

# ON INFERTILE GROUND: GROWING A LOCAL FOOD SYSTEM THROUGH AGRICULTURAL CONSERVATION EASEMENTS

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## I. INTRODUCTION

Agricultural conservation easements (ACE) are a popular way to limit development on agricultural land and preserve open space for the community. As the local food movement (The “Movement”) grows, ACE holders and agricultural organizations see obvious connections between conserving farmland and growing a more locally based food system in the United States. However, this Article illustrates how the links between ACEs and the local food movement are not as strong, or even as desirable, as they seem. From their genesis, the ACEs have never been about protecting farming or the production of food. In reality, the ACE subordinates two values which are central to the local food movement: the value of land for agriculture and the value of community decisions. These values are central to many within the local food movement, and as such, proponents should give serious

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pause to the argument that the ACE is an appropriate tool to build a more local food system.

Part I introduces ACEs as a land use mechanism, and Part II analyzes the intent and effect of this mechanism. Part III demonstrates how ACEs subordinate the agricultural value of farmland to its development value through the federal Tax Code, through implementation of ACEs, and through the economic reality of modern farming. Part IV explores how ACEs subordinate community decisions to individual decisions through compensation to the landowner, and through extinguishment of ACEs. Finally, Part V summarizes the local food movement's objectives and methods, relating them back to ACEs.

## II. FARMLAND PROTECTION AND CONSERVATION EASEMENTS

In the early 1980s, citizen groups and farmland constituencies sounded a rallying cry to stop the annual loss of over three million acres of American farmland to suburban sprawl.<sup>1</sup> In response, the federal government, states, and municipalities developed the agricultural conservation easement (ACE) to address the problem.<sup>2</sup> A conservation easement is a contract which limits the development of property.<sup>3</sup> More specifically, it is a contract between a qualified organization, such as a land trust or a government agency, and a landowner which gives the organization the right to enforce land use restrictions against the landowner. These easements are statutory creations, and as such, can exist only for the conservation purposes specified in the statute. Fortunately, every state, as well as the federal government, includes the protection of farmland<sup>4</sup> as a conservation purpose, although usually indirectly.<sup>5</sup> When applied to agricultural land, an ACE restricts development of agricultural land with the ostensible purpose of protecting the land's capacity for

1. Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992 ANN. SURV. AM. L. 235, 235-36 (1993).

2. See generally, AMERICAN FARMLAND TRUST & AGRICULTURAL ISSUES CENTER, A NATIONAL VIEW OF AGRICULTURAL EASEMENT PROGRAMS: MEASURING SUCCESS IN PROTECTING FARMLAND—REPORT 4, Dec. 5, 2006, <http://www.aftresearch.org/research/publications/details.php?id=b939970b60e9da138bcc9164f6ca41>

3. *A National View of Agricultural Easement Programs*, AMERICAN FARMLAND TRUST, <http://www.farmland.org/resources/national-view/> (last visited Jan. 24, 2015).

4. For the purposes of the paper, the word "farmland" includes both farms and ranches.

5. Montana and Illinois' conservation easement enabling statutes do not specify farmland, but farmland is still protectable as open space. Todd D. Mayo, *A Holistic Examination of the Law of Conservation Easements*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 26, 38 (Julie Ann Gustanski & Roderick H. Squires, eds., Island Press 2000).

agricultural production.<sup>6</sup> Generally, the ACE also restricts subdivision. A conservation easement may be created for more than one purpose, and where it protects wildlife habitat or scenic values in addition to farmland, it may restrict hunting, timber harvesting, or other related activities as necessary to protect those additional values.<sup>7</sup> Most ACEs are held in perpetuity, meaning all future landowners are subject to the terms of the ACE. However, some jurisdictions allow ACEs to attach for a term of years.<sup>8</sup> The conservation easement, and the ACE, exists because the right to develop land is a property interest: the landowner may donate or sell such rights, apart from the land itself.<sup>9</sup>

Both liberal and conservative communities have received ACEs enthusiastically.<sup>10</sup> The landowner receives compensation for the public benefit of her land, and the community gets assurance that the land will continue to provide those benefits. Since the landowner and a land trust may negotiate an agreement exclusively between themselves, it appeals to landowners who are opposed to government regulation.<sup>11</sup> The relative speed of conservation easements, especially compared to expanding land use regulations, appeals to environmental advocates.<sup>12</sup>

In 1968, the Internal Revenue Service (IRS) officially recognized the donation of a conservation easement as a charitable activity.<sup>13</sup> However, potential donors remained uncertain about the actual deductibility of the donation, until the

6. Defining “capacity” is important. The ACE rarely mandates or incentivizes agricultural production. Although not unheard of, most easement holders are strictly opposed to requiring actual production. Telephone Interview with Bob Wagoner, Senior Policy and Program Advisor, American Farmland Trust (June 10, 2010).

7. ELIZABETH BYERS & KAREN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK*, 19-21 (Land Trust Alliance & The Trust for Public Land 2d ed. 2005).

8. Mayo, *supra* note 5, at Table 2.4.

9. Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* 14-17 (Julie Ann Gustanski & Roderick H. Squires, eds., Island Press 2000).

10. Although conservation easements vary substantially state-by-state, each state has a conservation easement enabling statute and, with the exception of Oklahoma, each state has at least one land trust. *See generally* *PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE* (Julie Ann Gustanski & Roderick H. Squires, eds., Island Press 2000) (detailing state conservation easement enabling statutes and programs).

11. Massachusetts is the only state to require public approval of every conservation easement. Mass. Gen. Laws. Ch. 184, § 32 (2014); *but see* Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 *DENV. U. L. REV.* 1077, 1092 (1996) (explaining why conservation easements are not, in fact, a private agreement).

12. The land trust movement is the biggest contingent of the environmental movement. Gustanski, *supra* note 9, at 14-17.

13. *See* Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement*

IRS promulgated Treasury Regulation 170(h) in 1986.<sup>14</sup> Treasury Regulation 170(h) specifies that a conservation easement is a charitable gift if it is for “the preservation of open space (including farmland and forestland),” is for conservation purposes only, yields a significant public benefit, and is in accordance with a clearly delineated governmental policy.<sup>15</sup> The clarifying IRS regulations led to a dramatic increase in conservation easement activity. Between 1985 and 2005, the number of acres protected under conservation easements jumped from nearly zero to at least six million.<sup>16</sup>

ACEs now have a wide impact on land use. It is difficult to calculate the exact number of acres put under protection because there is no central accounting system for protected lands. However, the amount of money spent acquiring ACEs provides some perspective. The Federal Farm and Ranchlands Protection Program (FRPP) alone has distributed over 1.3 billion dollars in matching funds for the purchase of ACEs.<sup>17</sup> In 2006, state and local bond initiatives funded over 6.7 billion dollars’ worth of conservation easements for farmlands and other lands.<sup>18</sup> The amounts expended through the private fundraising efforts of thousands of non-profit land trusts add to the total spend on ACE purchases.

Its originators conceived of the conservation easement as an equitable way to avoid taking property through eminent domain.<sup>19</sup> Public agents could avoid the condemnation process by seeking a voluntary relinquishment of the development rights for publicly beneficial lands. In return, the government would provide the landowner with compensation, just as it would have in an eminent domain proceeding.<sup>20</sup>

Early proponents were worried about housing development and its negative impact on wildlife habitat, scenic vistas, and parks. Farmlands were not at the fore

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*Donation—A Responsible Approach*, 31 *ECOLOGY L.Q.*, no. 1, 2004, at 88.

14. *Id.* at 19.

15. Treas. Reg. § 1.170A-14(d)(iii) (1994).

16. The 1840 members of the Land Trust Alliance protected over six million acres in 2005. The Land Trust Alliance provides the most accurate accounting available, although all easement holders are not members of the Land Trust Alliance. LAND TRUST ALLIANCE, 2005 NATIONAL LAND TRUST CENSUS REPORT, at 6, Figure 1 <http://www.northolympiclandtrust.org/Documents/2005LandTrustCensusReport.pdf>.

17. NAT. RES. CONSERVATION SERV., USDA, FY-2012 FARM AND RANCH LANDS PROTECTION PROGRAM, FINANCIAL ASSISTANCE OBLIGATIONS (2012).

18. LAND TRUST ALLIANCE, *supra* note 16, at 7.

19. William H. Whyte, Jr., *Securing Open Space for Urban America: Conversation Easements*, URBAN LAND INST. TECHNICAL BULL., Dec. 1959, at 5, 6.

20. Mr. Whyte insisted that any land should be fully condemnable for public purposes under takings jurisprudence before public agents could purchase a conservation easement. *Id.* at 16, 30.

of the originators' agenda. The author of the "earliest work of importance"<sup>21</sup> on conservation easements, William Whyte, cautioned that urbanites would not support conservation easements if they extended to farmland.<sup>22</sup> He argued the only way to secure passage of conservation easement enabling statutes was to protect farmland only as open space. The subordination of farmland to open space addressed two concerns. First, it assured one class of skeptics that no farmer would unduly benefit from the scheme. Second, it assured others that undeveloped land would not languish; open space could be farmed.<sup>23</sup>

Today, citizens may not need such obfuscation, and appear to agree that agricultural lands are worth protecting.<sup>24</sup> Every state has a public policy for the preservation of agricultural lands, be it an official declaration or the creation of special agriculture zones.<sup>25</sup> Citizens feel that maintaining local food supplies and a rural way of life are the primary goals of farmland preservation.<sup>26</sup> A second study reinforces the importance of food, showing that fifty-one percent of respondents were willing to be taxed to preserve local sources of fruit and vegetables, while only forty-one percent were willing to be taxed to preserve beautiful farmland.<sup>27</sup>

On the other hand, landowner motivations for placing a conservation easement on their land are complex and somewhat unclear.<sup>28</sup> Almost all studies report that a landowner's personal ethic is a primary motivation. The sharp increase in donations after tax credits became available suggests finances are also a major influence.<sup>29</sup>

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21. RICHARD BREWER, *CONSERVANCY: THE LAND TRUST MOVEMENT IN AMERICA* 33 (Univ. Press of New England 2003).

22. Mr. Whyte goes so far as to say urbanites would accuse the farmer of "getting away with murder" if he or she were paid for a conservation easement. He does not explain why he felt urbanites were so hostile to public funds being expended on agricultural land protection. Whyte, *supra* note 19, at 17.

23. *Id.*

24. A 1996 survey showed seventy-one percent of respondents agreed that "policies protecting farmland should be stronger." Gustanski, *supra* note 9, at Table 1.1.

25. This may also reflect the fact that to be tax deductible a conservation easement donation must be supported by a clearly stated public policy. *See* discussion *infra* Part III.A.2.

26. Joshua M. Duke & Rhonda Aull-Hyde, *Identifying Public Preferences for Land Preservation Using the Analytic Hierarchy Process*, 42 *ECOLOGICAL ECON.* 131, 142 (2002).

27. J. Dixon Esseks & Steven E. Kraft, *Survey: Are Owners of Urban-Edge Agricultural Land Willing to Provide Environmental Benefits that Urban and Suburban Residents Value?* *AMERICAN FARMLAND TRUST*, 16, Table 11 (2002) <http://www.aftresearch.org/farmland/report.html#benefits>.

28. *See generally* McLaughlin, *supra* note 13, at 14-17 (reviewing surveys on easement donor motivations).

29. *See* Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Protection into the Twenty-First Century*, in *PROTECTING THE LAND: CONSERVATION EASEMENTS*

To the casual observer, the ACE is benign, at worst. Large amounts of land are protected from development, and large amounts of public dollars are spent acquiring the land and providing tax benefits to donors. The situation appears ripe for an analysis of fiscal efficiency, but perhaps that is the extent of any necessary inquiry. It seems logical to conclude that protecting farmland protects farming, and thus local food production. What is there to discuss?

On the contrary, this paper argues that the situation desperately needs further discussion. This paper borrows from the pragmatic methods of the diverse universe of feminist legal thought to develop a deeper analysis of the ACE and its effect in local communities. Feminist legal thought focuses on identifying the practical ramifications of a law within communities, while paying special attention to its influence via more subtle expressions of power and subordination.<sup>30</sup> This paper operates on the assumption that such analysis of power and practical effect is worthwhile in any context, not just those involving gender. Food, farming, and rural life are fundamental to American culture and as such, it is worth asking about ACE's practical effect on the power dynamic between farmers and landowners. A feminist legal scholar looking at ACEs might ask, "Does the ACE create or contribute to a deprived position in society for farmers and the lands they farm, as opposed to other professions and land uses that hold greater power in society?" Especially as the local food movement continues to gather steam in raising awareness about the importance of farmers to American life, the question is certainly worth asking.

### III. INTENT AND EFFECT OF THE ACE

#### *A. Legal Intent*

Certainly to start such an inquiry, the place to begin is the source. As explained above, conservation easements did not experience widespread acceptance until the mechanism was interpreted within the Tax Code, so the Code is the primary source for ACEs as they are known today. The Federal Tax Code regulates

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PAST, PRESENT, AND FUTURE 56-60 (Julie Ann Gustanski & Roderick H. Squires, eds., Island Press 2000) (discussing the evolution of tax laws which affect conservation easements).

30. See ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY* 111-12 (New York Univ. Press 2006); see also CATHARINE A. MACKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 13 (Yale Univ. Press 1979); see also Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005 (1986).

the donation of a conservation easement as a charitable activity. In order to qualify for a tax deduction, the donation of a conservation easement must be for "conservation purposes."<sup>31</sup> The protection of farmland is included parenthetically, under an example of open space, as a valid conservation purpose.

When a conservation easement is intended to protect farmland, it must provide a public benefit.<sup>32</sup> The Treasury defines a public benefit by enumerating several factors for consideration: the uniqueness of the property to the area, the intensity of land development nearby, the consistency of the proposed open space with public programs, and the uniqueness of the project to the easement holder.<sup>33</sup> IRS private letter rulings (PLR) are necessary to further elucidate the requirements.

The following brief, but nonetheless exhaustive, review of the public benefit of farmlands in PLRs reveals the benefit of farmland is an absence of houses in places where there is demand, and the regulatory allowance to build houses. To begin, one example of farmland being deemed "unique" is when it possesses abnormally small lot zoning accompanied by high development pressure.<sup>34</sup> Notably, this uniqueness has nothing to do with agricultural capacity. The PLRs make extensive findings with respect to the intensity of land development nearby in determining that the farmland provides a public benefit. Parcels are beneficial if they are within close proximity of major cities,<sup>35</sup> have adjacent subdivisions,<sup>36</sup> are in densely populated regions,<sup>37</sup> are close to schools and residential developments,<sup>38</sup> or face a high demand for development and rapid population growth.<sup>39</sup> Similarly, a combination of farmland and stream habitat<sup>40</sup> has been found to make farmland unique, which further develops the idea that the farmland has little to do with its value.<sup>41</sup> Finally, where greater numbers of people drive by the protected parcel and take in the view, a public benefit exists.<sup>42</sup>

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31. Treas. Reg. § 1.170A-14(a) (2009).

32. The example offered by the IRS is the donation of farmland within a designated floodplain region. The public policy of floodplain preservation, along with a public benefit, justifies the protection of farmland. Treas. Reg. § 1.170A-14(d)(4)(iii)(A).

33. Treas. Reg. § 1.170A-14(d)(iv).

34. I.R.S. Priv. Ltr. Rul. 86-38-012 (June 18, 1986).

35. I.R.S. Priv. Ltr. Rul. 200-002-020 (Jan. 14, 2000).

36. *Id.*

37. I.R.S. Priv. Ltr. Rul. 86-23-037 (Mar. 11, 1986).

38. *Id.*

39. I.R.S. Priv. Ltr. Rul. 86-38-012 (June 18, 1986).

40. I.R.S. Priv. Ltr. Rul. 200-002-020 (Jan. 14, 2000).

41. On one parcel, the IRS made no findings with respect to uniqueness, leading to the assumption that the court found the project's alignment with public policy to be reasonable enough to establish charitable status. I.R.S. Priv. Ltr. Rul. 87-13-016 (Dec. 23, 1986).

42. I.R.S. Priv. Ltr. Rul. 200-002-020 (Jan. 14, 2000).

Certainly, there is well-grounded public policy in preserving open space in the midst of development. However, farmland offers an obvious benefit which a park does not: it provides food. Any mention of the production of food is conspicuously absent from every PLR. On the contrary, commentators have long held the position that farmland cannot be protected “for farmland’s sake.”<sup>43</sup> Despite public support for local food production,<sup>44</sup> PLRs make it clear that the benefit of farmland is not food. Apparently, the benefit of farmland is not determined by what it is, but rather, what it is not.

This is not to say the conservation easements should be available simply to protect any farmland. That is not the point. Rather, the point is to identify the precise values on which the mechanism of the ACE is truly built. The ACE subordinates the agricultural value of farmland to the land’s value as an investment for a housing development, in particular. The point is recognizing that the Federal Tax Code subordinates agricultural values by its very structure.

In addition to requiring a public benefit, the Tax Code requires all donated ACEs to be in accordance with a clearly defined public policy. This requirement suggests a slightly different interpretation of the public benefit requirement explored above. From an equanimous perspective, perhaps defining the public benefit of farmland only in terms of what it is not leaves the door open for state and local land trusts to incorporate the benefits of their unique farming communities.

A review of the same PLRs explored above reveals that the IRS accepts vague statements of support for farmlands in order to meet the public policy requirement. If a public agency holds an ACE, the IRS presumes a public policy supporting it exists.<sup>45</sup> A recent private letter ruling has clarified that the “mere acceptance” of an easement may not be enough; the agency must conduct some level of review before accepting the ACE.<sup>46</sup> The IRS cited a statement that encourages the voluntary restriction of development in areas designated as open space contained within a county’s general plan to demonstrate a clear public policy.<sup>47</sup>

The public policy examples cited in the PLRs do not indicate that state and local governments are focusing any more on the agricultural value of farmlands than the federal government.<sup>48</sup> Although a policy may clearly state that the mu-

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43. Quinn, *supra* note 1, at 251.

44. Duke & Aull-Hyde, *supra* note 26.

45. Treas. Reg. § 1.170A-14(d)(4)(iii)(B) (2009).

46. I.R.S. Priv. Ltr. Rul. 200-002-020 (Jan. 14, 2000).

47. I.R.S. Priv. Ltr. Rul. 86-38-012 (June 18, 1986).

48. These public policies also do not show support for ACEs as a method of farmland preservation. If zoning performs the traditional role of restricting development on land in a



nicipality supports the preservation of farmland, the policies are not specific beyond explaining the benefit of keeping houses off farmland. The IRS is accepting unarticulated expressions of support for farmland at the local level as well as at the federal level.

PLRs treat existing zoning regulations as a public policy for farmland preservation. Where the zoning plan defines an agricultural area, the municipality may support ACEs.<sup>49</sup> A community with a designated agricultural area for the purposes of preferential state tax assessments has a policy for farmland preservation.<sup>50</sup> A recent and the most thorough PLR discussing this issue found that a detailed county plan including the precise parcel under review in an agricultural security area provided a clear public policy.<sup>51</sup> Zoning regulations serve a wide variety of purposes, from preventing incompatible uses and promoting orderly extension of public utilities, to bolstering local economic development. Agricultural zoning satisfies subdivision and development control objectives. It fosters agriculture only by protecting it from incompatible uses rather than, for example, addressing other factors supporting strong agricultural communities. As such, the fact that zoning recognizes farmland isn't necessarily an affirmation of its role for food production either.

Local expressions of public policy supporting farmland, as seen through PLRs, ignore farmers and food production just as conspicuously as the federal determination of a public benefit. Not defining the public benefit of farmland for food production poses two problems. First, farms are uniquely diverse. Prioritizing a particular subset of farms, such as large confined animal feeding operations or small direct-market farms, results in a sharply different rural landscape. Second, if the community does not define what kind of farms they wish to preserve, they cannot control the landscape they end up preserving.<sup>52</sup>

Eliminating the definition of good farmland allows the "is not" value of farmland to rise, like cream, to the top. Farmland is not developed. Farmland is

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democratic and politically accountable fashion, why does agricultural zoning necessarily show support for ACEs? ACEs have far broader implications. Local farmland protection programs suggest that states and municipalities see value in stronger protections for farmland although they are not prepared to adequately protect it themselves. Perhaps a federal tax deduction is available because the local government supports it, and the local government supports it because a tax deduction is available.

49. I.R.S. Priv. Ltr. Rul. 86-23-037 (Mar. 11, 1986).

50. *Id.*

51. The language of private letter rulings suggests that the IRS is becoming more discerning in finding a benefit to conservation easements. However, there are no IRS investigations centering on the benefits of a conservation easement.

52. J.B. Ruhl, *Farmland Stewardship: Can Ecosystems Stand Any More Of It?*, 9 WASH. U. J.L. & POL'Y 1, 20 (2002) (discussing environmentally destructive practices of modern, industrial farms).

not housing. Together, federal tax codes and local implementation of ACEs cement the subordination of agricultural values. Ignoring the agricultural value of farmland while acknowledging only the investment value in the federal Tax Code renders the food that farmland produces, and how the farmer grows it, invisible.<sup>53</sup>

### *B. Practical Effect*

Even if a law's genesis does not articulate specific values in an affirmative context, the implementation of a law can still uphold such values. Laws can achieve goals for which they were never explicitly intended. Thus, the next stage is to analyze the effect of farmland conservation through ACEs broadly.

In many communities the Farm and Ranchlands Protection Program (FRPP) played a large role, either through its own presence, or because many state and local programs incorporated the same standards as the federal ACE-purchasing program. FRPP on-the-ground focus was on maintaining a critical mass of farmers to support agricultural industry. The program achieves this goal through three qualifications for funding: applicants had to be near a suitable market, had to be near other protected farm operations, and a majority of the applicant's soil had to also be "prime farmland."<sup>54</sup>

On a deeper level, these criteria were to implicitly capture affirmative goals for farming communities. The first two FRPP criterion, suitable markets and other protected farms, sought out a contiguous landscape of viable farms. This approach to farmland preservation was also intended to support a farm-related rural economy. Other land trusts and public programs shared this vision.<sup>55</sup> ACEs were supposed to satisfy this vision. The removal of development rights should have reduced the price of farmland. This should have enabled young farmers to enter the field with less initial debt. A lower property valuation should have also lowered the property taxes of existing farmers.<sup>56</sup> More and more profitable farm operations

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53. This insight is gleaned from one of radical feminism's premises: the violation of women is so pervasive in society as to be invisible. MACKINNON, *supra* note 30, at 1.

54. Soil is classified as "prime" by the Natural Resources Conservation Service, a designation that accounts for soil quality, slope, and erosion potential. NAT. RES. CONSERVATION SERV., USDA, PRIME AND IMPORTANT FARMLAND [www.nrcs.usda.gov/wps/portal/nrcs/detail/ak/soils/surveys/?cid=nrcs142p2\\_035988](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/ak/soils/surveys/?cid=nrcs142p2_035988) (last visited Jan. 24, 2015).

55. Tom Daniels, *Saving Agricultural Land with Conservation Easements in Lancaster County, Pennsylvania*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 166 (Julie Ann Gustanski & Roderick H. Squires, eds., Island Press 2000).

56. Kendra Johnson, *Conserving Farmland In California: For What and For Whom?*

should have supported a network of farm-related business.

The question is now whether the results were actually achieved. Despite the limited expression of farmland value in the Tax Code, are real programs creating more affordable farmland by reducing the purchase price of farmland and ongoing tax burdens? A study of preserved farmland in three Maryland counties revealed no statistically significant decrease in price.<sup>57</sup> A South Central Wisconsin study came to the same conclusion.<sup>58</sup> The same Wisconsin study did find a reduction in price for lands which had no existing or potential home site and were completely vacant. However, these lands are certainly unattractive to beginning farmers, and may be attractive only to farmers looking to expand acreage.<sup>59</sup> Study authors provide several reasons why ACEs are not reducing the price of the land: incomplete markets, low volume of sales,<sup>60</sup> or inadequate data collection.<sup>61</sup> Further, even where an ACE does appear to reduce the value of farm property when it is resold, the reduced price rarely matches the potential income to be earned from farming the property.<sup>62</sup> ACEs are not preserving the affordability of farmland for those who will actually farm it.

ACEs are not protecting farmland ownership by the farmer or resuscitating the nation's faltering rural economies by any better measure.<sup>63</sup> ACEs are instead creating large "estate" properties that are then being rented out to farmers for agricultural production.<sup>64</sup> The land may still be producing food, but not under the pastoral vision of a community of small landholders.<sup>65</sup> Farmers themselves may

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*How Agricultural Conservation Easements Can Keep Farmland Farmed*, 9 SUSTAINABLE DEV. L. & POL'Y 45, 47 (2008).

57. Cynthia J. Nickerson & Lori Lynch, *The Effect of Farmland Preservation Programs on Farmland Prices*, 83 AM. J. OF AGRIC. ECON. 341, 350 (2001).

58. KATHRYN ANDERSON & DIANA WEINHOLD, *Do Conservation Easements Reduce Land Prices? The Case of South Central Wisconsin*, Staff Paper No. 484, 19 (2005).

59. *Id.*

60. Catherine M. Keske et al., *Can Conservation Easements Market Evolve from Emerging to Efficient?*, 8 W. ECON. FORUM 10, 12 (2009).

61. ANDERSON & WEINHOLD, *supra* note 58.

62. Farms may be selling at less than fair market value, but surveyed program coordinators indicate that most protected properties are not selling for prices affordable to the farmer. AMERICAN FARMLAND TRUST & AGRICULTURAL ISSUES CENTER, *supra* note 2, at 31.

63. Only nine of twenty-five programs surveyed stated that their ACE-protected properties were sold to "all or mostly farmers." *Id.* at 33.

64. Of the same twenty-five programs, seventeen respondents cited a "significant degree of leasing" for farm production. This corresponds with national trends finding that forty-one percent of farmers lease land. The tax benefits of keeping land in agriculture are likely the motivating factor for landowners to lease to farmers. *Id.* at 36, 37.

65. If the objective is only to keep land under production, then an ACE may satisfy the goal. However, most land trusts articulate a broader vision for farmland protection including

actually become more and more beholden to large landowners through ACEs. Research also shows that conservation easements have had little direct impact on the decline of farm related services and agricultural economies nationwide.<sup>66</sup> The counties in the United States with the highest percentage of protected farmland suffered the same agricultural economic decline as the nation as a whole.<sup>67</sup>

These contrary results may be the result of the original criteria being determined under a misguided impression that the criteria were appropriate to the goals. Specifically, the inclusion of prime soils as a criterion may be misguided. The EPA points out that a loss of prime soil to development has not negatively affected farm productivity.<sup>68</sup> Prime soils are a narrow approach to modern farm quality that exclude many small and direct-market farms. Although prime soils are certainly valuable for farmlands, good farmland also needs to include lands which are particularly suited for intensive, raised bed systems, hoop houses, and organic nutrient management strategies. Such factors are not necessarily included in a prime soil determination.<sup>69</sup>

Seeking farmland contiguity also excludes small farms next to urban areas. The “traditional” network of farm services—grain storage facilities, feed yards, and large implement retailers—are not necessarily serving direct-market farmers. Multi-use distribution warehouses, small-scale processing facilities, and dynamic on-farm technologies support the direct-market farmer.<sup>70</sup> Not only can such facilities be integrated into an urban area, a direct-market farm is most viable near the urban consumer. Furthermore, direct-market farms are exactly the type of farm

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preservation of the family farm ideal and fostering land stewardship via individual ownership. To meet these expanded objectives, some land trusts are utilizing highly restrictive ACEs that require farmer ownership of the land and mandate agricultural production. Interview with Rebecca Fletcher, Outreach Coordinator, Equity Trust, Inc. (July 7, 2010).

66. AMERICAN FARMLAND TRUST & AGRICULTURAL ISSUES CENTER, *supra* note 2, at 42.

67. *Id.*

68. See *Land Use Overview*, U.S. ENVTL. PROT. AGENCY (April 9, 2013) [www.epa.gov/oecaagct/ag101/landuse.html](http://www.epa.gov/oecaagct/ag101/landuse.html).

69. See CATHERINE BADGLEY ET AL., *RENEWABLE AGRIC. & FOOD SYSTEMS, ORGANIC AGRICULTURE AND THE GLOBAL FOOD SUPPLY*, 92-94 (Cambridge Univ. Press 2007) (discussing various nutrients in soil that affect the quality of farmland).

70. April Terreri, *The Food Pipeline*, *PLANNING*, March 2004, at 8; Tom Philpott, *Community Gardens*, *NEWSWEEK*, Nov. 11, 2009, at 2. “Direct-market” farms sell their products directly to consumers through farmers markets, roadside stands, or sales to restaurants and other food service operations. Direct-market farmers are a small minority at six percent of all farms, but they experienced a fifty-percent increase in sales values between 2002-2007. D. Thilmany & C. Thomas, *Farmers’ Markets and Direct Marketing for Colorado Producers*, COLORADO STATE UNIVERSITY, FARM & RANCH SERIES NO. 4.007 (June 2009) <http://www.ext.colostate.edu/pubs/farmmgmt/04007.html>.

citizens believe ACEs protect.<sup>71</sup>

In a positive light, local programs are choosing implementation criteria that articulate the benefit of farmlands in terms of something other than “no houses.” However, as enacted, those programs do not appear to secure more affordable farmland, farmland ownership by farmers, or more viable farming communities. In fact, many program selection criteria go so far as to exclude small, direct-market farms. The irony is a bit rich when considering these excluded farms are exactly the type of farms citizens envision an ACE protects.

#### IV. ACE PROGRAMS AND RURAL POWER STRUCTURES

##### *A. Motivations for Participation and Individual Power*

The implementation of a program revolves around more than just its net effect. The motivations of those choosing to participate in the program also define its implementation. Who chooses to use a program, and their motivations for doing so, are fair metrics on which to judge an ACE’s value. As this paper specifically takes insight from feminist legal thought, the analysis is taken a step further into the power dynamic that influences participation in ACE programs.

First, the ACE must be placed in context as a tool to protect the oft-revered American family farm. In American culture, the farmer has a different relationship with and set of moral responsibilities to the land than other landowners. To the American mind, a farm is a family farm. It is part worldly and part familial, borne of a union between enterprise and mother earth. The agrarian philosophy celebrates the interplay of these dualistic elements. The individual works with the land to achieve a livelihood from it. To the agrarian, only through this dependency does an equitable, sustainable relationship emerge.

The agrarian ideal of the family farm pervades agricultural law, and indeed American life as a whole.<sup>72</sup> The drafters of the American Constitution elevated the wisdom of the farmer by awarding equal representation to each state in the U.S. Senate, regardless of population. Rural farming states arguably have greater influence per person over the course of American law. Landowners offered security to the new union because landowners could not uproot their capital and “abandon a

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71. Duke & Aull-Hyde, *supra* note 26, at Table 7.

72. Susan A. Schneider, *A Reconsideration of Agricultural Law: A Call for the Law of Food, Farming, and Sustainability*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 935, 935-36 (2010).

crumbling state.”<sup>73</sup>

Thomas Jefferson, the most revered voice of American agrarianism, wrote these oft-quoted lines in a letter to John Jay:

“Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous and they are tied to their country and wedded to its liberty and interests by the most lasting bonds.”<sup>74</sup>

Jefferson’s contemporaneous writings show that he believed in farmers because they represented a model democracy: farmers are independent agents, but only through collective action can they realize common goals.<sup>75</sup> Democracy was seen as inherent to the farming enterprise because the farmer’s dependence on the land required he maintain a balance between self-interest and selfish interests.<sup>76</sup> The long march of “agricultural exceptionalism” extends to special treatment for agricultural enterprises in bankruptcy, labor, antitrust, and environmental laws today.<sup>77</sup>

Agrarian traditions hardly embody a pure, peaceful notion of unity and peace. As some have pointed out:

“[B]y failing to question the race and gender relations that enabled the family farm, . . . [agrarianism] inherently glorifies them. Not only do these often romanticized notions of the family farm take as perfectly unproblematic patriarchal exploitation of women’s and children’s labor, they also ultimately uphold white privilege by ignoring the racial history of U.S. land policy.”<sup>78</sup>

Fortunately, a new agrarianism is taking shape and replacing an old agrarianism. In particular, the poetry, fiction, and essays Wendell Berry crafts from his Kentucky farm give voice to a new agrarianism, and lay the literary foundation for today’s local food movement.<sup>79</sup>

73. Paul Thompson, *Agrarianism and the American Philosophical Tradition*, 7 *AGRIC. & HUM. VALUES* 3, 4 (1990).

74. Thomas Jefferson, *Commerce and Sea Power: Letter to John Jay*, in THOMAS JEFFERSON: WRITINGS 818 (Merrill D. Peterson ed., The Library of America 1984).

75. Lynn M. Harter, *Masculinity(s), the Agrarian Frontier Myth, and Cooperative Ways of Organizing: Contradictions and Tensions in the Experience and Enactment of Democracy*, 32 *J. APPLIED COMM. RES.* 89, 91 (2004).

76. Thompson, *supra* note 73, at 7.

77. Schneider, *supra* note 72, at 935 (identifying source of phrase and examples of exceptions for agriculture); *see generally*, Ruhl, *supra* note 52 (explaining negative environmental effects of such exceptions).

78. JULIE GUTHMAN, *AGRARIAN DREAMS: THE PARADOX OF ORGANIC FARMING IN CALIFORNIA* 174 (Univ. of California Press 2004).

79. For example, *THE ART OF THE COMMONPLACE: THE AGRARIAN ESSAYS OF WENDELL BERRY* (Norman Wirzba, ed. 2002) (For a collection of writings demonstrating Wendell

Modern, new agrarianism voices opposition to the social and economic injustices of modern, industrial farming.<sup>80</sup> The efficiency minded objectives of industrial farming, which farmers themselves have completely adopted,<sup>81</sup> have undermined the unquantifiable values of a farm: long-term sustenance of the soil and rural culture. In deepening the split from an old agrarian mindset, new agrarian thought advocates social, environmental, and economic justice for diverse farm constituencies.

ACEs—as protection for farmlands—are an outgrowth of the American reverence for family farms. Proponents claim, in essence, to capture new agrarian values because ACEs return the value of public enjoyment of farmlands to the farmer, guard a rural way of life, and protect farmland affordability. In reality, ACEs are not accomplishing any of these objectives.

Instead of rewarding deserving farmers for the value of their stewardship, ACEs simply cash out the farmer as if she were a developer. As Professor Nancy McLaughlin<sup>82</sup> points out, ACEs do not value the benefit lost:

[A]lthough the purpose of providing tax incentives to easement donors is to encourage them to voluntarily protect the flow of public goods from their land, the before and after method [of easement valuation] does not in any way measure the value of those public goods. Instead, the before and after method measures only the market costs of an easement donation, or the extent to which placing permanent restrictions on the development and use of the land reduces the fair market value of the land.<sup>83</sup>

Farmers have no practical way to preserve the intangible benefits of farming for their communities. They may simply adopt the same investment mindset which reduces value to its quantifiable elements. The investment mindset only drives the farm away from the agrarian ethic the ACEs supposedly reward.<sup>84</sup>

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Berry's agrarian vision).

80. See *THE NEW AGRARIANISM: LAND, CULTURE, AND THE COMMUNITY OF LIFE* (Eric T. Freyfogle, ed., Island Press 2001); see also *THE ESSENTIAL AGRARIAN READER: THE FUTURE OF CULTURE, COMMUNITY, AND THE LAND* (Norman Wirzba ed., Univ. of Kentucky Press 2004).

81. Farm Bureau pushed for a strictly market approach to agriculture and eliminated funding for rural culture and education programs in the 1940s. Jess Gilbert, *Democratic Planning in Agricultural Policy: The Federal-County Land-Use Planning Program, 1938-1942*, 70 *AGRIC. HIST.* 233, 234, 242 (2008).

82. Professor of Law, University of Utah.

83. McLaughlin, *supra* note 13, at 71.

84. Mr. Strange offers several illustrations of how, “[w]ithin the family farm itself, the allure of land as an investment produces changed values and behavior which inevitably alter the character of the family farm.” *MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION* 50 (Inst. For Food and Dev. 1988).

In this way, the use of ACE programs condones a specific set of values. ACEs explicitly subordinate the value of the land for agriculture to the value of land as a housing development. Calculating only the development value of the land makes a statement about which value is more authentic. Further, ignoring the value of land for agricultural production is sure to erode its agricultural value.<sup>85</sup> ACEs render the agricultural value of the land nonexistent.

ACEs subordinates in a second way: it perpetuates the disadvantaged economic position of farmers. Modern farming has caused a fundamental shift between farmers and other landowners in terms of their relationship to the land. The family farm thrived on the abundance of land free for the taking in the early years of the United States. When homesteaders exhausted the supply of arable land, the Industrial Revolution arrived at the farmstead. Technology increased production, which increased the value of the land. The economic situation of the farmer altered for the worse, as described by Marty Strange:

Since nearly all the additional income from agricultural development was claimed by higher land prices and rents, most farmers benefited relatively little from [technological] progress. They enjoyed relatively less improvement in their standard of living than did the rest of society, since most of their growing income went to pay for land- this for the right to farm. Of course, to the extent that those who survived this competition for land actually bought and paid for land that was rising in value, they accumulated wealth, but it was only 'paper' wealth. It became a truism less humorous than ironic: Farmers live poor and die rich. The two groups benefiting most from these revolutions were consumers who received lower food prices resulting from expanded output, and landowners who received higher rents or higher market values for their land.<sup>86</sup>

Falling commodity prices and rising land prices trap farmers in a vicious cycle. Other landowners are not caught in this trap because they do not need the land itself as the vehicle for income generation. Most landowners draw on income unrelated to the land being purchased; the farmer draws on future income from the use of such land. Thus, other landowners do not suffer from the fact that commodity prices have not increased at the same rate as land prices.<sup>87</sup> The reality of farm economics has crudely distorted the farmer's relationship with his land.

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85. The agricultural value of land certainly can be calculated, and could easily be a determinant in the resale value of land. Telephone Interview with Rebecca Fletcher, Outreach Coordinator, Equity Trust, Inc. (July 7, 2010).

86. STRANGE, *supra* note 84, at 46-47.

87. Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237, 243 (1998) (explaining how low farm profitability may be the real culprit of farmland loss, not development pressure).



Because the modern, industrial farm has not proven itself financially sustainable across generations, farmers end up needing to sell an ACE or the land itself. Modern farmers carry an extraordinary debt load,<sup>88</sup> as compared with other businesses. Farmers incur much of this debt at the behest of collusive commodity buyers who offload their infrastructure needs onto the farm.<sup>89</sup> A woman can spend an entire career farming just to retire the debt necessary to begin farming. At the end of her career, the farmer has almost no real capital besides equity in the land she holds in fee. Many farmers dearly need to recover this equity to finance their retirement.<sup>90</sup>

Farmers clearly care about the preservation of farming. However, they care just as much about their finances. Farmers overwhelmingly prefer non-perpetual easements,<sup>91</sup> but rank perpetual easements higher after the surveyor informs study participants that non-perpetual easements are ineligible for most tax benefits.<sup>92</sup> The states with the most advantageous state tax credits for ACEs, Colorado and Virginia, protect more acres of farmland than any other.<sup>93</sup>

Although some ACEs are donated, the value of purchased conservation easements appears to far outweigh donated conservation easements.<sup>94</sup> Without a certain level of income, the tax benefits of a charitable deduction are negligible.<sup>95</sup> State, local, and federal entities operate many more public programs for agricultural land preservation than for natural habitat preservation.

The financial situation of farmers and their motivation to adopt an ACE implicates the farmer's deprived position. The farmer's other option would be to sell the land itself, which is hardly preferable. The problem is that the farmer is in this situation at all. If farming were financially viable and provided the same remuneration similar professions provide, farmers would have a real choice of options,

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88. For farmers that own their land, the sale of the farm can provide a nest egg. See STRANGE, *supra* note 84.

89. David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61, 100-101 (2010).

90. STRANGE, *supra* note 84.

91. Ashley D. Miller, et al., *Factors Impacting Agricultural Landowners' Willingness to Enter Into Conservation Easements: A Case Study*, 24 SOC'Y & NAT. RES. 65, 69 (2011).

92. Catharine Keske-Hoag, *Adoption of Conservation Easements Among Agricultural Landowners in Colorado and Wyoming: The Role of Economic Dependence and Sense of Place* 18 (June 25, 2010) (unpublished manuscript) (on file with the author).

93. *Id.*

94. Local Purchase of Agricultural Conservation Easement (PACE) Programs, which have the same purpose and function as an ACE, had over 1.5 billion in expenditures as of January 2010. AMERICAN FARMLAND TRUST, FACT SHEET: STATUS OF LOCAL PACE PROGRAMS (2012), available at <http://www.farmlandinfo.org/pace-status-local-programs-2012>.

95. Keske-Hoag, *supra* note 92.

such as selling the business and land to a young farmer who could look forward to a reasonable return on his investment.

Development of farmlands is not inevitable, and so development is not a problem solved by extinguishing development rights. The sale of development rights is an economic necessity motivated by the realities of modern farming.

ACEs subordinate the agricultural value of farmland by perpetuating the problems influencing the adoption of an ACE. ACEs offer the illusion of a solution. ACEs provide farmers with a mechanism to get money from development without addressing why they need the money in the first place. Politicians and rural communities accept ACEs because it appears to solve a problem. It does not. The financial unsustainability of industrial farming will continue despite ACEs. In the meantime, communities will continue to ignore the real problems while they enjoy the benefits of more “open space.”

### *B. The ACE and Community Power Structures*

The financial condition of the farm business clearly motivates adoption of an ACE, both by the landowner's own admission, and on the basis of farm economics as outlined above. This paper now turns to a discussion of how the price is calculated, and the implications on community-wide power structures. A property assessor calculates the value of an ACE<sup>96</sup> according to its unrestricted market value, based on the “highest and best use of the property,” within current zoning laws.<sup>97</sup> If zoning laws already prohibit subdivision of a farm, or limit the number of building sites, an ACE securing the same level of protection has no value. An ACE is most valuable where the zoning laws are least restrictive. For example, an ACE may protect a fifty-acre farm from any subdivision. Where the zoning would otherwise permit subdivision to ten-acre lots, the value of the ACE is the property value if sold as ten-acre parcels minus the value of the property if sold as a single parcel. In other words, the value of the ACE is the lost revenue from not developing the property to the maximum extent allowable by law.<sup>98</sup>

Zoning represents the community's power to regulate land use as they see

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96. The value of the ACE determines its purchase price or its value as a charitable contribution.

97. BYERS & MARCHETTI PONTE, *supra* note 7, at 91.

98. Serious issues with respect to valuation of easements in the context of existing zoning laws exist. LINCOLN INST. OF LAND POL'Y, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* 28 (2005).

fit, within certain constraints.<sup>99</sup> Absent special conditions, an individual landowner has no vested right in the zoning laws.<sup>100</sup> If the community changes zoning regulations, the public owes no compensation to a landowner who subsequently loses value.<sup>101</sup> In the example offered above, if the community revised its zoning laws to prohibit subdivision below fifty acres, the landowner would lose the same value in his land. Except, under rezoning, no one pays the landowner for his loss.

The community constructs individual property rights through zoning. In the example above, it appears that the individual landowner suffers under a rezoning. The neglected story is that the entire community loses under the ACE. Property rights are not a fundamental institution with an existence outside laws.<sup>102</sup> It is only under a system of laws that “property” exists at all, and those laws define an individual’s property rights.<sup>103</sup> When land-use regulations change, property rights change. The community constantly defines for itself what it means to own land.

Compensation for an ACE distorts this relationship, and subordinates the community. The ACE converts a liberty granted by the community to the landowner, and turns it into a right exercisable against the community. A “right” is something society views as fundamental; something that requires compensation if it is infringed upon. Liberties grant the possessor only the right to prevent interference with the exercise of that liberty.<sup>104</sup> A landowner does not possess a right to develop, because the community can revise zoning without compensation. The landowner has an expectation that she may develop her land, and nothing more. Providing compensation for an ACE creates the illusion that the landowner is entitled to more than the community. In fact, the community possesses more than the landowner: it possesses the power to define property.<sup>105</sup>

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99. As an exercise of the police power, if a zoning law advances a legitimate public interest and the regulation is rationally related to that interest, the regulation is constitutional.

100. Under common law, a landowner has vested property rights upon having received the confirmation of a proper government representative, relied upon that representation in good faith, and incurred substantial expense. *See generally*, U.S. v. Locke, 105 S.Ct. 1785, 1797-98 (1985).

101. *See* ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 128-29 (Beacon Press 2007) (discussing when landowners should be compensated for a change in zoning laws).

102. *See generally* Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 77 (2010).

103. Even a “fundamental” element of property rights, the right to exclude, was not always so. FREYFOGLE, *supra* note 101, at 29-60.

104. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16, 36 (1913).

105. *See* GORDON C. BJORK, LIFE, LIBERTY, AND PROPERTY: THE ECONOMICS AND POLITICS OF LAND-USE PLANNING AND ENVIRONMENTAL CONTROLS, 61-75 (D.C. Health and Co. 1980) (discussing the magnitude of the police power to zone and the legal framework of

Compensating landowners for ACEs subordinates the community to the individual, because it creates an incentive to operate outside the community process. An individual receives compensation by securing an ACE, and no compensation by securing a rezoning. The difference, of course, is that a rezoning changes the regulations for all land in the agricultural zone. To pursue a rezoning, a person has to think for the community rather than just for themselves. Thinking for the community as a whole is much more difficult, which adds to the incentive to secure an ACE.

After the ACE divides landowners from the community process with financial incentives, it drives the wedge deeper by focusing on the uniqueness of the farmer's individual land. The tax code does not justify an ACE simply as farmland. The parcel must be unique from neighboring properties. Land trust literature relies heavily on the connection a farmer has to his land individually.<sup>106</sup> After the individual justifies how unique and deserving his farmland is, separation from the community entrenches itself.

In addition to the power structures inherent in the pricing mechanisms, the tools available to extinguish an ACE permanently elevate individual decisions above the community. The doctrine of changed conditions may apply to conservation easements as a real covenant running with the land.<sup>107</sup> Under changed conditions, if the public cannot realize the intended benefits of the covenant, a court may extinguish the covenant. The *cy pres* doctrine may be available to conservation easements as a charitable trust.<sup>108</sup> Under *cy pres*, if carrying out the original intent of the donor becomes unlawful, impossible, impractical, or wasteful, the holder may modify or terminate the easement as long as the change is consistent with the granting landowner's purposes.

The doctrine of changed conditions does not allow the community to question the wisdom of the individual. A person seeking an extinguishment under changed conditions has to show that conditions external to the original agreement have changed. If all things remain the same, the court respects the past wisdom of

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the creation of property rights).

106. See generally, ANTHONY ANELLA & JOHN B. WRIGHT, *SAVING THE RANCH: CONSERVATION EASEMENT DESIGN IN THE AMERICAN WEST* (Island Press 2004) (demonstrating how beautiful photography and well-written text frame the issue of a conservation easement as a choice to save heritage and family lands); see also JEREMIAH P. COSGROVE & JULIA FREEGOOD, *YOUR LAND IS YOUR LEGACY: A GUIDE TO PLANNING THE FUTURE OF YOUR FARM* (3d ed., American Farmland Trust 2002) (using text to evoke family heritage and place on protected lands).

107. Cheever, *supra* note 11; but see RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.11(4).

108. Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 421, 459 (2005).

the original landowner regardless of the community's present wisdom. The doctrine prohibits the community from saying, "Nothing has changed. This conservation easement simply was not wise."

The cy pres doctrine allows more flexibility. Cy pres acknowledges that the intent of the donor may result in waste. Under property law, "waste" is an economic, not environmental, principle. If the preservation of farmland becomes wasteful, in light of more productive uses, a court may extinguish the conservation easement. In return for their loss, the easement holder receives compensation from the resulting development; the compensation must be used to honor the original intent of the donor.<sup>109</sup>

Cy pres allows the community to question the individual, but only on economic grounds. If community wisdom dictates something other than a profitable development of protected lands, cy pres may not be available.

The public decision-making process stops at the door of a conservation easement. Conservation easements carry with them the policy decision that the individual is the appropriate decision-making entity when it comes to using land.<sup>110</sup> Modern property law has been on a slow march toward a more evolved understanding of the intertwining of public and private interests in land.<sup>111</sup>

## V. IMPLICATIONS FOR LOCAL FOOD MOVEMENT ADVOCATES

Recently, land trusts and easement holders have aligned their conservation activities with the burgeoning local food movement.<sup>112</sup> Before jumping to any conclusions, advocates of locally based food systems should ask whether ACE programs express and enact the same values supporters of locally based food systems possess. Naturally, summarizing the values of any group of people as diverse as rural farmers and urbanite consumers is difficult. But it is certainly not impossible, allowing for some natural disagreement.

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109. *Id.* at 460.

110. Many will set up the "tragedy of the commons" as proof. However, many productive commons systems exist around the world. There are unique ways to structure a commons to prioritize community interests and honor the autonomy of the individual. *See*, Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L. J.* 549, 556-57 (2001).

111. Eric T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 *STAN. L. REV.* 1529, 1544-1556 (1989) (discussing California's water law perspective on private and public property rights).

112. Interview with Ryan Boggs, Executive Director, Legacy Land Trust, in Fort Collins, Colo. (June 2, 2010); Telephone Interview with Kendra Johnson, Coordinator, California FarmLink (June 17, 2010); Telephone Interview with Rebecca Fletcher, Outreach Coordinator, Equity Trust, Inc. (July 7, 2010).

Local food system advocates achieve their food system objectives by opposing agriculture-related environmental degradation,<sup>113</sup> including manure runoff,<sup>114</sup> soil erosion, and chemical contamination.<sup>115</sup> They oppose inhumane animal production practices and fair labor standards.<sup>116</sup> Advocates also target federal subsidies for corn, soybeans, and wheat as supporting unhealthy food, while making healthy foods more expensive.<sup>117</sup> The recent failures of industrial food safety lead advocates to call for greater transparency in food manufacturing.<sup>118</sup> The local food movement has reached the legal system as governments pass procurement laws for schools and agencies which permit preferential treatment for local farmers,<sup>119</sup> and establish local and regional food policy councils.<sup>120</sup> Many communities now host Community Supported Agriculture (“CSA”) farms: a direct arrangement between farmer and consumer for a share of the season’s harvest.<sup>121</sup> Even the federal government caught on to the local food movement. The First Family has a vegetable garden,<sup>122</sup> and the USDA launched its “Know Your Farmer, Know Your Food” program in September of 2009.<sup>123</sup> Aside from advertisements and menus, the average citizen sees the local food movement’s impact in the eighty-seven percent

113. See generally, Michael Pollan, *You Are What You Grow*, N.Y. TIMES, Apr. 22, 2007 at MM45.

114. Manure runoff results when heavy rains flood a manure-holding pond causing raw manure to escape and wash into waterways.

115. See Jack Kloppenburg, Jr. et al., *Tasting Food, Tasting Sustainability: Defining the Attributes of an Alternative Food System with Competent, Ordinary People*, 59 HUM. ORG. 177, 183 (2000).

116. See *id.*

117. Pollan, *supra* note 113.

118. Gardiner Harris & William Neuman, *Senate Passes Sweeping Law on Food Safety*, N.Y. TIMES, Nov. 30, 2010, at B1.

119. Derrick Braaten & Marne Coit, *Legal Issues in Local Food Systems*, 15 DRAKE J. AGRIC. L. 9, 26 (2010).

120. Food Policy Councils are groups of stakeholders that “examine the operation of a local food system and provide ideas and recommendations for improvement through public policy changes.” DRAKE AGRIC. LAW CTR., *Food Policy Council Questions and Answers*, <http://www.law.drake.edu/academics/agLaw/?pageID=foodPolicyQnA> (last modified Jan. 8, 2015). For an example of a food policy council enabling statute see MASS. GEN. LAWS ch.20 § 6C (2014).

121. Katherine L. Adams, *Community Supported Agriculture*, NAT’L CTR. FOR APPROPRIATE TECH., [www.attra.ncat.org/attra-pub/PDF/csa.pdf](http://www.attra.ncat.org/attra-pub/PDF/csa.pdf)

122. Marian Burros, *Obamas to Plant Vegetable Garden at White House*, N.Y. TIMES, Mar. 20, 2009 at A1.

123. Press Release, USDA, Agriculture Deputy Secretary Merrigan Launches Website for “Know Your Farmer, Know Your Food,” Plans Facebook Chat to Expand Conversation on Local Food Sys. (Sept. 24, 2009) (on file with author).

increase in nationwide farmers markets during the past ten years.<sup>124</sup> Books from popular authors Michael Pollan<sup>125</sup> and Barbara Kingsolver<sup>126</sup> have made bestseller lists, as food production realities make for compelling nonfiction.

Clearly, advocates of locally grown foods have specific production objectives but they also have deeper and more intangible concerns about community and culture. Communities which spend their money amongst themselves may be more resilient to outside economic forces. Community economic interaction fosters trust between citizens and mutual support for members.<sup>127</sup> The pleasure and joy of food traditions are vital to the local food movement.<sup>128</sup> Local food satisfies the human need for belonging by creating identifiable elements of community membership.<sup>129</sup> Locally adapted heirloom products, regional food ways, and the rhythms of production identify one community as unique from another.<sup>130</sup> Food is powerful because it is a visceral and emotional part of human communities.<sup>131</sup> The local food movement harnesses that visceral quality to build strong communities.

The local food movement, in its finest iteration, is not gourmet baby lettuce in every pot. It is about applying the principles of democracy to the production, distribution, and eating of food. In his essay, *Food Democracy and the Future of American Values*, Professor Neil Hamilton<sup>132</sup> outlines the tenets of democracy—citizen participation, informed choice, opportunity, and local control—and how the local food movement captures each of these tenets.<sup>133</sup>

Citizen participation is the very basis of the local food movement. Choosing local food is about making a conscious, informed choice about what each eater

124. USDA AGRIC. MARKETING SERV., FARMERS MARKETS AND LOCAL FOOD MARKETING, <http://www.ams.usda.gov/AMSV1.0/FARMERSMARKETS> (last modified Sept. 29, 2014).

125. See generally, MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* (The Penguin Press 2006).

126. See generally, BARBARA KINGSOLVER WITH STEVEN L. HOPP AND CAMILLE KINGSOLVER, *ANIMAL, VEGETABLE, MIRACLE: A YEAR OF FOOD LIFE* (Harper Collins 2007).

127. Christine Muhlke, *Growing Together*, N.Y. TIMES, Oct 8, 2010 at MM13.

128. See, Michael Pollan, *The 36-Hour Dinner Party*, N.Y. TIMES, Oct 6, 2010 at MM48.

129. See GARY PAUL NABHAN, *COMING HOME TO EAT: THE PLEASURES AND POLITICS OF LOCAL FOODS*, 18 (W.W. Norton & Co. 2002); see also Wendell Berry, *The Idea of a Local Economy*, in *FOOD & FAITH: JUSTICE, JOY AND DAILY BREAD* 125 (Michael Schut, ed., Earth Ministry 2009).

130. E.N. ANDERSON, *Me, Myself, and the Others*, in *EVERYONE EATS: UNDERSTANDING FOOD AND CULTURE* 124-139 (N.Y. Univ. Press 2005).

131. *Id.* at 97-108.

132. Dwight D. Opperman Distinguished Professor and Director of The Agricultural Law Center, Drake University Law School, Des Moines, Iowa.

133. See Neil Hamilton, *Food Democracy and the Future of American Values*, 9 DRAKE J. AGRIC. L. 9 (2004).

places into his or her own body. The very essence of local food and all the value it possesses extends from knowledge. By knowing where his or her food comes from, the citizen becomes an active participant in the web of production, processing, and distribution. Local advocates and experts are appointed to food policy councils as cities learn to link agriculture with environmental and community health.<sup>134</sup> The local food movement advances on a small scale through local community action.

A community food democracy is communitarian over individualistic. An authentic democracy considers the power structure which enables and disables votes, be they economic or political. The local food movement will not achieve its goals simply by encouraging everyone to make his or her own private decisions. Many citizens have no effective ability to buy the food they wish to consume. Many young farmers are unable to practice their chosen vocation because there is no training and no land available to them.<sup>135</sup>

By its design, implementation, and resulting power dynamics, ACEs and their associated programs do not align with the values of local food and farming advocates. ACEs are premised on a complete absence of farmland value in terms of food, farmers, or farming. Its implementation does not achieve farmland affordability or ownership by farmers, and does not develop stronger farming communities. Instead, ACEs perpetuate the disadvantaged economic position of farmers by creating illusory short-term solutions to deep structural problems in modern farm business models. ACEs tacitly elevate the individual over the community through the compensation scheme and the process of extinguishing an ACE. The local food movement expresses the values of community control and a strong cultural basis for food production. Clearly, these values are mismatched.

Instead, local food advocates might consider the prescription offered by many feminist legal scholars: dialogue. The legal, cultural, and personal issues inhibiting a local food system require difficult and extensive community dialogue. The private negotiation between a land trust and a landowner is, at the very best, a stopgap measure for the lack of public dialogue. ACEs do not further that dialogue even if a land trust engages community fundraising and board members. The public itself does not have a say in what lands the community protects or what agricultural production occurs on those lands.<sup>136</sup> Further, ACEs divert public attention

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134. DRAKE AGRIC. LAW CTR., *Food Policy Council Questions and Answers*, <http://www.law.drake.edu/academics/agLaw/?pageID=foodPolicyQnA> (last modified Jan. 8, 2015).

135. Neil D. Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. ILL. U. L. REV. 657, 660, 665 (1999).

136. Public decision-making in the nation's farmlands is an old idea. Federal involvement in agriculture exploded after the nation's traumatic Dust Bowl. Land use planning was the



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and funds away from the substantive changes that need to occur to make farming economically and environmentally sustainable. These options are immensely more difficult than an ACE. No pot of gold lies at the end of these rainbows either. Citizens, however, hold at least some power to build a local food system. That power should grow rather than abdicate to the expediency of an ACE.

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third and final element in the New Deal system of agricultural support payments and crop insurance. This planning program coordinated the extensive federal involvement in farm production—a level of involvement still sustained today but absent any planning. The aim of the agricultural planning program was explicitly democratic- the leaders sought nothing less than to “foment social change in agriculture.” The emerging American Farm Bureau Federation killed the planning program to favor its market-only agenda, leaving federal support for production of corn, soybeans, wheat, cotton, and sugar beets only and without any coordination to where farming should occur or limitations for farming on particularly sensitive lands. Gilbert, *supra* note 81.