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Agricultural Zoning: Impacts and Future Directions

MARK W. CORDES*

INTRODUCTION

Farmland preservation has become a growing societal concern over the past two decades and is now a common component of any serious discussion of environmental land-use controls. Although some disagreement remains on the necessity of preserving farmland,¹ there is no doubt that prime farmland is being converted at substantial rates.

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1. The rationales for farmland preservation fall into two broad categories: (1) food security and (2) environmental amenities. Food security refers to the concern that farmland conversion threatens our long-term ability to produce sufficient amounts of food to either feed ourselves or respond to future global needs. Environmental amenities refer to various environmental benefits created by farmland, including groundwater recharge, control of stormwater runoff, wildlife habitat, open-space preservation, and avoiding environmental costs associated with shifting rangeland and forests to the cropland base. The food security issue in particular has been the subject of intense debate in recent years, with some commentators arguing this remains a matter of concern. See, e.g., Luther Tweeten, *Food Security and Farmland Preservation*, 3 *DRAKE J. AGRIC. L.* 237 (1998); David Pimentel & Marci Pimentel, *U.S. Food Production Threatened by Rapid Population Growth*, at <http://www.enviroweb.org/gaiapc/Pimentel2.html> (last modified Oct. 30, 1997). But see, e.g., Peter Gordon & Harry Richardson, *Farmland Preservation and Ecological Footprints*, at <http://www-pam.usc.edu/volume1/v1i1a2print.html> (last visited Aug. 21, 1999) (questioning such assumptions).

This is particularly true in many of our nation's most productive agricultural areas, where farmland is often under substantial conversion pressure from advancing suburban development.² Whatever its broader worth to society as farmland, to the immediate parties involved the land is more valuable converted. This increasingly includes some of the nation's best and most productive farmland.

All levels of government have perceived farmland preservation as an important societal goal and have responded with a variety of programs to slow and control the rate of conversion.³ Some programs might be viewed as voluntary incentives to encourage farmers not to convert farmland, such as special tax incentive programs,⁴

2. The problem of farmland conversion first gained national attention with publication of the National Agricultural Lands Study (NALS) in 1981, conducted by the United States Department of Agriculture and the President's Council on Environmental Quality. The study included a comprehensive inventory of the nation's agricultural land base and examined conversion rates and projected future needs for farmland. The study concluded that the nation was losing more than three million acres of agricultural land every year, including one million acres from our cropland base. The study attributed most of the loss to changing living patterns, and in particular the spreading of residential development into rural America. See U.S. DEPARTMENT OF AGRICULTURE & PRESIDENT'S COUNCIL ON ENVIRONMENTAL QUALITY, NATIONAL AGRICULTURE LANDS STUDY, FINAL REPORT (1981).

A recent and comprehensive study by the American Farmland Trust confirmed the continuing loss of farmland and some of its potential consequences. The study analyzed conversion patterns and development pressures within each of the nation's 181 Major Land Resource Areas (MLRAs), geographic regions defined by the Department of Agriculture as having homogenous characteristics relevant to farming. The study found not only that every state was losing some of its best farmland to development, but a substantial amount of the nation's remaining prime farmland was under significant development pressure. In particular, seventy percent of the nation's MLRAs had high quality farmland under significant development pressure. See A. ANN SORENSON ET. AL., AMERICAN FARMLAND TRUST, FARMING ON THE EDGE 2-3, 8-20 (1997).

3. Congress has passed several statutes designed to facilitate and encourage farmland preservation, including the Farmland Protection Policy Act of 1981, 7 U.S.C. §§ 4201-4209 (1994), and the Federal Agricultural Improvement and Reform Act of 1996 (FAIRA), Pub. L. No. 104-127, 110 Stat. 888 (1996) (codified as amended in scattered provisions of Title 7 of the United States Code). Most efforts at farmland preservation, however, have been at the state and local level. For overviews of state and local farmland preservation programs, see William L. Church, *Farmland Conversion: The View from 1986*, 1986 U. ILL. L. REV. 521; Jerome G. Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591 (1984).

4. All fifty states have some form of tax relief provisions for agricultural land. Most common are preferential-assessment statutes, which assess land at reduced value when used for agriculture, and deferred taxation programs, which provide lower assessment for farmland but require partial or total repayment of tax savings if the land is converted to other uses. For a listing of all fifty state statutes, see American Farmland Trust, State Farmland Protection Statutes by Category (Table), at <http://www.farmlandinfo.org/fic/laws/fpkeytab.html> (last visited July 23, 2001).

recognition of agricultural districts,⁵ and right-to-farm laws.⁶ Other programs seek to more permanently restrict a landowner's right to convert by paying for development rights on the property. Most notable are Purchase of Development Rights (PDR) programs in which government purchases the development rights on farmland, paying the landowner the difference between the property's value if more intensive development is allowed and its value as farmland.⁷ Similarly, Transfer of Development Rights (TDR) programs also compensate landowners for lost development rights, but instead of cash landowners are given development rights that can be used elsewhere.⁸

Each program has a role to play in any comprehensive effort to preserve farmland, but in and of itself is inadequate. Right-to-farm laws are only effective in preventing involuntary conversion against a landowner's wishes; they do little to protect farmland when an owner desires to convert. Similarly, differential tax programs and agricultural districting can provide temporary relief from conversion pressure, but neither is sufficient to offset the financial incentive of conversion when significant development pressure exists.⁹ On the other hand, PDR programs, though effective in preserving farmland when implemented, are necessarily limited in their scope because of the significant costs involved. TDR programs avoid this problem by providing development rights instead

5. Agricultural districting involves the voluntary creation of agricultural districts, which typically requires that they be used for agricultural purposes for a minimum number of years. In exchange for the requirement that the land stay agricultural, landowners receive various benefits which, depending on the authorizing statute, might include restrictions on special assessments and limitations on the use of eminent domain. See LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE § 6.37 (2001).

6. Right-to-farm laws, found in all fifty states, protect farms against nuisance actions where development moves out to agricultural areas and creates conflicting uses. For a listing of all fifty states' "right to farm" statutes, see American Farmland Trust, State Farmland Protection Statutes by Category (Table), at <http://www.farmlandinfo.org/fic/laws/fpkeytab.html> (last visited July 23, 2001).

7. For descriptions of PDR programs, see MALONE, *supra* note 5, § 6.46; TOM DANIELS & DEBORAH BOWERS, HOLDING OUR GROUND: PROTECTING AMERICA'S FARMS AND FARMLAND 145-69 (1997).

8. There is a significant body of literature on TDR programs. See generally John J. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Julian Conrad Juergensmeyer et. al., *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441 (1998). For descriptions of how TDR programs might work with farmland preservation, see DANIELS & BOWERS, *supra* note 7, at 179-86 (describing six different TDR programs designed to protect farmland).

9. Various commentators have voiced this concern about voluntary types of programs. See, e.g., SARAH E. REDFIELD, VANISHING FARMLAND: A LEGAL SOLUTION FOR THE STATES, 96-97, 103 (1984); Church, *supra* note 3, at 550.

of money, but are contingent upon the right mix of development ingredients to succeed, especially appropriate "receiving areas." As a result, few successful TDR programs have emerged.¹⁰

For these reasons, agricultural zoning has emerged as the foundation of most farmland preservation efforts, reflecting several distinct advantages. On the one hand, agricultural zoning restricts a landowner's own decision to convert the property to more intensive uses, thus avoiding the limitations of voluntary programs. On the other hand, zoning avoids the financial limitations of PDR programs by placing the cost of preservation on the landowner. It has the added advantage of being a familiar and widely used land use control mechanism, thus assuring its acceptability to the general public.

Despite these strengths, zoning itself is not without its disadvantages. These include frequent legal challenges to restrictions, the perceived unfairness of placing the cost of preservation on affected landowners, and the potential for unanticipated impacts on broader community development. Perhaps most significant, however, is the concern that zoning restrictions are susceptible to change when development pressure increases, making it an unstable and, in the long run, ineffective preservation method. Moreover, if not properly implemented, agricultural zoning can actually exacerbate, rather than limit, sprawl, by spreading development too broadly.

This article will examine agricultural zoning as a farmland preservation tool. Part one will briefly examine types of agricultural zoning restrictions. Part two, which is the main focus of the article, will examine the impacts of agricultural zoning from four perspectives: (1) Its Legal Impact; (2) Its Economic Impact; (3) Its Development Impact; and (4) Its Effectiveness as a farmland preservation tool. Finally, the last section of the article will give some brief recommendations on the directions agricultural zoning might take.

I. TYPES OF AGRICULTURAL ZONING

Agricultural zoning, which began to gain wide acceptance in the 1970's and 1980's, is found today in a large number of counties throughout the country and provides the foundation for most farmland preservation

10. See Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 574-79 (1992) (discussing difficulties in establishing successful TDR programs).

efforts.¹¹ At least fourteen states currently have statutes which specifically address and authorize particular forms of “agricultural protection zoning,”¹² but as a practical matter agricultural zoning should normally fall within local government’s general zoning power, even in the absence of a specific statute. Because it can preclude conversion of farmland even when significant development pressure exists, zoning is a widely and increasingly used farmland preservation technique at the local level.

Agricultural zoning can be generally divided into two basic types: exclusive and non-exclusive agricultural zoning. Exclusive agricultural zoning prohibits any use of the land other than agricultural.¹³ Even this type of zoning will permit certain compatible or accessory buildings, such as barns, on the property; fundamentally, however, exclusive agricultural zoning is designed to limit the property to agricultural use only.

The second and more common approach is non-exclusive agricultural zoning, which permits non-farm uses, most notably residential, but in effect establishes agricultural zoning restrictions through severe density limitations. To be effective this requires large minimum lot size restrictions, where the minimum lot size typically would correspond to the minimum size of commercial farms in the area.¹⁴ Thus, minimum lot sizes might range from one house per 40 acres to one house per 160 acres. The obvious effect is to limit the property to agricultural use. A minimum lot size restriction might also take the form of a “sliding scale” restriction, which decreases the dwellings per acre as acreage goes up.¹⁵ Thus, the ordinance might permit one dwelling for the first ten acres, one for the next twenty, and one for each thirty acres after that. This permits greater residential development for smaller parcels, which are less likely to be devoted to farming, while retaining the essentially agricultural nature of larger units.

Another variation on non-exclusive zoning is cluster zoning, which establishes overall density restrictions on property but permits small lot “clustering” of actual development on the property. For example, an overall density of one unit for ten acres might be established, but actual

11. See DANIELS & BOWERS, *supra* note 7, at 106 (stating that agricultural zoning is currently used in over 500 counties and communities).

12. See American Farmland Trust, State Farmland Protection Statutes by Category (Table), at <http://www.farmlandinfo.org/fic/laws/fpkeytab.html> (last visited July 23, 2001) (listing all fourteen states).

13. See MALONE, *supra* note 5, § 6.32.

14. See MALONE, *supra* note 5, §§ 6.27-6.31. As will be discussed later, more lenient lot size restrictions, such as one house per five acres, do little to preserve farmland and might even exacerbate sprawl.

15. See MALONE, *supra* note 5, § 6.30.

development is “clustered” together at a greater density, leaving a significant area of land free for farming.¹⁶ This provides an opportunity for greater residential development while at the same time preserving large sections of land for agricultural use.

Whatever its form, if done correctly, agricultural zoning serves the purpose of significantly limiting development on farmland property, thus preserving the property’s farmland status. Importantly, by placing public restrictions on the property the landowner is not free to sell the land for nonagricultural use when development pressure and attendant financial incentives become great. The result is to place the cost of preservation, as reflected in diminution in land value, on the restricted landowner.

As noted earlier, agricultural zoning is not exclusive of other farmland preservation methods, and often is most effective when combined with other tools. For example, when used, TDRs are typically combined with agricultural zoning as a way to mitigate the economic impact of zoning.¹⁷ Similarly, PDR programs work best with agricultural zoning as a foundation. This not only helps keep purchase prices at a reasonable level, but addresses the reality that PDR programs rarely have the necessary funds to preserve necessary land immediately.¹⁸ Differential tax programs can also serve to mitigate the economic impact imposed by agricultural zoning.

In addition to the more traditional tools, agricultural zoning has also been combined with urban growth boundaries (UGB) in some instances to preserve farmland. An UGB in essence is a line drawn beyond which development will be prohibited, thus directing growth pressure inward instead of sprawling out. Oregon, in particular, has been a leader in combining UGBs with agricultural zoning as a method of preserving substantial areas of farmland, although the results have been somewhat mixed.¹⁹

16. See DANIELS & BOWERS, *supra* note 7, at 121-23.

17. See Edward Thompson, Jr., “Hybrid” Farmland Protection Programs: A New Paradigm for Growth Management, 23 WM. & MARY ENVTL. L. & POL’Y REV. 831, 840-44 (1999).

18. See *id.* at 844-45.

19. See DANIELS & BOWERS, *supra* note 7, at 139-41; Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 120 (1998).

Finally, important components of any zoning scheme, including agricultural zoning, are mechanisms for change. Zoning ordinances typically have three primary ways in which a land use restriction might be changed: variances, special-use designations, and rezoning of the land.²⁰ As applied to agricultural zoning, the most significant of these is actual rezoning of the property. At bottom, this is simply a mechanism by which a previous restriction on land use can be changed to permit other, and often more intensive land uses. At their best, such change mechanisms provide flexibility to zoning schemes so that they can be sensitive to changing societal and local needs. At their worst, they undermine long-term needs in order to bend to short term political and market expediencies.

Agricultural zoning, in all its variations and partnerships with other tools, is the primary basis for preserving farmland today. The next section of this paper will analyze the impact of agricultural zoning from four perspectives: (1) Its Legal Impact; (2) Its Economic Impact, especially from the landowner's perspective; (3) Its Development Impact; and (4) Its Effectiveness as a farmland preservation tool.

II. IMPACTS

A. THE LEGAL IMPACT: CONSTITUTIONAL RESTRAINTS ON AGRICULTURAL ZONING

An initial impact for analysis is the legal impact of agricultural zoning, and in particular what restraints might exist on its use as a farmland preservation method. There are, of course, various state laws that restrain zoning as a land use control device, including state enabling acts and more specialized doctrines.²¹ As a practical matter, however, the primary and most significant limitations on zoning are those found in the Fifth Amendment takings clause to the United States Constitution, which will be the focus of this section. Indeed, because of the significant economic

20. For a general description on how these mechanisms work, see DANIEL R. MANDELKER, *LAND USE LAW* 223-59 (2d ed. 1988).

21. For example, several states follow what is known as the "change or mistake" rule in reviewing rezonings. This rule requires that a rezoning is valid only if conditions have changed since the original zoning or if the original zoning was based on a mistake of some type. See MANDELKER, *supra* note 20, at 227-29. This doctrine has been used to invalidate an attempted downzoning of land to an agricultural district. See *City of Va. Beach v. Va. Land Assessment Ass'n.*, 389 S.E.2d 312, 314 (Va. 1990).

impact that agricultural zoning can have on land values as compared to alternative uses involving development, landowners have frequently argued that agricultural zoning constitutes an unconstitutional taking of property. This section will briefly analyze the constitutional validity of agricultural zoning as a land use device, with special attention given to the effect of the Supreme Court's recent decision in *Palazzolo v. Rhode Island*.²²

Current Supreme Court takings doctrine recognizes that in very limited situations the economic impact of a land use regulation might be so severe as to constitute an unconstitutional taking of property. This "regulatory taking" doctrine was first recognized in the seminal decision of *Pennsylvania Coal Co. v. Mahon*,²³ and over the years has proven to be a source of considerable litigation and confusion.²⁴ The Court currently applies a two-fold analysis for determining when the economic impact of a land use restriction constitutes a taking. First, as stated in *Lucas v. South Carolina Coastal Council*,²⁵ a regulation constitutes a taking if it deprives a landowner of "all economic viability."²⁶

22. 533 U.S. 606 (2001).

23. 260 U.S. 393 (1992).

24. Numerous commentators have noted the confusing state of the Supreme Court's takings jurisprudence over the years. See, e.g., ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 514 (2d ed. 1993) (noting the lack of clear standards has led to confusion); J. Peter Byrne, *Ten Arguments for Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89, 103 (1995) (calling it an unworkable "muddle"); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 *WASH. L. REV.* 91, 92 (1995) ("[r]egulatory takings are proving to be one of the enduring legal dilemmas of the twentieth century.").

25. 505 U.S. 1003 (1992).

26. The Court in *Lucas* characterized this as a "categorical taking," meaning that once a loss of all economic viability is established there is no need for a balancing of interests. *Id.* at 1015-16. In recognizing a taking based on loss of economic viability, the Court pointed to a number of previous cases in which it had stated, albeit in dicta, that a taking occurs when a regulation denies an owner "all economically beneficial or productive use of land." *Id.*; see, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The Court did not clarify what this term might mean, but found it was met when a regulation left land "valueless," as was the case in *Lucas*.²⁷

Second, the Court in *Lucas* stated that even when a regulation falls short of eliminating all economic viability, the regulation might still constitute a taking under what has become known as the *Penn Central* factors.²⁸ Those factors come from *Penn Central Transportation Co. v. New York City*,²⁹ in which the Court identified the character of the government action, its economic impact, and the degree of interference with investment-backed expectations as being particularly significant factors in determining whether a restriction was a taking. In that decision the Court held that the challenged restriction on use of air rights did not constitute a taking, both because the restriction still permitted a reasonable return on the land and because the challenged landmark law did not interfere with the original purpose of the property.³⁰

The Supreme Court itself has never applied this two-fold takings analysis to an agricultural zoning restriction. However, a significant number of lower courts have addressed takings challenges to agricultural zoning restrictions, with the vast majority of cases holding that the restriction was not a taking.³¹ These lower court decisions have taken various approaches in resolving takings claims, in part reflecting unique state standards, but have for the most part approached takings analysis consistent with the above Supreme Court test. Thus, lower courts have frequently stated that agricultural zoning is not a taking as long as the land is suitable for agricultural use and is economically viable, which is almost

27. The Court in *Lucas* did recognize an exception to the loss of all economic viability rule, stating that even this extreme impact would not constitute a taking if the regulation was preventing what would amount to a common law nuisance. 505 U.S. at 1029-31. The Court reasoned that since under common law concepts of property a landowner cannot cause a nuisance to his or her neighbor, the activity being regulated would not "inhere in the title" to begin with. *Id.* For that reason the Court remanded the case to the South Carolina courts, noting that although there was no economic viability, the issue of whether the statute was preventing a common law nuisance was a matter of state law. *Id.* at 1031.

28. *See id.* at 1019 n.8.

29. 438 U.S. 104 (1977).

30. *Id.* at 136.

31. *See, e.g.,* Christensen v. Yolo County Bd. of Supervisors, 995 F.2d 161 (9th Cir. 1993); Barancik v. County of Marin, 872 F.2d 8334 (9th Cir. 1988); Gisler v. County of Madera, 112 Cal. Rptr. 919 (Cal. Ct. App. 1974); County of Ada v. Henry, 668 P.2d 994 (Idaho 1983); Wilson v. County of McHenry, 416 N.E.2d 426 (Ill. App. Ct. 1981); Gardner v. N.J. Pinelands Comm'n, 593 A.2d 251 (N.J. 1991); Murray v. Columbia River Gorge Comm'n, 865 P.2d 1319 (Or. Ct. App. 1993).

always the case.³² Moreover, lower courts have frequently emphasized that the restriction did not interfere with a landowner's investment-backed expectations under *Penn Central*, either because the property was originally acquired for farming³³ or because the restrictions were in place when the land was bought.³⁴

On those few occasions where lower courts have found a taking to exist, it was usually because the land was truly unsuitable for farming and thus denied the landowner economically viable use of the land. For example, in *Kmiec v. Town of Spider Lake*,³⁵ the Wisconsin Supreme Court found an agricultural zoning restriction invalid where it was admittedly used as a "holding" classification for future use, despite the unsuitability of the land for farming.

32. See, e.g., *Christensen*, 995 F.2d at 165; *Jafay v. Bd. of County Comm'rs of Boulder County*, 848 P.2d 892 (Colo. 1993).

33. See *Gardner*, 593 A.2d at 261; *Gilliland v. City of Palmdale*, 179 Cal. Rptr. 627, 632-33 (1981).

34. See *County of Ada v. Henry*, 668 P.2d 994 (Idaho 1983); *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360 (Ill. App. Ct. 1993).

35. 211 N.W.2d 471 (Wis. 1973). For another example, see *Petersen v. City of Decorah*, 259 N.W.2d 553, 553 (Iowa Ct. App. 1977), where the court found an agricultural zoning restriction "unreasonable and confiscatory" where the city acknowledged it zoned the land agricultural as a holding classification, even though it was unsuitable for agricultural use and had not been productive for years.

As a general matter, however, courts have consistently held that agricultural zoning does not constitute an unconstitutional taking where the property can be effectively used for farming purposes, even if it involves a substantial economic burden on the landowner.³⁶

The lower court decisions generally upholding agricultural zoning against takings challenges appear to be consistent with what had been the standard view of the *Lucas/Penn Central* takings analysis. The Supreme Court's most recent regulatory takings case, *Palazzolo v. Rhode Island*,³⁷ decided in June of 2001, has the potential of significantly impacting regulatory takings analysis in several important respects. Although *Palazzolo* itself involved a coastal wetlands restriction, the Court's analysis is applicable to a broad array of land use restrictions, including agricultural zoning. Thus, some attention must be given to how *Palazzolo* will impact the validity of agricultural zoning restrictions.

In *Palazzolo* the Supreme Court reviewed a wetlands regulation which had been in place when the claimant acquired the property³⁸ and had the effect of prohibiting all development except the possible building of a house on several uplands acres. Although several issues were at play in

36. The state that has decided the most agricultural zoning cases, Illinois, takes a unique approach to zoning, applying a multifactor balancing test. *See, e.g., Twigg v. County of Will*, 627 N.E.2d 742 (Ill. App. Ct. 1994). This test blends both substantive due process and takings concerns and results in greater scrutiny of zoning decisions than is typically found in other states. Even so, the majority of Illinois decisions reviewing agricultural zoning restrictions have found them valid. *See, e.g., Harvard State Bank v. County of McHenry*, 620 N.E.2d 1095, 1098-99 (Ill. App. Ct. 1993); *Wilson v. County of McHenry*, 416 N.E.2d 426, 432 (Ill. App. Ct. 1981). In several cases, however, Illinois courts have struck down agricultural zoning restrictions under the multi-factor balancing test. *See Twigg*, 627 N.E.2d at 746; *Harris Bank of Hinsdale v. County of Kendall*, 625 N.E.2d 845, 846 (Ill. App. Ct. 1993); *Pettee v. County of DeKalb*, 376 N.E.2d 720, 725 (Ill. App. Ct. 1978); *Semja v. County of Boone*, 339 N.E.2d 452, 455 (Ill. App. Ct. 1975). In none of these cases, however, did the court suggest that the severe economic impact of agricultural zoning would constitute a taking. Rather, the restrictions were struck down in *Semja* and *Pettee* because the zoned property was unsuitable for farming. *Semja*, 339 N.E.2d at 455; *Pettee*, 376 N.E.2d at 725. In *Twigg* the restrictions were invalid because they were not the product of careful planning, while in *Harris Bank* they were struck down as being inconsistent with the county's comprehensive plan. *Twigg*, 627 N.E.2d at 745; *Harris Bank*, 625 N.E.2d at 849-50.

37. 533 U.S. 606 (2001).

38. A corporation owned by Palazzolo had actually purchased the property prior to the challenged restrictions being placed on the property. A year after restrictions were placed on the property, however, the corporation was dissolved for nonpayment of taxes and Palazzolo personally became owner of the property as a matter of law. Both the Rhode Island Supreme Court and United States Supreme Court treated Palazzolo as acquiring the property with notice of the restrictions. *Id.* at 614.

Palazzolo,³⁹ the most significant was whether notice of a restriction when property is acquired precludes a takings claim. The Rhode Island Supreme Court, following the majority of lower courts, said it did.⁴⁰ In a 5-4 decision, the United States Supreme Court reversed, holding that notice of a restriction does not preclude a taking claim.⁴¹ It went on to hold, however, that under the facts *Palazzolo* had not been denied all economically viable use of the property, since a house could be built on several acres of uplands property adjacent to the restricted eighteen acres of wetlands. The Court therefore remanded the case for a determination of whether a taking had occurred under the *Penn Central* factors.⁴²

The immediate impact of *Palazzolo* on agricultural zoning is twofold. First, and most obvious, is that a takings claim will not be precluded just because the agricultural zoning was in place when the property was acquired.⁴³ Although this has not been a common scenario in the agricultural zoning cases reported so far, it will likely become more common as time passes. As such, courts will be required to apply the two-fold *Lucas/Penn Central* analysis to all agricultural zoning restrictions challenged as takings,⁴⁴ regardless of when the property was acquired.

Importantly, however, although notice no longer precludes a takings claim, a close reading of *Palazzolo* indicates that it can still be considered as a factor in analyzing the interference with investment-backed expectations under *Penn Central*. In a concurring opinion Justice O'Connor stated that, although notice should not preclude a takings claim, neither should it be irrelevant when analyzing the degree of interference

39. An initial issue was whether the case was ripe for decision, with the state arguing that it was not yet ripe because no final decision had been made on whether development could occur. The Supreme Court rejected that argument, holding that the manner in which earlier development applications had been rejected indicated that the state environmental council would reject even less ambitious development proposals made by *Palazzolo*. *Id.* at 618-26.

40. See *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707, 716 (R.I. 2000).

41. *Palazzolo*, 533 U.S. at 625-29.

42. *Id.* at 629-30.

43. Prior to *Palazzolo*, a majority of lower courts had held that prior notice precluded a takings claim. Some reached this conclusion on the basis that notice negated any investment-backed expectations under *Penn Central*. See, e.g., *Good v. United States*, 189 F.3d 1355, 1357 (Fed. Cir. 1999); *Claridge v. N.H. Wetlands Bd.*, 485 A.2d 287, 291 (N.H. 1984). However, other courts held that prior regulations constituted "background principles of law" under *Lucas*. See, e.g., *Hunriker v. Iowa*, 519 N.W.2d 367, 371 (Iowa 1994); *Gazza v. N.Y. Dep't of Env'tl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997).

44. The Court affirmed the two-part *Lucas/Penn Central* analysis, and made clear that though a regulation permits economically viable use of land, it must still be analyzed under *Penn Central*. See *Palazzolo*, 533 U.S. at 616-17, 631-32.

with investment-backed expectations under *Penn Central*.⁴⁵ Four other justices agreed with O'Connor on this point, making a majority of the Court.⁴⁶ Although it is unclear what weight to give it in any situation, to the extent the owner knew of the restriction, it makes it less likely to be a taking under *Penn Central*.

The second immediate impact of *Palazzolo* on agricultural zoning is its affirmation that even minimal economic activity is enough to avoid a categorical taking under *Lucas*. In this sense *Palazzolo* is quite supportive of the validity of agricultural zoning. In affirming that the building of a "substantial home" on eighteen acres is economically viable, the Court was indicating that a *Lucas* categorical taking is limited to only extreme impacts. Indeed, in *Palazzolo* the landowner had sought \$3,130,000 for lost profits from not being able to develop the land, but the Court instead focused on the \$200,000 value of the upland property as evidence of economic viability.⁴⁷ If anything, this aspect of *Palazzolo* strengthens lower courts' consistent recognition that agriculturally zoned land meets the economically viable threshold as long as the land is suitable for farming.⁴⁸

Where does this leave the validity of agricultural zoning restrictions? Despite the shake-up created by *Palazzolo*, it is reasonable to predict that the vast majority of agricultural zoning restrictions, if done pursuant to sound planning and ensuring that the property is suitable for farming, should still be constitutional. First, there is little doubt that proper agricultural zoning permits some economically viable use of the property and thereby avoids a categorical finding under *Lucas*. As noted above, if anything *Palazzolo* strengthens agricultural zoning under the first part of the test.

The real question, therefore, is how agricultural zoning restrictions will hold up under the *Penn Central* analysis, which *Palazzolo* makes clear must still be applied even when the land remains economically viable. The short answer is that this should not pose a problem in most cases for several

45. *Id.* at 631-32.

46. *Id.* at 638-45 (Stevens, J., concurring in part and dissenting in part); *id.* at 654 n.3 (Ginsburg, J., dissenting); *id.* at 654 (Breyer, J., dissenting).

47. *Id.* at 630-31.

48. *See, e.g.,* Christensen v. Yolo County Bd. of Supervisors, 995 F.2d 161, 165 (9th Cir. 1993); Jafay v. Bd. of County Comm'rs of Boulder County, 848 P.2d 892 (Colo. 1993). *See generally* Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings of Private Property Far Outweigh the Rule*, 29 ENVTL. L. 939, 946-47 (1999) (analyzing the highly unusual nature of *Lucas* type categorical takings, which are limited to "losses of all value and use").

reasons. First, although not precluding a takings claim, *Palazzolo* indicates that knowledge of a restriction can be a factor in analyzing the degree of interference with investment-backed expectations.⁴⁹ *Penn Central* itself labeled this the most important factor,⁵⁰ and it seems to work against a landowner who was aware of the restriction when the property was purchased. Thus, in those instances where the claimant knew of the restriction, it would be very unusual to find a taking under *Penn Central*.

Therefore, to the extent the *Penn Central* analysis poses a problem for agricultural zoning, it would be where restrictions are imposed after the claimant acquired the property. Even here, however, *Penn Central* suggests most agricultural restrictions are valid, even if resulting in substantial diminution in value compared to other, more intensive land uses.⁵¹ This is clearest where the original purchase price reflects agricultural use and value, and only later did the value greatly appreciate, probably due to subsequent nearby development. Although downzoning in such a situation clearly has an economic impact on the affected landowner, it would not amount to the degree of investment-backed expectations necessary for a taking contemplated by *Penn Central*. Indeed, *Penn Central* itself involved essentially this same scenario, where what had been permitted development was eliminated, resulting in significant economic impact, but not interfering with what had been the original expectation of the owner.⁵²

More difficult is where property is zoned to permit development and is purchased at a price reflecting such development potential, and then is downzoned to permit only agricultural use. Although this would appear to be the strongest case for a taking under *Penn Central*, even here the Court has indicated such downzoning can inflict substantial economic losses and still not be a taking. Otherwise, it would be impossible to enact new zoning restrictions and other regulations necessary to address changing societal needs.

49. *Palazzolo*, 533 U.S. at 617-18.

50. *See Penn Central*, 438 U.S. at 124.

51. *Id.* at 131.

52. *Id.* at 135-36.

For that reason the Court has consistently indicated that even newly enacted land use restrictions, which change previous understandings of development opportunities and thereby diminish property values, are still generally constitutional.⁵³ Indeed, the Court in *Palazzolo* itself took care to affirm this basic point.⁵⁴

This position is also supported by the notion of regulatory risk, a concept that helps inform the reasonableness of any investment-backed expectations under *Penn Central*. The Supreme Court recognized this in *Lucas*, where it stated, “[i]t seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”⁵⁵ This builds on statements by the Court in other regulatory contexts, in which it has strongly affirmed the idea that the risk of regulation is part of economic life, which includes the distinct possibility of economic loss.⁵⁶ Thus, even when landowners have purchased property at prices reflecting permitted development opportunities, which are later subsequently restricted resulting in economic loss, a taking has not necessarily occurred.⁵⁷

When, therefore, might an agricultural zoning restriction on land suitable for farming constitute a taking under the *Penn Central* analysis? Although the vagueness of the test makes any predictions speculative, it would seem to require more than either buying property in reliance on

53. See *id.* at 136; *Agins v. City of Tiburon*, 447 U.S. 225 (1980) (holding that a zoning ordinance that limited development did not constitute a taking); *Vill. of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (upholding zoning ordinance which resulted in a seventy-five percent diminution in value of land).

54. 533 U.S. at 613. The Court acknowledged the commonly accepted principle that “a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned.” *Id.*

55. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

56. The Supreme Court has often stated that “[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.” *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993) (quoting *Darlington*, 358 U.S. at 91); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986) (quoting *Darlington*, 358 U.S. at 91).

57. Commentators have also argued that reasonable expectations of property use must include the possibility of further regulation which diminish property values. See John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339, 367 (1989) (characterizing purchase of undeveloped land as a “gamble,” part of which is “inherent risk that the government may tighten the applicable regulations”); Frank I. Michelman, *A Skeptical View of “Property Rights” Legislation*, 6 FORDHAM ENVTL. L.J. 409, 415 (1995) (“regulation [is] an ordinary part of background risk and opportunity against which we all take our chances . . . as investors in property.”).

current zoning restrictions or significant diminution in property values when zoning occurs. Although both of those facts might be a necessary predicate, it would seem to, in most instances at least, require problems with the third *Penn Central* factor: character of the government action. In particular, the more the restriction reflects sound planning principles, is pursuant to a comprehensive plan, and does not single-out isolated owners for restrictions,⁵⁸ the less likely a taking would be found. Conversely, if the zoning is ad hoc and narrowly focused on only a few landowners, together with significant diminution in value, it approaches the type of extreme situation that might constitute a taking under the *Penn Central* test.

As noted by both the majority and Justice O'Connor's concurrence in *Palazzolo*, the *Penn Central* test is necessarily quite flexible, and in the final analysis must be governed by what "fairness and justice" would dictate.⁵⁹ Therefore, there might be unique circumstances in which even a well-conceived and broadly applicable agricultural zoning restriction will be a taking under *Penn Central*. Yet, as a general matter, the Court has affirmed that newly enacted restrictions which change previous understandings and result in substantial economic loss are still not unconstitutional takings under *Penn Central*. Moreover, *Palazzolo* indicates that to the extent the landowner had notice of the restrictions, that can help inform the reasonableness of any investment-backed expectations, making a taking under *Penn Central* even less likely.

In summary, if done pursuant to sound planning and restricting only land suitable for farming, agricultural zoning should rarely, if ever, constitute a taking under current Supreme Court jurisprudence. Although the Court's recent decision in *Palazzolo* provides that landowner notice does not preclude a takings claim, eliminating one basis on which courts occasionally upheld land use restrictions,⁶⁰ agricultural zoning should still fare well under the two-fold *Lucas/Penn Central* analysis. First, agricultural zoning will almost always permit economically viable use of the land and therefore not constitute a categorical taking under *Lucas*, a conclusion made even stronger by *Palazzolo*. Second, most agricultural

58. The Court has on occasion noted that one basis for upholding zoning restrictions is the "reciprocity of advantage" they produce. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-18 (1992); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). This is commonly understood to mean that more broad based land restrictions provide reciprocal benefits in the form of restrictions on others, which help offset the burdens imposed on land.

59. 533 U.S. at 607 (stating that the *Penn Central* test must be applied according to the purpose of the takings clause, which is to ensure "fairness and justice" under the circumstances). *Id.*

60. See *supra* note 43.

zonings should be valid under *Penn Central*, especially if the land had originally been acquired for agricultural purposes.

Although agricultural zoning should generally not be a taking, prudence suggests several basic steps to insulate zoning against even the possibility of a taking. First, the restricted land must be suitable for farming and not just be zoned agricultural as a "holding classification."⁶¹ Second, the zoning should occur pursuant to sound planning principles and be broadly based, as opposed to targeting only a few properties. Third, to the extent possible, the zoning should identify properties earlier rather than later, when land values have appreciated substantially. Although this last factor is far from fatal, early identification of land to be zoned agricultural provides extra "breathing room" against takings challenges.

B. THE ECONOMIC IMPACT: IS AGRICULTURAL ZONING FAIR TO RESTRICT TO LANDOWNERS?

Perhaps the clearest and most immediate impact of agricultural zoning is on the regulated property owner.⁶² The effect of the regulation is to eliminate development opportunities, and to restrict the property to agricultural use. As a consequence, agriculturally zoned land frequently suffers a significant diminution in value as compared to alternative uses involving development.⁶³ As a practical matter, therefore, the most immediate financial impact of agricultural zoning is to shift the cost of farmland preservation from society as a whole to landowners themselves.

This shifting of preservation costs to landowners has given rise to concerns about the fairness of agricultural zoning. The essence of the fairness argument is that agricultural zoning forces a few landowners to bear the cost of preserving farmland for the benefit of society generally. The typical rationales for preserving farmland, such as food security and environmental amenities, go to society as a whole rather than the affected landowner. Thus, the argument goes that if most of the benefits from preservation go to society as a whole, then the cost of preservation should be placed on society as well.

61. See *Kmiec v. Town of Spider Lake*, 211 N.W.2d 471 (Wis. 1973) (striking down agricultural zoning restriction that was used simply as a "holding" classification).

62. The analysis presented here in Part II.B is a shortened version of discussions presented in two earlier articles. See Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO STATE L.J. 1035, 1069-81 (1999); Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187, 226-38 (1997).

63. See, e.g., *Harvard State Bank v. County of McHenry*, 620 N.E.2d 1360 (Ill. App. Ct. 1993) (indicating a fifty percent diminution in value).

As thus presented, the fairness argument does not necessarily dispute the wisdom of farmland preservation, but instead questions who should pay for it. Whatever the merits of preservation, it is arguably unfair to force a few landowners to bear the burden of bestowing benefits on the rest of society. Thus, the argument is made that if the benefits from preservation go to society as a whole, then society should pay for such benefits in the form of compensation to affected landowners. For this reason alternative preservation schemes involving Purchase of Development Rights or Transferrable Development Rights are viewed as more equitable in that they shift the cost of preservation from the regulated landowner back to society.⁶⁴

This fairness argument, very much a component of current discussions about farmland preservation, has intuitive appeal and needs to be taken seriously.⁶⁵ Fundamentally, it raises the question of how the benefits and burdens of land use controls should be distributed across society. In this respect thought should be given to whether a disproportionate burden falls on affected property owners, and how it might be at least partially addressed. Certainly use of PDRs and TDRs can be used to partially address these concerns.

As a practical matter, however, the perceived unfairness of agricultural zoning as applied to affected landowners is overstated for several reasons. First, of course, the impact on regulated owners of farmland is by no means all negative, especially as regards those who prefer to farm rather than convert to other uses. In such cases the restriction must be viewed as part of the broader comprehensive plan and the various reciprocal benefits it bestows on affected landowners. In particular, those intending to farm are insulated from the problems accompanying more intensive uses by similar restrictions on neighboring properties.⁶⁶ This provides significant benefits to farmland, thus at least partially offsetting the economic impact.

Second, even for landowners who want to convert the property to more profitable uses, the argument that agricultural zoning is inherently

64. See White, *supra* note 19, at 118.

65. The Supreme Court itself has often emphasized the importance of fairness in its own takings analysis, most recently stating in *Palazzolo* that the *Penn Central* balancing test must be applied with attention to principles of "fairness and justice." 533 U.S. at 607; see also, *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Scholars have also suggested that "fairness" is a central concern in the takings issue. See, e.g., WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 6 (1995); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1171-72 (1967).

66. See DANIELS & BOWERS, *supra* note 7, at 109.

unfair because of its economic impact on property owners remains overstated. First, the fairness argument assumes that the entire profit potential of private property is attributable to the landowner, when in fact a substantial portion of private property value is often established by government "givings." Government givings are actions which enhance, rather than diminish, property values. As noted by various commentators, much of the value of farmland is a result of such givings.⁶⁷ This might occur with farmland in numerous ways, such as farm subsidy programs and mortgage deductions, both of which indirectly enhance farmland values.

More directly on point, zoning and land use controls themselves enhance land values by minimizing the harms that might otherwise affect landowners, especially those arising from incompatible land uses. Thus, the very scheme of restricting property use adds significant value to neighboring property. Specifically, the increased value of agricultural land in alternative residential use in part exists because government zoning protects any residential development from conflicting industrial and commercial use. Any fairness arguments based on diminution in value necessarily reflect property values largely enhanced by protective government regulatory schemes.

Perhaps the most obvious example of government givings in regard to farmland subject to development pressure is basic infrastructure support that makes land developable in the first place. This is particularly relevant with regard to farmland preservation issues, where conversion pressure and enhanced land values typically occur because of government activity that facilitates conversion to other uses.⁶⁸ In particular, road and other infrastructure support, which makes land developable in the first instance, are paid primarily by general tax revenues and often result in disproportionate financial benefit to undeveloped land, often farmland, in proximity to development.⁶⁹

67. See, e.g., *Private Property Rights and Environmental Laws: Hearing Before the Senate Comm. on Env't & Pub. Works*, 104th Cong. 163, 163-65 (1995) (statement of C. Ford Runge, Professor, Dept. of Agriculture and Applied Economics, University of Minnesota); Edward Thompson, Jr., *The Government Giveth*, ENVTL. F., Mar.-Apr. 1994, at 22.

68. See Thompson, *supra* note 67, at 22.

69. It is important to note, of course, that in recent years developers have been increasingly required to pay for some infrastructure costs through exaction requirements, typically in the form of land dedications and impact fees. See generally ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, *REGULATION FOR REVENUE* (1993). As a practical matter, however, the enhanced value of property through exactions imposed in government's coordinating function far exceeds the cost of the exaction. Moreover, property values are also substantially enhanced by government activities not typically financed by exactions, such as major highways.

This “givings” analysis suggests that the economic impact of agricultural zoning on affected landowners is not nearly as great as it might initially seem. Although agricultural zoning frequently results in a significant diminution in value compared to alternative uses, much of that value was created by government activity in the first place. This is not to minimize the role of private initiative in creating land value, which is certainly important, nor intended to foreclose the inclusion of compensatory schemes, such as PDRs, in preserving farmland. But it suggests that arguments against agricultural zoning because of its significant economic impact on regulated property owners are misplaced.

It is also important to understand that our legal system and our society have long recognized that land is affected by a broader public interest. Although private property rights have been, and remain, an important component of our economy and legal system, they have never been viewed as absolute.⁷⁰ Rather, property rights have traditionally been viewed as being subject to public rights.⁷¹ Thus, when zoning restrictions are imposed on farmland to serve a public interest they are not necessarily depriving the owner of pre-existing rights; rather, such a limitation is inherent in the property to begin with. For this reason, a landowner’s reasonable expectations regarding the future use and transfer of property necessarily include the recognition that the property might be subject to restrictions such as zoning to serve a public purpose.

Taken together, the concepts of givings and the nature of private property suggest that agricultural zoning is not inherently unfair to affected

70. See generally Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Carol M. Rose, *A Dozen Propositions of Private Property, Public Rights and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265 (1996); Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFF. L. REV. 735 (1985).

71. The Supreme Court has frequently recognized that property interests are implicitly subject to the broader public interest. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) (holding that private property interests must at times “yield to the good of the community” for the sake of “progress”); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (stating that private property limited by other public interests, including exercise of the police power “to protect the atmosphere, the water and the forests.”).

Numerous commentators have also observed that our legal tradition has always viewed private property interests as being subject to certain public rights and interests. See, e.g., Rose, *supra* note 70, at 281 (public rights have co-evolved in our legal system with private rights, with courts seeking a balance between the two); Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1, 5 (1996) (stressing the importance of the social function of property, which necessarily limits property rights); Humbach, *supra* note 57, at 344-48 (stating that legal property rights are limited by competing needs of the general welfare).

landowners, even when the zoning results in a substantial economic impact. As such, agricultural zoning should not be avoided as a farmland preservation tool because of perceived unfairness to landowners, nor should local governments too quickly yield to rezoning requests on fairness grounds. Though affected landowners no doubt carry a disproportionate burden from zoning schemes, from a broader regulatory perspective such burdens are neither unanticipated nor abnormal, and thus, in most instances, should not be viewed as unfair.

That being said, to the extent possible it makes sense to attempt to mitigate what often appears to be harsh economic impacts on landowners. First, compensatory alternatives such as PDR and TDR programs should be used, when possible, to help offset the impacts of zoning. Not only do such programs help insulate zoning restrictions from change requests, but they arguably more closely align the burdens with the benefits of farmland preservation.⁷² In theory the amount of compensation need only be partial, discounting the perceived loss by government givings and regulatory risk. In practice the payment most typically reflects the lost development value of the property.

Second, fairness concerns can also be partially addressed by careful planning that identifies property to be preserved before development pressure arises. By restricting suitable farmland well in advance of development pressures, landowners have a reasonable opportunity to plan their affairs accordingly.

C. DEVELOPMENTAL IMPACTS: IS AGRICULTURAL ZONING CONSISTENT WITH OTHER SOCIETAL NEEDS?

A third impact of agricultural zoning is its effect on broader development goals that local and state governments might have. Any effort at preserving farmland must also give substantial attention to growth concerns and how they relate to farmland preservation. Indeed, the need to take regulatory steps to preserve farmland primarily becomes an issue because of the pressure to convert for development purposes. An important question is what effect agricultural zoning has on the growth/sprawl pressures that create the need to preserve in the first place.

72. It should be noted that some commentators have raised concerns that compensating landowners through PDRs constitutes double payments by government, first by increasing the value of the land by government givings, and second, by then compensating the landowner for purchase of the development rights. See Thompson, *supra* note 67, at 26.

The answer in part depends on the type of agricultural zoning method used and its effectiveness in preserving farmland. There is some evidence that some types of large lot zoning result in *increased* sprawl by simply scattering development further out.⁷³ Thus, rather than preserving farmland, such zoning arguably takes more away. Moreover, it exacerbates rather than controls sprawl development, with the consequences of sprawl. This includes increased transportation costs, increased pollution from vehicle miles traveled, increased infrastructure costs, and increased impacts from emergency vehicle response time.⁷⁴

If done correctly, however, agricultural zoning should have the opposite effect, which is to control or limit sprawl. Assuming development pressure remains the same, the effect of restricting large areas to agricultural use is to force development into a more contained area. Indeed, any farmland preservation program must necessarily be integrated as part of a more comprehensive effort to address the problems of sprawl, with each playing off the other. Thus, as efforts to preserve farmland necessarily lead to more compact development, so too do comprehensive efforts to address sprawl also necessarily involve preservation of prime farmland as a logical component. As will be discussed in the next subsection, attempts at agricultural zoning without compact growth plans will likely be unsuccessful.

Therefore, perhaps the most immediate consequence of successful agricultural zoning, if done as part of a broader growth management plan, is that existing development pressure will likely be directed to more compact and dense development. This can be done in several ways, but the end result is similar. Housing density increases and is located closer to existing urban or suburban areas.

73. See generally Douglas Jackson-Smith & Jill Bukovac, *Limitations of Agricultural Land Use Planning Tools in Rural Wisconsin*, PATS STAFF PAPER SERIES (Program on Agric. Tech. Studies, Madison, Wis.) (July 2000), available at <http://www.wisc.edu/pats/publuse/htm> (last visited Mar. 11, 2002).

74. See *infra* note 75.

This, in turn, has a number of positive impacts in addition to the preservation of farmland, including lower infrastructure costs, decreased transportation costs, decreased air pollution and energy consumption, and lower response time for delivery of government services.⁷⁵ In total, these represent significant social gains by limiting the adverse consequences of sprawl development.

There are, however, several potential social costs to such a compact development alternative. First is the denial of consumer preference by forcing compact development and limiting the possibility of large lot, scattered development. As a practical matter, we have sprawl because that is what a significant number of consumers want. Although the concept of sprawl itself is displeasing to most, the type of development that creates sprawl - large lot, scattered homes - is itself quite pleasing to many.⁷⁶ Indeed, the need for agricultural zoning is predicated on the fact that the market, reflecting consumer preferences, is inclined toward sprawl. Thus, effective agricultural zoning, if properly combined with a plan for compact development, arguably results in a denial of consumer preferences.⁷⁷

The basic response to this is that consumer preferences, though arguably reflecting what is best for those engaged in any particular

75. The social costs of suburban sprawl have been well documented. See, e.g., Robert W. Burchell & Naveed A. Shad, *A National Perspective on Land Use Policy Alternatives and Consequences*, Farm Foundation (Paper prepared for National Public Policy Education Conference, Portland, Oregon, Sept. 22, 1998); Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 335-36 (1993); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 69-77 (1999); Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 URB. LAW. 183 (1997). In recent years, however, some scholars have questioned the social costs of sprawl, stating that they are not nearly as great as thought and, indeed, sprawl brings benefits to society, primarily in the form of consumer choice. See, e.g., Clint Bolick, *Subverting the American Dream: Government Dictated Smart Growth is Unwise and Unconstitutional*, 148 U. PA. L. REV. 859 (2000); Peter Gordon & Harry W. Richardson, *The Economic Effects of Arizona's Proposed Citizen's Growth Management Initiative*, at <http://www.usc.edu/schools/sppd/research/arizona/arizona.pdf> (last visited Aug. 16, 2001). For an excellent overview of the debate on the effects of sprawl, see Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W. - N.W. J. ENVTL. L. & POL'Y 137 (1999).

76. Commentators have often acknowledged that sprawl reflects consumer choice. See, e.g., Burchell & Shad, *supra* note 75; DANIELS & BOWERS, *supra* note 7, at 133-34.

77. Harvard law professor Gerald Frug, a supporter of Smart Growth initiatives, recently argued that effective growth management goes beyond a denial of consumer preferences, but calls for a truly revolutionary restructuring of society in terms of housing choices, decreased reliance on the automobile, and "ending the current division of American metropolitan areas along the lines of class, race, and ethnicity." Gerald E. Frug, *Euphemism as a Political Strategy*, 30 ENVTL. L. REP. 11189 (2000).

transaction, frequently fail to consider the broader social costs of their actions and thus lead to an inefficient allocation of resources. In particular, the market, as reflected in consumer choices, fails to consider all the costs and benefits in a transaction; they are external to the decisionmaking process.⁷⁸ As it concerns consumer preferences for scatter development, consumers fail to consider the previously noted societal costs associated with sprawl: increased energy and transportation costs, increased pollution, infrastructure costs, and farmland loss. Beyond that, the preference for scatter development is itself heavily subsidized by government infrastructure costs, especially in terms of roads.⁷⁹ Taken together, the subsidized nature of the consumer choice for sprawl, along with the significant external costs imposed on the rest of society, indicate that denial of such consumer preferences is neither inefficient nor problematic. Indeed, combating sprawl, of which farmland preservation is one dimension, should result in significant social gains.

A second potential development cost that might result from effective agricultural zoning concerns what effect, if any, it might have on the price of new housing by limiting the supply of land. The preservation of farmland in and of itself would appear to enhance neighboring property values because of the environmental amenities that it brings. Yet agricultural zoning might potentially raise the cost of new entry level development by limiting the supply of available land for new construction. All else being equal, when the supply of a commodity decreases, and demand remains the same, the price increases.

As is true with many issues surrounding sprawl, there is substantial disagreement on what effect growth management strategies have on housing prices. Studies of Oregon's urban growth boundaries designed to contain growth and preserve farmland, suggest some increase in housing prices resulting from the limited land supply.⁸⁰

78. See Buzbee, *supra* note 75, at 84-85.

79. See Burchell & Shad, *supra* note 75, at 3-4.

80. See Samuel R. Staley & Gerard C. S. Mildner, *Urban-Growth Boundaries and Housing Affordability: Lessons from Portland*, at <http://www.rppi.org/urban/pb11.html> (last visited Aug. 21, 2001); Raymond J. Burby, Arthur C. Nelson, Dennis Parker & John Handmer, *Urban Containment Policy and Disaster: Is there a Connection*, at http://www.unc.edu/depts/dcrpweb/facstaff/faculty/burby/Urban_Containment_Policy.pdf (last visited Mar. 17, 2002) (summarizing studies).

This has also been theorized by a number of opponents of growth controls.⁸¹ Others, however, have suggested that efforts to combat sprawl need not increase housing costs, and, indeed, sprawl itself has a negative impact on affordable housing.⁸²

Despite this disagreement, it would appear that the actual impact of agricultural zoning on the cost of new entry housing prices in part depends on whether there are concomitant plans for more compact growth. To the extent that government decreases the supply of land through agricultural zoning, but fails to pursue compact growth alternatives, then arguably the cost of new housing will increase. This might occur where government maintains low-density residential restrictions, such as half acre lot minimums, while at the same time removing substantial acreage from the market through agricultural zoning. As a consequence, the cost of raw land would go up, and likely be passed on to consumers.⁸³ This would be particularly problematic with regard to provision of affordable housing for low and moderate income families.⁸⁴

On the other hand, if effective efforts at compact growth accompany agricultural zoning, as they should, the overall effect might well be to decrease entry housing costs. First, by using less land per home, compact housing reduces the percentage of housing costs attributable to raw land.⁸⁵ A recent study indicates that this alone is sufficient to reduce the cost of housing.⁸⁶ Second, the infrastructure costs are generally lower for compact housing, which should reduce its overall costs as well. Taken together, these suggest that agricultural zoning should not have an adverse effect on

81. See Gordon & Richardson, *supra* note 75; Bolick, *supra* note 75; Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171, 188-89 (2000); see also ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 996 (2d ed. 2000) (noting that most empirical studies conclude that growth controls raise housing prices).

82. See Freilich & Peshoff, *supra* note 75, at 191.

83. See J. D. Landis, *Land Regulation and the Price of New Housing: Lessons from Three California Cities*, 52 J. OF AM. PLANNING ASS'N 9 (1986).

84. Commentators and some courts have often noted that large lot zoning can have an "exclusionary" effect on low and moderate income families because those families cannot afford the higher prices demanded for such land. See *Britton v. Town of Chester*, 595 A.2d 492 (N.H. 1991); *S. Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975). DANIEL R. MANDELKER, ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT* 371-79 (4th ed. 1995). Combining large lot, residential zoning with agricultural zoning can be particularly problematic, since the exclusionary effect of the large lot zoning might be exacerbated by removing other land from the housing market through agricultural zoning. *Id.*

85. See Burchell & Shad, *supra* note 75, at 18-19.

86. See *id.*

new housing costs when combined with provisions for greater residential density development.⁸⁷

As a practical matter, of course, the actual cost for new housing will depend on a number of variables, including market demand for various types of housing in the community, the amount of land that is available for residential use, and developer incentives. For that reason, communities must remain sensitive to the potential impact agricultural zoning has on housing prices, and in particular, affordable housing for low and moderate income families.⁸⁸ At a minimum this should be addressed through separate plan and zoning provisions addressing the need for affordable housing and sensitive monitoring of any impacts that might occur. Special care should also be given to ensure that sufficient quantities of land are reserved for development and that zoning restrictions which impede low and moderate income housing are removed.⁸⁹

D. PRESERVATION IMPACTS: IS AGRICULTURAL ZONING EFFECTIVE IN PRESERVING FARMLAND?

A final, and perhaps the most significant, issue is whether agricultural zoning is effective in actually preserving farmland from conversion to other uses. As noted in the introduction, zoning has several major strengths relative to other preservation methods. It is able to quickly preserve large tracts of contiguous land for farming, creating an assurance of insulation and stability for future decisionmaking. Moreover, by taking the decision to convert away from property owners, it avoids the problems posed by

87. Indeed, if agricultural zoning is accompanied by more compact and dense development, this might actually help increase opportunities for affordable housing by eliminating or minimizing various "exclusionary zoning" techniques, such as large lot zoning.

88. For a sensitive examination of the way growth controls might adversely affect affordable housing, see Candida M. Ruesga, Note, *The Great Wall of Phoenix?: Urban Growth Boundaries and Arizona's Affordable Housing Market*, 32 ARIZ. ST. L.J. 1063 (2000).

89. As an example, Oregon's approach to land use requires that local governments engage in comprehensive planning, which must be guided by nineteen state-wide planning goals. These include goals for both protection of agricultural land (No. 3), urban growth boundaries (No. 14), and for affordable housing (No. 10). For a discussion of how Oregon addresses exclusionary zoning concerns within this framework, see Terry D. Morgan, *Exclusionary Zoning: Remedies Under Oregon's Land Use Planning Program*, 14 ENVTL. L. 779 (1984); see also Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1137 (1995) (stating that the Oregon system "has been the model for a successful 'balance of low-income housing needs with environmentalists' desires to preserve open space.'").

right-to-farm laws and tax programs. At the same time there is no cost, thus avoiding the significant limitations posed by PDR programs. Finally, zoning is familiar to most people and can fit within a broader comprehensive zoning scheme to which the entire community is subject.

For all these reasons, agricultural zoning is a necessary foundation to any effort to preserve farmland. The question continues to be, however, whether zoning remains an effective preservation technique by itself. This, in turn, requires some understanding of why conversion of farmland occurs. The primary reason for most farmland conversion is simple economics: as the suburbs expand, farmland will bring in a higher price in alternative, more intensive land uses, such as residential or commercial. Whatever its broader worth to society as farmland, to the immediate parties involved the land is often more valuable once it is converted.

A second reason for conversion, which plays into the first, is that farming the land is no longer a viable alternative for the landowner. This might be due to factors unrelated to land use issues, such as the general state of the farm economy or the lack of an interested heir to continue farming when the current owner retires. However, it might also result from encroaching development itself undermining the viability of farming, including increasing interferences with non-farm uses and the elimination of a critical mass to sustain a local farm economy. Moreover, it has been hypothesized that at some point an "impermanence syndrome" occurs, in which farmers stop investing in farm enterprises because of the perception that farming will not remain viable.⁹⁰ This lack of further investment acts to hasten the conversion spiral.

As should be apparent, these two forces mutually reinforce each other in creating conversion pressure. Economic incentives to convert farmland diminish the local farmland base, creating conflicts with new development and undermining farm vitality.⁹¹ Remaining farms thus become even more susceptible to conversion, even for farmers who might otherwise be inclined to remain in farming. Moreover, the case for granting zoning exceptions becomes stronger when farming no longer appears viable. Thus, any effort at farmland preservation must have an eye to both these concerns.

In theory, agricultural zoning would appear to effectively address both these concerns. First, as previously noted, zoning in effect removes the

90. See Arthur C. Nelson, *Farmland Preservation Policies: What Works, What Doesn't, and What We Don't Know*, available at <http://www.farmlandinfo.org/fic/ft/ohio/nelson.html> (last visited July 23, 2001).

91. See Thompson, *supra* note 17, at 839-40 (describing the "mutually reinforcing problems of farming in the shadow of the suburbs.").

decision to convert from the landowner. Thus, absent a zoning change, the landowner cannot convert the property to more intensive land uses, no matter how great the economic incentives.

Second, zoning would also appear to create a stable environment in which farming can remain a viable economic enterprise, at least to the extent it can be controlled by local government. In particular, by segregating large areas of farmland from other conflicting land uses, zoning avoids potential conflicts that interfere with farm activities. Zoning can also help ensure the maintenance of a large mass of farmland which is necessary for the preservation of the farm economy. Moreover, in theory zoning should address the "impermanence syndrome" by stabilizing farmland uses against conversion.⁹² If farmers perceive stability of farm use that zoning can create, they will continue to invest in their own farming activity.

Despite these theoretical strengths, the conventional wisdom is that zoning is not a particularly effective farmland preservation method. The fundamental concern about the effectiveness of agricultural zoning is the inherent impermanence of any system based on political choice. In particular, numerous commentators have noted that the opportunity to change zoning restrictions through variances and rezonings undermines its effectiveness as a long-term answer to farmland conversion.⁹³ Especially problematic is what is seen as a lack of political will to withstand requests for change. As a result, what often begins as a strong preservation plan on paper, soon evaporates in a succession of rezonings to accommodate development pressure.

The frequent inability of local government to withstand pressure to change arguably results from several of the previously discussed impacts of zoning. On the one hand, agricultural zoning often results in significant diminution in property value for the affected property owner, at times creating a perception of unfairness that makes the case for change seem more reasonable. On the other hand, substantial development pressure for consumer preferences for larger lots is often evident. Taken together, they create a powerful pressure for rezoning of agricultural land to more

92. See Sean F. Nolon & Cozata Solloway, Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 622 (1997).

93. See, e.g., White, *supra* note 19, at 118-19; Nolon & Solloway, *supra* note 92, at 628; Michael T. Peddle, *The Effects of Growth Management Policies on Agricultural Land Values*, available at <http://www.farmlandinfo.org/cae/wp/wp97-7.html> (last visited Mar. 11, 2002); David L. Szlanfucht, Note, *How to Save America's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333, 349 (1999); Thompson, *supra* note 17, at 839.

intensive uses. This is particularly true if there are no clear alternatives for the inevitable development pressure that builds. Without a clear plan on how to address housing and other needs, the most expedient route is to grant change requests.

The concern that the ease of change undermines the effectiveness of agricultural zoning finds support in studies and anecdotal evidence. For example, in a study of the effect of agricultural zoning on farmland preservation in Wisconsin, two researchers found agricultural zoning to have very little effect on preserving farmland.⁹⁴ Using data from over 800 towns in Wisconsin, the study examined the rate of farmland loss between 1990 and 1997.⁹⁵ After controlling for various other factors that might influence the loss of farmland, the study concluded that there was "no convincing evidence that the presence of an Exclusive Agricultural Zoning ordinance had a strong mediating impact on the rate of farmland loss."⁹⁶

The authors suggested that the mere presence of agricultural zoning was in and of itself an insignificant factor in preserving farmland. Rather, as frequently observed by others, the critical factor is a local government's willingness to enforce existing language and, in particular, to consistently say no to zoning change requests that would permit development. Communities with strong zoning language, but which frequently granted rezonings, lost farmland as rapidly as those with no zoning at all. However, communities with modest zoning language but which were resistant to change requests were effective in preserving farmland.⁹⁷

While recognizing this basic weakness in zoning as a preservation tool, two points should be made in its defense. To the extent zoning is unstable, it is not necessarily a weakness of the tool itself, but rather those implementing it. As noted by scholars, when communities have a strong commitment to preserving farmland, zoning works quite well.⁹⁸ Thus, the basic problem is the community's fundamental commitment to preserving farmland to begin with. For those serious about preservation, agricultural zoning is effective.

Second, zoning change mechanisms, the supposed achilles heel of zoning when it comes to preserving farmland, are not in and of themselves a weakness of a properly conceived system, but instead a strength. They provide what would otherwise be a static system insensitive to changing local and societal needs with the flexibility to respond to the inevitable

94. See Jackson-Smith & Bukovac, *supra* note 73, at 16.

95. *Id.*

96. *Id.*

97. See *id.*

98. See *id.*

changes that occur. In theory these change mechanisms permit zoning to more accurately respond to the correct use of land, granting change when it is in the public's interest and denying it when it is not. This is arguably good, since a truly effective farmland preservation system is not one that preserves farmland at all costs, but one that preserves farmland when the land is more valuable when it is preserved, and converts it when it is more valuable as converted.

The problem, of course, and this brings us closer to the primary weakness of zoning, is that the typical change request tends to focus on the interests of the immediate parties, and thus to short-change broader and long-term societal interests. This is in part due to incomplete information. In the same way that markets fail because of incomplete information, so too do political and governmental decisions. Thus, what is the correct allocation of land resources is often at best only an estimated guess in any particular situation.⁹⁹

More significant, political decision making tends to discount broader, more diffuse, and long-term societal interests, giving greater weight to immediate concerns. By their very nature many of the interests supporting farmland preservation extend beyond the local community and benefit regional and national interests, as well as future generations. This certainly is true of food security, which is a national and very long-term concern.¹⁰⁰ But even some of the environmental amenities often associated with farmland preservation, such as reduced pollution and energy consumption, extend beyond the local community. To the extent that these reflect societal interests beyond the local decision-maker's own immediate constituency, it is not surprising that they are heavily discounted or ignored altogether. This is particularly true when those seeking change from an agricultural zoning restriction present what appear to be immediate concerns, especially when surrounding property has already been developed.¹⁰¹

99. See Buzbee, *supra* note 75, at 89-90 (discussing informational problems that arise because input at local levels tends to come from concentrated interests of those who benefit from sprawl, rather than from dispersed interests of those who benefit from controlling sprawl).

100. As noted in note 1, *supra*, there is substantial uncertainty over whether food security is even a real concern. As acknowledged by Lawrence W. Libby, a leading proponent of farmland preservation, there is no concern about our ability to produce food for the immediate future, and most current projections are "sanguine" about our food production capacity until about 2050. See Lawrence W. Libby, *Farmland Protection for Illinois: The Planning and Legal Issues*, 17 N. ILL. U. L. REV. 425, 427 (1997).

101. See Buzbee, *supra* note 75, at 79-88. Professor Buzbee provides an in-depth analysis of the institutional problems of addressing farmland conversion and sprawl at the

Thus, for a combination of reasons, including the lack of political will to resist change and the perception, as well as the reality, that many of the benefits of preservation extend beyond the local community, agricultural zoning, by itself, is limited in its effectiveness as a preservation method. Efforts to improve agricultural zoning as a preservation technique must therefore address the problem of change and the underlying environment that gives rise to excessive change. As suggested above, this is in part an uphill battle, given the short-term and immediate focus of political decision making. Yet arguably, certain steps can be taken to address at least some of the underlying concerns giving rise to excessive change.

Most fundamentally, there must be a clear sense of, and commitment to, the idea that farmland preservation is an important societal goal. If government is truly resolved to protect farmland, then zoning is a cost effective way to preserve large tracts of land. At a minimum this requires early and full involvement of all stakeholders in supporting agricultural zoning, especially the farming community itself.¹⁰² To the extent farmers see zoning not as a threat, but as a tool designed to protect the local farm economy, their support can be critical in resisting conversion pressure. Moreover, to the extent the perceived purpose of the zoning is to support a strong local farm economy, rather than simply supply environmental amenities, it is more likely to be seen in the community's interest to resist change.

Zoning must also be used in such a way that farming remains a viable economic option, thus avoiding one of the two reasons for conversion. Most importantly, this means resisting unnecessary change in the first instance, since the perception of easy and inevitable change itself undermines the viability of zoning, which in turn leads to even greater change pressure. In addition, the initial zoning designations must provide for a sufficient acreage to ensure continuation of a vital local farming community.

Beyond that, the conditions giving rise to excessive change can be addressed through measures designed to stabilize zoning generally. Perhaps most important is sound planning, ensuring adequate opportunity for development while drawing clear lines where development will be

local level. He notes that:

no single unit of government bears most of the costs of sprawl or is likely to bear the blame for sprawl's harms and inconveniences. Moreover, the widely felt harms and discomforts of sprawl do not fall in a concentrated way on any particular segment of the public that is likely to be roused to political action.

Id. at 85.

102. See DANIELS & BOWERS, *supra* note 7, at 123-24.

prohibited. Especially critical are adequate provisions to accommodate anticipated growth, most likely in the form of plans for more compact development. Without a clear plan of how to address housing and other needs, the most expedient route is to grant change requests. Thus, to the extent that agricultural zoning removes significant amounts of land from the housing market, there needs to be a clear plan of how housing needs will be addressed without the necessity of rezoning agricultural land.

There are other measures that can be used to support agricultural zoning, including selective use of PDRs and TDRs, as well as urban growth boundaries. These, along with coordination of zoning with compact growth plans, will be examined more closely in the next section of this paper on future directions for agricultural zoning.

III. FUTURE DIRECTIONS

Agricultural zoning is a necessary component of any comprehensive effort to protect farmland. That will undoubtedly remain true even as efforts are made to identify new, and fine-tune existing, farmland preservation methods. The ability of zoning to restrict substantial amounts of farmland, at minimal cost to government and within existing legal parameters, will continue to make it an attractive, and even indispensable, preservation tool.

At the same time, the role of agricultural zoning in farmland preservation faces several significant challenges, some of which overlap with each other. Most significant among these are: continued concerns about "takings;" perceptions of unfairness to restricted property owners; potential conflicts with affordable housing goals; the necessity of coordinating agricultural zoning with growth management strategies; and, the instability of zoning as a farmland preservation technique because of the ease with which change is often permitted. With these considerations in mind, the following recommendations are made for the future of agricultural zoning as a centerpiece of farmland preservation efforts.

A. AGRICULTURAL ZONING RESTRICTIONS MUST BE DESIGNED SO AS TO LIMIT USE TO FARMING

Agricultural zoning is of little use if it permits a variety of other uses, which is sometimes the case.¹⁰³ The best alternative is exclusive

103. See White, *supra* note 19, at 120-22 (discussing problems initially faced in

agricultural zoning, which prohibits any use unrelated to farming.¹⁰⁴ To the extent large lot zoning is used, minimum lot sizes should conform to the size of the farm in the region and be of sufficient size to avoid the problem of purchase just for residential use. Thus, requirements of one house per five acres will do little good, since the restricted parcel is too small for viable farms and is attractive for residential development.¹⁰⁵ This will actually exacerbate sprawl, rather than control it.¹⁰⁶ Instead, minimum lot sizes need to be substantially larger so as to conform to viable farm sizes.

B. AGRICULTURAL ZONING NEEDS TO PRESERVE A SUFFICIENTLY LARGE AREA TO ENSURE MAINTENANCE OF A VIABLE FARM ECONOMY

In the long run agricultural zoning will succeed only if the farming community itself is confident that farming will remain viable, thereby encouraging continued investment in farming.¹⁰⁷ Although resistance to unnecessary change is perhaps most important in this respect, the initial designation of a critical mass of land is also important in maintaining a viable farming economy.

Oregon when a variety of nonfarm uses were at first permitted in Exclusive Agricultural Zones).

104. See MALONE, *supra* note 5, § 6.08[3].

105. See Jackson-Smith & Bukovac, *supra* note 73, at 6.

106. See Mark R. Rielley, Comment, *Evaluating Farmland Preservation Through Suffolk County, New York's Purchase of Development Rights Program*, 18 PACE ENVTL. L. REV. 197, 214 (2000).

107. See *id.* at 211-12.

C. AGRICULTURAL ZONING SHOULD OCCUR AS PART OF COMPREHENSIVE PLANNING, IDENTIFYING SUITABLE LAND IN ADVANCE OF DEVELOPMENT PRESSURE

The need for early identification of land to be zoned agriculturally serves several purposes. First, it helps avoid one of the few instances in which a taking might even arguably be found.¹⁰⁸ Second, advance planning provides fairness to affected landowners, who can plan both farming and financial activities accordingly. Third, perceptions of unfairness are greatest when highly valuable property is downzoned, a scenario made less likely by early identification and zoning of farmland. Fourth, early identification facilitates optimal use of buffer areas and PDRs, which will make agricultural zoning restrictions more resistant to change.

D. AGRICULTURAL ZONING NEEDS TO OCCUR IN COORDINATION WITH A REALISTIC PLAN TO ACCOMMODATE AND CHANNEL GROWTH

Agricultural zoning without a plan to accommodate anticipated growth will lead to one of several undesirable outcomes. First, and most likely, there will be substantial pressure to change the agricultural restrictions in order to accommodate the growth, leading to an undermining of the farmland preservation efforts.¹⁰⁹ Second, if the government remains firm in its agricultural restrictions, then potential problems with affordable housing arise.¹¹⁰ Thus, any attempt to restrict agricultural land, and thereby reduce the available supply of raw land for housing stock, must at the same time know how it will address anticipated housing needs.

108. As discussed in Part II.A of this article, agricultural zoning will rarely constitute a taking under current constitutional analysis as long as the property is suitable for farming and is economically viable. Even where there is substantial diminution in value due to a downzoning, there is still probably not a taking under the *Penn Central* balancing test. See *supra* text accompanying notes 49-52. Yet to the extent a taking might result, it would likely in part be based upon property that was purchased at a price reflecting currently permitted development opportunities and which was then downzoned resulting in substantial diminution in value. Early identification of land to be zoned agricultural avoids this scenario.

109. See Thompson, *supra* note 17, at 837 (suggesting that one reason there has been so little farmland rezoned to other uses in Montgomery County's Maryland's farmland preservation program is that a significant portion of rural land was reserved to accommodate future growth, thus avoiding the necessity of rezoning land intended to be preserved as farmland).

110. See *supra* text accompanying notes 80-89.

What constitutes a realistic plan to accommodate growth will necessarily depend on a number of variables unique to a region. It should, of course, guide development away from prime agricultural land. It should also provide a sufficient amount of land for residential development, depending on what a community's goals and housing needs are. This might include varying levels of agriculturally restricted property, with less desirable land targeted for eventual development later. This provides a flexible means of accommodating growth pressure while avoiding loss of a region's best farmland.

In most cases this will also require plans for more compact growth and higher density residential development. Many of the areas facing the greatest loss of farmland also anticipate substantial population growth in the near future.¹¹¹ At a minimum, this necessitates removal of minimum lot size requirements inconsistent with compact development. It makes little sense, and even invites erosion of agricultural zoning controls, to limit development to two or three houses per acre when facing significant population increases while seeking to preserve farmland. Beyond that, many communities need to affirmatively encourage compact development.

E. AGRICULTURAL ZONING NEEDS TO WORK IN CONJUNCTION WITH OTHER FARMLAND PRESERVATION TECHNIQUES, AND IN PARTICULAR WITH PDRS AND TDRS

Other farmland preservation programs, though insufficient in and of themselves to preserve farmland, can help to address some potential weaknesses of zoning. Indeed, a substantial amount of academic commentary in recent years has emphasized the need to combine agricultural zoning with other farmland preservation techniques for an effective program.¹¹² Such multifaceted programs, emphasizing PDRs and TDRs in particular, provide mutually reinforcing controls that address the weaknesses of zoning.

PDRs in particular can be used in a mutually supportive role with agricultural zoning. On the one hand, agricultural zoning can decrease the cost of PDRs by lowering development potential in a region. Moreover, agricultural zoning can insure that PDRs do not inadvertently increase

111. See A. ANN. SORENSON ET AL., AMERICAN FARMLAND TRUST, FARMING ON THE EDGE 8-16 (1997) (documenting growth and development pressures in regions facing greatest farmland loss).

112. See DANIELS & BOWERS, *supra* note 7, at 235; Thompson, *supra* note 17, at 844-51; White, *supra* note 19, at 115.

development by attracting people to take advantage of preserved land.¹¹³ At the same time, use of PDRs can support agricultural zoning in several significant ways. First, to the extent used, they help address the perception of unfairness that exists and helps assure acceptance of restrictions. This is true even for those who might not be the immediate recipients of PDRs, if they perceive the availability of PDRs at a later date.¹¹⁴ Second, it can add to the farming stability of a community, making it less likely that decisionmakers will yield to pressure to rezone agriculturally restricted land. Third, PDRs can be used to create an appropriate buffer between development and agriculturally zoned land.

This final point highlights the need for strategic use of PDRs in relation to zoning, balancing several competing concerns. On the one hand, they arguably should not be used too close, where development might be inevitable. Conversely, the use of PDRs too far out is a poor use of the funds. Instead, it makes the most sense to use them near where a growth line should be formed, creating a buffer between more intensive uses and other farmland subject to agricultural zoning. This potentially serves several purposes. First, it insulates the property most subject to development pressure from conversion, thus decreasing conversion pressure on the agricultural zoned property. Second, it helps the perception of farming stability, encouraging investment.

Communities should also consider use of TDRs as a compliment to agricultural zoning, primarily as a means of offsetting the perceived financial hardship on affected landowners that zoning might create. TDRs are a compensatory source for landowners without the fiscal limitations of PDRs, a major advantage. For this reason they have been successfully used as a compliment to agricultural zoning in a few instances, most notably Montgomery County in Maryland and the Pinelands in New Jersey.¹¹⁵ In both cases, the TDRs have provided a compensatory basis for zoning, helping to ensure its acceptability in the farming community, while also helping to provide for increased development density within designated growth areas.

113. See DANIELS & BOWERS, *supra* note 7, at 238-39.

114. See Thompson, *supra* note 17, at 845-46.

115. See DANIELS & BOWERS, *supra* note 7, at 179-86 (discussing success of various TDR programs); White, *supra* note 19, at 135-40 (discussing success of the Pinelands program).

As noted earlier, however, TDRs require the right mix of development conditions suitable to absorb transferred development, as well as stability of zoning controls within those areas, a relatively rare occurrence.¹¹⁶ For that reason, few successful TDR programs have emerged, despite their significant popularity in academic literature. Moreover, TDR programs must be carefully coordinated with the need for greater compact and dense development that will normally need to accompany agricultural zoning. On the one hand they seem to provide the perfect solution, since the TDRs are used to increase density and at the same time compensate restricted landowners. Yet for the TDRs to generate sufficient value, receiving areas must initially limit development density. This is arguably at odds with the need for compact growth and increased residential density mentioned above, and might in fact undermine zoning restrictions, especially if the TDR market fails to function properly.¹¹⁷ Thus, although the use of TDRs as a compliment to zoning should be explored, communities need to be sensitive to how they are coordinated with other components of a successful agricultural zoning system.

F. FINALLY, WHERE APPROPRIATE, USE OF REASONABLE URBAN GROWTH BOUNDARIES SHOULD ACCOMPANY AGRICULTURAL ZONING

Urban Growth Boundaries (UGB) have the potential to be highly effective tools to stabilize agricultural zoning, since by their very nature they are designed to contain growth within certain limits.¹¹⁸ This eliminates or minimizes leapfrog development that can slowly erode agricultural zoning schemes. Perhaps most significantly, they provide a solid basis for denial of zoning change requests and at the same time give farmland located outside the boundaries assurance of stability.

116. If requests for greater density development in receiving areas are given with relative ease, as is often the case, then the TDRs lose whatever worth they might otherwise have.

117. See ELLICKSON & BEEN, *supra* note 81, at 193 (“[t]o make TDRs valuable, [a] city may restrict permitted densities in the receiving area below what the city otherwise would have been willing to permit.”). This runs counter to the need for *increased* density within areas zoned for development to offset the removal of rawland for housing resulting from agricultural zoning. If the TDR market functions properly, the increased density occurs through use of the TDRs. However, if the TDR market fails to operate properly, then the result is a decrease in residential density, which, together with agricultural zoning might pose problems for the availability of affordable housing. See *supra* text accompanying notes 80-89.

118. For a description of Urban Growth Boundaries, especially as used in Oregon, see ELLICKSON & BEEN, *supra* note 81, at 989-95.

To work properly, such boundaries must balance several competing concerns. Perhaps most significantly, they need to be realistic in their expectations and provide for reasonable opportunities for growth.¹¹⁹ In most cases this will also require plans for compact growth and higher density development, with special attention to ensuring affordable housing opportunities. Finally, there needs to be a provision for periodic review of the boundaries in response to changing local needs.¹²⁰

To date, the limited experience with UGBs has been mixed in terms of their success in preserving farmland. The most extensive use of such boundaries has been in Oregon,¹²¹ where results have been uneven throughout the state. Although boundaries have worked reasonably well in the Portland metropolitan area, the experience has been more tenuous in other areas, with significant development often occurring outside the UGBs and only limited amounts of multiple-family development taking place within UGBs.¹²² Further, there is some evidence that UGBs in the Portland area have increased housing costs.¹²³ Nonetheless, in comparison to other areas, the use of UGBs in Oregon appears to be successful in preserving farmland.¹²⁴ Where growth boundaries have been combined with both agricultural zoning and PDRs and/or TDRs, such as in Lancaster, Pennsylvania and Montgomery County, Maryland, the success in preserving farmland has been even more apparent.¹²⁵

119. See, e.g., *id.* at 994 (stating that Portland, Oregon's UGB included significant room to accommodate future growth).

120. This, however, poses the potential problem that communities will quickly redraw UGBs in response to development pressure, similar to what many currently do with regard to agricultural zoning. See White, *supra* note 19, at 119-20 (discussing this problem in parts of Oregon).

121. Goal Fourteen of Oregon's mandated nineteen state-wide planning goals provides for creation of urban growth boundaries, and states that the "establishment and change of the boundaries shall be based upon . . . retention of agricultural land," with priorities set for different classes of farmland. See White, *supra* note 19, at 120.

122. See ELLICKSON & BEEN, *supra* note 81, at 992-94.

123. See sources cited *supra* note 80.

124. See Richmond, *supra* note 75, at 346-47 (stating that on balance, most commentators believe the Oregon experiment has been successful).

125. See DANIELS & BOWERS, *supra* note 7, at 141-42 (discussing success of the Lancaster program, which includes a mix of agricultural zoning, PDRs, and urban growth boundaries); Thompson, *supra* note 17, at 836-37 (discussing success of Montgomery County program, which includes a mix of agricultural zoning, PDRs, TDRs, and what the author calls an "urban limit line," beyond which development is heavily restricted).

CONCLUSION

Despite its shortcomings, agricultural zoning must remain a core component of farmland preservation efforts. It permits local government to immediately restrict large amounts of land at little or no cost, providing the potential for a stable farming environment and removing the ability of landowners to convert the property to more intensive uses. Even though this might have a significant economic impact on regulated landowners, if done properly it should not constitute an unconstitutional taking nor be viewed as inherently unfair.

At the same time, the effective use of agricultural zoning must recognize its limitations, especially the problem of government too readily granting rezonings and thereby eroding the system of controls. Thus, to the extent possible, efforts must be made to address conditions that create change pressures, and to integrate zoning into a more comprehensive farmland preservation program. Most fundamentally this means a realistic provision for accommodating growth, which, in many instances, will require more compact and dense development. Equally important is the need to integrate agricultural zoning with other preservation techniques, most notably PDRs, to create a mutually reinforcing set of controls.

Finally, the success of agricultural zoning as a farmland preservation technique needs to be judged not only on its ability to preserve farmland, but also in its compatibility with other societal goals. In particular, the desire for preserving farmland needs to be balanced against the need for reasonable growth within the community, with special sensitivity to ensuring affordable housing opportunities for citizens. Finding an appropriate balance between the legitimate housing needs of citizens and the need to protect prime farmland, is, in the long run, not only necessary for the health of the local community, but will provide a more solid basis for resisting change to the agricultural zoning restrictions themselves.

