordance with state goals would ensure an initially strong state role. Providing ongoing review of the implementation of the land use planning process would prevent piecemeal dissolution of the initial comprehensive plans, which local officials' unskillfulness or hostility toward zoning might produce.[139]

130. Comment, *supra* note 121, at 1164. *See supra* notes 129-30.

131. Comment, *supra* note 121, at 1171; D. MANDELKER, *supra* note 123, at 125, 398-404. As the drafters of the Model Code indicate, the Code "does not seek to replace local regulation as the basic mechanism for controlling the use of land. The great majority of land use decisions do not involve matters of state or regional importance . . . ." MODEL LAND DEV. CODE § 7-101 Note 1 (1975).

132. OR. REV. STAT. § 197.175(2) (Repl. Pt. 1981)

133. *Id.* § 197.230.

134. *Id.* §§ 197.225, 197.250.

135. *Id.* §§ 197.251, 197.605.

136. *Id.* § 197.640.

137. Comment, *supra* note 121, at 1175 n.170.

138. *Id.* at 1175. *See* D. MANDELKER, *supra* note 123, at 28 (1980 Supp.).

139. D. MANDELKER, *supra* note 123, at 20, 404.

B. *The Extent to Which the Planning Process Should Serve Land Preservation Goals*

A significant problem to be addressed when adopting state land use planning measures is determining the proper degree to which the substantive content of the policy should be legislatively defined.[140] A specifically defined policy adequately guides the agency in implementing the policies.[141] A related advantage is that it prevents the agency from gaining too much power, which could result if the agency had extensive discretion in interpreting the policy. On the other hand, a specifically defined policy is difficult for a legislative body to agree upon.[142] Also, specifically defined policies may be difficult to apply in all areas of the state at all times.[143]

Oregon's legislation consists of a general but strong policy in favor of preserving farmland. The legislation requires merely that land use planning decisions "[g]ive consideration to . . . [a]gricultural land."[144] This general requirement is then strengthened by extensive policy statements regarding the importance of farmland to the Nation's citizens.[145] The state legislation authorizes, but does not require, local governments to zone land exclusively for farm use.[146] The statute defines the term "farm use" as the "current employment of land for the primary purpose of obtaining a profit."[147] "Current employment of land for farm use" includes contiguous wasteland and woodlands so long as

140. *Id.* at 38-42.

141. *Id.* at 40.

142. *Id.*

143. *Id.*

144. OR. REV. STAT. § 197.230(2)(j) (Repl. Pt. 1981)

145. (1) Open land used for agricultural use is an efficient means of conserving natural 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 lands 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 or 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 a 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.

Id. § 215.243(1)-(4).

146. *Id.* § 215.203(1).

147. *Id.* § 215.203(2)(a).

they are held in common ownership with the farmland.[148]

An LCDC rule clarifies the legislation to the extent that it requires local governments to use exclusive agricultural zones to preserve agricultural lands.[149] However, no precise definition of agricultural land is available from either the statute or the agency rule. Under the agency rule, agricultural land consists of *predominantly* class I, II, III, and IV soils, and includes class V and VI soils in eastern Oregon.[150] The definition also includes even lesser quality soils if the soils are necessary to permit farm operations on neighboring lands.[151] Thus, both the state legislation and the agency rule are clearly not limited to prime agricultural lands,[152] which generally consist of only class I to III soils.[153] But the extent to which lesser quality soils must be preserved is unclear.

In response to the strong policy in favor of preservation, the Oregon courts have interpreted the definition of agricultural land broadly.

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148. *Id.* § 215.203(2)(b)(D)-(E).

149. "Agricultural 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 . . . ." OR. ADMIN. R. 660-15-000(3) (app. A 1981), *quoted in* Flury v. Land Use Bd. of Appeals, 50 Or. App. 263, 266 n.1, 623 P.2d 671, 673 n.1 (1981).

150. AGRICULTURAL LAND—in western Oregon is land of predominantly Class I, II, III and IV soils and in eastern Oregon is land of predominantly Class I, II, III, IV, V and VI soils as identified in the Soil Capability Classification System of the United States Soil Conservation Service, and other lands which are suitable for farm use taking into consideration soil fertility, suitability for grazing, climatic conditions, existing and future availability of water for farm irrigation purposes, existing land use patterns, technological and energy inputs required, or accepted farming practices. Lands in other classes which are necessary to permit farm practices to be undertaken on adjacent or nearby lands shall be included as agricultural land in any event.

Id.

The National Agricultural Lands Study describes the various classes of soil as follows:

Class I—	soils have few limitations that restrict their use.
Class II—	soils have moderate limitations that reduce the choice of plants or require moderate conservation practices.
Class III—	soils have severe limitations that reduce the choice of plants or require special conservation practices, or both.
Class IV—	soils have very severe limitations that reduce the choice of plants, or that require very careful management, or both.
Class V—	soils are not likely to erode but have other limitations that limit their use, and are impractical to remove.
Class VI—	soils have severe limitations that make them generally unsuitable for cultivation.
Class VII—	soils have very severe limitations that make them unsuitable for cultivation.
Class VIII—	soils and landforms have limitations that nearly preclude their use for commercial crop production.

NALS, *supra* note 8, at 45 Table 2-7.

151. OR. ADMIN. R. 660-15-000(3) (app. A 1981). For the text of the rule, see *supra* note 150.

152. Jurgenson v. County Court, 42 Or. App. 505, 512, 600 P.2d 1241, 1244-45 (1979); CONFERENCE, *supra* note 1, at 106.

153. Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443, 448 (1982).

The requirement that the land consist of *predominantly* class I to IV soils has been interpreted to mean that the land need only consist of seventy percent of the designated classification.[154] Also, the tract sought to be developed cannot be considered in isolation; rather, it must be considered along with the larger tract of which it is a part.[155] Thus, if the larger tract in common ownership consists of predominantly class I to IV land, or of class I to VI land in eastern Oregon, nonfarm uses are barred on every portion of the tract. This result reflects the legislative policy to conserve not only farmland, but also open space for aesthetic purposes,[156] and to separate farming from urban uses by channeling new urbanization toward existing urban areas.[157]

The effectiveness of Oregon's comprehensive preservation program makes it a desirable model for Illinois to follow. Although the extent to which all undeveloped lands must be preserved is ambiguous under the program, the cumulative effect is that most open space is being preserved for future generations while urban development is being channelled toward existing urban areas.[158] The legislation reaches this result by promulgating a strong state role in the planning process and extending preservation efforts to marginal as well as prime agricultural lands. The program recognizes that regulating only prime lands would promote haphazard spot development, which would compound the adverse effects of urbanization on farming activity.[159] It also recognizes that the State's interest is in maintaining a high aggregate level of production. Both prime and marginal land may be necessary to supply future food needs.

C. *The Taking Issue*

Zoning undeveloped land for exclusive agricultural use will have the effect of significantly reducing the market value of the land. This presents the issue of whether the zoning constitutes a taking of private property without just compensation or whether the police power per-

154. Jurgenson v. County Court, 42 Or. App. 505, 600 P.2d 1241 (1979) (24 of 34 acres were within the designated classification and thus the 34-acre tract was required to be placed in exclusive agricultural zone).

155. Lemmon v. Clemmens, 57 Or. App. 583, 646 P.2d 633 (1982); Meyer v. Lord, 37 Or. App. 59, 586 P.2d 367 (1978).

156. OR. REV. STAT. § 215.243(2) (Repl. Pt. 1981). For the text of the statute, see *supra* note 145.

157. OR. REV. STAT. § 215.243(1)-(3) (Repl. Pt. 1981). For the text of the statute, see *supra* note 145.

158. NALS, *supra* note 8, at 248.

159. *See supra* text accompanying notes 41-43.

mits the state to regulate the land.[160]

The proper bounds of the police power have been indistinct ever since Justice Holmes made his cryptic statement that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[161] The United States Supreme Court has recently admitted that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[162] Unsuccessful scholarly attempts to foreclose debate on the subject have been numerous.[163]

The most permissive view of the police power was espoused by the Supreme Court of Wisconsin in *Just v. Marinette County*.[164] In that case, the landowner contended that a shorelines zoning ordinance was invalid because it prohibited any development of his lakefront property, thus reducing its value substantially.[165] While the court upheld the ordinance, the significance of the case lies not in its holding, but in its broad rationale. Rather than focusing on the diminution in value of the property as regulated or on the profitability of the land as zoned, the court stated that an owner has no inherent right to change the natural conditions of his land.[166] "While loss of value is to be considered in determining whether a restriction is a . . . taking, values based upon changing the character of the land at the expense of harm to public

160. The fifth amendment commands that "private property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

161. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

162. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

163. *E.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Saks, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

164. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

165. The ordinance permitted the landowner some minimal uses, such as harvesting wild crops, hunting and fishing, and maintaining hiking trails. *Id.* at 12 n.3, 201 N.W.2d at 765 n.3.

166. Is the ownership of a parcel of land so absolute that a man can change its nature to suit any of his purposes? The great forests of our state were stripped on the theory man's ownership was unlimited. . . . The despoilage was in the failure to look to the future and provide for the reforestation of the land. An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses.

Id. at 17, 201 N.W.2d at 768.

rights is not an essential factor or controlling."[167]

The *Just* rationale would clearly allow Illinois to preserve not only prime and marginal farmland, but also all open lands, without compensating the landowner. Simply put, the police power would allow the State to prohibit any change in the existing character of the land.

The court's analysis in *Just* closely parallels the view that Justice Brandeis espoused while dissenting from Justice Holmes's majority opinion in *Pennsylvania Coal Co. v. Mahon*.[168] Justice Holmes's judicial policy was to accord great deference to legislative judgments when regulations infringed upon contract rights. To be upheld, contract regulations needed only to be reasonably related to a valid governmental purpose.[169] However, Justice Holmes departed from that policy in favor of a balancing approach when confronted with regulations infringing upon property rights.[170] In dissent, Justice Brandeis refused to accord property rights such sanctity: "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put."[171] Emphasizing the limited supply of natural resources and the need for orderly urban development, one report urges that *Pennsylvania Coal* be overruled.[172] Advocating departure from traditional, albeit muddled,[173] taking analysis, the report concludes that the *Just* approach should be adopted: "[I]t is not too late to recognize that Justice Brandeis was right."[174]

However, the implications of the *Just* approach are extreme.[175] Property values have traditionally included values based upon speculative future uses of the property.[176] Thus, the *Just* approach gives the government essentially "untrammelled power to destroy previously established property value without paying compensation."[177] Moreover, it provides no assurance that the landowner is left with a reasonable or profitable use of the land.[178]

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167. *Id.* at 23, 201 N.W.2d at 771.

168. 260 U.S. 393 (1922).

169. *See, e.g.*, Adkins v. Children's Hosp., 261 U.S. 525, 567 (1923) (Holmes, J., dissenting); Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 163, at 240-44.

170. *See supra* text accompanying note 161.

171. *Pennsylvania Coal Co.*, 260 U.S. at 418 (Brandeis, J., dissenting).

172. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 163, at 238-53.

173. *See supra* text accompanying notes 161-63.

174. F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 163, at 253.

175. Large, *supra* note 25, at 1074-83.

176. *Id.* at 1078.

177. Berger, *supra* note 163, at 180.

178. *See supra* note 165.

A more moderate approach is illustrated by the Supreme Court's latest comprehensive analysis of the taking issue in *Penn Central Transportation Co. v. New York City*.[179] That case indicates that speculative values are irrelevant to a determination of whether there has been a taking, but that the owner will be assured that a profitable use of the land remains. In *Penn Central*, Grand Central Terminal had been designated as a historic landmark by New York City's Landmark Preservation Commission.[180] The Commission denied the owner permission to build a fifty-three story office building above the terminal because the office building would adversely affect the terminal's historic and aesthetic features.[181] Penn Central claimed that the denial constituted a taking of its property without compensation.[182]

The *Penn Central* Court refused to hold that a taking had occurred. The regulation permitted the owner to use Grand Central Terminal in the same manner that it had used the property for sixty-five years.[183] A mere showing that Penn Central had been denied the ability to exploit a speculative property interest did not constitute a taking.[184] The focus of the taking issue is on the uses that the regulation permits rather than on reduced values associated with speculative uses.[185] According to *Penn Central*, so long as an "economically viable" use remains, no taking has occurred.[186] Any nonagricultural value associated with undeveloped land is merely speculative value. Therefore, as applied to agricultural land, *Penn Central* authorizes the zoning of all land for exclusive agricultural use so long as agriculture is a profitable use of the particular land. If no economically viable use remains after the zoning is imposed, courts following *Penn Central* would strike down the regulation. Such zoning would be upheld only if the extreme approach espoused in *Just* were adopted.[187]

Although the current strong legislative policy in favor of preserving agricultural lands[188] might alter the Illinois judiciary's traditional conservative stance toward zoning,[189] it is unlikely that the judiciary would be willing to undertake as substantial a departure as the *Just*

179. 438 U.S. 104 (1978).
180. *Id.* at 115.
181. *Id.* at 117-18.
182. *Id.* at 119.
183. *Id.* at 136.
184. *Id.* at 130.
185. *Id.* at 131.
186. *Id.* at 138 n.36.
187. *See supra* text accompanying notes 164-78.
188. ILL. REV. STAT. ch. 5, ¶ 1002 (1981). For the text of the statute, see *supra* note 30.
189. N. WILLIAMS, *supra* note 88, § 6.17, at 143-48; R. LINOWES & D. ALLENSWORTH, *supra* note 11, at 81-85; *see* Siegel, *supra* note 88.

case authorized in Wisconsin. However, regulation that left land with no economically viable use would be invalidated under the *Penn Central* approach. Upon this land, spot development could occur because profitable and unprofitable land is often commingled.

The American Law Institute, in its Model Land Development Code, provides a mechanism to prevent spot development on such lands. Under the Code, if a court finds that a regulation constitutes a taking, the court is to refrain from invalidating the regulation until the agency has had time to decide whether it wishes to validate the regulation by compensating the landowner sufficiently to eliminate the unconstitutional taking.[190] Wide latitude is granted in the form of the compensation.[191] Since the compensation is only in an amount sufficient to avoid the taking issue, it would be cheaper to the agency than outright purchase of the fee. The public cost of preserving the land and eliminating spot development is thus reduced.

VI. Conclusion

The annual loss of over 100,000 acres of Illinois farmland is alarming. The loss of farmland constitutes the loss of environment, landscape and heritage, as well as food and fiber. Commendably, the Illinois General Assembly has recognized the necessity of preserving this essential natural resource. However, the means adopted are only tangentially related to the goal. As a result, only a marginal reduction in the rate of conversion can be expected.

The means adopted in Illinois consist of increasing the profitability of farming through relief from property taxes and increasing the viability of farming by offsetting the disruption caused by nearby urbanization. These incentives might influence the decision of some owners to keep the land in production. More commonly, however, the lure of profit will exert a greater influence on the owner so that any concern for retaining the land in agricultural use will be compromised. Consequently, direct measures to preserve farmland are necessary.

Local government has the ability to directly preserve land, but has not utilized its ability to any great extent. Instead, most have consistently fostered urban growth and development. The persistent failure of local government to preserve this irreplaceable resource illustrates the necessity of a strong state role in the preservation effort.

It is proposed that the General Assembly should require Illinois counties to adopt exclusive zoning ordinances, and that county zoning

190. Model Land Dev. Code § 9-112(3) (1975).
191. *Id.* § 5-101(3).

plans should be subject to ongoing review at the state level. This combination of state and county efforts should effectively divert development to existing urban areas, and significantly reduce the rate of conversion of Illinois farmland.

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