IMPROVING THE FARMLAND POLICY OPTIONS FOR OHIO LOCAL GOVERNMENTS

by

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Farmland policy seems to be firmly established on the state and local policy agenda in Ohio. It was two years ago this month that the Governor's Farmland Preservation Task Force made its final report to the state (Ohio Farmland Preservation Task Force). That report spawned several legislative initiatives that continue today, with emphasis on market rules that acknowledge the non-market services that farmland provides. The general political mood seems open and generally positive on the topic, in search of reasonable ways to accommodate and yet direct the economic forces of change so important to Ohio. No serious policy participant seeks to *stop* growth, *or* turn it loose without a market structure sensitive to the public interest in retaining open lands. Between these extremes, and the few who espouse them, are reasonable policy options that seek the best of both -- growth *and* open land retention. The goal is comprehensive and balanced land policy that includes farm and other open lands as part of a preferred mix of land uses.

Ohio has farmland policy on the books -- notably the agricultural district law (Meck and Pearlman, p.658-61) and current agricultural use value assessment (Jeffers and Libby) enacted shortly after an earlier Governor's land use task force reported to the people in 1974. We have an Office of Farmland Preservation in the Ohio Department of Agriculture (Meck and Pearlman, p.110-111) and recently enacted authority for governments to purchase and hold agricultural easements (Meck and Pearlman, p. 660-61). Several local governments use large lot (20 acre) minimum lot sizes to discourage subdivision of open land and encourage agriculture. But the rural land use policy machinery needs an overhaul, or at least a tune-up, to run smoothly and reliably in the approaching century. Of course the policy process never rests. Policy problems are never really solved, they are redefined for new elected officials, bureaucrats and landowners. No set of tools for influencing land market decisions is adequate, and what is acceptable in one part of Ohio will not be so everywhere. Policy conditions vary both in time and space. As Charles Lindblom observed in his famous treatise "The Science of Muddling Through" (Lindblom) meaningful policy change in a democratic system is incremental adjustment, not revolution. In that spirit, I offer recommendations for

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three specific adjustments that will make a difference in Ohio, enabling state and local officials to conduct policy consistent with the ever-illusive public interest.

Agricultural Zoning. Zoning is a well established authority for local governments to avoid or minimize conflicts among adjacent land uses by controlling the mix of activities permitted in different areas. Current enabling law in Ohio permits counties and townships to enact land use regulations, consistent with a comprehensive plan, to "promote public health, safety and morals"(RC 303.2 and 519.02). Municipalities interestingly omit the "morals" of the counties and townships and replace them with "general welfare" (RC 713.06). Neither provision follows the standard state zoning enabling act exactly, but Ohio courts have not been particularly influenced by those discrepancies. The presumption is that municipalities, counties and townships have authority to enact such rules as necessary to protect the health, safety, morals and general welfare, and the burden of proof is on those seeking to overturn a statute to establish the absence of a valid public purpose (Meck and Pearlman, p.139-41). Established purposes for Ohio local zoning include environmental protection and controlling residential density, both of which *could* relate to farmland protection.

Absence of the "general welfare" purpose for township zoning was key to invalidation of a river buffer district in Liberty township, Delaware County, in 1996. Lack of a clear connection to public health, safety or morals in lieu of general welfare led the court to conclude that creating an open space buffer along the Olentangy River was beyond the authority of township zoning (Meck and Pearlman, p.155-57). However, specific authority for establishing "planned unit development" ordinances within townships *does* include the general welfare purpose.

Large lot zoning by Ohio townships and counties lacking the general welfare authority may be vulnerable as well. The Montgomery County Appeals Court ruled against large lot zoning in that county in that it did not relate to an accepted public purpose and unreasonably restricted development (Meck and Pearlman, p. 177). Large lot provisions run the further risk of being exclusionary for all but the wealthy who can buy large parcels of land.

Single cases do not determine later ones, but legal precedent is a powerful force. The policy setting is at best uncertain for true agricultural zoning relying on a "general welfare" rationale for limiting land use options in viable farming areas. The only explicit mention of agriculture in Ohio zoning law is to exempt agricultural land and buildings from most local regulation in counties and townships (but not municipalities). Adding general welfare as a basis for township and county zoning would be an improvement for local agricultural zoning, but granting specific authority for exclusive agricultural zoning would be even better. Perhaps true exclusive ag zoning would survive legal scrutiny in some townships, under some circumstances, but clear definitive authority for such action is a necessary addition to Ohio zoning enabling law. Those local governments interested should have clear authority to act.

First is the need to state a clear and compelling public purpose for retaining farmland in a jurisdiction. Such language at the state level would strengthen local action. I propose language similar to that used in the state of Oregon (see Appendix) to establish the broad public interest in farmland -- the many

natural resource services available, the importance of large and contiguous blocks of farmland for continued viability, impacts of conflict between farm and non-farm land uses and the unnecessary costs of community services resulting from mixing urban activity into farming areas. Secondly, we need a clear definition of "farm use" to assure that all legitimate agriculture is included, with crops, livestock, wood lots, land temporarily idled as part of the farm operation, and necessary input or product storage. There should be a list of permitted uses that are consistent with active farming. Included would be a farm residence and other residences only if directly connected to the farm operation and various other structures and facilities consistent with farming. Procedures for locating non-farm residences, if permitted at all, should be based on a sliding scale with number of lots dependent on parcel size (e.g. one dwelling for first fifteen acres, two dwellings on forty acres, three on eighty, with lot size limited to one acre). Finally, effectiveness of the exclusive agricultural zoning provisions depends on a current comprehensive plan that puts agriculture in context and establishes long term intent.

Thus agricultural zones are *for* agriculture, targeted on those areas with an economic future in agriculture, not areas held in reserve for development (see AFT, 1987; Center for Rural Pennsylvania). There is experience in other states to draw upon. The language that fits Ohio can be crafted. Most important is providing the clear authority for Ohio counties and townships to serve the public interest through zoning that encourages the conditions necessary for continued farming. It is a modest adjustment to current law, going beyond the obviously fragile provisions for large lot zoning.

Farm Security Areas. Another technique or authority needed in Ohio is enabling law for counties (and possibly townships) to establish farm security areas of sufficient size and scope to be meaningful. It would augment, not replace, the existing agricultural districting program. I suggest a minimum size of 300 contiguous acres, drawing on nearly thirty years of experience in New York (see Bills and Cosgrove), approved by the county planning commission to assure consistency with a comprehensive plan, and only available in Ohio counties that have an active farmland preservation task force and farmland protection strategy.[2] One or several farmers could propose creation of a farm security area with a pledge to remain in active farming for a renewable twenty year period.

Incentives would be needed to make the establishment of a farm security area attractive in light of current CAUV and ag district provisions in Ohio. The participating farmer would be protected from public actions to build new roads, sewer and water, subdivisions, solid waste sites or commercial developments

[2]The minimum is 500 acres in New York for review after eight, twelve or twenty years depending on local conditions. A Michigan proposal is for 250 acre minimum for ten or twenty-five years. Failure to extend at the end of that period requires the owner to reimburse ten years of property tax savings with funds dedicated to purchase of development rights (Gerhart).

and any special assessments associated with these changes. Right to Farm provisions already available in Ohio would apply. As additional incentives, I suggest considering that any new farm structures be exempt from taxation for ten years and there be a

special CAUV bonus of 10% additional tax saving for the participating farmer. Counties that establish FSA's would have priority for other state dollars, as well.[3]

The farm security areas are not zoning districts in the sense that lists of permitted uses are developed, and creation is voluntary. Existing non-farm activity would continue, but further such activity discouraged. A "notice of intent" would be required for any non-farm development within an FSA, with review of impact on agriculture by the county farmland preservation taskforce. The party proposing the change would have to demonstrate that impacts on agriculture are minimal, or mitigated in some way. If state funding is involved in the proposed land use change, the state would be required to mitigate by purchasing development rights on other farmland in the area. The clear intent is to encourage farm investment and call public attention to the existence of areas where farming has an economic future. The existence of FSA's would become a matter of public record, actively communicated to buyers and sellers in the land market.

Development Equity Sharing. Developing open lands inevitably brings considerable capital gain. That gain constitutes the primary force shaping land use patterns in any market economy. If certain lands are to be kept undeveloped for the various services they produce, some means for sharing capital gains on other land is essential. Asking the owner of farmland to sacrifice several thousand dollars an acre to remain in farming may work for some and for a while, but is a weak basis on which to build long term farmland protection.

Purchase programs, now possible in Ohio, enable the community to buy the development right from the owner, thus sharing the development equity. Purchase in this manner is essentially permanent, a daunting prospect for many farm families. Experience elsewhere suggests however that the opportunity to sell development rights is attractive to many (AFT, 1997). Various lease-to-purchase or installment purchase arrangements may reduce the immediate cost and have attractive tax advantages to the farmer.

An alternative to permanent transfer is a temporary lease or what Ohio fruit farmers Nancy and Jim Patterson have termed "generational development rights." The idea here is to enable the farmer to lease for

[3]A process for giving priority for state funded infrastructure projects to "certified well planned counties" and attention to agricultural security areas is contained in H.B. 267, sponsored in the Ohio General Assembly by Krebs, Logan, et al in the 1999-2000 regular session.

30 years (about one generation) the right to develop eligible farmland. They suggest a bidding process similar to that employed with the Conservation Reserve Program or the Environmental Quality Incentive Program, where the owner offers development rights to specific acres for a given period of time at a certain price. The county or township seeking to acquire the rights would examine all proposals in light of land use objectives and available budget. Proposals would receive points based on priority criteria and selected or rejected on that basis. At the end of the lease period, or perhaps a few years prior for planning purposes, the farmer could consider leasing for another term and enter the lease competition at that time. With development rights under contract, market value would be close to ag value for CAUV tax purposes. As the end of the lease term approaches, market value would reflect the possibility that the land would be available on the open market and tax savings under CAUV would begin to increase. Even if the lease were not renewed, the farmer would retain CAUV tax savings. Both owner and community would have to re-examine the importance of that land to the local land use strategy near the end of the lease term. The advantage of this temporary arrangement is that it might be attractive to more farmers and more land rights could be bought for the same budget. A disadvantage might also be its expense, in that over time the community might pay more for rights to a given parcel than if they were permanently acquired just once.

Transfer of development rights is a development equity sharing device that deserves further attention in Ohio. The Governor's Task Force recommended TDR in their final report in June, 1997. It is an intuitively appealing approach in which those who gain from development compensate those whose land is not eligible for development under local zoning or perhaps as part of a farmland security area. TDR keeps the public cost down by essentially sharing the development value with the owner, rather than trying to buy or lease that right. Sending and receiving areas must be designated and a market for the right to develop established. TDR is used by selected local governments in fifteen states (see AFT, 1997, p.121-144). Montgomery County, Maryland implemented one of the first TDR programs in conjunction with down zoning of rural land that was under severe development pressure. Landowners who lost equity as a result were compensated through a system granting the opportunity to sell one development right per five acres, the development density permitted under the previous zoning ordinance. Brokers buy and sell development rights in Montgomery County; recent price per development right has been in the $10,000 to $12,000 range (Criss). Establishing which areas can sell and which areas must buy development sharpens definition of growth management plans for the area.

I suggest establishing a TDR experiment or prototype in Ohio based on the proposed farm security areas as sending districts for development elsewhere in the county. The experiment and probably the program should be on a county level where resource base is adequate. Counties interested in conducting such an experiment could submit proposals to the Office of Farmland Preservation in ODA for review, technical assistance and support. There is interest among Ohio farm leaders in such an approach -- it is an option that should be available for Ohio counties.

A variation on TDR is development rights mitigation by which developers who purchase and build on selected open lands in one part of a jurisdiction purchase development rights to farmland elsewhere in return. Rights are thus transferred from one property to another, accommodating development while at the

same time protecting farmland. Emphasis should be on lands in designated farm security areas for the mitigating purchase.

There are two final innovations for sharing development equity between owner and developer or buyer -- equity insurance and equity mortgage. These have been proposed by analysts in New Jersey, one of the earliest states in farmland protection efforts. Equity insurance would have the local government assure the land owner of the future value of the difference between full market and ag value at the time the policy is issued. Essentially the community would pay an initial "down payment" and annual insurance premiums which accumulate and earn tax free dividends while the land stays in farming. The policy is cashed in when the farmer retires, or is paid to heirs. The owner gains from assured annual payments in an uncertain market situation and favorable tax treatment; the community is better able to manage total cost. An equity mortgage is similar in that annual payments of principle plus interest are made by the community to the owner over a specified term, sort of a mortgage in reverse (Adelaja and Schilling).

CONCLUSIONS

Ohio citizens are ready to act in altering the pattern and character of development into rural areas. They insist on local discretion, not state direction. But they want state leadership and assistance. Throughout the state people feel the aggravation of congested roads and the constant need to be on them to get what they need. They see unpleasant changes in the countryside, conditions reported in every daily newspaper in the state and in the national media as well. Road congestion is the great common denominator in the search for more reasoned development -- everyone feels it. The suggestions here are extremely modest, just an improved set of tools for farmland protection which is a small but integral part of overall growth management. Open land, including farmland, is valued by Ohio citizens everywhere for the many services it provides. No one asks to stop growth and change, but merely to facilitate growth without loss of other things we value. We need new ideas for harnessing the economics of land use change for the benefit of all.

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APPENDIX

--Exclusive agricultural zoning language in Oregon, Kentucky and Pennsylvania.--

Excerpts from **Oregon** Revised Statutes 215.203-.298

STATEMENT OF PURPOSE

215.243 Agricultural land use policy. The Legislative Assembly finds and declares that:

(1) Open land used for agricultural use is an efficient means of conserving natural resources that constitute an important physical, social, aesthetic and economic asset to all of the people of this state, whether living in rural, urban or metropolitan areas of the state.

(2) The preservation of a maximum amount of the limited supply of agricultural land is necessary to the conservation of the state's economic resources and the preservation of such land in large blocks is necessary in maintaining the agricultural economy of the state and for the assurance of adequate, healthful and nutrition s food for the people of this state and nation.

(3) Expansion of urban development into rural areas is a matter of public concern because of the unnecessary increases in costs of community services, conflicts between farm and urban activities and the loss of open space and natural beauty around urban centers occurring as the result of such expansion.

(4) Exclusive farm use zoning as provided by law, substantially limits alternatives to the use of rural land and, with the importance of rural lands to the public, justifies incentives and privileges offered to encourage owners of rural lands to hold such lands in exclusive farm use zones.

[1973 c.503 S.1]

AGRICULTURAL LAND USE
(Exclusive Farm Use Zones)

215.203 Zoning ordinances establishing exclusive farm use zones; definitions.

(1) Zoning ordinances may be adopted to zone designated areas of land within the county as exclusive farm use zones. Land within such zones shall be used exclusively for farm use except as otherwise provided in ORS 215.213, 215.283 or 215.284. Farm use zones shall be established only when such zoning is consistent with the comprehensive plan.

(2) (a) As used in this section, "farm use" means the current employment of land for the primary purpose of obtaining a profit in money by raising, harvesting and selling crops or the feeding, breeding, management and sale of, or the produce of, livestock, poultry, furbearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof. "Farm use" also includes the preparation and storage of the products raised on such land for human use and animal use and disposal by marketing or otherwise. "Farm use" also includes current employment of land for the primary purpose of obtaining a profit in money by stabling or training equines. "Farm use" also includes the propagation, cultivation, maintenance and harvesting of aquatic species. It does not include the use of land subject to the provisions of ORS chapter 321, except land used exclusively for growing cultured

Christmas trees as defined in subsection (3) of this section or land described in ORS 321.267 (1) (e) or 321.415 (5).

(b) "Current employment" of land for farm use includes:

(A) Farmland, the operation or use of which is subject to any farm-related government program;

(B) Land lying fallow for one year as a normal and regular requirement of good agricultural husbandry;

(C) Land planted in orchards or other perennials, other than land specified in subparagraph (D) of this paragraph, prior to maturity;

(D) Land not in an exclusive farm use zone which has not been eligible for assessment at special farm use value in the year prior to planting the current crop and has been planted in orchards, cultured Christmas trees or vineyards for at least three years;

(E) Wasteland, in an exclusive farm use zone, dry or covered with water, neither economically tillable nor grazeable, lying in or adjacent to and in common ownership with a farm use land and which is not currently being used for any economic farm use;

(F) Land under buildings supporting accepted farm practices;

(G) Water impoundments lying in or adjacent to and in common ownership with farm use land;

(H) Any land constituting a woodlot, not to exceed 20 acres, contiguous to and owned by the owner of land specially valued for farm use even if the land constituting the woodlot is not utilized in conjunction with farm use;

(I) Land lying idle for no more than one year where the absence of farming activity is due to the illness of the farmer or member of the farmer's immediate family. For purposes of this paragraph, illness includes injury or infirmity whether or not such illness results in death;

(J) Any land described under ORS 321.267 (1) (e) or 321.415 (5); and

(K) Any land in an exclusive farm use zone used for the storage of agricultural products that would otherwise be disposed of through open field burning or propane flaming.

PERMITTED USES

215.213 Uses permitted in exclusive farm use zones in counties that adopted marginal lands system prior to 1993.

(1) In counties that have adopted marginal lands provisions under ORS 197.247 (1991 Edition), the following uses may be established in any area zoned for exclusive farm use:

(a) Public or private schools, including all buildings essential to the operation of a school.

(b) Churches and cemeteries in conjunction with churches.

(c) The propagation or harvesting of a forest product.

(d) Utility facilities necessary for public service, except commercial facilities for the purpose of generating power for public use by sale and transmission towers over 200 feet in height.

(e) A dwelling on real property used for farm use if the dwelling is:

(A) Located on the same lot or parcel as the dwelling of the farm operator; and

(B) Occupied by a relative, which means grandparent, grandchild, parent, child, brother or sister of the farm operator or the farm operator's spouse, whose assistance in the management of the farm use is or will be required by the farm operator.

(f) Nonresidential buildings customarily provided in conjunction with farm use.

(g) A dwelling customarily provided in conjunction with farm use if the dwelling is on a lot or parcel that is managed as part of a farm operation not smaller than the minimum lot size in a farm zone with a minimum lot size acknowledged under ORS 197.251.

(h) Operations for the exploration for and production of geothermal resources as defined by ORS 522.005 and oil and gas as defined by ORS 520.005, including the placement and operation of compressors, separators and other customary production equipment for an individual well adjacent to the wellhead. Any activities or construction relating to such operations shall not be a basis for an exception under ORS 197.732 (1) (a) or (b).

(i) Operations for the exploration for minerals as defined by ORS 517.750. Any activities or construction relating to such operations shall not be a basis for an exception under ORS 197.732 (1) (a) or (b).

(j) A site for the disposal of solid waste that has been ordered to be established by the Environmental Quality Commission under ORS 459.049, together with equipment, facilities or building necessary for its operation.

Excerpts from **Kentucky** Revised Statutes 100.201-.203

(2) When all required elements of the comprehensive plan have been adopted in accordance with the provisions of this chapter, then the legislative bodies and fiscal courts within the planning unit may enact permanent land used regulations, including zoning and other kinds of growth management regulations to promote public health, safety, morals, and general welfare of the planning unit, to facilitate orderly and harmonious development and the visual or historical character of the unit, and to regulate the density of population and intensity of land use in order to provide for adequate light and air. In addition, land use and zoning regulations may be employed to provide for vehicle parking and loading space, as well as to facilitate fire and police protection, and to prevent the overcrowding of land, blight, danger, and congestion in the circulation of people and commodities, and the loss of life, health, or property from fire, flood, or other dangers. Land use and zoning regulations

may also be employed to protect airports, highways, and other transportation facilities, public facilities, schools, public grounds, historical districts, central business districts, prime agricultural land, and other natural resources; to regulate the use of sludge from water and waste water treatment facilities in projects to improve soil quality; and to protect other specific areas of the planning unit which need special protection by the planning unit.

Excerpts from **Pennsylvania** Consolidated Statutes 10601-01605

Section 604. Zoning Purposes -- The provisions of zoning ordinances shall be designed:

(1) To promote, protect and facilitate any or all of the following: the public health, safety, morals, and the general welfare; coordinated and practical community development and proper density of population; emergency management preparedness and operations, airports, and national defense facilities, the provisions of adequate light and air, access to incident solar energy, police protection, vehicle parking and loading space, transportation, water, sewerage, schools, recreational facilities, public grounds, the provision of a safe, reliable and adequate water supply for domestic, commercial, agricultural or industrial use, and other public requirements; as well as preservation of the natural, scenic and historic values in the environment and preservation of forests, wetlands, aquifers and floodplains.

(2) To prevent one or more of the following: overcrowding of land, blight, danger and congestion in travel and transportation, loss of health, life or property from fire, flood, panic or other dangers.

(3) To preserve prime agriculture and farmland considering topography, soil type and classification, and present use.

(4) To provide for the use of land within the municipality for residential housing of various dwelling types encompassing all basic forms of housing, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes and mobile home parks, provided, however, that no zoning ordinance shall be deemed invalid for the failure to provide for any other specific dwelling type.

(5) To accommodate reasonable overall community growth, including population and employment growth, and opportunities for development of a variety of residential dwelling types and nonresidential uses.