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I. INTRODUCTION

There can be little doubt that agriculture is important to Illinois. It is everywhere, dominating the countryside and critical to the state's economy. In fact, the obvious ubiquity of farming as a land use outside of the immediate metro area of Chicago precludes farmland protection from virtually any list of priority statewide policy challenges. I contend, however, that farmland protection does in fact belong on the state's policy agenda, as one important goal of growth management *and* as a policy objective on intrinsic merit. My purpose in this address is to review the primary planning and legal issues surrounding farmland protection as a policy issue and then suggest a general strategy for Illinois.

II. POINTS OF DEPARTURE

Successful policy for farmland retention must acknowledge certain facts.

1. Farmland is first and foremost a business. It is a land intensive business, like mining and recreation, but its continuation does require attractive economic circumstances for the production of food and fiber. Farming is also a way of life, but so is being a stockbroker, barber or lawyer. In my view, farmland retention policy is *not* about protecting a certain life style, or attitude about the relationship between people and land, but about protecting the production capability which farmland embodies *and* the non-production attributes of viable farmland. There are other policy objectives dealing with perceived virtues of the farming lifestyle or land and agricultural ethics.[1]

2. Land is of diminishing importance in food production. Management and capital have steadily replaced land and labor in all food production processes, releasing those resources for other purposes. Similar substitutions are evident for other natural resource based commodities.[2] These techno-

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1. *See* Paul Thompson, THE SPIRIT OF THE SOIL (1995).

2. T.W. Schultz, *The Economic Value of Human Time Over Time*, LECTURES IN AGRICULTURAL ECONOMICS, USDA (1977).

logical changes in farming have facilitated economic progress and specialization of function. For decades, land has been pushed out of farming in all states, including Illinois, and that trend will likely continue.

3. Land use change is fundamental to a dynamic society. Changes in use occur in response to expressed willingness to pay for land as a productive resource, as location for economic activity or for certain amenity values. Price is a function of expected returns over some reasonable planning horizon, discounted to present value. Land use changes occur within a structure of property rights and other rules that establish boundaries on acceptable use.

4. Farming is a part of a much larger complex of economic activities that we call the food industry. There is more to agriculture than farming, but the production step is critically important.

III. WHY FARMLAND POLICY?

There are at least two distinct lines of argument on the "why" issue. First is the adequacy of food supply and the obvious necessity of land as a medium for plant growth; the other is the non-owner services of farmland.

A. FOOD SECURITY

This theme has both short and long run dimensions. While we need less farmland now that with earlier production technologies, we do need *some*. Since food is generally acknowledged to be critical to human survival, at some level of land supply plant growth will compete favorably with subdivisions for given acres of land. All land is not created equal and the food supply result of losing highly productive land will be greater than from loss of marginal land.

In their classic analysis of resource scarcity, Barnett and Moore discuss the mitigating effect of rising factor prices that signal relative scarcity.[3] Substitution of renewable, manmade input factors for non-renewable natural resources corrects for increases in relative input prices. No such factor price increase has occurred for the land component of food production functions, and in fact real prices of agricultural commodities themselves have generally declined since the early 1900's.[4] The land market has not recorded a scarcity value for farmland, that is, an increment of land value attributable

3. HAROLD J. BARNETT & CHANDLER MORSE, SCARCITY AND GROWTH: THE ECONOMICS OF NATURAL RESOURCE AVAILABILITY 126-147 (1963).

4. Shultz, *supra* note 2, at 12-13.

to the judgement that future land supply will be inadequate. Such scarcity price effects *are* evident for other non-renewable resources.[5]

We have been wise enough to develop land substitutes before any food supply scarcity warning signal has sounded. Incentive for that investment seems to have been the significant opportunity cost of people and land in farming. Land and people *have* gone to other pursuits with resulting increases in overall economic growth and quality of life. In a very real sense, then, we are enjoying the fruits of past investments in land substitution, living off the surplus. The opportunities foregone by leaving land in farming will continue to increase in value with no obvious constraint until the quantity of food supplies is less than quantity demanded, price rises accordingly, and those supplying food (farmers) can outbid their competitors for the land required. No doubt those adjustments *can* occur. But economic shortage, meaning that prices are high enough to trigger diversion of more land to food production, can impose significant economic, social and political disruption. As Krutilla and Fisher observed in their early theoretical and empirical analysis of irreversabilities in natural environments, resources are not perfectly mobile among alternative uses.[6] When amenity or ecological imperatives are disrupted by major alterations of the resource, reversibility is at best very expensive and perhaps impossible.[7]

Thus, the food adequacy rationale for farmland protection is really about risk management over time. It is about comparing the consequences of taking a chance on future food production capacity with the consequences of protecting the option for increased future food production and thereby forgoing other possibilities for that land. Obviously, farmland protection has its own cost. Most recent analyses are sanguine about productive capacity of the U.S. food system, at least until about 2050. Optimism is based on continued substitution of management and manmade renewable capital for land and labor and estimates of future world-wide effective demand for food. These projections assume that land conversions will leave some highly productive land in farms and that the human capital will be there to convert those resources to food. Projections also assume that potential cropland currently in pasture, range or forest can and with a functioning land market *will* be converted to cropland.[8] In statistical jargon, this issue is about comparing the consequences of Type I and Type II errors on the

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5. TALBOT PAGE, CONSERVATION AND ECONOMIC EFFICIENCY 164 (1977).

6. JOHN V. KRUTILLA AND ANTHONY C. FISHER, THE ECONOMICS OF NATURAL ENVIRONMENTS: STUDIES IN THE VALUATION OF COMMODITY AND AMENITY RESOURCES 28-33 (1975).

7. *Id.*

8. PIERRE R. CROSSON AND STERLING BRUBAKER, RESOURCES AND ENVIRONMENTAL EFFECTS OF U.S. AGRICULTURE 59 (1982).

hypothesis that there will be plenty of future food production capacity because of new technologies and market driven resource adjustments. The consequence of the Type I error, rejecting a true hypothesis and retaining more farmland than needed would appear to be less socially critical than accepting a false hypothesis and *converting* more land than needed for long term food security. Your position on the matter depends on your confidence about continued technological substitution, your time preference and attitudes about the future, and your judgment about what could have been done with land unnecessarily kept in farming.

I happen to be risk averse on this matter. I would concur with the general advice of Kenneth Arrow and other scientists writing for the 1994 Stockholm convention on economic and environmental policy, that ". . . given the fundamental uncertainties about the nature of ecosystem dynamics and the dramatic consequences should we guess wrong, it is necessary that we proceed in a precautionary way."[9] There is also the ethical conundrum of discriminating against future generations in the discounting process. Discounting future returns is an essential part of decision-making, but it does value future needs lower than current.[10]

It makes little sense for an individual community, county or even state to argue that their farmland would make a real difference in overall food supply. Perhaps if *all* of Illinois were paved over as fast as the asphalt trucks could move there would be a market upheaval at the Board of Trade, feed prices would rise and price of tar would increase. But I suspect that things would settle down. The more compelling line of analysis is the collective consequence of millions of individually rational land conversion decisions, each made with recognition that a single conversion will make no difference, leading to significant irreversabilities — the "tyranny of small decisions."[11]

The food adequacy rationale for policy actions *today* that encourage protection of prime farmland for future generations, perhaps even beyond 2050, is really a public good issue, protecting the non-exclusive, non-rival-in-use sense of personal security that future generations will have enough food. One could argue that the short term land use benefits forgone by such a strategy are far outweighed by that unmeasured collective sense of security. Protecting or sustaining public goods like fragile ecosystems or

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9. Kenneth Arrow, et al., *Economic Growth, Carrying Capacity and the Environment*, SCIENCE, Apr. 28, 1995, at 521.

10. Krutilla & Fisher, *supra* note 6, at 65-73.

11. F. Kahn, *The Tyranny of Small Decisions: Market Failures, Imperfections and the Limits of Economics*, KYKLOS 28 (1996).

endangered species must be a federal or state policy position supporting local action.

B. NON-OWNER SERVICES

The other line of argument on the "why" of farmland protection concerns the various non-owner amenities available from actively farmed land. These services tend to be "real time" and non-monetary. They may be congestible common property services, meaning that many may enjoy access to them but that overuse can create problems. Physical contact with the land is not necessary for some of these services and their value is generally not captured by the land owner. Examples are groundwater recharge, habitat for migratory birds of animals that are enjoyed by non-owner, the waste conversion and nutrient management service of land, farms as part of the rural character of a place, open space for relief from human congestion. These services reflect the preferences and attitudes of people living near the agricultural areal. Some services may in fact be withheld from non-payers thus enabling the owner to reflect their value in land use decisions. Biomass, including food and farm wastes, has significant potential as an alternative energy source.[12] People will pay for the right to fish a stream or pond, hunt the fields or forested parts of the farm, or even visit a farm as a bed and breakfast guest.[13] Some will support farmland preservation efforts to help assure a local supply of fresh produce.

The motives behind farmland protection policy obviously vary from place to place, among levels of government and over time. Interest groups organize around any or all of these lines of argument to support specific policy initiatives. Most voters invest little in trying to understand a specific rationale, but have the general sense that farmland is important, now and for future generations, and are willing to pay a modest price in taxes or forgone economic change to protect the farming option for selected lands.

IV. AN OVERVIEW OF POLICY EXPERIENCE

While there is certainly not a crisis environment surrounding farmland protection as a policy issue, there is a rich body of experience with local and state programs to encourage its retention. Voters, taxpayers and elected

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12. *See* Virginia R. Tolbert & Andrew Schiller, *Evironmental Enhancement Using Short-Rotation Woody Crops and Perennial Grasses as Alternatives to Agricultural Crops*, IN ENVIRONMENTAL ENHANCEMENT THROUGH AGRICULTURE (William Lockeretz, ed., 1995).

13. *See* Lawrence W. Libby, *Public Recreation on Private Land: Research Needs and Considerations*, IN CONFERENCE PROCEEDINGS: INCOME OPPORTUNITIES FOR THE PRIVATE LANDOWNER THROUGH MANAGEMENT OF NATURAL RESOURCES AND RECREATIONAL ACCESS 60 (William N. Grafton et al., eds. 1990).

officials in all fifty states and most counties and towns have seen fit to provide both inducements and restrictions to affect the pattern and rate of farmland conversion. The goal is to alter the options available to the owner or to influence the relative attractiveness of those options. The techniques employ all the rights and authorities exercised by governments in pursuit of the public interest — taxation, regulation and purchase.

A. TAX

The taxation power of government has been employed to adjust economic signals for the farmer, to induce or encourage his or her continued operation in the face of development pressure. The idea is to influence the expected net returns to farming and thereby the "margin of transference" among land uses. Use value assessment of farmland is the most common approach, taxing land on its use in farming rather than on market value. All states employ some technique to assess farmland on its income producing potential *as* farmland or, in two states, establish a threshold relationship between household income and property taxes. Any property taxes above that threshold come back to the farmer as a credit against state income tax.[14] These tax programs confront the concept that market value of land is an accurate indicator of ability to pay when the land is employed as a managed ecosystem rather than as location for other economic activity. Various provisions of the federal income and inheritance tax codes also acknowledge the land intensive character of farming by reducing the incentives to convert land from farming to something else.

Tax programs are incentives; they seek to achieve positive social result by influencing the actions of self-interested land owners. The declared purpose of protecting farmland is achieved to the extent that owners continue to find the incentives attractive. In about thirty-seven states, farmers who decide that the incentive is no longer sufficient to offset substantial capital gains from a non-farm sale must pay back a portion of the accumulated income transfer. But in Illinois, Florida, Indiana and a few other states there is no penalty when that land use change occurs. The change can proceed in either case, it just costs more to those who must pay back some of the tax benefit previously received. Because of the non-compulsory nature of the tax approach to land policy, these programs have been criticized as merely subsidized speculation in future land value.[15] It

14. *See* L. DeBoer and J. Sindt, *Use Value Assessment of Farmland*, Unpublished report to the Indiana General Assembly, Department of Agriculture Economics, Purdue University, October 31, 1996.

15. A. Nelson, *Economic Critiques of U.S. Prime Farmland Preservation Policies*, 6 J. RURAL STUD. 119, 129-30 (1990).

is certainly more difficult to achieve specific policy purposes when private land use choices are manipulated rather than directed.

B. REGULATION

The public power to regulate in the interest of "the public health, safety and general welfare" has been directed at farmland protection through zoning.[16] Zoning experience in the U.S. goes back to the earliest colonial times when certain "offensive activities" were separated from the rest of the community.[17] Rural zoning with attention to the needs of agriculture and forestry was first introduced in Wisconsin in 1923.[18] Since the health and safety arguments are seldom clearly applicable to a local land use ordinance, the general welfare rationale is usually used. Only Hawaii and Oregon have state land use controls that include farmland as a state resource. Hawaii designates agricultural districts and Oregon has state oversight of local zoning to assure compliance with state growth management and open land protection goals. Local ordinances may designated certain areas for farming and related uses or may simply have larger minimum lot zones and fewer land use restrictions in the largely agricultural area surrounding a municipality. The former, exclusive agricultural zoning has protection of farmland as a stated purpose on behalf of the general welfare of local citizens, while the latter is directed more at reducing the cost of urban sprawl.

C. PURCHASE

The acquisition power of government has been directed to farmland protection through the public purchase of the right of the owner to develop his land. There are specifically authorized purchase programs in about sixteen states, mostly in the Northeast where there is well articulated demand for farmland and open space protection as a part of overall economic change.[19] Suffolk County, New York was the first local government to actively seek rights to farmland in the mid-1960's. More recent examples are Peninsula Township, Michigan, and King County, Washington. Purchase seems to work best where there is significant non-farm population in cities and suburbs, with high effective demand for the open space amenities of farmland, and relatively small areas of farmland under obvious development pressure. All states, counties and municipalities

16. ERLING D. SOLBERG, U.S. DEP'T OF AGRICULTURE, RURAL ZONING IN THE UNITED STATES 2 (1952).

17. *Id.*

18. *Id.*

19. KEITH WIEBE, ET AL., U.S. DEP'T OF AGRICULTURE, PARTIAL INTERESTS IN LAND: POLICY TOOLS FOR RESOURCE USE AND CONSERVATION 12-13 (1996).

already have the authority to acquire land or rights in land to accomplish valid public purpose. That general authority would presumably include acquisition of development rights to farmland.[20] A local government wanting to preserve farmland could add acquisition to its current regulatory program. But specific ordinances for that purpose undoubtedly give direction and visibility to the effort. Purchase of development rights is a "kinder, gentler" approach to farmland policy, that pays for the desired change in private land use behavior rather than regulating it away through zoning. As such, PDR will be increasingly attractive in Illinois and other states in the Midwest.

D. A MOVING TARGET

With all of that policy experience, one might assume that the "problem" of farmland protection could be solved or at least a strong consensus developed as to the best way to get it done. Such assumptions fail to account for transitory human expectations, the incremental nature of all policy, and our unfortunate tendency to ignore our own experience. Richard Darman, former Director of the Office of Management and Budget, recently observed, "The scandal is not that government has failed . . . but that so little has been learned from our trials."[21] We do a poor job of keeping track of the flow of consequences from specific policy initiatives. Nowhere is that more apparent that in farmland protection policy. But it is also true that attitudes, preferences and expectations of farmland owners and other citizens are in constant adjustment. A use value assessment law may make a real impact on rural land patterns in an area, providing the marginal incentive necessary to keep farming an attractive land use option. A new highway interchange, an industrial relocation or just the passing of a farm from one generation to the next can dramatically cchange the economic signals and their consequence to the land owner. An observer might conclude that the tax provision failed because it did not permanently retain farmland in that area. There are no stable measures of success and failure in policy since any such judgment changes with the perceptions of the affected population. Many policy problems are never really solved, just redefined. An at any given point in time, notions of fairness, good and bad land use, and policy success vary over the landscape. Acceptable public action to preserve farmland in Vermont or Oregon may be unacceptable to voters in Illinois or Ohio. And there can be much variation in culture and

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20. *See* Lawrence W. Libby, *The Role of Easements in New York's Open Space Planning*, AGRICULTURAL ECONOMICS REPORT 272 (1968).

21. Richard Darman, *Riverboat Gambling with Government*, N.Y. TIMES, December 1, 1996 § 6 (Magazine), at 116-17.

attitudes from region to region *within* a state. We can certainly observe how people respond to certain rules or incentives in other places and employ that knowledge locally, as long as we understand that no policy problem stays fixed for long. Richard Darman's general complaint is still valid, though — we need to keep better track of how specific land use programs function within a specific social context, and make that knowledge available to policy participants.

V. FARMLAND AND LAND USE PLANNING

Farmland protection policy is really targeted land use planning. The purpose of planning is to develop a collective expression of the community's expectations for its future. The process for developing that plan and then carrying it out over time is far more important than the document — the Plan itself. Land use planning explicitly considers the management of economic change, to benefit from the resource market while avoiding some of the costs of undirected change. Effective consideration of farmland as a community resource requires understanding both the economic and spatial aspects of a farm. Following are the primary issues concerning how agriculture is considered in a land use planning process:

A. FOCUS ON FARMLAND

Farmland needs to be a specific and deliberate part of rural land use planning. Too often, land use planning overlooks farmland as an essential part of the food industry, and considers it a homogeneous category of open space. The extensive three volume Urban Land Institute analysis of management and control of growth in the U.S. essentially considered farmland as specialized open space, important to a community perhaps, but poorly defined or measured. Land was analyzed for its carrying capacity with certain inherent natural hazards affecting possible use, rather than as a productive resource. Effective growth management policy must consider farmland quality differences, evidence of farmer investment and general viability of farming. Economic growth does occur *within* agriculture as changes in technology affect employment and returns to the industry. Conversion of farmland is not a necessary prerequisite to growth. Effective consideration requires specific information on the extent and character of local agriculture, the income it produces and the non-owner benefits it generates. Planners need data on recent farmland conversions, parcel splits, economic pressures on farming and changes occurring within the industry. Such information must be a part of the *process* of planning that engages the local population. The implementing ordinance must acknowledge the need

for realistic amounts of development space for the community, while setting retention policy for the best farmlands.

Large lot zoning has been used extensively in Illinois and other Midwestern states, with variable success. What seems to be a "large lot" that would discourage residential development at one point in time may lead to thirty-five or forty acre "farmettes" with little real commitment to farming. While these rural estates may provide some of the open space amenities of farms, they seldom represent long term investment in the food sector. The large lot approach seeks to discourage development of farmland, but does not constitute an affirmative action to protect farming as a valid land use. Other approaches include sliding scale zoning with number of buildable lots ties to parcel size and farmland characteristics, quarter/quarter zoning with one lot per forty acres of farmland on large parcels and exclusive agricultural zoning.[22]

B. IMPACTS OF OTHER PUBLIC ACTIONS

The unintended effect of other planning actions on viability of farming must be analyzed. Highway development, power or pipeline extensions, construction of public buildings, even subdivision control are necessary and valid public actions that have unintended though predictable impacts on farmland. Highway extension creates a plume of economic influence, particularly at interchanges. With cost of development always an issue, infrastructure planners lean toward relatively undeveloped farmland. Roads or power lines that bisect a farm can make operating those fields very difficult and create the promise of continued change that will influence the farmer's decisions. Local governments frequently welcome these federally funded infrastructure projects as inexpensive stimulants to economic growth. The facts on economic impact are in debate and declining federal dollars in the late 90's may affect local enthusiasm.[23] Illinois already requires review of the likely impact of major state infrastructure projects on existing agriculture, but interstate highways are not included.

A provision of Michigan law limiting application of the subdivision control act to parcels that are ten acres or smaller is blamed for accelerating farmland conversion in that state. Further, an owner can create four lots less than ten acres in size every ten years without going through the costly

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22. PLANNING AND ZONING FOR FARMLAND PROTECTION: A COMMUNITY BASED APPROACH, (American Farmland Trust, ed. 1987).

23. *Public Infrastructure Investment and the Market for Farmland*, Paper for the Competition for Land Conference, Sycamore, Illinois. Center for Agriculture in the Environment, February 7, 1997.

platting process, leading to obvious fragmentation.[24] While some parcel size threshold for application of subdivision rules makes sense, effect of those provisions on the public goal of farmland retention must be weighed.

C. LEVELS OF GOVERNMENT

Differences in scope and goals among levels of government can thwart the good intentions of farmland protection. Efforts to reform the Michigan subdivision control act have encountered the treasured traditions of home rule. Each local unit reserves the right to decide its own future, or to not decide anything. Unfortunately, there is little history of land use cooperation among units or levels of government in the Midwest. A recent case study of Waukesha County, Wisconsin revealed that county level good intentions regarding farmland protection were displaced by local towns and municipalities eager to develop that "under utilized land."[25] Many small governmental units find farmland retention an untenable goal, since the amount of land is small in the statewide scheme of things and development apparently highly important. In the hunt for tax dollars, rural communities find themselves in competition with each other for potential development.

Annexation procedures enable the landowner and community to cut a deal, expanding municipal boundaries into the outlying rural area, essentially gerrymandering development at the expense of farmland protection goals with little or no regional oversight. Much of the community demand for additional space is fueled by our love affair with the private auto. Only 3% of urban trips in the U.S. involve public transport and 84% private auto.[26] The comparison for public modes is 14% in Canada, Denmark and U.K., 20% in Switzerland.[27] Thirty-nine percent of trips are on foot in Sweden, 30% in France and Switzerland.[28] This pattern of travel is deeply ingrained in the American culture, reinforced by low gasoline taxes (about 1/6 the level in Europe) and transportation policies. The economic and social consequences of highly subsidized individual mobility are poorly understood or measured.

Effective response to our collective demand for open land, most of it currently in farms, is complex indeed. It requires attention to urban living

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24. Kurt J. Norgaard, *Subdivision Control Act Causes 10+ Acre Divisions*, 12 PLANNING AND ZONING NEWS 5, 5-11 (March 1994).

25. S. Gehl and Lawrence W. Libby, "Understanding the Rules, Practices and Attitudes Regarding Land Use in Waukesha County, Wisconsin," DeKalb, Illinois: Center for Agriculture in the Environment, CAE/WP 97-5.

26. *Urban Passenger Transport in the US and Europe: A Comparative Analysis of Public Policies*, 15 TRANSPORT REVIEW 2, 99-117 (1995).

27. *Id.* at 103.

28. *Id.*

conditions that seem to expel citizens into the countryside. It requires better use of vacant "brownfields" with both large and small urban centers to provide jobs and other qualities people seek. It requires less expensive and more accessible alternatives to the private auto. It requires a superstructure for meaningful collaboration among governments within a state. There are significant scale economies in provision of certain services, reducing the burden on households and businesses. The "go it alone" strategy is costing everyone. Farmland is really meaningful only on a regional or state level, thus its protection through policy cannot be just the aggregate of what every rural municipality wants for itself. Oregon's combination of state directed urban growth boundaries and farmland protection presents a useful model for creative interaction among levels of government for the common good.

Perhaps a limited version of metropolitan government should be undertaken in Illinois and other Midwestern states to concentrate on the regional pattern of land conversion, the long term importance of productive farmland, and the inherent inconsistencies of local land development plans. The greatest challenge in functionally specialized regional government is finding the political will. People tend to associate with their city, town or village and compete with others. They do not immediately relate to metropolitan government and in fact may be suspicious of it. Local officials have an obvious stake in the local unit. But there is a place for regional attention to selected problems.

VI. THE LEGAL ISSUES WITH FARMLAND PROTECTION

A. SEEKING A BALANCE

The primary legal question in farmland protection policy is the balance between the rights to land held by the owner in fee and rights held by non-owners.[29] Ties to the land run particularly deep in farming. Land is both living space and livelihood, the living factory within which the growth processes of agriculture occur. Control of resources is essential to management of the farm business. Few who look at land simply as a place to put things can appreciate the intensity of feeling about property rights held by many farmers. Protection of private property rights can be as emotional as the abortion issue to many landowners. But rights to real property are *not* absolute, and never have been. The limits on opportunities or options for the owner are a product of prevailing human preferences in the relevant public. The existence of a *right* to do something implies a

29. Lawrence W. Libby, PROPERTY RIGHTS — THE PUBLIC PRIVATE BALANCE, LAND USE DECISION MAKING — ITS ROLE IN A SUSTAINABLE FUTURE FOR MICHIGAN: IN CONFERENCE PROCEEDINGS 93-109 (Sandra S. Batie et al., eds. 1996)

reciprocal *duty* by others to acknowledge that action. Thus, in a real sense the limits on a land owner's rights are defined by what others are willing to put up with. And those limits are under constant adjustment.

The notion of regulated private action is familiar and generally accepted by the vast majority of the population living in apartments, condominiums and housing complexes. They know that their comfort and safety require limits on the actions of others and can accept restrictions on themselves. Thus, there is little popular sympathy for the notion that a farmer should be able to do whatever he wants with his land. At the same time, there is a budding property rights movement in this country, based largely on ideological support for limiting governmental "intrusion" into the rights of individuals, but with intense backing by some land owners who fear substantial reduction in potential returns from selling land.[30] The balance between owner and non-owner rights in land is sustained by the court system dealing with common law redress of nuisance and upholding Constitutional protections of due process, equal treatment and just compensation contained in the 5th and 14th Amendments. I would not pretend to review this literature for such an August group of distinguished attorneys, but the trend has been to support local efforts to regulate land use as long as there is evidence of a thoughtful rationale (land use planning), all people are treated equally (no spot zoning or arbitrary districts), proper procedures are followed to allow public input (hearings, postings) and that the owners are not deprived of all economic value (takings). Courts have been particularly vigilant in weeding out claims of economic ruin based on speculative possibility rather than reasonable, investment backed expectations.[31]

B. STATE PROPERTY RIGHTS PROTECTION LAWS

Several states have "leapfrogged the Constitution" by passing statutes designed to clarify the conditions under which regulation becomes a taking.[32] Federal property rights protection bills have been considered by both the House and Senate in recent years and will certainly be on the table in 1997-98. They involve specific thresholds (25 to 30%) of land value impact from a federal action that would trigger compensation of the owner. Most current state laws are of the "look before you leap" variety requiring

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30. *See generally*, LAND RIGHTS: THE 1990'S PROPERTY RIGHTS REBELLION (Bruce Yandle, ed. 1995).

31. D. Bromely, *Regulatory Taking: Coherent Concept or Logical Contradiction?*, 17 VT. L.REV. 647-682 (1993).

32. Mark Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOLOGY L.Q. 187 (1997).

policy makers to consider the likely effects of a new law or program on private property rights. Florida and Texas have taken the most direct action to define takings. Florida's law establishes procedures by which land owners who feel that their economic options are "inordinately burdened" by a regulation may seek compensation. The Texas law establishes a 25% reduction in property value as the trigger for a regulatory taking. Neither has sufficient court experience or testing to judge real impact. Cordes has argued that the assessment statutes are costly and largely redundant requirements that governments consider potential takings in writing new law. But he acknowledges that the new statutes will place additional priority on these impact assessments. Authorities will take property rights analyses more seriously and perhaps will organize their efforts to disprove potential taking rather than to establish whether such a burden seems to exist. That is a subtle yet important distinction. The problem is that such judgments must be based on *potential* consequences, not on existing and presumably measurable value changes. The real question, he says, is whether the benefits of this new information outweigh the cost of collecting it.[33]

A major shortcoming of the threshold approach is the illusion of precision in establishing diminution in land value attributable to a specific action. The consequence of a 1% change in value could be substantial — at 24% reduction no compensation is required — at 25% it is. And there are many factors acting collectively that cause land value change. The new regulation in question is but one of them and sorting out the factors will be a challenge. There will be much debate over that marginal change with expert witnesses for both sides presenting data, definitely a growth market for economists. From a policy standpoint, there is a real question whether a specific numerical threshold belongs in a statute, or worse yet in the State Constitution as has been proposed in Florida. Such specificity reduces opportunities to respond to changing economic conditions or preferences and expectations of the population, and may give a false sense of closure. No number is fully satisfactory. It locks into law a specific definition of fairness that can have little validity beyond the political compromises necessary to pick any number at all. *At best* it puts people on notice that property rights are important.

As noted, the balance between owner and non-owner rights in use of land is in constant adjustment. It becomes a political matter because prevailing attitudes about who should pay for achieving public purpose determine that balance at any given time, on any given question. Current emphasis on non-regulatory approaches to protecting farmland and other land use

33. *Id.* at 241.

contributions to general welfare suggests a swing toward the property owner. But the issue is currently enmeshed in broader debates about the size and scope of government, the budget, and both the rights and obligations of individuals to look out for themselves.

C. PUBLIC TRUST

Another legal theme in farmland protection concerns a possible role for the public trust doctrine as legal underpinning for farmland protection policy. As I have contended in another paper,[34] the basic *logic* of public trust makes sense as the underlying rationale for state level farmland protection policy. Legal scholar Joe Sax long ago argued that the public trust doctrine alone among prominent legal concepts has the breadth and substance to be useful for citizens seeking a comprehensive legal approach to natural resource management.[35] The inherent productive quality of prime and unique farmland could be considered a resource of profound importance to future generations, and as such subject to public protection as part of the public trust. Having so declared, the State could move with the full range of policy instruments (tax and other incentives, development rights purchase, and regulation) to assure that neither short term economic goals nor the disjointed actions of a fragmented bureaucracy will permanently compromise the broader public stake in long term food production capacity. A clear, concise statement of the resource attributes of interest and the reasons for their inclusion as a part of the public trust would be required. Frequent reassessment of the "state of the land" would be mandated, with policy adjustment as necessary. Local and county farmland policy would have to be consistent with the general public trust responsibility of the state, providing the basis for statewide guidance and oversight.

VII. CONCLUDING SUGGESTIONS FOR ILLINOIS

I offer the following general suggestions for consideration, beyond the use value assessment, agricultural impact evaluation and "agricultural areas" programs currently operating in Illinois:

First, Illinois should consider a comprehensive citizen-driven appraisal of the state's farmland resources. Land must be seen as a part of the state's agricultural industry, and part of the nation's resource base as well. The appraisal should include the local policy experience with farmland protection, as part of growth management or on its own. The universities, land resource organizations and state agencies could provide the data and staff experience necessary for this "taking stock" of Illinois farmland.

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34. Libby, *supra* note 29.

35. Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

Secondly, Illinois should adopt a policy position regarding the importance of farmland in the short and long run, then a series of "town meetings" could be organized throughout the state, chaired by a prominent agricultural leader, to help surface the expectations and attitudes people have about Illinois farmland and relevant policy options. These meetings should start with a background statement from the appraisal noted above. But these should be primarily listening sessions, to help establish dialog.

Thirdly, a set of targeted policy reviews should be undertaken, to determine current U.S. farmland policy experience, the techniques and their performance, for their relevance to Illinois. Results of this work should be presented in public meetings with opportunities for discussion with land use professionals.

Finally, the state should propose a comprehensive strategy for farmland protection and growth management that acknowledges roles for state, county and other local governments *within* a state framework. State action is necessary, but far from sufficient for a successful farmland protection policy.