An Agricultural Law Research Article

Review of Governmental Policies and Techniques for Keeping Farmers Farming

by

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A REVIEW OF GOVERNMENTAL POLICIES AND TECHNIQUES FOR KEEPING FARMERS FARMING

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INTRODUCTION

Across the country, private citizens and governments at all levels have become increasingly concerned with the loss of farmland to other uses. The U.S. Soil Conservation Service estimated recently that some 2 million acres of cropland were urbanized each year between 1965 and 1975, about half of which was Class I to Class III land.[1] Often the problem has been viewed as one arising primarily from the inadequacy of land use controls for preventing conversion of farmland to less desirable uses. In fact, most farmers sell out because of insufficient net income and the declining attractiveness of farming as a way of life, or in order to retire. Thus, an effective farmland retention policy must address itself to these more fundamental issues and explore the steps that are available to the various levels of government to make 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 markets in wheat, beef, pork, corn, soybeans, fibers, rice, and forest products, to name only the most important,[2] will influence price levels. Drought, natural disaster, and international politics play a key role in determining demand and supply. Energy and fertilizer costs are a function of international forces that are only partially within our nation's control. Federal policies concerning price supports also exercise large

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1. JOHNSON, *Very Little Time To Protect Our Precious Cropland Preserve,* SOIL CONSERVATION (December 1976) 6; SAMPSON, *Development on Prime Farmland,* ENVIRONMENTAL COMMENT (January 1978) 4-6. Class I, II, and III lands are classified as good agriculture land because of their favorable soil depth, slope, and drainage characteristics.

2. In 1976, cash receipts from the ten most important farm commodities were: cattle and calves, $19.42 billion, diary products, $11.43 billion, corn, $9.76 billion, soybeans, $8.05 billion, hogs, $7.37 billion, wheat, $5.63 billion, cotton lint, $3.17 billion, eggs, $3.16 billion, broilers, $2.94 billion and tobacco, $2.27 billion. STATE FARM INCOME STATISTICS, SUPPLEMENT TO STATISTICAL BULLETIN No. 576 (Washington, D.C.: ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, Sept. 1977).

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 using the land for farming. On the demand side, metropolitan expansion, highway construction, commercial and industrial relocation, natural resources development, and recreational use, such as second home development, 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:[3]

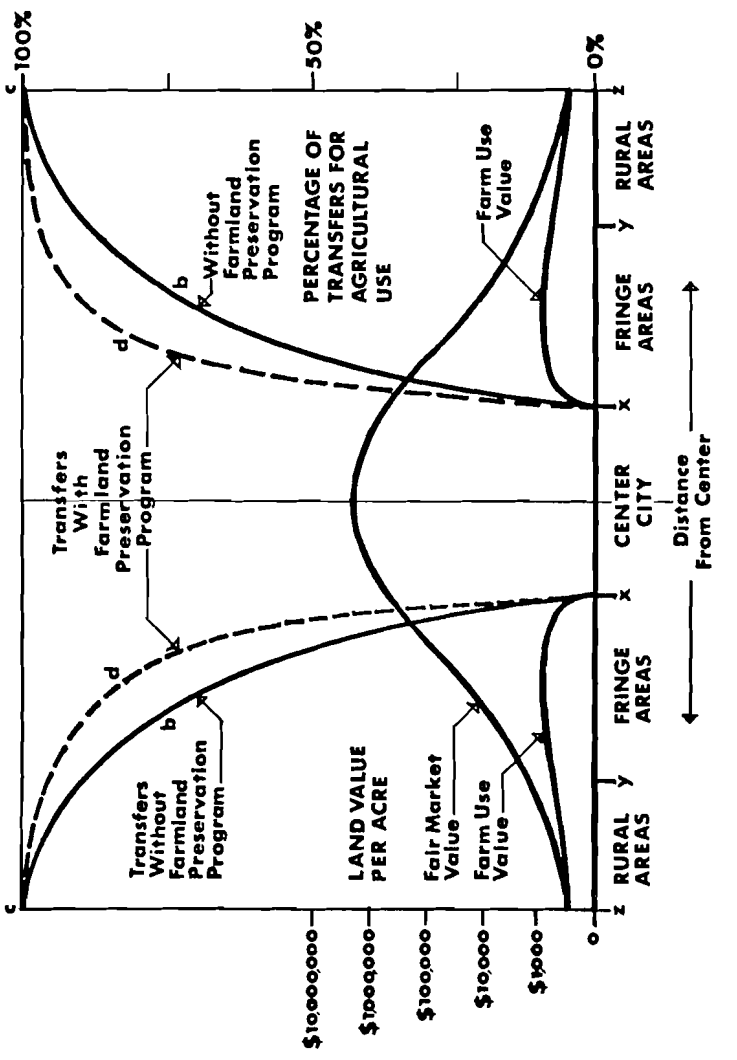
(1) Demographic factors: the farmer's age, health and proximity to retirement, the presence or absence of children who wish to continue farming, disability, retirement, and death
(2) Economic factors: the offering price for the land, recent net returns from agricultural operations, high property, estate, and inheritance taxes, transportation costs, and so forth
(3) Transitional factors: the desire of a farmer to farm elsewhere, or to pursue a different occupation
(4) Secondary factors: externalities such as complaints from neighbors about fertilizer odor, pesticides and herbicides, air and water pollution from nearby industries, other nuisance elements such as increased traffic and depradation of crops, and decrease in the availability of farm labor and suppliers or equipment and services.

The pressure for change to incompatible conversion 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 converting 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 retirement policy and sell to a developer. Graph 1 shows schematically the general relationships among farm use value, fair

3. *See* REGIONAL SCIENCE RESEARCH INSTITUTE, UNTAXING OPEN SPACE: AN EVALUATION OF THE EFFECTIVENESS OF DIFFERENTIAL ASSESSMENT OF FARMS AND OPEN SPACE 49-56 (1976) (hereinafter referred to as UNTAXING OPEN SPACE).

GRAPH I

SCHEMATIC REPRESENTATION OF RELATIONSHIPS AMONG FARM USE VALUES, FAIR MARKET VALUE AND FARM SALES FOR AGRICULTURAL USE



market value, and farm sales to buyers who will continue to farm the land. Farmland preservation policies are designed to decrease sales to converting users and would have the effect of moving curve x b c toward curve x d c.

This quick review of the major factors that bear on a farmer's decision to sell his farm to an incompatible converting user reveals the limited potential which land development regulations and incentives have for insuring that farmers keep farming. They can 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 can 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 at most moderate (so that bids for land are not three, four or more times as great as farm use value), where agriculture is reasonably profitable, and where the farmer is at most middle-aged or has family members who are willing and able to continue agricultural activities. To be effective, an agricultural lands strategy must address most, if not all, of the major land market factors that induce farmers to sell to incompatible converting users.

COMPONENTS OF A COMPREHENSIVE PROGRAM TO KEEP FARMERS FARMING

All levels of government play essential roles in formulating a comprehensive program for encouraging farmers to keep their land in agricultural use. Furthermore, the preservation of agricultural and other open land is the flip side of the coin of growth management in metropolitan areas. Consequently, national, state, regional and local policies for growth management, environmental protection and housing construction must be fashioned *in pari materia* with agricultural land preservation policies. The overview that follows is necessarily general in nature because of space limitations. More detailed studies of specific components are mentioned in the footnotes.[4]

4. Agricultural land preservation has been the subject of many excellent recent studies, such as ROE, *Innovative Techniques to Preserve Rural Land Resources,* 5 ENVIR. AFF. 419 (1976); LAPPING, BEVINS & HERBERS, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands,* 42 MO. L. REV. 369 (1977); R. COUGHLIN, et al, SAVING THE GARDEN: THE PRESERVATION OF FARMLAND AND OTHER ENVIRONMENTALLY VALUABLE LAND (1977) (hereinafter referred to as SAVING FARMLAND); 31 J. OF SOIL AND WATER CONSERVATION 180-208 (passim) (1976); D. MINER, FARMLAND PRESERVATION IN THE WASHINGTON METROPOLITAN AREA (1976); LYMAN, et al.: *Can Zoning Save Farmland?,* 7 AIP PRACTICING PLANNER 18 (1977).

THE FEDERAL ROLE

In recent years Congress has enacted several important laws that install the federal government as a major actor in the land development process and the related area of agricultural land preservation. The National Environmental Policy Act[5] and the A-95 Review Process[6] require federal, state and local agencies to evaluate the environmental impacts of over a hundred major federal programs and to consider the relation of individual projects to regional comprehensive planning goals. Technically, these administrative procedures require consideration of farming and farmland preservation goals.

Federal Pollution Control Programs

The Federal Water Pollution Control Act Amendments of 1972

The Clean Water Act as amended by the Clean Water Act of 1977[7] commits the federal government to the general goal of eliminating the discharge of pollutants into navigable waters by 1985 and to improving the quality of waters throughout the country. It does this by creating a complex federal-state-regional-local partnership for the articulation of water quality standards and effluent limitations and the creation of vigorous planning and implementation mechanisms, under the overall supervision of the U.S. Environmental Protection Agency. The Act creates five interrelated planning programs moving from broad scale river basin resource management studies through an areawide planning program to the design of specific sewage treatment plants.

(1) Section 209 requires long-range regional resource management studies and plans for water and related lands for every river basin in the country by 1980.[8]

(2) Section 303(e) establishes a continuing planning process for each river basin as a mechanism for setting major priorities and objectives for pollution control.[9]

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5. P.L. 94-52; 42 U.S.C. §§4343-4347 (Supp. V 1975). *See also,* R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT AND ITS AFTERMATH (1976).

6. OFFICE OF MANAGEMENT AND BUDGET, CIRCULAR A-95. Under the A-95 Review Process, state and local governments which request federal categorical grants-in-aid in 253 programs must submit their applications to local and state clearing houses which in turn circulate them to interested agencies for review and comment as to their desirability and consistency with relevant comprehensive plans. *See also,* U.S. OFFICE OF MANAGEMENT AND BUDGET, 1978 CATALOG OF FEDERAL DOMESTIC ASSISTANCE (1978) (Appendix I).

7. 33 U.S.C. §§1251-1524 (1976) and P.L. 95-217. *See also,* NOTE, *Federal Water Pollution Control Act, Amendments of 1972,* 17 NAT. RES. J. 511 (1977).

8. 33 U.S.C. §1289 (1976), referring to Level B plans required by the Water Resources Planning Act, 42 U.S.C. §1962 (Supp. V 1975).

9. 33 U.S.C. §1313(e) (1976).

(3) Section 208 mandates that areas designated by a state governor as having significant water quality problems create an areawide waste treatment management program which will take an inventory of existing conditions, establish detailed water quality goals, and create the governmental management structure needed to implement the program.[10] The state environmental protection agency must perform the same functions with respect to those areas that are not so designated.[11]

(4) Section 201 authorizes planning, design and construction of individual sewage collection and treatment plants, and is the basis for the substantial federal grant-in-aid program for the construction of such facilities.[12]

(5) Section 106 establishes criteria for setting priorities among competing applications for funds for the construction of waste treatment works.[13]

Planning has not proceeded in the rational manner outlined above, however. The EPA has made numerous grants for sewage plant construction under Section 201, despite the fact that most Section 208 plans were not scheduled to be completed until late 1978. Sections 209 and 303(e) plans are still further from completion. Section 208 planning and management are of special importance to agricultural areas. They are the principal means of coordinating the construction of new waste water treatment plans with the comprehensive plans of municipalities and of regulating non-point source pollutants such as run-off from agricultural land.[14] The state and areawide agencies have primary responsibility for developing the substantive content of 208 plans subject to EPA approval.

The Act also created the National Pollutant Discharge Elimination System[15] under which the EPA, or a state if certified by the EPA, issues permits that set limits on all point source discharges subject to the Act. This program regulates both the quantity and quality of discharges into streams and rivers and the location of new point

10. 33 U.S.C. §1288 (1976).

11. *See* N.R.D.C. v. Train, 396 F. Supp. 1386 (D.D.C. 1975). It is subject to the same planning criteria as designated areas. *N.R.D.C. v. Costle,* 564 F.2d 573, 7 ERC 2066 (D.C. Cir. 1977).

12. 33 U.S.C. §1281 (1976).

13. 33 U.S.C. §1256(f)(1)(A) (1976).

14. *See* U.S. ENVIRONMENTAL PROTECTION AGENCY, GUIDELINES FOR STATE AND AREAWIDE WATER QUALITY MANAGEMENT PROGRAM DEVELOPMENT (Washington, D.C., Nov. 1976); *Thumbnail Sketch of 208,* ENVIRONMENTAL COMMENT 4 (November 1976); E. MOSS, LAND USE CONTROLS IN THE UNITED STATES 68-97 (1977).

15. 33 U.S.C. §1342 (1976).

sources. It can be used to preserve water quality in agricultural areas.

In November, 1975 the EPA took action of major significance to rural areas with high water quality when it adopted a strong national policy against further degradation of the nation's waters.[16] This policy, together with the specific planning and enforcement mechanisms of the Act, may lead to better protection of prime agricultural areas from water pollution and may even deter development from occurring on them.

The Clean Water Act of 1977[17] was passed as a "mid-course correction" after three years of congressional wrangling. The Act extended the 1972 Act for four more years and authorized $24.5 billion for the sewage treatment construction grant program. It also extended the deadlines for compliance by municipal waste discharges to July 1, 1982, with EPA approval, and for compliance by industry with new conventional pollutant and toxic pollutant effluent limitations to July 1, 1984 and provided the EPA with more powerful tools with which to control toxic pollutants (Sections 53 and 54). Of special relevance to rural areas are the following provisions.[18]

(1) The Act places heavy emphasis on the development of alternative and innovative treatment systems such as land application of effluents and provides significant financial incentives for their development. Thus, for instance, spray irrigation of appropriate crops will become more widespread (Sections 6, 9, 17 and 28).

(2) It authorized grants for individual or small treatment systems (Section 14).

(3) Grant funds of up to $150 million per year were authorized for Section 208 planning through 1980 (Sections 4 and 31).

(4) Open space and recreational benefits are to be considered in the design of treatment plants and effluent disposal sites (Section 32).

(5) Four per cent of the sums allotted to any state with a rural population of 25 per cent or more is to be set aside for the construction of alternative treatment systems for communities having a population of less than 3,500 (Section 27).

(6) Return flows from irrigation systems are exempted from the permit requirement of the National Pollutant Discharge Elimination System (Section 33).

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16. *See* 40 Fed. Reg. 55341 (Nov. 28, 1975); 40 C.F.R. §130.17 (July 1, 1977).

17. Pub. L. No. 95-217, 91 Stat. 1566 effective December 27, 1977.

18. This discussion is drawn from a Special Report in 8 Envt'l Rep. (BNA) 1425-27 (January 20, 1978), and 123 *Cong. Rec.* H12690-12722 (H.R. REP. NO. 3199) and S 19636-19686.

(7) An agricultural cost sharing program is authorized under Section 208 to reduce nonpoint source pollution from agricultural activities (Section 35).

The Clean Air Act of 1970, as amended

With the Clean Air Act of 1970, as amended in 1974 and 1977,[19] the federal government took over primary control of the regulation of air pollution. It required the EPA to establish national ambient air quality standards for each of six pollutants: sulfur oxides, total suspended particulates, carbon monoxide, photochemical oxidants, hydrocarbons and nitrogen oxides.[20] Each state designated air quality control regions that were tailored to local conditions.[21] Two standards were set for each pollutant: the primary ambient air quality standard designed to protect public health and the secondary air quality standard, designed to protect public welfare.[22] The primary standards were to have been met by mid-1975, but many areas failed to do so. The 1977 amendments require the states to review their state implementation plans and to meet revised standards no later than December 31, 1982.[23]

The Act is a complex one and cannot be reviewed in detail here.[24] Of special importance to agricultural land preservation are the Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) provisions of the 1977 Act.[25] Taken together, these provisions permit the states, with the approval of the EPA, to set stringent air quality standards in areas where ambient air quality is better than required by general ambient air quality standards and to require new sources of pollutants to meet tough emission limitations.[26] Under these regulations, state governors may take into account the need to protect air quality in significant agricultural areas when establishing PSD and NSPS regulations.

19. 42 U.S.C. §1857 (Supp. V 1975).
20. 42 U.S.C. §1857c-3 (Supp. V 1975).
21. *See* 40 C.F.R. Part 81
22. *See* 40 C.F.R. Part 50 and 42 U.S.C. §1857c-4 (Supp. V 1975).
23. Pub. L. No. 95-95, §106, §129, 91 Stat. 685, amending 42 U.S.C. §7409 and adding 42 U.S.C. §7502.
24. *See* E. MOSS, LAND USE CONTROLS IN THE UNITED STATES 40-67 (1977); D. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 169-221 (1976); and U.S. CODE, CONG. AND AD. NEWS, 75th CONG. 1st SESS. No. 8, Sept. 1977, 2207-2707.
25. Clean Air Act Amendments of 1977, Pub. L. 95-95, §127 & 109, 91 Stat. 685.
26. *See,* 123 CONG. REC. S13700 (daily ed. Aug. 4, 1977) (remarks of Sen. Muskie); H.R. REP. NO. 95-564, 95th Cong., 1st Sess. 129-131, 148-153 (1977).

The Resource Conservation and Recovery Act of 1976

The major outlines of the federal programs for control of environmental pollution were completed with the passage of the Resource Conservation and Recovery Act of 1976.[27] It provides for the development of federal and state programs for the regulation of land disposal of waste materials that are not regulated by other acts. It bans open dumping,[28] provides guidance and financial assistance for state and local planning efforts,[29] authorizes the EPA to establish complete control of the dumping of hazardous wastes through a comprehensive permit system,[30] and establishes programs for resource conservation and recovery.[31] The Act is still in the early stages of implementation so it is not possible to assess its impact. It can be used, however, to prevent water and air pollution from waste disposal sites in agricultural areas.

Federal Farm Policies

In the winter of 1977-78 farmers protested the nearly catastrophic decline in their income in 1976 by conducting tractor drive-ins in many cities including Plains, Georgia and Washington, D.C., and by organizing the initial phases of a farmer's strike. While articulation of an appropriate agricultural policy is beyond the scope of this article, it is clear that healthy profits are one of the most effective incentives to keep farmers farming, and a sound farm policy is a central component of any program to preserve farmland.

The Housing and Community Development Act of 1974, as amended in 1977

The Housing and Community Development Act of 1974, as amended in 1977,[32] combined ten earlier categorical grant programs into one special revenue sharing or block grant program. Its central objective was "the development of viable urban communities, by providing decent housing and a suitable living environment, and expanding economic opportunities, principally for persons of low and moderate income."[33] One of the few eligibility conditions for

27. Pub. L. No. 94-580, §1001, 90 Stat. 2795 (to be codified in 42 U.S.C. §6901).

28. Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580 §§1003(3), 4002(c)(3), 4003(2), 4005(c), 90 Stat. 2795 (1976).

29. *Id.* §§4001-4009.

30. *Id.* §§3001-3011.

31. *Id.* §§5001-5004.

32. 42 U.S.C. §5301 (Supp. V 1975), *as amended by* Housing and Community Development Act of 1977, Pub. L. No. 95-128, §101, 91 Stat. 1111 (1977); [1977] U.S. CODE CONG. & AD. NEWS 2884-2997.

33. 42 U.S.C. §5301(c) (Supp. V 1975).

community development bloc grants (CDBG's) is the requirement that local communities prepare Housing Assistance Plans (HAP) that survey existing housing stock in the community, assess community housing needs—including an estimate of those nonresidents "expected to reside" within its borders in the future, establish a goal for the provision of subsidized housing, and give a description of the location of existing and proposed lower income housing.[34] This requirement is of special relevance to rural suburban communities, many of which still have farming areas, because, if coupled with a strong state or judicial policy against exlusionary zoning, the HAP requirement may force development within existing borders, in order to become eligible for CDBG's. It might also encourage annexations. Both types of action could accelerate the conversion of farmland to urban uses. Clearly, needs for agricultural land must be taken into account in preparing housing assistance plans.

The 1977 amendments established new policies relating to the allocation formula for CBDG's. These policies sought to prevent a shift from older eastern and midwestern cities to the cities of the south and the sun belt[35] and placed increased emphasis on economic development. The amendments seek to further these goals with the creation of the Urban Development Action Grant Program[36] and the revival of older cities by the encouragement of rehabilitation,[37] neighborhood development,[38] and deconcentration of racial minorities.[39] If these efforts are successful over the long run, especially when combined with efforts to reduce national energy consumption by encouraging more compact development and increasing the cost of automobile commuting, the result might be to decrease the demand for residential and commercial sites at the rural/urban fringe.

Amendments to the Internal Revenue Code

In the Tax Reform Act of 1976 Congress amended the estate tax provisions so that under carefully defined conditions farm real estate inherited by a member of a decedent's family may be valued at farm use value instead of fair market value. Moreover, the amendment provided for a recapture of some or all of the foregone tax revenue if the property is sold to persons who are not family members, or converted to another use within 15 years after death.[40] The tax-

34. 42 U.S.C. §5304(a)(4) (Supp. V 1975).
35. Housing and Community Development Act of 1977, Pub. L. No. 95-128, §106, 91 Stat. 1111 (amending 42 U.S.C. §5306 (Supp. V 1975)).
36. *Id.* §110 (adding new section 42 U.S.C. §5318).
37. *Id.* §104 (amending 42 U.S.C. §5304).
38. *Id.*
39. *Id.*
40. Tax Reform Act of 1976, §2003, I.R.C. §2032A.

writing committees intended to reduce the pressures for sale or conversion resulting from heavy estate tax obligations.[41] The amendments also created estate and gift tax credits that when combined have the effect of exempting $175,623 of the estate from taxation by 1981.[42] Consequently, smaller farms, at least, may be passed on to a spouse or child free of estate tax liability.

Comprehensive National Policy Concerning Agricultural Land

In March, 1977, Vermont Congressman Jeffords introduced the "National Agricultural Land Policy Act."[43] The bill recited the needs for a strong agricultural sector, the fact that two to three million acres of land are converted from agricultural uses to nonagricultural uses, and the polluting effects of urban encroachment. It called for the establishment of an Agricultural Land Review Commission whose mission would be to study the conditions of agricultural land in the country and prepare a report recommending national, state and local strategies for preserving such land within three years of its creation. While at the time of writing no hearings had been held on the bill, it explicitly addresses the need to establish national policies in the area.

The Role of State Governments

Formulation of State Urban Growth and Agricultural Land Policies

In recent years, there has been a growing realization among state governors and legislators that states should take a stronger role in management of urban growth, preservation of agricultural lands, and protection of environmentally significant areas.[44] Several factors

41. H.R. REP. NO. 1380, 94th Cong. 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 3356, 3359. *See* BUREAU OF NATIONAL AFFAIRS TAX MANAGEMENT PORTFOLIO 299, VALUATION OF REAL ESTATE A-13 to A-20 (1977).

42. I.R.C. §§2012, 2013; [1977] 2 FED. EST. & GIFT TAX REP. (CCH) ¶5750.

43. H.R. REP. NO. 4569, 95th Congress, 1st Sess. (1977).

44. *See, e.g.,* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 134-36 (1968); NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 191, 236-53 (1968); F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 2-3 (1971); COUNCIL ON STATE GOVERNMENTS, LAND USE POLICY AND PROGRAM ANALYSIS No. 1: INTERGOVERNMENTAL RELATIONS IN STATE LAND USE PLANNING *passim* (1974); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, A.C.I.R. STATE LEGISLATIVE PROGRAM No. 5: ENVIRONMENT, LAND USE AND GROWTH POLICY *passim* (1975); R. HEALY, LAND USE AND THE STATES 1-13, 190-212 (1976); AMERICAN INSTITUTE OF PLANNERS, SURVEY OF STATE LAND USE ACTIVITY (1976); 1976 REPORT ON NATIONAL GROWTH AND DEVELOPMENT: THE CHANGING ISSUES FOR NATIONAL GROWTH 131-34 (1976); AMERICAN LAW INSTITUTE, A MODEL LAND DEVELOPMENT CODE 248-54 (1976); E. MOSS, LAND USE CONTROLS IN THE UNITED STATES 252-95 (1977); R. FISHMAN, HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW 6 (1978).

contributed to this realization. The rapid suburbanization of the 1950s and early 1960s produced suburban sprawl and environmental despoliation on an unprecedented scale. The demonstrations of civil rights activists and poor people in the mid-sixties created dramatic awareness of the injustices endemic in our cities. The environmental awakening symbolized by the first Earth Day in April 1970 triggered a multitude of legislative and executive actions to reduce air, water and land pollution. Finally, the New Federalism of the Nixon Administration and the conservative swing of the mid-seventies, as epitomized in general and special revenue sharing programs,[45] betokened a belief that the federal government was not the best and only vehicle for the solution of society's problems, and that state and local governments should take a larger role. Thus, by 1975 all of the states except Alabama were engaging in programs of state land use policy development or management.[46] Seventeen had completed growth plans or policy guidelines, twenty had ongoing Public Land Use Commissions, and five had private study commissions.[47]

Agricultural lands policies were explicitly mentioned in several of the policy documents. For instance, the Pennsylvania Office of State Planning and Development has proposed a comprehensive Rural Farm Strategy that includes designation of prime farm areas, creation of agricultural districts, differential assessment, purchase and leaseback of agricultural land, purchase of development rights, agricultural zoning, transferable development rights, a farmers' loan program, and a comprehensive program for assisting agricultural development.[48] California's Office of Planning and Research proposed a comprehensive Urban Development Strategy for the state, which emphasized containment of new growth within existing urban areas and a careful coordination of state and local capital improvement and environmental protection programs, so as to reduce the rate of conversion of farmland to urban uses.[49] Both reports considered growth management and agricultural land preservation together.

Thus, the first step in developing an effective state agricultural lands program is the formulation of specific state policies based on a

45. *See, e.g.*, State and Local Fiscal Assistance Act of 1972, 31 U.S.C. §1221 (1976); 42 U.S.C. §5301 (Supp. V 1975), *as amended by* Housing and Community Development Act of 1977, Pub. L. No. 95-128, §101, 91 Stat. 1111 (1977).

46. E. MOSS, *supra* note 44, at 253-256.

47. 1976 REPORT ON NATIONAL GROWTH AND DEVELOPMENT, *supra* note 44, at 133.

48. OFFICE OF STATE PLANNING AND DEVELOPMENT (PENNSYLVANIA), LAND POLICY STRATEGIES: CONFERENCE DRAFT C-1 to C-28 (1977).

49. STATE OF CALIFORNIA OFFICE OF PLANNING AND RESEARCH, URBAN DEVELOPMENT STRATEGY FOR CALIFORNIA: REVIEW DRAFT (1977).

comprehensive survey of conditions in that state. Such policies must be consistent with a companion set of policies dealing with urban growth management and housing.

Methods of Implementing State Agricultural Lands Policies

The central responsibility for fashioning methods for preserving agricultural lands rests with state governments because first, they have the residual sovereign power to formulate their own programs or to delegate that power to local government, and second, they are large enough to represent a broad spectrum of interests relating to land development. State programs must embody a variety of techniques that are designed to treat sensitively the major factors that induce the sale of farmland to incompatible converting uses. This section will review in a comprehensive and integrated way techniques that have been implemented or proposed. No one state has instituted all of those analyzed, although it is suggested that a comprehensive policy should embrace most or all of them in one form or another.

Agricultural Districts

Most types of farming require large areas of land and an economic infrastructure that supplies equipment, labor, services and supplies. Farming activities often generate externalities that give rise to complaints by non-farmer neighbors. Farmers, in turn, may be adversely affected by the concommitants of suburban residential, commercial, and industrial development. Thus, it is appropriate to enact, as several states have, procedures for the establishment of agricultural districts of substantial size where only farming and closely related activities can be carried on. Under California's Williamson Act,[50] individuals or groups of landowners may submit a request for designation as an agricultural preserve that is referred to the Local Agency Formation Commission (LAFCO) and the county planning commission for review and comment within 30 days.[51] After a public hearing, the county may so designate the land and must restrict all land in the preserve that is subject to restrictive agreement under the Act by zoning or other suitable means to agricultural, recreational, open space, or compatible uses.[52] The Act provides that agricultural preserves must be at least 100 acres, but permits counties to reduce this minimum if they find it necessary.[53]

50. CAL. GOV'T CODE §§51200-51295 (West Cum. Supp. 1978).
51. CAL. GOV'T CODE §§51233, 51234 (West Cum. Supp. 1978).
52. CAL. GOV'T CODE §§51201(d) and (e), 51230 (West Cum. Supp. 1978).
53. CAL. GOV'T CODE §51230 (West Cum. Supp. 1978).

New York's Agricultural Districting Law[54] authorizes the creation of agricultural districts by two methods. Under the first, farmers may request the county legislature to create such a district if, among them, they own more than 500 acres.[55] After public hearings and review by a county agricultural districting advisory committee and the county planning board, the county legislature may certify the district.[56] This certification must then be reviewed by the State Agricultural Resources Commission and the Secretary of State and approved by the Commissioner of Environmental Conservation.[57] By including such broadly representative agencies in the approval process, the Act seeks to force consideration of a broad range of public purposes. The second method authorizes the Commissioner of Environmental Conservation to create agricultural districts of at least 2,000 acres if the land delineated is mostly unique and irreplaceable agricultural land, and if agricultural use is consistent with the state's plans.[58] The Commissioner is also required to hold public hearings and to subject the proposal to the scrutiny of several broadly representative agencies.[59] In the fall of 1976, some four million acres, or about one-third of the state's agricultural lands, had been placed in agricultural districts of the first type.[60] Several other states have enacted[61] or are considering proposals for,[62] similar laws.

Regulatory Techniques to Encourage the Retention of Land in Agricultural Use

Either as part of an agricultural districting scheme or as a means of encouraging agricultural use generally, a state may use several

54. N.Y. AGRIC. & MKTS. LAW §§300-307 (McKinney 1972, Supp. 1977).
55. N.Y. AGRIC. & MKTS. LAW §303(1) (McKinney, 1972).
56. N.Y. AGRIC. & MKTS. LAW §303(2), (4) (McKinney Supp. 1977).
57. *Id.* §303(5).
58. *Id.* §304.
59. *Id.*
60. M. LAPPING, *et al., supra* note 4, at 406. *See also,* R. E. COUGHLIN, et al, *supra* note 4, at 248-258.
61. *See, e.g.,* Oregon's exclusive farm use zoning enabling act, OR. REV. STAT. §215.203 to 273 (Repl. 1975) and Oregon's Land Use Act, OR. REV. STAT. ch. 197 (Repl. 1975), which created the Land Conservation and Development Commission (LCDC) and required counties and cities to adopt comprehensive plans and land use controls to implement them (OR. REV. STAT. §197.175 (Repl. 1975)). The LCDC required municipalities to designate urban growth boundaries around all cities within which most development was to be channeled. *See* SAVING FARMLAND (1977) *supra* note 4, at 198-209. In 1977, Maryland passed a comprehensive law designed to preserve agricultural land, which included provisions for agricultural districts. M.D. AGRIC. CODE ANN. §2-509(b) (Supp. 1978).
62. *See, e.g.,* PA. OFFICE OF STATE PLANNING AND DEVELOPMENT, LAND POLICY STRATEGIES: A CONFERENCE DRAFT C-11 to C-24 (1977), which recommends the passage of a law patterned after the Oregon and New York statutes.

methods to counteract some of the factors which induce the conversion of farmland to an incompatible use.

(1) Agricultural Zoning–With Oregon and California leading the way, several states are experimenting with enabling acts authorizing and requiring exclusive agricultural or related use zoning.[63] Typically, these ordinances restrict permissible uses severely and require large minimum lot sizes.[64] If the local government enacting such an ordinance bases it on a thorough analysis of trends in agricultural use, the importance of farming to its economy, soil and open space studies, comprehensive planning and a showing of consistency with regional and state policies,[65] legal constitutional problems may be avoided. In any case the principal legal hurdle is the claim that exclusive agricultural use zoning constitutes a taking without just compensation,[66] or an unreasonable exercise of the police power because it renders the property unsuitable for any reasonable use for which it is adapted.[67] Legal doctrines in this area are in a state of flux, and commentators have failed to develop a coherent, widely accepted rationale to explain the many decisions. Perhaps this uncertainty in the law exists because the facts of the particular case play such an important role in its outcome.[68] The traditional line of analysis, illustrated by Justice Hall's decision in *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*,[69] holds that where state or local regulations so restrict the uses to which land can be put that it can not be used for any reasonably profitable purpose, they constitute a taking without just compensation and thus violate the Fifth Amendment as made applicable to the states through the

63. *See, supra* notes 50-61.

64. For instance, in Madera County, California, minimum lot sizes in exclusive agricultural zones range from 20 to 640 acres and only agricultural, farm residential transportation and utility uses are permitted as of right. *See* Madera County, Cal., Zoning Ordinance 298-B-1 (Oct. 1, 1974).

65. *See, e.g.*, the King County, Cal., Agricultural Protection Program, Ordinance 3064 (Dec. 20, 1976).

66. *See,* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 175-182 (1973).

67. Fred F. French Investing Co. v. City of N.Y., 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (Ct. App. 1976), appeal dismissed, 429 U.S. 990 (1976).

68. *See, e.g.*, F. BOSSELMAN, et al, *supra* note 66; Berger, *A Policy Analysis of the Taking Problem,* 49 N.Y.U. L. REV. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967); Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking,* 57 MINN. L. REV. 1 (1972); Dunham, *Flood Control Via the Police Power,* 107 U. PA. L. REV. 1098 (1959); Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971); 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.23 (1968); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies,* 75 COLUM. L. REV. 1021 (1975).

69. 40 N.J. 539, 193 A.2d 232 (Sup. Ct. 1963).

Fourteenth Amendment.[70] This line of reasoning has been modified in two significant recent decisions. In *Fred F. French Investing Co. v. City of N.Y.*,[71] the New York Court of Appeals rejected the "taking" concept in situations of severe regulation and rested its analysis on whether or not the exercise of the police power was reasonable. In determining reasonableness the court analyzed (1) the substantiality of the relation of the ordinance to the protection of the public health, safety, morals or general welfare, (2) the relationship between the ends sought and the means used to achieve that end, and (3) the degree to which the regulation "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."[72] It is possible that this balancing approach may support greater limitations on the owner's capacity to convert farmland to nonagricultural use than the traditional taking doctrine, especially in agricultural areas where fair market values are not grossly in excess of agricultural use values and where a strong planning and policy basis has been established for preserving agricultural use.

The second significant development in "Taking Issue" doctrine is the decision of the Wisconsin Supreme Court in *Just v. Marinette County*,[73] holding 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."[74] This principle represents a significant departure from the traditional analysis of the taking issue. While it may be explained in part by (1) 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 (2) 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 needed to produce our nation's food supply.

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70. *Id.* at ____, 193 A.2d at 241-244. Justice Hall later suggested that the reasoning followed in Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills might require reexamination where vital ecological and environmental considerations are involved. AMG Assocs. v. Township of Springfield, 65 N.J. 101, ____ n. 4, 319 A.2d 705, 711 n. 4 (Sup. Ct. 1974).

71. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (Ct. App. 1976), *appeal dismissed*, 429 U.S. 990 (1976).

72. *Id.* at ____, 350 N.E.2d at 386-387, 385 N.Y.S.2d at 9-10.

73. 56 Wis.2d 7, 201 N.W.2d 761 (1972), followed in Sibson v. State, 115 N.H. 124, 336 A.2d 239 (1975).

74. *Id.* at ____, 201 N.W.2d at 768.

There appear to have been only two appellate decisions involving exclusive agricultural use zoning with large minimum lot sizes. In *Gisler v. County of Madera,*[75] the California Court of Appeals sustained against a taking claim a zoning ordinance that established an 18 acre minimum lot size and prohibited all but agricultural uses. The basis of the decision in this regard was that agriculture was a reasonable use in the particular section of the county involved. In *Joyce v. City of Portland,*[76] Portland rezoned 842 acres of land from low density residential to farm and forest use. The Oregon Supreme Court held that zoning did not constitute a taking because the landowners conceded that their properties could be beneficially used for farming.

In summary, it is difficult to predict how an exclusive farm use zoning ordinance with large minimum lot sizes might fare in the courts, especially in rural-urban fringe areas where there is considerable differential between farm use and residential or alternative developed use values. Certainly the chances for success would improve if the enacting municipality has based the ordinance on a comprehensive planning analysis and can show that the preservation of the agricultural area is consistent with state and regional policies.

(2) Restrictions on State Activities in Agricultural Districts—The policies and activities of state agencies such as the construction and extension of highways, water or sewer facilities, or subsidized housing, can have seriously adverse effects on agriculture. Thus, agencies responsible for highways and water and sewer activities must be required to shape their programs so as to take into account the goal of agricultural preservation.[77] In addition, state and local regulations that might seriously interfere with farming activities should be modified to minimize these adverse impacts.[78] Particularly, use of eminent domain by state agencies in agricultural districts should be subject to review by the state department responsible for farmland

75. 38 Cal.App.3d 303, 112 Cal. Rptr. 919 (Dist. Ct. App. 1974). *See,* F. BOSSELMAN, *et al., supra* note 66, at 175-182. *C.F.,* HFH, Ltd., et al v. Super. Ct. of Los Angeles County, 15 Cal.3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (Cal. 1975), *cert. denied,* 425 U.S. 904 (1976).

76. 240 Or. App. 685, 546 P.2d 1100 (Ct. App. 1976).

77. New York requires this. *See* N.Y. AGRIC. & MKTS. LAW §305(3) (McKinney Supp. 1977).

78. Oregon prohibits state and local governments from enacting regulations in exclusive farm use zones which unreasonably restrict or regulate farm structures or accepted farm practices because of noise, dust, odor or other air-borne materials where the conditions do not extend beyond the boundaries of the zone. ORE. REV. STAT. §215.253 (Repl. 1977). *See also,* N.Y. AGRIC. & MKTS. LAW §305(2) (McKinney Supp. 1977).

preservation if the use would have an unreasonable adverse effect on agricultural land preservation goals.[79]

(3) Exemption from Assessments for Improvements–In many states, municipalities and special authorities have the power to assess landowners for the value added to their land by the construction of roads, water and sewer lines, storm sewers, electrical lines, and solid waste disposal facilities. In rural areas, these assessments, which often are computed on a front foot basis, can impose a heavy financial burden on farmers whose land they adjoin, but who may not receive full benefits from them. Some states have provided that farmers are exempt from such levies except to the extent that their residence is in fact served by them.[80]

(4) Transferable Development Rights–At the present time, a heated debate in the land development regulation field concerns the desirability and feasibility of transferable development rights (TDRs).[81] While there are many variations on the scheme, the basic concept is to establish a method of regulating land development under which certain areas are subject to severe restrictions while others are planned for development. The owners of land in the conservation area are empowered to sell the rights to develop their land (which they are not permitted to exercise) to owners of land in the development area who are then permitted to develop at higher densities than if they had not acquired the additional rights. Where TDRs are used to preserve agricultural land, they are intended both to blunt the "taking challenge" which heavily restricted farmers might raise, and to distribute costs of preserving farmland more equitably by forcing them to be included in development costs.

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79. In New York, the Commissioner of Environmental Conservation must review the proposed use of eminent domain in agricultural districts and can force a 60 day delay in the initiation of condemnations. He may request the Attorney General to sue to enjoin such use if it violates the provisions of the Agricultural Districting Law. N.Y. AGRIC. & MKTS. LAW §305(4) (McKinney Supp. 1977).

80. *See, e.g.,* N.Y. AGRIC. & MKTS. LAW §305(5) (McKinney Supp. 1977); ORE. REV. STAT. §308.401 (Repl. 1977); in Pennsylvania and New Jersey a farmer may be liable for the assessment after he converts to a non-agricultural use. PA. STAT. ANN. tit. 53, §§1241-1243 (Purdon Supp. 1978); N.J. STAT. ANN. §§40:56-41.2-40:56-41.5 (West Supp. 1978).

81. *See, e.g.,* Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 YALE L.J. 75 (1973); B. CHAVOOSIAN, GROWTH MANAGEMENT PROGRAM (1975); J. HELB, et al., DEVELOPMENT RIGHTS BIBLIOGRAPHY (1976); SCHNIDMAN, *Transferable Development Rights: An Idea in Search of Implementation,* 11 LAND AND WATER L. REV. 339 (1976); Keene, *Transferable Development Rights: An Evaluation,* in TOUGH CHOICES FOR TODAY'S WORLD (1977); D. MERRIAM, et al., BIBLIOGRAPHY OF THE TRANSFER OF DEVELOPMENT RIGHTS (Council of Planing Librarians Exchange No. 1338) (1977); Merriam, *Making TDR Work,* 56 N.C. L. REV. 77 (1978).

While some TDR Programs have been adopted, only a few have been implemented, and several of those are being litigated.[82] Because of the many legal,[83] economic, and public acceptability questions which must be resolved, it is too soon to judge whether TDRs will be an effective tool for preserving farmland.

Tax Incentives

State and local tax burdens may in some instances contribute to the conversion of agricultural land.[84] Even in remote rural areas where fair market value approximates farm use value, real property taxes can constitute fifteen to twenty percent of net agricultural income.[85] In rural-urban fringe areas where land values are often several multiples of farm use value and where there is neither legal nor *de facto* preferential assessment, they can equal or exceed farm income.[86] Forty-six states have enacted differential assessment laws that authorize local assessors to assess eligible farm property at its current use value for real property tax purposes.[87] One other has

82. *See* Keene, *supra* note 81; Woodbury, *Transfer of Development Rights: A New Tool for Planners,* 41 J. AMER. INST. OF PLANNERS 3 (Jan. 1975); Woodbury, *Whatever Happened to Development Rights?* ENVIRONMENTAL COMMENT, 13-16 (February 1976); and M. BENNETT, TRANSFER OF DEVELOPMENT RIGHTS: PROMISING BUT UNPROVEN NEW APPROACH TO LAND DEVELOPMENT REGULATION (PA. ENVIR. COUNCIL, 1976).

83. The New York Court of Appeals found unconstitutional a TDR scheme designed to preserve two privately owned parks because the TDR's which the owner received when his land was restricted were of too uncertain a value to constitute just compensation. Fred F. French Investing Co., Inc. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed,* 429 U.S. 990 (1976). *But see,* Penn Central Transportation Co. v. City of New York, ____U.S. ____, 397 N.Y.S.2d 914, 46 U.S. Law Week 4856 (1978), where the U.S. Supreme Court held that the application of New York's landmark preservation ordinance to Grand Central Terminal did not constitute a taking. Because of this finding, the court did not reach the issue of whether the development rights offered to Penn Central were reasonable compensation for the denial of the right to develop its Grand Central Station site. *See* Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision,* 91 HARV. L. REV. 402 (1977).

84. UNTAXING OPEN SPACE, *supra* note 3, at 1-9. *See also,* Keene, *Differential Assessment and the Preservation of Open Space,* 14 URBAN LAW ANNUAL 11, 39-51 (1977).

85. UNTAXING OPEN SPACE, *supra* note 3, at 23-30.

86. *Id.* at 26.

87. Alaska: ALASKA STAT. §29.53.035 (Supp. 1977); Arizona: ARIZ. REV. STAT. §§42-136, 227 (Supp. 1977); Arkansas: ARK. STAT. ANN. §§84-479 to 480 (Supp. 1977); California: CAL. CONST. art. XIII, §8 (adopted 1974, amended 1976), CAL. GOV'T CODE §§51200-51205 (Deering Supp. 1977), CAL. REV. & TAX. CODE §§421-429 (Deering Supp. 1977); Colorado: COLO. REV. STAT. §§137-1-3(5) to 3(6) (1973); Connecticut: CONN. GEN. STAT. §§7-131(a) to 131(n), 12-107(a) to 107(f), 12-504(a) to 504(h) (Supp. 1977); Delaware: DEL. CONST. art. 8, §1 (because of technical errors in the passage of this amendment, it may be defective); Florida: FLA. CONST. art. 7, §4; FLA. STAT. ANN. §§193.461 (preferential assessment for agricultural land), .501 (recreation land restrictive agreement) (West Supp. 1977); Hawaii: HAW. REV. STAT.

amended its constitution and has considered differential assessment legislation.[88] These laws clearly provide tax benefits of sufficient magnitude to reduce significantly the rate of conversion of farmland.[89] They are, however, an important component of any comprehensive program for preserving agricultural lands.

Just as Congress amended the Internal Revenue Code to ease the impact of the federal estate tax on small to medium-sized farmers,[90] so states may amend their inheritance tax laws to permit qualifying agricultural land to be valued at current use value and to postpone the payment of taxes until the land is sold to a non-family member or is converted to nonagricultural uses.[91]

Connecticut, Massachusetts, and New Hampshire impose a conveyance tax on the sale of land which has been receiving differential assessment. In New Hampshire, the tax amounts to ten per cent of the fair market value assessment at the time of sale.[92] Massachusetts and Connecticut's taxes are levied at ten per cent of the sales price during the first year of ownership and decline one per cent a year until the eleventh year when they no longer apply.[93] The intent of these provisions is to deter farmers from selling.

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§§246-10, 12, 12.3 to .4 (Repl. 1976, Supp. 1977); Idaho: IDAHO CODE §63-202 (Repl. 1976); Illinois: ILL. CONST. art. 9, §4(b); ILL. ANN. STAT. ch. 120, §§501(a)(1), 501(a)(3) (Smith-Hurd Supp. 1977); Indiana: IND. CODE ANN. §6-1.1-4-13 (Burns Repl. 1978); Iowa: IOWA CODE ANN. §§384.1, 441.21, .22 (West Repl. 1976, Supp. 1978); Kentucky: KY. CONST. §172A; KY. REV. STAT. ANN. §§132.010, .190 to .200 (Baldwin 1976); Louisiana: LA. CONST. art. VII, §18(c); LA. REV. STAT. ANN. §§47.2301 to .2309 (West. Supp. 1977); Maine: ME. CONST. art. IX, §8; ME. REV. STAT. tit. 36, §§1101 to 1118 (Supp. 1978); Maryland: MD. CONST. art. 15, art. 43; MD. ANN. CODE art. 81, §19(b) (Repl. 1975, Supp. 1978); Massachusetts: MASS. CONST. art. XCIX; MASS. ANN. LAWS: ch. 61A, §§1 to 24 (Michie/Law. Co-op Supp. 1977); Michigan: MICH. COMP. LAWS §§554.701-.719 (MICH. STAT. ANN. §§26.1287(1) to 1287(19) (Supp. 1976)); Minnesota: MINN. STAT. ANN. §§273.111, .112 (West. Supp. 1978); Missouri: MO. ANN. STAT. §§137.017 to .026 (Vernon Supp. 1978); Montana: MONT. REV. CODES ANN. §§73-512, 74-56, 84-401, 429.12, 437.1 to .17 (1974, Supp. 1976); Nebraska: NEB. CONST. art. 8, §1; NEB. REV. STAT. §§77-1343 to 1348 (Repl. 1976); Nevada: NEV. REV. STAT. §§361.325; New Hampshire: N.H. CONST. art. 5-B, N.H. REV. STAT. ANN. §§79A:1 to :14 (current use taxation), :15 to :21 (discretionary easements) (Supp. 1977); New Jersey: N.J. CONST. art. 8, §1(1); N.J. STAT. ANN. §§54:4-23.1 to .23 (West Supp. 1978); New Mexico: N.M. CONST. art. VIII, §1; N.M. STAT. ANN. §72-29-9 (Supp. 1975); New York: N.Y. AGRIC. & MKTS. LAW §§300-307 (land in agricultural districts) (McKinney Repl. 1972, Supp. 1978); North Carolina: N.C. GEN. STAT. §§105-277.2 to .7 (Supp. 1977); North Dakota: N.D. CENT. CODE §57-02-27 (Supp. 1977); Ohio: OHIO CONST. art. II, §36 (1912, amended 1974); OHIO REV. CODE ANN. §§5713.30 to .38 (Page Supp. 1977); Oklahoma: OKLA. CONST. art. X, §8 (1907, amended 1972); OKLA. STAT. ANN. tit. 68, §2427 (West Supp. 1977); Oregon: OR. REV. STAT. §§308.345 to .403, 215.203 to .263 (Repl. 1977, Repl. 1978); Pennsylvania: PA. CONST. art. 8, §2; PA. STAT. ANN. tit. 16, §§11941-11947; tit. 72, §§5490.1 to .13 (Purdon Supp. 1977); Rhode Island: R.I. GEN LAWS §§44-27-1 to 6, 44-5-12, 44-5-39 to 41 (Supp. 1977); South Carolina: S.C. CODE §§65-1605.1 to .2 (Michie Supp. 1975) *as amended* by Act 750, 1976 S.C. Acts; South Dakota: S.D. CONST.

Acquisition of Interests in Land

State programs which rely on agricultural districting, regulations, and tax incentives have the advantage of not requiring public funds except that the latter may reduce revenues or result in a shift of tax burdens to other landowners in the taxing jurisdiction.[94] They do not by themselves necessarily assure that specific areas will be preserved, partly because of the taking issue and partly because they seek only to create incentives to keep farmers farming. In an effort to secure more effective control over the conversion of agricultural lands, state governments might seek to acquire less-than-fee or fee simple interests in land.

(1) Development Rights Programs—One approach, which has been adopted in at least five states,[95] is to acquire development rights in eligible agricultural land. By acquiring such rights through paying the

art. VIII, §15, S.D. COMPILED LAWS ANN. §§10-6-31 to 33.4 (Supp. 1978); Tennessee: TENN. CODE ANN. §§67-650 to 658 (Repl. 1976, Supp. 1977); Texas: TEX. CONST. art. VIII, §1-d (Supp. 1978); Utah: UTAH CONST. art. XIII, §3; UTAH CODE ANN. §§59-5-87 to 105 (Repl. 1953, Supp. 1977); Vermont: VT. STAT. ANN. tit. 24, §2741 (Supp. 1977); Virginia: VA. CONST. art. X, §2; VA. CODE §§58-769.4 to .15:1 (Repl. 1954, Supp. 1978); Washington: WASH. REV. CODE §84-34-010 (Supp. 1977); West Virginia: W. VA. CODE §11-3-1 (Repl. 1974, Supp. 1978); Wisconsin: WIS. STAT. ANN. §15.135(3), 71.09(11), 91.01 to 91.78 (1977); Wyoming: WYO. STAT. §§39-2-103 (1976).

88. KAN. CONST. art. 11, §12; WIS. CONST. art. 8, §1.

89. UNTAXING OPEN SPACE (1976), *supra* note 3; M. LAPPING, et al., *supra* note 4; C. ROE, *supra* note 4; Atkinson, *The Effectiveness of Differential Assessment of Agricultural and Open Space Land,* 36 AMER. J. ECON. SOC. 197 (1977); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands,* 42 MO. L. REV. 369 (1977); Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal,* 25 KAN. L. REV. 215 (1977); T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE ASSESSMENT OF FARM AND OPEN SPACE LAND (1974); R. GLOUDEMANS, USE VALUE FARMLAND ASSESSMENTS: THEORY PRACTICE, IMPACT (1974); Comment, *Preferential Assessment of Agricultural Property in South Dakota,* 22 S.D.L. REV. 632 (1977).

90. *See* text accompanying notes 40-42, *supra.*

91. Oregon's Inheritance Tax Statute specifies that "Interests in real property passing by reason of death that had received special assessment as farm use land under subsection (1) of ORS 308.370 shall be valued at its (sic) value for farm use . . ." OR. REV. STAT. §118.155 (Repl. 1975).

92. N.H. REV. STAT. ANN. §79 n. 7 (Equity Supp. 1975).

93. CONN. GEN. STAT. §12-504a (Supp. 1977); MASS. ANN. LAWS ch. 61A, §12 (Michie/Law Co-op, Supp. 1977).

94. *See* UNTAXING OPEN SPACE, *supra* note 3, at 6-8, 80-99.

95. Maryland: MD ANN. CODE art. 2, §2-503 to 2-515 (Repl. 1975, Supp. 1978); New York: N.Y. GEN MUN. LAW (McKinney) §247, used by Suffolk County as the Authorization for Local Law No. 19, Local Law Relating to the Acquisition of Development Rights on Agricultural Lands, Suffolk County, N.Y. (1974); New Jersey: N.J. STAT. ANN. §4:1B-1 to 4:1B-15 (Supp. 1978); (West Supp. 1978); Massachusetts: MASS. GEN. LAWS. ANN. ch. 132A §§11A-11D (West Supp. 1978); Connecticut: Public Act 78-232 (West Comm. Legis. Serv. 1978); *see also,* WALL ST. J., Dec. 2, 1977, at 27, col. 4; Klein, *Preserving Farmland on Long Island,* ENVT'L COM. 11 (Jan. 1978).

landowner the difference between the fair market value and the agricultural use value of the land, the governmental agency gets a legal right to prevent the owner from converting his land to an impermissible nonagricultural use. The owner receives just compensation and therefore cannot successfully raise a taking claim.

Suffolk County, New York has adopted a program[96] under which farmers were invited to submit offers of sale of development rights. Owners of 17,949 acres responded at the total offer price of $116.5 million.[97] After considerable opposition and an unsuccessful court challenge a bond issue for $21 million was approved for the purchase of rights on 3,883 acres.[98] Starting in September, 1977, owners of twenty-two parcels of land agreed to accept the county's offer of about $5.6 million for development rights in the Town of Riverhead.[99]

Building on the recommendations of the Blueprint Commission on the Future of New Jersey Agriculture,[100] the New Jersey legislature enacted a $5 million dollar experimental program authorizing the Department of Agriculture and Environmental Protection to acquire development rights on selected farms. The Departments selected five townships in Burlington County, and after drafting regulations, easement documents, and guidelines for appraisals the program began in May, 1977.[101] Offers on approximately 18,600 acres were received.[102] At the time of writing, these are being evaluated.

The Maryland law, which became effective on July 1, 1977,[103] authorizes the Maryland Agricultural Land Preservation Foundation to acquire development rights on lands that are located in agricultural districts created pursuant to the act. Funds for acquisition are provided separately through the state appropriations process.[104] Landowners may make offers of sale which must then be reviewed by a county agricultural advisory board and approved by the county in which the land is located.[105] Landowners and the Foundation

96. *See* Bryant & Conklin, *New Farmland and Preservation Programs in New York,* 41 J. AM. INST. PLANNERS 340 (1974); Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment,* 26 DE PAUL L. REV. 447 (1977).

97. SAVING FARMLAND, *supra* note 4, at 149.

98. *Id. See also* WALL ST. J., *supra* note 95.

99. WALL ST. J., *supra* note 95. *See also,* Klein, *supra* note 95, at 11-13.

100. *See* REPORT OF THE BLUEPRINT COMMISSION OF THE FUTURE OF NEW JERSEY AGRICULTURE (1973).

101. SAVING FARMLAND, *supra* note 4, at 152-162.

102. WALL ST. J., *supra* note 95.

103. MD. ANN. CODE art. 2, § § 2-503 to 2-515 (Repl. 1975, Supp. 1978).

104. MD. ANN. CODE art. 2, § 2-505 (Repl. 1975, Supp. 1978).

105. MD. ANN. CODE art. 2, § 2-510(C) (Repl. 1975, Supp. 1978).

may agree to have payments made over a period of years, up to ten.[106] Rights may be terminated if approved by the county and if the owners buy them back at the current development value.[107] At the time of writing, no development rights had been purchased.

Connecticut passed a development rights statute on June 1, 1978 which authorized a five million dollar Agricultural Loans Preservation Pilot Program similar to New Jersey's, except that it is being administered across the state.

The brief experience with development rights purchase programs shows first, that landowners find the program sufficiently attractive to make them offer development rights, and second, that it is an expensive way to preserve significant amounts of agricultural land—at least in urban states like New Jersey and New York.

(2) Land Banking and Other Mechanisms for Acquiring the Fee Interest—Land banking, which has been used in several other countries,[108] received the *imprimatur* of the prestigious American Law Institute in 1976 when the ALI approved a Land Banking Article in its Model Land Development Code.[109] Several studies have advocated the technique as a means for providing for more orderly urban growth and, at the same time, controlling inflation of urban land prices.[110] The approach has considerable potential as a way to retard conversion of prime agricultural land. Serious constitutional, political, and financial hurdles must be surmounted, however, before the effectiveness of this approach can be tested.

Under appropriate state land banking legislation, a state agricultural land authority would be created with the power to acquire fee or less than fee interests in land by purchase, gift, or condemnation

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106. MD. ANN. CODE art. 2, § 510(J) (Repl. 1975, Supp. 1978).

107. MD. ANN. CODE art. 2, § § 514(C) to 514(F) (Repl. 1975, Supp. 1978).

108. *E.g.*, Canada, Australia, Sweden and Netherlands. *See*, A. STRONG, PLANNED URBAN ENVIRONMENTS (1971); SAVING FARMLAND, *supra* note 5, at 161-181; Passow, *Land Reserves and Teamwork in Planning Stockholm*, 36 J. AM. INST. PLAN. 179 (1970); S. KAMM, LAND BANKING (1970).

109. ALI MODEL LAND DEVELOPMENT CODE, ART. 6 (1976).

110. *See, e.g.*, F. BOSSELMAN, ALTERNATIVES TO URBAN SPRAWL: LEGAL GUIDELINES FOR GOVERNMENTAL ACTION (1968); ADVISORY COMM. ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA 152-61 (1968); C. HAAR, *Wanted: Two Federal Levers for Urban Land Use—Land Banks and Urbank*, HOUSE COMMITTEE ON BANKING AND CURRENCY, PAPERS SUBMITTED TO SUBCOMMITTEE ON HOUSING PANELS 727, 935 (1971); D. HEETER, TOWARD A MORE EFFECTIVE LAND USE GUIDANCE SYSTEM, Am. Soc'y. Plan. Off. REPT NO. 250 (1969); NATIONAL COMM. ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 251 (1960); NAT'L RESOURCES COMM., OUR CITIES: THEIR ROLE IN THE NATIONAL ECONOMY (1937); REPS, *The Future of American Planning: Requiem or Renaissance?*, 1967 PLANNING 47, 52.

pursuant to a general state agricultural lands preservation plan.[111] It could then manage the lands, lease them to farmers, or sell them to farmers subject to appropriate development right retention or restrictive covenants. Such a program has been in operation in Saskatchewan, Canada since 1972.[112] There the Land Bank Commission acquired 721,292 acres in the years 1972-1976 and leased 133,696 acres to local farmers.[113] In addition, the agricultural land authority may have the power to acquire land by preemption—in effect a statutory right of first refusal. Under this approach,[114] the authority would designate areas in which agricultural land sales would be subject to preemption. When notified of a contract of sale, the authority could exercise its right to purchase the land at the agreed sales price or if it thought the price was too high, at a judicially fixed price.

The very concept of large-scale government intervention in the purchase of agricultural lands seems inconsistent with traditional American attitudes toward land ownership—attitudes which favor private ownership. Also, the costs of acquisition of extensive land holdings would be so high that such a program might be unable to compete effectively with other demands on the public fisc. But these are essentially political issues which must be resolved by the voters if and when the need for preservation of agricultural land becomes sufficiently critical. The central legal issue confronting an agricultural land program is whether the power of eminent domain could be used for acquiring land for unspecified uses at some unprescribed future date. While decisions in the urban renewal area provide general support for the validity of such a use,[115] the only decision deciding specifically the constitutionality of a land banking program is *Commonwealth of Puerto Rico v. Rosso.*[116] There the Supreme Court of Puerto Rico sustained the Commonwealth's Land Banking

111. *See, e.g.,* ALI MODEL LAND DEVELOPMENT CODE § §6-101 and 6-103 (1976).

112. *See* Land Bank Act of 1972, Saskatchewan; Young, *The Saskatchewan Land Bank,* 40 SASK. L. REV. 1 (1975).

113. *See,* SAVING FARMLAND, *supra* note 4, at 167-171; FIFTH ANNUAL REPORT OF THE LAND BANK COMMISSION (1977).

114. In France, Companies for Land Planning and Rural Organization (Societés d'Aménagement Foncier et d'Etablissement Rural (SAFERs) have this power. *See,* Farm Law of 1960 (Law No. 60-808) (1960) J. O. *See,* SAVING FARMLAND, *supra* note 4, at 172-181.

115. *See, e.g.,* Berman v. Parker, 348 U.S. 26 (1954). *See also,* People of Puerto Rico v. Eastern Sugar Assoc., 156 F.2d 316 (1st Cir. 1946), *cert. denied, mem.* 329 U.S. 772 (1946) sustaining the Puerto Rican land reform program against a challenge that a taking for the purpose of redistribution to small landholders is not for a public purpose.

116. 95 P.R.R. 488 (1967), *appeal dismissed,* 393 U.S. 14 (1968). *See* Note, *Commonwealth of Puerto Rico v. Rosso: Land Banking and the Expanded Concept of Public Use,* 23 CASE W. L. REV. 897, 916-23 (1972).

Program against due process claims. While the *Rosso* case is not a definitive holding on the issue, recent holdings in other cases defining the limits of public use have been so expensive that it seems likely that a well-grounded and planned agricultural land preservation program would survive a challenge on due process grounds.[117]

CONCLUSION

In this survey of the causes of the conversion of farm land to nonagricultural use and techniques which have been used or proposed for stemming the loss of such land, several major themes emerge. *First,* the problem must be viewed not so much as one of losing farmlands as it is one of losing farmers to other occupations. Thus, government programs must be designed to keep or make farming a sufficiently attractive and profitable way of life to keep farmers farming. Land use controls are only one small—albeit essential—element of such programs. *Second,* agricultural lands policy must be formulated together with urban growth management and environmental protection policies by all levels of government. The states have the key role here because of their traditional responsibility for creating the basic norms and procedures for guiding urban development. Of course, the federal government has an important responsibility too, especially in the design and implementation of its environmental protection, housing and community development, and energy laws. But state and local governments will continue to possess significant power to regulate such activities. *Third,* the challenge is the greatest in the urban fringe areas where demand has driven land prices well above farm use values. It is here that farm land and its preservation costs the most, is often most politically unpopular, and raises the most serious constitutional questions.

Only a balanced approach using most or all of the tools described above—one which is neither too expensive to the public nor too harsh on owners of farm land—can be successful. Such an approach will require several changes in contemporary attitudes. *First,* farmers must be willing to accept a greater degree of governmental control over land conversion if they wish to reduce the shift from agricultural to other uses, especially in heavily urbanized states. *Second,* state governments will have to take the lead in identifying those farming areas which should be protected, and in providing the tools to do so. *Third,* the courts will find it necessary to rethink judicial doctrines relating to the "taking issue," land banking, and tools such

117. ALI MODEL LAND DEVELOPMENT CODE §6-101 (1976).

as transferable development rights. *Fourth,* environmental protection laws must be administered with an eye to whether they encourage or discourage farming. *Finally,* taxpayers will be called upon more and more frequently to pay for the acquisition of fee and less-than-fee interests in critically important farm lands. In short, the goal of preserving prime agricultural land by keeping farmers farming presents a challenge that will test our country's political insight, legal creativity, and ability to pay.