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ARTICLE: Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques **

NAME: ELISA PASTER *

BIO:

* Elisa Paster is an associate at Freilich, Leitner, & Carlisle, a Missouri firm specializing in municipal and land use law across the country. She received a Bachelor of Arts degree, cum laude, in the Growth and Structure of Cities from Bryn Mawr College in Philadelphia, Pennsylvania, and a Master of Science degree, highest honors, from the University College of London in London, England. She holds a Juris Doctorate, cum laude, from the University of New Mexico. Ms. Paster worked as a city planner for the City of Albuquerque and now specializes in land use, planning, and municipal law.

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SUMMARY:

... Productive agricultural lands are an irreplaceable natural resource being lost to sprawling subdivisions throughout the country. ... Cluster zoning may require that the landowner of a tract of land identify the building lots and the open space to be preserved, or it may simply require that a certain percentage of land remain as open space or agricultural land. ... For example, one model ordinance permits residential and open space uses. ... Though cluster zoning can keep land available for smaller agricultural operations or open space, it is generally not a viable technique for commercial agriculture. ... Unfortunately, mandatory ordinances generally decrease land values, which decrease farmer's equity in land, so many farmers are opposed to agricultural zoning. ... The combination of these elements might help to provide maximum choice to the residents of the rural area while contributing to an overall agricultural preservation plan by making as much land available for agriculture as possible by reducing conflicts between uses, reducing development pressure, and allowing development in appropriate areas. ... Miami-Dade County is an appropriate ground for the transfer and purchase of a development right program because of the existence of the UDB, the existing zoning, and the vast expanses of agricultural lands. ...

HIGHLIGHT:

ABSTRACT

Productive agricultural lands are an irreplaceable natural resource. Nonetheless, as urban populations increase and spill over the edges of the urban boundary, communities are relinquishing farmland to low-density development without regard to preserving these vital lands. While the growth of cities is essential to their economic health, that growth does not have to be at a premium cost to rural areas. The agricultural industry is vital to the United States economically, environmentally, and socially, so local planners and community members must make agricultural preservation part of long-term planning goals. There is no doubt that the realities of agriculture are changing, as small farmers find that agricultural production is no longer viable, as the popularity of organic farming and specialty crops increases, and as globaliza-

tion raises phyto-sanitary and economic issues. As such, realistic, long-term planning goals that take the benefits and drawbacks of agriculture into account are vital. Land use planning is one tool that can be paired with other strategies to help save vital agricultural lands, so that the benefits of farming can be realized in our communities for the future.

TEXT:
[*283]

I. INTRODUCTION

Productive agricultural lands are an irreplaceable natural resource being lost to sprawling subdivisions throughout the country. [*284] Although the world's technology grows more complex every day, no technology has been able to replace the unique qualities of prime farmland that have developed over time. Nonetheless, as urban populations increase and spill over the edges of the urban boundary, communities are relinquishing farmland to low-density development without regard to preserving these vital lands.

The American Farmland Trust (AFT), a national group aimed at stopping the loss of productive farmland and promoting farming practices that lead to a healthy environment, notes several reasons to save agricultural lands. First, preservation of agricultural lands is of paramount importance because of the role that agricultural and open space land play economically, environmentally, and socially. American agricultural lands provide the nation and the world with so many food and fiber products that the industry has been likened to OPEC in the field of energy. n1 According to the AFT, the food and farming business contributes more than \$ 1 trillion to the U.S. economy, more than 13 percent of the nation's gross domestic product, and employs approximately 17 percent of the labor force. n2 Another reason that saving agricultural lands and open space is imperative for the environment is that it provides for natural habitat, food and cover for wildlife, preservation of wetlands, and maintenance of air quality. n3 Finally, farming is important culturally in that the American way of life is rooted in an agricultural past and the natural landscape connects individuals to the natural world. n4

Saving agricultural lands may be achieved through a comprehensive system of land use, economic policy, and political strategies. Land use policies are an important component of this strategy in that they save the actual lands, separate incompatible land uses, give farmers the opportunity to continue farming even as development pressures increase, provide economic incentives to remain in the agricultural industry, and retain the character of rural areas. Some of the land use policies will help to strengthen and build the agricultural economy. The strategies recommended below must be utilized within the context of a comprehensive planning system that includes technical assistance and development of the agricultural economy and recognition [*285] of current urban uses and how the developing urban area affects rural systems.

II. LEGAL FRAMEWORK

The authority of local government agencies to adopt land use and zoning regulations is derived from a state's inherent police powers. Governments have the authority to regulate the activity or use of property to protect or to prevent harm to the public health, safety, and welfare. n5 Though there are limitations on a government's police power, the courts have recognized the need for planning to deal with critical issues including urban sprawl, declining land values, environmental issues, open space, and agricultural preservation. n6

Local governments cannot, however, adopt land use and zoning regulations that infringe on private property rights; therefore, a number of legal issues must be considered when developing an agricultural preservation strategy. Generally, the issues include whether the local government has authority or police powers, the action advances a legitimate governmental purpose, the system applies equally to persons and land without operating in a discriminatory manner, the governmental regulations are implemented in a way that does not constitute a "taking" of private property without "just compensation," or the government regulations afford substantive and procedural due process to persons affected. Land use laws differ from state to state and vary in degrees of complexity. Because California has one of the most established bodies of land use law in the nation, this article will use it as a model of legal analysis for agricultural preservation issues in light of Supreme Court precedent.

In California, a local government's authority is derived from court precedents n7 and the state constitution, which grants cities the power to "make and enforce within their limits all local police, sanitary and other ordinances not in conflict with general laws." n8 Other legal issues are considered below in three distinct categories: takings, impact fees, and due process. [*286]

A. Takings

The majority of legal challenges to land use regulations fall under Fifth Amendment claims that the regulations constitute a "taking" of private property without "just compensation." Generally, government may limit use of property through regulation without effecting a taking under the Fifth and Fourteenth Amendments only if the purpose is to protect the public welfare and the regulation is narrowly tailored to achieve that goal.ⁿ⁹ However, once a regulation ⁿ¹⁰ has been deemed to effectuate a taking, monetary compensation may be requiredⁿ¹¹ or the regulation is void. If the regulation ⁿ¹² does not involve a physical or title taking but is in the nature of amenity protection such as open space preservation, environmental protection, or agriculture preservation, courts use a balancing test to determine whether the benefit to the public is outweighed by the burden to the land owner. The test asks whether the regulation substantially advances a legitimate state interest and whether it denies an owner economically viable use of the land. ⁿ¹³

Under the first prong, the court will not construe the government's action as a taking if the governmental entity reasonably concluded that "'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land."ⁿ¹⁴ The court also requires that the regulation be reasonably calculated to fix the problem without exceeding the public necessity or substantially affecting uses that do not "partake of the offensive character of those which create the problem sought to be ameliorated."ⁿ¹⁵ In short, the government must [*287] craft a regulation that solves the problem in the least obtrusive means possible.

Under the second prong, a court must determine whether the property maintains any permanent beneficial value when viewed as a whole. ⁿ¹⁶ Both federal and state courts have uniformly held that all substantial use of property must be lost before an economic taking occurs. Economic takings must be viewed in their entirety and courts do not consider a diminution in value of even 99 percent a taking. ⁿ¹⁷

Transfer of development rights (TDR) programs have been particularly susceptible to takings claims. In *Penn Central Transportation Co. v. New York City*, the high court upheld the use of an urban TDR program in New York City. ⁿ¹⁸ While more recent cases have brought TDRs under fire, no Supreme Court decision has invalidated TDR as a land use tool. ⁿ¹⁹ California courts have upheld TDR programs, finding that adoption of a TDR regulation is an exercise of the city's police power if applied in a manner that is not arbitrary, capricious, or unrelated to health, safety, and public welfare. ⁿ²⁰ The California courts focus on the principle that a local ordinance or plan permits a certain amount of development. At least 27 California counties and cities have adopted [*288] some form of TDR including Marin, Monterey, San Luis Obispo, San Diego, and Los Angeles. ⁿ²¹

The court upheld an open space TDR preservation program in *Aptos Seascap Corp. v. County of Santa Cruz* in the early 1980s. ⁿ²² The plaintiff, Aptos Seascap, owned 110 acres of property, 70 acres of which included a beach, arroyos, and a line of cliffs or palisades. The county adopted a plan classifying the property as beach, open space, or palisades. ⁿ²³ The landowner wanted to subdivide the land but could not due to the classification; therefore, Seascap claimed a deprivation "of all reasonable use." The court found that no taking had occurred because Seascap could be given density transfers, a form of TDR, on its other lands to compensate for the restriction. ⁿ²⁴ The court stated, "a provision allowing some transfer of development rights from the restricted property or awarding compensating densities elsewhere may preclude a finding that an unconstitutional taking has occurred." ⁿ²⁵

The court upheld a similar program in *Barancik v. County of Marin*. ⁿ²⁶ Marin County adopted a community plan that limited development to one residence per 60 acres to protect ranching from incompatible uses. The plan also included a TDR provision to allow a finite increase of density in the plan area by purchasing development rights at the market rate. ⁿ²⁷ The plaintiff owned land within the community plan area and wanted to develop his property at a higher density than allowed by the plan. The county denied the request, based on the plan and the failure to purchase development rights, and the plaintiff brought suit claiming he had been deprived "of all beneficial use of his property in violation of the Fifth and Fourteenth Amendments." ⁿ²⁸ The court upheld the validity of the community plan, finding that preservation of ranch land and the rural quality of the area served a valid public purpose. The court stated, "The Countywide Plan is a legislative declaration that there will be a corridor in Marin agricultural in its use. The choice was not irrational, the application to [*289] Barancik not arbitrary." ⁿ²⁹ The court also upheld the TDR program, finding no constitutional violation exists where a TDR program does not change the amount of total development permitted but merely changes who may do the developments by altering the number of development rights available. ⁿ³⁰

In 1994, the U.S. Supreme Court decided the landmark case of *Dolan v. City of Tigard*, ⁿ³¹ holding that, not only must exactions have the required nexus to the development's impacts (a matter settled in *Nollan v. California Coastal Commission* ⁿ³²), but also, the degree of the exaction must be roughly proportional to the projected impact of the proposed development. ⁿ³³ Local governments must demonstrate that exactions imposed as a condition of development are not only related in nature but also in extent to the impact of the development paying the fee.

The applicability of Nollan and Dolan on impact fees was tested in *Ehrlich v. Culver City*.ⁿ³⁴ Ehrlich, the plaintiff landowner, applied to the city for a development project permit. Culver City required exactions in the form of a recreation fee and an arts fee as a prerequisite to the approval of a development project.ⁿ³⁵ The California Supreme Court held that a local government has the police power to base a development or impact fee on a rule of general applicability, and the fee is not subject to the heightened judicial scrutiny of Nollan or Dolan.ⁿ³⁶ In other words, development fees are permissible as long as they are not imposed on an ad hoc basis; there must be general legislatively formulated fees.ⁿ³⁷

In 1996, in an apparent response to Ehrlich, the California legislature amended what is known as the Mitigation Fee Act.ⁿ³⁸ This Act allows local governments to establish, increase, or impose a fee as a condition of approval of a development project. The amended Act requires a local government to identify the purpose for which the fee will be used, determine the reasonable relationship between the fee's use and the type of development project on which the fee is imposed, determine the reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed, and determine whether there is a reasonable relationship between the [*290] amount of the fee imposed as a condition of approval on a specific development project and the cost of the public facility attributable to that project.ⁿ³⁹

B. Due Process

Land use controls must comply with the substantive limitations imposed on land use regulation by the due process clause of the U.S. and California constitutions. The due process clause requires that land use controls be rationally related to the legitimate government interests of public health, safety, morals, and general welfare.ⁿ⁴⁰ Legitimate general welfare interests include maintaining neighborhood character,ⁿ⁴¹ maintaining aesthetics,ⁿ⁴² and encouraging housing within already urbanized areas.ⁿ⁴³

Regional general welfare is a state constitutional substantive due process test that was first recognized by the U.S. Supreme Court in *Village of Euclid, Ohio v. Ambler Realty Co.*ⁿ⁴⁴ In upholding the zoning ordinance, the Euclid Court recognized that a zoning ordinance, under substantive due process, must have a substantial relationship to the public's health, safety, and general welfare. The Court did not limit this relationship to the welfare of the city that adopted the ordinance but related it to the "general welfare" and recognized that there may be situations where the general public interest outweighs the interests of the municipality that causes the interests of the municipality to "give way" to these larger interests.ⁿ⁴⁵

Regional general welfare, as a state constitutional due process test, was concretely established in *Borough of Cresskill v. Borough of Dumont*, a lawsuit initiated by several township boroughs challenging the rezoning of a tract from residential to commercial in a neighboring township borough.ⁿ⁴⁶ The court noted,

The public health, morals and welfare are not limited by the boundaries of any particular zoning district, nor even [*291] by the boundaries of the municipality adopting the ordinance....What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality...has the power to bring suit against anyone for the purpose of protecting the public's interests which the municipality itself is endeavoring to promote, and which it is duty bound to promote.ⁿ⁴⁷

In *Associated Home Builders v. City of Livermore*,ⁿ⁴⁸ the voters of the City of Livermore enacted an ordinance that prohibits issuance of further residential building permits until local educational, sewage disposal, and water supply facilities comply with specified standards. Associated Homebuilders, an association of contractors, subdividers, and other persons interested in residential construction in Livermore, brought suit to enjoin enforcement of the ordinance. In its ruling, the California Supreme Court simply stated the California rule: "the land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare."ⁿ⁴⁹

California courts and the state legislature have left little doubt as to the validity of agricultural preservation ordinances and zoning schemes in the interest of promoting the general welfare. The legislature has stated that the preservation of open space "is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber...."ⁿ⁵⁰ The legislature has further asserted that the preservation of agricultural land is beneficial to the entire community.ⁿ⁵¹ Additional statutory evidence is found in the Public Resources Code, which provides funds to local governments for acquiring easements, lands, or development rights to prevent the loss of agricultural lands.ⁿ⁵²

The California courts have similarly affirmed preservation of agricultural land as a general welfare interest. n53 In *Associated Home [*292] Builders v. City of Walnut Creek*, the California Supreme Court stated, "Undeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure. The development of a new subdivision in and of itself has the counter-productive effect of consuming substantial supply of this precious commodity...." n54

III. AGRICULTURAL AND RURAL LAND POLICIES AND IMPLEMENTATION TECHNIQUES

A. Agricultural Zoning

Courts validated zoning as a legitimate exercise of a municipality's police power in the seminal case of *Village of Euclid, Ohio v. Ambler Realty Company*. n55 Since that time, local governments have used zoning to achieve fulfillment of general health and welfare goals, including the preservation of agricultural lands. Indeed, zoning is the most utilized technique for preserving agricultural and rural lands in part because zoning land exclusively for agricultural use prevents residential subdivisions while simultaneously creating a holding zone to restrict urban expansion. n56 While some zoning regulations have fallen to takings claims (see discussion *infra*), courts have consistently upheld agricultural zoning against takings claims n57 because agricultural zoning permits some economic use of the land (i.e., farming). n58

1. Area Based

Area based zoning ordinances allow a fixed amount of development per a specified number of acres, for example one nonfarm lot per 50 acres. n59 These ordinances operate to preserve agricultural land by limiting incompatible development within agricultural areas. For instance, in sliding scale zoning ordinances, the number of dwelling units permitted varies with the size of the tract. Owners of smaller parcels may divide their land into more lots on a per-acre basis than [*293] owners of larger parcels. n60 Sliding scale zoning may also be used by qualitatively assessing land. For example, Clinton County, Indiana, allows denser development on lands with poor soil quality and prohibits development on lands with fertile soil. n61 Sliding scale zoning operates as an agricultural preservation technique by promoting development on smaller tracts that are on less valuable soil while prohibiting development on fertile, soil rich lands. n62 Further, municipalities satisfy constitutional takings requirements by permitting high density development on agricultural land when farming is not profitable. n63

Conservation easements are used in many communities to restrict development once maximum densities are reached. n64 Communities that do not require conservation easements or some other type of deed restriction will be in danger of losing the land to non-agricultural uses in the future. The other potential problem with area-based zoning is that, as with other types of zoning ordinances, area-based zoning is only as good as the political will to maintain and enforce it. Communities must be willing to commit physical and economic resources to ensure successful zoning programs.

On the other hand, area-based zoning is a very inexpensive way to protect land because little public expenditure is necessary. Compared to other programs, such as transfer of development rights and purchase of development rights, area based zoning can be implemented very quickly and cheaply. The public is also familiar with area-based zoning, making adaptation and implementation of these programs less susceptible to public controversy.

2. Large Lot Zoning

Some communities have tried to slow rapid growth patterns by requiring that rural land be subdivided into a minimum of five-acre lots, with the intention that larger parcels will maintain lower density and rural character. As a general rule, the minimum lot size created is the amount of land necessary to carry on a successful farming operation; thus, lot sizes reflect the economic reality of agriculture.

Though large lot zoning was a traditional strategy to protect farmland in the 1970s and 1980s, the resulting development of subdivisions has suggested that it may not be the most effective strategy. The main problem is that the lot size is not large enough to discourage [*294] development, yet it is too small for effective agriculture. n65 Large lot zoning, therefore, is widely criticized for promoting sprawl and the degradation of farmland. Large lot zoning essentially converts farms and valued open space into private property and large lawns, where little community open space is preserved and neighbors are isolated from each other by their islands of unproductive private land. The resulting pattern becomes "wall to wall" subdivision, where every portion of each parcel is developed into yards, roads, and driveways. Property owners find large lot zoning objectionable because only the rich can afford the large prices that are commensu-

rate with large lots. n66 Other critics have renamed large lot zoning "snob zoning" n67 and the residents of these areas "cappuccino cowboys." n68

3. Cluster

Cluster zoning allows development on part of a property while the remainder is retained for open space or agricultural uses. Cluster zoning encourages creativity in urban site design and enables the protection of on site amenities and environmentally sensitive areas. n69 Cluster zoning and cluster subdivisions are known by many names: open space zoning or density zoning and cluster developments, conservation subdivisions, open space, or open land subdivisions, respectively. n70

Clustering may be accomplished through the use of a particular zoning district, which establishes a fixed or sliding scale area-based dwelling unit allocation and requires clustering on a portion of the site. Alternatively, clustering may be used in conjunction with existing zoning and allowed as an optional or density bonus. For example, the Hammocks, a residential development in Florida, was built using cluster zoning paired with density incentives, thereby increasing the average net [*295] density to 11.5 units per acre and creating green spaces and lakes for the community. n71

Cluster zoning may require that the landowner of a tract of land identify the building lots and the open space to be preserved, or it may simply require that a certain percentage of land remain as open space or agricultural land. The protected land is usually owned and maintained by a homeowners association. Specifically allowed land uses are either identified in the existing zoning or limited by cluster development regulations. For example, one model ordinance permits residential and open space uses. Possible residential space uses include clustered single-family houses, single-family farmstead dwellings, and community living arrangements. Possible open space uses include agricultural ones such as farming (crops, the and raising and sale of livestock) and Christmas tree farming and sales, and passive recreational spaces for wildlife sanctuaries and nature preserves. n72 Communities like Larimer County, Colorado, offer a system of incentives and benefits that gives local administrators the option of adopting regulations that fit the specific needs of parcels on a case-by-case basis. n73

The most effective clustering regulations are those that are mandatory. As stated by one agricultural preservation expert,

when clustering and open space preservation are left optional, only a small percentage of developers will choose to take advantage of this approach. Most simply continue to do as they have always done: creating checkerboards of house lots and streets. This means that even though the clustering option is in the zoning ordinance, it remains essentially unused. The community is still left with conventional development patterns repeated over fields and woodlands. n74

[*296] Though cluster zoning can keep land available for smaller agricultural operations or open space, it is generally not a viable technique for commercial agriculture. n75 The protected land is normally owned by a homeowners association, and, while homeowners may lease it back to local farmers, some residents may object to allowing agricultural production because of noise, dust, and odors related to commercial farming. n76 The incompatibility of uses can be addressed by right-to-farm laws (discussed *infra*) or through ordinances that require homeowners to lease the land back to local farmers while limiting the type and scale of agriculture on the property or ensuring that farmers who sell development rights to homeowners retain title to continue farming. n77 In general, cluster zoning has been used most successfully to protect environmentally sensitive lands or to create intermediary areas between agricultural areas and housing. n78

Critics of cluster zoning argue that it actually results in "clustered sprawl" n79 and that farmland within clustered residential areas can only realistically be used for low-value crops because of incompatible use issues. n80 Critics also argue that cluster zoning is environmentally unsound because cluster development works best with urban infrastructure although the remote location requires onsite septic tanks. n81 Failing septic systems require the extension of water and sewer lines, which opens farmland up to more development. n82 Finally, cluster development is criticized because mixing residences and farming simply does not work. n83

While critics of clustering worry that this technique will cause loss of exurban or rural character, subdivisions designed with these concerns in mind can mitigate, if not eliminate, such concerns. A clustered subdivision should be located as near to the major roads in the area as possible to allow for easy access. Instead of having separate driveways onto the arterial roads, creating a more urban feel, a subdivision should be designed so the entire tract is set back from the main road with only one access point to the road and houses accessing a loop or network of small streets. These streets should be gravel and narrower than traditional urban subdivision streets to create a rural [*297] neighborhood

feel. Clustered subdivisions should also be buffered from the street with extensive landscape--hopefully so well buffered that passing motorists will not even realize the houses exist.

4. Buffering

Buffering is the physical separation of farms from incompatible uses including landscape and acreage. Buffers are narrow bands of land planted with permanent vegetation that are located in and around areas of intensive agricultural production. n84 Buffers safeguard farms from vandals and trespassers and protect adjacent homeowners from the negative impacts of commercial farming. n85 Several types of buffers exist including field borders, riparian grass buffers, contour grass strips, grassed waterways, and vegetative borders n86 and range in size from 50 feet to 800 feet. n87 All have the same function: to minimize conflicts between residential and agricultural users.

Buffers can be mandatory or voluntary. In Suffield, Connecticut, an individual farmer may request a buffer with a width of 30 to 100 feet. The buffer is located on the parcel that the developer will develop. The law also requires that lot owners be notified that they are responsible for buffer maintenance and that subdivision plans give notice to lot owners about "active agriculture and practices that may annoy or irritate neighbors." n88 Other communities have voluntary buffers between farm and non-farm uses. The Georgia Model Code requires that any non-agricultural use located next to an agricultural use provide a 150-foot agricultural buffer. n89 The buffer must consist of native trees, hedges, and naturally occurring elements "so that they provide a more or less opaque screen" between the agricultural and non-agricultural uses. n90 [*298]

A significant challenge with buffers is enforcement. Though ordinances may require buffers, the ordinances are not always enforced. Buffering ordinances can be effective as long as local government has subdivision review authority to impose the buffer requirement and provided local government enforces the buffers once in place. Placing the buffer restriction in the landowners' title will assure adequate legal notice to the individual landowner responsible. n91

Successful buffer ordinances cannot be standard; each buffer must be site based and locally determined. Mandatory buffers that require maintenance are most effective. Ordinances must determine the buffer size and establish a source of payment for repairs and maintenance. n92 While buffers themselves do not protect farmland, they reduce incompatibility problems, which lead to pressure on farmers, such as nuisance suits and neighbor complaints, to stop farming.

5. Overall Benefits and Drawbacks of Agricultural Zoning

Overall, the aforementioned zoning techniques are an inexpensive way to protect large areas of agricultural land because little public expenditure is necessary to implement zoning ordinances. Communities also favor agricultural zoning ordinances because they are easy and quick to implement as compared to development rights programs and easy to explain to the public, who are accustomed to zoning ordinances. They also separate farms from non-agricultural land uses and reduce the likelihood of conflicts between farmers and their non-farming neighbors. Finally, agricultural zoning is flexible; if the economic or political climate changes, the zoning code may also be easily modified. n93

Critics of agricultural zoning suggest that these programs are not permanent. While flexibility is beneficial, it is also a drawback because large agricultural parcels may quickly be converted to developable parcels with a simple zone change. Moreover, agricultural preservation ordinances do not prevent annexation by municipalities (unless annexation is forbidden on agricultural lands), so lands may quickly lose protection from development. One solution is for agricultural zoning programs to include mandatory deed restrictions or easement requirements to prevent conversion and annexation. Unfortunately, mandatory ordinances generally decrease land values, which decrease farmer's equity in land, so many farmers are opposed to agricultural [*299] zoning. n94 Finally, these programs may be difficult to monitor and enforce on a day-to-day basis. n95 Municipalities must be willing to devote economic and human resources to agricultural zoning programs to ensure their success.

B. Non-Zoning Techniques

1. Right-to-Farm Laws

Since the 1960s, each of the 50 states has enacted some type of right-to-farm law. n96 Right-to-farm laws are state laws or local ordinances that protect farmers and farm operations from public and private nuisance lawsuits. n97 There are two objectives to these laws: first, strengthening the legal position of farmers against nuisance suits by their neighbors, and second, protecting farmers from anti-nuisance ordinances and unreasonable agricultural regulations. n98

Although right-to-farm laws do not protect farmers from state and federal pollution and safety laws, they do underscore the legitimacy of farm uses. n99

State statutes can be broken into three groups. General right-to-farm statutes provide that a farming operation cannot be declared a nuisance if it were not a nuisance at the time the operation began. n100 This type of statute is also termed a "coming to the nuisance" statute and is intended to write a legal defense into the law: n101 if farmers are there first, they should not be forced out by residents moving to the area who do not like the effects of commercial agriculture. The second type of statute protects specific types of agriculture including the cultivation of land, production of crops, and raising of poultry, n102 thereby protecting farmers from unreasonable local regulations. Finally, some statutes protect farmers and production companies from food safety suits. n103

Right-to-farm laws are effective when metropolitan areas begin to encroach on outlying farm communities. n104 They cause urban dwellers [*300] wanting a rural lifestyle to rethink their decision when animal waste, airborne pollution, odors, slow-moving farm machines on roads, and roosters crowing at the crack of dawn disturb their "rural tranquility." n105 Without these laws, public law nuisance suits may succeed. As a political matter, these ordinances also encourage elected officials to minimize ordinances that intrude on farming. Nonetheless, these laws do not prevent the ultimate problem of incompatibility of uses, which must be addressed through strict environmental enforcement and exclusive agriculture districts. Another solution is to allow for payment of damages instead of cessation of activities. n106

Right-to-farm laws have not been extensively litigated, but this trend is likely to change as the fringe creeps nearer to farmland and new residents file suits based on trespass rather than on nuisance. n107 Plaintiffs may still file a nuisance suit against a farmer regardless of the existence of right-to-farm laws. Although the plaintiff has a slim chance of winning, the cost and aggravation of the suit may be detrimental to the agricultural operation. n108 Thus, some states, such as Michigan, require plaintiffs to pay the farmer's costs in an unsuccessful nuisance suit, n109 while other states, such as Delaware, Iowa, Kentucky, Missouri, New Mexico, South Dakota, and Wisconsin, allow farmers to recover for frivolous suits. n110 While many states do have a provision barring nuisance suits, the Iowa Supreme Court held that right-to-farm laws cannot absolutely bar nuisance suits. n111 Other state supreme courts have not followed this trend, but litigation continues.

In light of the Iowa Supreme Court decision and increasing litigation, right-to-farm laws should be paired with nuisance easements. Imposing nuisance easements precludes surrounding property owners from suing agricultural landowners for maintaining a nuisance (such as noise, air pollution, and odor). For example, the easement might contain language that grants rights to the farmer to create noise or dust due to agricultural activities.

Pairing right-to-farm laws with growth management techniques such as clustering and the land evaluation and site assessment system (LESA) (see *infra*) strengthens the underlying program. In *Whitted v. Canyon County Board of Commissioners*, n112 the Iowa Supreme Court [*301] concluded that right-to-farm laws encourage the full and complete use of agricultural land and are still compatible with growth management techniques. In this case, a farmer proposed a small subdivision on a portion of his farm with rocky, poor farmland. He intended to continue farming the rest of the land. Neighbors appealed approval of the subdivision, claiming it would deprive them of full use of their agricultural land. The court concurred with the County Land Use Board, stating that, "by allowing the development...the development pressure on areas more conducive to agriculture would be lessened. Further...requiring deed restrictions and marketing disclosures would aid in preserving the agricultural nature of the surrounding area." n113

2. Agricultural Districting

Agricultural districts are special areas where commercial agriculture is encouraged and protected through a broad array of measures such as bans on local government laws that restrict farming, enhanced protection from private nuisance lawsuits, eligibility for differential tax assessment, and limiting non-farm development around active agricultural areas and conservation easement programs. n114 Agricultural districting is distinct from zoning in that the latter only addresses particular land uses and is one tool that might be used in an agricultural district. An agricultural district encompasses a wider range of tools for farmers that include land use policies, taxing mechanisms, and zoning and conservation techniques.

Agricultural districts are generally state-level programs. As of 1997, 16 states have enacted agricultural district laws. n115 Generally, state statutes establish a process for identifying agricultural districts and designating geographical areas for longterm agriculture. Benefits exist because agricultural districts are flexible and local in nature; stabilize the land base at a low public cost; provide multiple benefits to farmers; help protect large blocks of land; and have volun-

tary enrollment, which makes the program popular with farmers. n116 The drawbacks of the program are the following: sanctions for withdrawing land are minimal and do not deter conversion; limits on non-farm development may not prohibit the development of urban infrastructure in agricultural areas; and, in some states, benefits are not a strong enough incentive for [*302] farmers to enroll and the procedure for creating the districts is long and cumbersome. n117 States may overcome the drawbacks by developing strong incentives and penalties, by pairing the agricultural districts with other programs discussed in this article, and by developing a flexible program that changes as agriculture transforms to meet economic challenges.

3. Land Evaluation Systems

The land evaluation and site assessment system (LESA) was launched in 1981 by the U.S. Soil Conservation Service to make objective ratings of the agricultural suitability of lands against the demands for other uses. n118 LESAs effectively rates a tract's potential for agricultural as well as social and economic factors. n119 Though the federal government developed LESAs, state and local governments have adopted the program to meet their specific needs, particularly as a land use planning tool. n120 LESAs are a two-part system consisting of land evaluation and site assessment that can be used as part of an agricultural preservation program by assisting implementation of the Farmland Protection Policy Act (FPPA), selecting appropriate lands to be included in the program, and establishing minimum parcel sizes for farm subdivisions in agricultural districts. n121 The land evaluation part of LESAs is usually designed by the federal Soil Conservation Service (SCS) and local Soil and Water Conservation Districts (SWCD). The land evaluation component is conducted by a local committee comprised of a district conservationist, a cooperative extension representative, SWCD directors, farmers, planners, local agricultural officials, and others who have knowledge of the land resources of the area. n122 The site assessment component is usually designed by local officials or a site assessment committee appointed locally. n123 Site assessment factors include parcel size; on-farm investment; characteristics external to the parcel of land, such as nearby land uses; zoning; and other farmland protection measures. n124 [*303]

LESA is a flexible system designed to accommodate differences among states, counties, or areas. Specific systems are based on existing knowledge of the area, local soil surveys, land use plans, policies, and programs. LESAs are effective in selecting lands for development rights programs, choosing land for preservation, identifying appropriate locations for infrastructure, assessing environmental impacts, and developing guidelines determining which uses should be permitted for land conversion to nonagricultural use.

A 1990-1991 study identified 212 local and state governments in 31 states as active or former users of LESAs. n125 Of these 212 jurisdictions, 138 local and state governments were still using the system in 1994. Those who abandoned the system found it too complicated or time consuming, while others noted a lack of interest or support by landowners or planners. n126 Other jurisdictions reported that the LESAs scores were unreliable and unhelpful. Unreliability may be attributed to technical problems with a particular LESAs system, staffing inadequacies, or local political factors. n127 Approximately 79 percent of respondents were satisfied with LESAs.

C. Land and "Less-Than-Fee" Acquisition Programs

1. Conservation Easements

A conservation easement (or conservation restriction) is a voluntary legal agreement between a landowner and a land trust or government agency that permanently limits uses of the land to protect its conservation values. The landowner sells the right to develop all or part of the land to the conservation organization for non-agricultural or non-open space uses, but the landowner may continue to own and use the land and may sell it or pass it on to heirs. n128 Each easement is tailored to meet the landowner's personal management objectives and goals for the property so that current uses may continue. n129

Placing an easement may result in property tax savings and can be essential for passing land on to the next generation. By removing the land's development potential, the easement lowers its market value, [*304] thereby lowering estate taxes. Whether the easement is donated during life or by will, it can make a critical difference in the heirs' ability to keep the land intact. n130

The major drawback of conservation easements is the expense to the local entity. Second, since participation is voluntary, enrollment is entirely dependent on the desire of the landowner. n131 Finally, conservation easements are acquired piecemeal, creating islands of open and agricultural lands whose promise of open space might actually induce surrounding development. n132

Given these drawbacks, granting conservation easements as an exaction and using conservation easements in tandem with other techniques is becoming popular. n133 In the city of Agoura Hills, the developer of a large subdivision dedicated 63 acres of land at the gateway of the Santa Monica Mountains in exchange for cluster zoning. n134 The city was in favor of the dedication because it did not cost money and reaped the same benefits. The developer favored the dedication because tax benefits were available, cluster zoning provided more density, and the open space was a desirable amenity to the development. n135

2. Purchase of Development Rights and Purchase of Conservation Easements

In a typical purchase of development rights (PDR) program, the government purchases the owner's right to develop specific parcels of land for managerial purposes, leaving the owner all the rights of ownership. n136 One form of PDR commonly used for agricultural preservation is the purchase of conservation easements (PACE). n137 Landowners voluntarily sell conservation easements to governments or other private conservation agencies. The price of the development right is generally equal to the diminution in the market value of the land resulting from the removal of the development rights and, thus, is the difference between the value of the land for agricultural use or open [*305] space and the land's current value. n138 In return for the payment, the landowner agrees to use the land for open space or agriculture in perpetuity, although some programs allow termination of the condition under certain restrictions. n139 PDR programs are similar to conservation easements with one critical difference: in PDR programs the development rights can be sold to another landowner while conservation easements do not transfer a development right.

PDR programs may be independent or cooperative state and local programs. Some states' PDR programs are funded, implemented, and administered by state agencies; some local governments fund their own programs given the lack of state resources; and other states simply fund the purchase of land through either local governments or non-profit organizations. n140 Cooperative state and local governmental programs are advantageous because they allow the state to set broad policies and implement regional planning strategies, while local governments, with their specific knowledge of the area, identify land suitable for PDR programs and monitor the programs. n141 Cooperative programs are also beneficial because of the increased levels of funding available.

PDR programs are popular with farmers because they offer enticing incentives including the availability of real capital without having to mortgage land, lower real property taxes reflecting the decrease in the value of the land once the development rights have been sold, and potential estate or inheritance tax benefits. n142 PDR programs are also advantageous because they offer a more permanent solution than does zoning, while avoiding Fifth Amendment takings challenges that might hamper zoning efforts. n143

Some landowners reject PDR programs because they are perceived as "tying the hands" of the landowners' heirs, who may wish to sell the land for its development value. n144 PDR programs may not work because, although buying development rights is less expensive than buying land in fee simple, the program is still cash intensive. In [*306] communities where taxes and fees are already levied for schools, public safety, parks, infrastructure, and community programs, agricultural preservation may fall by the wayside unless there is heightened community awareness as to the necessity of preserving agricultural lands. n145

Successful PDR programs must be carefully designed to include a set of criteria that prioritizes which land the development rights should purchase. The criteria must take into account the location and surrounding uses of the land. PDR programs make sense if hundreds of acres can be preserved (either through contiguous smaller parcels or a few large parcels) because it is more likely that larger commercial farms will be successful. n146 If only smaller amounts of farmland can be preserved, the adjacent land may be a magnet for housing developers who market "rural lifestyles," and the use conflict between farming and residences will be at a maximum. n147

To be successful, the costs of land in PDR programs must be reasonable and should be balanced against the likelihood that land will remain in viable agricultural production for a certain amount of time. n148 At high expense per acre, little farmland will be saved; thus, the PDR program is not the most cost-effective technique and the farm will not be large enough to sustain itself. n149 Finally, because these small areas of farmland are likely to be located near suburban sprawl, incompatibility issues will arise.

3. Transfer of Development Rights

Transfer of Development Rights (TDR) allows for planning on an area-wide basis by allowing landowners in restricted areas (sending areas) to transfer densities and other development rights to landowners in areas appropriate for higher density development (receiving areas). n150 Landowners in receiving areas are allowed to develop their land but

only if they purchase development rights from the agricultural or environmentally sensitive lands, thereby directing development away from threatened lands to areas better equipped to deal with heavy development. n151 [*307]

TDR programs are popular not only because they give governments an alternative to purchasing land outright in fee simple and ameliorate the harshness of restrictive zoning, n152 but also because the goal is to have an "everyone wins" outcome. n153 The sending area landowner is able to continue farming without development pressures and benefits from the sale of the rights. The receiving area landowner is able to build at a greater density and realizes the market value of the land. Other benefits to government are the ability to make full use of public infrastructure, ease in providing affordable housing through higher densities, preservation of land, and legal defensibility. n154 The community benefits by preserving farmland without spending money and by promoting sustainable growth in the community. n155

In designing a TDR program, municipalities must ensure a market exists, prioritize the location of sending and receiving areas, and determine the number of rights to be bought or sold. The number of rights to be bought or sold should be based on ecological and population concerns because the more sprawling the community, the more rights are required. n156 Other considerations include encouraging landowners to sell through development restrictions, n157 density bonuses for receiving areas, sound planning to separate sending, an active real estate market to ensure buying and selling of rights, n158 fast and easy TDR approvals, n159 and effective monitoring and enforcement.

The transfer of development rights is not an ordinary part of the bundle of rights associated with land ownership. n160 State governments must enact specific legislation to enable a local government to legalize the sending of development rights from one parcel to another. This principle is based on the fact that governments may offer incentives to private interests to provide public amenities or to support the public good through their police powers. n161 This local power is derived from the states. Some state statutes enable localities to authorize and implement TDR programs while others merely provide for the adoption of an ordinance under planning and zoning powers. n162 Other states only allow [*308] authorization of TDRs in the context of imposing specified procedural or substantial limitations. n163 However implemented, the program must be designed to withstand the specific legal challenges discussed earlier in this article.

D. Taxation Programs

I. Agricultural Tax Programs Generally

The disparity between the market value of agricultural land for farming and other uses and high property taxes are two reasons farmers are "forced" to sell their farms. n164 To reduce the temptation or need to sell due to the tax burden, many states have enacted legislation giving real property tax deferments, preferences, or exemptions to the owners of agricultural or eligible land. Like the other techniques described in this article, tax incentives are most effective when used in tandem with other mechanisms.

The purpose of agricultural tax programs is to help farmers economically by reducing their real property taxes by basing tax value on agriculture instead of on its value for development. Another purpose of agricultural tax programs is to protect farmland by easing the financial pressures that force some farmers to sell their land. n165 Unfortunately, tax programs cannot ensure long-term protection of farmland and are criticized because they inadvertently provide a subsidy to real estate speculators who keep their land in agriculture pending development. n166 Although tax incentives do reduce the tax pressure, they do not reduce development pressure, and the capital gains for land development may still outweigh the property tax incentive in some markets. n167 Nonetheless, tax programs are beneficial because they correct inequities in the tax system created by development pressures and help farmers stay in business.

2. Differential Assessment

Differential tax programs provide incentives for landowners to keep their land in agriculture by assessing agricultural land at its current or farm value rather than its fair market value. n168 Agricultural value [*309] represents what farmers would pay to buy land in light of the net farm income they can expect to receive from it, while fair market value represents what a willing buyer would pay to develop the land. n169 The three kinds of differential assessment programs are preferential assessment, deferred taxation, and restrictive agreements.

According to the American Farmland Trust, preferential assessment is the most liberal tax assessment means because "it does not impose penalties for converting land to non-eligible uses. The agricultural value is multiplied by the local tax rate to determine the amount of real value tax due each year." n170 Farm buildings are generally taxed at their fair market value. These programs base farmer's tax bills on the agricultural value instead of the fair value as long as the land remains in agricultural use. n171

The principle behind a deferred taxation program is that the tax on the market value of the property is deferred until the property is developed and the landowner is only taxed according to the actual use. Deferred taxation programs use the same process as preferential assessment programs to calculate property taxes. The difference is that a fee is imposed on the landowner when the land is converted to non-eligible uses or sold for development. Some regulations impose penalties based on the number of years the land received the benefit, while other regulations impose a conversion tax. n172 Most states require landowners to renew their application for tax deferment each year.

The taxation programs are designed to target commercial agricultural land rather than hobby farms used for recreation or land that is vacant pending development. To achieve this goal, landowners may be required to sign restrictive agreements (California) or restrictive covenants (Georgia, Hawaii, New York, and Pennsylvania). The restrictive agreements must be signed as a condition precedent to the value assessment. n173 In Minnesota, this goal is achieved by having fairly restrictive eligibility criteria: lots must be at least ten acres and must meet an ownership and production test. For the ownership test, the land must be the owner's homestead or that of a surviving spouse, child, or sibling; the land must have been in possession of one of the previously mentioned parties for seven years; or the land must be the homestead of a shareholder in a family farm corporation. Eligible uses are those where (1) the land is devoted to agricultural uses for sale, (2) the proceeds from [*310] the land constitute at least one-third of the owner's income, or (3) the land "yields at least \$ 300 plus \$ 10 per tillable acre in total income, including rent." n174

3. Land Conversion Tax

A land conversion tax is a fee to convert farmland from agricultural to non-agricultural uses and is best demonstrated by California's Williamson Act. Under the Act, participating landowners sign a ten-year contract with the county that renews annually and gives the landowners a substantial tax break. In return, the landowner agrees to use the land only for agricultural purposes. If the landowner wants to get out of the program, he or she may initiate the nine-year non-renewal process. During the nonrenewal process, the annual tax assessment gradually increases. At the end of the period, the contract is terminated. To approve a tentative contract cancellation, a county or municipality must make specific findings that are supported by substantial evidence. The existence of an opportunity for another use of the property is not sufficient reason for cancellation. In addition, the uneconomic character of an existing agricultural use shall not, by itself, be a sufficient reason to cancel a contract. The landowner must pay a cancellation fee equal to 12 and one-half percent of the cancellation valuation of the property. n175

E. Infrastructure Fees

1. Impact Fees

Impact fees are mandatory payments imposed by local governments at the time of development approval that are calculated to be the proportionate share of the capital cost of providing a development with major infrastructure such as roads, schools, sewer and water lines, and emergency services. n176 The charges differ from taxes in that impact fees constitute a single payment, unlike periodic payments of taxes. The developer is only required to pay his "fair share," or the cost that the new development will impose on the community. n177 Governments favor impact fees because they reduce the reliance on bonds to finance [*311] infrastructure and because the community avoids paying the high costs of development on the fringe or in areas without existing infrastructure. Impact fees exist in some form or other in every state. n178

The power to charge impact fees is derived from local government's police powers. While some states enact enabling legislation for impact fees, others simply delegate the power to local governments through home rule power. n179 Local governments have limited powers to impose taxes, but they have broad powers to regulate to protect the health, safety, and welfare of the community. n180 The courts have upheld the legality of impact fees if there is a rational relationship between the demands of new development and assessments against it. n181 There are two prongs in this rational nexus test: first, there must be a need for an additional public facility or service created by the new development and the fee must not exceed the cost of providing the facility; and second, the development charged the fee must derive some benefit from the new facility. n182 Impact fees that do not meet this test are considered unconstitutional takings, entitling the property owner to monetary damages.

Impact fee programs must be carefully designed so the fees are reasonable and fairly and accurately reflect a new development's fair share of the necessary facility. n183 Local governments often use careful economic analysis and planning to determine impact fees. While impact fees have not traditionally been used as a direct tool to protect agricultural land, n184 they have been used as part of an overall growth management policy that may have a strong preservation component. n185

2. Environmental Impact Fees and Mitigation Ordinances

A new type of impact fee, called an environmental mitigation fee or simply a mitigation fee, is a hybrid between an impact fee and the marketbased environmental mitigation models. n186 In the context of [*312] agricultural preservation, municipalities identify agricultural and natural resource lands that are in danger of conversion through a comprehensive planning process. The comprehensive plan guides the assessment of impact of any development. n187 A developer would be charged based on an established formula and may choose one of three options: pay and proceed with the project, reduce the adverse impact and pay a reduced fee, or pay another firm to mitigate adverse environmental impact elsewhere. n188 In essence, mitigation fees require that developers permanently protect open space or agricultural land in exchange for permission to convert other land to urban uses. n189 The money generated through mitigation fees can be funneled into agricultural preservation programs such as PDR, PACE, and TDR or into local budgets for monitoring and enforcement.

Though few courts have addressed mitigation fees, they have withstood inverse condemnation challenges in California. The Fourth District Court of Appeals held that the enactment of a comprehensive plan requiring the dedication of an agricultural conservation easement as a condition of approval to develop land for nonagricultural purposes did not violate due process or amount to a taking. n190 While the plaintiffs challenging the ordinance argued that it was precluded under a Dolan takings analysis, the court found otherwise, indicating that a legislatively adopted zoning scheme, such as a mitigation ordinance, is distinguishable from a Dolan taking because the condition is simply a limitation on the use that the applicant might make of his own parcel. n191 The Dolan case "is limited to adjudicative decisions conditioning permit applications on particular parcels." n192

F. Comprehensive Planning

Timing and sequencing development to coincide with the provision of public facilities was first implemented in an innovative plan in Ramapo, New York, and was upheld by the courts in the landmark case of *Golden v. Planning Board of Town of Ramapo*. n193 The basic idea is that all residential development must proceed according to the provision [*313] of adequate municipal facilities as established by a long-term comprehensive and capital improvement program. n194 The importance of the Ramapo plan is the recognition of the fundamental constitutional principle that development on the urban fringe can be controlled by linking the development with the planned extension of capital improvements over a reasonable time.

A tier system utilizes the Ramapo principle by providing for the delineation of functional areas within the region for the identification of goals and objectives and the implementation of growth management techniques. n195 The number of tiers will vary according to the current and desired pattern of the urban area but will generally include a downtown area or urban core, existing residential areas within the urban area and older suburban areas, a developing area, rural and agricultural lands that are inappropriate or premature for development, and environmental and agricultural zones that warrant preservation or protection through environmental protection. n196

The tier model is further articulated through concurrency systems that tie development approvals to level of service (LOS) standards. LOS standards measure the ratio of public facility capacity to the need for the facility. Concurrency ordinances take into account all demand for the facilities, including existing demand as well as the additional population added by new development proposals. n197 An adopted LOS standard reflects a policy decision concerning the appropriate equilibrium between population and public facilities that may be applied to new development in the standard setting and review process and to the public capital budgeting process. Lastly, LOS standards provide a convenient benchmark for monitoring the growth management system. n198

Tier and concurrency systems preserve agricultural lands by directing development to existing urban areas and by prioritizing lands to be given over to development based on infrastructure and LOS standards. These systems do not concentrate on one particular sector of a city but instead concentrate on planning for the entire area. The result is that agricultural and open space preservation are given due consideration and are seen as an important resource for the entire community. [*314]

IV. CASE STUDY

A. County Profile

Miami-Dade County is located on the southeastern coast of Florida and is home to 31 local municipalities. From 1990 to 2000, the population of the county grew from 1,937,194 to 2,175,634, an increase of 12.3 percent. n199 The county encompasses approximately 1.55 million acres of land, three-fourths of which are under water, in water conser-

vation areas or in areas considered sub-marginal for urban or agricultural uses. n200 Agricultural uses in Miami-Dade County are located in the south central portion of the county, also known as the Redlands, but considerable urban land uses are scattered throughout this agricultural area.

Agricultural land in Miami-Dade County is considered to be among the most threatened in the nation. n201 Even though the number of acres of rural land is not decreasing rapidly, the uses on those agricultural lands are changing to the detriment of agriculture. According to the Census of Agriculture, land devoted to agriculture has remained fairly stable since the 1980s, ranging from 83 to 87 thousand acres. n202 However, between 1992 and 1997, the number of farms has decreased by 17 percent, reflecting a nationwide trend of corporate farming, and the average farm size increased by almost 23 percent, from 44 to 54 acres, during that same five-year period. n203 Increasing numbers of residential uses and "hobby farms" exist in the rural area, and traditional farmers are disappearing due to international competition, infestation of pests, and the decreasing economic viability of the farming industry.

Land uses in Miami-Dade County are guided by the Comprehensive Plan and its accompanying Land Use Planning (LUP) map. While the Comprehensive Plan does address agriculture in its land use policies, there is not a specific agricultural element to the plan. The Urban Development Boundary (UDB) is a major component of the land use strategy as it demarcates where urban development ends and rural [*315] development begins. n204 Most agricultural lands exist outside the UDB, though some are located within the boundary. There is a blanket zoning of one dwelling unit per five acres outside the UDB, regardless of whether or not the land is being used for agriculture. The rural area has a mix of agricultural uses and single family residential uses, thereby increasing the danger for incompatibility of farm and non-farm uses.

Historically, Miami-Dade County land use patterns reflect patterns across America: loss of agricultural land to urban development, rising land prices on the fringe, and urban sprawl. Since World War II, the greatest proportion of growth has taken place in the urban-rural fringes of major metropolitan centers. This type of growth has led to the depletion and deprivation of important environmental resources, including the loss of unique agricultural lands. n205 As urban growth spreads into the rural and semi-rural areas of Miami-Dade County, the character unique to the rural community is threatened. n206

B. Suggested Use of Tools in Miami-Dade County

Miami-Dade County can benefit from many of the tools discussed in this article through the adaptation of a comprehensive agricultural preservation plan that utilizes a range of techniques that address the diverse needs of the rural area. n207 The suggested use of tools discussed in this article is but one way they might be combined for agricultural preservation, and other possibilities do exist. In any case, a successful plan must balance the needs of preservation with private property rights to withstand legal challenges.

Many of the agricultural preservation techniques discussed are appropriate for Miami-Dade County given its specific situation and are combined below in the following categories: purchase/transfer of development rights, clustering, and concurrency. The combination of [*316] these elements might help to provide maximum choice to the residents of the rural area while contributing to an overall agricultural preservation plan by making as much land available for agriculture as possible by reducing conflicts between uses, reducing development pressure, and allowing development in appropriate areas.

Miami-Dade County is an appropriate ground for the transfer and purchase of a development right program because of the existence of the UDB, the existing zoning, and the vast expanses of agricultural lands. While the UDB delineates urban zoning and uses from rural areas, some areas of the UDB are still developed at rural densities. Moreover, there are a number of incorporated municipalities extending to the edge of the urbanized area that still have vacant land available for development. While residents in these municipalities might argue that higher densities within their existing urban areas could be a detriment to the community, thus arguing for fringe development on agricultural lands, the opposite is actually true. If the agricultural lands are developed in a typical suburban fashion with large lots, few urban amenities, and little employment opportunities, commuters from the newer areas will be driving through the existing urban areas. Although the commuters' use of the urban infrastructure will decrease the quality of the services, the users will not pay taxes to fund improvements and maintenance. Therefore, increased densities inside the UDB are actually beneficial to all areas. Thus, a transfer of development rights program could be developed between the county and local municipalities so that the county agricultural areas would constitute the main sending zones, and vacant land within municipalities and county land within the UDB would constitute the receiving areas. The location of the UDB, and subsequent pressure on rural areas due to the possibility of urban style services in other areas and encroaching urban uses, provides some obvious criteria for prioritization, an important element of a successful TDR program. Choice of lands to

be included in the program could also occur through the use of a LESA system that prioritized based on soils, proximity to infrastructure and services, and potential environmental impacts.

Similarly, the area is appropriate for a purchase of development rights program. Prioritization of lands can occur as discussed above. The biggest challenge would be raising money for the program. The county could utilize some of the revenue raising tools, including a bond measure, land transfer taxes, mitigation fees, or a land conversion tax.

Clustering is another appropriate technique for the preservation of agricultural lands in Miami-Dade County because there is a general consensus regarding the maintenance of the current one-to-five density. Some residents could maintain large- or small-scale agriculture while [*317] others could cluster uses in appropriate areas, and the overall density average would remain consistent. The clustering should be used sparingly, though, and should only be allowed under specific criteria to minimize conflicts detrimental to farming. Criteria for clustering should be guided by LOS standards, a LESA evaluation, and the county's long-term goals for the rural area.

The Florida Growth Management Act of 1985 mandates concurrency. According to that law, the Miami-Dade Comprehensive Plan establishes LOS standards for transportation facilities, sewerage, water, drainage/aquifer recharge, solid waste disposal, recreation/open space, coastal management, and conservation. However, these concurrency regulations only apply to the area inside the UDB; no specific LOS standards exist for the rural area. Instead, the county simply has a policy of restricting the infrastructure and other services to a "rural" level. Development, albeit rural in nature, is allowed consistently in the rural area without thought to where it is most necessary based on existing uses, infrastructure and long-term planning goals. Thus, the adoption of rural LOS standards and a corresponding CIP for these services is appropriate to encourage preservation of the lands that the county finds most important. Therefore, while services may be available in certain areas, they will be restricted in others as appropriate to protect the most threatened agricultural lands. Some areas should have LOS standards at a higher level because of potential clustering; other areas might have lower LOS standards because of participation in TDR, PDR, and conservation easement programs. LOS standards will also help preserve the agriculture industry by allowing improvement in services such as roads, which support economic development.

Because of the high growth rate in the area, Miami-Dade County should consider the expansion of the UDB, although this strategy may be controversial and expansion will require political will. While critics might argue that this expansion will actually lead to the increased degradation of agricultural lands, it is possible to allow new development on former agricultural lands with little negative impact. For example, the county may expand the UDB and institute a minimum zoning requirement so that individuals who want to develop in the new tier could only do so by purchasing development rights. Requiring property owners to purchase these rights should relieve agricultural lands of development pressure by placing restrictions on the land and creating more housing units within the UDB. Clustering could also be encouraged within the new tier, thereby preserving areas of open space. Those who do not wish to develop at higher densities may have the opportunity to develop at lower densities only after paying a mitigation fee. The fee would constitute their payment for the detriment they are [*318] causing to the agricultural lands and to the community overall and could be used to fund a PDR program.

V. CONCLUSION

The need for agricultural preservation grows every day as cities pour into rural areas in search of large open tracts of land for the expansion of the suburbs. While growth of cities is essential to their economic health, that growth does not have to be at a premium cost to rural areas. The agricultural industry is vital to the United States economically, environmentally, and socially; therefore, local planners and community members must make agricultural preservation part of their long-term planning goals. There is no doubt that the realities of agriculture are changing as small farmers find that agricultural production is no longer viable, as the popularity of organic farming and specialty crops increases, and as globalization raises phyto-sanitary and economic issues. Therefore, realistic, long-term planning goals that take the benefits and drawbacks of agriculture into account are vital. Land use planning is one tool that can be paired with other strategies to help save vital agricultural lands so that the benefits of farming can be realized in our communities for the future.

FOOTNOTES:

n1 American Farmland Trust, Farmland Information Center, Fact Sheet: Why Save Farmland?, 1, available at [http://www.farmlandinfo.org/documents/28562/FSWhy%20Save%20Farmland 1-03.pdf](http://www.farmlandinfo.org/documents/28562/FSWhy%20Save%20Farmland%201-03.pdf) (last visited Mar. 29, 2004).

n2 Id.

n3 Id. at 2.

n4 Id. at 3.

n5 See *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500-07 (1987); *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962).

n6 Robert H. Freilich & Jason M. Divelbiss, *The Public Interest Is Vindicated: City of Monterey v. Del Monte Dunes*, 31 *Urb. Law.* 371, 374 (1999).

n7 See *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 39 *Cal. 3d* 878, 882 (1985); *Scrutton v. County of Sacramento*, 79 *Cal. Rptr.* 872, 876 (*Cal. Ct. App.* 1969); *De Vita v. County of Napa*, 9 *Cal. 4th* 763, 764 (1995).

n8 *Cal. Const. art. XI, § 7.*

n9 *DeBenedictis*, 480 U.S. at 485-493.

n10 Since the seminal case *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the court has recognized three kinds of regulatory takings: physical, title, and economic. A physical taking is one where a governmental entity invades private property regardless of the extent of diminution in property value. See *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). A title or exaction taking does not involve land invasion but results from the government accepting a title dedication or monetary exaction representing a payment in lieu of dedication. See *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 836 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386-87 (1994). An economic taking is one where a regulation does not substantially advance a legitimate state interest and denies an owner the economically viable use of his land. See *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

n11 *First English Evangelical Church v. County of Los Angeles*, 107 S. Ct. 2378, 2386 (1987).

n12 *Nollan*, 483 U.S. at 833-34.

n13 See, e.g., *Agins*, 447 U.S. at 255-27; *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 261 (1984); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-16 (1992).

n14 *Penn Cent.*, 438 U.S. at 125.

n15 *Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 518 (1971).

n16 See, e.g., *Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 644-45 (1993); *Pennel v. City of San Jose*, 485 U.S. 1 (1988); *Hodel v. Irving*, 481 U.S. 704, 714 (1987).

n17 See, e.g., *Concrete Pipe & Products*, 508 U.S. at 643-44; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Ass'n*, 535 U.S. 302, 331-33 ("Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole,' whereas a temporary restriction that merely causes a diminution in value is not.").

n18 *Penn Cent. Transp. Co.*, 438 U.S. at 104.

n19 The Supreme Court considered a TDR program in Lake Tahoe, regulated by the Tahoe Regional Planning Agency, in *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997). The court did not rule on the TDR question, ruling instead on narrow ripeness grounds. Justice Scalia's concurrence seriously questioned the validity of the TDR program and has spawned much academic debate. See, e.g., William Hadley Littlewood, Transferable Development Rights, TRPA, and Takings, The Role of TDRS in the Constitutional Takings Analysis, 30 *McGeorge L. Rev.* 201 (1998); Julian Conrad Juergensmeyer et al., Transferable Development Rights and Alternatives after Suitum, 30 *Urb. Law.* 441 (1998); R.S. Radford, Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRS in the Aftermath of Suitum, 28 *Stetson L. Rev.* 685 (1999); Andrew J. Miller, Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?, 39 *Nat. Resources J.* 459 (1999).

n20 See, e.g., *Barancik v. County of Marin*, 872 F.2d 834, 837 (9th Cir. 1988); *Ojavan Investors, Inc. v. Cal. Coastal Comm'n*, 26 *Cal. App. 4th* 516, 525 (1994); *A Local and Regional Monitor*, 16 *Cal. 2d* 358 (*Ca. App.* 1993); Daniel J. Curtin & Cecily T. Talbert, *Curtin's California Land Use and Planning Law* 67 (22d ed. 2002).

n21 Am. Law Inst.--Am. Bar Ass'n Continuing Legal Educ., State and Local Preservation Policy: A Review of Transferable Development Rights (TDR) Programs in the United States, SG040 ALIABA 409 (Oct. 2001).

n22 *Aptos Seascape Corp. v. County of Santa Cruz*, 138 *Cal. App. 3d* 484 (1st Dist. 1982).

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n24 *Id.* at 496.

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n26 872 *F.2d* 834 (9th Cir. 1988).

n27 *Id.* at 835.

n28 *Id. at 836.*

n29 *Id. at 837.*

n30 *Id.*

n31 *512 U.S. 374 (1994).*

n32 *483 U.S. 825 (1987).*

n33 *Dolan, 512 U.S. at 391.*

n34 *911 P.2d 429 (1996).*

n35 For a complete set of the facts, see *id. at 433-36.*

n36 *Id.*

n37 *Id.*

n38 Cal. Gov't Code § § 66000-66005 (2004).

n39 *Id. at § 66001(a)-(b).* See Curtin, *supra* note 20.

n40 *Assoc. Home Builders, Inc. v. City of Livermore, 557 P.2d 473, 483 (1976).*

n41 *Ewing v. City of Carmel-by-the-Sea, 234 Cal. App. 3d 1579 (1991).*

n42 *Metromedia, Inc. v. City of San Diego, 610 P.2d 407 (Cal. 1980)* (banning offsite advertising signs); *Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996)* (public art fee ordinance).

n43 Curtin, *supra* note 20, at 3.

n44 *272 U.S. 365, 395 (1926).*

n45 *Id. at 390.* See *Nectow v. City of Cambridge, 277 U.S. 183 (1928)* (substantive due process applicable to challenges to zoning ordinances).

n46 *Borough of Cresskill v. Borough of Dumont*, 100 A.2d 182 (N.J. 1953).

n47 *Id.* at 191-92.

n48 557 P.2d at 473.

n49 *Id.* at 483.

n50 *Cal. Gov't Code* § 65561(a) (2004).

n51 *Id.* at § 65561(b) ("Discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers.").

n52 *Cal. Pub. Res. Code* § 31156 (2004).

n53 See, e.g., *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987), cert. denied, 488 U.S. 827 (1988); *Zilber v. Town of Moraga*, 692 F. Supp. 1195 (N.D. Cal. 1988); *Twain Harte Assocs. v. County of Tuolumne*, 265 Cal. Rptr. 737 (Cal. Ct. App. 1990); *Eldridge v. City of Palo Alto*, 129 Cal. Rptr. 575 (Cal. Ct. App. 1976).

n54 *Associated Home Builders v. City of Walnut Creek*, 484 P.2d 606, 613 (Cal. 1971).

n55 272 U.S. at 365.

n56 Robert H. Freilich, Am. Bar Ass'n, *From Sprawl to Smart Growth: Successful Legal, Planning, and Environmental Systems* 284 (1999).

n57 Am. Farmland Trust, *Saving American Farmland: What Works* 51 (1997).

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n59 *Id.* at 59.

n60 *Id.* at 317.

n61 *Id.*

n62 *Id.* at 59-60.

n63 *Am. Farmland Trust, supra* note 57, at 60.

n64 *Id.* at 59.

n65 Tom Daniels, *When City and Country Collide: Managing Growth in the Metropolitan Fringe* 217-18 (1999).

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n67 Mass. Dep't of Housing & Community Dev., *Executive Order 418 Housing Certification FY 2002*, available at <http://www2.massdhcd.com/e418portal/CommReport02.asp?MNO=317&FY=2002> (last visited Mar. 18, 2004).

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n72 Southeastern Wisconsin Regional Planning Commission, *Model Zoning Ordinance for Rural Cluster Development*, available at <http://www.sewrpc.org/modelordinances/clusterordinance.pdf> (last visited Mar. 18, 2004).

n73 Tyson Smith & Philip Moffat, *An Analysis of the Development and Planning Alternatives to Protect the Character of Eastern Sarasota County while Minimizing Adverse Impacts on Sarasota County Taxpayers*, 32 (Jan. 2000) (unpublished manuscript) (on file with the University of Florida Conservation Clinic).

n74 Randall Arendt, "Open Space" Zoning: What It Is and Why It Works, 5 *Plan. Commissioners J.* 4 (1992), available at <http://www.plannersweb.com/articles/are015.html#mandatory> (last visited Mar. 18, 2004).

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n76 *Id.*

n77 Smith & Moffat, *supra* note 73, at 31.

n78 *Am. Farmland Trust*, *supra* note 57 at 33.

n79 Daniels, *supra* note 65, at 219.

n80 *Id.*

n81 *Id.*

n82 *Id.*

n83 *Id.*

n84 Nat'l Conservation Buffer Council, Conservation Buffers: Showing Stewardship, Protecting Productivity, available at Dep't of Agriculture, Natural Resources Conservation Serv., Buffer Strips: Common Sense Conservation, at <http://www.nrcs.usda.gov/feature/buffers/#Anchor-WhatBuffer> (last modified Mar. 18, 2004).

n85 *Am. Farmland Trust*, *supra* note 57, at 318.

n86 Nat'l Conservation Buffer Council, *supra* note 84.

n87 For example, in San Luis Obispo County buffers are mandatory and range from 100 to 800 feet depending on agriculture type, in Sacramento County buffers are mandatory and generally require a physical separation of 300 to 500 feet, and in Stanislaus County buffers are mandatory and the type of buffer (topographical, vegetative, or other) is determined on a site-by-site basis. Farmland Programs Neglect Buffer Protections, 12 Farmland Preservation Rep., Feb. 2002, at 2 [hereinafter Farmland Rep.].

n88 *Id.* at 5.

n89 Ga. Dep't of Community Affairs, Model Code, Alternatives to Conventional Zoning: Agricultural Buffer Requirements § 4-3 (Apr. 2002), available at <http://www.dca.state.ga.us/planning/ModelCode/4-3AgriculturalBuffer.pdf> (last visited Mar. 18, 2004).

n90 *Id.*

n91 Farmland Rep., *supra* note 87.

n92 See *id.* at 3.

n93 *Am. Farmland Trust*, *supra* note 57, at 50.

n94 *Id.*

n95 *Id.*

n96 *Id.* at 169.

n97 A public nuisance involves actions that injure the public at large, while private nuisances interfere with an individual's use of his property.

n98 *Am. Farmland Trust*, *supra* note 57, at 169.

n99 Daniels, *supra* note 65, at 220.

n100 Freilich, *supra* note 56, at 287.

n101 *Am. Farmland Trust*, *supra* note 57, at 169.

n102 Freilich, *supra* note 56, at 287.

n103 *Id.* Melody Petersen, Farmers' Right to Sue Grows, Raising Debate on Food Safety, N.Y. Times, June 1, 1999, at A1.

n104 Freilich, *supra* note 56.

n105 *Id.* at 287.

n106 See, e.g., *Boomer v. Atlantic Cement Co., Inc.*, 340 N.Y.S.2d 97 (N.Y. Sup. Ct. 1972).

n107 Daniels, *supra* note 65, at 150.

n108 *Id.* at 151.

n109 *Id.*

n110 *Am. Farmland Trust*, *supra* note 57, at 176-79.

n111 *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 320-21 (Iowa 1998).

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n119 *Id.*

n120 *Id.*

n121 Freilich, *supra* note 56, at 286.

n122 Loyd E. Wright, The Development and Status of LESA, in *A Decade with LESA: The Evolution of Land Evaluation and Site Assessment* 33, 35 (Frederick R. Steiner et al. eds., 1994)

n123 *Id.*

n124 *Id.*

n125 *Id.* at 58 (referencing F. Steiner et al., *Agricultural Land Evaluation and Site Assessment: Status of State and Local Programs* (1991)).

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n127 Id.

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n131 Kelly A. Casillas, Protecting Open Space: Conservation Easements and Other Open Space Strategies 447 (Feb. 2002) (unpublished manuscript, on file with author).

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n133 Id.

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n135 Id.

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n138 Frank Schnidman et al., Retention of Land for Agriculture: Policy, Practice and Potential in New England 18 (1990).

n139 See, e.g., *R.I. Gen. Laws* § 42-82-5(e) (2003).

n140 See, e.g., Schnidman et al., *supra* note 138 (containing information on Rhode Island at 204-05, Vermont at 141-43, Connecticut at 186, Maine at 306, and Massachusetts at 88-91).

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n143 Daniels, *supra* note 65, at 223.

n144 Salkin, *supra* note 142.

n145 Rick Pruetz, *Saved by Development: Preserving Environmental Areas, Farmland and Historic Landmarks with Transfer of Development Rights* 69 (1997).

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n149 Daniels, *supra* note 65, at 224.

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n151 Miller, *supra* note 20, at 467.

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n178 James C. Nicholas et al., Perspectives Concerning the Use of Environmental Mitigation Fees as Incentives in Environmental Protection (Part I), 7 *Envtl. Liability* 25, 28 (1999).

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n180 Id. at 28.

n181 Id. at 30. See also *Jordan v. Vill. of Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965).

n182 Nicholas et al., supra note 178, at 30. See also *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180, 183 (Fla.1995).

n183 Nicholas et al., supra note 178, at 30-31.

n184 They have been used to reduce sprawl but have not been a direct method such as agricultural zoning or TDRs.

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n187 Id.

n188 The third option might be similar to off-site mitigation programs such as pollution trading and wetlands mitigation programs, see Nicholas et al., supra note 186.

n189 Casillas, supra note 131, at 449.

n190 *San Mateo County Coastal Landowners' Assn. v. County of San Mateo*, 38 Cal. App. 4th 523 (1995).

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n207 Successful agricultural preservation does not occur only through utilization of land use strategies; other economic development, technical assistance, marketing, and trade techniques and realization of the cultural importance of farming are also necessary. Additional strategies might include promotion of agricultural tourism programs; strengthening local legislation, such as the right-to-farm law; and lobbying to change state legislation to allow for greater tax incentives and agricultural districts. This article, however, limits itself to land use recommendations that will help to support an overall agricultural preservation program.