Agricultural Land Preservation: Legal and Constitutional Issues

by

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I. INTRODUCTION

Good agricultural land is one of the United States' major resources. Economically, agricultural production has been a significant contributor to our balance of payments in recent years.[1] Farmlands also serve significant ecological and aesthetic purposes. Considered the backbone of our nation, farming constitutes a valued way of life. Recently there has been growing awareness of and concern over the loss of agricultural land in light of estimates that about three million acres of agricultural land are being converted to nonagricultural uses every year, roughly one-third of which is prime farmland.[2] This concern has been manifested at all levels of government. In 1976, for example, the Secretary of Agriculture adopted a policy designed to protect farmland which urged all federal agencies to shape their activities so as not to convert farmland unless there were no suitable alternate sites.[3] State and local governments, which have the primary responsibility for administering

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1. In 1978 there was a net agricultural trade surplus of $13.4 billion. U.S. GENERAL ACCOUNTING OFFICE, PRESERVING AMERICA'S FARMLAND—A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT 1 (1979) [hereinafter cited as PRESERVING AMERICA'S FARMLAND].

2. U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—1979, TENTH ANN. REP. ON ENVIRONMENTAL QUALITY 396 (1979) [hereinafter cited as CEQ TENTH ANN. REP.].

3. PRESERVING AMERICA'S FARMLAND note 1 *supra*.

land use controls and other tools designed to protect agricultural lands, have addressed the problem with augmented dedication.[4]

Often the problem has been viewed as one arising primarily from the inadequacy of land use controls in preventing conversion of farmland to less desirable uses. Most farmers, however, sell their farms because of insufficient net income, the declining attractiveness of farming as a way of life, or simply their desire to retire. Thus, an effective farmland retention policy must address itself to these more fundamental issues and explore the options available to the various levels of government in making farming sufficiently appealing to farmers so that they will continue to use their land for this purpose.

What, then, are the causes of dissatisfaction with farming? At the broadest scale, conditions in international commodity markets influence price levels unfavorable to the American farmer. Drought, floods, and international politics play a key role in determining supply and demand for the farmer's products. Energy and fertilizer costs are a function of international forces that are not entirely within our nation's control. Federal policies concerning price supports also exercise large and critical influences on commodity prices. Technological advances and regional patterns of investment and migration have significant impact on the availability of labor and the relative attractiveness of farming as an economic activity.

Finally, many additional factors determine whether and when an individual farmer will sell his land and whether he will sell it to a buyer who intends to convert it to a use that is incompatible with farming. On the demand side, metropolitan expansion, highway construction, commercial and industrial relocation, natural resources development, and recreational use all coalesce into a high offering price for agricultural land. Federal and state programs concerning environmental protection and housing construction are often major factors influencing demand. On the supply side, a farmer's receptivity to an offer from a buyer who will convert to an incompatible use arises from four interlocking sets of factors: 1)

4. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RESOURCE J. 119 (1979). *See also* CEQ TENTH ANN. REP., *supra* note 2, at 396-402.

demographic factors such as the farmer's age, health, and proximity to retirement, the presence or absence of children who wish to continue farming, disability, retirement, and death; 2) economic factors which include the offering price for the land, recent net returns from agricultural operations, high property, estate, and inheritance taxes, and transportation costs; 3) transitional factors such as the desire of a farmer to farm elsewhere, or to pursue a different occupation; and 4) secondary factors incuding complaints from neighbors about fertilizer odor, pesticides and herbicides, air and water pollution from nearby industries, other nuisance elements such as increased traffic and depredation of crops, and decrease in the availability of farm labor and suppliers of equipment and services.[5]

The pressure for change to incompatible uses is particularly strong in the rural-urban fringes of metropolitan areas. In urban and suburban areas there is little demand for land for agricultural purposes. In remote rural areas there is little land development pressure. Thus, it is in the rural-urban fringe that the differential between the price offered by incompatible users (or fair market value) and the current-use or agricultural value of agricultural land is the greatest. Here, the farmer is most strongly tempted to cash in his land and sell to a developer. Farmland preservation policies are designed to decrease such sales to converting users.

This review of the major factors that bear on a farmer's decision to sell his farm to a buyer who will convert it to a nonagricultural use reveals the limited potential which land development regulations and incentives have for ensuring that farmers keep farming. They have little effect on the basic economics of agricultural activity as reflected ultimately in the price a farmer can get for his commodities and the costs he must incur for seed, feed, fertilizer, equipment, fuel, labor, borrowed money, transportation, and storage. They have little impact where demographic factors are a major cause of the decision to sell. Thus, land development regulations and incentives have the most potential in areas where the demand for alternative uses is moderate, where agriculture is reasonably profitable, and where the farmer is at most middle-aged

5. REGIONAL SCIENCE RESEARCH INSTITUTE, UNTAXING OPEN SPACE: AN EVALUATION OF THE EFFECTIVENESS OF DIFFERENTIAL ASSESSMENT OF FARMS AND OPEN SPACE 49-56 (1976) [hereinafter cited as UNTAXING OPEN SPACE].

or has family members who are willing and able to continue agricultural activities.[6] To be effective, a broad agricultural land strategy must address most, if not all, of the major land market factors that induce farmers to sell to buyers who will convert them to incompatible uses.

Thus, the problem of how best to reduce the rate of conversion of agricultural land to noncrop uses is only a small, but essential, part of the much larger problem of how to make farming sufficiently attractive, both economically and as a way of life, so that farmers will keep farming. The larger problem is one which must be addressed at all levels of government. The smaller problem is one which is primarily the concern of local governments which have traditionally had the responsibility for establishing and implementing land development and use regulations. In urbanizing areas the preservation of agricultural land is the obverse of growth management, and in resource development areas, such as those with large oil shale or coal deposits, it is the obverse of resource extraction policies. Thus, in the areas where agricultural land is under the greatest development pressure, it will only be preserved if programs of growth management and resource development are fashioned in pari materia with farmland preservation policies.

The topic of this Article is an even narrower segment of the problem of how best to preserve agricultural land. It will analyze the major legal and constitutional issues which arise when a state or local government adopts and implements a program to preserve farmland. This will involve a review of the major grounds which exist for attacking such programs in court and an evaluation of the role of the judiciary in the general process of farmland preservation.

II. Major Classes of Approaches

The analysis of the legal aspects of agricultural land preservation is organized according to the four major powers which are available to state and local governments: regulation, taxation, acquisition of interests in land, and the spending power. Regulation embraces zoning, subdivision regulation, pollution control, growth management, and the creation of agricultural districts. Govern-

6. *Id.* at 115-18.

ments enact tax incentives or otherwise shape their tax laws so as to reduce the pressure which taxes often create to convert farmland to noncrop uses. Several states and units of local governments have adopted programs for purchase of the development rights for agricultural land and the topic of land banking has received considerable attention in recent years. Finally, local governments may use sewer moratoria, control over provision of utilities, and capital improvement programs to deflect development from agriculturally important areas.

A. Legal Problems in Regulatory Programs for Preserving Agricultural Land

1. Is the Program Authorized by State Enabling Legislation?

The first question which must be answered by any farmland regulatory program is whether it is authorized by appropriate state legislation. Most agricultural municipalities lack a home rule charter and therefore have only those powers which are expressly or impliedly delegated to them by the state legislature. The zoning enabling acts of most states, which are modeled after the Standard Zoning Enabling Act,[7] have sufficiently broad enabling language to make it probable that a court would construe them to authorize agricultural zoning. However, it may still be advisable to secure an amendment to a state's enabling act specifically permitting such a regulatory program as was done recently in Pennsylvania[8] and New Jersey.[9]

Several states, with Hawaii,[10] California,[11] Oregon,[12] and Wisconsin [13] the most notable examples, have enacted laws permitting or requiring such zoning. Others, such as New York,[14] Maryland,[15]

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7. U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. ed. 1926), *reprinted in* ALI, MODEL LAND DEVELOPMENT CODE (tent. draft 1968) (Appendix A).
8. PA. STAT. ANN. tit. 53, § 10603 (Purdon Supp. 1978).
9. N.J. STAT. ANN. § 40:55D-2 (West Supp. 1979).
10. HAWAII REV. STAT. § 205-1 (Supp. 1978).
11. CAL. GOV'T CODE §§ 51200-51295 (West Supp. 1978).
12. OR. REV. STAT. § 197.175(b) (1973).
13. WIS. STAT. ANN. § 91.01-.79 (West Supp. 1979).
14. N.Y. AGRIC. & MKTS. LAW §§ 300-307 (McKinney Supp. 1979).
15. MD. AGRIC. CODE ANN. § 2-509(b) (Supp. 1979).

and Virginia[16] have authorized the creation of agricultural districts upon the petiton of a sufficient number of farmers in a particular area. At the local level, without any specific enabling act authorization, smaller municipalities have instituted "quarter/quarter" and "sliding scale" techniques.[17] The quarter/quarter technique permits a farmer to reap some of the financial gain resulting from rising land values without severely disrupting agricultural operation. The farmer is permitted to develop one acre for a single family home for each forty acres he owns. The sliding scale approach is a variation on the quarter/quarter idea. A farmer is allowed to develop individual lots but the number is determined according to a sliding scale under which the density decreases as the size of his holding increases. For instance, Peach Bottom Township, Pennsylvania adopted a sliding scale which permits one single family unit for the first seven acres and one unit for each additional fifty acres up to a maximum of nineteen for tracts of over 830 acres.[18] No court has decided whether these approaches are authorized by the state's zoning enabling act.

In conclusion, the first step in the development of a regulatory program for preserving agricultural land is to determine whether it is authorized by enabling legislation. It appears that most uses of zoning for this purpose can find support in the typical enabling act, but it may be a form of insurance to secure appropriate amendments expressly approving it.

2. *Is It in Accordance With a Comprehensive Plan?*

The draftsmen of the first zoning enabling act, passed in New York in 1914,[19] as well as those of the Standard Zoning Enabling Act,[20] realized that a comprehensive plan was an essential link between general police power objectives and regulations applicable to

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16. VA. CODE §§ 15.1-1506 to 15.1-1513 (Supp. 1978), *as amended by* ch. 377, 1979 Va. Acts.

17. W. Toner, Saving Farms and Farmlands: A Community Guide (ASPO Planning Advisory Serv. Rep. No. 333) (July 1978). This publication contains a model quarter/quarter ordinance prepared by the Metropolitan Council of the Twin Cities Area and the Sliding Scale Ordinance of Ravenna Township, Minnesota.

18. *Id.* at 17.

19. Ch. 470, 1914 N.Y. Laws.

20. *See* note 7 *supra*.

specific properties within each zoning district.[21] Any municipality which is embarking on a farmland preservation program should undertake a comprehensive planning study on which the program will be based. This study should analyze trends in agricultural use, the importance of farming to the municipality's economy, soil and open space studies, and a review of state and regional policies concerning agriculture and agricultural land preservation, as well as a more traditional examination of the factors which would be considered in a traditional growth management study. The comprehensive plan should be amended to reflect the findings of these analyses and the new farmland policies. Unless this is done, the municipality exposes itself to the risk of a successful attack by a landowner whose land was theretofore zoned for development but is now restricted to agricultural use, on the grounds that the rezoning is not in accordance with the comprehensive plan.

One of the leading cases on the comprehensive plan requirement is *Udell v. Hass*.[22] The plaintiff's land had been rezoned from commercial to residential use, causing at least a sixty percent drop in value. Finding that the town had adopted a developmental policy which envisioned that the area where the plaintiff's land was located would be used for commercial development, the court held that the rezoning was not in accordance with a comprehensive plan. The court emphasized that the plan is the essence of zoning and provides the basis for a rational allocation of land use.

In recent years some state legislatures have enacted statutes that require local governments to adopt comprehensive plans.[23] Such a requirement was involved in the Oregon Supreme Court's decision in *Baker v. City of Milwaukie*, in which the court held:

> In summary, we conclude that a comprehensive plan is the controlling land use planning instrument for a city [or county]. Upon passage of a comprehensive plan, a city [or county] assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it. We further hold that the zoning decisions of a city [or county] must be in accord with that plan and a zoning ordinance which allows a more intensive use than that prescribed in the plan must fail.[24]

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21. *See* S. TOLL, ZONED AMERICAN 171, 233 (1969).

22. 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968).

23. HOUSING FOR ALL UNDER LAW 325-410 (R. Fishman ed. 1978). *See, e.g.*, CAL. GOV'T CODE § 65300.5 (West Supp. 1980); FLA. STAT. ANN. § 163.3177 (West Supp. 1979).

24. 271 Or. 500, ___, 533 P.2d 772, 779 (1975).

Thus, as more and more states strengthen the role of comprehensive planning in land development regulation, it becomes increasingly important that local governments prepare an agricultural land preservation program based on sound ecological, economic, and demographic data, and a careful articulation of state and local agricultural policies. If they fail to do this they run the risk of having agricultural zoning declared invalid for failure to meet the requirement that it be in accordance with a comprehensive plan.

3. Is There a Taking Without Just Compensation?

If we assume that an agricultural land regulatory program is properly authorized by enabling legislation and is in accordance with a comprehensive plan, the principal constitutional hurdle it will have to surmount is the challenge that it constitutes a taking without just compensation. Whether such a program relies on exclusive agricultural zones or very large minimum lot sizes, it will often have the effect of significantly reducing the market value of the land so limited. Legal doctrines in this area are in a state of flux and legal commentators have developed several different theories, none of which is completely satisfactory.[25]

The starting point in contemporary "taking" analysis is *Pennsylvania Coal Co. v. Mahon.*[26] The special circumstances of that case and the fact that Justice Brandeis dissented from Justice Holmes' decision suggests that it warrants careful analysis. The plaintiff, Mahon, sought an injunction to prevent the coal company from mining under his property in such a way as to remove its support and cause subsidence of the surface and his house. The coal company had sold the surface rights to the property to Mahon's predecessor in title in 1878 but had reserved the rights to remove all the coal underneath the surface, and its grantee had waived all claims for damages resulting from the mining of coal. Mahon claimed that the Kohler Act[27] took away the coal com-

25. *See, e.g.*, F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973); Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?*, 57 MINN. L. REV. 1 (1972). The basis of the issue is, of course, the interpretation of the requirements of the fifth amendment to the United States Constitution.

26. 260 U.S. 393 (1922).

27. Pa. Law 1198 (May 27, 1921) (now codified at PA. STAT. ANN. tit. 51, §§ 661-71 (Purdon 1966)).

pany's right to mine under a residence owned by another party where such mining would cause subsidence of the surface. The trial court found that mining under Mahon's property would cause subsidence but denied an injunction, holding that the Kohler Act as applied would be unconstitutional, because it destroyed the coal company's absolute right to remove its coal.[28] The Pennsylvania Supreme Court reversed and granted the injunction,[29] holding that the statute was a legitimate exercise of the police power.

Justice Holmes[30] identified the property interest involved as the right to mine coal and found that the Kohler Act destroyed that right by making it commercially impracticable to exercise it. He found that since the case involved a single private house and the threatened damage was not common or public, the coal company's activity of mining coal was not a public nuisance.[31] He held that with respect to the Mahon's individual claim the public interest was not "sufficient to warrant so extensive a destruction of the [coal company's] constitutionally protected rights."[32]

Moving to broader questions raised by the Kohler Act which had been argued in the courts below, Justice Holmes held that the provisions which prohibited mining under streets and cities where the right to mine coal without providing support had been reserved were also unconstitutional. They destroyed the right to mine without having to provide support, which had been recognized by Pennsylvania courts as an estate in land.[33] He reasoned that if the public authorities were so shortsighted as to acquire only the surface rights to build streets (and presumably pay less for them) they could not come before a court later and ask for rights of support without compensation.[34]

The concluding paragraph of Justice Holmes' opinion is illuminating:

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28. *See* Mahon v. Pennsylvania Coal Co., 274 Pa. 489, ___, 118 A. 491, 492 (1922).

29. 274 Pa. 489, 118 A. 491 (1922).

30. Mr. Justice Holmes wrote for the majority which included Chief Justice Taft, and Justices McKenna, Van Devanter, Sutherland, McReynolds, and Pitney, who retired 20 days after the decision.

31. 260 U.S. at 413.

32. *Id.* at 414.

33. *Id. See also* Mahon v. Pennsylvania Coal Co., 274 Pa. at ___, 118 A. at 497 (dissenting opinion).

34. 260 U.S. at 415.

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.[35]

The decision rests on Justice Holmes' conclusion that Mahon's predecessor had bought a property interest which carried with it certain risks. Having made that deal, he and his successors would not later be allowed to change it. Holmes' oft-quoted statement that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,"[36] does not appear to be necessary to the holding in the case because there was a complete destruction of the property interest as he had characterized it, not a partial dimunition in its value. In addition, the fact situation was, if not unique, certainly unusual in that there was a division of the fee interest and a specific assumption of the risk which the plaintiffs later sought to avoid. Finally, the only individuals or municipalities protected by the Kohler Act were those who had specifically waived the right to support when they acquired the surface rights.

Justice Brandeis, on the other hand, began by characterizing mining which causes subsidence under public streets and the property of others as a public nuisance and therefore subject to legislative prohibition without compensation "[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use."[37] 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.*"[38] He found that the Kohler Act was a reasonable exercise of the police power and would have granted the injunction.

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35. *Id.* at 416.
36. *Id.* at 415.
37. *Id.* at 417 (dissenting opinion).
38. *Id.* at 418 (dissenting opinion) (emphasis added).

In several other cases the Supreme Court has upheld police power regulations which significantly reduce the fair market value of specific properties.[39] Other than *Mahon*, the principal class of cases in which the Supreme Court has found that a taking occurred involved situations where the government had acquired property resources to facilitate uniquely public functions.[40] They can all be distinguished on that ground from efforts to preserve agricultural land by zoning.

In the years following the *Mahon* decision, taking doctrines were developed primarily in the state courts. The most commonly accepted line of analysis is well-exemplified by the New Jersey Supreme Court's reasoning in *Morris County Land Improvement Co. v. Township of Parisippany-Troy Hills*.[41] The court held that if a zoning ordinance so restricts the uses to which land can be put that it cannot be used for any reasonable profitable purpose, it constitutes a taking and therefore violates the fifth amendment's injunction that no property shall be taken for public use without just compensation.[42] The *Morris* court examined the objective sought by the ordinance and balanced that objective against the harm to the owner's property rights. In this instance the court found that where the purpose and practical effect of the regulation is to appropriate private property the scales had been tipped. Here the detriment to the owner was found to outweigh the municipality's objective in regulation. It should be noted that the New Jersey Supreme Court subsequently suggested that this reasoning might require reexamination where vital ecological and environmental considerations were involved.[43]

A second approach was followed in *Fred F. French Investing Co. v. City of New York*.[44] In that case the court focused on both

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39. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Gorieb v. Fox, 274 U.S. 603 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Welch v. Swasey, 214 U.S. 91 (1909).

40. *See, e.g.*, Griggs v. Alleghany Co., 369 U.S. 84 (1962); Causby v. United States, 328 U.S. 256 (1946); Portsmouth Co. v. United States, 260 U.S. 327 (1922).

41. 40 N.J. 539, 193 A.2d 232 (1963). *See* 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW 436-42 (1975).

42. 40 N.J. at ___, 193 A.2d at 241-42.

43. AMG Assocs. v. Township of Springfield, 65 N.J. 101, ___, 319 A.2d 705, 711 (1974).

44. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990

the impact of the regulation and the legitimacy of the objective and balanced the two to determine the ordinance's validity. The court rested its analysis on a direct examinaton of the reasonableness of the police power. The court looked to the substantiality of the relationship of the ordinance to the protection of the public health, safety, morals, and general welfare, the relationship between the means used and the ends sought, and the extent to which the ordinance "renders the property unsuitable for any reasonable income productive or other private use for which it is adapted, and thus destroys its economic value, or all but a bare residue of its value."[45] In predominantly agricultural areas, where farming is an accepted, profitable way of life, a court following this analysis may be more likely to find that farming is still reasonably income productive and therefore that exclusive agricultural zoning is not an unreasonable mode of regulation. However, as development values of agricultural land climb because of approaching urbanization, the risk of judicial invalidation of agricultural zoning increases.

A third approach to the problem of highly restrictive regulation is found in the decision of the Wisconsin Supreme Court in *Just v. Marinette County*.[46] The court held that the owner of land within 1,000 feet of a lake "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."[47] This principle represents a significant departure from the traditional analysis of the taking issue because it permits a severe restriction on the landowner's use of the land to be outweighed by the public's interest in the objective of ecological conservation. While it may be explained in part by reference to the fact that the land involved was adjacent to a lake and therefore critical to the maintenance of the quality of the hydrological system and by the existence of the public trust doctrine in Wisconsin with respect to navigable waters, it stands as a precedent which may be extended to embrace prime agricultural lands

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(1976).

45. *Id.* at ___, 350 N.E.2d at 387, 385 N.Y.S.2d at 10 (citations omitted).

46. 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (followed in Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975)).

47. *Id.* at ___, 201 N.W.2d at 768.

needed to produce our nation's food supply.

In the last fifteen years a large number of county and local governments have adopted amendments to their zoning ordinances which were designed to keep land in agricultural use, either by zoning it exclusively agricultural, establishing large lot sizes, or preventing nonagricultural development on highly productive farmland.[48] There have been only a few appellate court decisions which consider the constitutionality of exclusive agricultural use zoning in the face of a challenge that they constitute a taking. The majority of these cases come from California where the supreme court has sustained them uniformly, holding that an ordinance which on its face results in a mere diminution of property value is not improper,[49] and that a zoning ordinance is valid unless its effect "is to deprive the landowner of substantially all reasonable use of his property."[50] So long as land which is zoned for exclusive agricultural use is or could be productive, its owners will not be heard to complain.[51]

In a 1979 case involving potentially highly restrictive regulations of a five-acre lot overlooking San Francisco Bay, the California Supreme Court held that a landowner who was deprived of all reasonable use of his property could not recover damages for the destruction of his property value by way of inverse condemnation but was only entitled to a judicial declaration that the regulations were invalid, and that as long as some use of the property was al-

48. Under a grant from the National Agricultural Lands Study, the author and three other principal investigators have conducted an extensive survey of all the states and have identified preliminarily over 225 exclusive agricultural use zoning ordinances. An analysis of these ordinances will be published by the National Agricultural Lands Study in 1981.

49. Sierra Terreno v. Tahoe Regional Planning Agency, 79 Cal. App. 3d 439, 144 Cal. Rptr. 776 (1978) (following HFH Ltd. v. Superior Ct., 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975)). This principle applies both when land had been zoned for agricultural use for twenty years so that the owner is being denied the opportunity to reap a speculative profit, *see* Brown v. Fremont, 75 Cal. App. 3d 141, 142 Cal. Rptr. 46 (1978), and when land had been rezoned from commercial and agricultural use to general forest use, thus preventing a previously permissible use.

50. Furey v. City of Sacramento, 24 Cal. 3d 862, ___, 598 P.2d 844, 849, 157 Cal. Rptr. 684, 689 (1979) (quoting Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979)).

51. *See also* Helix Land Co. v. City of San Diego, 82 Cal. App. 3d 932, 147 Cal. Rptr. 683 (1978); Pacific Properties, Inc. v. County of Santa Cruz, 81 Cal. App. 3d 244, 146 Cal. Rptr. 428 (1978); Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

lowed, the regulation was valid as a matter of law.[52] The court recognized the chilling effect which the potential liability for damages would have on municipal efforts to regulate land use and the need to impart flexibility in planning efforts.[53]

In Oregon it has been held that a rezoning of 842 acres of land from low density residential to a farm and forest classification was not a taking because the land could be put to substantial, beneficial use for farming.[54] An intermediate court has also upheld the Oregon Land Conservation and Development Commission's power to adopt an agricultural goal specifying that soils in capability classifications I-IV of the United States Soil Conservation Service's classification system should be inventoried and preserved by exclusive farm use zones.[55] The commisson's goal has been held applicable to decisions denying rezoning, partitioning (dividing into two or three lots), annexation, and subdivision requests.[56] Thus, the developing Oregon case law strongly supports the legislature's program to preserve agricultural and forest land in the state.

The remaining agricultural zoning cases are from Illinois. In one case an Illinois intermediate court gave short shrift to a county's attempts to preserve farmland. The county had zoned fifty acres, fifteen of which were submarginal farmland and thirty-five of which were covered with woods, for exclusive agricultural use. Even though the property was surrounded on three sides by farms, the court held that the regulation bore no "real or substantial relation to the public health, safety, morals, comfort, or general

52. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *cert. granted*, 48 U.S.L.W. 3426 (1980).

53. *Id.* at ___, 598 P.2d at 30-31, 157 Cal. Rptr. at 377. The Supreme Court's decision in this case could have a major impact on the development of the taking doctrine, especially if it reverses the California Supreme Court. If it takes Justice Holmes literally and holds that regulations which deny all reasonable use of property constitute a taking and therefore give rise to a cause of action for inverse condemnation, municipalities will be severely inhibited from enacting regultions which seriously restrict use. If it holds that under the facts of the case there was a triable issue of fact as to whether the regulations involved were unconstitutionally restrictive, it will put into question the line of California cases discussed at notes 49-52 *supra* and cases such as Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

54. Joyce v. City of Portland, 24 Or. App. 689, 546 P.2d 1100 (1976). *See also* Fifth Ave. Corp. v. Washington County, 282 Or. 591, 581 P.2d 50 (1978).

55. Meyer v. Lord, 37 Or. App. 59, 586 P.2d 367 (1978).

56. *See* Jurgensen v. County Court, 42 Or. App. 505, 600 P.2d 1241 (1979).

welfare" and was therefore unconstitutional.[57]

The paucity of cases dealing with exclusive agricultural zoning makes it difficult to predict how courts will rule in the many states whose municipalities have adopted such ordinances. It is certainly significant that the California and Oregon Legislatures have both enacted laws requiring local governments to plan and zone, and articulating strong state policies for the preservation of agricultural forest lands and open space generally.[58] The courts in other states that have not enacted such laws may be influenced by the most recent pronouncements on the taking issue by the United States Supreme Court.

In June 1978 the Supreme Court of the United States undertook a major review of the taking doctrine in *Penn Central Transportation Co. v. City of New York*.[59] The case involved the constitutionality of New York City's Landmarks Preservation Law.[60] Under this law the Landmarks Preservation Commisson may designate a building as a landmark, subject to modification or disapproval by the Board of Estimate. The owner of a landmark building must maintain the building's exterior and must secure the approval of the Commission before making exterior modifications. The owner may transfer unused development rights from a landmark parcel to nearby lots. The law provides for judicial relief if the owner is able to show that he cannot earn a reasonable return on the site. The Grand Central Terminal was designated as a landmark and Penn Central did not appeal the decision at the time. Penn Central then leased the air rights above the building to U.G.P. Properties so that U.G.P. could build an office building above the terminal. The Commisson disapproved two designs for an office building over fifty stories high because of their adverse

57. Smeja v. County of Boone, 34 Ill. App. 3d 628, ___, 339 N.E.2d 452, 454 (1975). *See* Pettee v. County of DeKalb, 60 Ill. App. 3d 304, 376 N.E.2d 720 (1978); Continental Homes of Chicago, Inc. v. County of Lake, 37 Ill. App. 3d 727, 346 N.E.2d 226 (1976). It should be noted that a leading commentator on American zoning law has described Illinois zoning law as unique in the United States in the strength of its prodeveloper orientation and hostility to zoning. *See* 1 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER 143-48 (1974).

58. CAL. GOV'T CODE §§ 65560-65570 (West 1980); OR. REV. STAT. §§ 215.213, .243, .253 (Supp. 1980). *See also* Oregon Land Conserv. & Dev. Comm'n, Statewide Planning Goals and Guidelines (Sept. 1978).

59. 438 U.S. 104 (1978).

60. New York City Admin. Code ch. 8-A, § 205-1.0 (1976).

effects on the terminal's historic and aesthetic features.

Penn Central and U.G.P. brought suit alleging that the disapproval of these proposals constituted a taking of their property without just compensation in violation of the fifth and fourteenth amendments and deprived them of their property without due process of law in violation of the due process clause of the fourteenth amendment. The trial court sustained their claims but was reversed by the New York appellate courts,[61] on the basis that there was neither a taking nor a denial of due process.

The Supreme Court affirmed, in an opinion by Justice Brennan with Justices Rehnquist, Burger, and Stevens dissenting. Both opinions illuminate the issue of whether and under what conditions land use regulations pursuant to the police power constitute a taking. The section which follows will analyze them in tandem to point out the areas of convergence and divergence, and then examine their implications for exclusive agricultural zoning.

Both Justices Brennan and Rehnquist agreed that the fifth amendment's guarantee is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[62] Justice Brennan observed that the Court "has been unable to develop any 'set formula' for determining when justice and fairness require" compensation.[63]

The first major divergence between the two opinions concerning the basic conceptual scheme which should be used in deciding whether there was a taking, Justice Brennan adopted a four-step approach.[64] The first step is the determination of whether the interest at issue is one that is "sufficiently bound up with the reasonable expectation of the claimant to constitute 'property' for fifth amendment purposes."[65] If it is, the next step would characterize the property interest involved. In *Penn Central,* for instance, the question was whether the interest was the full fee interest or

61. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

62. 438 U.S. at 123, 140 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

63. *Id.* at 124.

64. *Id.* at 124, 130-31.

65. *Id.* at 125. If it is not, the inquiry stops at this stage. *See, e.g.,* United States v. Willow River Power Co., 324 U.S. 499 (1945).

merely the development rights.[66] The third step involves an analysis of the character of the governmental action. If it is pursuant to a "public program adjusting the benefits and burdens of economic life to promote the common good,"[67] such as an exercise of the taxing power, zoning laws,[68] or other regulations designed to protect the public health, safety, morals, or general welfare,[69] it will be sustained even though it destroys or adversely affects recognized real property interests,[70] unless the impact is unduly harsh.[71] If the government actions can be characterized as "acquisition[s] of resources to permit or facilitate uniquely public functions," they may more readily be held to be takings.[72] The fourth step in Justice Brennan's analysis involves an examination of the nature and extent of the interference with the rights in the property, especially the extent to which the regulation affects investment-backed considerations.[73] If the governmental action simply prohibited the most beneficial use of the land, it would not constitute a taking.[74] Where, however, a regulation results in a virtually complete destruction of a recognized property interest, it might.[75]

Justice Rehnquist advocated a quite distinct, and perhaps novel, mode of analysis. He recognized as a general rule the principle that government is prohibited from destroying property interests without just compensation.[76] Concluding that claimants' property—their air rights—had been destroyed by the Commission's

66. *See* notes 81-86 and accompanying text *infra*.

67. 438 U.S. at 124.

68. *Id.* at 124-25. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Gorieb v. Fox, 274 U.S. 603 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Welch v. Swasey, 214 U.S. 91 (1909).

69. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

70. 438 U.S. at 124-27.

71. *Id.* at 127.

72. *Id.* at 128 (citing United States v. Causby, 328 U.S. 256 (1949)); Griggs v. Allegheny County, 369 U.S. 84 (1962); Portsmouth County v. United States, 260 U.S. 327 (1922); United States v. Cress, 243 U.S. 316 (1917).

73. 438 U.S. at 124, 130, 135-38.

74. *Id.* at 124-27. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

75. 438 U.S. at 127-28 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)); Armstrong v. United States, 364 U.S. 40 (1960); Hudson Water Co. v. McCarter, 209 U.S. 349 (1908).

76. 438 U.S. at 141-43.

action under the Landmark Law, he noted that there were two exceptions to the general rule. The first is the nuisance exception which applies to situations when the regulation prohibits a noxious use of the property.[77] Such a regulation would be valid against a taking claim even if it resulted in a virtually complete destruction of property value and even if the government singled out a particular property owner. The second exception, which applies even where the prohibition is of a noninjurious use, is when "the prohibition applies over a broad cross section of land and thereby secure[s] an 'average reciprocity of advantage.' It is for this reason that zoning does not constitute a 'taking.' "[78]

> Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but for the common benefit of one another.[79]

He emphasized that it is " 'the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.' "[80] Thus, his mode of analysis is starkly simple: any regulation of land use which destroys a property interest without just compensation is a taking unless it involves the prohibition of a nuisance or is imposed on a broad basis to promote the general welfare. Restrictions which fall within one of these exceptions are valid even if they result in a substantial diminution of fair market value.

The second divergence between the two opinions concerned the characterization of the property interest involved in the controversy. Justice Brennan characterized it as the entire bundle of rights which Penn Central possessed as fee simple owner of the terminal and its site. He asserted that "[t]aking jurisprudence does not divide a single parcel into discrete segments and attempt to

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77. *Id.* at 144-45.
78. *Id.* at 147.
79. *Id.* at 139-40.
80. *Id.* at 149-50 (quoting United States v. Cress, 243 U.S. 316, 328 (1917)).

determine whether rights in a particular segment have been entirely abrogated."[81] He did not consider whether U.G.P.'s property interest—a leasehold interest in the air rights—put it in a different position, a position which would be clearly analogous to that of the Pennsylvania Coal Company in the *Mahon* case. Justice Brennan cited cases which upheld laws restricting the development of air rights,[82] subjacent rights,[83] and lateral rights.[84] Justice Rehnquist characterized the property interest as the air rights above the terminal which Penn Central leased to U.G.P.[85] He cited cases holding that less than fee rights were property for the purpose of the fifth amendment.[86]

A third key divergence between Justice Brennan's and Justice Rehnquist's opinions was in their characterization of the Landmarks Law. Justice Brennan viewed it as embodying a comprehensive plan to preserve a class of structures in New York City—those with historic or aesthetic interest—an objective which he held to be a valid goal for the exercise of the police power.[87] By contrast, Justice Rehnquist viewed the law as singling out four hundred of the over one million buildings in New York, many of which were publicly owned, for special, restrictive treatment.[88] He viewed this as exactly the kind of individualized burdening of a few individuals which the fifth amendment was designed to prevent.[89] Both Justices agreed that there is no taking where a prohibition applies over a broad cross-section of land and subjects all property owners in the area to the same public interest-serving prohibitions.

Having established his conceptual scheme, Justice Brennan

81. *Id.* at 130-31.

82. Welch v. Swasey, 214 U.S. 91 (1909).

83. Goldblatt v. Hempstead, 369 U.S. 590 (1962).

84. Gorieb v. Fox, 274 U.S. 603 (1927).

85. Penn Cent. Transp. Co. v. City of New York, 438 U.S. at 143, 149 n.13.

86. United States v. Causby, 328 U.S. 256 (1946) (air rights taken by low-flying airplanes); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (firing of projectiles over a summer resort can constitute a taking).

87. 438 U.S. at 129, 131-35. Appellants conceded that a showing of diminution of value would not establish taking if the restriction had been imposed through historic district legislation, that is, if it had been established on a zonal basis. *Id.* at 131.

88. *Id.* at 138-40, 147-48.

89. *Id.* at 149.

then analyzed the character of the New York Landmarks Preservation Law. He held that it "embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city,"[90] and the fact that the Law did not impose identical or similar restrictions on all structures located in a particular physical community did not make it a taking.[91] Finally, he held that this was not an instance where the government had appropriated a private property interest for a strictly governmental purpose.[92]

Justice Brennan, having already characterized the property interest involved as the entire parcel, then examined the nature and extent of the economic impact of the Landmarks Law on the property. First, he found that there was no interference with Penn Central's present use of the terminal as a major element in its transportation system, as it had been doing for sixty-five years.[93] In fact, he regarded the Landmarks Law as permitting Penn Central to obtain reasonable return from its investment.[94] Second, he noted that Penn Central was not prohibited from all use of its air rights, only those contained in its two proposals for an office building of over fifty stories. He conjectured that the commission might approve a smaller, less obtrusive building.[95] Third, Justice Brennan observed that Penn Central could realize some economic return from its air rights by transferring them to other parcels it owned in the vicinity.[96] He concluded that the interference with Penn Central's property rights was not of such a magnitude that it constituted a taking.[97]

Justice Rehnquist, however, did find a taking because Penn Central's property interest had been destroyed in a manner which did not fall into one of his two exceptions. He would have remanded the case to the New York Court of Appeals to determine whether the transferable development rights constituted just

90. *Id.* at 132.
91. *Id.* at 133.
92. *Id.* at 135.
93. *Id.* at 136.
94. *Id.* at 129.
95. *Id.* at 137.
96. *Id.*
97. *Id.* at 135-38.

compensation.[98]

With this background it is appropriate to address the question of whether and under what circumstances exclusive agricultural use zoning would amount to a taking without just compensation using the conceptual schemes articulated by Justices Brennan and Rehnquist. Since factual circumstances are of critical importance in such a determination, let us hypothesize four typical counties. County A is located in the middle of the Corn Belt. Ninety-five percent of its land is in highly productive agricultural use, although there are two growing, small cities in the county. Farmers are the most politically powerful group. The fair market value of agricultural land approximates its farm use value in most of the county. County B is in the outer rural-urban fringe of a metropolitan area. Developers have brought portions of a farm and built small subdivisions. Farming is of considerable economic importance and occupies about eighty percent of the land area. Fair market values of undeveloped land are about three times farm use value. County C is in the inner rural-urban fringe. About one-third of the county is developed, but farming is fairly widespread. Fair market values are about ten times farm use values, with the result that few farmers can afford to buy a farm or to add acreage to their present farm. Speculators have begun to pick up farms as they come on the market and then lease them to neighboring farmers. Developers usually buy land under sales agreements which are conditioned on their being successful in obtaining rezoning at higher densities. County D is largely suburban and two-thirds of it is developed. Fair market values of land are about fifteen to twenty times farm use value. A few farmers continue to farm but most of them are nearing retirement age. Here, developers also buy land under sales agreements that are conditioned on rezoning.

Assume that before adopting an exclusive agricultural zoning ordinance, each county completed a comprehensive planning program which included topographical studies which identified reltively steeply sloped areas, the hydrological system and areas of high erosion, soil maps showing prime agricultural soils, and existing land use maps. The planning process identified areas of logical growth, especially those in which public water and sewer sys-

98. *Id.* at 152.

tems were available, and designated as development areas sufficient land to accommodate anticipated residential, commercial, and industrial development. The plans presented data showing the importance of agriculture to the counties' economic prosperity and noted relevant national and state policies with respect to preserving farming. Differential assessment is available to eligible agriculture land. The zoning ordinance creates exclusive agricultural use zones for those areas shown to have prime agricultural soil by the data developed in the planning analysis. Farmers are permitted to subdivide a one-acre lot for each fifty acres of qualified farmland they own and sell it to a family member or to one of their employees. Farms in these zones are excused from paying assessments for new roads and water and sewer facilities to the extent they do not serve the farm homestead. There are no provisions for transfer or purchase of development rights. The economic impact of the exclusive farm use zoning on the value of undeveloped farmland is negligible in County A and increases steadily through Counties B and C, and causes reductions in value of seventy-five to ninety-five percent in County D.

Under Justice Brennan's mode of analysis, the starting point is the character of the governmental action. Here, exclusive agricultural zoning seeks to adjust "the benefits and burdens of economic life to promote the common good,"[99] regulates on an area-wide basis and does not reduce current-use value by prohibiting existing uses. Justice Brennan would characterize it as a general, communitywide exercise of the police power and not one whose impact falls impermissibly on a few landowners. At least in Counties A and B, it does not appear to significantly frustrate "investment-backed expectations." Justice Brennan did not elaborate on this phrase which embraces a multitude of complexities.[100] Justice

99. *Id.* at 124.

100. The following considerations arise from the use of the phrase "investment backed expectations" in the context of agricultural land preservation: Does the farmer whose land has been owned by his family for generations have them? How about the farmer who added an additional one hundred acres to his farm twenty years ago at a premium above farm use value, in order to make it a more efficient farming operation, a speculator who views himself as a middle man between the farmer and a developer, a developer who buys under a conditional sales agreement, or finally, a developer who buys the land outright for a price which is well above farm use value? Whose expectations must we consider, those of the landowner, those of the conditional purchaser, those of adjacent owners, or those of the residents of the community as a whole?

Brennan's citation of previous cases[101] which had sustained land use regulations even though they prohibited potential future uses and therefore diminished fair market value, supports the conclusion that "investment-backed expectations" is synonymous only with the expectation, made tangible by the commitment of resources, that the investor will be able to continue the current use to which the property is being put. This was precisely the kind of expectation which was frustrated by the Pennsylvania statute which was held to be a taking in *Mahon.* Thus, where there is a broad exercise of the police power, even a developer who has bought land outright for a premium over current-use value in the hopes of developing it under either existing or modified zoning regulations would be viewed as merely having assumed an investment risk which may or may not be profitable and whose hopes for a profit do not constitute the kind of property interest which the fifth amendment was designed to protect. In County D, where the balance has shifted in favor of suburban development, it can be argued that it would be reasonable for a developer to expect that he would be allowed to develop agricultural land. Under the circumstances hypothesized, the encroachment of suburbs with their attendant interferences with agricultural activities, the gradual disappearance of supportive services for farming, an aging farm population, and generally held values which are those of suburbanites, not agriculturists, make it more and more difficult to argue that agriculture is still a viable economic activity. Also, as the number of farmers decreases, the impact of the regulation becomes more individualized. As a result the likelihood of forcing a few to bear the burdens which should be borne by the whole—the evil which the fifth amendment seeks to prevent—becomes greater. Still Justice Brennan does not negate the possibility that he would find that a well-documented, well-conceived, and well-implemented exclusive agricultural zoning would not frustrate reasonable investment-backed expectations, especially if the areas so zoned were adjacent to similarly zoned areas in an adjoining county.

The second step in Justice Brennan's approach is to examine the nature and extent of the interference with rights in property. First, as in *Penn Central,* he would characterize the relevant prop-

101. Gorieb v. Fox, 274 U.S. 603 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Welch v. Swasey, 214 U.S. 91 (1909).

erty interest as the full fee simple title, not the development rights which comprise a part of it. Thus, the basis on which diminution would be calculated would be current-use value, or current value plus development value, not development value alone. Second, since the regulations represent a broad exercise of the police power, and are designed to preserve an economic activity which is widespread and of considerable importance to the community as a whole, they do not single out a few properties and impose harsh prohibitions on them, at least in Counties A, B, and C. Third, by hypothesis, the economic impact of exclusive agricultural use zoning, while significant, is not as severe as that of the zoning ordinance sustained in *Euclid,* except in County D where the diminution in property values begins to approach this level. Thus, it would seem reasonable to conclude that if Justice Brennan found there was no taking in the *Penn Central* situation, then, a fortiori, he would not find a taking by an exclusive agricultural use zoning ordinance, at least in the first three of the counties hypothesized here.

Under Justice Rehnquist's analysis the first issue concerns how he would characterize the property interests involved. While conceivably he might separate the development rights from the rest of the fee, as he did in *Penn Central,* and, following *Mahon,* hold that there was complete destruction of them, the more reasonable interpretation of his opinion suggests that he would treat the full fee interest as the relevant property interest. In the situations hypothesized, farmers do not separate out the development rights, sell them, and retain the underlying fee with the intention of allowing a developer to construct homes on the land. Thus, since the property continues to have value in its current use, there has not been a complete destruction of a property interest which would call into play Justice Rehnquist's general rule requiring just compensation. Second, even if he were to identify the development rights as the relevant property interest and find a destruction of them, exclusive agricultural use zoning "applies over a broad cross section of land"[102] and thus falls squarely within his second exception. Paradoxically, in view of his consistently conservative and property-oriented philosophy, Justice Rehnquist is much more supportive of broad-based land use regulations than Justice Bren-

102. 438 U.S. at 147.

nan and has indicated a willingness to support it against a taking challenge even if it causes a substantial reduction in property value.

Thus, both the majority and dissenting opinions in *Penn Central* indicate that the taking and due process clauses of the United States Constitution do not bar exclusive agricultural use zoning, except possibly in extreme situations where agricultural use is no longer economically feasible because of extensive suburbanization.

In November 1979 the Supreme Court had another opportunity to examine the taking issue. The Eagle Protection Act[103] and the Migration Bird Act,[104] as interpreted by the Secretary of the Interior,[105] prohibited commercial transactions in parts of birds that had been killed legally before the effective dates of the Acts. A dealer of Indian artifacts sold artifacts containing feathers from protected birds which had been killed before the birds came under the protection of the Acts (preexisting artifacts). After having been convicted and fined for violating the laws, he brought a declaratory judgment action, alleging that the statutes did not cover the sale of preexisting artifacts and that if they did, they resulted in a taking without just compensation. In *Andrus v. Allard*[106] a three judge court, harboring grave doubts about the constitutionality of the Acts as interpreted by the Secretary of the Interior, held that they were not applicable to preexisting artifacts.[107] The Supreme Court noted probable jurisdiction.[108] Justice Brennan, writing for all of the Justices except Chief Justice Burger who concurred in the judgment, first upheld the Secretary's interpretaton of the Acts as being applicable to preexisting parts. Turning to the taking issue, he noted that *Penn Central* recognized that government regulation involves an adjustment of rights for the public good which often curtails some potential for the use or economic exploitation of rights. "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of 'justice and

103. 16 U.S.C. § 668 (1976).
104. *Id.* § 703.
105. 50 C.F.R. §§ 21.2(a), 22.2(a) (1975).
106. 48 U.S.L.W. 4013 (1979).
107. *Id.* at 4014.
108. 440 U.S. 905 (1979).

fairness.' "[109]

He concluded by stating: "It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.' . . . We hold that the simple prohibition of the sale of lawfully acquired property in this case does not affect a taking in violation of the Fifth Amendment."[110]

Taken literally, *Allard* holds that Congress has the power to prevent the sale of property in order to achieve a desired public purpose, and that so long as the owner retains the right to possess, transport, donate, bequeath, or derive economic benefit from its use, there is no unconstitutional taking. While it would be unwise to apply this doctrine woodenly to the regulation of the use of farmland, it certainly provides support for the central argument made here that a well-documented exclusive agricultural zoning ordinance which permits the farmer to possess, cultivate, sell, rent, donate, and bequeath his land but prevents him from developing it for urban uses would be sustained by the Supreme Court.

In summary, it is difficult to predict how a particular state su-

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109. 48 U.S.L.W. at 4017. Justice Brennan went on to state:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" [the right to sell] of the bundle is not a taking, because the aggregate must be viewed in its entirety. . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.
>
> It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. . . . In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a taking claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Id. (citations omitted).

110. *Id.*

preme court would view an exclusive agricultural use zoning ordinance, especially when the land subjected to it is located in a rural-urban fringe area where fair market values are many times farm use values. Certainly, a court which adopts the *Just* approach would be much more likely to sustain it as against a challenge based on the taking clause than one following the traditional approach. More significantly, it is too early to assess the impact the *Penn Central* and *Allard* decisions will have on state court interpretations of the state's taking and due process clauses. It is clear, however, that *Penn Central* and *Allard* provide strong support for the position that a properly planned and implemented exclusive agricultural use zoning ordinance which is based on state policies for saving farmland is safe from attack on taking clause grounds.

As has already been suggested,[111] the United States Supreme Court's articulation of the principles for determining when a state or municipal regulation becomes so restrictive that it is unconstitutional under the federal due process and taking clauses is significant both because it is the authoritative statement of federal constitutional doctrine and because of its potential impact on state courts' interpretations of analogous state constitutional provisions. Its importance is further magnified because many state courts have recognized a right of inverse condemnation which permits the owner of severely restricted property to recover damages from the government involved measured by the standards used in eminent domain proceedings.[112]

The most far-reaching and profound implication of Supreme Court doctrines in this area of the law, however, arise because of the recent decision of *Monell v. Department of Social Services*,[113] in which the Supreme Court held that local governments are "persons" for the purpose of civil suits brought under section 1983[114] of

111. *See* text accompanying notes 58-59 *supra*.

112. *See* Kanner, *The Consequences of Taking Property by Regulation*, 24 PRAC. LAW. 65 (1978); Comment, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439 (1974). Note that two leading courts have rejected the notion of inverse condemnation. Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976); Agins v. City of Tiburon, 24 Cal. 3d 410, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *prob. juris. noted*, 48 U.S.L.W. 3435 (1980).

113. 436 U.S. 658 (1978).

114. 42 U.S.C. § 1983 (1976).

the Civil Rights Act. This section authorizes the recovery of damages by those who are deprived of their civil rights by persons acting under color of any state law, ordinance, regulation, custom, or usage.[115] The *Monell* decision overruled an earlier case[116] which had held that while a person so injured could recover damages from state and local government officials under specified conditions, he could not recover them from the local government itself. In *Owen v. City of Independence*[117] the Supreme Court, answering some of the questions left open in *Monell*, held that local governments are liable for section 1983 violations by their employees even if the employees acted in good faith or violated a citizen's civil rights unintentionally, so long as the violation results from an official government policy. The Supreme Court has held that the deprivation of property without just compensation gives rise to a cause of action under section 1983.[118] An analysis of the developing principles concerning the requirements for establishing liability on the part of states, municipalities, and their officials, the defenses thereto, the limits on and measures of such liability, and the types of remedies available is beyond the scope of this Article.[119] It is clear, however, that the Supreme Court's demarcation of the line between constitutional and unconstitutional regulation of property will determine the liability of state and local governments and officials in section 1983 actions. It therefore creates a federal cause of action analogous to a claim for inverse condemnation. If the Supreme Court interprets the federal constitution expansively so as to protect the rights of property owners, state and local governments will be severely restricted in their attempts to regulate land development. If the Court limits the area of unconstitutional regulation as this Article suggests it has, property owners will often have to accept harsh regulation, but state and local governments will have a greater capacity to guide urban growth and protect critical agriculturally and environmentally significant areas, free of the shackles of a federalized law of inverse condemnation.

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115. *Id.*

116. Monroe v. Pape, 365 U.S. 167 (1961).

117. 48 U.S.L.W. ___ (1980).

118. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

119. *See* Freilich, Rushing & Noland, *1978-79 Annual Review of Local Government Law*, 11 URBAN LAW. 548 (1979); Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213 (1979).

4. Does the Program Expose the Municipality to Liability Under Federal Antitrust Laws?

Another developing area of the law involves the liability of local governments for anticompetitive effects of local actions which violate the Sherman Antitrust Act[120] and the Clayton Antitrust Act.[121] In a recent instance, for example, a developer who was prevented from constructing a shopping center because the city refused to rezone his land from agricultural and mining to business, was held to have a cause of action if he could show that the city's refusal was motivated by an agreement to exclude competitive shopping center developments from the city.[122] This potential liability arises because of the recent Supreme Court decision in *City of Lafayette v. Louisiana Power & Light Co.*[123] In that case the Court held that municipalities may be held liable for antitrust violations unless countervailing policies are of such weight that they override the presumption against exclusions from coverage of the antitrust laws.[124] The Court had earlier recognized two instances where such policies arose: first, the objective of protecting citizens' right to petition lawmakers requires the exclusion of legislative lobbying from potential antitrust liability;[125] and, second, considerations of federalism arising out of a dual system of government in which the states are sovereign under the Constitution significantly protect a state's rights to control its officers and agents.[126] A plurality of the *Lafayette* Court articulated a third policy, holding that the *Parker* doctrine

> exempts only anti-competitive conduct engaged in as an act of government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service. . . . This does not mean, however, that a political subdivision necessarily must be able to point to a specific, detailed legislative authorization before it properly may assert a Parker defense to an antitrust suit. . . . [A]n adequate state mandate for anticompetitive activities of

120. 15 U.S.C. §§ 1-7 (1976).

121. *Id.* §§ 12-27.

122. Mason City Center Assoc. v. City of Mason City, 468 F. Supp. 737, 738 (N.D. Iowa 1979).

123. 435 U.S. 389 (1978).

124. *Id.* at 399.

125. Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

126. Parker v. Brown, 317 U.S. 341, 351 (1943).

> cities and other subordinate governmental units exists when it is found "from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of."[127]

The Court ruled, then, that the state must impose the practices "as an act of government" for there to be an antitrust exemption.[128]

Three district courts have ruled on the availability of state immunity to local governments that sought to prevent certain land development projects. In *Cedar-Riverside Association v. United States*[129] the plaintiffs were developers who had been selected to develop 100 acres in the Cedar-Riverside Urban Renewal Area in Minneapolis, but were later prevented from doing so by the city and its redevelopment authority. Cedar-Riverside brought suit, alleging among other claims that this action violated the federal antitrust laws. The court held that the relevant Minnesota statutes evidenced an intent by the legislature to permit the municipalities and the housing authorities to engage in anticompetitive activities in the area of urban redevelopment and renewal.[130]

In *Miracle Mile Association v. City of Rochester*[131] the plaintiff-developers owned land in another municipality for which they alleged they had received zoning and site plan approval and were ready to proceed with construction. They alleged that the city had undertaken an extensive campaign to prevent or delay the development by instituting New York wetlands, state environmental assessment, federal water pollution control, and federal flood insurance proceedings against it.[132] The court held that the city was immune from antitrust liability because its actions were "pursuant to a comprehensive regulatory scheme enacted by the State for the purposes of displacing competition with regulation."[133] The court also held that the *Noerr-Pennington* exemption[134] also applied to

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127. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413-15 (1978).

128. *Id.* at 418. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 790-91 (1978); Cedar-Riverside Assocs., Inc. v. United States, 459 F. Supp. 1290, 1298 (D. Minn. 1978).

129. 459 F. Supp. 1290 (D. Minn. 1978).

130. *Id.* at 1298.

131. [1979] Trade Cas. (CCH) ¶ 62,735 (W.D.N.Y. 1979).

132. *Id.* at 78,147.

133. *Id.* at 78,149.

134. *Id.* at 78,151.

the city's attempts to secure action by other governmental entities.[135]

Finally, in *Mason City Center Association v. City of Mason City*[136] the plaintiffs were developers who proposed to develop a regional shopping center on thirty-five acres of land in Mason City, Iowa, which was zoned A-Agriculture and Mining. The city refused to rezone it to G-Business which was necessary if the shopping center were to be built. The developers brought suit alleging that this refusal was pursuant to an agreement with another developer to prevent any firm from constructing a regional shopping center which would compete with the developer's proposed downtown center.[137] The defendants demurred to the complaint on the grounds that their refusal to rezone was protected as a matter of law by the state action exemption delineated in *Parker v. Brown*[138] and its progeny, and by the *Noerr-Pennington* doctrine.[139] The court rejected both of the defendants' claims. With respect to the state action exemption, the court held that Iowa's zoning law did not embody the kind of comprehensive regulatory system envisioned in *City of Lafayette* and that it did not reflect a clear state intent to displace competition with regulation or monopoly public service. The court made several observations.[140] First, the Iowa enabling act did not require local governments to enact zoning ordinances. Second, the act did not require zoning decisions to be for the purpose of restraining competition. Third, the statute did not set up a state agency for supervising local zoning regulations as a sovereign policymaker. Finally, there was no evidence that the state legislature even contemplated that its municipalities would enter into anticompetitive agreements with developers.

With respect to the *Noerr-Pennington* exemption, the court overruled the demurrer because it concluded that it needed testimony on the question of whether or not the city entered into an agreement with a developer with the intent to exclude competition. If the testimony substantiated that fact, the city's actions would

135. *Id.* at 78, 149-51.
136. 468 F. Supp. 737 (N.D. Iowa 1979).
137. *Id.* at 740.
138. 317 U.S. 341 (1943).
139. *See* 435 U.S. at 399 n.17.
140. 468 F. Supp. at 743.

not be covered by the *Noerr-Pennington* exemption which protects only efforts to influence the passage of enforcement of legislation.[141]

The small number of decisions involving the *City of Lafayette* exemption from antitrust liability for local governments requires that any conclusions drawn from them be viewed as tentative. Still they suggest that for a local government to qualify for this exemption, it must be acting pursuant to a comprehensive system of state regulation which requires it to engage in certain actions and reflects a state legislative intention to displace competition with regulation or monopoly public service. Thus, a county in Oregon acting pursuant to that state's comprehensive system for regulating land development and protecting key agricultural and environmentally significant areas would appear to be in a much stronger position to claim the exemption than would a municipality in a state that has adopted a zoning enabling act patterned after the Standard State Zoning Enabling Act,[142] and that does not have to take an active role in supervising the regulation of land development. These cases demonstrate further the importance of comprehensive planning at both state and local levels for the preservation of agricultural land.

5. Does an Agricultural Land Preservation Program Constitute Exclusionary Zoning?

The courts in New Jersey,[143] Pennsylvania,[144] and New York[145] have responded to the widespread practice by municipalities of zoning so as to exclude low and moderate income housing by invalidating such regulations, on the basis of equal protection and due process doctrines. A municipality in those states which adopts comprehensive farmland preservation regulations may run afoul of these antiexclusionary zoning principles. It is probable that other state supreme courts will take similar positions, especially in the

141. *Id.* at 744-46.

142. *See* note 7 *supra.*

143. *See* Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 801 (1975).

144. Surrick v. Zoning Hearing Bd., 476 Pa. 182, 382 A.2d 105 (1977).

145. *See* Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

Northeast and Midwest where small, often parochial, municipalities have primary responsibility for land development regulations. The courts in these three states have held that municipalities must take the regional welfare into account in shaping their land development regulations and make provisions for accommodating their fair share of the regional demand for low and moderate income housing.[146]

More specifically, in *Southern Burlington County NAACP v. Township of Mount Laurel*,[147] the New Jersey court held that a municipality with significant amount of undeveloped land near a metropolitan area

> must by [its] land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income. It must permit multi-family housing . . . as well as small dwellings on very small lots . . . and, in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size and the like, to meet the full panoply of these needs.[148]

In *Oakwood at Madison, Inc. v. Township of Madison*[149] the court amplified *Mount Laurel* by holding that "it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the least cost housing, consistent with minimum standards of health and safety, which private industry will undertake. . . ."[150]

In 1977 the Pennsylvania Supreme Court articulated that state's antiexclusionary zoning doctrines in *Surrick v. Zoning Hearing Board*.[151] The test set out in *Surrick* provided that a court will determine whether the municipality in question is "a logical area for development and population growth" and is "in the path

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146. The California Supreme Court has held that municipalities' land development regulations must serve the regional, as well as the local, welfare. Associated Homebuilders of Greater Eastbay Inc. v. City of Livermore, 18 Cal. 3d 582, 607-08, 557 P.2d 473, 487-88, 135 Cal. Rptr. 41, 55-56 (1976). In Save a Valuable Environment v. City of Bothell, 89 Wn. 2d 862, 871, 576 P.2d 401, 406 (1978), the Supreme Court of Washington adopted a regional welfare test in evaluating a city's zoning for commercial uses.

147. 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 801 (1975).

148. *Id.* at ___, 336 A.2d at 731-32.

149. 72 N.J. 481, 371 A.2d 1192 (1977).

150. *Id.* at ___, 371 A.2d at 1207.

151. 476 Pa. 182, 382 A.2d 105 (1977).

of urban-suburban growth."[152] In doing this, the court should consider factors such as proximity to a large metropolis and the projected population growth figures for the community and the region. The court should then ascertain the present level of development in the particular community by considering such factors as population density, percentage of undeveloped land within its borders, and the percentage of such land which is available for multifamily dwellings. Taken together, these factors determine whether a municipality is a developing municipality and therefore subject to the remaining principles.

Second, if a court finds that the municipality is a developing one, it must then examine the municipality's zoning ordinance to determine whether it contains exclusionary or unduly restrictive provisions which do not have the requisite substantial relationship to the public health, safety, morals, and general welfare. As Justice Nix stated, the court will determine "whether the zoning formulae fashioned by [the zoning hearing boards and the governing bodies] reflect a balanced and weighted consideration of the many factors which bear upon local and regional housing needs . . . ."[153] The court should evaluate the overall effects of challenged ordinances, not simply whether they exclude or severely restrict a particular use. Furthermore, these effects will be measured against the regional welfare, as well as that of the locality.

The *Surrick* court confirmed, then, that it had adopted the "fair share" concept as a means of measuring whether a particular municipal ordinance has the requisite substantial relationship to the local and regional welfare. Justice Nix reasoned that municipalities must determine regional housing needs and then fashion their zoning regulations so as to make realistically possible the construction of the municipality's fair share of present and prospective regional housing needs of all categories of people who wish to live within its borders, including those with low and moderate incomes. The court did not attempt to specify how a municipality's "fair share" would be ascertained.[154]

Applying this analytical matrix to the controversy before him,

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152. *Id.* at ___, 382 A.2d at 110.
153. *Id.* at ___, 382 A.2d at 109-10.
154. *Id.* at ___, 382 A.2d at 110-11.

Justice Nix found the ordinance exclusionary and directed the zoning hearing board to grant a variance and issue a building permit conditioned on Surrick's compliance with the administrative requirements of the zoning ordinance and other reasonable regulations consistent with the opinion.[155]

The New York Court of Appeals, in *Berenson v. Town of New Castle*,[156] adopted a two-branched test with which to determine the validity of an allegedly exclusionary zoning ordinance. First, the court should look to see whether the municipality has provided for a properly balanced and well-ordered community. Second, consideration must be given to regional needs and requirements. "There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met."[157]

The policies supporting the preservation of farmland and the provision of low and moderate income housing intersect in the rural-urban fringes of our country's metropolitan areas. More and more states will follow the antiexclusionary zoning doctrines enunciated by the New Jersey, Pennsylvania, and New York courts, as they come to realize the impact of local exclusionary zoning practices on the availability of low and moderate income housing. Land development regulations adopted in the name of agricultural land preservation may run afoul of antiexclusionary zoning principles. A recent Pennsylvania case[158] involving West Nantmeal Township, a rural municipality about twenty miles west of Philadelphia, illustrates this point. Six percent of the township was in residential use, sixty-one percent in cropland, and twenty-nine percent in woodland. The remaining four percent was in other uses. The township adopted a zoning ordinance which made no provision for apartments and zoned thirty-seven percent of the land for single family residential use with a minimum lot size of ten acres. Only eleven percent was zoned for single family homes on an acre or less of land.

The Commonwealth Court, an intermediate court which is the

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155. *Id.* at ___, 382 A.2d at 112.
156. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).
157. *Id.* at ___, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.
158. *In re* Application of Wetherill, ___ Pa. Commw. Ct. ___, 406 A.2d 827 (1979).

state's court of last resort for most zoning cases, held that the township's zoning ordinance was unconstitutional under the principles of the *Surrick* decision.[159] The court found that the township was a logical area for development and growth because of its proximity to Philadelphia and an interchange on the Pennsylvania Turnpike. The claimed justification for the ordinance by the township board of supervisors—that it would preserve the best farmland and limit development where there were inadequate transportation and public water and sewer facilities—was held to be untenable.[160] It does not appear from the court's brief opinion that the township provided an adequate planning basis for its large-lot zoning approach to preserving farmland. Thus, the case should not be read to establish a broad principle of invalidity for all efforts to preserve agricultural land on the rural-urban fringe. But it emphasizes the need for municipalities located there both to articulate clearly the basis for their agricultural zoning and to make adequate provision for projected growth with a full range of housing types.

B. Legal Problems Arising Out of the Use of the Taxing Power[161]

1. Differential Assessment Programs

Forty-seven states have enacted legislation permitting land in agriculture or other eligible use to be assessed at its current or agricultural use value.[162] Kansas has amended its constitution to per-

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159. *See* text accompanying notes 151-54 *supra*.

160. ___ Pa. Commw. Ct. ___, 406 A.2d 827 (1979).

161. *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).

162. ALA. CONST. art. 11, § 217; ALA. CODE § 40-8-1 (Michie 1975); ALASKA STAT. § 29.53.035 (Supp. 1979); ARIZ. REV. STAT. §§ 42-136, -227 (Supp. 1979); ARK. STAT. ANN. §§ 84-479 to 84-480 (Supp. 1978) (current-use value assessment held unconstitutional in Pulaski County Bd. of Equalization v. Public Serv. Comm'n, No. 78-811 (Circuit Ct., Pulaski County, Ark. (Dec. 4, 1979)); CAL. CONST. art. 13, § 8; CAL. GOV'T CODE §§ 51200-51205 (West Supp. 1979); CAL. REV. & TAX. CODE § 423 (West Supp. 1979); COLO. REV. STAT. § 39-1-163 (Supp. 1978); CONN. GEN. STAT. §§ 7-131a to 7-131n; 12-107(a) to 12-107(f); 504(a) to 507(h) (West 1979); DEL. CONST. art. 8, § 1 (because of technical errors in the passage of this amendment, it may be defective); FLA. CONST. art. 7, § 4a; FLA. STAT. ANN. § 193.461 (preferential assessment for agricultural land); § 193.501 (recreation land restrictive agreement) (West Supp. 1979); HAWAII REV. STAT. § 246-12, -12.3 (dedication program); § 10 (deferral program) (Supp. 1979); IDAHO CODE § 63-202 (Supp. 1979); ILL. CONST. art. 9, § 4(b); ILL. STAT. ANN. ch. 120, § 501(a)(1)-(3) (Smith-Hurd Supp. 1979); IND. CODE ANN. § 6-1.1-4-13 (Burns Supp. 1978); IOWA CODE ANN. §§ 384.1, 444.21 (West 1971 & Supp. 1979); KY. CONST. § 172A; KY. REV. STAT. ANN. § 132.450 (Baldwin 1978); LA. CONST. art. 7, § 18(c); LA. REV. STAT. ANN. §§ 47.2301-.2309 (West Supp. 1980); ME. CONST. art. 9, § 8; ME. REV. STAT. tit.

mit differential assessment,[163] but as of late 1979 had not enacted implementing legislation. Many have added a deferred taxation feature which makes an owner who converts preferentially assessed land to an ineligible use liable for the difference between the taxes he would have paid absent such a preference and those which he actually paid.[164] The period over which these "rollback taxes" are due varies from two to fifteen years.[165] A few states require owners to enter into long term contracts to keep their land in agricultural use.[166] These differential assessment programs are designed to reduce farmers' taxes and were championed as measures which would preserve farmland and open space. Their effectiveness for the latter purpose has been the subject of considerable commentary.[167]

The principal legal issue raised by differential assessment pro-

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36, §§ 1101-1118 (Supp. 1979); MD. CONST. art. 43; MD. ANN. CODE art. 81, § 19(b) (1975 & Supp. 1979); MASS. CONST. § 245; MASS. ANN. LAWS ch. 61A, §§ 1-24 (Michie/Law Co-op 1979); MICH. COMP. LAWS §§ 554.701-.719 (Supp. 1979); MICH. STAT. ANN. §§ 26.1287(1)-.1287(19) (Supp. 1979); MINN. STAT. ANN. §§ 273.111 (preferential assessment for agricultural lands) (West Supp. 1979); MO. ANN. STAT. §§ 137.017-.026 (Vernon Supp. 1980); MONT. REV. CODES ANN. §§ 84-401, -429.12, -437.1 to .17 (1947 & Supp. 1977); NEB. CONST. art. 8, § 1; NEB. REV. STAT. §§ 77-1343 to -1348 (1979); NEV. REV. STAT. §§ 361.325, 361A.010-.160 (1975); N.H. CONST. pt. 2, art. 5-B; N.H. REV. STAT. ANN. § 79A:1-:14 (current-use taxation); § 79A:1-:15 to :21 (discretionary easements) (Supp. 1979); N.J. CONST. art. 8, § 1(1); N.J. STAT. ANN. §§ 54:4-23.1 to .23 (West Supp. 1979); N.M. CONST. art. 8, § 1; N.M. STAT. ANN. § 72-29-9 (Supp. 1979); N.Y. AGRIC. & MKTS. LAW §§ 300-307 (land in agricultural districts) (McKinney 1972 & Supp. 1979); N.C. GEN. STAT. §§ 105-227.2 to .7 (1979); N.D. CENT. CODE § 57-02-27 (Supp. 1979); OHIO CONST. art. 2, § 36; OHIO REV. CODE ANN. §§ 5713.30-.38 (Page Supp. 1979); OKLA. CONST. art. 10, § 8; OKLA. STAT. ANN. tit. 68, § 2427 (West Supp. 1979); OR. REV. STAT. §§ 215.203-.263, 308.345-.406 (1977 & Supp. 1979); PA. CONST. art. 8, § 2; PA. STAT. ANN. tit. 16, §§ 11941-47; tit. 72 §§ 5490.1-.13 (Purdon Supp. 1979); R.I. GEN. LAWS §§ 44-5-12; 44-5-39 to 44-5-41; 44-27-1 to 44-27-6 (Supp. 1979); S.C. CODE §§ 12-43-220 to -230 (1976); S.D. CONST. art. 8, § 15; S.D. COMP. LAWS ANN. §§ 10-6-31 to 10-6-33.4 (Supp. 1979); TENN. CODE ANN. §§ 67-650 to -658 (1976 & Supp. 1979); TEX. CONST. art. 8, §§ 1-d, 1-d-1; TEX. REV. CIV. STAT. ANN., art. 7174A, 7174B (Vernon Supp. 1980); UTAH CONST. art. 13, § 3; UTAH CODE ANN. §§ 59-5-87 to -105 (1973 & Supp. 1979); VT. STAT. ANN. tit. 24, § 2741; tit. 32, §§ 3751-60 (Supp. 1979); VA. CONST. art. 10, § 2; VA. CODE §§ 58-769.4 to 58-769.15:1 (1954 & Supp. 1979); WASH. REV. CODE § 84.34.010 (1979); W. VA. CODE § 11-3-1 (1971 & Supp. 1979); WIS. CONST. art. 8, § 1; WIS. STAT. ANN. §§ 15.135(3), 71.09(11), 91.01-.78 (West Supp. 1979); WYO. STAT. §§ 39-2-103 (1977).

163. KAN. CONST. art. 11, § 12.

164. UNTAXING OPEN SPACE, *supra* note 5, at 39-42.

165. Keene, *Differential Assessment and the Preservation of Open Space*, 14 URBAN L. ANN. 11, 18-19 (1977).

166. *Id.* at 19.

167. Keene, *supra* note 4, at 139 n.89.

grams is whether they violate the uniformity clauses. Found in most constitutions, uniformity clauses provide that taxes shall be levied on real property uniformly, based on fair market value.[168] Differential assessment laws permit eligible land to be assessed at current-use value. In many cases agricultural land will have a lower value in its current use than it would if its development potential were taken into account, as would be done if its fair market value were the measure. Thus, differential assessment programs create two classes of real property and assess one at a lower rate with a resultant reduction in taxes. Most courts which have addressed the issue have held that the program violates the uniformity clause,[169] while a few have sustained such laws.[170] At least half of the states with differential assessment laws have anticipated the potential inconsistency with uniformity clauses and have passed constitutional amendments expressly authorizing this technique.[171]

The provisions of the various differential assessment laws vary widely from one state to the next[172] and present a potentially rich but presently untapped mine for litigation.[173] One recent case involved a challenge to the deferred taxation or rollback provisions of Illinois' differential assessment law on the ground that they denied equal protection. In *Hoffman v. Clark*[174] the landowners argued that these provisions created two classes of agricultural land, one consisting of land that was kept in agricultural use and another consisting of land that was later converted to nonagricultural uses and subjected retroactively to higher taxes during the three years prior to conversion because of the rollback provisions. They

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168. *See* OKLA. CONST. art. 10, § 8.

169. *See* State Tax Comm'n v. Wakefield, 222 Md. 543, 161 A.2d 676 (1960); Boyne v. State, 80 Nev. 160, 390 P.2d 225 (1964); Switz v. Kingsley, 69 N.J. Super. 27, 173 A.2d 449 (1961), *modified* 37 N.J. 566, 182 A.2d 841 (1962).

170. *See* Hoffman v. Clark, 69 Ill. 402, 372 N.E.2d 74 (1977); Bensalem Township School Dist. v. County Comm'rs, 8 Pa. Commw. Ct. 411, 303 A.2d 258 (1973).

171. ALA. CONST. art. 11, § 217; CAL. CONST. art. 13, § 8; DEL. CONST. art. 8, § 1; FLA. CONST. art. 7, § 4; ILL. CONST. art. 9, § 4(b); KAN. CONST. art. 11, § 12; KY. CONST. § 172A; LA. CONST. art. 7, § 18(c); ME. CONST. art. 9, § 8; MD. CONST. art. 15, 43; MASS. CONST. § 245; NEB. CONST. art. 8, § 1; N.H. CONST. pt. 2, art. 5-B; N.J. CONST. art. 8, § 1 ¶1; N.M. CONST. art. 8, § 1; OHIO CONST. art. 2, § 36; OKLA. CONST. art. 10, § 8; PA. CONST. art. 8, § 2; S.C. CONST. art. 10, § 1; S.D. CONST. art. 7, § 15; TEX. CONST. art. 8, §§ 1-d, 1-d-1; UTAH CONST. art. 13, § 3; VA. CONST. art. 10, § 2; WIS. CONST. art. 8, § 1.

172. UNTAXING OPEN SPACE, *supra* note 5, at 11-21.

173. *See* [1979] State Tax Cas. Rep. (CCH) ¶ 20-110.

174. 69 Ill. 2d 402, 372 N.E.2d 74 (1977).

asserted that there was no reasonable basis for this classification so that it denied the equal protection. Observing that the legislature had broad discretion in classifying the objects of legislation, the court held that the rollback taxes were designed to deter conversion of agricultural land to nonfarm uses and that this constituted a reasonable basis for treating the two classes of farmland differently.[175]

Two recent decisions of the Florida Supreme Court illustrate some of the legal issues which may be involved in the determination of eligibilty. The Florida preferential assessment law[176] provides that to be eligible land must be "actually used for a bona fide agricultural purpose." It lists several factors which may be considered in determining eligibility, one of which is that if land is sold for a price more than three times its agricultural assessment, a rebuttable presumption is created that the land is not being used in good faith for agricultural purposes. In *Roden v. K. & K. Land Management, Inc.*[177] the court held that even though part of the 350 acre tract which was sold for six times its agricultural assessment was used for an amusement park, the balance, which was in citrus groves, was still eligible for preferential assessment because sufficient evidence had been submitted to rebut the presumption.

Another provision of the Florida preferential assessment law requires that whenever a subdivision plat is recorded for land receiving preferential assessment, the land must be reclassified as nonagricultural.[178] In *Bass v. General Development Corp.*[179] the court held that the conclusive presumption that an owner who files a subdivision plat is not using the land for agricultural purposes is unreasonable and a violation of the due process clauses of the Florida and United States Constitutions.[180] The court found that since the actual present use of the land controls, not the intended future use, the conclusive presumption deprives the owner of due process by denying him the opportunity to prove otherwise. The statute was also held to be a denial of equal protection because there was

175. *Id.* at ___, 372 N.E.2d at 85-86.
176. FLA. STAT. ANN. § 193.461 (West Supp. 1978).
177. 368 So. 2d 588 (Fla. 1978).
178. FLA. STAT. ANN. § 193.461(4)(a)(4) (West Supp. 1978).
179. 374 So. 2d 479 (Fla. 1979).
180. *See, e.g.*, Weinberger v. Salfi, 422 U.S. 749 (1975).

no rational basis for dividing land in actual agricultural use into two classes and making those owners who file subdivision plans ineligible for preferential assessment.

Three states, Connecticut,[181] Massachusetts,[182] and New Hampshire,[183] have adopted a variant to the typical rollback tax. They impose a conveyance tax on the sale of land which has been subject to differential assessment. The rate is ten percent of the sales price for land sold after less than one year of differential assessment and declines to one percent of sales price for land which has been differentially assessed for ten years. Connecticut's statute was challenged on the ground that the ten-year decreasing tax denied equal protection in that it bore no reasonable relationship to the goal of preserving open space. A state trial court found that deterrence of rapid turnover of eligible land by the imposition of progressively higher taxes on conveyances of land held for progressively shorter terms of ownership constituted a reasonable basis for distinguishing between short term and long term ownership and sustained the law.[184]

In an effort to deter short term speculation in undeveloped land, the Vermont Legislature enacted a land gains tax,[185] which shares many of the characteristics of rollback taxes. The tax is imposed on gains from the sale of land and its rates are inversely proportional to the length of the holding period starting at less than one year and ending after six years, and proportional to the percentage of profit. The maximum rate of sixty percent applies to a gain of 200% or more on land held for less than a year, and the rate declines to a minimum of five percent for gains of zero to ninety-nine percent on land held between five and six years. The objective of the tax was to deter short term speculation on land because it was viewed as particularly disruptive to the land market.[186] Recent litigation attacked the tax on two grounds: first, that it denied equal protection because it discriminated unreasonably between land held for less than six years and land held for a longer

181. CONN. GEN. STAT. § 12-504a (Supp. 1979).
182. MASS. ANN. LAWS. ch. 61A, § 12 (Michie/Law. Co-op Supp. 1979).
183. N.H. REV. STAT. ANN. § 79A:7 (Supp. 1979).
184. Curry v. Planning & Zoning Bd., 34 Conn. Supp. 52, 376 A.2d 79 (1977).
185. VT. STAT. ANN. tit. 32, §§ 10001-10 (Supp. 1979).
186. Note, 49 WASH. L. REV. 1159 (1974).

period of time, and second, that it deprived landowners of property without due process of law because it amounted to double taxation since capital gains were also subject to federal capital gains taxes. The Vermont Supreme Court rejected both arguments, holding that deterring short term land speculation was a legitimate public purpose which provided a reasonable basis for treating land held for a shorter period differently from land held for a longer period and that cumulative taxation such as was found there was permissible.[187] The actual effects of this tax on land prices are difficult to ascertain.[188]

Rollback taxes serve two major purposes. First, they are designed to recapture some of the taxes lost as a result of a differential assessment program. Such programs have the effect of shifting some portion of the tax burden from owners of eligible land to owners of other real property which is mostly in commercial and residential use. By requiring owners of land that is converted out of agricultural use to return the taxes deferred during at least part of the period of participation, the tax shift is reduced. Second, as the *Hoffman* and *Curry* decisions discussed, rollback taxes are intended to deter conversions to nonagricultural uses. It is doubtful, however, that they are effective in this regard.[189] Effective tax rates on agricultural land average about one percent of fair market value,[190] although in the rural-urban fringe the rates may be somewhat higher, and rollback taxes are imposed only on the difference between fair market value and agricultural use values. The rollback period is typically about five years, although it varies from two[191] to fifteen years.[192] In a situation where the effective real property tax rate is one percent and the rollback period five years, the rollback taxes would constitute the five percent of the sales price. Even this amount is deductible for federal income tax purposes because it is classified as a tax, not a penalty.[193] In states

187. Andrews v. Lathrop, 132 Vt. 256, 315 A.2d 860 (1974).

188. Baker, *Controlling Land Uses and Prices by Using Special Gain Taxation to Intervene in the Land Market: The Vermont Experiment*, 4 ENVT'L AFF. 427 (1975).

189. *See* UNTAXING OPEN SPACE, *supra* note 5, at 68-76.

190. U.S. DEP'T OF AGRICULTURE, FARM REAL ESTATE TAXES (1976) (RET-17), at 5 (1977).

191. *See, e.g.*, R.I. GEN. LAWS § 44-5-39 (Supp. 1979).

192. *See, e.g.*, ME. REV. STAT. ANN. tit. 36, § 1112 (Supp. 1979).

193. I.R.C. § 164(a)(1).

where no interest is imposed on deferred taxes, they amount simply to an interest-free loan for the period of the rollback. Even where interest is charged on the deferred taxes,[194] it does not constitute a penalty unless it is at a higher rate than the landowner would have to pay on a loan from customary commercial sources, and no state imposes interest at a rate equivalent to the rates prevalent in 1980.[195]

Thus, in many cases, the net cost of the rollback tax will be small in relation to the capital gain realized from the sale of eligible land to nonagricultural uses, and its deterrent effect minimal. The more soundly based rationale for deferred taxation provisions is that they increase tax equity by forcing landowners who are no longer promoting the public purpose of preserving agricultural land to pay the taxes deferred and thereby reduce the tax shift which results from differential taxation. This rationale has, however, an ironic twist: the extent to which it has served is inversely proportional to the effectiveness of deferred taxation for achieving its goal of deterring conversion of agricultural land to nonagricultural uses.

2. *Federal Estate Tax Benefits for Farmers*

Before 1976 the marital deduction[196] and exemption[197] provisions of the federal estate tax made it possible for a farmer to leave an adjuted gross estate (after administration expenses) of $120,000 to his spouse without incurring any estate tax liability. The Tax Reform Act of 1976[198] significantly increased the tax benefits which accrue to the estate of a qualified farmer. First, in merging the previously separate gift and estate taxes, it created the unified credit which exempts up to $175,625 for decedents dying after January 1, 1981.[199] Second, the marital deduction was expanded to allow the deduction from the gross estate of an amount equal to the greater

194. Keene, *supra* note 161, at 18-19.

195. Hawaii's 10% rate is the highest. HAWAII REV. STAT. § 246-10 (1976 & Supp. 1978); § 246-12.3 (1976).

196. I.R.C. § 2056(a).

197. *Id.* § 2052.

198. Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (codified at U.S.C. tit. 26 (Supp. II 1978)).

199. I.R.C. § 2010. *See* [1977] 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 5750.

of one-half of the decedent's gross estate or $250,000.[200] If a decedent dying in 1980 had made no taxable gifts during his lifetime and left an adjusted gross estate of $411,563 to his wife, $250,000 of it could be deducted as a marital deduction, leaving $161,563; and the unified tax credit would reduce the estate tax liability to zero. Thus, small farm estates up to $400,000 would usually incur little, if any, estate tax liability.[201]

Third, the newly enacted section 2032A[202] permits an executor to elect to value the farm at its agricultural use value if (1) the decedent was a citizen or resident of the United States at the time of his death, (2) the value of the farm reduced by the mortgage liabilities attributed to it constitutes at least fifty percent of his adjusted gross estate, (3) at least twenty-five percent of the adjusted value of the gross estate consists of qualified farm property, (4) the real property qualifying for agricultural use valuation will pass to a qualified heir (a member of the family or a defined close relative), (5) the real property was owned by the decedent or a member of his family and used as a farm for five of the eight years immediately prior to his death, and (6) the decedent or a member of his family took an active part in the operation of the farm for at least five of the eight years immediately preceding his death.[203] The reduction in value of the gross estate cannot exceed $500,000. If the farm is sold to nonfamily members or ceases operation within fifteen years of death, the estate will be liable for some or all of the taxes saved as a result of the original reduction in appraised valuation.[204] The agricultural use value is determined by computing the average annual state and local real estate taxes for such comparable land, and dividing the difference by the average annual effective interest rate for all Federal Land Bank Loans.[205] These rates ranged between 8.29% and 8.92% in 1977 and 1978.[206] While the reduction in the value of the estate under section 2032A

200. I.R.C. § 2056(a).

201. Sisson, *The Tax System and the Structure of American Agriculture*, TAX NOTES: THE WEEKLY TAX SERVICE 419, 420 (Oct. 1, 1979).

202. I.R.C. § 2032A.

203. *Id.* § 2032A(b)(1).

204. *Id.* § 2032A(c).

205. *Id.* § 2032A(e)(7)(A).

206. Rev. Rul. 78-363, 1978-39 I.R.B. 20; [1977-78 Transfer Binder] FED. EST. & GIFT TAX REP. (CCH) ¶ 12,190.

is limited to $500,000, the per acre reduction may range from twenty to eighty percent.[207]

Fourth, the 1976 Tax Reform Act made it possible for a farmer's estate tax liability to be paid over a fifteen year period, with interest on the tax attributable to the first million dollars to be amortized at the rate of four percent, if more than sixty-five percent of the decedent's gross estate is an interest in a farm.[208] This was designed to ease the burden on the heirs at and soon after the time of death.

While it is too soon to evaluate fully the impact of section 2032A, several observations have been made. First, the value of the reduction in the taxable estate for which it provides increases with the size of the gross estate.[209] Its major beneficiaries are farmers with estates with a fair market value of over $1,000,000 with significant farm holdings. Their estates will often be able to take full advantage of the $500,000 reduction permitted, and the taxes which their estates are avoiding are at higher levels because of the progressivity of federal estate tax rates. Second, the requirement of section 2032A that farms will lose the tax benefits if they are sold outside the family within fifteen years will deter sales of farmland which has received preferential treatment. This will aggravate the problems faced by beginning farmers seeking to acquire land.[210] Third, the net effect of section 2032A will be to capitalize at least part of the estate tax reductions into future land values,[211] thus tending to inflate farmland values. Fourth, the tax benefits are not available either to those who sell farmland in their lifetime or to tenant farmers or lessees of farmland.[212]

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207. Matthews & Stock, *Valuing Farmland After the 1976 Tax Reform Act: A Beneficial Alternative*, J. AM. SOC'Y FARM MANAGERS & RURAL APPRAISERS 42 (1978), *cited in* Sisson, *supra* note 201, at 420.

208. I.R.C. § 6166; [1977] 2 FED. EST. & GIFT TAX REP. (CCH) ¶ 9702-04.

209. *See generally* Hjorth, *Special Estate Tax Valuation of Farmland and the Emergence of a Landholding Elite Class*, 53 WASH. L. REV. 609 (1978).

210. *See* Sisson, *supra* note 201, at 420.

211. *Id.*

212. *See generally* Hjorth, *supra* note 209, at 613. For a careful review of the estate planning implications of § 2032A, see Dyer, *Estate Tax Savings and the Family Farm: A Critical Analysis of Section 2032A of the Internal Revenue Code*, 11 CAL.-D. L. REV. 81 (1978). For additional analyses of § 2032A, see [1979] 3 FED. EST. & GIFT TAX REP. (CCH) at 15056-58.

3. Differential Appraisal for State Inheritance and Estate Tax Purposes

All of the states except Nevada impose some form of estate tax, inheritance tax, or both. Most have enacted provisions which allow them to absorb the full amount of the credit allowed for state death taxes against federal estate tax liability, created by section 2011 of the Internal Revenue Code, and many allow decedents' estates to benefit from preferential appraisal of qualifying agricultural land. These laws can be classified into four major categories. The first includes sixteen states with estate tax laws that use the federal definition of the taxable estate (thus making available § 2032A valuation for state estate tax purposes) and impose a state estate tax in the amount of the permissible state death tax credit.[213] In the second category, are eight states which have incorporated the provisions of § 2032A into their death tax laws in order to make differential valuation available to all estates.[214] Third, four states permit differential valuation of farmland but do not follow either of the first two approaches.[215] The remaining states, except for Mississippi and South Dakota, have, in addition to their inheritance or estate tax laws, a "pick-up" tax which imposes an additional estate tax equal to the amount by which the permissible

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213. ALA. CODE. §§ 40-15-1 to -21 (Michie 1975); ALASKA STAT. §§ 43.31.011-.430 (1977); ARIZ. REV. STAT. §§ 43.1501-.1535 (1978); ARK. STAT. ANN. §§ 63-101 to -151 (1971 & Supp. 1979); COLO. REV. STAT. §§ 39-23.5-101 to -117 (Cum. Supp. 1979); FLA. STAT. ANN. §§ 198.01-.44 (West 1971 & Supp. 1980); GA. CODE ANN. §§ 91A.5701-.5705 (1980); MINN. STAT. ANN. §§ 291.005-.33 (West 1972 & Supp. 1979). *as amended by* 1979 Minn. Laws, ch. 303, art. 3, §§ 1 to 27; MO. REV. STAT. §§ 145.010-.350 (1978); MONT. REV. CODES ANN. § 72-16-308 (1979); N.M. STAT. ANN. §§ 7-7-1, -2 (1978); N.D. CENT. CODE §§ 57-37.1-01 to -21 (Supp. 1979); S.C. CODE §§ 12-15-10 to -1670 (Cum. Supp. 1979). (This law incorporates the pre-1976 federal estate tax law and as a consequence does not make § 2032A treatment available. Amendatory legislation to correct this has been introduced.); UTAH CODE ANN. §§ 59-12-1 to -44 (1974); VT. STAT. ANN., tit. 32, §§ 7401-7497 (Cum. Supp. 1979); Va. Code §§ 58-238.1-16 (Cum. Supp. 1980).

214. DEL. CODE ANN. tit. 30, § 1314 (1974). *See* [1977] 1 STATE INHERITANCE, EST. & GIFT TAX REP. (CCH) ¶ 1805; ILL. ANN. STAT. ch. 120, § 385 (Smith-Hurd Supp. 1979); KAN. STAT. ANN. §§ 79-1501 to -1530 (1977) (repealed 1978); KY. REV. STAT. §§ 140-300 to -360 (Cum. Supp. 1978), *as amended by* 1978 Ky. Acts, ch. 138, §§ 4 to 12; MISS. CODE ANN. § 27-9-8 (Cum. Supp. 1978); N.Y. TAX LAW § 954a (McKinney Supp. 1979); TENN. CODE ANN. § 30-1621 (Cum. Supp. 1979); WASH. REV. CODE §§ 83.16.100-.140 (Supp. 1980).

215. CONN. GEN. STAT., § 12-349 (1979); MD. ANN. CODE, art. 81, § 154 (Cum. Supp. 1979); MICH. COMP. LAWS ANN. § 205.202d (Supp. 1979); OR. REV. STAT. § 118.155 (1977), *as amended by* 1979 Or. Laws, ch. 553, § 12.

state death tax credit exceeds the state death tax.[216] For estates containing qualified agricultural property receiving § 2032A valuation, if the state death tax credit exceeds the state death taxes,[217] the preferential valuation will reduce or eliminate the "pick-up" tax.

Oregon's statute[218] states simply that interests in real property passing by reason of death that had received special assessment as farm use land shall be valued at farm use value for inheritance tax purposes, if they are in exclusive farm use pursuant to Oregon's farmland preservation law.[219] An earlier version of this statute, which accords this preference only to land which was zoned for exclusive farm use, was challenged in *Winningham v. Department of Revenue*[220] by the executors of the estates of two decedents who had owned land which had received preferential assessment as unzoned farmland under section 308.370(2) of the Oregon Revised Statutes, not as zoned farmland. The Department of Revenue disallowed current-use value appraisal because the land was not in an exclusive farm use zone as required by the then applicable provisions of section 118.155 of the Oregon Revised Statutes. The executors argued that distinguishing between zoned and unzoned farmland would violate the state's uniformity clause.[221] The court sustained the statute on the grounds that the legislature's desire to save farmland by encouraging the creation of exclusive farm use zones sustained the nonuniform treatment.[222]

C. *Legal Problems Arising From Programs for Acquiring Interests in Land*

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216. *See* [1980] 5 STATE INHERITANCE, EST. & GIFT TAX REP. (CCH) ¶ 70,111-633; 14 REAL PROPERTY, PROB. & TR. J. 377-400 & 523-539 (1979).

217. For example, taxable estates of $4,440,000, $8,400,001, $1,540,000, and $5,040,000 are entitled to state tax credits of $10,000, $26,600, $70,800, and $402,800 respectively. *See* [1979] 1 STATE INHERITANCE, EST. & GIFT TAX REP. (CCH) ¶ 1100.

218. OR. REV. STAT. § 118.115 (1975), *as amended by* ch. 553, § 12, 1979 Or. Laws. *See* [1979] 3 STATE INHERITANCE, EST. & GIFT TAX REP. (CCH) ¶¶ 1800, 1805.

219. OR. REV. STAT. § 118.155 (1975).

220. [1979] STATE INHERITANCE, EST. & GIFT TAX REP. (CCH) ¶ 20,999.

221. OR. CONST. art. 1, § 32, art. 9, § 1.

222. In 1977 the state legislature amended OR. REV. STAT. § 118.115 (1975) to include both zoned and unzoned farmlands, but its application was not retroactive.

1. Land Banking

Land banking has received considerable attention over the past several years as a means of providing for a more orderly process of urban growth and for controlling urban land prices.[223] While the concept is a controversial one in a country which places a high value on private property and freedom from governmental regulation, it received a significant endorsement in 1975 when the American Law Institute included a land banking section in its Model Land Development Code.[224]

There are two principal legal problems involved in land banking. The first is whether the agency undertaking it has adequate legislative enabling authority. While there are many laws authorizing the acquisition of interests in real property for fairly specific purposes such as preservation of open space or scenic vistas, removal of urban blight, and development of housing and industrial parks, only Puerto Rico has enacted the kind of broad-based, comprehensive legislation necessary to support a land banking program.[225] The enactment of such legislation is nevertheless a prerequisite before a state or local government can implement a general land banking program as a way to preserve prime agricultural land.

The second major legal challenge which a land banking program must face is whether the acquisition of land for unspecified uses satisfied the constitutional requirement that the power of eminent domain can be used only to acquire land for a public purpose. In the only decision considering this issue, *Commonwealth v. Rosse*,[226] the Supreme Court of Puerto Rico sustained the Land Administration Act[227] and the constitutionality of land banking, at least under the conditions it found to exist in the Commonwealth. The case is not completely dispositive of the issue because the court's reliance on the rapid inflation of land prices, the concen-

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223. *See, e.g.*, H. FRANKLIN, D. FALK & A. LEVIN, IN-ZONING: A GUIDE FOR POLICY MAKERS ON INCLUSIONARY LAND USE PROGRAMS (1974); A. STRONG, LAND BANKING: EUROPEAN REALITY, AMERICAN PROSPECT (1979).

224. ALI, A MODEL LAND DEVELOPMENT CODE 230-47 (1976).

225. *See* Note, *Public Land Banking: A New Praxis for Urban Growth*, 23 CASE W. RES. L. REV. 897 (1972).

226. 95 P.R.R. 488 (1967), *appeal dismissed*, 393 U.S. 14 (1968).

227. P.R. LAWS ANN. tit. 23, § 311f(s) (1964).

trated ownership of land, and the density of population on the island gives it limited precedential value for mainland jurisdictions where social and economic conditions are significantly different. At any rate, after reviewing related cases involving the use of eminent domain for fairly broad, loosely defined purposes, the commentators for the ALI Model Land Development Code concluded that "it seems likely that the important public benefits of land banking will prove persuasive against an attack by a condemnee or by a taxpayer challenging the expenditure of public funds."[228]

2. Purchase of Development Rights Programs

At least five states, New Jersey,[229] Maryland,[230] Connecticut,[231] New York,[232] and Massachusetts,[233] and one county[234] have enacted legislation authorizing state agencies or local governments to acquire less than fee interests in land for the purpose of preserving good agricultural land, and the approach is currently being considered in many parts of the country.[235]

These laws have all been enacted since 1974 and rely on voluntary cooperation by interested landowners. The approach does not raise any significant legal problems, provided it is based on appropriate enabling legislation.

D. Legal Problems Arising From the Use of the Spending Power to Protect Agricultural Land

As already emphasized, the greatest pressures to convert agri-

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228. ALI, *supra* note 224, at 231-32. For an excellent analysis of the policy issues involved in land banking, see D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 967-69 (1979).

229. N.J. STAT. ANN. §§ 4:1B-1 to 4:1B-15 (West Supp. 1979).

230. MD. AGRIC. CODE ANN. §§ 2-503 to -515 (Supp. 1979).

231. CONN. GEN. STAT. §§ 22-26bb to 22-26hh (1979).

232. N.Y. GEN. MUN. LAW § 247 (McKinney Supp. 1979).

233. MASS. GEN. LAWS ANN. ch. 132A, §§ 11-A to -D (West Supp. 1979).

234. King County, Wash. Ordinance No. 4341 (July 18, 1979). King County voters approved a bond issue of $50 million for the purchase of development rights on Nov. 6, 1979. *See generally* Comment, *Agricultural Land Preservation: Washington's Approach*, 15 GONZ. L. REV. 765 (1980).

235. *See generally* Netherton, *Restrictive Agreements for Historic Preservation*, 12 URBAN LAW. 54, 58, 62-65 (1980); Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540-80 (1979).

cultural land to incompatible nonagricultural uses occur in the rural-urban fringe of growing metropolitan areas. There is the picturesque, rolling, well-drained prime agricultural land which is as well-suited for urban development as it is for farming. It is here that there are two markets for land: one for farmers who want to expand their holdings but who can afford to pay only agricultural use value, and one for developers who can afford to pay much higher fair market value. Because of this bifurcation in demand, there is a great differential in bidding prices which makes control by police power regulation so problematic, because of the taking issue. In the last twenty years many suburban municipalities have come to realize that the problems of guiding new development and protecting agriculturally and environmentally significant areas must be solved together using a comprehensive growth management program. This section will discuss some of the legal issues arising out of the use of the spending power of government to provide the water supply, sewerage, transportation, and other infrastructural systems so as to encourage development in some areas and deflect it from those where farming is an important economic activity.

1. Extension of Water and Sewer Service and Sewer Moratoria

One method of channeling development away from agricultural areas is for a municipality to require that new developments have public water and sewer services and then refuse to extend such facilities to areas which are to be kept undeveloped. This technique raises an interesting question concerning the legal duty of a municipality, acting as a public utility, to extend its services to all members of the public if it has the carrying and treatment capacity to do so. The issue is whether a municipality can use its powers as a public utility to provide or withhold water and sewer facilities as a tool for implementing its comprehensive growth management plan, when it has the technical capacity to provide the services. In *Robinson v. City of Boulder,*[236] the Colorado Supreme Court held that the city could not restrict development in this manner, at least not in the area outside its city limits where it was the sole purveyor of water and sewer services. Other states have

236. 190 Colo. 357, 547 P.2d 228 (1976).

generally held that local governments have a measure of discretion in deciding whether to extend utilities within their borders,[237] and *Robinson* can be read to imply that the court might have reached a different conclusion had the application for extension concerned an area within the city.

Faced with overburdened sewerage systems and more stringent federal water quality regulations, many suburban municipalities have imposed moratoria on the issuance of sewer hook-up permits and the extention of sewerage systems. As would be expected, developers who were prevented from building new homes have challenged these moratoria in court with varying degrees of success. The New York Court of Appeals has held that while it is an unreasonable use of the police power for a municipality to bar indefinitely all multifamily construction on the basis that the sewer system is overloaded,[238] it is permissible for it to suspend temporarily the issuance of sewer permits while it takes bona fide steps to construct adequate sewerage facilities.[239] This decision also highlighted the importance of the comprehensive plan in such situations when the court held the proposed multifamily unit invalid, because it was not based on planning considerations. Several courts have emphasized that municipalities have a duty to construct necessary sewerage facilities to protect the public's health and cannot use sewer inadequacy as a pretext for exclusionary growth management regulations.[240] A federal district court in Maryland sustained a state moratorium on sewer hook-ups in Montgomery and Prince George's counties which had been in effect for five years, holding that the moratorium did not constitute a taking of property because of the serious public injury which would occur if it were not imposed, that it is not a deprivation of property without due process because it was a reasonable government policy to use sewer service restrictions to stage development, and that five years was not an unreasonably long period of time because of the

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237. Note, *Control of Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974).

238. Westwood Forest Estates, Inc. v. Village of South Nyack, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).

239. Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 323 N.E.2d 697, 364 N.Y.S.2d 160 (1974).

240. *Compare* National Land Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) *with* Charles v. Diamond, 41 N.Y.2d 308, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977).

complexities of securing federal grants for the construction of new facilities.[241] These decisions indicate that well-planned community programs to preserve prime agricultural land, which rely on municipal powers to control the location and phasing of infrastructural facilities to encourage development in nonagricultural areas, will be generally favorably received by the courts.

2. Capital Improvements and Comprehensive Growth Management

A few communities have developed comprehensive growth management systems which seek to tie development approval into the availability of urban infrastructure.[242] The best known of these are the systems adopted in Ramapo, New York, a large town to the west of New York City,[243] and Petaluma, California, across the Golden Gate Bridge from San Francisco.[244] In brief, Ramapo's plan keyed subdivision approval to the availability of sewers, storm drainage systems, public parks and schools, major roads, and firehouses. The program was based on a comprehensive planning analysis, sewerage and drainage studies, and a capital program, and envisaged the possibility that development might be postponed as much as eighteen years in some parts of the town. Two landowners challenged the plan on the grounds that it was not authorized by the New York Town Law and, even if it was, that it constituted a taking without just compensation because it imposed long term restrictions on the development of land. The New York Court of Appeals sustained the plan.[245] The court noted that "[t]he undisputed effect of these integrated efforts in land use planning and development is to provide an over-all program of orderly growth and adequate facilities through a sequential development policy commensurate with progressing availability and capacity of public

241. Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975).

242. M. GLEESON, I. BALL, S. CHINN, R. EINSWEILER, R. FREILICH, & P. MEAGHER, URBAN GROWTH MANAGEMENT SYSTEMS: AN EVALUATION OF POLICY RELATED RESEARCH (1975); D. MANDELKER & R. CUNNINGHAM, *supra* note 228, at 987-1083.

243. *See* Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). *See also* Ramapo, PLANNING, July 1972, at 108-12.

244. *See* Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

245. Golden v. Planning Bd., 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

facilities."[246] It analyzed the relevant provisions of the enabling act and, despite the fact that there was no specific authorization for controlling the timing or sequence, held that the words "restrict and regulate" conferred the power to control the rate of development as well as its location, type, bulk, and density.[247] The court also rejected the taking challenge, finding that these restrictions did not constitute a permanent, blanket prohibition of development. Developers could often qualify for approval by installing their own infrastructure and, in any case, the regulations were accompanied by what appeared to be bona fide efforts by the town to provide the necessary capital improvements.[248] In summary, the court held that a municipality may control the timing and location of development, if it has prepared the way by thorough comprehensive planning and has demonstrated its good faith in accommodating the pressures of developing, including the need for low and moderate income housing.[249]

The Petaluma plan was premised on two growth management techniques. The first limited the number of building permits which would be issued to 500 per year (a significant reduction from the preexisting rate of growth) and used a complex evaluation system to allocate these permits among the builders who submitted development proposals. The second established an urban extension line based on availability of water supply, sewerage, and other municipal services, and sought to limit growth beyond the line. The local homebuilders association challenged the plan, principally on the grounds that it impermissibly restricted the right to travel of families who would be prohibited from moving to the city and that it denied substantive due process because it was exclusionary in purpose and effect and therefore served no legitimate public purpose. The lower court sustained the right to travel argument,[250] but was reversed on appeal on the basis that the builders' association did not have standing to assert the rights of third parties to travel.[251] The court of appeals also rejected the substantive due process ar-

246. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

247. *Id.* at 371, 285 N.E.2d at 297, 334 N.Y.S.2d at 146.

248. *Id.* at 373-74 n.7, 285 N.E.2d at 198-99 n.7, 334 N.Y.S.2d at 147-48 n.7.

249. *Id.* at 380-83, 285 N.E.2d at 303-05, 334 N.Y.S.2d at 153-56.

250. Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

251. 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

gument, holding that preserving the town's environment and managing its growth were legitimate public interests which provided a valid basis for the program which Petaluma had adopted.[252]

While the comprehensive growth management plan considered in the Ramapo and Petaluma plans were not primarily concerned with the preservation of agricultural lands, they suggest, together with the exclusionary zoning decisions in New Jersey, Pennsylvania and New York the basic principles by which farmland preservation programs will be judged: 1) the programs must be based on and consistent with thorough comprehensive data gathering and planning which takes into account state and local policies concerning agriculture, 2) they may be integrated with environmental protection programs, especially the provision of adequate sewerage and wastewater treatment facilities, but these programs must be undertaken in good faith and cannot be used as an excuse for exclusionary land development programs, and 3) counties and local governments must make adequate provision for low and moderate income or, at the minimum, "least cost" housing.

III. Conclusion

Government officials and citizens concerned with the preservation of agricultural land must remember that their primary objective must be to enable farmers to continue farming by making agriculture an economically and humanly attractive way of life. Land development regulations and incentives deal with only a part of the overall problem and must be drafted to meet the various legal and constitutional requirements reviewed in this Article. Farmland preservation programs must be set in the general context of growth management and resource development programs. To increase their chances of success, they should be based on sound enabling legislation, developed through comprehensive planning and policies which give appropriate recognition to low and moderate income housing, commercial and industrial development, and environmental protection objectives. At the same time, they must not contravene the fundamental safeguards accorded to private property by the due process, equal protection, and taking clauses of the United States Constitution.

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252. *Id.* at 905-06.