

Farmland Preservation: A Vital Agricultural Law Issue for the 1980's

by Julian Conrad Juergensmeyer*

I. INTRODUCTION: PRIME AGRICULTURAL LAND AND THE PRESSURES OF URBANIZATION

One of the most perplexing problems facing agricultural interests today is the rapid conversion of prime agricultural land on the urban fringe to nonagricultural use.¹ Developers are constantly in search of large parcels of level land that are relatively free of vegetation and with adequate drainage. This description unfortunately also characterizes prime agricultural land and creates a tension between increasing urban development and demands for increased agricultural production.²

Statistically, a majority of the nation's land is classified as agricultural land.³ From a national agricultural land base of almost 2.25 billion acres, it is estimated that 35,000 acres are lost every week to development.⁴ Soil Conservation Service research indicates that

* Professor of Law, University of Florida, Spessard L. Holland Law Center. B.A., (1959); J.D., (1963), Duke University. This article is based upon a speech presented as the fourth annual Foulston-Siefkin Lecture at Washburn University School of Law. This article is based upon portions of chapter 4 of J. JUERGENSMEYER & J. WADLEY, *AGRICULTURAL LAW*, to be published by Little, Brown & Co. in 1982. Copyright is reserved on behalf of the authors and Little, Brown & Co.

1. No other area of agricultural law has been the subject of as much comment and debate. For a broad treatment of the farmland preservation issue, see Cotner, *Land Use Policy and Agriculture: A State and Local Perspective*, U.S. DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE (1974); NATIONAL ASSOCIATION OF COUNTIES RESEARCH FOUNDATION; *DISAPPEARING FARMLANDS: A CITIZEN'S GUIDE TO AGRICULTURAL LAND PRESERVATION* (2d ed. 1980); U.S. GENERAL ACCOUNTING OFFICE REPORT TO CONGRESS, *PRESERVING AMERICA'S FARMLAND: A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT* (1979); COUNCIL ON ENVIRONMENTAL QUALITY, *LAND USE, THE FIFTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY* (1979); *PRESERVATION OF PRIME AGRICULTURAL LAND, ENVIRONMENTAL COMMENT*, URBAN LAND INSTITUTE (Jan. 1978); REAL ESTATE RESEARCH CORPORATION, *THE COSTS OF SPRAWL* (U.S. Government Printing Office, Washington 1979); Blobau, *The Loss of Agricultural Land*, REPORT TO THE CITIZENS ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY (1974) (bibliography); Little, *Middleground Approaches to the Preservation of Farmland*, NATIONAL AGRICULTURAL LANDS STUDY (1980); Little, *Land and Food: The Preservation of U.S. Farmland*, AMERICAN LAND FORUM (1979); Little, *The Case for Retaining Agricultural Land*, LIBRARY OF CONGRESS (Nov. 8, 1977) (Workshop); Miner, *Agricultural Retention: An Emerging Issue in Environmental Comment*, URBAN LAND INSTITUTE (May 1975); Clark, *Conserving the Nation's Farmland* (1979) (background paper written for the Northeast-Midwest Institute, Washington D.C.).

2. Newton & Boast, *Preservation By Contract: Public Purchase of Development Rights in Farmland*, 4 COLUM. J. ENV'T'L L. 189, 189 (1978); Hanson, *Research Issues and Results Pertaining to Preservation of Agricultural Land: The California Experience*, ECONOMIC ISSUES IN LAND USE PLANNING, April 1977, at 124.

3. Bonner & Sidor, *Issues in Land Use*, ENV'T'L COM., May 1975.

[A]bout one-fourth of the land is in crops and one-third in grassland pasture and range. One-third of the land is in forests. Marsh, swamps, deserts, and barren lands account for about an eighth of the land area. Urban uses require about two percent of the land; roads, airports, and other transportation facilities utilize another one percent.

Id. at 2.

4. H.R. REP. NO. 1400, 95th Cong., 2d Sess. 7 (1978).

roughly five million acres⁵ of rural land are lost yearly through continued urban development, isolation as a result of urban development and construction of new water supply projects.⁶ If present trends continue, prime farmland equivalent in area to the entire state of Indiana may be withdrawn from agricultural production between 1980 and 2000.⁷

Rural lands are being urbanized at rates five to ten times faster than the population growth.⁸ Between 1950 and 1972 seventeen states lost 20% of their taxable farmland, nine states more than 30%, four states more than 40%, and New Hampshire and Rhode Island lost more than 50%.⁹ Between 1970 and 1972, twenty-five million more people moved to non-metropolitan areas than moved to metropolitan areas.¹⁰ The overall result of continued suburban migration has been the loss of 119 million acres of farmland—an area three times the size of New England—between the years 1954 and 1974.¹¹

When reduced to its lowest common denominator, the problem of farmland preservation is a question of protecting a low-density resource from the pressures of a high-density market.¹² Although the problem appears to be disarmingly simple, many factors are involved. A primary factor contributing to the loss of prime agricultural land is the current spiral in land values.¹³ In the past five years the average per-acre price for all farmland has increased approximately 65%.¹⁴ The farmer on the urban fringe is placed in a particularly uncomfortable position. Although possessing an understanding of the land, of the relationship of people to the land, and of the problems and costs of land ownership,¹⁵ the farmer may not hold such an affection for the soil that he will hold out in the face of massive profits. The temptation to sell is undoubtedly connected to the proximity of the farmland to the urban fringe. Since suburban land values average 1,800% more when utilized for building purposes than for cultivation or grazing,¹⁶ the farmer is

5. *Id.* at 8.

6. The figure varies greatly depending on the source. See, e.g., NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT (1981) (3 million acres) [hereinafter referred to as NALS FINAL REPORT]; Merriam, *Making TDR Work*, 56 N.C.L. REV. 77, 77 (1978) (1.4 million acres); Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 ENV'TL AFF. 419, 419 (1976) (1 million acres).

7. NALS FINAL REPORT, *supra* note 6, quoted in Blundell, *As World Needs Food, U.S. Keeps Losing Soil to Land Developers*, Wall St. J., Oct. 24, 1980, at 1, col. 6.

8. Bonner & Sidor, *Issues in Land Use*, LAND RESOURCES TODAY, Jan. 1975, at 4.

9. *Id.*

10. *Id.*

11. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 597 (95th ed. 1974).

12. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973).

13. Healy & Shurt, *New Forces in the Market for Rural Land*, 46 APPRAISAL J. 185, 190 (April 1978).

14. R. GLOUDEMANS, USE VALUE FARMLAND ASSESSMENTS: THEORY, PRACTICE AND IMPACT 4 (1974).

15. Northeast Regional Center for Rural Development, 12 RURAL LAND USE PROB. & POSSIBILITIES 1 (1976).

16. Healy & Shurt, *supra* note 13, at 190.

likely to take his profits and leave farming altogether.

Another factor which must be considered in evaluating preservation alternatives is the changing nature of farmland ownership. Urbanites, investors, syndicates, retirees and corporations are entering the agricultural land market in increasing numbers. In 1976 alone, 35% of farmland purchases were made by local nonfarmers, non-county residents and others.¹⁷ Investors, both foreign and domestic, view land acquisition as a hedge against inflation based on the proven expectation that land prices will outperform the general price index and the market for common stock.¹⁸ Urbanites and retirees, on the other hand, purchase suburban and rural land to escape the pace of urban life.¹⁹ Developers purchase rural land because it provides large, contiguous, relatively inexpensive parcels of land for commercial, industrial, recreational, and housing developments.²⁰ Finally, farmers and agricultural corporations purchase additional acreage to take advantage of economies of scale.²¹ On the other side of rural land demand is the slowly disappearing family farm. The family farmer is confronted with factors such as an inability to compete against the large agricultural corporations coupled with pressure to sell at a profit.²²

As the foregoing discussion suggests, whether or not a farmer will sell his land to buyers for non-agricultural use is determined by the interrelationship of complex socio-economic factors. These include: (1) demographic factors, such as the farmer's age, state of health and whether or not he has children who want to be farmers; (2) economic factors, including the fair market value of the land and the profit which can be made from the land if it is farmed; (3) transitional factors, such as the landowner's interest in pursuing a nonfarm occupation or moving to another climate; and (4) so-called secondary factors, such as nuisance complaints by nonfarm neighbors about farm odors and pesticides, decrease in the availability of farm labor, supplies, and services, and increase in government regulation of farming activities.²³

Although the greatest loss of farmland has occurred in California and the Northeast, loss of agricultural land anywhere in the United States has at least a potential effect on farming in the Midwest and elsewhere. For example, if a state such as Kansas were to suffer no significant loss of farmland,²⁴ Kansas farmers and other residents

17. *Id.* at 187.

18. *Id.* at 191.

19. *Id.* at 195.

20. Newton & Boast, *supra* note 2, at 195.

21. Healy & Shurt, *supra* note 13, at 188.

22. See Healy, *Public Policies in Relation to Farm Size and Structure*, 23 S.D.L. REV. 608 (1978).

23. Keene, *Agricultural Land Preservation: Legal and Constitutional Issues*, 15 GONZ. L. REV. 621, 622-23 (1980).

24. Topeka Capital J., Aug. 9, 1981, at 11, col. 3.

would still be subjected to some or all of the following negative consequences: (1) an increase in prices of agricultural products formerly raised on the now lost agricultural land and now imported from abroad or in short supply; (2) an increase in the price of Kansas farmland because of increased demand caused by decreased supply of farmland in other areas of the country; (3) an influx of farmers and farm laborers seeking farms or employment because of the loss of their farms, or farm employment, in other states; (4) an increased demand for recreational access to Kansas farmland because of the loss of open recreational land elsewhere; and (5) increased pressures on the family farm structure in Kansas due to the increased demands of productivity caused by decreases in production in those states losing farmland.

The quest for farmland preservation must be balanced against the needs and demands of the nonfarm public and against the direct and indirect social costs which any viable program will involve. A multitude of land use planning concepts are currently in vogue as potential solutions to the problem. These include zoning, cluster zoning, compensable regulation plans, negative easements and purchase of development rights, land banking, large lot zoning, open space zoning, planned unit developments, purchase and leaseback programs, agricultural service districts, transferable development rights, differential taxation, eminent domain, public rights of first refusal, and public and private land trusts. This article will analyze and evaluate these various techniques, but remember that these techniques are frequently not responsive to the socio-economic considerations that create the problem. Great expectations should not be aroused with regard to the ability of these techniques to preserve prime agricultural lands unless they are part of an overall economic and social policy that is responsive to the causes of the agricultural-land-disappearance syndrome. In short, if farming is not economically profitable, no approach or combination of approaches to farmland preservation will be successful.

II. A DEFINITION OF "AGRICULTURAL LAND"

An initial consideration for any discussion of farmland preservation is the definition of the term "agricultural land." The effectiveness of any agricultural land use plan may depend upon the type of real estate for which protection is sought. If the protective legislation or enactment defines agricultural real estate generally in terms of rural or open space lands, the protective blanket may be so broad as to include lands that have no real value for cultivation and grazing.²⁵ If, alterna-

25. See, e.g., *Boehm v. Burleigh County*, 130 N.W.2d 170, 173 (N.D. 1964) (lands unplatted and outside the limits of any town or city used as a nursery were agricultural lands); *Eisenzimmer v. Bell*, 75 N.D. 733, 738, 32 N.W.2d 891, 893 (1948) (agricultural land, as envisioned by a North

tively, agricultural land is defined narrowly, buffer lands that effectively separate farmland from the urban fringe may not be protected.²⁶ The importance of seeking a definition of agricultural lands does not lie in developing a hard and fast meaning for the term or in developing any hierarchy of definitional preference. The true value of such an inquiry is found in the realization that the definition of agricultural land is only one variable that must be assessed in any given land preservation and use plan.

One study defines agricultural land as follows:

"Agricultural lands" are lands currently used to produce agricultural commodities, including forest products, or lands that have the potential for such production. These lands have a favorable combination of soil quality, growing season, moisture supply, size and accessibility. This definition includes about 590 million acres of land that has no potential for cultivated crop use but is now in agricultural uses including range, pasture, or forestland. There were 1.361 billion acres of agricultural land in 1977.²⁷

Another typical definition of "farmland" is "a piece of land consisting of a fixed number of acres which is used primarily to raise or produce agricultural products, and the customary buildings which accompany such activities."²⁸ The United States Department of Commerce in its 1969 census indicated that "'farmland' as defined in that census included all land contained within the physical boundaries of a farm including cropland, woodland, and pasture."²⁹ "A definition of 'farmland' stressing productivity and usefulness might include all land on which agricultural operations were conducted during a given period of time under the day-to-day control of an individual management and from which \$1000 or more of agricultural products were sold during the year."³⁰

Because many farmland preservation efforts concentrate on the protection of "prime farmland," that concept also merits definition. The United States Department of Agriculture's Soil Conservation Service defines "prime farmland" as

land that has the best combination of physical and chemical characteristics for producing food, feed, forage, fiber, and oilseed crops, and

Dakota statute exempting farm structures and improvements located on farmland from taxation, was a generic term used merely to distinguish rural from urban or other properties); *Milne v. McKinnon*, 32 S.D. 627, 632, 144 N.W. 117, 118 (1913) (land covered by timber, underbrush, grass, and weeds that had little or no value for agricultural production was agricultural land for tax assessment purposes).

26. *See, e.g., Eisenzimmer v. Bell*, 75 N.D. 733, 739, 32 N.W.2d 891, 893 (1948) (buildings located on a lot within the platted portion of an incorporated city were not exempt from taxation as farm structures located in agricultural lands).

27. NALS FINAL REPORT, *supra* note 6, at xx.

28. Rohan, *Agricultural Zoning*, 3 ZONING & LAND USE CONT. (1978).

29. Comment, *Preservation of Florida's Agricultural Resources through Land Use Planning*, 27 U. FLA. L. REV. 130, 130 n.5 (1974).

30. Giron & Clayton, *Overview of Florida Agriculture from 1974 Agricultural Census*, 1974 U. FLA. FOOD & RESOURCE ECON. 1.

is also available for these uses (the land could be cropland, pastureland, rangeland, forest land, or other land, but not urban built-up land or water). It has the soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops In general, prime farmlands have an adequate and dependable water supply from precipitation or irrigation, a favorable temperature and growing season . . . and few or no rocks Prime farmlands are not excessively erodible or saturated with water for a longer period of time, and they either do not flood frequently or are protected from flooding.³¹

The Soil Conservation Service of the United States Department of Agriculture is now involved in a nationwide program to map and identify prime farmland, but completion of the effort is not expected until 1986. Pending the completion of that project the Soil Conservation Service classifies rural land into eight categories on the basis of soil capabilities and limitations. Classes I, II and some class III land corresponds to "prime farmland." The balance of class III and all of class IV is considered marginal for production of crops, and classes V to VII land is unsuitable for growing ordinary field crops.³²

The following table summarizes the rural lands classification breakdown:

National Summary of U.S. Land Use by Capability Class³³

<u>Class</u>	<u>Cropland</u>	<u>Pasture/ range</u>	<u>Forest</u>	<u>Other lands</u>	<u>Total</u>
	(Millions of Acres)				
I & II	221.3	62.9	39.8	13.5	337.5
III	122.8	88.0	61.0	14.4	286.2
IV	39.9	70.7	57.7	8.5	176.8
V-VIII	<u>16.4</u>	<u>349.3</u>	<u>216.9</u>	<u>33.5</u>	<u>616.0</u>
Total	400.4	570.9	375.4	69.8	1,416.5

III. THE FEDERAL GOVERNMENT AND FARMLAND PRESERVATION

The concern of any federal agency with the agricultural lands preservation problem is not only of recent origin but represents a dramatic change of position. As late as 1974, a USDA study concluded that "although thousands of acres of farmland are converted annually to other uses . . . we are in no danger of running out of farmland."³⁴ A shift in USDA policy occurred the next year. By 1976, the Secretary of Agriculture announced a new USDA policy which would discourage

31. REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, CED-79-109, PRESERVING AMERICA'S FARMLAND—A GOAL THE FEDERAL GOVERNMENT SHOULD SUPPORT 2 (Sept. 20, 1979) [hereinafter cited as COMPTROLLER GENERAL REPORT].

32. See SOIL CONSERVATION SERVICES, U.S. DEPARTMENT OF AGRICULTURE, STATISTICAL BULL. No. 578, POTENTIAL CROPLAND STUDY (1977).

33. Giron & Clayton, *supra* note 30, at 1.

34. U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, MISC. PUB. No. 1290 (1974), *quoted in* COMPTROLLER GENERAL REPORT, *supra* note 31, at 6.

federal government activities converting prime agricultural land to other uses and encourage state and local authorities to advocate the protection of such land.³⁵ In 1978, the USDA issued a revised and considerably stronger policy committing USDA agencies to intercede with all other federal agencies when conversion of prime farmland is threatened.³⁶ The most significant federal government policy revision in regard to farm land preservation, other than USDA actions, is the action taken in 1976 by the Council on Environmental Quality (CEQ) directing all federal agencies to consider the loss of prime farmland when preparing environmental impact statements required by the National Environmental Policy Act of 1969.³⁷

In spite of these changes in federal agency policies, federal government programs are still considered the cause of the loss of thousands of acres of prime agricultural lands.³⁸ Continuing concern over such government activities led to the establishment of the National Agricultural Lands Study (NALS) in June of 1979 to assess and propose remedies for the problem.³⁹ The recommendations contained in the final report of the NALS are directed toward five objectives:⁴⁰ (1) information sharing by state and local governments concerning successful agricultural lands preservation programs; (2) articulation of a national policy on agricultural lands preservation and its implementation; (3) federal support of state and local government programs; (4) financial assistance for protection programs; and (5) clarification of land information base statistics and data.⁴¹

To accomplish these five goals, the study makes five categories of recommendations. The first category concerns the characteristics of successful agricultural lands preservation programs and how they can serve as guidelines for development of new programs. The suggestions are: (a) that agricultural lands preservation programs should be combined with a comprehensive growth management system; (b) that state

35. "USDA will urge all agencies to adopt the policy that Federal activities that take prime agricultural land should be initiated only when there are no suitable alternative sites and when the action is in response to an overriding public need." COMPTROLLER GENERAL REPORT, *supra* note 31, at 7.

36. *Id.*

37. 42 U.S.C. § 4321 (1970). The CEQ directive stated, "Efforts should be made to assure that such farm lands are not irreversibly converted to other uses unless other national interests override the importance of preservation or otherwise outweigh the environmental benefits derived from their protection." COMPTROLLER GENERAL REPORT, *supra* note 31, at 35.

38. *Id.*

39. Furthermore, various members of Congress have introduced bills to establish a federal policy and federal programs to protect prime farmland. *See id.* at 49-52.

40. The NALS was issued on January 17, 1981. The study was co-chaired by the USDA and the CEQ. In addition, the following agencies participated: Department of Commerce, Department of Defense, Department of Energy, Department of Housing and Urban Development, Department of the Interior, Department of State, Department of Transportation, Department of the Treasury, Environmental Protection Agency, and the Water Resources Council. NALS FINAL REPORT, *supra* note 6.

41. *Id.* at 74.

governments should assume an active role in the programs; (c) that protection programs should be adopted before development patterns foreclose some or many options; (d) that accurate information should be used in developing the programs; (e) able political leadership should be sought as a key element of success; (f) that agricultural land protection programs should support the economic viability of agriculture in the area; and (g) that considerable attention should be given to assure that protection programs are legally defensible.⁴²

The second category of recommendations relates to "national policy and federal agency initiatives."⁴³ Most of these recommendations are vague and general. For example, the study supports a presidential or congressional statement of policy articulating the national interest in agriculture, inter-agency coordination, and the mandatory adoption of an agricultural lands policy by each federal agency whose programs result in conversion of agricultural lands to nonagricultural uses. More specifically, a review of the Federal Tax Code is called for to offer incentives for retaining agricultural land in production.⁴⁴

The three remaining categories of recommendations are technical assistance and education,⁴⁵ financial assistance,⁴⁶ and information and research needs.⁴⁷ These categories overlap and contain little that could be called new or innovative, with a few exceptions. The Soil Conservation Service is called on to give higher priority to the detailed soil survey previously discussed.⁴⁸ An "ombudsman" service is suggested, to act as an advocate for farmers and agricultural land protection.⁴⁹ Finally, a "statistical protocol" is advocated in the following terms:

A Statistical Protocol should be developed, led by the Office of Federal Statistical Policy and Standards. Federal agencies that collect and use natural resource data should participate in this effort. Components of the protocol should cover standards for data collection techniques and requirements for appropriate statements of data limitations in connection with data publication or public release.⁵⁰

42. *Id.* at 74-76.

43. *Id.* at 76.

44. *Id.* at 79.

45. *Id.* at 80.

46. *Id.* at 83.

47. *Id.* at 85.

48. *Id.* at 84.

49. *Id.*

50. *Id.* at 85. A recent development in this area is the passage of The Farmland Protection Policy Act, Pub. L. No. 97-98, 95 Stat. 1341 (codified at 7 U.S.C. § 4201 (1981)), which was passed "to minimize the extent to which Federal programs contribute to the unnecessary and irreversible conversion of farmland to nonagricultural uses" *Id.* This Act calls upon federal agencies to evaluate the effect of their programs on farmland and to propose changes in their programs which will further the policy of keeping farmland in agricultural use. The Secretary of Agriculture is charged with coordinating and overseeing the implementation of this Act and is required to report annually to Congress on his efforts. *Id.* For a brief discussion of this Act, see Farmland, Newsletter of the American Farmland Trust, Jan. 1982, at 1.

IV. ZONING: A POPULAR APPROACH TO PRESERVATION OF AGRICULTURAL LANDS

In spite of recent changes and innovations in the land use control area, zoning remains the most frequently used and potentially the most effective land use control device to protect and preserve agricultural lands. Nonetheless, serious limitations exist on the effectiveness of zoning, in its traditional format, as a solution to the preservation problem.

A. *Traditional Euclidean Zoning*

The key characteristic of use categories under traditional or euclidean zoning is that all use zones are "cumulative," meaning that all higher, *i.e.*, more preferred, uses are permitted in "lower" categories. Since the urban planners who traditionally drafted zoning ordinances were development oriented, "agricultural use" was ranked at or near the bottom, meaning that any and all uses ranked "higher" were permitted in agricultural zones no matter how inconsistent or competing they were with agricultural uses.

Even those traditional zoning ordinances that allow only agricultural and other specific uses in agricultural zones allow a mix of potentially inconsistent uses which can exist in agricultural use zones: (1) citrus and other fruit crops cultivation, production and horticulture; (2) truck farms; (3) plant nurseries and greenhouses not involved with retail sales to the general public; (4) poultry and livestock production excluding commercial swine raising; (5) grazing and pasturing of animals; (6) home occupations wherein products sold shall have been produced in major part by the permanent occupants thereof; (7) roadside stands of a temporary nature for the sale of fruits, vegetables and similar products produced on the premises, provided such stand is placed no closer than twenty-five feet to a property line; (8) government owned or operated building or use excluding public utility and service structures; (9) fish hatcheries or fish pools when approved in accordance with all applicable federal, state and county regulations and laws; (10) publicly owned or controlled parks and recreation areas; (11) bait production not involving retail sales; (12) stables, barns, sheds, silos, granaries, windmills and related agricultural structures; (13) dairies; (14) agriculture; (15) silviculture including timber production where such operation is first approved by the County Urban Forester; (16) single family dwelling and customary accessory uses including docks and boat houses; (17) neighborhood recreation areas when approved as part of a subdivision plat; (18) prefabricated or modular housing when approved by the State as complying with applicable

building codes; and (19) churches and structures appurtenant thereto.⁵¹

Some uses may be permitted only temporarily or subject to certain restrictions. For example, an ordinance might permit mobile home use only if the mobile home use only if it is to be used by night watchmen in an area where residential dwellings are under construction and where chronic vandalism occurs.

The following is a fairly typical list of special exception uses that may be permitted in an agricultural district: (1) cemeteries, mausoleums; (2) kennels, including the commercial raising or breeding of dogs; (3) hospitals, sanitariums and convalescent homes, veterinary clinics; (4) private nursery schools, kindergartens, primary schools, secondary schools and colleges; (5) temporary asphalt plants for the purpose of specific public road construction; (6) sawmills; (7) public utility and service structures; (8) fraternal clubs when chartered by the state; (9) borrow operations complying with all applicable county ordinances; (10) country and golf clubs, fishing clubs, fishing camps, marinas, gun clubs, or similar enterprises or clubs when located on lands comprising five or more acres and making use of land in its predominantly natural state; (11) privately owned and operated recreational facilities open to the paying public, such as athletic fields, stadiums, racetracks and speedways.⁵²

Traditional euclidean or cumulative zoning affords agricultural lands virtually no protection from interference by other uses. The impact of such zoning on the owner of agricultural land is almost entirely negative; the landowner frequently is thwarted in devoting the land exclusively to higher economic uses but receives very little protection from interference by other uses in return. Consequently, modern zoning ordinances are increasingly noncumulative in nature; all or specified use zones are to be devoted exclusively to the designated use, and even so-called higher uses are excluded. Given the failures of cumulative zoning to protect agricultural lands, it is not surprising to find that in many zoning ordinances of recent vintage, land zoned for agricultural purposes can be devoted only to agricultural and closely related uses.

B. *Exclusive Agricultural Use Zoning*

Exclusive agricultural zoning, unlike agricultural zoning under cumulative ordinances, not only restricts the landowner of agricultural land but confers protection to the farmer by excluding incompatible uses. Such zoning, in theory at least, is a definitive tool for preserving agricultural lands and preventing their conversion to non-agricultural

51. 3 J. JUERGENSMEYER & J. WADLEY, *ZONING: THE LAW IN FLORIDA* § 2-9 (1980).

52. *Id.* § 2-10.

uses.⁵³ Even if land speculators purchase farmland and take it out of agricultural production, strict enforcement of the zoning code would normally prevent any development on or changes in the land that would affect its ultimate suitability for agricultural production.

The problems encountered with exclusive agricultural use zoning as a farmland preservation tool result not from zoning principles but from zoning practice. The farmer himself may find the stringency of the zoning protection economically unacceptable, and he or his vendees may resort to the normal avenues for zoning flexibility—variances, special exceptions, and rezonings—to obtain permission for profitable but ultimately incompatible uses, thus undermining if not defeating the protective goals of such zoning approaches.⁵⁴

C. *Other Non-Euclidean Zoning Approaches*

One of the most serious dilemmas encountered by owners of agricultural land occurs when adjacent land is developed for residential commercial or other nonfarm uses. Once such development occurs, the farmer usually finds himself subjected to intense economic pressures to convert his farm to nonagricultural use because of an increase in value that results from neighboring development. He also frequently discovers that his land no longer is well-suited to agricultural uses, since the normal odors, noises, and pollutants accompanying many agricultural activities are now nuisances in the eyes of his new neighbors.⁵⁵ Cluster zoning, planned unit developments, and open space zoning are non-euclidean land use control techniques designed to alleviate such results of development by providing a land buffer on or between the developed land and the neighboring farmland.

1. *Cluster Zoning*

Cluster zoning involves development of a tract of land so as to allow the preservation of open space or buffer areas on all or certain borders but without changing the established maximum densities. As a result, new development need not abut agricultural land, and the development/farming conflict is lessened.

Local governmental use of the cluster concept to provide a buffer between areas of development and of agriculture is relatively simple in

53. See Juergensmeyer, *Introduction: State and Local Land Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463 (1980). Perhaps the most ambitious and innovative use of exclusive agricultural zones is found in Oregon, where Exclusive Farm Use Zones are mandatory under state law for agricultural land. They are combined with Urban Growth Boundaries to protect agricultural lands from development pressures. See Rochette, *Prevention of Urban Sprawl: The Oregon Method*, 3 ZONING & PLANNING L. REPORT 25 (1980).

54. Special exceptions and necessary uses discussed in connection with cumulative zoning can also exist under supposedly "exclusive" zoning ordinances.

55. See 1 J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW ch. 25 (1982).

the sense that little or no change in basic zoning codes is necessary to allow such an approach. Most courts have recognized the permissibility of such an approach, even pursuant to euclidean ordinances, since no variation of overall density or of permissible uses occurs. The developer who is required or encouraged to cluster his planned improvements is not usually in a position to assert constitutionally based objections since he is not denied the right to develop to the overall density maximum established by the local land use regulation. In fact, developers frequently seek permission to cluster since there often are economies of design, construction, and topographic advantages to such a development arrangement.⁵⁶

2. *Planned Unit Development*

The planned unit development (PUD) is grounded upon the cluster concept but constitutes both a refinement of that concept and a departure from traditional euclidean zoning approaches. The PUD combines uses within a development so that various housing types, high-rise apartments, townhouses, single family dwellings, and condominiums, for example, co-exist with open spaces, recreational areas, convenience type commercial uses business or professional uses.⁵⁷

The use of a PUD for the development of land adjacent to agricultural lands has various protective aspects. As with clustering, buffer areas that are not built upon can be placed between new improvements and neighboring farmland. Furthermore, unlike clusters, the provision for various commercial, recreational, business, or professional facilities within the PUD means that adjacent farmland is not needed as a location for supportive services which inevitably accompany development. By providing for such nonresidential uses, the PUD offers greater protection for adjacent agricultural land than simple cluster zoning does. Although PUDs frequently receive even greater developer enthusiasm than clusters, local land use control authorities are often less enthusiastic about the PUD since its combination of uses is in conflict with one of the sacred cows of traditional zoning—separation of uses. Additionally, approval for use of PUDs normally requires the existence of floating zones⁵⁸ within the zoning jurisdiction.

56. See House, *Policy Instruments for Shaping Land Use Choices*, 3 LAND RESOURCE TODAY 4 (1974); Merriam, *supra* note 5.

57. See I J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS ch. 12 (1979); Schneiderman, *Transferable Development Rights: An Idea in Search of Implementation*, 11 LAND & WATER L. REV. 339 (1976); Symposium, *Planned Unit Development*, 114 U. PA. L. REV. 1 (1965).

58. The floating zone involves the creation of a land use category, for example, PUDs, and the designation of the criteria that must be met before a landowner may make the specified use. The zoning category then "floats" until a landowner wishes to use his land for the category in question. If the landowner makes the proper application and meets the specified criteria, the zone "sinks" to his land and replaces the preexisting zoning classification. The floating zone concept is

3. Open Space Zoning

Open space zoning is a more drastic way of providing the type of open space or land buffer between new development and neighboring agricultural land that results almost automatically from clusters and PUDs. The technique is much simpler, however, since land bordering agricultural area is designated in the relevant comprehensive plan as being unavailable for development and is zoned for only recreational or other nondevelopment uses.⁵⁹ The problem presented by open space zoning is that the economic value of land so zoned is nearly destroyed, thereby entitling the landowner to contest the zoning designation as an unconstitutional taking of property without compensation.⁶⁰

4. Large Lot Zoning

Another related zoning technique frequently advocated as an agricultural lands preservation device is "large lot" zoning. By establishing high minimum lot area requirements such as one acre, five, ten, fifteen, or, in one case, eighteen acres,⁶¹ residential development of rural land is discouraged by increasing the cost of and thereby decreasing the demand for such property.⁶² Furthermore, if the land is developed, the low density of such developments has a minimal deterrent effect upon the continued suitability of adjacent or nearby land for agricultural use. The major disadvantage of using large lot minimum zoning to protect agricultural land is the same encountered with open space zoning: the economic value may be so greatly decreased as to raise the taking issue.⁶³ Furthermore, the exclusionary effects of large lot minimum requirements provide still another basis for contesting its validity.⁶⁴

V. AGRICULTURAL DISTRICTS

California,⁶⁵ New York,⁶⁶ and Virginia⁶⁷ pioneered agricultural districting, which is designed to bring about, through voluntary compli-

antithetical to euclidean zoning, since mapping the location of each use was an essential element of euclidean zoning ordinances. To have a zone that was not located in terms of specific parcels of land was unthinkable. For discussions of the floating zone concept, see *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960); *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957). See also D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 453 (1973); 2 J. JUERGENSMEYER & J. WADLEY, *supra* note 51, § 11-4; Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963).

59. See 3 P. ROHAN, *AGRICULTURAL ZONING, ZONING & LAND USE CONTROLS* 19 (1978).

60. See notes 137-48 and accompanying text *infra*.

61. *Gisler v. County of Madera*, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

62. Tuthill, *Rights in Land*, ENV'TL COM., May 1975.

63. See notes 137-48 and accompanying text *infra*.

64. See notes 156-57 and accompanying text *infra*.

65. The agricultural districting statutes of New York and Virginia currently are considered the prototypes of agricultural districting. Their precursor and inspiration is said to be California's Land Conservation Act, CAL. GOV'T CODE §§ 51200 to 51293 (West 1966 & Supp. 1981), which is known popularly as the Williamson Act. Meyers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1, 2 n.8 (1979). See also Gustafson & Wallace, *Differential Assessment as Land Use*

ance and local initiative, the same quality of protection to farmland afforded by exclusive agricultural zoning. Agricultural landowners who meet specified acreage minimums can voluntarily form special districts.⁶⁸ Such status, depending on the exact provisions of the relevant statute, creates a binding agreement between the landowner and local authorities for a specified number of years during which the landowner receives special tax treatment and freedom from eminent domain. The authority of public agencies to install growth stimulating public services in the area is limited, special assessments against the land are forbidden, and local governments are prohibited from enacting certain regulations of farming practices on the land unless public health and safety factors are involved.⁶⁹ If nonagricultural uses are made of the land during the "contract" period, heavy tax penalties are incurred.⁷⁰

The major advantage and appeal of the agricultural districting approach to farmland preservation lies in its emphasis on voluntary compliance and local initiative. Other strengths include the retention of land ownership in the farmer, the stringent restrictions its voluntary nature allows on land use without raising taking issue problems,⁷¹ and its emphasis on local control, which at least theoretically makes it responsive to local needs and problems.⁷² Given these advantages, the popularity of this approach to farmland protection and preservation is not surprising. In 1978, approximately one-half of the farmland in the state of New York was in agricultural districts.⁷³

In spite of this popularity, the approach is not without its disadvantages. The obvious disadvantage is the feature which has already been pointed out as a basis for the concept's appeal, *i.e.*, it is entirely voluntary. Study of the effectiveness of the approach is limited by the fact that only those lands relatively free from urban fringe development pressures, that is to say, those lands that need protection the least, are

Policy, The California Case, 41 AM. INST. PLAN. 379 (1975); Comment, *Condemnation of Agricultural Property in California*, 11 U. CAL. D.L. REV. 555 (1978).

66. N.Y. AGRIC. & MKTS. LAW §§ 300-377 (McKinney 1972 & Supp. 1981-82).

67. VA. CODE §§ 15.1-1506 to 15.1-1513 (1981).

68. Any owner of agricultural land who meets the statutory acreage requirements (in New York the greater of 500 acres or 10% of the land to be included in the district and in Virginia at least 500 acres and no more than 3,500 acres to be included in agricultural districts) may apply to the local governing body, which seeks the opinion of a planning body, holds public hearings, and then adopts, modifies, or rejects the proposal. In New York, the Commission on Environmental Conservation also has the power to create agricultural districts. For details of the New York and Virginia procedure, see Myers, *supra* note 65.

69. *Id.* See FLA. FOOD & RESOURCE ECONOMICS DEPARTMENT, LAND FOR FLORIDA AGRICULTURE (1977); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri Farmland*, 42 MO. L. REV. 369 (1977).

70. In New York, for example, conversion to nonagricultural uses during the contract period results in a penalty equal to twice the taxes levied against the property in the year following conversion. N.Y. AGRIC. & MKTS. LAW § 306 (McKinney Supp. 1981-82).

71. See notes 137-48 and accompanying text *infra*.

72. See Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECOLOGY L.Q. 655 (1980).

73. See Myers, *supra* note 65.

