

# BEYOND FAIRNESS: WHAT REALLY WORKS TO PROTECT FARMLAND

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## I. INTRODUCTION

Every state, and many local governments, has enacted land use policies with the ostensible policy of “preserving”<sup>2</sup> farmland.<sup>3</sup> Although “[t]he policy

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2. The author abhors the use of the term “preservation” and will henceforth use “conservation” or “protection.” See Theodore Feitshans, *Forest and Farm Land Conservation*, paper presented at the 2006 AALA Agricultural Law Symposium (October 13, 2006) (on file with author) (For a discussion of the various terms).

3. See AM. FARMLAND TRUST, *SAVING AMERICAN FARMLAND: WHAT WORKS* 40 (1997); see also TOM DANIELS & DEBORAH BOWERS, *HOLDING OUR GROUND: PROTECTING*

instruments range from regulating the land market, to public purchase of the landowner's [*sic*] right to develop the land, to organized wishful thinking [*sic*] about the future through land use planning,"<sup>4</sup> most focus almost exclusively on "land," omitting the "farm" and the farmer.

For example, although most growth management statutes purport to strive to protect farmland, the statutes fail to holistically address the issue. Freilich uses "agricultural land" interchangeably with "open space."<sup>5</sup> He also claims that one purpose of "agricultural land" is to "provide visible open spaces."<sup>6</sup> Many would dispute the claim that an intensive hog operation, for example, constitutes "open space." In fact, "open space" and farmland are very different.

Freilich calls for exclusive agricultural districts wherein all residential uses would be prohibited.<sup>7</sup> Kelly asserts that adequate farmland protection requires "a combination of strategic public acquisition, performance and other development standards, and incentives to 'cluster' development on less sensitive land under common ownership."<sup>8</sup>

Daniels maintains that farmland protection programs must seek four main goals: (1) protect a critical farmland mass; (2) maintain affordable farmland prices for expansion and entry; (3) provide reliable protection in the future; and (4) achieve results in a cost effective manner.<sup>9</sup> These goals notably omit consideration of farm profitability or any focus on the farm operator. In contrast, a survey of county agricultural departments in Washington State revealed that most planning departments felt that the significant factors contributing to a farm

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AMERICA'S FARMS AND FARMLAND 5-6 (1997) (discussing the steps states have taken to preserve farmland); Lawrence W. Libby, *Efficiency, Equity and Farmland Protection: An Economic Perspective*, paper presented at the 2000 AALA Educational Symposium (Oct. 11-13, 2001), available at [www-agecon.ag.ohio-state.edu/programs/Swank/pdfs/efficiency\\_equity\\_and\\_farmland%20protection.pdf](http://www-agecon.ag.ohio-state.edu/programs/Swank/pdfs/efficiency_equity_and_farmland%20protection.pdf) (discussing farmland policy amongst the states).

4. Libby, *supra* note 2.

5. See ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 279-96 (Am. Bar Ass'n 1999).

6. *Id.* at 284.

7. *Id.* at 287.

8. ERIC DAMIAN KELLY, MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES, AND IMPACTS 154 (1993) (citing Gary Pivo, Robert Small, & Charles R. Wolfe, *Rural Cluster Zoning: Survey and Guidelines*, LAND USE LAW AND ZONING DIGEST 3 (1990)).

9. Thomas L. Daniels, *Where Does Cluster Zoning Fit in Farmland Protection*, 63 J. AM. PLANNING ASS'N. 129 (1997).

operator's decision to retain farmland were "farm operation profitability, farm operator age, [and] farm operator plans . . ." for the land at his retirement.<sup>10</sup>

Libby encapsulates the latter considerations when asserting that a successful farmland protection policy must

. . . acknowledge that a farm is more than land. A program that focuses on land, but overlooks the management part of the farm is bound to fail. It may keep land from being developed, but will not retain economically viable open land with the opportunities and incentives that make land a farm. Open, unattended land with no economic return will not long resist development, nor should it.<sup>11</sup>

Libby further opines that a successful farmland protection program must distribute the costs of the program fairly.<sup>12</sup> This paper will not address this important issue. The equitable distribution of costs is an issue that could form the basis of an entire article. Finally, Libby also asserts that all levels of government must participate in order for the program to be successful.<sup>13</sup> The vast majority of "traditional" farmland protection policies fail to address any of the three prerequisites for a successful farmland protection program posited by Libby: maintaining the economic viability of farming, distributing the costs fairly, and involving all levels of government.

"[T]he availability of land does not by itself ensure the continuation of farming."<sup>14</sup> Programs that impose substantial measures to protect not just land, but agricultural operations themselves represent a step forward.<sup>15</sup> "Whatever the level of sophistication, however, these programs share a common denominator: they treat the protection of agricultural land, even the protection of agriculture itself, as a land use issue."<sup>16</sup> This focus is far too narrow.<sup>17</sup> Land is but one input in the agricultural production process.<sup>18</sup> Farm production needs other resources,

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10. Linda R. Klein & John P. Reganold, *Agricultural Changes and Farmland Protection in Western Washington*, 52 J. SOIL & WATER CONSERVATION 6, 12 (1997).

11. Lawrence W. Libby, *Farmland Protection Policy: An Economic Perspective Working Paper CAE/WP 97-1*, 7 (Am. Farmland Trust, Ctr. for Agric. in the Env't, 1997), available at <http://aftresearch.org/research/resource/publications/wp/wp97-1.html>.

12. *Id.*

13. *Id.*

14. Myrl L. Duncan, *High Noon on the Orgallala Aquifer: Agriculture Does Not Live by Farmland Preservation Alone*, 27 WASHBURN L.J. 16, 18 (1987).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

such as water, in order to be successful.<sup>19</sup> Furthermore, in many critical agricultural areas like the Midwest, the land supply does not appear to be threatened.<sup>20</sup>

Programs to set aside land for agricultural production fail to maintain viable commercial farmland operations.<sup>21</sup> Until land protection policies and commercial farmland viability policies are consciously linked, state and local farmland policies will more likely protect open spaces than the economic vitality of the working rural landscape.<sup>22</sup>

The fairness issues referred to by Libby have received a considerable amount of recent attention.<sup>23</sup> However, lost in the arguments over fairness is the issue of whether the tools promote the industry of agriculture. The literature fails to evaluate the tools for effectiveness. This paper attempts to describe programs that conserve the “farm” in “farmland.” Lacking quantitative support for effectiveness of any programs, the author must rely instead on anecdotal evidence and common sense.

## II. TRADITIONAL FARMLAND PROTECTION TOOLS

### A. Introduction

Traditional farmland protection tools include “agricultural” or large lot zoning, agricultural and forestal districts, conservation easements (donation of development rights), purchase of development rights (purchase of conservation easements), use-value assessment for real property tax purposes, and various forms of estate tax relief.

These tools fail in furthering the industry of agriculture, although each may enjoy varying degrees of success in setting aside certain land for open space. However, many tools seem to only result in the exclusion of low- to moderate-income families, and in forcing development further out from job and population

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19. *See id.* at 18-19 (for the proposition that the surface cannot be the only focus. Land with polluted water or an inadequate water supply is just as incapable of being used for agricultural purposes as land that has been converted to non-agricultural use).

20. *See id.* at 19 (stating that the land supply in non-urban fringe areas, notably the “Farm Belt,” is not threatened).

21. *Id.* at 18.

22. *See id.* at 19 (maintaining that conservation of other natural resources is also critical to preserving American agriculture).

23. *See* Jesse J. Richardson, Jr., *Downzoning, Fairness and Farmland Protection*, 19 FLA. ST. U. J. LAND USE & ENVTL. L. 59 (2003); *see also* Mark W. Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 FLA. ST. U. J. LAND USE & ENVTL. L. 371 (2005).

centers (sprawl).<sup>24</sup> In many cases, this result seems to be more than a coincidence. This section briefly describes traditional farmland protection tools and their limitations.

### B. Agricultural Zoning

“Agricultural . . . zoning refers to county and municipal zoning ordinances that support and protect farming by stabilizing the agricultural land base.”<sup>25</sup> Regulations placed upon land zoned “agricultural” prohibit uses that are inconsistent with farming and limit the allowed density of residential development.<sup>26</sup> Lot sizes are usually anywhere from 20 to 640 acres, depending on the location.<sup>27</sup> Some maintain that this practice may maintain open space and rural character. However, by spreading out homes in such a way that the land is not practically useable for farming or forestry, the practice could also accurately be referred to as “rural sprawl.” The resulting lots are “too large to mow, but too small to plow.”<sup>28</sup>

### C. Agricultural and Forestal Districts

Agricultural and forestal districts are programs implemented at the local level that “allow farmers to form special areas where commercial agriculture is encouraged and protected.”<sup>29</sup> Participation is voluntary and entails the landowner agreeing not to develop the land for a set term (usually renewable), in exchange for certain benefits like differential assessment, right to farm protections, and qualification for purchase of development rights programs.<sup>30</sup> Agricultural and

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24. See Freilich, *supra* note 4, at 5 (attributing sprawl during the 50 year period between 1920 and 1970 to large lot zoning).

25. AM. FARMLAND TRUST, *supra* note 2, at 49; For an excellent discussion of agricultural zoning issues, see Jill K. Clark & Peggy Kirk Hall, *Does “AG” Stand for “Anything Goes”?: An Analysis of Agricultural Zoning Districts* (Apr. 13, 2007) available at [http://cffpi.osu.edu/docs/Clark\\_Hall\\_AgZoning0407.pdf](http://cffpi.osu.edu/docs/Clark_Hall_AgZoning0407.pdf); see also Peggy Kirk Hall & Jill Clark, Center for Farmland Policy Innovation, *Zoning in Support of Agriculture in Ohio: What are the Options?* (May 2007) available at <http://cffpi.osu.edu/docs/Final%20Zoning%20for%20Agriculture.pdf>.

26. *Id.*

27. *Id.*

28. Randall Arendt, “Open Space” Zoning: *What It Is and Why It Works*, 5 PLANNING COMM’R J. 4, 5 (1992).

29. AM. FARMLAND TRUST, *supra* note 2, at 197.

30. *Id.*

forestal district programs also protect the land from annexation and eminent domain, and prevent the construction of infrastructure such as roads and sewers.<sup>31</sup>

#### D. Conservation Agreements

“A conservation easement is a legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land by recording deed restrictions that prohibit development in order to protect its conservation value.”<sup>32</sup> Agreements are tailored to each property to ensure the protection of “agricultur[e], ground and surface water, wildlife habitat,” or other resources.<sup>33</sup> In exchange for their donation of land to remain perpetually undeveloped, landowners receive income, property, and estate tax deductions.<sup>34</sup> Once again, while easements may prevent development on certain parcels of open space and rural land, easements fail to guarantee continued agricultural activity on the property. In addition, easements fail to affect the rate or amount of development, merely pushing development to other parcels. Easements may promote sprawl, or smart growth, depending upon location and characteristics of the property.<sup>35</sup>

The purchase of development rights simply refers to the purchase of a conservation easement from the landowner by a public agency or charitable organization.<sup>36</sup> By selling their development rights outright, landowners are able to capitalize financially while not actually taking their land out of agriculture.<sup>37</sup>

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31. See generally JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 562-63 (2003) (for a discussion of agricultural districts).

32. VA. CHAPTER OF THE AM. PLANNING ASS'N, VIRGINIA'S GROWTH MANAGEMENT TOOLS 26 (1999), available at <http://www.vaplanning.org/pdfs/growthtools.pdf> (updated Jan. 2002).

33. FARMLAND INFO. CTR., AM. FARMLAND TRUST, FACT SHEET: AGRICULTURAL CONSERVATION EASEMENTS (2006), available at [http://www.farmlandinfo.org/documents/27762/ACE\\_06-10.pdf](http://www.farmlandinfo.org/documents/27762/ACE_06-10.pdf) [hereinafter AM. FARMLAND TRUST].

34. *Id.*

35. Jesse J. Richardson, Jr. *Conservation Easements: Smart Growth or Sprawl Promotion?*, 23 AGRIC. L. UPDATE 4-5 (Sept. 2006).

36. Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283, 304-05 (2004).

37. *Id.* at 307; see also AM. FARMLAND TRUST, *supra* note 32.

### E. Use-value Assessment

Use-value assessment refers to the practice of valuing the property for local real property tax purposes upon the basis of its value in a particular (current) use, rather than upon the basis of its market value.<sup>38</sup> This practice operates on the theory that by reducing the property tax burden on undeveloped parcels of land, pressures to convert the parcels to more intensive uses will be reduced by decreasing holding costs and increasing profitability of current uses.<sup>39</sup> Thus, agricultural land currently used for farming will be valued for local real property tax purposes as such. This gives farmers an economic incentive to continue to use their land for agriculture.<sup>40</sup>

### F. Conclusions

Only one traditional farmland protection tool (use-value assessment) addresses farm profitability, albeit in a limited sense, by reducing one farm expense.<sup>41</sup> Although use-value assessment lowers operating costs for working lands, the programs generally fail to target actual working lands. Many programs allow landowners with only \$1,000 in annual gross revenues to qualify.<sup>42</sup> Therefore, hobby farmers and country estate owners receive the benefit of the subsidy.

Although some of the tools address “fairness”, each does so only in the context of compensating (or not compensating) farmers for giving up development rights.<sup>43</sup> No combination of these tools address Libby’s triumvirate of essential elements: maintaining the economic viability of farming, distributing the costs fairly, and involving all levels of government.<sup>44</sup>

Large lot zoning promotes sprawl by encouraging low density residential uses and pushing development further from job centers.<sup>45</sup> Farmers bear the entire

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38. JUERGENSMEYER & ROBERT, *supra* note 30, at 570-572.

39. *Id.*

40. *Id.*

41. *Id.* at 570.

42. *See e.g.*, Farm Bill: The Federal Agricultural Improvement and Reform Act (FAIR), House Comm. on Agric., 104th Cong., 1996 (1996), available at <http://www.house.gov/agriculture/105/master3.htm> (discussing various farm protection measures and defining a farm as “any place that has, or has the potential to produce, \$1,000 or more in annual gross sales of farm products”).

43. *See generally* JUERGENSMEYER & ROBERT, *supra* note 30, at 570 (discussing the various tools).

44. Libby, *supra* note 10, at 7-8.

45. Paster, *supra* note 35, at 293-94.

cost of the program in terms of forgoing the value of lost development rights.<sup>46</sup> Similarly, conservation easements, donated or purchased, merely alter the location of development.<sup>47</sup> Whether the effects of these programs yield societal benefits or detriments depend on many factors which presently fail to be addressed by program administrators.<sup>48</sup>

Despite these shortcomings, commentators continue to promote the use of these tools as effective ways to protect farmland.<sup>49</sup> These authors often use “open space” and “farmland” interchangeably, as well as confusing “population growth” with “sprawl”.<sup>50</sup>

### III. WHAT WORKS?

#### A. Introduction

The literature fails to identify tools that actually work to promote the industry of agriculture, instead lumping farmland with open space, and measuring “success” by number of acres on which development is prohibited. This approach proves to be short-sighted and counterproductive.

The best way to keep land in agriculture is to ensure the profitability of agriculture. Although state and local strategies generally fail to affect the bottom line, some policies can enhance farm profitability.<sup>51</sup> Effective state and local policies to protect farmland fall into 4 categories:

- (1) land conservation;
- (2) design techniques to accommodate development in an agriculture-friendly fashion;
- (3) economic development; and,
- (4) education.<sup>52</sup>

Each of these categories is equally important in promoting a healthy agriculture industry. Land conservation tools include most of the traditional farmland protection tools. Most programs focus on land conservation exclusively.<sup>53</sup>

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46. See *id.* at 294 (stating that little public expenditure is necessary to implement area based zoning and discussing how lots can and cannot be divided).

47. *Id.* at 293.

48. See generally *id.* at 298 (discussing benefits and drawbacks of zoning programs).

49. See generally *id.* at 293 (discussing the use of these tools as ways to protect farmland); see also Gwenann Seznec, *Effective Policies for Land Preservation: Zoning and Conservation Easements in Anne Arundel County, Maryland*, 23 VA. ENVTL. L. J. 479, 513 (2005).

50. See Paster, *supra* note 35, at 293-94; see also Seznec, *supra* note 48, at 513.

51. AM. FARMLAND TRUST, *supra* note 2, at 38.

52. See Seznec, *supra* note 48, at 488, 513, 517, 521-22 (discussing zoning issues in land conservation, ecologically-friendly methodology, economic development and education).

53. See AM. FARMLAND TRUST, *supra* note 2, at 39-52.

However, in order to increase the amount of land available for agriculture, better ways to accommodate inevitable development must be devised. Conservation subdivision design, density bonuses, and other tools (including Culture-Based Incentive Planning) discussed below, fall into this category.

Economic development techniques include hiring a staff person to act as a liaison between the agriculture industry and the local governing body, and appointing an agriculture industry development advisory board.<sup>54</sup> In addition, local land use ordinances should be reviewed to ensure that the ordinances allow agri-tourism and other agriculture-related activities to ensure profitable operations.<sup>55</sup>

Finally, education plays a key role in any farmland protection program. Cooperative Extension serves as a valuable resource in this regard. New residents need education on agricultural operations. Citizens, along with local and state legislators, sometimes require education on issues impacting agriculture and how to grow wisely.

This section outlines several tools that hold the promise to effectively conserve working lands as well as the industry of agriculture. Some of these tools address land use. However, use of one tool in isolation destines the program for failure. Only by using a combination of tools, designed to increase profitability while distributing costs fairly and involving all levels of government, will ensure working lands are conserved.

### B. *Smart Growth*

As originally set forth by Livable Oregon, Inc., smart growth consists of land use that adheres to the principles of efficient use of land resources, full use of urban services, mixed use, transportation options, and detailed human-scale design.<sup>56</sup> Smart growth takes on different forms, and uses various monikers in a wide-range of communities.<sup>57</sup> However, the concept retains common features wherever found, in that it seeks to “[e]nhance the sense of community, [p]rotect investment in existing neighborhoods, [p]rovide certainty in the development process, [p]rotect environmental quality and conserve open space, [r]eward de-

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54. *Id.* at 38-39.

55. See Robert Andrew Branan, *Zoning Limitations and Opportunities for Farm Enterprise Diversification: Searching for New Meaning in Old Definitions*, Nat'l Agric. L. Research Ctr. (2004), available at [http://www.nationalaglawcenter.org/assets/articles/branan\\_zoninglimitations.pdf](http://www.nationalaglawcenter.org/assets/articles/branan_zoninglimitations.pdf).

56. AM. PLANNING ASS'N, PLANNING ADVISORY SERVICE, *THE PRINCIPLES OF SMART DEVELOPMENT* 3 (1998).

57. Geoffrey Anderson & Harriet Tregoning, *Smart Growth in Our Future? in URBAN LAND INSTITUTE ON THE FUTURE, SMART GROWTH: ECONOMY, COMMUNITY, ENVIRONMENT* 4, 10 (1998).

velopers with profitable products, [provide] financing and flexibility, [d]ecrease congestion by providing alternative modes of transportation, [and m]ake efficient use of public money.”<sup>58</sup>

Communities use various strategies in attempting to achieve these goals. Typically, the strategies used include one or more of the following elements:

- Conservation of open/green space, including farmland preservation
- Incentives to encourage investment and reinvestment in central cities, older suburbs, and existing communities
- Location of major new regional attractions in central cities;
- Creation of higher-density development nodes around transit
- Use of new urbanist ideas to build communities with charm and character at higher densities
- Mixed-use development
- Dispersed affordable housing
- Infill development.<sup>59</sup>

In essence, Smart Growth consists of two main pillars: (1) discouraging development on resource lands, like prime agricultural land; and (2) encouraging development in appropriate areas.<sup>60</sup> Society approves of the first pillar and emphasizes conservation, often to the total exclusion of directing development to appropriate areas.<sup>61</sup> When insufficient lands are designated for development, development, by necessity occurs on resource lands. Since the resource lands are not generally prioritized, the market will determine which resource lands will be developed.<sup>62</sup> The market results do not necessarily coincide with the result that a community would choose if resource lands were prioritized.

This strategy seems to confuse the independent and dependent variables. The rate and amount of development is independent of any conservation efforts and depends upon factors generally exogenous to governmental control in the United States.<sup>63</sup> Factors such as birth rate, death rate, and immigration rate generally determine the rate of growth in the United States overall.<sup>64</sup> Other factors, like the availability of jobs and the quality of life, determine the spatial distribution of growth along with the rate of growth in particular regions.<sup>65</sup>

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58. *Id.*

59. *See id.* (Note that this description includes “farmland” as a subset of “open space”).

60. *See id.* (discussing how to determine where and how to grow).

61. *Id.* at 4.

62. *Id.* at 9.

63. *See id.* at 10 (discussing the approaches and barriers to smart growth).

64. Jesse J. Richardson, Jr., *Conservation Easements: Planners’ Friend or Foe?*, CITIZENS PLANNING EDUCATION ASSOCIATION OF VA. NEWSLETTER, 2006, at 1 (on file with author).

65. *See* Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L. J. 247, 248-52 (2000).

Placing more emphasis on encouraging development in appropriate areas better promotes the conservation of farmland. The responsible planning agency must first project the rate and amount of growth, as well as determine the socio-economic characteristics of future inhabitants. Appropriately zoned land, in sufficient amounts, should be available for the anticipated development.

Various tools can be used to direct development to areas that avoid development of priority agricultural lands. Infrastructure tools include urban growth areas or urban service areas. These terms refer to mapped areas in a locality in which the government will provide water, sewer, and other urban infrastructure. Prime farmlands should be located outside of these areas.<sup>66</sup>

Montgomery County, Maryland provides an example of failure to designate an adequate amount of land for development.<sup>67</sup> Moglen, Gabriel, and Faria used geographic information system tools to identify resource lands and “priority funding areas.”<sup>68</sup> The study showed that inadequate lands were designated for commercial development requiring some commercial development on resource lands.<sup>69</sup> Since neither the local nor the state government had prioritized the resource lands, other factors determined which land would ultimately be developed.<sup>70</sup>

### C. Culture-based Incentive Planning

Applied researchers at Virginia Tech are pioneering a concept deemed “culture-based incentive planning” (CBIP).<sup>71</sup> CBIP designs planning strategy around human nature and the American culture, not against it. The model, and its associated techniques, draw upon a number of disciplines that neither land planning nor farmland protection have a substantial heritage of collaboration with: applied behavioral analysis, environmental psychology and behavioral economics.<sup>72</sup> The approach attempts to encourage rural cluster development and conser-

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66. See RANDALL ARENDT, *RURAL BY DESIGN: MAINTAINING SMALL TOWN CHARACTER* 293-95 (1994) (discussing ways to minimize conflict between new residents and farmers).

67. See Glenn E. Moglen, Steven A. Gabriel & Jose A. Faria, *A Framework for Quantitative Smart Growth in Land Development*, 39 J. AM. WATER RESOURCES ASS'N. 947, 947-59 (2003).

68. See *id.* (discussing “priority funding areas,” which refer to those regions which the Maryland state government will provide infrastructure related to urban development, such as public water and sewer under Maryland’s Smart Growth provisions).

69. See *id.* at 953-54.

70. See *id.*

71. Donald R. Chance, Syllabus, Research Design and Qualitative Methods, Special Research Seminar at Virginia Tech, (2006) available at [www.uap.vt.edu/uapacademics/murp/pdfs/spring06/UAP\\_5484.pdf](http://www.uap.vt.edu/uapacademics/murp/pdfs/spring06/UAP_5484.pdf).

72. *Id.*

vation subdivision design.<sup>73</sup> Although the Virginia Tech work focuses on sustainable development of forestland, the concept applies equally as well to agricultural land.

Land planners have been using the concept of clustering since the advent of organized civilization. Knossos, the ancient capital of the Minoan civilization on the Greek island of Crete was a highly complex cluster design dating from 1900 BC, nearly 4,000 years ago.<sup>74</sup> Ancient Akrotiri on the Greek Island of Thira (the likely home of the lost city of Atlantis), was also a cluster design.<sup>75</sup> Domesday Book, a comprehensive survey of English property in the year 1086, (immediately following the Norman Conquest), along with substantial documentation from current landscape archeologists and planning historians, affirms the common use of rural clustering in field, forest, and hamlet patterns throughout the Middle Ages.<sup>76</sup> These are practices that are still widely employed in Western Europe and Great Britain today, and are the very basis of national planning policies in natural resource areas where rural landscape character and land conservation goals dominate far more than in America.<sup>77</sup>

In the context of modern day America, rural clustering has been actively advocated in cluster zoning provisions for more than 35 years. William Whyte, in 1968, advanced cluster zoning for the purpose of preserving rural character in his watershed work, *The Last Landscape*.<sup>78</sup> During the same time period Ian McHarg, as well as Arthur Palmer, pursued a parallel track of ecological site analysis and design principles.<sup>79</sup> Most recently, Randall Arendt, armed with his early English planning exposure and the work of others before him, has been the most publicized advocate of an improved format of rural clustering commonly referred to as conservation zoning and subdivision design.<sup>80</sup> The basic Arendt

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73. *Id.*

74. Donald R. Chance, *Culture-Based Incentive Planning* (2007) (Unpublished Manuscript, Virginia Tech. University) (on file with author).

75. *Id.*

76. TOM WILLIAMSON & LIZ BELLAMY, *PROPERTY AND LANDSCAPE: A SOCIAL HISTORY OF LAND OWNERSHIP AND THE ENGLISH COUNTRYSIDE* 32 (1987).

77. BARRY CULLINGWORTH & VINCENT NADIN, *TOWN AND COUNTRY PLANNING IN THE U.K.* 328 (14th ed. 2006) (1964).

78. *See* WILLIAM H. WHYTE, *THE LAST LANDSCAPE* (Univ. of Pa. Press 2002) (1968).

79. *Compare* IAN L. MCHARG, *DESIGN WITH NATURE* (Nat'l History Press 1969) *with* ARTHUR E. PALMER, *TOWARD EDEN* (Creative Resource Systems 1981) (where both use similar design principles and ecological site analyses).

80. *See generally* RANDALL G. ARENDT, *RURAL BY DESIGN: MAINTAINING SMALL TOWN CHARACTER* (Planners Press Am. Planning Assoc. 1994); RANDALL G. ARENDT, *CONSERVATION DESIGNS FOR SUBDIVISIONS* (Island Press 1996); RANDALL G. ARENDT, *GROWING GREENER: PUTTING CONSERVATION INTO LOCAL PLANS AND ORDINANCES* (Island Press 1999) [hereinafter

model, which constitutes the current generation of ordinance design in the evolution of the clustering concept, is now being widely employed in local jurisdictions in Pennsylvania (The Growing Greener Program), Massachusetts, Maryland, and the Great Lakes region.<sup>81</sup> Experimentation and field experience using this model continues to advance our knowledge of how best to design and employ conservation zoning techniques, for which Randall Arendt deserves great credit.

Cluster zoning formats allow or require the density transfer of residential lots internally on a site for the express purpose of maintaining open space, rural character, and/or natural resource management potentials.<sup>82</sup> These zoning districts function by allowing smaller lot sizes on a tract where larger lots are normally required.<sup>83</sup> Under cluster zoning, landowners are generally permitted the same number of residential lots as they would have been permitted under the traditional zoning requirements.<sup>84</sup> In some ordinance designs, bonus incentive schemes may permit more lots than normally allowed under the zoning base in return for the landowner agreeing to provide any number of special community benefits, for instance, affordable housing units.<sup>85</sup>

The principle difference between traditional and cluster zoning schemes is that under traditional zoning mechanisms all, or nearly all, land in the parcel is subdivided into lots.<sup>86</sup> When by-right agricultural zoning districts establish density through minimum lot size requirements, they produce a strong economic incentive for the landowner/developer to attempt to subdivide every area of a tract into lots, regardless of suitability, or other considerations, in the drive to maximize the number of lots for sale.<sup>87</sup> This is one reason why most development under traditional zoning formats result in “left-over,” difficult to develop, lots that may never sell – a decided disadvantage for the landowner/developers.<sup>88</sup> In contrast, under cluster zoning, anywhere from 50% to as much as 90% of the land is set aside as conservation land, open space, or retained for traditional for-

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GROWING GREENER]; RANDALL G. ARENDT, CROSSROADS, HAMLET, VILLAGE, TOWN: DESIGN CHARACTERISTICS OF TRADITIONAL NEIGHBORHOODS, OLD AND NEW (Am. Planning Assoc. 2004).

81. See generally GROWING GREENER, *supra* at note 79 (discussing the “Growing Greener” program across a variety of states).

82. See Paster, *supra* note 35, at 294.

83. See AM. FARMLAND TRUST, *supra* note 2, at 318.

84. See *Id.*, *supra* note 2, at 127.

85. ARENDT, *supra* note 80, at 48-49.

86. FREILICH, *supra* note 4, at 5.

87. ARENDT, *supra* note 80; see also Chance, *supra*, note 73.

88. *Id.*

est practices.<sup>89</sup> When constructed properly, cluster zoning districts result in lot placement for areas best suited for development given the various trade-off parameters under consideration in the design.

#### D. Limiting Differential Assessment and Modifying Agricultural and Forestal Districts

Differential assessment programs value agricultural land at agricultural use value for local real property tax purposes.<sup>90</sup> “All 50 states have some form of differential assessment.”<sup>91</sup> Most researchers agree that differential assessment fails to protect farmland.<sup>92</sup>

One issue involves the level of gross revenues required for the preferential tax treatment. Many states use the minimal amount of \$1,000 per year in gross revenues.<sup>93</sup> At that level, the communities, along with farmers, are subsidizing the life styles of hobby farmers and owners of country estates.

Higher levels of gross income, or other more stringent qualifications for use-value assessment, would strengthen the program. In short, the drawback to use-value assessment at present is the lack of discrimination in the application. For example, geographic limitations would enhance use-value assessment. The program could exclude farms on the edge of a growing town that lie in the path of development, and logically should be developed. On the other hand, the program could target productive farm operations in prioritized agricultural areas in the community, creating critical mass.

Additionally, low qualification hurdles for differential assessment limit the effectiveness of agricultural and forestal districts. Agricultural and forestal

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89. See Land Choices: Preserving the Past, Creating the Future, Conservation Subdivision Design Myths, <http://www.landchoices.org/Myths.htm>, (last visited Jun. 4, 2007).

90. ROBERT E. COUGHLIN, ET AL., NAT'L AGRIC. LANDS STUDY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 56 (1981).

91. LINDA A. MALONE, ENVIRONMENTAL REGULATION OF LAND USE, § 6.43 at 6-69 (Paulette Simonetta & Tammy J. Moore eds., 2006) (1990).

92. *Id.* at 6-70; see also Myrl L. Duncan, *Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land*, 24 NAT. RESOURCES J. 61, 87 (1984). Note, however, that most farmers would vigorously disagree with this assessment. One must also wonder why researchers uniformly dismiss differential assessment, a program that reduces operating costs for farmers, while approving of land conservation programs, such as conservation easements, that fail to even minimally aid farm operations.

93. See Duncan, *supra* note 91, at 80; see also Farmland Tax Break Loophole State Activity Page, STATE ENV'T'L RES. CTR., <http://serconline.org/farmlandTaxLoophole.html> (for a discussion of South Carolina's tax reduction program); Herd Planning & Design, *Task 3 Report: Review and Evaluation of Land Conservation Tools* (Aug. 14, 2002), available at <http://www.montva.com/departments/plan/cpfiles/REPORTS/herd4.php> (discussing Virginia's conservation tools).

districts entail the landowner agreeing not to develop the land for a set term (usually renewable) in exchange for certain benefits such as differential assessment, right to farm protections, limitations on eminent domain, and qualification for purchase of development rights programs.<sup>94</sup> Ten states have agricultural and forestal district programs.<sup>95</sup>

However, the incentives often prove insufficient to encourage many farmers to join voluntary districts, particularly given the long duration and onerous burdens of many district programs.<sup>96</sup> Many of the benefits are available to farmers without joining a district.<sup>97</sup> If the locality employs use-value assessment generally, without requiring enrollment in an agricultural and forestal district, the incentives to join a district prove to be especially lacking.<sup>98</sup> Combining differential assessment with agricultural and forestal districts offers some promise.<sup>99</sup>

Virginia's enabling authority shows how smart growth can be combined with the financial incentives of differential assessment. Virginia Code section 15.2-4306 (2007) provides that the following factors should be considered when evaluating land for inclusion into an agricultural and forestal district:

1. The agricultural and forestal significance of land within the district or addition and in areas adjacent thereto;
2. The presence of any significant agricultural lands or significant forestal lands within the district and in areas adjacent thereto that are not now in active agricultural or forestal production;
3. The nature and extent of land uses other than active farming or forestry within the district and in areas adjacent thereto;
4. Local developmental patterns and needs;
5. The comprehensive plan and, if applicable, the zoning regulations;
6. The environmental benefits of retaining the lands in the district for agricultural and forestal uses; and
7. Any other matter which may be relevant.<sup>100</sup>

In addition, the Code provides guidance in judging the agricultural and forestal significance of land, suggesting that "soil, climate, topography, other natural factors, markets for agricultural and forestal products, the extent and nature of farm structures, the present status of agriculture and forestry, anticipated

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94. MALONE, *supra* note 90, § 6.37 at 6-58.

95. Jesse J. Richardson, Jr., *Measuring Local Government Land Use Autonomy* (The Brookings Inst., Working Paper, forthcoming) (on file with author in draft form).

96. Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113, 115 (1998).

97. *Id.*

98. COUGHLIN, *supra* note 89 at 86.

99. *Id.*

100. VA. CODE ANN. § 15.2-4306 (2007).

trends in agricultural economic conditions and such other factors as may be relevant.”<sup>101</sup> By combining smart land use and economic factors, agricultural and forestal districts could provide a vital tool in effective promotion of agricultural activity.

One could enhance agricultural and forestal districts further by tying qualification for differential assessment to inclusion within an agricultural and forestal district. Virginia Code section 15.2-4312 provides that inclusion in an agricultural and forestal district automatically qualifies the land for differential assessment, so long as all other requirements are met.<sup>102</sup> This incentive proves valuable in localities that have not enacted use value assessment generally.

However, differential assessment alone provides insufficient incentive for a farmer to join districts that impose onerous burdens and/or provide for long terms of restriction. The incentives should be modeled to provide adequate compensation to participating farmers, insuring fairness.

#### *E. Farm Business Succession Education*

Contrary to popular belief, farms are most often lost, not to the “evil developer,” but due to a lack of succession planning. Farm business succession planning seeks to allow an orderly and efficient transfer of control of ownership/management of the farm operation to the next generation or successor.<sup>103</sup> A national organization, the National Farm Transition Network, provides an umbrella for state organizations to network and collaborate.<sup>104</sup>

For example, both Virginia and North Carolina have very different, yet very active, farm business succession programs.<sup>105</sup> The participants have found that farm business succession planning often creates the difference between continuing the operation of the farm or not.

The first step in the process is to determine whether, economically, the farm should be passed to the next generation. If the farm succession is not feasible, alternatives like an I.R.C. Section 1031-type exchange can be discussed.<sup>106</sup> In some cases, like a situation where no successor exists, the parties are better off

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101. *Id.*

102. *Id.* at 15.2-4312(A).

103. National Farm Transition Network, [www.farmtransition.org/aboutnetw.html](http://www.farmtransition.org/aboutnetw.html) (last visited May 31, 2007).

104. *Id.*

105. *Compare* Save Virginia Farms, [www.savefarms.com](http://www.savefarms.com) (for a discussion of Virginia’s farm business succession program) (last visited May 31, 2007) *with* North Carolina Farm Transition Network, [www.ncftn.org](http://www.ncftn.org) (last visited May 31, 2007).

106. I.R.C. § 1031 (2007).

if the farm is sold and the operator does not continue the operation. Also, where the farm is in the logical path of development, similar strategies are appropriate.

If a successor is identified and the farm can economically be passed to a new operator, strategies are developed so that all parties and all generations can receive necessary income and assets. In 2006, Virginia Cooperative Extension agents identified farm business succession as the most pressing issue in the state.<sup>107</sup>

#### F. *Term Easements*

A term easement is a conservation easement of less than perpetual duration.<sup>108</sup> At present, the vast majority of conservation easements are perpetual in nature. Most land trusts will only accept perpetual easements, and the myriad of tax benefits generally only attach to perpetual easements.<sup>109</sup>

Some assert that term easements fail to provide adequate “protection” to the land. Presumably, the development provides the threat. However, conservation easements do not affect the rate or amount of development.<sup>110</sup> The factors that affect the rate of development include the birth rate, death rate, and immigration rate.<sup>111</sup> On a local or regional level, factors like the availability of jobs and quality of life affect the amount and rate of development. All of these factors remain largely exogenous to, and beyond the control of, governments in the United States. Conservation easements merely change the spatial arrangement of growth and development.<sup>112</sup>

Perhaps more importantly with respect to farmland protection, conservation easements fail to impact the amount of conserved land. Easements merely determine the spatial layout of open space land. If one or several parcels are perpetually bound by a conservation easement, development does not stop, but merely moves to other parcels within the region.

Many commentators have noted the many drawbacks to perpetual easements.<sup>113</sup> With respect to growth and land use planning, the static nature of per-

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107. See generally Virginia Cooperative Extension, <http://www.ext.vt.edu/resources/> (last visited Jun. 11, 2007) (providing links to state agricultural and natural resources information).

108. COLO. COALITION OF LAND TRUSTS, TERM EASEMENT WHITE PAPER (2001), available at [http://www.ctahr.hawaii.edu/awg/downloads/rp\\_AFT\\_TermEasements.pdf](http://www.ctahr.hawaii.edu/awg/downloads/rp_AFT_TermEasements.pdf).

109. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 424 n.6 (2005).

110. Richardson, *supra* note 63.

111. *Id.*

112. *Id.*

113. See McLaughlin, *supra* note 108; JEFF PIDOT, POLICY FOCUS REPORT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM 1 (Lincoln Inst. of

perpetual conservation easements simply proves incompatible with the dynamic nature of smart land use planning. Leading scholars overwhelmingly maintain that perpetual conservation easements should be reserved for very rare, very unique circumstances.<sup>114</sup>

However, term easements fail to find favor in many quarters. The largest stumbling block comes when determining fair compensation.<sup>115</sup> If the program bases compensation on the difference between the fair market value of the land and agricultural value, the price of a term easement may easily approach the cost of a perpetual easement.<sup>116</sup> However, arbitrarily low payments (as in the former program in Pennsylvania) dampen enrollment in the program.<sup>117</sup>

The Colorado Coalition of Land Trusts White paper suggests decoupling estimates of land value from the payments to land owners and provide non-cash benefits like tax benefits, consulting services, or the like.<sup>118</sup> In addition, farmers could be surveyed to determine how much landowners would accept.

Many existing agricultural programs, like the Conservation Reserve Program, Conservation Reserve Enhancement Program, Wildlife Habit Incentive Program, and the Wetlands Reserve Program, *inter alia*, closely resemble term easements. Like these payments, term easements provide the multiple benefits of an ability to be targeted to those most desirable, a capacity to be capped by the governmental entity, assistance to farm viability with periodic cash payments, and apparent fairness. However, “term easements” appear to be tainted by an extremely negative connotation. Political acceptance and perceptions of fairness may dictate that different terminology be used to describe programs that provide very similar benefits. One such program is referred to as “green payments.”

### G. *Green Payments*

A green payment “efficiently links the production of environmental goods and services with the opportunity to derive an income over and above the

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Land Policy 2005); Julia D. Mahoney, *The Illusion of Perpetuity and the Preservation of Privately Owned Lands*, 44 NAT. RESOURCES J. 573, 573 (2004); Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 786 (2002).

114. Discussion from the Collaborative Seminar on the Integration & Reconciliation of Regulation & Acquisition Approaches to Land Conservation, Georgetown Environmental Law and Policy Institute (Sept. 26, 2006) (unpublished discussion attended by the author) [hereinafter Collaborative Seminar Discussion].

115. COLO. COALITION OF LAND TRUSTS, *supra* note 107.

116. *Id.*

117. *Id.*

118. *Id.*

cost of producing these goods and services.”<sup>119</sup> As Even points out, green payments avoid the restrictions placed on traditional subsidies by international accords, generate the appearance of fairness, provide additional income to farmers, and produce environmental benefits.<sup>120</sup>

Agriculture provides positive externalities that accrue to members of the community. Fairness dictates that those benefiting pay. Farmers would reap the rewards by supplementing incomes. The community benefits through the increased chance that the farm operation would remain viable and increased environmental amenities. Presumably, green payments would be made in those cases where the producer is asked to undertake additional actions that provide public goods.<sup>121</sup> Green payments appear to advance many of the goals of a successful program to advance the industry of agriculture in a way that provides numerous benefits to society.

#### H. *Smart Payments*

The author proposes the concept of “smart payments” to build on the concept of green payments. These payments would be made by local or state governments to producers occupying lands that, from a smart growth perspective, should not be developed at present. The payments would be decoupled from the value of the property’s development rights to avoid the taint of term easements.

The payments would promote farm profitability, smart development patterns, and fairness. The augmentation of farm income would encourage farmers to stay on the farm while strict targeting of the payments would ensure that the farm’s citizens who want to stay in business would receive the payments. Finally, since farm operations produce many positive externalities (open space, viewsheds, etc.) the payments would compensate for these externalities, thereby promoting fairness.

Such payments hold numerous advantages over conservation easements and other traditional forms of farmland protection. First, the payments can be carefully targeted to only those producers that need them and whose continued existence provide a societal benefit. (Why should a community pay subsidies, in the form of tax benefits for conservation easements or differential assessment, to hobby farmers or country estate dwellers that reside on property immediately

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119. William J. Even, *Green Payments: The Next Generation of U.S. Farm Programs?*, 10 *DRAKE J. AGRIC. L.* 173, 173 (2005).

120. *Id.* at 180, 184, 198.

121. Collaborative Seminar Discussion, *supra* note 113 (Jeff Pidot asserts that incentives should be paid for benefit-conferring actions, while regulations should prohibit actions that prove harmful).

outside a growth center, appropriate for development? Such a landowner retains the right to not develop, but should not be subsidized for a decision that produces no societal good, and perhaps, a societal bad in the form of “dumb growth.”) Similarly, landowners who have no intention to develop their property, or fail to produce significant products, should not be subsidized to maintain a lifestyle.

In addition, governments could “cap” the dollar amount of smart payments. Such payments would only go to those farmers who most clearly fit within the criteria. Thus, smart payments force communities to prioritize conservation lands.

A growing movement calls for local food production for a myriad of reasons. Smart payments could target this and other community desires. For example, many communities voice objections when farm operators engage in generally accepted agricultural practices such as land application of biosolids and intensive livestock production. Smart payments could be increased when operators agree to restrict such practices.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

Farmland protection efforts in the United States continually fail to achieve true enhancement of the industry of agriculture. Unlike open space preservation and protection of areas such as wetlands or groundwater recharge areas, farmland protection (at least according to the rhetoric) seeks to enhance and maintain an economic activity.

Presently, governmental and private groups treat farmland and open space equivalently. Such an approach ensures failure with respect to farmland protection. The standard response, that land conservation measures keep land open such that the land may be used for agriculture, rings hollow and indicates ulterior, and malevolent, motives behind farmland protection movements.

We as a society, as well as individual communities, must first expressly state the goals of farmland protection. If the goal is to slow or stop growth, the goal proves both unlawful as well as impossible to achieve. If the goal truly is to assist the economic viability of family farms, then the tools used to achieve that goal are in dire need of modernization.

Traditional tools often work at cross purposes in trying to advance the agricultural industry. These tools fail to address issues such as the risk of weather, low prices for products, increasing costs for inputs, and (on the coasts at least) the high price of land. A conservation easement fails to improve the managerial skills of a farm manager, or address any other economic issues in the farm economy. Farm families that resort to selling or donating development rights in the face of mounting operating losses invite disaster.

The increasingly ideological rhetoric in farmland protection threatens the entire movement. If farmland protection is being used to subsidize the lifestyles of wealthy country estate owners, then credibility, and possibly all support in Congress, as well as state and local legislatures, may be lost.

At bottom, we may be seeking to “preserve” “community character.” In any case, we must clearly delineate our goals. Then, we may rationally determine the tools to use to most efficiently and effectively achieve the lawful goals. Too often, farmland protection is used as a thinly veiled means to engage in unlawful, and sprawl-inducing, exclusionary zoning. We must rise above that temptation and find ways to truly contribute to the farm economy with programs that maintain the economic viability of agriculture, distribute the costs fairly, and involve all levels of government.