Helping Farmers and Saving Farmland

by

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Originally published in the 37 OKLAHOMA LAW REVIEW
37 OKLA. L.R. 31 (1984)

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The Problem

Each week the United States loses 35,000 acres of agricultural land to other uses.[1] The United States Soil Conservation Service has estimated that between 1965 and 1975 approximately one million acres of Class I to Class III soils, those best suited for agriculture, were urbanized each year.[2] The loss of farmland to urban uses is permanent and cumulative. This loss raises the cost of farming and increases food costs to consumers as it becomes necessary to bring marginal land into production.[3] Marginal land, by definition, is land less well suited to agricultural uses; thus its use necessitates a greater investment to develop than does prime farmland.[4]

Much of the country's prime agricultural land is located near urban centers.[5] The loss of prime agricultural land to other uses is usually symptomatic of urban sprawl or poorly regulated urban development. The type of development normally associated with urban sprawl not only reduces farmland and increases the costs of farming and farm products, it also usually increases municipal costs[6] and reduces the urban amenities associated with "green belts" close to population centers.

Conserving agricultural land close to urban centers makes sense. It makes planning sense, it makes environmental sense, and it makes economic sense. Not only does farmland offer city residents a pleasing

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1. CONSERVING THE NATION'S FARMLAND, NORTHEAST-MIDWEST INST. 1 (May 1979); HOUSE COMM. ON AGRICULTURE, REPORT ON AGRICULTURAL LAND RETENTION ACT, H.R. NO. 1900, 95th Cong., 2d Sess. 7 (1978); J. BELDEN, G. EDWARDS, C. GUYER & L. WEBB, NEW DIRECTIONS IN FARM, LAND AND FOOD POLICIES 10 (1979) [hereinafter cited as BELDEN]

2. Keene, *A Review of Governmental Policies and Techniques for Keeping Farmers Farming*, 19 NAT. RES. J. 119 & n.1 (1979).

3. CONSERVING THE NATION'S FARMLAND, *supra* note 1, at 1.

4. W. COCHRANE & M. RYAN, AMERICAN FARM POLICY 5 (1976). The authors noted that "[I]n physical terms, there was a decline in the efficiency of producing digestible energy through crops over the period 1948-1973." *See* BELDEN, *supra* note 1 (article notes increasing artificial soil enrichment costs); *Hearing on H.B. 5882 Before the Subcomm. on Family Farms and Special Projects*, 94th Cong., 1st Sess. (1977) (testimony of P. Huessy, Special Assistant for Congressional Affairs, the Environmental Fund).

5. CONSERVING THE NATION'S FARMLAND, *supra* note 1.

6. Municipal costs increase as cities or townships must supply municipal services, e.g., extend water and sewer lines, improve roadways, or increase school capacities. *See, e.g.*, Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), and the issues discussed therein.

vista and open space to escape from the congestion of urban living, it is the basic resource for the most critical industry in the United States. The "farmette" or the large lot cut out of a producing farm is synonymous with bad urban planning. Sprawl or scatter-shot development is wasteful, both from the perspective of the municipality that must provide services to far-flung residences and from the perspective of farmers interested in farming the best land available. The highest and best use of prime farmland is as farmland.[7]

The cost of providing municipal services is only one cost of ignoring the value of farmland close to the cities. There is also the more general cost that the elimination of such farmland entails, that is, the increased cost of producing food. Most of the energy use in farm production occurs off the farm in processing and transporting food from the farm to the table.[8] As farmland gets converted to other uses it becomes less profitable for farmers to continue to farm,[9] and as more farms are converted to urban uses it becomes less profitable for the supporting industries to remain. As they leave, jobs leave and access to locally produced food is diminished.

As an example, in 1979 the price of the broccoli consumed by New Yorkers reflected the cost of close to one million gallons of fuel that was needed to transport it across the country.[10] Six cents out of every dime we spend on food goes to the cost of transportation.[11] That cost could be reduced if more food was produced close to the markets, that is, if more food were produced closer to cities. In Pennsylvania, the leading agricultural producer in the Northeast, more than 70% of the food consumed is imported at a cost of $8.6 billion,[12] with transportation costs to consumers of nearly $890,000 per day.[13]

The costs of not conserving the farmland that is close to urban areas are reflected in direct costs to urban residents who must pay for the long-distance transport of food and for the increased municipal costs associated with urban sprawl. Urban residents must also pay the indirect costs associated with the loss of rural amenities, farm-related jobs, increased congestion, and with increased demand for municipal

7. This is reflected, for example, in the requirement in the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1265(20) (1982) that companies mining coal under prime farmland return it to its pre-mining capabilities. Whether such a standard is possible to meet is still a matter of some controversy.

8. Data from U.S. Dep't of Energy cited in RODALE PRESS, THE CORNUCOPIA PROJECT: ORGANIC PATHS TO FOOD SECURITY 26 (1980).

9. *See* BELDEN, *supra* note 1. The recent growth in "right to farm" legislation indicates one legislative response to the high incidence of one cost, the nuisance suit brought against farmers by new rural residents. *See infra* notes 170-171.

10. THE CORNUCOPIA PROJECT, *supra* note 8, at 29.

11. *Id.*

12. THE CORNUCOPIA PROJECT, THE PENNSYLVANIA FOOD SYSTEM: PLANNING FOR REGENERATION 6 (1982).

13. *Id.* at 3.

services. Viewing adjacent farmland as merely the area into which new development will be pushed reduces the incentive for conscientious planning that takes into account all of the needs and resources of a particular area.

Farmers with land close to metropolitan areas or in the path of development cannot be faulted for converting their land to other than agricultural uses. The gap between the exchange value of their land if it remains in agriculture and the exchange value if it is available for conversion to urban uses is often stunningly wide.[14] Moreover, the very forces creating the pressures for farmers to sell their land often motivate farmers to cease farming and thus cut their immediate costs in anticipation of sales that may never occur. Once farmers stop making the investments necessary to keep their land in agricultural production, the costs of returning that land to agriculture, if development does not occur, are often prohibitive.[15] The pressure for conversion is especially great in areas close to cities because that is where the demand for land for agricultural uses is lowest when compared to the demand for land for urban uses. There is little pressure for conversion in mainly rural areas, and land in those areas stays largely in the farm real estate markets.

The conversion of farmland also indicates that farmers at the urban fringe are more likely to sell their land for urban development than to hold it as retirement security. A land-use policy designed to keep urban fringe land in agriculture must not only insulate farmers from the pressure leading them to convert their lands to nonagricultural uses,[16] but it must also afford farmers the opportunity to protect the retirement fund represented by the value of their land.

One commentator has identified four interlocking factors that determine a farmer's receptivity to an offer from a nonfarm buyer:

> (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

14. This is reflected in the case of Suffolk County, New York, where the gap was close to $6,000 an acre. The proof of the disparity in values is the plethora of use-value tax plans that have been adopted. See text at Part I and accompanying notes.

15. Berry & Streiker, *An Economic Analysis of Transfer of Development Rights*, 17 NAT. RES. J. 55, 56 (1977).

16. Keene, *supra* note 2, at 120.

> 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 or equipment and services.[17]

Clearly, a land-use policy alone cannot address all of these issues,[18] but just as clearly, a land-use policy that has as its objective the preservation of farmland and a farm economy can affect some of the economic factors that drive farmers out of the industry and can reduce some of the secondary factors that make farming unattractive. That a land-use policy alone cannot solve all the problems related to the conversion of farmland is no reason to ignore the significance such policies can have.

This article will examine one technique of land preservation, the transfer of development rights (TDR) as a method for alleviating the pressures on farmers to convert their land to nonagricultural uses at the urban fringe. It is not suggested as a panacea, and it will be discussed as one technique among others, but it is one approach that explicitly recognizes the economic necessities involved in maintaining farming as a competitive industry. The success of a TDR program is based upon the reconciliation of two traditionally contradictory goals: the preservation of large blocks of agricultural land and the generation of developmental demand. Before the necessity of considering TDRs can be established, a brief look at other farmland preservation techniques is in order. Only by understanding their failure will the needs they failed to address be made clear.

I. *Protecting Farmers and Farmland: Some Nonresponsive Answers*

The transfer of development rights is just one of many techniques that states and localities have tried to use to protect valuable natural or historic assets. Another method especially favored has been preferential or use-value assessments of farmland. Forty-seven states have enacted some form of differential assessments for farmland.[19] These statutes were enacted to relieve some of the financial burden imposed on farmers through state or local taxing agencies.[20] In many cases,

17. *Id.*

18. A land-use policy cannot affect demographics, and other policies affecting land use, such as the federal agricultural price support system and federal water and air pollution laws, are beyond the control of localities.

19. Keene, *supra* note 2, at n.87.

20. REGIONAL SCIENCE RES. INST., UNTAXING OPEN SPACE: AN EVALUATION OF THE EFFECTIVENESS OF DIFFERENTIAL ASSESSMENT OF FARMS AND OPEN SPACE 23 (1976).

especially at the urban fringe, the tax burden imposed on farmers where their land is assessed on the same basis as other developable land can exceed farm income.[21] While the various plans differ in their particulars, the underlying premise is that land kept in farming should be taxed at its use value, rather than at its market value, because that basis actually reflects the present value of the asset to the farmer. Many plans require the farmer to enter into some form of contractual arrangement with the state that prevents the farmer from converting the land within a particular time period and triggers a financial penalty if the farmer does sell or develop the land.[22]

Some states apply a conveyance tax to land that has been receiving differential assessment if it is sold for nonagricultural uses.[23] Others reimpose the deferred taxes as well as assessing an additional penalty.[24] The Williamson Act,[25] the California plan that has received much attention, is an indication that, at least in California, open-space taxation alone has failed to protect land at the urban fringe because the penalty the state imposes if land is taken out of the Act is insufficient to deter development. The profits from conversion are just too great.[26] An observer has noted that the effect of the Act has been to allow speculators to hold the land cheaply and then to pass the penalty along to the ultimate consumers of the development.[27]

Another use of the taxing tool is found in Vermont, where the state has enacted what amounts to a tax on the unearned increment of land that is purchased and resold within a statutorily prescribed period.[28]

21. Keene, *supra* note 2, at 137. This is probably most dramatic in expanding metropolitan areas. For example, in Maryland, land in the rural areas between Clarksburg and Damascus has a value of $1,000/acre while land in the Gaithersburg, Rockville, and Potomac areas has a value ranging from $10,000 to $100,000 an acre. Thus the tax burden increases according to proximity to urban areas.

22. There are three basic types of systems for property tax relief through use-value assessments. The first is a simple "preferential assessment" in which agricultural land is assessed at its current use-value. No restrictions are placed on whose land is eligible and under what conditions. The second basic system is "deferred taxation" in which land is assessed at its use-value, but if the land is developed the tax relief provided must be repaid to the relevant taxing agency. The third basic type is the "restrictive agreement" in which the landowner signs some form of contract restricting the land to agricultural use for some period of time. *See, e.g.*, MICH. COMP. LAWS §§ 554.701 to .719 (1970).

23. *See, e.g.*, New Hampshire, N.H. REV. STAT. ANN. § 79-A:7 (Supp. 1983).

24. *See, e.g.*, Massachusetts, MASS. ANN. LAWS, ch. 61A, § 7 (Michie/Law. Co-op. 1978).

25. CAL. GOV'T CODE §§ 51200-51295 (West 1983 & Supp. 1984).

26. *Use-Value Assessment and Land Conservation*, 12-14 (California Agriculture, U.C. Division of Agricultural Sciences) (Mar. 1977) *reprinted in* BELDEN, *supra* note 1, at 706.

27. *Id. But see Williamson Open Space Act: Special Hearing Before the California Assembly Comm. on Planning & Land Use* 73 (Nov. 19, 1971) (testimony of J. Janelli, California Farm Bureau Federation).

28. VT. STAT. ANN. tit. 32, §§ 10001-10010 (1981 & Supp. 1983).

The rate of the tax declines over the period the land is held and expires after seven years.

Two other techniques that have gained some currency are the use of exclusive agricultural zoning and the creation of agricultural districts.[29] The premise behind both plans is that for farming to be a viable industry, large amounts of land are required and a supporting structure of labor, supplies, and services is necessary. By deciding which land to set off exclusively for agricultural purposes, a community can regulate and minimize the negative externalities generated or absorbed by agriculture.

Under the New York system a farmer or group of farmers owning in total more than five hundred acres may petition the county government to create an agricultural district.[30] After a number of administrative steps, including public meetings and ultimate approval by the State Agricultural Resources Commission, the Secretary of State, and the Commissioner of Environmental Conservation, an agricultural district may be created restricting economic activity within the district to farming and closely related activities.[31] The Commissioner of Environmental Conservation may create agricultural districts of at least two thousand acres where the area is judged to constitute unique and irreplaceable agricultural land and where the agricultural use is consistent with the state's plans.[32] Although this technique may protect large areas of agricultural land, its efficacy in preserving agricultural land at the urban fringe is not yet clear.

California's Williamson Act[33] also permits landowners as individuals or in groups to petition the county planning commission and the Local Agency Formation Commission for the designation of an area as an agricultural preserve.[34] The Act requires that agricultural preserves be at least one hundred acres, but allows individual counties to reduce the size requirement if they determine that this is necessary to protect the land under consideration.[35] While the failure of the Williamson Act to preserve "urban-agricultural" land is well known,[36] it is notable that of the fifteen states producing 86% of this country's wheat, California is the only one with a farmland preservation program, weak though it may be.[37]

29. Keene, *supra* note 2, 131-7 & n.61.
30. N.Y. AGRIC. & MKTS. LAW §§ 300-309 (McKinney 1972 & Supp. 1984).
31. *Id.* § 303(5).
32. *Id.* § 304.
33. CAL. GOV'T CODE §§ 51200-51295 (West 1983 & Supp. 1984).
34. *Id.* § 51233.
35. *Id.* § 51230.
36. *See supra* text accompanying notes 24-26. *See also* L. WEBB, PROTECTING THE FAMILY FARM/PRESERVING FARMLAND 22 (1978).
37. *American Farmland—The Quiet Loss,* in Washtenaw County Soil Conservation District

New York is among six states that have adopted enabling legislation that permits state or local agencies to purchase less than fee interests in farmland as a way of preserving valuable agricultural resources.[38] Of these purchase-of-development-rights programs, the attempt to save farmland in New York's Suffolk County has gained the widest attention. Suffolk County is an area of about 600,000 acres on central and eastern Long Island. Of the acreage in the county about 55,000 acres are devoted to farming. Only about 10% of Suffolk County's population of 1.24 million lives within close proximity to the rural areas of the county.[39]

Agriculture has been an important industry in Suffolk County, but over the past two decades farmland decreased by 50%. The asking price for developable farmland in 1977 averaged around $7,500 per acre compared to its estimated value as agricultural land of $1,500 per acre.[40] Despite the high market value, farmland in the county had been assessed, de facto, at its use value. This resulted in a net annual saving per acre of close to $325 for holders of farm real estate.[41] Despite this tax break, well over half of the farmland in the county is held by nonfarmers.[42]

Clearly, the tax incentive in Suffolk County was not enough to keep land in farmers' hands. The need for a more effective program was recognized in the passage of Local Law 19.[43] In 1979 this Act enabled the county to make an inventory of the agricultural lands to be preserved and to begin work on a $21 million bond issue to finance the purchase of development rights on the lands selected. Farmers in the county were invited to submit offers to sell their development rights. Owners of 17,949 acres responded to the invitation, and the total cost to the county for the development rights offered came to $116.5 million.[44]

In view of the financial limitations of the bond issue, the county finally settled on 3,883 acres and had to content itself with plans to

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Newsletter, 6 (1979); Testimony of P. Huessy, *Hearing, supra* note 4.

38. CONN. GEN. STAT. ANN. §§ 22a-26 (West 1975); MD. CODE ANN. § 2-503 to -515 (1979); MASS. ANN. LAWS ch. 132A, § 11A (Michie/Law. Co-op 1981); N.J. STAT. ANN. § 4:1B-1 to 4:1B-15 (West Supp. 1984); N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1983-84); Kings County in Washington State, Local Ord. 3064, which set off agricultural districts and initiated a PDR program. There the local government has also started a local bulk-marketing program to support local products.

39. Lesher & Eiler, *An Assessment of Suffolk County's Farmland Preservation Program*, [illegible] AM. J. AGRIC. ECON. 140 (1978).

40. *Id.* at 141.

41. *Id.*

42. *Id.*

43. This ordinance was passed under the powers created by N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1984).

44. Lesher & Eiler, *supra* note 39, at 141.

raise an additional $90 million to purchase the development rights on a total of 15,000 acres.[45]

The express goals of the program when it was presented were to preserve a viable agricultural economy, to maintain an aesthetically pleasing rural environment, and to save local tax money by limiting the extension of municipal services.[46] In view of the figures just recited, it is uncertain whether any of these goals will be accomplished. Even when the program is fully realized, the purchase of development rights will preserve only about one quarter of the land presently in agricultural production and will do so only at a very high cost to the residents of the county. Additionally, since the acreage to be saved is that farthest from present population centers, the benefits of a pleasing rural environment will redound more favorably to some residents than to others, spreading the cost, in at least one sense, unevenly among the taxpayers of Suffolk County. One commentator has noted that given the lesson of Suffolk County, "one might very well question whether such a policy will be useful to other areas worried about controlling urban fringe growth."[47]

Land banking is a technique for preserving farmland that is little used in this county,[48] although a court in Puerto Rico[49] has indicated that it is a proper governmental tool for the preservation of sensitive lands. Canada has experimented with the technique in Saskatchewan[50] by giving the province a right of first refusal on agricultural land sold within the province.[51] Such land, if purchased by the province, is leased back to farmers who fall into prescribed economic classes. It is unlikely that programs of this nature will gain much currency with communities interested in preserving urban-fringe agricultural land. The costs of acquiring a fee interest in real estate, given the costs of acquiring only the development rights,[52] would likely prove prohibitive.

II. *Transferable Development Rights in Theory and in Practice*

The transfer of development rights as a program for preserving scarce

45. *Id.*

46. *Id.*

47. *Id.* at 143.

48. *See* A.L.I. MODEL LAND DEVELOPMENT CODE, art. 6, § 221 (1975).

49. Commonwealth of Puerto Rico v. Rosso, 95 P.R.R. 488 (1967), *app. dismissed*, 393 U.S. 14 (1968).

50. Saskatchewan Land Bank Act of 1972; SASK. REV. STAT. ch. L-2 §§ 1-70 (1978).

51. SASK. REV. STAT. ch. L-2, § 9 (1978); SASK. REV. STAT. O-2, § 1-65 (1978).

52. This assumes the cost to the government is "fair market value" and not some lower amount. The costs to Suffolk County in acquiring the development rights is instructive in this regard.

agricultural resources has received far more attention than practical application.[53] Many reasons have been advanced for the failure of such programs to take hold, ranging from "intellectual xenophobia"[54] to serious questions of the constitutional validity of the technique.[55]

Transfer of development rights programs share much with the other programs just described. Like the tax programs, TDR attempts to alleviate some of the economic pressures on farmers who choose to keep their land in agricultural production. Like the agricultural zoning and districting plans, TDR attempts to minimize the externalities generated by agricultural uses and to prevent urban uses from generating secondary externalities that prevent farming from being a viable urban-fringe land use. Like purchase-of-development-rights programs, TDR is a means of capturing some of the economic value of land for farmers (or the owners of farmland) without developing the land or taking it out of agricultural production. Finally, like all of the other programs, TDR seeks to preserve some rural amenities for urban dwellers. One writer has concluded that "when compared along three major criteria, cost to the public, effectiveness in preserving valuable landscapes or landmarks, and the issue of taking private property without compensation, transferable development rights (TDRs) fare very well on paper."[56]

There are many variants of the TDR concept; this article will focus on three: the Puerto Rico plan developed by Professor Costonis,[57] the New Jersey proposals put together by the Rutgers group,[58] and the New York landmark preservation program.[59] While there are many other proposals, and the three mentioned above are not all concerned with the preservation of agricultural land on the urban fringe, together

53. *See* J. ROSE, THE TRANSFER OF DEVELOPMENT RIGHTS (1975). Perhaps the failure of Professor Costonis to sell the "Chicago Plan" is the premiere example, although it is of the landmark rather than open space genre.

54. Rose, *Psychological, Legal and Administrative Problems of the Proposal to use the Transfer of Development Rights as a Technique to Preserve Open Space*, in ROSE, *supra* note 53, at 293, 294.

55. *See, e.g.*, Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975). This note also focuses on landmark preservation, especially the New York program.

56. Berry & Streiker, *supra* note 15, at 550. *Cf.* Merriam, *Making TDR Work*, 56 N.C. L. REV. 77, 103-06 (1978).

57. J. COSTONIS & R. DEVOY, THE PUERTO RICAN PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHTS TRANSFER (1975) [hereinafter cited as COSTONIS & DEVOY].

58. Binetsky, Chavooshian, Ginman, Hall, Jager, Nieswand, Norman, Reock, Rose, *Legislative Proposal: The Open Space Preservation Act* [hereinafter cited as Binketsky, Chavooshian] in ROSE, *supra* note 53, at 178-85.

59. N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 (1976). The New York Plan will be focused upon largely because of the litigation it has spawned. It will be considered in the context of the taking issue.

they contain the germ of a program that could be adapted to the preservation of valuable urban agricultural land. Most of the programs that have been tried reflect in some way the core of ideas contained in the above plans.

Like the purchase of development rights programs, TDR recognizes that development rights are separable from land ownership and form only one aspect of what is recognized as property.[60] As several commentators have noted, the legal antecedents for TDR are to be found in the early transportation acts, the mill-dam acts, laws regulating drainage and irrigation, and in oil and gas regulation.[61] Each of these acts regulates preferred uses, strictly constrains private uses, or shifts entitlements to a common pool with correlative shares allocated according to some measure of development potential.[62]

While in urban areas transferable development rights may be looked upon as a novel land-planning device, in farm country the notion that the productive capacity of one area may be severed and transferred to another area is at least as old as the Agricultural Adjustment Act.[63] Depending on the crop being farmed, acreage allotments have traditionally been transferable between farms in the same county or administrative area under that Act.[64] If one farmer wants to farm tobacco, for example, and does not have the required acreage allotment, then that farmer must either qualify for an allotment under the Act or must purchase an existing allotment from a farmer in the same area.[65]

One crop that farmers, especially those in developing areas, hope to harvest is the appreciated nonfarm development value of their holdings. Holders of non-farmland in developing areas also hope to cash in on the development potential of their land. TDRs function much like the transfer of acreage allotments between these two holders of development potential. Trade-offs must be negotiated between the two parties in order that the holder of the nonfarmland may develop his property. Like crops, development potential becomes merely another cash-valued commodity.[66]

60. *See, e.g.*, ROSE, *supra* note 53, at 4-24.

61. *See, e.g.*, Carmichael, *Early America Precedents: Transferable Development Rights As a Basis for Land Use Controls*, in ROSE, *supra* note 53, at 27-74. The discussion in Professor Carmichael's article is mirrored in other comments on the legal basis for TDR. I have consciously chosen not to expand on the legal antecedents of TDR because of its treatment elsewhere.

62. I have chosen this rather abstract characterization as a summary of the concepts referred to *supra* text accompanying note 58 and to reflect Professor Sax's characterization of property in *Taking and The Police Power*, 74 YALE L.J. 36 (1964).

63. 7 U.S.C §§ 1281-1393 (1982).

64. 7 U.S.C. §§ 1305, 1344(b) (1982).

65. 7 U.S.C. §§ 1314, 1316 (1982).

66. Unlike crops, however, the right to develop a particular tract of land is subject to public

The basic transfer-of-development rights scheme recognizes that land has at least two values: its current use value and its development value. From this premise most TDR plans allow the development potential to be transferred to another parcel of land, thereby extinguishing the right to develop the transferor site. The New Jersey scheme reduces the development rights to certificates that may be freely traded[67] or held by speculators. Other plans call for the rights to be purchased by the state or local agency and deposited in a "development rights bank" for resale to subsequent developers.[68] The filigree applied by commentators aside, the basic idea is simple.

The Puerto Rico and New Jersey Plans

The Puerto Rico plan proposed by Costonis and DeVoy is a variation of the Chicago plan first proposed by Professor Costonis for the protection of valuable architectural landmarks in Chicago.[69] It envisions four steps. The necessary first step is for planners to take an inventory of sensitive natural areas. Once the areas to be protected are defined, the planning board designates them as Protected Environmental Zones (PEZ) and restricts development in those areas through various regulations. Third, the owners of restricted parcels may appeal the PEZ designation and seek compensation up to a "reasonable beneficial value,"[70] or they may seek a variance to permit development, or they may negotiate some other form of settlement. The dollar value of the restricted development potential vests in the Puerto Rican Environmental Trust Fund. Fourth, the cost to the government of acquiring the development rights is to be recouped by selling them to developers. The developers may use the rights to build up to prescribed densities within designated transfer zones. In this plan the government plays a prominent role, and the transfer of rights between private landowners is not permitted.

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approval and is valueless until such approval is given. Also, the value for the rights to develop a particular tract of land is speculative until the public approval is given and a willing purchaser comes forward with plans to develop.

67. Binetsky, Chavooshian, *supra* note 58, at 182.

68. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972), *reprinted in* ROSE, *supra* note 53, at 109. *Cf.* The British Plan discussed in ROSE, *supra*.

69. COSTONIS & DEVOY, *supra* note 57.

70. Professor Costonis suggests this test as a way to ensure "fair" compensation by portraying possible profitable uses of land as a spectrum running from "zero intensity use" to "highest and best use unrestricted by public regulation" and arguing that courts should seek the middle ground. Costonis, *Fair Compensation and the Accommodation Power*, 75 COLUM. L. REV. 1021 (1975). I tend to agree with Professor Berger's reply in 76 COLUM. L. REV. 799 (1976), where he suggests that Professor Costonis has not really discovered something new, but that courts have been applying a test similar to "fair compensation" throughout the taking controversy.

The Puerto Rico plan is justified on many grounds. First, the architects of the plan maintain that the TDRs provide some compensation to the owners of restricted parcels even where the public designation of the parcels would not qualify the owners for compensation under traditional takings tests.[71] Second, the TDRs recoup for the public some of the value added to private land from public investment, and at the same time, temper the windfall/wipeout problem associated with public land-use decisions.[72] Finally, the plan charges the costs of negative externalities to the development process, exposing the social costs of development and making clear the costs of environmental protection—an argument for candor in the land-use business.[73]

The development of land within a designated PEZ need not be totally restricted. In making its land inventory, the planning board also decides whether there are residual uses to which the land could be put that would not jeopardize the environmental feature sought to be protected. Whether a restricted landowner receives any damages due to the restriction is decided through an administrative process that determines if the restrictiveness of the PEZ designation precludes all reasonable beneficial use of the property. If the land is totally restricted, then compensation or fee acquisition would be required. If the PEZ restrictions allow some residual use of the property, but not a reasonable beneficial use, then the hearing board will either grant a variance to allow development up to the reasonable beneficial use, or it will grant compensation to the landowner that reflects the difference in value between the land in its residual use and the land put to its reasonable beneficial use.[74]

If the board determines that compensation must be paid, then the commonwealth receives a conservation easement on the property, and the property has its assessed valuation for property tax purposes reduced accordingly. The restricted property owner thus receives the benefit of compensation, some residual use of the property, and property tax

71. COSTONIS & DEVOY, *supra* note 57, at 15.

72. *Id.* at 10.

73. *Id.*

74. Compensation is not measured on the premise that land can be put to its most speculative use. Before the board of appeals, the "reasonable beneficial use" is determined. For example, the most profitable use might be a hotel or any high-rise. An allowable use might be five single-family dwelling units. A reasonable beneficial use might be two single-family dwelling units. The PEZ residual use might be agriculture. Finally, there is zero intensity use. If the board had adjudged agriculture as the reasonable beneficial use, then the compensation claim would have been denied. If two dwelling units are reasonable, then the board gathers evidence on foregone market values. A variance could be granted if intensified land use would not be injurious to the PEZ goals. Otherwise, compensation would be paid in an amount reflecting the difference in the land's value under the respective uses.

relief.[75] Acquiring less than a fee interest protects the resource and protects the commonwealth from having to become an administrator of vast public lands or public lands that have the potential to attract illegal settlements.

The initial problem faced by the commonwealth is how it is to finance the purchase of development rights from the land that is in the PEZs. The plan proposes the establishment of an environmental trust fund to pay for the initial purchases, but it envisions a self-financing program emerging from the sale of development rights to those who want to build in the transfer districts.[76] Unlike most TDR plans, the Puerto Rico plan does not contemplate a one-for-one transfer of density allowances; rather, the plan requires the developer to purchase from the Land Administration the *economic value* of the development rights before being permitted to go ahead with construction. The value of the development rights obtained by the environmental trust fund is equal to the price of the conservation easement restricting land in the PEZ.[77] The key to making the developers purchase the development rights from the commonwealth is to ensure that there is an adequate economic incentive to do so.

The Puerto Rico plan requires that zoning regulations concerning allowable density be strictly adhered to and that where the zoning is permissive it be changed to more restrictive categories to create a market for development rights. If landowners perceive that they will be able to obtain permission to develop their land through a variance procedure or through rezoning, the mechanism for maintaining a market for development rights will be effectively circumvented. The plan also proposes to offer planning and design incentives in the form of development rights in order to encourage the development of a market for the rights. Such rights would include the right to

> construct more or larger buildings on the property. The right to position buildings differently on the property than is permitted in the basic regulations. The right to incorporate uses or activities otherwise not allowed. . . . The right to time priority ensuring expeditious processing of development applications and petitions. . . . The commitment [from the municipality or commonwealth] to provide adequate public facilities and services on schedule to accommodate the subject development. . . . The cooperation of the Land Administration in consolidating land through the use of the eminent domain power.[78]

75. COSTONIS & DEVOY, *supra* note 57, at 18-19.
76. *Id.* at 22-24.
77. *Id.* at 38.
78. *Id.* at 40.

In short, the plan views the needs of developers (and what they would be willing to purchase) more broadly than most other plans, but it also vests substantial authority and marketing power in a centralized planning agency. The prohibition on private transfers of development rights suggests a potential bottleneck in the development of a market for TDRs, especially since all pricing decisions are essentially reserved for the planning agency.

The New Jersey plan is a variation on the simple TDR scheme, but it is notable because it self-consciously attempts to keep the transfers in the private market and to minimize the role of government. The underlying goal is to achieve private economic equity and efficiency while also achieving public land-use goals.

This TDR plan obviates the need for differential taxation because the value of a parcel of land declines as its development potential is reduced. Put another way, the value of the land is based upon its relation either to the speculative real estate market or to the farm real estate market; the pressures and exchange values in each are different and the landowner is taxed in view of his market position.

The New Jersey plan works in three steps. First, the community decides upon the desired mix of land uses and the level of development. It prescribes by zoning ordinances which land is to remain undeveloped. The New Jersey proposal requires that parcels designated to be kept in open space be at least twenty-five acres in size and may include a mix of open space uses. Only land zoned exclusively for industrial or commercial use may not be designated open space.[79] Farmland may be included in the open space designation and farm buildings may be preserved in open space districts as nonconforming uses. Any enlargement of a nonconforming structure is subject to planning board review and approval. No variances are to be permitted in the open space zones except to protect the health or safety of the public.[80]

Second, development rights are allocated to the owners of the land to be preserved. Development rights certificates are allocated on the basis of the percentage that the landowner's property contributes to the total assessed value of all undeveloped land in the area. The planning board must then review the assessed value of all the property that is to receive development rights certificates. The review of the appraised value under this plan is to be done in special hearings conducted by the planning board to allow the restricted owners to compare the valuation of their property with other restricted property. A landowner who

79. Binetsky, Chavooshian, *supra* note 58, at 180-81.
80. *Id.* at 181.

objects to the assessment may appeal the decision of the planning board to the appropriate court.[81] The development right certificates are to be recorded by the county clerk in the same way that other real estate transactions are recorded.[82] When some development takes place for which development rights are required, the county clerk must be notified in order to cancel the development certificates.

Third, the landowners in the areas zoned for development who wish to develop their land more intensively than is permitted under the zoning regulations must purchase development rights on the open market from the holders of the development right certificates. Once the landowner purchases the requisite number of development rights for the type of development sought, a variance must be granted as of right.[83]

According to the plan outlined above, changes in the community's growth management policies could require the addition of development rights to the pool already established or require a change in the types of development rights offered.[84] What is explicit in these plans, unlike the land-use regulation techniques described earlier, is the express desire on the part of the local government or planning agency to spread the costs of regulation and eliminate or reduce the windfall/wipeout problems associated with land-use regulation or other government actions.[85]

Some Practical Effects of Severing Development Rights

In order for a TDR program to preserve farmland effectively at the urban fringe, it must contribute to the maintenance of a viable agricultural economy and reduce the economic incentives for farmers to leave the area or change occupations. Further, a land-use program that seeks to keep farmers farming must recognize that for farmers the development potential of their land, or its appreciation in value over the period for which they hold it, represents their retirement fund. The program must take those expectations into account.

Yet this need must not be overstated because the land will still retain a value as farmland that farmers will be able to realize upon their decision to cease farming. The value of land in the agricultural real estate market is not insubstantial,[86] although it is undeniably less than its value in the unrestricted speculative real estate market.

81. *Id.* at 182.

82. *Id.*

83. Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, in ROSE, *supra* note 53, at 186, 195.

84. *Id.*

85. Hagman, *Windfalls and Wipeouts*, in ROSE, *supra* note 53, at 265, 273.

86. The price of prime farmland varies from region to region depending on availability and potential use (e.g., hazelnuts versus corn), but the price can go as high as $7,000/acre for grain in the Upper Plains states. BELDEN, *supra* note 1, at 17-20.

Because there are so few actual TDR programs, there are few studies of the effects of these programs on the value of farmland severed from its development potential. In this regard, however, the experience in Suffolk County is instructive.

One of the main arguments for creation of the Suffolk County program was that the purchase of development rights would preserve an economically viable agricultural economy because it would reduce the price of farmland. Yet, one economic analysis of that program indicates that while the purchase of development rights gives the owners of farmland the economic value of the development potential, it does not reduce the costs of farmland as farmland, although it may stabilize the rents over time.[87]

What the study does indicate is that competition for agricultural resources will occur within the agricultural market rather than in markets for other more profitable uses.[88] Thus, while economic costs of farming may rise over time as the demand for land increases, they will not rise at the urban fringe out of proportion to the demand for farmland generally. Further, the farmer who owns the preserved acreage will be able to realize both the gains on the sale of the development potential and the appreciation of farmland as farmland.

Where the urban fringe farmland is owned by speculators and rented to farmers, the actual costs to farmers may be lower than if they owned the land.[89] This conclusion is based on the premise that the per-acre cash rents reflect the farmer's total land costs in the production process, but where the land is owned the land costs include the real estate taxes and other opportunity costs of keeping the land in agricultural production.

Thus, in Suffolk County where 60% of the farmland is held by "speculators," the average per-acre rent to farmers is $50.[90] Speculators hold the land and rent it at nominal rents in expectation of greater profit when the land is developed. But where the development potential is removed from the land, speculators are less willing to hold the land. The present farmer/renter is thus required to compete to purchase the land to continue farming.

If farmers are forced to purchase the land, their costs per acre rise to approximately $145 based on the agricultural value of $1,500 per

87. Lesher & Eiler, *supra* note 39, at 140, 141.

88. The costs for agricultural land in a situation where the development rights have been removed will still vary, but the pressures on costs for other more profitable uses will be removed. This also puts the pressure on farmers to succeed as farmers and not to count on development alone as a force that decreases their long-term risk of staying in the industry.

89. Lesher & Eiler, *supra* note 39, at 140-41.

90. *Id.*

acre and assuming opportunity cost of capital at 8% and real estate taxes of $25 per acre.[91] For renters, then, the effects of instituting a program severing development value from use value are initially higher rents but stabilized costs over the longer term. Farmers who are also farmland owners would not be subject to these initial dislocations since it is assumed that they would have internalized the opportunity costs of holding the land and would have been able to realize a gain on the sale of its development potential.

While the advocates of a TDR program may raise inflated claims about what a program can accomplish, especially during the political battle to get it enacted,[92] such claims should not obscure what a well-designed program can accomplish. As indicated above, a program like that proposed in New Jersey would help stabilize agricultural land costs and would help protect the investment expectations of owners of farmland, but it would probably not reduce the costs of farmland as farmland. In addition, a TDR program that operated in conjunction with and not as a substitute for comprehensive zoning and planning could substantially insulate farm uses from urban uses and minimize conflicts between the two. If a TDR program accomplished even these limited goals, the possibility of preserving urban-fringe agricultural land would be greatly enhanced.

Elements for a Successful Program

Planning and flexibility are the watchwords of a successful TDR program. This section will explore and describe the necessary components of a successful TDR program aimed at the preservation of agricultural lands within metropolitan areas. As in the New Jersey plan, the pricing of development rights is best left to the marketplace. Individual landowners or holders of development rights ought to be trusted to make the best deals for themselves,[93] but the local government must create the circumstances for a market to exist.

The local planning agency must first inventory the land necessary to support a continuing local agricultural industry and must fix the amount of developable land within its jurisdiction. In making this inventory the planning agency must be sensitive to the requirements of

91. *Id.*

92. *See, e.g.*, Shales, *Who Pays for Transfer of Development Rights*, in ROSE, *supra* note 53, at 330. This article, among others in the book, makes assorted claims like those made during the time Suffolk County's program was under consideration, e.g., lower costs of farmland, TDR programs are costless, that they will totally replace zoning, etc. Clearly, some of the claims are untenable.

93. This is admittedly a normative statement, but there is some indication that administrative difficulties increase as pricing mechanisms get more complex. *See* Merriam, *supra* note 56, at 116-17.

the agricultural infrastructure vital to agricultural production. If the agency errs and too little land is preserved, the residual agricultural land may be insufficient to support the suppliers of labor and services upon which the total agricultural economy in an area depends.[94] The land must also be preserved in parcels that are large enough to make it worthwhile to farm. What that size is, of course, will vary depending upon which crops form the basis of the local farm economy. Some provision must also be made to allow necessary uses on the farmland that is preserved.[95]

In determining the amount of land allowed to be developed, the agency must understand the existing and potential relationships between markets for residential, commercial, and industrial uses. A sophisticated understanding of the needs for these uses and their interrelationship will be reflected in the amount of land reserved for development and the number of development rights created.[96] The municipality should commit itself to making the types of capital investments necessary to promote development in a particular area. It is not enough to designate an area on the planning map as commercial; the capital infrastructure necessary to support a commercial zone must be put in place. The planning board must also ensure that the designation of zones will be such that the uses will be complementary as well as merely compatible. The municipality must include a variety of uses in the transfer district, each requiring or producing a different type of demand for development rights.[97]

In growing communities where development pressure is just beginning to be felt, the state's exclusionary zoning philosophy may require that the municipality provide for a variety of uses to avoid a challenge to the plan.[98] Like the New Jersey certificates, development rights should be allocated in a way that permits a submarket in the development rights to exist. In this way not only could a speculative market be created

94. Labor is a more flexible element of the input mix. In the United States only 25% of the people employed on farms are hired workers; the rest are farm operators or family workers. T. SCHULTZE, THE DISTRIBUTION OF FARM SUBSIDIES: WHO GETS THE BENEFITS? 7 (1971).

95. *See, e.g.*, Rose, *supra* note 83, at 189-90.

96. I have already discussed the need to preserve agricultural land on a district-wide scale rather than on a parcel by parcel basis. The number of rights allocated must be based on the amount of land to be saved and the potential (and existing) demand for various floor-space requirements. The correllation between the two needs must be at the forefront of the planner's mind. *See* Rose, *supra* note 83, at 186-99.

97. BUCKINGHAM TWNSP., PA., ZONING ORDINANCE OF 1975, § 502 (Mar. 18, 1976).

98. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977); Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *app. dismissed and cert. denied*, 423 U.S. 808 (1975); Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970); National Land Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965).

for development rights, but the local government could act as a purchaser to influence the market as development needs change over time.[99]

Ease of administration should be a prime concern. Thus, while it might be preferable to allocate development rights in a way that reflects existing development potential,[100] such a method would call for extensive individual appraisals and might be beyond the means of many rural communities just beginning to feel development pressure. A simpler method would allocate development rights purely on a density and acreage basis.[101]

The maintenance markets for development rights depend in large measure on the value of developable land and the rigidity with which the preserved zones are enforced. Two economists suggest that a strictly enforced no-development policy over specific areas combined with a TDR program would increase the value of the developable land even where development is contingent upon the possession of development rights, preserving the exchange value of development rights.[102] This would ensure that farmland owners would be able to capture some of the restricted land's development value. The local municipality must make no allowances for variances or rezoning within the transfer district. As suggested by Professor Costonis in the Puerto Rico plan, if developers think they can accomplish their development goals without purchasing development rights, there will be little incentive for them to do so.

In order to maintain a market for development rights the local government must create the incentives that will produce one. Assuming that there is some development pressure, the planning board must make it clear that the development that will take place will only occur in designated places. The municipality must then reinforce the planning decision by making the designated transfer zone suitable for development. While some degree of discretion is removed, it is essential for maintenance of a market for TDRs that the development scheme be seen as relatively permanent. Even if more area is needed for development later, the restricted areas that have already transferred their rights away for use in the development zone should have to purchase development rights from the city in order to develop the newly designated land.

99. The model for this form of intervention is the government commodity price support payments. *Cf.* Merriam, *supra* note 56, at 133-38.

100. *See, e.g.*, Binetsky, Chavooshian, *supra* note 58, at 178-85. Merriam, *supra* note 56, at 116 n.238, suggests eight allocation alternatives: (1) acreage, (2) zoning, (3) general plan, (4) physical capability of development, (5) locational probability of development, (6) value of foregone development potential, (7) value of property, and (8) value of land.

101. *See, e.g.*, Merriam, *supra* note 56, at 115.

102. Berry & Streiker, *supra* note 15.

There are other things that a municipality can do to encourage the development of a market for TDRs. For instance, in Montgomery County, Maryland, the county acts as a guarantor for loans from local banks to farmers that are secured by the development rights issued under a TDR program.[103] This ensures that the holders of the rights view their rights as valuable and helps to set a price for them. The county or the municipality could also guarantee to purchase the development rights after a holder of the rights has actively tried to sell them for an extended period of time without finding a buyer. In this way the municipality could help alleviate fears about the marketability of the development rights. Once they were purchased by the local government, the landowner, if the rights were still attached to the land, would have to record a conservation easement in favor of the local government.[104]

One possible problem that might hinder or dissuade a holder of unsevered development rights from transferring them to a developer is the effect of the transfer on land that is mortgaged. A holder of development rights on mortgaged land might be loathe to transfer those rights if the transfer would trigger the due-on-sale clause or some other default provision in the mortgage.

Historically, due-on-sale provisions were created to protect the lender's security interest in the property. It has recently come into much wider use as a tool for updating the lender's mortgage portfolio to current interest rates. While the states were split as to whether a lender must show that the action that triggered the due-on-sale or default provision actually impaired the lender's security, the trend was against requiring such a showing.[105] The same trend has also indicated that due-

103. MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59c-11 (1981).

104. A conservation easement—a use restriction—in favor of the commonwealth is the quid pro quo for the compensation paid to the landowner. The extent depends upon the pertinent restrictions required under the PEZ. COSTONIS & DEVOY, *supra* note 57. *Cf.* PA. STAT. ANN. tit. 32, § 5005(a)(8) (Purdon Supp. 1982), in which the commonwealth has the power to acquire fee simple interests and then resell the property subject to restrictive easements limiting use.

105. For a minority view confining due-on-sale enforcement to situations of impaired security, *see* Dawn Inv. Co. v. Superior Court of Los Angeles County, 30 Cal. 3d 695, 639 P.2d 974, 180 Cal. Rptr. 332 (1982), in which private, public, and residential, as well as commercial situations, are affected. For majority view, *see* Northwestern Fed. Sav. & Loan v. Tennes, 315 N.W.2d 296 (N.D. 1982), in which federal regulations, more favorable to enforcement, preempt state laws. The case involved a lease with an option to purchase that triggered the due-on-sale clause. In Lipps v. First Am. Serv. Corp., 223 Va. 131, 286 S.E.2d 215 (1982), the court used strong language stating that there is no restraint or alienation in upholding enforcement of a due-on-sale clause triggered by the mortagor and his purchaser entering a land sales contract.

Following the Supreme Court's decision in Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) and the passage of the Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, differing state laws have been preempted. For a comon-sale clauses will not be enforced where there is no change of possession.

For TDRs, then, case law is hopeful. Junior encumbrances usually do not trigger due-on-sale clauses because a junior encumbrance does not terminate the borrower's interest in the land.[106] It only creates the possibility of a future conflicting claim. If a future foreclosure threatens the lender's security, then a court might allow a right to accelerate payment on the primary debt. If junior encumbrances do not necessarily trigger any acceleration clauses, there is no reason the transfer of a development right would do so because the holder of the development right has no possessory interest in the farmland from which the development right was severed. Once the right is transferred, the holder of the right has no claims on the transferor. Further, it is unlikely that the mortgage that is secured by the farm was based on anything but the assessed use value of the property. To have based it upon speculative development potential would have posed an unacceptable risk to the lender unless the lender was in the business of real estate speculation. Even if the farmland at the time the mortgage was made could have been used for other than farm purposes, there was no vested right in the owner of that property to rely on presently legal uses. Similarly, the lender could not have reasonably relied on perpetually unrestricted and therefore value-inflated land.

As a political matter, once younger farmers see the value inherent in TDRs they are likely to be supporters of a program that will allow them to keep farming while still realizing the nonfarm value of their property.[107]

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plete discussion, *see* Note, *Mortgages: The "Due-on-Sale" Clause—Is More Consideration Due?*, 37 OKLA. L. REV. 117 (1984) (this issue). *See also* Kinzler, *Due-on Sale Clauses: The Economic and Legal Issues*, 43 U. PITT. L. REV. 403 (1982).

106. *See, e.g.*, La Sala v. American Sav. & Loan, 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

107. Unfortunately, there are several tax problems that may vitiate the apprarent benefits, but they do not seem sufficient to offset the potential economic benefits to be derived from transferable development rights. Eligibility under I.R.C. § 2032A special use valuation might be jeopardized by the sale of the development interests. Section 2032A in combination with the special payout period under I.R.C. § 6166 provides considerable estate planning advantages to farmers. Whether they would be willing to sacrifice the advantages that such tax provisions supply would necessarily have to turn on whether the advantages were available through some other method. Since it appears that the valuation of the property for estate tax purposes (and for every other tax purpose) would be reduced by the severance of the development rights, the need for special use valuation under § 2032A would be eliminated, especially since the advantage of extended payout under § 6166 would be preserved. *See* Barnes, *An Alternative to Alternate Farm Valuation: The Conveyance of Conservation Easements to an Agricultural Land Trust*, 1981-1982 AGRIC. L.J. 308 (1982).

An additional advantage would be gained by the cash infusion such a sale would bring. A properly constructed installment sales contract under I.R.C. § 453 would help mitigate the in-

While the planning board might build in bonuses to encourage specific kinds of development or might vary the number of development rights necessary as planning priorities change, evidence suggests that programs have a greater likelihood of success where there are limited objectives, where government intervention is kept to a minimum, and where the management area is local rather than regional.[108] What is clear, and is seldom acknowledged by proponents of TDR schemes, is that the notion of elaborate equity that any TDR program reflects is the equity between landowners and not between various users of land. A TDR program, such as that suggested here, will not make farmland cheaper, but it will stabilize land value for agricultural use by setting the industry demands as the determinant of costs to farmers rather than the demand function for all other uses.

III. *An Answer to the Problems of Constitutionality*

Almost from the outset commentators have challenged the constitutionality of TDR programs.[109] The argument runs this way: Govern-

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come tax problems that might accompany such a sale. *See* Rev. Rul. 77-414, 1977-2 C.B. 299. A properly constructed sale combined with a § 6166 election might be even more advantageous to the farmer than a § 2032A election.

Other tax considerations are whether the income from the sale of the development rights will be treated as a long-term capital gain under I.R.C. §§ 1221, 1222(a), and 1231(a) and whether the exclusion allowable under I.R.C. § 1202 is applicable. The problem will arise in the treatment of the gain apportioned between the farm residence and the other farm buildings. The answer to that question will turn on how the farmer's basis was apportioned prior to the sale. *See* Note, *Tax Consequences of Development Rights Transfer: An Exploratory Essay*, 33 TAX LAW. 283 (1979). Another issue that will in all probability arise is whether the sale of the development rights, which will be apportioned for tax purposes between the land and the building, will trigger the depreciation recapture provisions of I.R.C. § 1250. It is beyond the scope of this article to discuss all of these issues in depth, but they are necessary considerations, both in the contemplation of designing a TDR program and in the arranging of an actual transfer under a program.

108. Berry & Streiker, *supra* note 15. Much has been made of the TDR program that was adopted in Buckingham Township in Bucks County, Pennsylvania. *See, e.g.*, Richman & Kendig, *Transferable Development Rights—A Pragmatic View*, in THE LAND USE AWAKENING 218 (Feilich & Stuhler eds. 1981). There the plan seemed well planned and sufficiently ahead of intense development pressure to succeed. Unfortunately, conversations with Robert E. Moore, a county planner, in July of 1982, indicate that the plan is under considerable political pressure because the local zoning board has used the plan to exclude almost all development. They have not made any provisions for the capital investments that will be necessary to attract development to the transfer zone, and they have consistently shrunk the size of the transfer district, thereby throwing into disarray the important balance that was made when the plan was originally adopted. Because of their actions the plan is facing many challenges that it could have avoided. The feeling is that the TDR plan is being used to achieve planning and environmental ends other than those for which it was approved. While this might be evidence of the inherent frailties of the political system, it is also evidence that a TDR plan stands a better chance of success where it is of limited scope and where it it used in conjunction with other planning tools, rather than where it is used to usurp them.

109. *See, e.g.*, Note, *supra* note 55.

ment may prescribe uses and may restrict land to particular uses under the police powers vested in the state. However, where the restriction is unchangeable and so severe as to prohibit all but the least profitable uses, the government must compensate the landowner for the loss in value suffered. Further, the government may not use transferable development rights to compensate for the taking because the value of transferable development rights is too speculative to meet the standard of just compensation.[110] But, these commentators have also recognized that where the restrictions under a TDR plan allow a reasonable return to the landowner, the restriction will not involve a taking.[111]

In *Penn Central Transportation Co. v. New York City*[112] the United States Supreme Court again reviewed the taking jurisprudence of this country. The Court was asked to assess the constitutionality of New

110. The literature on the taking issue is vast. I limited myself to the articles by Costonis and Berger cited earlier; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of Just Compensation Law*, 80 HARV. L. REV. 1165 (1967), and the various taking analyses in the TDR articles I surveyed, some of which are not cited in the text because my analysis does not rely on them; e.g., Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974); Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

111. Note, *supra* note 55, at 1107. However, state courts such as New York have adopted the reasonable return test to evaluate land-use regulations. In fact, the principle is nothing new. As early as 1938 the New York Court of Appeals in Arverne Bay Constr. Co. v. Thatcher, 287 N.Y. 222, 15 N.E.2d 587 (1938), held that delays in an owner's economic enjoyment of his property, even where the delay is long term, are not sufficient to invalidate an otherwise valid police power regulation. More than thirty years later the New York Court of Appeals restated the test in Golden v. Planning Bd. of the Town of Ramapo, 30 N.Y.2d 359, 258 N.E.2d 291, *app. dismissed* 409 U.S. 1003 (1972). There the court upheld the growth restrictions despite a showing that the regulations could result in severe development restrictions lasting up to eighteen years. TDRs would only change the locus of development, not the right to develop. A sluggish market may delay their transference, but that would be insufficient to invalidate them, especially where it could be shown that they have some residual value that bears some relationship to the value of the unsevered development interest.

Recent Supreme Court cases indicate that some form of a residual beneficial use test will be used to assess the validity of land-use regulations. In the dissenting opinion to San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621 (1981), Justice Brennan indicated that the down-zoning attempted by the city would be invalid because it eliminated any remaining value in the down-zoned property. The remedy, however, need not be full compensation for the value of the fee; invalidation of the ordinance with the duty to pay damages for the interim restriction on the property would be sufficient. *Id.* at 653-60.

112. 438 U.S. 104 (1977). This case is focused on because of the extended analysis of taking doctrine to be found in Justice Brennan's decision. This analysis is not definitive and it does zigzag among the competing theories, but it at least touches on the taking tests of noxious use, public acquisition, physical invasion, diminution of value, and frustration of distinct investment-backed expectations. *See also* Agin v. City of Tiburon, 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Andrus v. Allard, 444 U.S. 51 (1979). *But see* Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982); San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621, 636 (1981) (dissent).

York City's landmark preservation law.[113] Although the challenged statute has a TDR component, the Court did not have to reach the issue of whether TDRs in the context of a taking would constitute just compensation. The Court did note, however, that: "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."[114]

The New York City landmark law is administered by the Landmarks Preservation Commission, whose staff identifies properties of historical or cultural value that should be preserved. After public meetings the Commission may designate a particular building as a landmark.[115] The designation is reviewed by the New York City Board of Estimate, which can disapprove if it is not in conformance with the city's plans for the area.[116] The owner of the preserved building may also seek judicial review of the original designation.[117]

Final designation creates affirmative obligations for the owner of the landmarks.[118] The owner must keep the exterior features in good repair and must get special approval from the Commission for any external improvements or alterations of the building.[119] The zoning laws permit owners of real estate who have not developed their parcel to the maximum permissible density to transfer the unused portion of their development potential to contiguous parcels on the same city block.[120] Landmark sites are given more liberalized transfer rights[121] and are not limited by the requirement that the transfer site be contiguous to the landmark.

Grand Central Terminal was designated a landmark. After designation, Penn Central, the owner of the terminal, entered into a lease with a development company which was to build and rent a 55-story

113. N.Y.C. ADMIN. CODE, ch. 8.A, § 205-1.0 (1976).

114. *Penn Central*, 438 U.S. 104, 137 (1977).

115. N.Y.C. ADMIN. CODE, ch. 8-A, § 207-1.0(n) (1976).

116. *Id.* § 207-2.0(g)(1).

117. *Id.*

118. *Id.* § 207-10.0(a).

119. *Id.* §§ 207-4.0-207.90. There are three procedures under the law the owner may use to gain administrative approval for alteration to the landmark. First, the owner may apply for a "certificate of no effect on the protected architectural features." § 207-5.0. Second, the owner may apply for a certificate of appropriateness. § 207-6.0. Such a certificate will be granted if the Commission determines that the proposed change will not damage the historical, cultural, or aesthetic features of the landmark. Denial of these applications is subject to judicial review. Finally, the owner may seek a certificate of appropriateness on the grounds that the building in its present state is yielding an insufficient return. § 207-8.0.

120. N.Y.C. Zoning Resolution art. 1, ch. 2, § 12-10 (1978).

121. *Id.*, art. 7, ch. 4, §§ 74-79.

office building atop the landmark. Under the terms of the lease the developer was to pay Penn Central $1 million annually during construction and $3 million annually after completion.[122] Applications for the relevant certificates were denied. Penn Central appealed denial of the certificates, arguing that the restrictions imposed by the landmark law were a taking without just compensation and that the denial of building approval was a violation of substantive due process rights accorded Penn Central through the fourteenth amendment.

The New York Court of Appeals rejected these contentions,[123] holding that there had been no taking because the regulation did not wrest control of the property from private hands; it merely restricted possible use. In affirming the New York court's holding that there had been no denial of substantive due process, the United States Supreme Court reiterated the factors that led the lower court to such a holding:

> (1) the landmark regulation permitted the same use as had been made of the Terminal for more than half a century;
> (2) the appellants failed to show that they could not earn a reasonable return on their investment in the Terminal itself; . . .
> (4) the development rights above the Terminal, which had been made transferable to numerous sites in the vicinity of the Terminal, . . . were valuable to the appellants and provided "significant", perhaps "fair" compensation for the loss of the rights above the Terminal itself.[124]

Writing for the Court, Justice Brennan detailed the present state of the taking doctrine. He restated the proposition that mere diminution in value is insufficient for a regulation to be struck down as a taking,[125]

122. *Penn Central*, 438 U.S. at 116. This section adopts the facts as set out in the Court's opinion in view of the lower court's opinion and other commentators' views.

123. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

124. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 121-22 (1977). Justice Brennan's characterization of the New York court's holding (opinion by Breital, J.) has been used. But, importantly, Judge Breital also distinguishes Lutheran Church v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974), and 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 (1976), *app. dismissed*, 429 U.S. 990 (1976), in which the New York City Landmark Law was invalidated as applied to those two properties. In distinguishing *Lutheran Church*, Judge Breital noted that contrary to the showing in that case, Penn Central is not owned by a charitable organization, and unlike the Lutheran Church, Penn Central is organized to make a profit and it did not indicate that it was incapable of making a reasonable return if its right to develop the subject property is limited. Further, the Lutheran Church was not given any way of ameliorating the harm since it had no way of transferring any development rights as did Penn Central.

In the *French* case, although transferable development rights were available, they "were left in legal limbo" because they were not readily attachable to any site and the regulation leaving the parks in a state of zero development deprived the owner of *all* beneficial use without any prospect of earning a return on the investment.

125. 438 U.S. 104, 131 (1977).

but noted that a harsh regulation may constitute a taking where "it is not reasonably necessary to the effectuation of a substantial public purpose."[126] The Court evidently regarded as dispositive the failure of Penn Central to prove or even claim that Grand Central Terminal was incapable of earning a reasonable return in its present use.[127]

In discussing *Pennsylvania Coal v. Mahon*,[128] which Penn Central relied upon for the proposition that denial of use of the air space above the terminal so frustrated the investment-backed expectations of the company that the restriction constituted a public servitude on the property, and thus a taking, the majority noted that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available is quite simply untenable."[129]

In a footnote to the opinion the Court explained that *Pennsylvania Coal* does not relieve the terminal owner of accounting for the impact of the regulation on the property as a whole; the fact that it may restrict a profitable use does not transform the government action from regulation to taking,[130] especially where the regulation is part of a general land-use plan. In fact, the Court maintained:

> [I]t is literally not accurate [for appellants to claim] that they have been denied *all* use even of those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings . . . . [T]he rights afforded are valuable.[131]

This finding led the Court to conclude that even if the regulation considered alone could have been construed as a "taking," the impact of the transferable development rights on the value of the property after the regulation mitigated the severity of the restriction and thus limited resort to a *Pennsylvania Coal* analysis.[132]

In a dissenting opinion joined by Chief Justice Burger and Justice Stevens, Justice Rehnquist structured the issues somewhat differently. First, the dissent argued that the case fell outside traditional zoning cases because the type of restriction placed upon the property was not consistent with the underlying justification of the police power.[133] This

126. *Id.* at 127.
127. *Id.* at 129.
128. 260 U.S. 393 (1922).
129. 438 U.S. 104, 130 (1977).
130. *Id.* at 130 n.27.
131. *Id.* at 137.
132. *Id.* at 136.
133. *Id.* at 139.

argument, based on *Pennsylvania Coal v. Mahon*,[134] maintains that restrictions on use arising out of zoning regulations are based not only on benefits secured to the municipality as a whole, but on an "average reciprocity of advantage"[135] accruing to all similarly restricted landowners. This common benefit offsets to some extent the reduction in the value of the property caused by the restriction. Absent a reciprocity of advantage, a restricted landowner is made to shoulder the entire burden of the public regulation. Such a restriction does not automatically trigger the application of the just compensation clause of the fifth amendment. If the regulation can be shown to prevent a "noxious use" of property or if the regulation (or prohibition) covers a broad section of land, no compensation is required. Since the regulation at issue in the *Penn Central* case did not fall into one of the two exceptions, according to the dissent, it was not properly construed as a valid exercise of zoning powers or of the general police power to protect the health, safety, or welfare of the community taken as a whole.[136]

Finding no police power justification for the landmark ordinance, the dissent would hold that the regulation had taken private property for a public use. The dissent used the following analysis: Property includes every sort of interest a person may possess in relation to a physical thing.[137] Here, the air rights above Grand Central Terminal represent to Penn Central an enormously valuable property interest. Despite the residual value left in the ownership of the terminal itself, the landmark regulations destroy the property interest in the air rights above the terminal. Penn Central can do nothing with the air space above the terminal that might have an adverse effect on the terminal itself. The city gets the benefits of the preservation of "an outstanding example of beaux arts architecture,"[138] and the owners get nothing but the right to transfer a previously held right to develop their property to some other narrowly designated site. To the dissenting Justices this is nothing other than the taking of a private property interest for a public use.

The dissent opined that allowing for the transfer of the right to develop the air space above the terminal to another site was an admission by the city that the property interest in the air rights had been taken.[139] Further, they argued that allowance for conversion of the

134. 260 U.S. 393 (1922).
135. 438 U.S. 104, 140 (1977).
136. *Id.* at 147.
137. *Id.* at 142-43.
138. *Id.* at 146.
139. *Id.* at 150.

air rights into a transferable property interest was merely an attempt to compensate Penn Central for the loss of the valuable right to develop the air space above the terminal. The fifth amendment, however, requires *just* compensation. The fifth amendment, according to Justice Rehnquist, requires "'a full and perfect equivalent for the property taken'."[140] To provide less would allow the government to load "upon one individual more than his just share of the burdens of government."[141]

Having concluded that a compensable taking had occurred, the dissent conceded that there was an insufficient record to decide whether the TDRs proffered by the city would meet the test of just compensation. The answer to the question of whether the TDRs are a "full and perfect equivalent for the property taken" cannot be provided by the public authority which has taken the property, but must be answered by the courts if the aggrieved property owner is unsatisfied with the compensation offered.[142] TDRs may be sufficient compensation only if the court determines that they adequately preserve the value lost when Grand Central Terminal was declared a landmark. In the face of an undeveloped record on this point, the dissent was also concerned with the uncertain market value of TDRs and with the complex procedural requirements necessary to obtain a permit to transfer the rights. If either of these factors impairs the value of the transferable rights, then the compensation they offer will not be just.

The dissent's analysis is compelling in its clarity in a notoriously confusing area of the law. Yet the dissent's analytical clarity comes at the expense of conceptual subtlety. Arguing that the concept of property adopted by the majority was too limited and cautioning against a vulgar concept of property interests, the dissent embraces a traditional notion of property rights embodying an unrestricted right to exploit the profit-making capacity of an interest in land. This disjunction is implicit in the analysis the dissent adopts. It presumes a vested right in every nonnoxious use of property when, in fact, the history of the police power demonstrates that the regulation of nuisance or noxious uses has been only one justification for the restriction or prohibition of certain uses of property.[143] The notion of property advanced by the dissent is inadequate because it would require the city to preserve every preexisting economic interest that cannot be designated a "nuisance

140. *Id., quoting* Monongahela Nav. Co. v. United States, 148 U.S. 312, 326 (1892).

141. *Id.* at 147, *quoting Monongahela,* 148 U.S. at 325.

142. 438 U.S. 104, 150-51 (1977).

143. *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

or noxious use," or else to broadly limit all property rights in order to justify a restriction. Such a designation is, of course, merely a way of saying that the economic interest that has been diminished is not now property.[144] Despite the protestations in the dissent, it is precisely this type of conceptualism that has prevented the emergence of a clear judicial approach to the taking issue.

Goldblatt v. Hempstead,[145] relied upon by the dissent for the proposition that the municipal regulation may only restrict legitimate economic uses of property when they threaten public health, safety, or welfare, merely illustrates the point that for the purposes of determining whether a taking has occurred, a court will not examine the effect of the regulation on each of the discrete interests a person may hold in relationship to the thing in question, but will consider the effect of the regulation on the property taken as a whole. In that case the record indicated that the zoning ordinance completely destroyed the economic value of the mining interest held by the owners in the subject property. The record was incomplete on the effect of the regulation on the value of the property taken as a whole, but the Court expressly stated that the restriction should not be viewed as a taking merely because it "completely prohibits a beneficial use to which the property had previously been put."[146] If the test suggested by the dissent in *Penn Central* had been adopted, the regulation would have resulted in compensation for the taking of the mining interest.

Pennsylvania Coal v. Mahon[147] the case in which Justice Holmes clearly enunciated the diminution of value test, and the case upon which the dissent principally rests, was not an inquiry into the diminution of the value of the mineral interest held by the coal company at all. As discussed in a recent commentary,[148] and as is apparent upon a close reading of the case, what was at stake in that case was not the reduction in value of a particular interest but the total destruction of the only interest held by the company in favor of other private interests. The case does not suggest that the Court considered the damage done to a discrete interest held by the coal company as part of damage done to a more generalized property interest. The dissent in *Pennsylvania Coal* further emphasized that point.[149]

144. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39 (1964).
145. 369 U.S. 590 (1962).
146. *Id.* at 592.
147. 260 U.S. 393 (1922).
148. McGinley & Barret, *Pennsylvania Coal Company v. Mahon Revisited: Is the Federal Surface Mining Act a Valid Exercise of the Police Power or an Unconstitutional Taking?* 16 TULSA L.J. 418 (1981).
149. 260 U.S. 393, 416-22 (1922).

Monongahela Navigation Co. v. United States,[150] upon which the *Penn Central* dissent relied to explicate the requirements of the fifth amendment, suggests in fact that the majority's resolution of the dispute in the *Penn Central* case was correct. Though the *Monongahela* case does make the point for which it was cited in the dissent, the language quoted is merely the initial gloss on the language of the fifth amendment. The Court goes on to say that when compensation is required, it is to be derived from the profit-making capacity of the property that is taken. Since the property in *Penn Central* was not injured in its profit-making capacity, what injury was suffered? The profitability of the air rights above the terminal was impaired, but in order to suggest that the regulation was a compensable taking, Penn Central would have had to demonstrate a vested right in the existing zoning. Without such a showing there could be no taking because no vested property right was lost.[151] The creation of transferable development rights in the air space that was subject to the restriction only suggests the creation of a property right in the density that was restricted which would vest when properly attached to some prescribed receiving property.

In *Monongahela Navigation*[152] the Court stated that the profit-making capacity of the locks (that is, the right to collect tolls) was a publicly created right and could be regulated by the state.[153] However, the franchise to collect tolls on the river could not be taken without the payment of just compensation because "the franchise is a vested right. The state may retake it, as it may take other private property, for public uses, upon the payment of just compensation."[154]

In short, the dissent in *Penn Central* suggested a reconciliation in the law where there was none by positing a strict limitation on the reach of the police power held by the states and by using a definition of property that is at once too narrow and too broad. It is too narrow because it reduces property interests to the profit-making capacity of each of the elements in that bundle of rights that the law recognizes as property, and it is too broad because it embraces inchoate contingencies.

Property, like law, is an artifact of society. The law necessarily circumscribes and defines our expectations concerning the use of our property. By elevating all expectations of profit-making potential into protectible property interests, the dissent would necessarily limit the role

150. 148 U.S. 312 (1892).
151. *Id.* at 341. *See also* 438 U.S. 104, 135 (1977).
152. 148 U.S. 312 (1892).
153. *Id.* at 334-35.
154. *Id.* at 341.

of the power of the state to regulate the private manipulations of those expectations. The dissent's definition and analysis actually describe a particular understanding of the way our society functions or *ought* to function, but it does so by locking the law into a conceptualization of the interests at stake that is at odds with precedent in the area, and it does so in a way that holds no promise of resolving the difficult disputes that have made this area of the law so complex and murky.

The taking jurisprudence enunciated by the Court in *Penn Central* bodes well for the type of limited TDR schemes described earlier. In fact, the express goal of the regulation—maintenance of a viable agricultural economy—presumes that the land that is regulated will be able to provide a reasonable return on investment. In light of the tests advanced by the Court in *Penn Central*, assessment of the TDR plan outlined earlier indicates that the regulation could survive a federal constitutional taking challenge. First, the land is regulated to preserve a valuable economic use. Second, the regulation is part of a general land-use plan. Third, the availability of transferable development rights and well-defined transfer districts help mitigate the severity of the regulation and thus preserve the value of the tract when looked at as a whole.

The majority never considered whether the TDRs were appropriately viewed as just compensation because the question did not arise. Development rights and transfer privileges were regarded as valuable. In context, however, the value was readily available to the terminal owners who simply could apply their rights to another previously owned property in a setting where the extant demand for office space was tremendous.

Will using TDR schemes to preserve prime farmland on urban fringes—restricting property to agricultural uses only—result in regulatory taking? In *Agins v. City of Tiburon*,[155] the Supreme Court again validated the use of the zoning power to preserve community values in the face of potentially extreme diminution of the economic value of the regulated parcel. The Court endorsed the public goal of protecting the community against excessive urbanization and it did so in the context of restricting residential uses which are traditionally afforded great protection. The Court also focused more intently on whether the restriction denied a reasonable use of the property rather than on the diminution of value caused by the ordinance. The holding of the Court was in broad language, however, because of the facial nature of the Agins's attack.

In *Andrus v. Allard*,[156] a case arising under the Eagle Protection

155. 447 U.S. 255 (1980).
156. 444 U.S. 51 (1979).

Act[157] and the Migratory Bird Treaty Act,[158] Allard was engaged in the sale of Indian artifacts. Some of the artifacts contained the feathers of protected birds. Despite a record indicating that the artifacts preexisted the enactment of the statutes, Allard was prohibited from selling any items containing remains of the protected species. He challenged the statute as a deprivation of a property interest in violation of the fifth amendment prohibition against uncompensated takings. The Court held that there was no taking and that the loss of a contemplated profit opportunity was not a loss of a fundamental attribute of ownership.[159] Although the case involved personalty, the type of property has never been held to be constitutionally significant for purposes of the fifth amendment.[160]

In applying the principle to realty, in this case farmland, the power to prohibit potentially valuable development uses is not a loss of a fundamental attribute so long as other property rights remain.[161] The denial of the right to exploit one property interest does not constitute a taking because, as the Court pointed out in *Penn Central*, the property rights must be viewed as an aggregate.[162] The Court reiterated its position that for purposes of the fifth amendment a court must look at the property as a whole and not analyze the effects of a regulation on each element of that bundle of rights called property. In fact, with a TDR comes a privilege to convey the development potential, easing the impact of the restriction on uses. From this perspective TDRs can be seen as an enhancement of property interests: the right to exercise a use that could be prohibited.

The right to develop land in accordance with any personal desire cannot be construed as a fundamental attribute of ownership, although it is certainly a possible artifact of ownership. Under traditional zoning analysis there are no vested rights to rely on or develop under a particular zoning scheme.[163] A vested right to develop based on a zoning classification or some other governmental action normally arises only after a property owner, in good faith reliance upon some act or omission of the government, has made substantial changes in his posi-

157. 16 U.S.C. § 668(a) (1982).

158. *Id.* § 703.

159. 444 U.S. 51, 65-66 (1979).

160. *See* Andrus v. Allard, 444 U.S. 51 (1979). *Cf.* City of Oakland v. Oakland Raiders, 31 Cal. 3d 656, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).

161. *See* Andrus v. Allard, 444 U.S. 51 (1979); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1977).

162. 438 U.S. 104, 130 (1977).

163. Avco Community Dev. v. South Coastal Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *app. dismissed*, 429 U.S. 1083 (1977).

tion or has incurred some irretrievable expense or obligation.[164] This is essentially the premise underlying the "distinct investment-backed expectations" exception enunciated in *Penn Central* and later crystallized in *Kaiser Aetna v. United States.*[165]

Assuming that the development potential of urban-fringe farmland is the property owner's most valuable asset, a court must weigh the benefits to the public of preserving a vanishing natural resource against the impact of the economic loss on the landowner. First, the taking question will apply to the whole property, not merely to the development potential. Second, the regulation must be seen as part of a comprehensive plan. The analogy to landmarks is apparent. Landmark designation is not zoning in the sense implied by the dissent in *Penn Central.*[166] Similarly, the suggested TDR scheme will not apply to all farmland.[167] Third, there will be no interference with current use of the property as farmland.

The reasonable beneficial use of the restricted property is defined in terms of farmland. If it can be shown that the value of the residual use of farmland on the urban fringe is comparable to the average use of agricultural land on or away from the urban fringe, then the restriction of the land to agricultural uses can be sustained without finding a taking. Regulations that do not permit the most profitable uses of property can still be a valid exercise of police power. The evidence indicates that even with a fully developed TDR program in place, those farmers who hold restricted parcels would not receive full compensation for the loss of the right to develop their land.[168] The economic loss suffered, however, is offset by the value recapture attributable to the sale of the development potential in the form of development rights and the likely increase in value of the farmland as farmland when it is located closer to regional markets. If such an analysis is correct, then the restriction would even meet the reciprocity of advantage test suggested by the dissent in *Penn Central.* A well-planned system with marketable TDRs would reduce the uncertainty of value that was found fatal to the scheme in *Fred French Investing Co.*[169] Just as the Court in *Penn Central* recognized the mitigating impact of TDRs on the landmark regulations in New York City, a well-planned TDR pro-

164. Robinson v. Los Angeles, 146 Cal. App. 2d 810, 304 P.2d 814 (1957); Largo v. Imperial Homes, 309 So. 2d 571 (Fla. App. 1975); Sarasota County v. Walker, 144 So. 2d 345 (Fla. App. 1962).

165. 444 U.S. 164 (1979).

166. 438 U.S. 104, 139 (1977).

167. See *supra* text accompanying notes 89-114.

168. Berry & Streiker, *supra* note 15, at 71.

169. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *app. dismissed*, 429 U.S. 990 (1976).

gram could extend the same mitigation principle to farmland preservation.

Conclusion

The preservation of valuable agricultural resources is more than a land-use problem, but a conscientious TDR program that has as its aim the preservation of the local agricultural economy can do much to keep valuable agricultural land in production and can capture for farmers or farmland owners some of the development value of the preserved land. Of course, farmland may be preserved without the institution of a transferable development rights program, but it is the only farmland preservation program that incorporates consideration for both the financial and the land-planning needs of farmers. As has been seen with agricultural zoning and agricultural districting programs, the existing law in the area tends to render such programs temporary and subject to political challenges that are often backed by legal doctrine. From the viewpoint of the farmer, such programs are also lacking because a permanent agricultural zone or agricultural district classification would occasion a serious loss of value to the farmland owner even as it preserved the farmland. The goal of farmland preservation programs should also be the preservation of farming.

Right-to-farm legislation[170] has recently been enacted in many states across the country[171] in recognition that to save farmland a policy must

170. Right-to-farm legislation has taken essentially two approaches: (1) limitations of the power of local governments to regulate agriculture or agricultural practices; and (2) limitations on private causes of action in nuisance against farmers for farming. The legislation gives farmers one of two ways to use the laws, either as means to seek a declaratory judgment to have a regulation that interferes with agriculture declared invalid, or to defend against actions brought against them by residents in communities that have grown up around the farms. The second type of statute generally provides that a court cannot declare farming a nuisance if:

1. the operation was not a nuisance at the time it began;
2. the only basis of the claim is that conditions in the area of the farm have changed;
3. the farm has been in operation for at least one year;
4. there is no negligent or improper operation of the farm; and
5. the alleged nuisance does not imperil the public health or safety.

Problems with right-to-farm statutes are that they rarely give any guidance in the statutory language to a court that must balance the purposes of the act with the duty to protect the public health and safety, and it is not clear whether changes in farm technology will transform what was formerly not a nuisance into a nuisance or whether failure to adopt new farm technology pushes formerly "proper" farm operations into "negligent or improper" operations. There is litigation pending in several states that will provide answers to some of these questions. R. COUGHLIN & J. KEENE, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS (1981).

171. Thirty-four states have enacted various right-to-farm statutes. Some deal with agriculture generally, although many in the west focus primarily on feed-lots. ALA. CODE § 6-5-127 (Supp. 1981); ARIZ. REV. STAT. ANN. § 3-1061 (Supp. 1981-82); CAL. CIV. CODE § 3482.5 (West Supp.

be designed to help farmers. The tax-abatement schemes that have gained wide currency are reflective of that insight, but, as the evidence indicates,[172] money saved either through property tax or income tax relief[173] is seldom sufficient alone to keep a farmer farming or to keep land in agriculture.

A transferable development rights program appears to be the only tool that self-consciously speaks to the varying planning needs of the agricultural community. It also appears as the only land-planning program that could successfully resist the various economic and legal challenges that will arise. The preservation of large blocks of agricultural land sufficient to preserve the industry in an area may be accomplished through the traditional land-planning tools, but TDR programs recognize that as only the first step in preserving agriculture. A successful program must recognize the role of the land asset in the eyes of the farmer. A TDR program does this and also helps to spread the costs of the preservation to the community that will be benefited by the program. As discussed earlier, successful programs will be carefully planned and implemented on local rather than regional scales, with a full understanding of the interlocking markets for various land uses, and will give communities a rational hope of stemming the tide that has been inundating the nation's precious and exhaustible agricultural land resources.

1982); COLO. REV. STAT. § 35-3-5-102 (Supp. 1981); DEL. CODE ANN. tit. 3, § 1401 (Supp. 1980); FLA. STAT. § 823-14 (Supp. 1982); GA. CODE § 72-108 (1981); IDAHO CODE § 22-4503 (Supp. 1982); ILL. ANN. STAT. ch. 5, § 1018 (Smith-Hurd Supp. 1981-1982); IOWA CODE ANN. § 172D.2 (West 1976); KAN. STAT. ANN. § 47-1505 (1977); KY. REV. STAT. § 413-072 (1980); LA. REV. STAT. ANN. § 51-1202 (West Supp. 1982); ME. REV. STAT. ANN. tit. 17, § 2805 (Supp. 1981-1982); MD. CTS. & JUD. PROC. CODE ANN. § 5-308 (Supp. 1981); MICH. COMP. LAWS ANN. § 286.473 (Supp. 1982-1983); 1980 Minn. Laws ch. 566, § 473 H.12; MISS. CODE ANN. § 95-3-29 (Supp. 1981); MONT. CODE ANN. § 27-30-101 (1981); MONT. CODE ANN. § 45-8-111 (1981); N.H. REV. STAT. ANN. § 430-C (Supp. 1981); N.M. STAT. ANN. § 47-9-3 (Supp. 1981); N.Y. PUB. HEALTH LAW § 1300-C (McKinney Supp. 1981-1982); N.Y. AGRIC. & MKTS. LAW § 305(2) (McKinney 1972); N.C. GEN. STAT. §§ 106-701 (Supp. 1981); N.D. CENT. CODE § 42.04 (Supp. 1981); 50 OKLA. STAT. § 1.1 (1981); OR REV. STAT. § 215.25 (Repl. 1979-1980); PA. STAT. ANN. tit. 3, § 911 (Purdon Supp. 1964-1981); H.B. 1823 (1982); S.C. CODE ANN. § 46-45-30 (Law. Co-op. Supp. 1981); TENN. CODE ANN. § 53-6702 (Supp. 1981); TEX. AGRIC. CODE ANN. § 251-004 (Vernon 1982); UTAH CODE ANN. § 78-38-7 (Supp. 1981); VA. CODE § 15.1-1512B (1981); WASH. REV. CODE ANN. § 7.48.305 (Supp. 1982); WYO. STAT. § 11-44-102 (1977).

172. See *supra* notes 23-27 and accompanying text.

173. MICH. COMP. LAWS §§ 554.701-.719 (1970), *supra* note 23, for example, provide an income tax credit for landowners whose land is enrolled in the farmland preservation program where property tax on the land and buildings exceeds 7% of the household income. *Id.* § 554.710(1).