

Federal, State and Local Programs to Protect Farmland

by

Lawrence W. Libby¹

Introduction

Farmland protection policy in the U.S. is not a uniform, coherent national effort, but an assemblage of disparate state and local programs. Authority to guide or control land use change has been delegated by Congress to the states, and from there to local governments in most states. Policy has emerged incrementally as citizens in a particular place wrestle with the balance among private property rights, the interests of non-owners seeking a certain mix of land services, and the broader public interest. That balance differs over time and space; acceptable farmland policy changes as people feel greater growth pressure on farmland and at any point in time will vary depending on the cultural setting in different places. Farmland policy in California, for example, will always differ from that in Ohio or Maryland. The basic tools available to all governments are nearly the same, though selection among them is a local matter.

Farmland protection policy is the rural or exurban element of metropolitan growth management. It is often mapped as the “hinterland” of a region, where little is going on, available for future expansion. But farmland protection policy has its own life and substance. It has evolved somewhat in parallel with growth management, with a power cluster of agencies, public and private interest groups, professions, and even academic disciplines that is different from the growth management cluster. Focus here is on the farmland side.

Federal Attention to Farmland Policy

There has always been a certain tension between federal and state roles in land use policy. Perhaps the pinnacle of federal involvement came during the New Deal as Americans struggled to recover from the Great Depression and Dust Bowl at the same time. The National Resources Board asserted in 1934 that “heedless and unplanned land exploitation should give way to federal policies geared to the national welfare” (Lehman, 18-19). States and local governments resisted such a heavy federal role. Land Grant colleges were not very enthusiastic about it either. The effort gradually devolved to county committees of farmers who would develop farmland plans with state oversight, coordinated at the federal level. Even that fell apart, largely because the Bureau of Agricultural Economics in USDA lacked the expertise to do the job (Lehman).

Washington Senator Henry Jackson introduced legislation in 1971 to create a network of state comprehensive plans, with federal support. Then-President Nixon introduced his own land use planning bill that absorbed the Jackson bill to become the Land Use Policy and Planning Assistance Act of 1973. It died an early death, one of many victims of Watergate. The rhetoric of the time emphasized curbing sprawl rather than protecting farmland, though rural lands were very much a part of the picture. Representative Jim Jeffords of Vermont proposed the National

¹ Lawrence W. Libby is C. William Swank Professor of Rural-Urban Policy, Ohio State University. Paper prepared for the conference “What the Public Values About Farm and Ranch Land,” November 13-14, 2003.

Agricultural Land Policy Act in 1977, building on some of the policy momentum generated by Jackson. This action would have required the federal government to analyze the effects of government spending and development subsidies on the nation's farmland supply. It was in the general spirit of environmental impact statements required under recent environmental legislation, and decision impact statements required by executive order during the Carter administration. State and local governments, development interests, and even agricultural groups raised the specter of federal encroachment into traditional state authority, beginning with this seemingly reasonable bill, but then leading "who knows where?"

From the remnants of the Jeffords and Jackson policy initiatives, concern for the nation's farmland in the face of sprawling development led to the National Agricultural Land Study (NALS), instigated by the President's Council for Environmental Quality and USDA. Jeffords' former aide Bob Gray co-staffed that effort with economist Michael Brewer from Resources for the Future. There were deep disagreements among staffers on the evidence for farmland protection policy. Some felt the evidence was compelling, that continued abuse of the nation's farmland supply would spell disaster, and that action was called for. Economists and soil scientists within USDA tended to emphasize the role of production technology replacing farmers and land while creating huge surpluses of certain commodities. The NALS report was issued in the last days of the Carter administration in 1981. Its most enduring result may have been the spirited national debate on farmland issues, leading to additional state attention to these matters and to creation of the American Farmland Trust as a national farmland organization that eventually added state-level offices. Farmland protection has been on the policy agenda ever since.

National farm legislation has given attention to conservation and farmland since the 1981 Farm Bill that included the Farmland Protection Policy Act. That law requires federal agencies to consider the impacts of their programs on the nation's farmland. The 1996 Farm Bill included a Farmland Protection Program, with \$35 million appropriated for qualified state programs for purchase of farmland development rights. That program was expanded in the 2002 Farm Bill to include ranchlands as eligible for rights acquisition, with nearly \$1 billion authorized over ten years. While far less money has actually been available, federal dollars to augment state and local funds are available for states and non-profit land trusts for purchase of farmland conservation easements.

Other federal programs have significant, though largely unintended, impacts on farmland. David Rusk has referred to this bundle of development incentives, subsidized credit for housing, water and sewer grants, tax deductions that encourage new home development as "the sprawl machine" (p.86). Road and highway spending of about \$6 billion a year (GAO, p. 105) influences development patterns, and thereby farmland retention. Air quality legislation requires regional land use programs to reduce pollution from cars and trucks. Section 208 of the 1972 Clean Water Act gives attention to the effects of land use patterns on water quality and has supported land planning efforts in many states.

Federal oversight, or at least monitoring, of state and local land policy efforts would seem to make some sense. But a significant federal role is simply not palatable to state and local governments, at least beyond the provision of improved data on land use change and population

shifts, funding for state and local action, and perhaps research on the economic performance of various farmland protection policies.

State and Local Farmland Programs

All states and most localities are doing something about protecting farmland and other open lands. They all employ some mix of the basic powers of government – to tax, spend and regulate. Comprehensive planning, of which land use is a part, exists in all states to varying degrees. Planning as a part of land use policy is basically a local function, authorized by the state. Only 15 of the 50 states *require* local governments to plan land use change, though most of the others stipulate what a local plan should include if planning is undertaken. Oregon, Tennessee and Washington require municipalities to include urban growth boundaries as part of their plan; others require historic preservation, infrastructure, or protection of ecologically sensitive areas in their plans. Others, notably Vermont, Pennsylvania and Maryland, target state infrastructure grants to those areas that have sound land use planning (GAO, p.96-97).

Much of the local planning in the U.S. was conducted with federal funds provided under Section 701 of the Federal Housing and Community Development Act of 1954. These grants totaling about \$100 million a year ended in 1980 and many communities still rely on those original 701 plans, now 30 years old.

Several states have reformed their enabling legislation for local planning and land use control. Since 1985, 11 states have major reforms in place (GAO, p.97-99). Other states, e.g. Michigan and Ohio, considered comprehensive reform legislation in 2000-03 but were unable to reach consensus. Any change in the rules has gainers and losers and the more specific changes are incorporated into a single bill, the more difficult passage becomes. Seemingly every interest group can find something to complain about.

Tax. Taxes are a cost of doing business or just living in a modern society. Selective raising or lowering of taxes or fees can be employed as a policy instrument to encourage actions deemed to be socially desirable, or discourage those that aren't.

About 20 states enable local governments to levy impact fees (not taxes) on new development to offset the added infrastructure cost that these developments impose on the community. Those fees must correspond to the actual additional cost and must be used for those purposes only, not put into the general fund. Impact fees can affect the development pattern by encouraging growth where there is existing infrastructure capacity, and discouraging it in the hinterland, much of which is farmed. If an adjoining community has no such fees, however, the incentive is to go where cost is lower. Other programs grant tax abatements and other incentives for developers who will develop within “enterprise zones” or other preferred areas, rather than out at the fringe.

Maryland was the first state, in 1956, to tax its farmland on the basis of its agricultural value rather than full market value. Now all but Michigan have some variation of a use value assessment program designed to reduce the farmer's cost of remaining active in farming. Some of those state programs entail a 3 to 5 year rollback of taxes foregone if the farmer decides to sell, others do not. Michigan, Wisconsin and New York employ a “circuit breaker” approach

that provides a reduction in the landowner's state income tax if property taxes exceed a threshold proportion of household income (AFT).

Internal revenue codes provide income and estate tax incentives for donation of the development value of open land. Donations are deductible from federal income tax, up to 30% of the individual's income in any one year. States vary in the degree to which they have promoted these donations, or facilitated them through easement acquisition programs.

Any tax incentive is effective as a land use instrument only to the extent that it influences the behavior of the land user or owner. If the benefit to the owner of doing something else is greater than the incentive, the desired effect is lost. Use value assessment programs do encourage farmers to continue operating longer than they might otherwise, but are not binding and do not truly "preserve" farmland for the long haul. They do reduce the holding cost of land and therefore the cost of speculating on future market value, but the amenity services that the public prefers are available as long as the farmland remains eligible for special tax treatment.

Zoning. Twenty-four states have zoning that is termed "agricultural," though in most cases it only relies on large minimum lot sizes to discourage development in districts identified as agricultural. In all but Hawaii, zoning authority is delegated to local governments to act on behalf of the "health, safety and general welfare" of the local citizenry. Hawaii has established statewide agricultural districts. Oregon requires that counties include agricultural zones as part of their growth management plans; Pennsylvania, Maryland and California have county zoning ordinances that establish permitted uses that are consistent with active farming. These are the only true farmland protection zones that recognize farming as a land use to be retained in the public interest.

The big argument about agricultural zoning as a policy approach has been its fairness. Is it "fair" to simply remove or divert development potential from farmland through regulation, essentially requiring the farmer to bear the cost of achieving the public purpose of farmland protection? Zoning is an example of the "command and control" approach to policy that economists have generally derided as inefficient, even beyond the fairness issue (e.g. Gardner). One's opinion of fairness may have something to do with timing. That is, if development potential is removed by down-zoning from minimum lot size of 3 acres to 30, it may seem like a sudden and unfair burden on the owner for whom the change in rules could have real impact. On the other hand, if agricultural zoning is enacted before there is development pressure, there is little that is actually foregone. If the ordinance relies on large minimum lot size to discourage development in agricultural areas, as is done in Ohio and much of the Midwest, there is little reason to expect farming will really be protected. Many of these agricultural zones are in effect holding zones for future development, with a long list of permitted uses that have nothing to do with farming. Zoning amendments are routinely granted, the farmer is really losing little or no development value, and there could be a real question as to how these agricultural zones serve the public interest of keeping land in farming.

The central fairness question usually comes back to the "takings issue." Does regulation deprive the land owner of virtually all economic value from the land and therefore constitute a regulatory taking under the U.S. and most state constitutions? Courts have consistently upheld agricultural

zoning as a legitimate legislative exercise of the police power in the public interest. The basic legal tests involve whether all economic viability has been removed (Lucas case) or that the owner has invested in the land with legitimate expectation of future return that has been eliminated by regulation (Penn Central case). Those conditions have not been met for exclusive agricultural zoning in any case so far. A recent U.S. Supreme Court case in Rhode Island determined that a landowner may bring a takings claim even when the restriction in question was there *before* the person bought the land. It would be hard to bring an “investment backed expectations” claim under those conditions where notice of use limitations through zoning has been given, but the landowner does have the right to file a takings claim and would have to meet the economic viability test established in the Lucas case (Cordes, 1999, 2002).

Thus it appears that agricultural zoning is a legally “fair” limitation on individual discretion, on behalf of the health, safety and welfare of the broader public. One could argue that much of the land value the owner worries about losing to public regulation was in fact created by other public decisions regarding roads, water and other infrastructure (Runge). Perhaps the public is just reclaiming some of that value.

Some states have enacted property rights protection statutes to sidestep the constitutional tests and create a more direct avenue for landowners to seek compensation for regulation that affects their property value (Cordes, 1997). Florida and Texas are the most notable of these; the former establishes an indefinite standard of “inordinate burden” as the threshold for legal action by an unhappy landowner, the latter includes a 25% reduction of property value as the triggering point (Libby). Both require evidence in court and action is limited to certain public actions that may affect property values. Florida’s statute, for example, applies only to laws passed after 1995 and omits transportation regulations. The 18 or so other states with specific language for property rights are basically “look before you leap” statutes that require considering the possible effects on private property rights before enacting new regulations. Oregon voters passed a 2000 referendum to require compensation when public regulation caused *any* reduction in private property value. This law, seemingly unworkable and incredibly expensive to administer, was subsequently declared unconstitutional by the state court on a technicality. The amendment language violated the “single amendment requirement” by containing two substantive points. The Oregon legislature considered a bill in 2003 to establish a 10% threshold on impact of regulation on market value. The Washington state initiative was similar, but began with legislation requiring compensation and ended with a referendum to overturn that statute.

Thus, farmland zoning appears to be a legally acceptable but under-utilized instrument for farmland protection. Bowers has argued that tax incentive and development rights purchase programs will only work in the context of effective and consistent rural zoning. More attention to agricultural zoning seems warranted.

Purchase. The spending power is the most direct way for government to influence private land use in the public interest. Government just buys the land use rights needed to assure a land use pattern that generates public benefit. Some feel that purchase is the fairest method of accomplishing public purposes, since the public pays the market value of those rights. About 20 states have legislation specifically permitting government to purchase development rights to farmland, with procedures for assuring that the rights purchased do in fact contribute to the

public interest, and setting priorities on specific parcels. The landowner voluntarily offers to sell or donate development rights, so the price received must make the seller whole.

Suffolk County, New York enacted the first easement purchase program in 1974, followed shortly thereafter by programs in several New England states. Federal funds have been available under the Farmland Protection Program as discussed above. There is remarkable diversity in prices paid for development rights among the states, influenced by the appraisal method, parcel size, conditions imposed on the landowner by the easement agreement, amount of farmland in the area, proximity to other preserved land and location of the parcel relative to other economic activities. Price of the development right should represent the present value of the potential flow of development income to that parcel. Land productivity will also affect land value, of course, and is usually one of several criteria upon which selection is based in the first place. As evident in table 1 in the appendix, average easement price per acre in 2001 varied from \$667 for two very large parcels of relatively unproductive land in the high growth state of Florida to \$6654 an acre for much smaller parcels in land-poor Rhode Island.

There is also considerable diversity among the states in selection criteria exercised by the state agency purchasing the development rights. Soil quality is a criterion in all states but Utah and Montana. The Land Evaluation/Site Assessment (LESA) developed by USDA is used in Delaware and several other states. Some states emphasize lands under direct pressure for non-farm development; others prefer lands neither remote nor under intense pressure. Parcel size matters in some states, but not others. The scenic quality of alternative parcels is important in relatively few states -- New England and Pennsylvania (Hallerstein, et al., Wang and Libby)

Land trusts and other NGOs are significant in the easement acquisition picture. Only about half of the 170 land trusts responding to a recent national survey indicated a specific interest in farmland protection, but those that do are a significant factor within the states involved (Bailey and Libby). In many cases they work closely with the state agency. The Vermont Land Trust, for example, works through the Vermont Housing and Conservation Board to select parcels and monitor compliance with the easement. New Jersey appropriates funds to land trusts, Ohio land trusts are eligible to apply for state funds on behalf of farmers and may go through the state for federal easement dollars. Michigan has a continuing relationship with The Conservation Fund, a national conservation organization that will sell the easement idea to interested farmers, help with paperwork for application and monitor compliance with any easements signed. The Fund receives a percentage of the easement value on signed easements and a monitoring fee from the state.

In other states, particularly in the West, land trusts rather than governments are the primary holders of farmland easements. There are few government-directed easement programs in these states and few sources of funds, and many farmers seem to prefer land trusts to government anyway. Surveys in California indicate that landowners are reluctant to reduce their options by selling development rights and are concerned that a government program might change the rules midstream (Sokolow, et al.). Californian farmers prefer land trusts, but have few local land trusts that are interested in farmland as part of their land portfolio. While some landowners prefer land trusts because they are non-governmental and comprised of local citizens, including farmers, others are concerned that land trusts may come and go, their boards change frequently, they lack

long term stability, and enforcement may be uneven. There is clearly room for both government and private land trusts in the farmland protection effort.

Farmland easement purchase programs are all voluntary for the landowner. The farmer can sell if the price offered is attractive, and can continue to work the farm. But there is little room for price negotiation in most state programs. A price is determined through an appraisal process based on comparable sales (if there are any), estimates based on land value with and without the easement in place, or a points-based system that sets value based on various land attributes. It is usually a take-it or leave-it price for the landowner, or at best a well-bounded negotiation based on appraisals. Recent research indicates that farmers have significant “attachment value” to a farm that has been in the family for generations, and value various land amenities that may not be picked up in the appraisal (Marshall, Hoag and Seidl). Getting agreement for a particular easement contract can be a time-consuming process for both landowner and easement holder – transactions cost can be significant.

Easements purchased under any of the state or local programs, or secured through donation to a land trust or unit of government are essentially permanent. Most programs have escape clauses for conditions that make continued farming absolutely untenable, but the process is difficult in all cases. Escape requires the owner to buy back the development rights at current prices, *if* there is sufficient reason to allow them to do so. Burden of proof on the landowner is substantial. Maryland, Pennsylvania and Delaware have a 25 year checkpoint built into the easement program. Some Maryland landowners have interpreted this as an automatic chance to reconsider and get out of a permanent easement. The easement holders in state government, however, are taking a much harder line on that point.

Thirty year term easements are possible under the federal Farmland Protection Program. A temporary leasing of development rights will not qualify for tax deduction under internal revenue code. Payment to the farmer is taxed as capital gain. With term easements, payment is taxed as ordinary income. Suffolk County, New York noted above as the first easement program in the country recently enacted a term easement program as a stop-gap until sufficient funds for permanent easements could be acquired (Daniels).

Directions in Farmland Protection Policy

Future farmland protection policy is likely to emphasize *both* more effective rural zoning to establish that farming is the “highest and best” use for some lands, and market-type devices that enable the farmer to realize the development value inherent in some open land. They may sound like inconsistent trends, but simply reinforce the notion that purchase and other ways to return value to farmers must operate within a consistent regulatory structure.

Zoning can protect and even expand the opportunities for farmland owners and should not always be considered a loss of owner rights. Thoughtless development patterns can impose huge economic burdens on farm owners, increasing the cost of operation and clouding the future of land conversion, limiting options for many farmers. “Real” agricultural zoning must create conditions that support farm decisions, not just discourage development until the price is right. Statements of legislative intent should establish the importance of farming as a land use, with a

list of permitted uses appropriate to that purpose. Agricultural zoning, in conjunction with voluntary agricultural districts, can identify those areas with a real future in farming. These agricultural zones can then become sending areas for TDR programs or other expressions of land use priority.

Agricultural zoning is legal and can be effective if properly administered. The record thus far with rural zoning is not impressive.

Landpooling and “agricultural preservation and development associations” are market based techniques that acknowledge the development value of some farmlands and help the farmer participate in those gains. These are private enterprises that must function within a general structure of growth management institutions that protect the public interest. Experience with landpooling for rural areas is limited to several cases in Europe and Australia, though a project is currently underway in Colorado. The European approach likely works through a government agency, but that is not the model being developed in the US. The basic notion is that landowners will form a limited liability company, partnership or cooperative to manage the many services available from their pooled land and share the revenues. One’s share of the revenues depends on the assets he or she has in the pool.

The land services could include residential or other development, hunting and various wildlife services, agri-tainment opportunities, farmers markets, sending areas for TDR programs, wetland mitigation payments, secondary treatment of wastewater, gravel and other minerals, tax savings from development rights donation, etc. A board of directors develops a business plan, analyzes the available land in terms of output potential of commodities and eco-system services, markets the land services, invests in additional lands or other assets, and generally runs the operation. Farmland protection is a key part of it all, and research shows that proximity to farmland generates an increment of value for the nearby residential lot. By giving more structure to the development process, landpools may reduce local government service costs.

Landpool companies may seek outside investment dollars, as well. Real Estate Investment Trusts, for example, may invest in a large landpool for the returns to individual or institutional investors.

Landpooling cannot be the whole answer for protecting farmland, but does go a long way toward capturing many of the so-far unmarketed amenities that open lands provide while facilitating sensible development. It has real potential (Renkert, Carlson).

Purchase of farmland development rights will continue as the primary market-type instrument for farmland protection. More states will add enabling authority responding to citizen demand and the availability of federal funds with state and local match.

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APPENDIX

TABLE 1.1 PRICE VARIATION IN FARMLAND EASEMENT PURCHASE UNDER THE FARMLAND PROTECTION PROGRAM – THROUGH DECEMBER 2001

State	Landowners	Easement Cost						Federal Payment		Entity Payment	
		Acres	Total (\$)	Avg. (\$/acre)	Cost Range(\$/acre)**		Federal Payment	Entity Payment	Federal Payment	Entity Payment	
					Minimum	Maximum					
CA	10	1,129	5,864,859	5,195	766	134,250	3,154,000	54%	2,710,859	46%	
CO	10	4,130	3,161,960	766	630	4,000	2,057,000	65%	1,104,960	35%	
CT	6	938	2,775,939	2,961	980	12,137	1,224,264	44%	1,551,675	56%	
DE	18	5,696	5,584,176	980	272	2,728	2,330,000	42%	3,254,176	58%	
FL	2	3,709	2,472,586	667	498	850	1,032,961	42%	1,439,625	58%	
KY	14	2,663	2,208,500	829	148	1,026	1,100,000	50%	1,108,500	50%	
ME	2	269	230,000	855	395	1,739	115,000	50%	115,000	50%	
MD	66	8,658	12,828,766	1,482	146	5,978	2,782,509	22%	10,046,257	78%	
MA	27	2,756	7,420,450	2,692	738	14,861	2,400,000	32%	5,020,450	68%	
MI	14	1,723	5,616,343	3,260	1,939	6,493	3,157,250	56%	2,459,093	44%	
NC	6	343	706,382	2,059	1,804	2,495	331,144	47%	375,238	53%	
NH	11	773	2,564,500	3,318	600	17,500	864,000	34%	1,700,500	66%	
NJ	28	5,306	21,365,690	4,027	1,495	11,151	2,600,000	12%	18,765,690	88%	
NY	12	1,947	6,293,515	3,232	545	24,037	1,112,430	18%	5,181,085	82%	
PA	58	11,404	23,501,159	2,061	500	9,996	3,270,000	14%	20,231,159	86%	
RI	8	616	4,099,005	6,654	3,636	13,059	1,175,000	29%	2,924,005	71%	
VT	39	12,395	8,595,391	693	369	1,314	2,300,000	27%	6,295,391	73%	
WA	12	897	1,825,392	2,035	378	19,174	650,000	36%	1,175,392	64%	
WI	11	1,201	1,942,364	1,617	1,250	2,371	878,281	45%	1,064,083	55%	
Grand total		66,553	119,056,977	1,789			32,533,839	27%	86,523,138	73%	
Avg. acres or \$/farm		188	336,319				91,903				

Note: **Detailed information will be provided in Table 1.2