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FARMLAND PRESERVATION BY PURCHASE OF DEVELOPMENT RIGHTS: THE LONG ISLAND EXPERIMENT

Craig A. Peterson*
and
Claire McCarthy**

Suffolk County, on New York's rapidly urbanizing Long Island, recently has established a program to preserve farmland. Under this program, farmland is divided into an underlying title which is kept by the farmer, and development rights which are purchased by the government. The authors review the Long Island experiment and discuss its successes and failures. In addition, the authors propose contract provisions and administrative procedures to guide future attempts to preserve America's open spaces.

America's need for open spaces has become a widespread and popular concern—at times a very fashionable if not faddish one. Those individuals dedicated to any one purpose served by open space may remain largely unconcerned about others.¹ One universally accepted goal of open space conservation, however, is preservation of agricultural land.

A primary justification for farmland preservation, in addition to the obvious aesthetic function it serves,² is that it promotes a viable segment of the nation's economy. While protecting agricultural land helps safeguard the nation's food supply,³ it often at-

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1. Several examples of the varied and conflicting uses served by open space are: to conserve wildlife habitats; to provide areas for outdoor recreation, either through small neighborhood parks in developed areas or by securing large open areas to contain urban sprawl; to preserve areas of historical importance; or to secure space for future, timed development.

2. Krasnowiecki & Strong, *Compensation Regulations for Open Space, a Means of Controlling Urban Growth*, 29 J. AM. INST. PLANNERS 87, 91 (1963).

3. The proposed National Land Use Planning Act of 1973 included agricultural lands among areas of critical environmental concern since "uncontrolled or incompatible development could endanger future water, food and fiber requirements of more than local concern." H.R. 10294, 93rd CONG., 1st Sess. §413(a)(3)(1973). See Wershow & Meyer,

tracts a lucrative tourist trade and "rural-resort economy"⁴ by preserving the scenic value of the area. Moreover, the economy is boosted by energy conservation for, by limiting urbanization, farm preservation helps create a more efficient use of energy producing resources.⁵ Farmland preservation also has a significant impact on the nation's ecology, especially in maintaining the supply and quality of ground water.⁶ Finally, farmland preservation is justified by its effect in preventing urban sprawl⁷ and protect-

Preservation of Florida's Agricultural Resources Through Land Use Planning, 27 U. FLA. L. REV. 130 (1974).

4. C. DU TOT, PARTNERSHIP, PLANNING AND ENGINEERING GUIDELINES HANDBOOK, FARMING (prepared for Suffolk County, New York farmland preservation plan 1974).

5. The first stated recommendation of voluntary programs to conserve energy in the area of agriculture is to restrict developments. Illinois Energy Issues (Citizens for Alternate Energy, Jan. 1977).

6. Farmland preservation would help in avoiding problems of some highly urbanized areas such as those near New York City, where the water supply has been endangered and water has had to be imported. See J. KLEIN, REPORT TO THE SUFFOLK COUNTY NEW YORK LEGISLATURE (1973). Successful protection of the water supply, however, necessitates large areas of open space. This creates serious threshold problems. For instance, maintaining the water supply may preclude unreasonably the future population from having sufficient housing.

7. See J. KLEIN, REPORT TO THE SUFFOLK COUNTY NEW YORK LEGISLATURE (1973). It may well be, however, that a farmland preservation program would force development into other areas which are even less desirable for such development than the farmland conserved. Additionally, the pressures exerted on local governments to rezone currently low-density parcels to permit higher density development could increase. Increased demand, coupled with increased scarcity of developable land, presumably would push the cost of developable land higher, with the result that the cost of providing adequate housing would increase.

If the strong anti-exclusionary trend in the state courts, as exemplified by *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), continues, the appropriateness of some features of agricultural preservation might be called into question. In *Mount Laurel*, arising in the state of New Jersey, the court held that developing municipalities must zone to provide an opportunity, limited by a "fair share" of the regional need, for a range of density levels, building types, and lot sizes. This would provide some land for density levels and building types which are appropriate for low and moderate cost housing.

There are additional questions which must be asked and answered concerning any farmland preservation program; (1) Is agricultural preservation in general and the acquisition of particular farmland parcels, in particular, consistent with general comprehensive plans of affected governmental units? (2) Can data be marshalled to show that the acquisition of particular parcels at particular prices will in fact modify development patterns on land other than that being acquired? (3) What is the magnitude of the saving, if any, of public costs of schooling, sewers, and the like, so as to justify the acquisition costs and expensive administering programs? (4) Would the money be better spent for other social purposes? (5) Would the acquisitions unreasonably preclude the future population from

ing quality agricultural acreage.

Today, more and more farmland is being sold under the pressure of development. As urban and suburban centers expand, the market values of land rise and farmland owners, many of them non-farmers who lease their land to farmers, appear susceptible to the lure of profit.⁸ There is an urgent problem associated with this trend. Wisely cultivated, prime agricultural land has a seemingly infinite capacity to produce. Yet land once lost to agricultural production is lost forever.⁹ As a result of unrestricted developments, much of the quality farmland in the United States has been lost permanently.¹⁰

One particularly promising technique to preserve farmland is the acquisition of development rights, hereafter referred to as DR's. These rights, which "do not possess a clearly defined character in property law,"¹¹ elude a rigid definition.¹² Briefly stated, however, the concept of farm preservation through the acquisition of development rights is that a farmer splits his fee simple into

having sufficient housing? (6) Will certain other non-residential uses which might be needed to broaden the local tax base be effectively precluded? (7) Will farmland preservation deter population growth temporarily until localities and municipalities have the mechanisms to manage growth?

In general, the question is "whose 'community' is to be improved, whose amenities protected, and at how much cost to whom?" Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 183 (1961).

8. This is not to suggest that no farmers are interested in reaping the financial benefits of land sales to developers. Senator Hector MacPherson of Oregon, himself a dairy farmer who has worked in his state for statewide land-use legislation, once said "Scratch a farmer, and you'll find a subdivider." C. LITTLE, *THE NEW OREGON TRIAL* 26 (1974).

9. The supply of prime farmland is limited: in 1973 there were 465 million acres of cropland in the United States, only 72 million of which were prime agricultural land (Class I) and over half of that acreage was in urban areas. See J. KLEIN, *REPORT TO THE SUFFOLK COUNTY NEW YORK LEGISLATURE* (1973).

10. As William Reilly has noted:

The land market, as it operates today, is the principal obstacle to effective protection of private open space. To achieve permanent protection, open spaces should be insulated as completely as possible from the market forces that now inexorably press them into development. One way to accomplish this objective is for owners of open space to give them up or sell some of their property rights.

THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH 21 (W. Reilly ed. 1973).

11. Krasnowiecki & Strong, *Compensation Regulations for Open Space, a Means of Controlling Urban Growth*, 29 J. AM. INST. PLANNERS 87, 95 (1963).

12. For the importance of careful definition of language in defining D.R.'s, see notes 68-70 and accompanying text *infra*.

(1) an underlying interest or title and (2) DR's.¹³ The DR's are sold to a governmental unit. Upon receipt of a deed to the DR's, the government has the right and power to restrict that acreage for agricultural uses, even if the farmer subsequently sells the underlying title to the land.

There are financial advantages to the farmland owner in selling DR's. Financial demands on the farmer, such as high operating costs and real estate taxes, reduce the likelihood that the farmer will be able to recapture the necessary investments for production that will generate a reasonable rate of return.¹⁴ The DR acquisition program helps relieve the farmer's financial troubles by preventing the spread of urbanization, which in turn keeps the value of the farmland and real estate taxes low. Furthermore, the government buys the DR's and thus gives the farmer an increased available cash reserve, especially necessary to meet anticipated death taxes. At the same time, to remain in agriculture, farmers need the flexibility to shift from one agricultural use to another, or they may want to provide for the construction of additional residences in the event that any descendants wish to participate in the farming operation. Therefore, the farmer's flexibility is not diminished unduly because the land continues in agricultural use.

The basic reason the government purchases DR's is to ensure that the land will remain in agricultural production.¹⁵ The farmland may be sold, but the right to use the land for anything other than agricultural use is no longer part of the interest in the land

13. A DR is analogous in some respects to mineral or air rights. Although the owner transfers those rights (by sale, exchange or gift), he still retains the ownership of limited rights, as delineated by deed restrictions and/or easements.

14. T. CASPER, L. SCHNEIDER & D. DERR, *THE APPLICATION AND COSTS OF THE DEVELOPMENT RIGHT CONCEPT TO FARMLAND IN NEW JERSEY 1-2* (special report #19 February 1973).

15. For a description and evaluation of other possible techniques, see *MANAGEMENT AND CONTROL OF GROWTH* (R. Scott, D. Brower, D. Miner ed. 1975); Bosselman, *Growth Management and Constitutional Rights, Part II: The States Search for a Growth Policy*, 11 *URBAN L. ANN.* 3 (1976); Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Land*, 20 *S.D. L. REV.* 548 (1975); Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 *VILL. L. REV.* 559 (1964); Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 *U. PENN. L. REV.* 179 (1961); Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 *MINN. L. REV.* 1 (1972); Comment, *Control of Urban Sprawl or Securing Open Space: Regulation by Condemnation or by Ordinance*, 50 *CAL. L. REV.* 483 (1962); Note, *Techniques for Preserving Open Spaces*, 75 *HARV. L. REV.* 1622 (1962).

held by the landowner, and cannot be conveyed by him to any buyer. In addition, the government can preserve the aesthetic value of the land by prohibiting shifts or changes from existing agricultural uses. The government may restrict signs, billboards and other advertisements; garbage and storage dumps; portable living quarters such as trailer and mobile home parks; removal of surface minerals; industrial activity; removal of trees and shrubs except where necessary; installation of unsightly utility poles; commercial activity, except as incidental to agricultural uses; and additional buildings.

This Article focuses on DR acquisitions as a means of preserving farmland. Part I deals with the farmland preservation plan which is the most prominent, current DR acquisition program.¹⁶ It will describe the plan's development, standards, and procedures; evaluate the role of citizen participation; and recommend

16. A DR program can be divided conceptually into two functional phases: acquisition and administration. Problems and opportunities inherent in the acquisition phase include:

- (1) Identification of the level of government that should be primarily responsible for plan.
- (2) Constitutional, home rule, and enabling act mandates and possibilities.
- (3) Common law and statutory problems in defining the interest to be purchased.
- (4) Constraints relating to political attitudes.
- (5) Role of citizens in decision-making process.
- (6) Identification of alternative and supplemental programs of farmland preservation.
- (7) Selection of purchase criteria.
- (8) Decision as to voluntary elements of program and whether condemnation will be authorized.
- (9) Degree to which procedures and standards will be articulated in the statutes and ordinances, as opposed to administrative regulations.
- (10) Possible range of payment alternatives.

Issues and problems relating to administration and enforcement include:

- (1) Proper level of detail in legislative enactments to provide certainty without undue rigidity.
- (2) Establishment of fair, workable, written procedures that are understandable.
- (3) Articulation of standards for exercises of governmental discretion.
- (4) Development of enforcement mechanisms.
- (5) Establishment of provisions respecting possible dispositions of D.R.'s.
- (6) Selection of existing or new agencies to administer the program.
- (7) Identification of manpower, staff requirements, and administration board commitments.

other areas of possible cooperation between the private and public sectors. Part II will make selected recommendations for future DR programs.

I. SUFFOLK COUNTY DEVELOPMENT RIGHTS ACQUISITION PROGRAM

A. *Overview*

There have been several noteworthy attempts to preserve farmland by acquisition of DR's.¹⁷ The plan initiated in Suffolk

17. New Jersey has instituted a Demonstration Project to determine whether the purchase of Development Easements (DE's) would be an effective means for the state to preserve its farmland. See Agricultural Preserve Demonstration Program Act, ch. 50 (1976) N.J. Sess. Law Serv. 171 [to be codified as N.J. Stat. Ann. § 4:1b-1 to 4:1b-15 (West)]. Under the joint direction of the Departments of Agriculture and Environment Protection, the program is designed to purchase DE's to prime agricultural land with funds from the State's "Green Acres Fund."

Burlington County was chosen over 11 other areas considered for the demonstration project because (1) there are 771 parcels of farmland, most of them composed of prime, agricultural soil; (2) Burlington County has an urban-rural mix that is a reasonable facsimile of the typical farmland area in New Jersey, and (3) development pressure is not yet so great as to boost the cost of DE's beyond the resources of a limited budget.

The Green Acres Bond Act of 1975, enacted to fund the Green Acres and Recreation Opportunities Act of 1974, set aside \$200 million for preservation of open space. The question of the use of Green Acres funds for the preservation of farmland on a large scale raises certain problems for New Jersey, since the Green Acres Act was passed as a means of preserving open space for recreation and conservation purposes. Even Assembly Act #1334 (which approves the \$5 million for DE's) described the purpose of the funds as being for the "acquisition of lands by the State for recreation and conservation purposes, including the acquisition of development rights, conservation easements, and other interests less than a fee simple."

Public hearings were then held, at which over twenty individuals testified, representing a broad cross-section of organizations, including the Farm Bureau, the New Jersey Association of Realtors, New Jersey Builders Association, Burlington County Planning Boards, and the League for Conservation Legislation.

Following public hearings, a Steering Committee was appointed "to provide responsible advice and recommendations to the operating agency," the Division of Rural Resources of the Department of Agriculture, and to communicate with the general population concerning the program.

The specific responsibilities of the Steering Committee were: (1) to communicate with landowners and citizens in the project areas to inform them of the features of the project; (2) to advise the Division of Rural Resources on guidelines to be furnished to farmland owners in making their offers; (3) after receipt of offers, to advise the Division of Rural Resources on which offers conflicted with municipal or county plans or were otherwise unsuitable; (4) to advise the Division on guidelines to be used for appraisal; (5) after appraisal, to advise the Division on which parcels should be acquired.

The Division of Rural Resources has the general operating responsibility for the entire program; as its final task, it will submit recommendations to designated representatives

County, New York, however, is being watched closely by federal officials and others as a potential model for farmland preservation in other areas,¹⁸ and therefore is worthy of close analysis.¹⁹ The goal of this plan is to preserve as much prime agricultural land as possible. To implement this objective, the Suffolk County

of the Departments of Agriculture and Environmental Protection. After the decision of those representatives, the Department of Environmental Protection would be empowered to make DE purchases on behalf of the State of New Jersey.

The Demonstration Project includes provisions for review and evaluation at stated intervals by designated members of the Departments of Agriculture and Environmental Protection and the state legislature. Those reviews are to occur: (1) prior to solicitation of offers from farmland owners; (2) immediately after offers have been received and preliminary analysis by the Steering Committee and the Division is completed; (3) after appraisals and comparisons of bid value and appraised value by the Division; and (4) at the conclusion of the program. The entire project may be terminated at any one of those intervals.

Maryland has proposed a program which combines DR purchase with agricultural districting. Only landowners within an agricultural district of at least 500 acres may sell to the state an easement which would prohibit development of the land for other than agricultural or forestry uses. There is no provision for DR purchase outside such a district. See FINAL REPORT, COMMITTEE ON THE PRESERVATION OF AGRICULTURAL LAND, TO THE SECRETARY OF AGRICULTURE, MARYLAND DEPT. OF AGR. 38-39 (Aug. 1974).

A task force appointed by the Governor of Connecticut in 1974 to recommend a policy for maintaining farmland in that state established as its primary recommendation the preservation of "fertile land by purchasing development rights." (Letter to the author from Donald A. Tuttle, Director, Board of Agriculture, State of Connecticut (Dec. 23, 1976). As of late December 1976, legislation to implement the recommendation was being drafted.

An important element of this process was a comprehensive inventory of state cropland suitable for preservation, which was completed in mid-December 1976. Among the interesting findings of the inventory were: (1) "Farmers rent about half as much land as they own." Waggoner, Tuttle & Hill, "Land for Growing Food in Connecticut" 7 (unpublished report, the Connecticut Agricultural Experiment Station, New Haven, Connecticut, Dec. 15, 1976); (2) The owners of about half the land surveyed were interested in selling DR's. Based upon percentage of total acreage, 34% were interested in selling within 5 years, 8% after 5 years, 10%—perhaps, 21%—never, and the remainder were no reply or sold for development; and (3) The price of development rights would be approximately \$1,800 (market value per acre) less agricultural value, based upon a sample of farms sold during the period 1972-75. *Id.* at 10-12.

18. Assistant Secretary of Agriculture Robert W. Long remarked upon its passage: "This is the sort of action we've strongly encouraged; there isn't a better example of community effort." P. Roche, "Suffolk Plan to Save Farms Plants Seeds of Hope Across U.S.," *Wall St. J.*, Sept. 13, 1976, at 23, col. 3.

19. Much of the following information is based in part upon field work conducted by the authors during the summers of 1975 and 1976, including tape recorded interviews with farmers, citizen activists, legislators, and elected officials. Because the interviewees often requested that they not be quoted, observations based on those talks are not attributed by name. [hereinafter cited as Interviews] See Peterson & McCarthy, *These Farmers said 'No Sale'*, 41 PLANNING, J. AM. SOC. PLANNING OFFICIALS (1975).

Legislature passed a Capital Plan, which included funds for the acquisition of fee title to farmlands, and the Planning Department helped draft an acquisition program. In conjunction with this plan, an Agricultural Advisory Committee, hereafter referred to as the AAC, was formed²⁰ to "identify the problems which confront the agricultural industry and to help the County Administration and other local governmental units to develop the remedies."²¹

The consensus of the AAC was that real property and death taxation were the major problems facing the farmer. Under the then prevailing rules, land was valued at its highest and best use. In areas under developmental pressure, such as Suffolk County, land sold for real estate development purposes commanded high prices. Farmland was assessed for local real estate tax purposes at this higher fair market value rather than at its agricultural value. In addition, federal and state death taxes were frequently so high that portions of the land had to be sold by the estate for sufficient liquidity to satisfy the tax liabilities. Farmers on the AAC felt that existing approaches to minimize both property²²

20. Appointed by the County Executive, John Klein, in March 1972, the AAC was composed of fourteen farmers representing different types of agri-business interests, the Farm Bureau, and three ex-officio members: the County Executive, the Director of the Suffolk County Extension Service, and one of the County's seventeen legislators. The Committee met twelve times from April 1972 to March 1974.

21. KLEIN, FARMLANDS PRESERVATION PROGRAM: REPORT TO THE SUFFOLK COUNTY LEGISLATURE (1973).

22. In an attempt to cope with the problem of property tax, New York State in 1971 passed an Agricultural District Act, which permitted farmers to band together to form an agricultural district of at least 500 acres which would then be taxed on the basis of agricultural use only. Many states have had to amend their constitutions to allow for this type of "preferential assessments." See WHYTE, *THE LAST LANDSCAPE* (1968). See also Ellingson, *Differential Assessment and Local Government Controls to Preserve Agricultural Land*, 20 S.D. L. REV. 548 (1975).

A second device is Individual Commitment, available to any owner of not less than ten acres of land used in agricultural production. This land has been used in the preceding two years for the production of agricultural products of a gross average sales value of at least ten thousand dollars. A qualifying farmer may make a commitment to continue to use such land exclusively for agricultural production for the next eight years. The land is then eligible for agricultural value assessment. Any conversion of land from agricultural production will constitute a breach of commitment and will disqualify all the land for a agricultural value assessment.

Both these devices were seen as offering the Suffolk County farmer little remedy. One reason was that 60% of the farmland was owned by non-farmers who were assumed to be waiting until the development pressure forced the price of land even higher before selling.

and death taxes²³ provided inadequate relief.

With the dual concerns of preserving farmland and lessening the tax burdens, the AAC discussed and evaluated various land-

There also was insufficient incentive for the speculator to go through the lengthy process necessary to form an agricultural district. In both the Agricultural District Act and the Individual Commitment the penalties for discontinuing agricultural use are so severe as to limit participation. Furthermore, neither affords permanent protection for farmland.

23. After development of the Suffolk County Plan, Congress passed modest estate tax relief to farmers, as part of the 1976 Tax Reform Act. Under the changes, INT. REV. CODE §2032A allows farm properties, and certain other properties used in a trade or business, to be valued at their "use" value rather than "highest and best" value for federal estate tax purposes, thereby reducing the estate tax liability.

Certain requirements must be met before a §2032A election can be made. First, the property must be located in the U.S. and have been acquired by a qualified heir or passed to a qualified heir from a decedent who was a citizen or resident of the U.S. at the time of his death. Second, the property must constitute at least 50% of the adjusted value of the gross estate and have been in use for a qualified purpose at the time of decedent's death. See INT. REV. CODE §2032(A)(e)(5). If the property was not in use for a qualified purpose at the time of decedent's death, it must constitute at least 25% of the adjusted value of the gross estate and have been owned and used by decedent or a member of his family for a qualified purpose, for periods totaling at least five of the eight years immediately preceding decedent's death.

There are two major limitations on the usefulness of §2032A: (1) The property must continue to be used for a qualified purpose for at least 15 years after the decedent's death in order to receive the full benefit of the tax reduction. This will require the qualified heir to continue to farm the property for 15 years unless the property is sold and the proceeds realized upon disposition do not exceed the §2032A valuation. If the sale proceeds exceed the §2032 valuation or if the property ceases to be used for a qualified use, an additional tax will be imposed. "Cessations of qualified uses" is defined at §2032(A)(c)(7). This additional tax will be the lesser of either the excess of the amount realized upon disposition over the §2032A valuation or the additional tax that would have been due had the property been valued at its highest and best value for estate tax purposes. The Code also provides for a gradual decrease in the amount of the additional tax if the property is sold or ceases to be used for a qualified use between 10 and 15 years after decedent's death. Any sale must be an arm's length transaction and the additional tax will be imposed proportionately if there is a sale of only part of the §2032A property. The Code sets a three year statute of limitations on liability for the additional tax which begins to run when the Secretary of the Treasury is notified of the sale or cessation of the qualified use. New Code section 6324B establishes a lien in favor of the United States on the property in the amount of any additional tax due. It is impossible to predict the number of farm estates that will be affected by this continuing qualified use restriction.

(2) In no case can the value of the property be reduced by more than \$500,000. While the tax saving that can be realized under §2032A is still a substantial amount (using the new rates the tax on \$500,000 is \$155,800), estates composed principally of large farm properties will continue to be burdened with enormous estate tax liability. For example, a medium size, 350 acre farm having a "highest and best" value of \$3,000 per acre is worth \$1,050,000. The maximum reduction available under §2032A will, in this case, decrease the value by less than half. The sale of development rights to at least a portion of the property is still a viable alternative for the owner of large farm properties.

use control techniques.²⁴ A proposed County program of acquisition of fee title to farmlands with leaseback to farmers²⁵ was rejected in favor of a DR purchase program.²⁶ The DR system, first recommended by one of the farmers on the AAC, avoided problems likely to arise under the leaseback plan.²⁷ For instance, County acquisition of DR's, leaving underlying agricultural title in the landowner's name, would preserve a larger area than would the acquisition of fee title because of its lower cost.²⁸ Moreover, a DR program would lower local real estate taxes for the landowners because of the restriction to agricultural use; at the same

24. Control techniques which require state action were beyond the scope of the committee. Instead the committee centered on such techniques as agricultural overlay districting. That technique and local agricultural use easements were endorsed as a means to augment any County Program. See Minutes of the A.A.C. (July 23, 1973). For an example of agricultural overlay districting see ZONING CODE, TOWN OF SOUTHAMPTON, New York §2-40-30-01. See generally Bosselman, "Four Experiments in Preserving Land" (presented at a conference on Agriculture in the Future and its Implications for Land-Use Planning, San Francisco, California, May 1975).

25. For discussion on the technique of condemnation and leaseback, see Clawson, *Suburban Development District—A Proposal for Better Urban Growth*, 26 J. AMER. INST. PLANNERS 69 (1960).

26. See Minutes of the A.A.C. (May 15, 1973). See also Interviews, *supra* note 18.

27. Problems encountered by a fee/leaseback system are thought to include: (1) lack of security that the same farmer could continue to farm the same parcel year after year, since the land would be leased on the basis of competitive bidding; (2) no guarantee that a farmer would farm the same land sold to the County; (3) length of the leases; (4) a loss of loan collateral for necessary farm purchases (seed, fertilizer, etc.); (5) uncertainties as to responsibility for maintenance of physical facilities; (6) increased risk to large capital investment; (7) difficulties involving necessary inspections and permits; and (8) bureaucratic delays. Finally, the cost of purchasing fee title appeared to be so high that only a small percentage of available prime agricultural land could be preserved.

Although a fee/leaseback system was rejected by the farmers on the A.A.C. as being unsuited to the situation of Suffolk County, such a system seems to be proving successful in other cases. See Bosselman, *supra* note 22; WHYTE, *THE LAST LANDSCAPE* (1968); PA. STAT. tit. 32, §5001-13 (1967).

28. The cost of DR purchase is undeniably high. According to the U.S. Bureau of the Census, 1 CENSUS ON AGRICULTURE (1969), and Area Reports, Part 8, New Jersey (1972), the cost of development rights value of agricultural land in sixteen counties in New Jersey averaged 85% of the market value of the land, with the agricultural value per acre averaging only 15% of the full market value.

In Suffolk County, the cost of purchasing DR's was compared with the cost of school taxation if the farmland were to be sold and developed. Figures were drawn for developments of 1 acre lots, 1/2 acre lots, and 1/4 acre lots, with an average 1.5 children per dwelling unit. In each case, taking into consideration present tax rates, average market value, and assessment of a single family home, a deficit would occur, and local taxes would be raised to carry the additional school cost.

time, the land would remain on the local rolls. Finally, it would eliminate the high degree of government control of the land, as well as the landlord-tenant problems inherent in the fee-leaseback system. In addition to those advantages over the leaseback system, the DR system's voluntary character appealed to the farmers' independent spirit.²⁹

After deciding upon the DR program, the AAC developed additional policy proposals that were presented to the County Legislature for approval. Top priority to purchase DR's was established for large, farmer-owned property and the non-farmer-owned land adjacent to it.³⁰ Buffer zones were to be maintained between the farm activity and other nearby residential or commercial uses. The AAC proposals further sought to keep participation on a voluntary basis, "without resort by the County to unilateral action through the use of condemnation,"³¹ and "once purchased by the County [D.R.'s] could not be sold or otherwise transferred by the County without affirmative approval of the voters in a County-wide referendum."³²

The AAC plan also provided criteria for site selection. These criteria were:

1. Soil suitability: Only prime agricultural land³³ was to be included in the program. Farms situated on the two large areas

29. In sharp contrast to the American farmer's traditional hostility to the government and America's laissez-faire attitude toward land control is the reaction of many landowners in Sweden to governmental designation of what are known as "nature monuments." The Swedish national government is empowered so to designate areas of botanic, geologic, or scenic importance. Through the use of this designation, more than 300 sites, totaling 7,500 acres, have been protected. Lakes, trees, bird habitats, views, and marshes, located on private and crown lands, are subject to use restrictions because of their classification as nature monuments. Usually no compensation is paid a private landowner when some or all of his property is designated a nature monument. Up to now the landowners have been proud to have nature monuments on their grounds.

A. STRONG, *PLANNED URBAN ENVIRONMENTS* 23 (1971).

30. There was countywide concern that this program would aid the speculators more than the farmers, by paying them for their development rights, and then allowing them to collect rents for use of the agricultural land. This provision was meant to insure that the program would first serve the farmers and farming families.

31. *REPORT OF THE AAC TO THE S.C. LEGISLATURE* 4 (March 1974).

32. *Id.*

33. For a description of different classifications of agricultural land, see South Fork Subcommittee of the AAC, *South Fork Farmland* 2 (Dec. 1973).

of prime agricultural land on the eastern end of Suffolk County had the highest priority.³⁴

2. Present land use: Land being actively farmed had priority over large estates.

3. Contiguity of farms: Tracts of 200 acres or more would be given highest priority. Large areas are more conducive to intensive and economic operations and individual isolated farms lack appropriate buffer zones.

4. Development pressure: Farmlands under the greatest pressure to sell were to be given highest priority.

5. Price:³⁵ The County retained the right to reject the bid on any land, even if it fulfilled all the above criteria, if the price were beyond the County's financial resources.³⁶

34. Prime agricultural soil exists in two large tracts on Long Island (the Bridgehampton-Haven Association, and the Haven-Riverhead Association, both at the very eastern end of the Island) and only rarely in the western part of Suffolk County. Over 63,000 acres are actively farmed in the four east end towns (Southold, Riverhead, Southampton, Easthampton); less than 5,500 acres are farmed in the western end of the island.

35. Market value of Suffolk County farmland in 1973 was in the range of \$4,000 to \$7,000 per acre for farmland in undeveloped areas, to well over \$20,000 per acre in portions of western Suffolk and in shorefront land in eastern Suffolk. Statistics, Group for America's South Fork (1973 appraisals for the County).

Bids Received (Feb. 11, 1975)

<u>Town</u>	<u>Number of Bids</u>	<u>Acreage</u>	<u>Value of Bids</u>
Brookhaven	32	1,925.3	\$ 16,891,656
East Hampton	11	356.8	4,428,040
Huntington	7	443.0	7,752,940
Ishp	2	55.2	785,000
Riverhead	120	7,570.0	39,034,357
Smithtown	7	157.7	2,123,120
Southampton	126	4,693.0	31,004,643
Southold	76	2,747.4	14,577,054
TOTAL	381	17,748.5	\$116,596,770

The legislature then authorized implementation of the program³⁷ and a Select Committee³⁸ was appointed to establish procedures to regulate it.³⁹ The legislature set forth the contours of

Town-by-Town Totals: Acreage and Values

	<i>Number of Bids Ap- praised</i>	<i>Total Acreage</i>	<i>Total Appraised Value De- velopment Rights</i>	<i>Total Bid Value De- velopment Rights</i>
Brookhaven	4	368.3	\$ 2,338,700	\$ 2,875,003
Huntington	2	118.0	1,524,100	1,689,000
Riverhead	47	3,554.3	17,204,600	16,663,092
Smithtown	2	61.6	473,500	700,000
Southampton	22	924.8	5,076,925	4,970,222
Southold	39	1,330.8	6,373,000	7,786,213
TOTALS	116	6,357.8	\$32,990,825 \$5,189/acre	\$34,683,530 \$5,455/acre

37. The State of New York, by various legislative enactments has emphatically stated it to be a most important state policy to conserve and protect and to encourage the development and improvement of agricultural lands, both for the production of such lands as valued natural and ecological resources. It has further stated that the expenditure of county funds to acquire legal interest and rights in such lands is in furtherance of such policy and is the expenditure of public funds for public purposes.

The County is in complete accord with such policy and thus local law is intended to indicate generally the procedures which will be employed by the county in its pursuit of its goals to protect and conserve agricultural lands, open spaces, and open areas.

Resolution No. 573, §1 (1974), adopting Local Law No. 19 (June 14, 1974).

38. The Select Committee was composed of three legislators (one from Riverhead, the County seat; one from Western Suffolk; and one from Central Suffolk); the County Extension Administrator; the Director of the Suffolk County Planning Department; a representative of each of the four east end towns, selected by the Town Boards; the former Director of the Extension Service; and the County Executive. Following the recommendation of the AAC, no member of that committee and no "farmer" was appointed to the Select Committee in order to avoid charges of favoritism and impropriety. The Select Committee met three times in the fall of 1974 and presented its report to the Suffolk County Legislature in November 1974.

39. The Select Committee appointed by the County Executive outlined procedures and recommended specific site selection for DR purchase. The procedures developed include solicitation of bids from farmland owners, informational meetings, and an educational effort, including communication of the guidelines for participation in the program. See REPORT TO THE SELECT COMMITTEE ON THE ACQUISITION OF FARMLANDS TO THE SUFFOLK COUNTY LEGISLATURE (Nov. 19, 1974).

the final Suffolk County Plan in two ordinances,⁴⁰ a form of real estate purchase contract, and a form of deed.⁴¹ Only four sentences of the Local Law No. 19 pertain to acquisition and administrative matters.⁴² This skeletal outline was fleshed out somewhat in April 1976, by an ordinance⁴³ which established a county "Farmlands Development Rights Committee"⁴⁴ to supervise matters related to DR's.⁴⁵

The 1976 Ordinance also addressed more fully the issue of subsequent dispositions of DR's. The ordinance prohibited alienation except by a subsequent local law recommended by the committee and approved by county-wide referendum.⁴⁶ Standards for any recommendation of alienation included "the continuing practicality of the use of the remainder fee of lands [ex-DR's] . . . and such factors as the uses to which adjacent lands have been put and the necessity for the use of the lands for another governmental purpose."⁴⁷ The ordinance provided that all DR's are deemed

40. Local Law No. 19, §10 (1974); A Local Law in Relation to Farmlands and Development Rights Therein (Suffolk County, New York, 1976) [hereinafter cited as A Local Law].

41. The form of deed—as does the form of contract—defines a DR to mean:

The permanent legal interest and right to permit the use of the premises exclusively for agricultural production as that term is presently defined in §301 of the New York State Agricultural and Market Laws, and the right to prohibit the use of the premises for any purpose other than agricultural production.

42. In such manner as he may determine, the county executive will solicit offers to sell development rights in agricultural lands to the county; following receipt of such offers, the county executive shall cause an appraisal of the market value of such development rights to be made. After a report on the matter by the county executive to the county legislature, it shall hold a public hearing on the question of the acceptance of all or more of such offers. Said hearing shall be held upon such notice given in such manner as the legislature may determine.

Within thirty (30) days after such public hearing, the county legislature shall make a decision upon the matter of such offers.

Local Law No. 19 (1974).

43. See A Local Law, *supra* note 40.

44. The committee is to be composed of seven appointees of the County Executive with legislative approval and one designee of each of the four town boards.

45. The committee was authorized to make recommendations on the following: (a) DR acquisitions; (b) whether to grant subdivision requests relative to land whose DR's have been sold; (c) disposition of DR's; (d) any matters relevant to development rights and the agricultural economy generally.

46. *But see* Local Law No. 19, §4 which is silent on any committee recommendations but required a referendum.

47. See A Local Law *supra* note 40.

dedicated to the conservation of agricultural lands.⁴⁸ Furthermore, it established that all county owned property dedicated to such conservation generally may be alienated only (a) if authorized by law following advice by the Development Rights Committee and approved by referendum or (b) if the DR's are retained.⁴⁹

B. *Advantages of Citizen Participation*

Regardless of what policy considerations a legislature adopts, a DR purchase program requires a high degree of public-private cooperation. Since "citizen participation should facilitate the mutual adaptation of government and citizen,"⁵⁰ the degree of public involvement and governmental responsiveness in the development of such programs as the one in Suffolk County can be crucial to the effectiveness of that program. To the extent that in Suffolk County citizen participation affected the DR program both positively and adversely, it can serve as a guide for other programs. Its successes can be imitated and its limitations, if possible, avoided.

The farmers, being the citizens most intimately involved in farmland preservation, must be in a position to participate substantially in the program for it to succeed. Farmers, rather than "professionals," can point out what no one else can: the specific advantages and disadvantages from the viewpoint of the affected farmer. There is little purpose in developing a program of farmland preservation that appeals to planners and government officials if it does not appeal to the farmland owners.⁵¹ In the Suffolk

48. *Id.* §28, amended the county charter by adding a section entitled "Dedication of properties and the conservation of agricultural lands."

49. Retention of DR's could well prove to be a valuable tool for farmland preservation when the county owns the fee simple title.

50. *Citizen Participation in State Government: A Summary Report to the Office of Exploratory Research and Problem Assessment Research Applied to National Needs 17* (National Science Foundation, Washington, D.C., Dec. 1973).

51. When the AAC was formed, the Suffolk County Planning Department was working on the county acquisition of fee title program, which the Legislature had approved in 1972. However, when this program was discussed, A.A.C. members had generally negative reactions and instead proposed the purchase of DR's. The farmers on the A.A.C. achieved two things here: first, they illustrated the general hostility of the farming community to the fee/leasehold system and the practical problems involved in such a system from the standpoint of the farm manager, problems of which the planners and politicians were unaware; and second, they proposed an alternative suited to the character and circum-

County Program, the AAC was composed of fourteen farmers and three ex-officio members. The committee met regularly, with a high turnout, active participation, and continuity of discussion. The effectiveness of this group is evidenced by the fact that it was the AAC's DR plan rather than the Planning Department's originally proposed fee title program that was adopted.

Along with the need for farmer participation in the development of any farmland preservation program, there is the concomitant need to consult technical experts and professionals.⁵² The three ex-officio members of the AAC, who were present at almost every meeting, represented the County government and the Extension Service, the primary technical staff available to Suffolk County farmers. In addition, the AAC invited guests to its meetings. Among these guests were assessors, Town Supervisors, members of Planning Boards, reporters, and attorneys who spoke on taxation. There also were formal and informal lines of communication between the AAC and the Group for America's South Fork,⁵³ an environmental group dedicated to open space preservation. Finally, the County Executive served as an effective link between the AAC and the Suffolk County Planning Department

stances of the Suffolk County farmer. Interviews, *supra* note 19.

For discussion of community participation in the decision making process, see McDevitt, *Public Participation in the English Land Use Planning System* (Part I), 6 URBAN LAW 483, 499 (1974); H. Foster & D. Johnston, CITIZEN ADVISORY GROUP TRAINING 8 (Community Planning Dep't, Univ. R. I. 1973).

52. Many of these same areas were among the necessary "performance standards" for citizen participation in the former HUD Model Cities Program. Those requirements were: (1) a structure through which the residents of the neighborhood can participate; (2) leadership consisting of individuals whom the residents accept; (3) citizen involvement which is sufficiently knowledgeable so as to initiate proposals; (4) technical assistance available to the citizens involved. See D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 13-14 (1971).

53. Working together, farmers and the executive director of the Group for America's South Fork prepared a four page document and maps designating criteria for areas of selection and delineation of prioritized areas for acquisition in the Town of Southamptton. The maps showed farmland in four ownership patterns: (1) local farmer owned and operated; (2) local farmer owned and renter operated; (3) local non-farmer owned and renter operated; (4) non-local non-farmer owned and renter operated. The criteria developed for selection of sites were: environment, soil suitability, present land-use, contiguity, development pressure, and price. With one exception, these were the criteria eventually adopted by the entire AAC, and the maps were sufficiently sophisticated to be a model for others forwarded to the County Planning Department for review and analysis.

by coordinating their activities.⁵⁴ In these ways the AAC was connected with the administrative infra-structure of the DR program, independent professionals who advised on various related topics, and experts who aided in the formation of the program.⁵⁵

The government's willingness to cooperate with these farmers, experts, and professionals to reach the goal of preserving farmland was demonstrated in Suffolk County by the adoption of the farmer's plan instead of the government proposal. This type of public-private cooperation is vital to a successful program.⁵⁶ As one example, the environmental interest organization, Group for America's South Fork, negotiated with a farmer-landowner for the purchase of his property, which was on the verge of being sold to a developer and thus lost permanently as agricultural land. The Group bought the parcel and then sold it to the County at the same price because the County Executive had agreed in advance that the County would retain the development rights to the land. This transaction between a private organization and a governmental unit, while not unique,⁵⁷ demonstrates that with imag-

54. The county executive also served as liason between the AAC and the governments of the local municipalities at the regularly scheduled meeting of the town, village and county officials.

55. In his summary of Remarks on Staff Proposal for Public Involvement Program for the Great Lakes Plan for Great Lakes Tomorrow (an international organization to improve citizen participation in Great Lakes decisions Aug. 23, 1976), Richard Robbins, the Executive Director of that organization, stressed two points which apply to all citizen participation groups: (1) that the structure of citizen participation should not be separate from the technical program and the technical committees, and "both technical staff and participation staff should report to the Director and he should be required to integrate their activities; and (2) the importance of taking advantage of existing organizations and existing expertise.

56. For a discussion of the relationship of alternate recruitment techniques to the perceived responsiveness of government officials, see J. PIERCE & H. DOERKSEN, *WATER POLITICS AND PUBLIC INVOLVEMENT* (1976).

57. Other environmental groups have been actively involved with the preservation of open space. The Nature Conservancy (established in 1951 as a publicly supported, non-profit organization) accepts land donations and purchases fee simple title with money raised by public subscriptions. Since its formation, the Nature Conservancy has preserved over 700,000 acres of forests, marshes, mountains, and beaches in over 1,200 projects in 47 states, the Virgin Islands, and Canada, directing its efforts entirely to the preservation of natural lands.

The Trust for Public Land is another non-profit organization which acquires land for open space for resale to governmental units at substantially lower prices. Among other large groups which work for the protection of the environment and natural areas are the Sierra Club and the Charitable Law Foundation of New England, Inc.

inative organizations and a responsive government, public interest groups can participate to the benefit of farmland preservation programs.

The opportunity to donate DR's to the government is another area of public/private cooperation in farmland preservation plans. Owners of farmland whose DR's are not chosen for purchase or who do not desire to be paid in one lump sum⁵⁸ could opt for donation. Although this procedure would not afford the landowner the immediate financial rewards of a DR sale, it would lower both the property and death taxes while preserving the land in agricultural use. It also would afford the farmer certain Federal income,⁵⁹ gift,⁶⁰ and estate⁶¹ tax advantages. Furthermore, DR donation affords a high degree of flexibility to the landowner. Donors usually can tailor their gifts to meet their own specific needs, rather than the needs of the governmental unit. For example, it may be that by careful analysis of future needs, the farmland owner could retain the right to build greenhouses or dairy processing buildings on a section of his land. It would be the responsibility of the donor rather than the legislature to specify the rights remaining with the land.⁶²

Another possibility for private action worthy of consideration is an innovative preservation technique known as a "Real-Estate Syndicate."⁶³ Landowners and residents form a syndicate, pool-

58. The issue of payment has been a major problem for the program. In order to reduce capital gains taxes, farmers may prefer to be paid on an installment basis for a period of five years or more. See INT. REV. CODE §453. Suffolk County, however, is not empowered by its charter to buy and pay for anything other than on full cash terms. The proposed solution to this dilemma was for the County to escrow into a bank full payment for the DR's, and have the bank enter into a contract with the farmer to pay for the DR's on an installment plan.

59. The landowner who donated land or the DR's to land to the state, or presumably in this case, the county, would be allowed a tax deduction for Federal income tax purposes against ordinary income equal to the fair market value of the land or interest in land donated, if that interest was donated in perpetuity. INT. REV. CODE §170.

60. Inter vivos gifts of land to the state are fully deductible and are not affected by Federal gift tax. See INT. REV. CODE §2522.

61. Land given to the state through a will is allowed a full fair market value deduction when determining the taxable estate. See INT. REV. CODE §2055(a).

62. Tax issues incident to donation of land and interests in land are complex. For discussion of these problems, see Thomas, *Transfers of Land to the State for Conservation Purposes: Methods Guarantees, and Tax Analysis for Prospective Donors*, 36 OHIO ST. L.J. 545 (1975).

63. The study which developed this technique was undertaken by Wallace McHarg

ing their assets for the purpose of acquiring DR's, options, rights of first refusal, and/or fee title to land. It determines what land can be sold for development and what is to remain agricultural. The syndicate sells the development land and distributes the profits three ways. First, it reimburses the owners of land prohibited from development and preserved as farmland; second, it finances additional purchases of fee title or interests in land; third, it pays dividends to its stockholders. A syndicate approach, however, is viable only if the development land is up-zoned to permit higher intensity uses.

C. Problems

Although the farmer-initiated land-use program established in Suffolk County has many advantages, especially with respect to private citizen input, it is not without serious problems. Chief among these is that agriculture interests dominated the formulation process. Citizen advisory groups usually are comprised as a microcosm of the community, to "mirror" the distribution of interests in the general public.⁶⁴ This is especially important in farmland preservation, which has an impact on a community's economics, ecology, industry, growth, and aesthetics. Because the AAC was formed to identify agri-business problems, it was composed primarily of farmers.⁶⁵ It functioned, however, as a citizens advisory committee on preservation of farmland, a broader topic with a variety of purposes. Not surprisingly, the farmers on the committee tended to be primarily interested in preserving the

Associates in 1963, and was published under the title *PLAN FOR THE VALLEYS*. Consultants on the project included Anne Louise Strong, William Grimsby, William Roberts and William C. McDonnell.

64. J. PIERCE & H. DOERKSEN, *WATER POLITICS AND PUBLIC INVOLVEMENT* (1976).

65. D. Hagman, *Representation is the major problem for citizen participation*, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 13 (1971). Twin questions of *who* should be represented and *by whom* inevitably arise when attention is focused on committee selection process; among the possibilities are election by the general public, appointment by a public official, designation by specific organizations, or volunteering. For discussion of the relation of alternative recruitment techniques to the perceived responsiveness of governmental officials, see J. PIERCE & H. DOERKSEN, *WATER POLITICS AND PUBLIC INVOLVEMENT*. Interesting issues include the appropriate levels of representation (*e.g.*, socio-economic levels, geographical distribution, business interests, racial or religious affiliations), and methods for ensuring that representatives communicate with "constituents."

agricultural way of life, and relatively unconcerned with problems of the sharing, timing, and cost of growth and suburban sprawl except as they impacted on farming operations. Consequently, the committee was not a "mirror distribution" of the community.

The lack of representation was not rectified by community attendance at AAC meetings. While these meetings were open and had occasional visitors from the general citizenry, most of the visitors were farmland owners. During the entire period that the AAC met, other interest groups were not represented. Other land-owners, business interests, low income families, ethnic minorities, farm laborers, and conservationists interested in saving the dunes or wetlands were absent.

"Mirror distribution" of the community also was lacking in geographical representation. Almost all of the fourteen farmers on the AAC were from the east end of Suffolk County. While it is true that most of the prime agricultural land which was to be saved by the County is in those towns, it is also true that there are scattered sites in Western Suffolk. This area was not represented on the subcommittees, and there was only one Western Suffolk resident on the Select Committee, despite the fact that the Western area contained 92% of Suffolk County's population. Broader representation of the general citizenry during the development of programs which affect the entire community is essential. To be effective this representation must take place while fundamental policy issues are still open.⁶⁶

Substantial publicity can generate early public involvement. While it is true that the activities of the AAC were sometimes reported by the press, there appears to have been no effort by the AAC to publicize its deliberations so as to elicit additional public participation in the formation of the program. Publicity which follows the commitment of government officials to a program probably is too late. By that time, the government is reluctant to change the basic contours of its program. Publicity following formulation did serve in this case, however, to educate the citizenry and to win support for the plan. Representatives from over thirty

66. McDevitt, *Public Participation in the English Land Use Planning System*: (Part I), 6 URBAN LAW. 483, 507 (1974).

organizations such as the League of Women Voters, Concerned Citizens of Montauk, Citizens for the East End, and Planning Boards supported the program at a public hearing.⁶⁷

II. PROPOSALS FOR DR PLANS

A review of selected aspects of the Suffolk County DR plan as well as other farmland preservation programs suggests a need for procedural and substantive detail and safeguards. This section proposes specific elements for consideration. Adoption of some or all of these proposals would depend, of course, upon such constraints as common and statutory law, political climate, and available resources.

A. *The Purchase Contract*

1. *Definitional Clarity*

Clarity in defining terms and precision in articulating the purchased and retained rights is essential. Empirical evidence strongly suggests that such clarity can prevent honest disagreements over what rights were taken when the DR's were purchased.⁶⁸ Enactments and instruments should define carefully "development right,"⁶⁹ being very specific as to the rights taken and the rights retained, with special attention to the terms "agriculture" and "agricultural uses."⁷⁰ For example, the com-

67. The Skeffington Committee found that publicity was needed in relation to (1) the initial announcement that a plan is being prepared; (2) the report of survey identifying parcels; (3) the presentation of the major planning issues and choices available; (4) the statement of the policies favored by the local authorities.

This public hearing is similar to the public hearing held in Trenton, New Jersey on February 23 and March 1, 1975 relating to the Burlington County demonstration project. In that instance, representatives of over 20 organizations and agencies appeared to speak in support of the program, including representatives of realtors and developers.

68. The state of Wisconsin's generally successful experience in enforcing its extensive scenic easement program indicates that the principal enforcement problems involve disputes respecting the nature and extent of the restrictions on development. Suffolk County, New York farmers repeatedly asked for a clear delineation of what interests in land they were being asked to sell. See generally Conference Proceedings, Scenic Easements in Action (Univ. Wis., Dec. 16-17, 1966).

69. In a DR Program designed to preserve agriculture, definitional problems usually center either on the terms "development right" and "agriculture" or on the legal character of a development right.

70. Ambiguity and confusion over the central terms "agricultural lands" and

munity may want to keep the land in active farm production rather than permit it to lay fallow, thus prohibiting nonproduction even though the land would still constitute open space.

An appropriate approach might be to state a general definition followed by a list of non-exclusive examples. Key elements in such a definition should be that the land is to remain substantially undeveloped and is to be used to produce plants or animals. To avoid estates where farm animals such as horses are kept for recreation, it might be useful to qualify plants and animals as "useful and nonrecreational." The phrase "other similar uses and activities," as utilized in typical zoning ordinances, also would be desirable. This, of course, requires an administrative official empowered to exercise discretion as to whether a particular proposed use is sufficiently "similar."⁷¹

Enactments and instruments also should be drafted to minimize enforcement problems potentially posed by the use of traditional common law terminology. Various commentators have suggested that DR's are analogous to easements⁷² or restrictive cove-

"agricultural production" were impediments to passage of the Suffolk County Plan. Section 2 of Local Law No. 19-1974 provided measures for acquisition of DR's in "agricultural lands," defined as "lands used in bona fide agricultural production." The latter term meant "the production for commercial purposes of all those items and products as defined in Agricultural and Markets Law, Section 301 . . ." (emphasis added). A broad definition of "agricultural lands" was presumably adopted to preserve non-food producing lands.

71. Not all farmland sought to be preserved would be entirely undeveloped but rather would have small structures, for example, sheds or living quarters. In that connection it is important to provide that the landowner may maintain, repair, and perhaps modify in insignificant ways any pre-existing structure. The local government should decide whether structures destroyed (by fire or wind, for example) could be replaced; under typical non-conforming use provisions of zoning ordinances, when a structure is more than 50% destroyed it cannot be rebuilt. It is essential for farming that farmers be allowed to re-build sheds and houses for residential living. Borrowing from lot area requirements now common in subdivision and zoning controls, perhaps there should be some restriction on the percentage of coverage of the open space area by any new or enlarged structures, assuming they are permitted. Again some administrative discretion will presumably be required.

72. In *Kamrowski v. State*, 31 Wis.2d 256, 142 N.W.2d 393 (1966) the Wisconsin Supreme Court was called upon to decide whether visual enjoyment of landscape, provided by "less than fee" interests in land, is a sufficient public use or purpose to warrant acquisition by condemnation. Noting that the legislative history of the statute set forth the "purpose and general meaning" of the term "scenic easement" which was undefined in the statute, the court held that a public purpose could be based upon the preservation of a scenic corridor along the road bordering the Mississippi River. Cf. *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975). *Contra*, *Pontiac Improvement Co. v. Board of Commissioners*, 104 Ohio St. 447, 135 N.E. 435 (1922) (no

nants. If DR's are characterized as easements in gross the future transferability by a government may be impossible.⁷³ If viewed as restrictive covenants, on the other hand, because they are made for the benefit of the landowners in a particular area, they are only enforceable if made in accordance with a general scheme involving uniform restrictions. Unless the prohibitions are clear and unequivocal, they might be extremely difficult to enforce. Flexible restrictions requiring the use of discretion⁷⁴ may not be enforced absent some clear community standard and plan against which to judge the exercise of discretion.

The definitional problem could be overcome by avoiding the common law terminology. The Suffolk County plan did this when it defined a DR as a "permanent legal interest in the use of agricultural lands and the right to restrict, prohibit, or limit the use of such lands for any purpose other than agricultural production."⁷⁵ Unfortunately, Suffolk County did not use this definition in its form contracts and deeds.⁷⁶ To avoid potential common law problems, governments should consistently use neutral terms such as "rights and interests in land,"⁷⁷ as well as "development rights." Furthermore, the general term could be followed by spe-

condemnation of easement to regulate plantings and hillside grading, absent a public right of entry).

See also W. WHYTE, *THE LAST LANDSCAPE* (1968); Whyte, *Securing Open Space for Urban America: Conservation Easements*, T. B. 36 URBAN LAND INST. (1959); JORDAHL, JR., *CONSERVATION AND SCENIC EASEMENTS*, IN *LAND ECONOMICS* (1963); DEP'T. TRANSP. WIS., *A MARKET STUDY OF PROPERTIES COVERED BY SCENIC EASEMENTS ALONG THE GREAT RIVER ROAD IN VERNON AND PIERCE COUNTIES*, SPECIAL REPORT No. 5 (1967).

73. Other possible technical problems arising in easement law are: whether new categories of easements can be created; as regards appurtenant easements; whether identification of a dominant tenement is permitted; and whether the easement can be terminated automatically without notice or compensation. See J. BEUSCHER, *LAND USE* 139-49 (1976).

74. See generally 5 N. WILLIAMS, JR. *AMERICAN LAND PLANNING LAW* 360 (1974).

75. Suffolk County, Ordinance No. 19, §2.

76. Instead of a somewhat vague "legal interest in the use of agricultural lands," the forms of contract and deed substitute "legal interest and right to permit the use of the premises exclusively for agricultural production;" instead of "right to restrict, prohibit or limit . . ." the form of contract and deed specifies "the right to prohibit . . ." Certainly the definitions should be the same in each case. The revised language has elements of restrictive covenant as well as easement terminology.

Similar language problems are found in at least one state enabling statute. The New Jersey Green Acres Act in 1961 made reference to "a restriction on the use of land . . . sometimes known as a 'conservation easement,'" obviously blending the use of the terms "restriction" and "easement." N.J. SESS. LAWS ch. 45, §12b (1961).

77. See generally 5 N. WILLIAMS, JR., *AMERICAN LAND PLANNING LAW* 359 (1974).

cific permitted or prohibited uses or aspects of development.⁷⁸ Alternatively, states can provide in the enabling act that DR's will not be affected by traditional common law doctrines respecting enforcement or transferability. One well-conceived approach suggests this language: "[P]ublic conservation interests in land shall not be subject to the legal or equitable requirements of privity, nor the rule against creating novel incidents, nor any judicial rule which requires that an interest in land touch and concern the land."⁷⁹

2. *The terms of the purchase contract and deed can and should reflect the special needs of the selling landowner and the purchasing government.*

As is common in real estate transactions, the purchase of DR's should be evidenced by a carefully prepared purchase contract. The use of a contract permits the parties to tailor each transaction to the special needs of the selling farmer.⁸⁰ For example, the

78. *Id.*

79. Child, *Legislation to Preserve and Control Open Space Land*, 6 HARV. J. LEGIS. 57, 79 (1968). The New York enabling statute, Municipal Law §247, could be improved. It is preferable to other statutes which do not specifically refer to "development right" at all but mention, for example, only "fee or any lesser interest," MD. ANN. CODE art. 66C, §257A, or, even more vaguely "in fee or otherwise." MASS. GEN. LAWS ANN. ch. 92. Among other things, section 247 empowers counties, after notice and a public hearing, to purchase any development right "necessary to achieve the purposes of this chapter." The "purposes" are not clearly set forth but the preservation of "open spaces and areas" is referenced at sub-section 2, where the quoted terms are defined as any space or area characterized by (1) natural scenic beauty or, (2) whose existing openness, natural condition or present state of use, if retained, would enhance the present or potential value of abutting or surrounding urban development, or would maintain or enhance the conservation of nature, or scenic resources. The term "natural resources" includes agricultural lands actually used in "bona fide agricultural production." The legislative history of section 247 apparently indicates that its purpose was solely to increase recreational facilities. Note, *Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962). Of course, the bill was passed a decade before the arrival in the early 1970's of a "new mood" challenging the "ideals of growth" in the United States.

80. It may be, however, that for ease of administration or because of some perceived value in insuring uniformity of transactions, the government purchaser will refuse to negotiate purchase contract terms separately and instead insist that a prospective seller sign a form contract on a "take it or leave it" basis. The latter approach would in some cases preclude the preservation of especially key parcels, for ownership of land under particularly intense development pressures ensures that a farmer is in a strong bargaining position with an alternative of quick, profitable sale to speculators or developers.

contract could grant, lease, and/or confer options to purchase DR's.⁸¹ The terms of any option, of course, would depend upon negotiations between the purchasing governmental unit and the selling farmer.

The government obviously has an interest in including certain provisions in a DR purchase contract. For example, if purchase funds are limited, the government may request a series of options exercisable in order each year. The failure to exercise any particular option could trigger a termination of any future options, thereby affording the optionor the right to dispose of the property elsewhere. The contract also could provide governmental rights of first refusal⁸² to purchase some or all of the underlying title retained by the selling farmer. This right is important to the purchasing government which, for example, might desire to permit public access for a nature park or to undertake or cause development. The selling farmer's interest could be furthered by granting a right of first refusal to purchase back the DR's. This right might be exercised if the government contemplated disposition for a price less than the selling farmer would be willing to pay in order to merge the DR's and underlying title.

Carefully prepared contract provisions can anticipate and avoid many problem areas in a farmland preservation program. One such provision might specify whether and to what extent

81. A farmer owning 1,000 acres in fee simple may wish to *sell* DR's to only 50 acres (perhaps to test whether the program is workable); if he finds it personally advantageous, he could then offer to sell more DR's at a later time. This course entails some risks, because funds for additional DR acquisitions might not subsequently be available. Also, the criteria for site selection could have been modified so as to reduce or eliminate purchaser interest in additional acreage. The farmer also might decide to lease DR's to another 50 acres for five years, a period in which in his judgment, potato farming is certain to remain profitable. From the purchaser's standpoint, because a lease would be considerably cheaper than a purchase, more land could be preserved from development (even though temporarily).

Finally, he may decide to grant *options* to purchase DR's to leased or other acreage. The purchaser might well insist on such options as a condition to leasing DR's. Among other things, temporarily withholding a large supply of developable land through an extensive leasing program would increase the market value of buildable parcels; absent an option, the government's lease program would itself create a windfall for the leasing landowner when he later sells the land for development.

82. The terms of such a right of first refusal presumably would include traditional elements of duration of right, contents of required notice to the government, method of exercise, and effect of non-exercise.

public access is granted. Presumably at least visual access of especially scenic parcels would be socially desirable, if it does not interfere unreasonably with the agricultural uses to which the land is being put.⁸³ It would be advisable to include the details of any public access arrangement, rather than merely state generalized intentions.⁸⁴

A second contract provision that would avoid potential problems is one addressed to mineral rights, because such activities as mining and excavation could be construed as permissible activities by the owner of the underlying title. Careful definition of the term "Development Right" in all applicable statutes, ordinances and instruments could eliminate much of this uncertainty. However, it would be a useful enforcement mechanism to require that DR sellers notify the purchaser upon receiving actual knowledge that any person is attempting to mine, excavate, drill, or quarry the property, and also that the sellers cooperate to prevent the occurrence of such acts.⁸⁵

The level of voluntary participation by potential DR sellers may be unsatisfactory if there is a flat bar on future construction. Therefore, the contract should include provisions respecting the rights of the seller to construct improvements and structures necessary for agricultural uses and for other limited purposes. The seller's descendants might wish to construct a farm house and to farm a portion of the parcel, or the seller may wish to improve the amenities surrounding the homestead.⁸⁶ More importantly,

83. Interviews with farmers (1975-1976) in Suffolk County indicated widespread fear that tourists and environmentalists would be "underfoot" and would complain of dust, noise and the like, which are generated by agricultural activity.

84. In some cases, the government might negotiate for a limited period of time (for example, three years) during which foot, horse, or non-motorized vehicle access and enjoyment of portions of the land would be permitted. Such a short period might be regarded by all parties as experimental.

85. For examples of enforcement mechanisms used in DR acquisition provisions see Agreement Between the City of Boulder, Colorado and James F. Reich, et. al., at 2 (Sept. 14, 1972) (available in the offices of the authors).

86. In a recent DR acquisition instrument the sellers reserved, *inter alia*, the right to construct up to 5 additional detached dwelling units on the subject property including accessory buildings and structures which are incidental to a dwelling unit occupancy or agricultural use activities. However, the right to construct up to 5 additional dwelling units is restricted to living grantors or living children of grantors . . . who possess and truly hold a good faith intention to occupy such a dwelling unit as the residence of his or her family.

fire or other casualty might destroy a structure necessary for continued agricultural activity. Some governmental review of the location and appearance of the structures⁸⁷ would be desirable, although the seller probably would resist such a procedure.

Restrictions on the types of future construction also should be set forth with particularity in the contract. The terms of a particular zoning classification in existence on the date of the deed could be incorporated by reference and supplemented with additional requirements that have been negotiated between the parties. Among the possible restrictions, which should be recited verbatim in the contract and deed as a guide to the DR seller, are: maximum building height, number of stories, square footage per story, building form, materials, paint, landscape and fencing.

The contract must, of course, set forth a purchase price. Lump sum payments are certainly the most convenient to administer and may be the only permissible form under local government law applicable to the purchasing government.⁸⁸ A government purchaser desiring to require improvements so as to increase agricultural productivity or scenic attractiveness may propose the establishment of an escrow account for a portion of the lump sum purchase price.⁸⁹

Deed of Development Rights to the City of Boulder, Colorado, at 5 (Aug. 6, 1974) (available in the offices of the authors).

87. A similar requirement was inserted in an instrument executed in Colorado.

The location and exterior appearance of any such buildings or structures shall be reviewed and approved by the City of Boulder's Department of Community Development prior to the construction, for the purpose of insuring that the appearance and placement of such buildings and structures are compatible with the purposes of this indenture to preserve the subject property in a bucolic and agricultural condition.

Id. at 5.

88. However, the seller, especially one having an extremely high basis in the property, might well find it advantageous to structure the transaction as an INT. REV. CODE §453 sale.

89. In one situation, \$250 of the \$1,250 per acre DR purchase price was paid into an escrow account to enable the seller to construct and improve property as to which DR's were being purchased. Such improvements included: access road repair; bridge improvement; modification and leveling of fields; repairs to the irrigation system; tree planting; creation of off-stream ponds; and realignment of a creek channel which had deviated from its course by erosion and flooding. The purchaser agreed to provide labor, equipment and assistance in the projects, provided that the actual costs thereof were paid by the escrow agent. The escrow account was to terminate in 5 years. See Agreement Between the City of Boulder, Colorado and N. McKenzie, at 10-12 (Aug. 2, 1974) (available in the offices of the authors).

Finally, provisions respecting condemnation actions by governmental entities other than the purchaser should be included in the contract. The objectives of farmland preservation might be undermined, for example, by the condemnation of a key parcel for a municipal building or school. Condemnation by other government entities would not appear to be a difficulty if DR's have been purchased. On the other hand if the government is a DR lessee with only an option to purchase DR's, there is some risk of attempted condemnation while the option is in effect. Suggested provisions include the right of the optionee government to participate in the condemnation proceedings and the allocation of any monies paid for the property taken by the condemning authority.

B. Administrative Procedures

1. DR acquisitions should be viewed as exercises of administrative or quasi-judicial, rather than legislative, authority.

Farm preservation programs should provide adequate procedural safeguards and substantive standards. Generally, case law interprets enabling statutes, home rule power, and state constitutions to confer virtually uncontrolled authority⁹⁰ upon local jurisdictions to acquire and hold specific types of property. By reason of this liberal construction,⁹¹ there is limited judicial review of the legislature's actions. In fact, courts normally will not interfere unless there is strong proof of malicious intent, capriciousness, or corruption.⁹²

90. *Lewis v. Shreveport*, 108 U.S. 282 (1883).

91. C. ANTIEAU, *MUNICIPAL CORPORATION LAW* §20.09, at 20-38 (1974).

92. Current case law governing property acquisitions by government, not involving the eminent domain power, confers broad authority on the legislature. Assuming the power to acquire a particular property interest, procedural requirements imposed by statute and/or charter must be substantially complied with. *Hoskins v. Orlando*, 51 F.2d 901 (5th Cir. 1931). Once the purchase withstands threshold tests of power and substantial compliance with any procedural requirements, it will generally be upheld if it is for a public purpose, even though some individual or individuals also benefit. The factors generally regarded as relevant to a determination of public purpose as well as the effect of incidental private benefit are set forth in *Allydonn Realty Corp. v. Holyoke Housing Auth.*, 304 Mass. 288, 23 N.E.2d 665, 667 (1939). Generally the standard of judicial review of legislative determination of public purposes is modest: the determination will be upheld unless clearly incorrect. *Barnes v. Newhaven*, 140 Conn. 8, 98 A.2d 523 (1953). See also *Moran v. Leadbetter*, 334 Mich. 234, 54 N.W. 2d 310 (1952).

To combat this essentially uncontrolled legislative power, individual DR acquisition decisions should be viewed as exercises of adjudicative or quasi-judicial, rather than legislative, authority. This approach recently has been applied in the area of rezoning.⁹³ Indeed, a growing body of precedent is rejecting the traditional position that "all zoning decisions by local governing bodies [are] legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by separation of powers."⁹⁴ In *Fasano v. Board of County Commissioners*,⁹⁵ the Oregon Supreme Court, citing with approval *Ward v. Village of Skokie*,⁹⁶ invalidated a rezoning, noting that a determination that the permissible use of a particular piece of property should be changed is an exercise of quasi-judicial authority⁹⁷ subject to such procedural due process requirements as adversary hearings and findings of facts. Other case law has held individual rezoning to be "adjudicatory" because the parties whose interests are affected are readily "identifiable" and applicability of the zone change is "localized."⁹⁸ Hence, state rules governing administrative hearings have been held applicable and an "appearance of fairness" as regards the motives of the covenantors and the hearing procedure was required.⁹⁹

The rationale for treating rezonings as exercises of adjudicative or quasi-judicial authority is arguably applicable to DR acquisitions. Like a request for a rezoning, an offer to sell DR's is initiated by a landowner,¹⁰⁰ involves specific parcels, and potentially

93. Rezoning is an amendment to the zoning map which change the zone (and permitted uses) that is applied to a parcel of land. See generally D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 104 (1971).

94. Model Land Development Code §2-312 n.264, 574.

95. 507 P.2d 23 (Ore. 1973).

96. 26 Ill.2d 415, 186 N.E.2d 529 (1962).

97. See generally Comment, *Zoning Amendments: Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

98. *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 299, 502 P.2d 327, 331 (1972).

99. *Id.* See *Kropt v. City of Sterling Heights*, 391 Mich. 139, 164, 215 N.W.2d 179 (1974). (Levin, J., concurring). Recent Michigan developments in this area are thoughtfully analyzed in Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975).

100. It could be argued that by generally soliciting bids the governmental unit is initiating the transaction; hence the pattern resembles a comprehensive revision of a zoning map. Similar cases would be regarded as legislative, with fewer procedural safeguards and less stringent standards of judicial review.

affects the uses and nature of surrounding land. There are, however, significant differences. The size of the DR parcels often will exceed those of most rezonings.¹⁰¹ Moreover, DR acquisitions have the effect of lowering potential land use intensity and, therefore, are analogous, to "down zonings," which are unlike the typical rezoning to a more intensive range of uses.

The Model Land Development Code¹⁰² recognizes that governmental land use decisions are generally initiated by developers and evaluated by the local government on an *ad hoc* basis.¹⁰³ In general, the Model Code's procedural approaches for rezonings of individual parcels are designed to ensure fairness and regularity.¹⁰⁴ Hearings to select DR parcels should be governed by similar rules, set forth in the state enabling act and in local implementing ordinances.

Certain basic due process requirements should be included in the DR purchase rules.¹⁰⁵ First, there should be published notice in a newspaper of general circulation and individual notices to all parties with an interest and also to agencies, groups, and individuals who have requested notification. The exact content of such notice should be prescribed, including the location of each parcel to be considered. Secondly, the rules governing the hearing

101. Section 2-312 of the Model Code governs "special amendments." A "special amendment" includes one "(a) which results in a change limited in effect to a single parcel into several parcels under related ownership; or (b) which changes regulations applicable to an area of (50) acres or less . . ." Model Code §2-312 (Note).

102. The Model Land Development Code is a Ford Foundation-financed effort approved by the American Law Institute.

103. Examples of efforts to persuade the local government to permit proposed development are detailed and analyzed in Peterson, *Flexibility in Rezoning and Related Governmental Land Use Decisions*, 36 OHIO ST. L.J. 499, 510-18 (1975).

104. For an explanation of procedural approaches, see Fox, *A Tentative Guide to the American Law Institute's Proposed Model Land Development Code*, 6 URBAN LAW. 928, 932 (1974).

The agency's decision . . . must be in writing and must be based upon the record made at the hearing. Notice of the hearing must have been given to a wide range of potentially interested parties, as listed in the Code. All material findings of fact must be supported by substantial evidence in the record; all conclusions must be supported with reasons that do not simply echo the language of the Code or development ordinance.

Id. at 932.

105. These proposed requirements are patterned generally after Section 2-304 ("Administrative Hearings") of the Model Code. See also Bosselman & Peterson, *Proposed Zoning Code for the City of Toledo, Ohio* (October 1975).

should require testimony given under oath and permit liberal use of the power to subpoena both witnesses and materials. All interested persons should be allowed to present their evidence and, within reasonable limitations, be entitled to cross-examine opposing parties. Thereafter the parties should be entitled to a full record of the hearing. It also is essential to prohibit direct or indirect communications between the legislators and any interested party concerning any issue involved in the hearing except upon notice and opportunity for all such parties to participate. Finally, there should be written decisions, including findings of fact and conclusions together with reasons therefor, each material finding being supported by substantial evidence.¹⁰⁶

In addition to rules increasing procedural safeguards, the DR acquisition decision should be guided by general standards established in the state enabling act. These standards governing individual purchases might include the effect on future population trends; the type and quality of transportation; industrial and commercial facilities; and the needs of the area for adequate housing. The state enabling statute also should require specific findings of fact as to each criterion. These general standards could be expanded by adoption at the local level of more specific criteria consistent with current plans.¹⁰⁷

Any governmental unit adopting a DR plan should be required to engage in comprehensive planning. A common criticism of farmland preservation programs is their emphasis upon immediate acquisition action, without sufficient consideration of "reasonable control upon the means proposed."¹⁰⁸ Because of the obvious social, economic, and environmental trade-offs implicit

106. It should be noted that the recommended administrative hearing goes beyond what the Model Code contemplates prior to the acquisition or disposition of interests in land held by the government. Under the Code, most disposition hearings are not governed by such procedural safeguards but must only comply generally with the requirements of legislative-type hearings as set forth in Section 2-305, and other standards established at a legislative-type hearing. These generally are limited to published notice, the opportunity of interested persons to submit written recommendations and comments for filing and public inspection, and the power to establish additional procedures for the receipt of oral statements and arguments.

107. See Kleymeyer and Hartsock, *CINCINNATI'S PLANNING GUIDANCE SYSTEM* (ASPO, Oct. 1973).

108. P. Davidoff, Book Review, 26 *AM. INST. PLANNERS J.* 337, 338 (1960).

in any decision in this area, it is probably more useful to justify the acquisition of open space by reference to explicit policies rather than merely because "it is public benefit in its own right."¹⁰⁹ Such planning also tends to support governmental action against constitutional attack based on arbitrariness or discrimination, or, if the acquisition decisions are viewed as quasi-judicial, against non-constitutional contentions that the decisions were not based upon substantial evidence.¹¹⁰

2. An Administrator and an Appeals Commission should be established to supervise farmland preservation.

It would be desirable for the local DR ordinance, like most modern zoning ordinances, to provide that the enforcement and administration of the program be conducted by a Development Rights Administrator and an Appeals Commission. The duties of the Administrator should be described in detail¹¹¹ and include the duties to investigate all offers to sell development rights; to propose ordinance and regulatory text amendments; to suggest desirable parcels to be acquired; and to hear and act upon requests for interpretations and any permits. The Administrator also should be responsible for making investigations of violations of the ordinance, maintaining records, and providing information upon request. Acquisition and disposition decisions, however, should not be within the power of the Administrator.

The Appeals Commission, composed of elected officials, citizens, farmers, and professional planners, would ensure that the preservation ordinance is being applied correctly. It would also

109. W. Whyte, *Securing Open Space for Urban America: Conservation Easements*, *Technical Bulletin 36*, URBAN LAND INST. (1959).

110. Examples of potential specific standards upon which the legislature would base particular acquisition decisions and make findings are: remaining adequacy of supply of land for decent housing; to the extent that aesthetic (scenic) considerations are relevant, access of transportation to the public in the region; insufficiency of public resources (*e.g.*, schools, water supply) upon which to base development; and existence of a plan or planning program.

111. It would be important to recruit and hire an individual whose exposure and experience in land use matters has been broad. It would probably be advisable in that event for the administrator to be placed administratively and physically in the office of the local government planning staff so as to promote coordination and consistency with other land use and environmental programs and policies.

interpret the ordinance in cases in which the Development Rights Administrator perceives ambiguity in the ordinance, and desires a decision at a higher level.

The ordinance establishing the Commission should contain a description of the rules governing the appeal procedure. These rules should provide for an administrative hearing governed by the same rules proposed for DR acquisition decisions. Pending the determination at this hearing, the administrator's decision should be stayed. In addition, the rules should specify the interest that a party must have in order to appeal. A desirable formula might be "any person aggrieved, or any officer, department, board, or governmental agency or body affected by the decision." Other factors that should be set forth in the rules are the time period within which an appeal must be filed and the requirements that notice specify the grounds and that the Development Rights Administrator transmit to the board all the papers constituting the record on which the decision was based. Finally, the specific authority of the Development Rights Administrator and the local government planning staff to participate in the appeal hearings and to advocate positions should be articulated.

The local DR ordinance also should establish a special permit procedure.¹¹² The importance of such a procedure is that, despite the current DR plans which emphasize long-range farmland preservation, some low intensity quasi-agricultural or non-agricultural uses later might be proposed as consistent with both agricultural preservation and other worthwhile policies, such as expanded recreation. Occasional¹¹³ or modest activities of this sort might not be susceptible to advance description in ordinances or legal instruments, and hence, a procedure should be established to provide the flexibility needed in this situation. Faced with a similar problem, modern zoning ordinances often have taken the approach of relying on administrators and developers to design

112. The administrative hearing requirements discussed in connection with appeals from decisions of the Development Rights Administration probably would be appropriate for such special permit situations. In this case, perhaps an initial hearing could be held and a decision made by the Development Rights Administrator, appealable to a Board, as discussed earlier.

113. If such a special permit technique were adopted, it should be designed for *relatively infrequent* types of low intensity land uses which are potentially compatible with agricultural uses without taking land out of production.

developments that suit the neighborhood rather than on rigid, pre-stated ordinances.¹¹⁴

The right of the administrator, after reasonable advance notice, to inspect parcels as to which DR's have been purchased is an integral part of the enforcement procedure¹¹⁵ and should be set forth in the local ordinance. If a violation of any use or other restriction is alleged, the landowner first should be given full written notice of the alleged unlawful use, the steps to be taken to correct the violation, and the date before which such action should take place. The landowner also should be advised of the right to demand an administrative hearing governed by the procedural safeguards before noted. If the hearing is requested,¹¹⁶ no judicial enforcement proceeding could be instituted until the hearing examiner or body had decided the matter. Either the landowner or the government could seek a review of that determination.¹¹⁷

Local DR government ordinances setting forth the contours of a DR program should include administrative requirements for

114. In such cases, the trend in zoning might be instructive:

Modern zoning ordinances typically rely less and less on pre-stated regulations and require developers to work with local administrative officials in designing a type of development that fits more closely into the specific circumstances of the surrounding neighborhood.

MODEL LAND DEVELOPMENT CODE §2-312 (Note).

115. The importance of carefully thinking through enforcement measures cannot be over-emphasized. In the area of scenic easement enforcement, for example, along 7,500 acres of parkways, enforcement was difficult partially because courts were reluctant to issue injunctions prior to actual violations; damages were difficult to ascertain and often insufficient.

Experience with the Wisconsin Scenic Easement program suggests that clarity of language in statutes and instruments, a prescribed rotating inspection system with prompt reporting by citizens and the Government of violations, together with an understanding by local courts of the administrative and legal aspects of such devices will encourage significant enforcement.

D. SUTTE & R. CUNNINGHAM, SCENIC EASEMENTS: LEGAL, ADMINISTRATIVE AND VALUATION PROBLEMS AND PROCEDURES 15 (National Cooperative Highway Research Program Report #56 (1968)).

116. Although a hearing procedure to enforce a local government's property rights in DR's is not a constitutional requirement, it may be an appropriate step. The Model Code, however, probably would not require it unless the restrictions were contained in an ordinance; it would be unlikely for them to be referenced in an "order or rule."

117. These procedures are set forth in sections 10-121 and 202 of the Model Land Development Code respecting violations of "orders, rules, or ordinances" as those terms are defined in the Code.

periodic reporting to the public on existing DR locations and compliance with governing restrictions. Furthermore, the report would make recommendations as to prospective DR acquisitions and would include statistics and commentary on the effectiveness and efficiency with which agricultural land has been protected. Data should be provided respecting changes in tax assessment base and taxes received, trends in costs of local infrastructure such as sewers and schools, administrative and acquisition costs, and any other possible effects of the preservation program. Finally, reporting should contain information on housing and land prices; the rate of new construction; and the effect on such other planning elements as employment, commercial and industrial facilities, and transportation.¹¹⁸

Although the administrator and the Appeals Commission must have broad powers, it is not recommended that they be empowered to grant relief in the nature of a variance.¹¹⁹ The primary justification for this position is experimental. In the area of zoning, published studies of variance administration indicate that many administrative boards do not regularly observe the principal purpose of variances,¹²⁰ to exercise discretion in waiving some aspect of the applicable ordinance in "exceptional instances." The purpose is clearly frustrated when a high percentage of variance applications is granted.¹²¹ Furthermore, under a voluntary program it would be fair to put the burden upon the landowner

118. See generally Krasnowiecki & Strong, *supra* note 2.

119. A variance, sometimes called a "variation," is designed to provide relief from the requirements of a zoning code because of hardship. See generally 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§129.01-146.11 (1975).

120. It may be contended that a technique should be incorporated to allow some flexibility in cases in which the owner would suffer unique hardship or practical difficulties in complying with the terms of the agricultural title after development rights were sold.

121. In a 1973 study supervised by one of the authors and conducted by Ms. Virginia Ware of Denver, Colorado, a review of variance decisions in Toledo, Ohio, over the three year period ending in the fall of 1973, indicated that 91% of the 346 variance applications were approved. The approval rate was higher when the applicant was a resident homeowner (85%) rather than the owner of the commercial establishment (80%). See Dukemanier & Stapleton, *The Zoning Board of Adjustment: A Case Study of Misrule*, 50 KY. L.J. 273 (1962); Comment, *Administration of Zoning in Maine*, 20 ME. L.REV. 207 (1968); Comment, *Zoning: Variance Administration in Alameda County*, 50 CALIF. L.REV. 101 (1962); Note, *Syracuse Board of Zoning Appeals—An Appraisal*, 16 SYRACUSE L.REV. 632 (1965).

to evaluate and decide initially whether the sale of DR's could preclude reasonable return on his investment in the land.

3. *A voluntary DR program might include police power and should include the power to condemn.*

Although condemnation is a necessary element of farmland preservation plans, legislatures could enact programs that minimize its need.¹²² One method is to require all participating landowners to offer DR's to a substantial percentage of their land¹²³ to ensure preservation of large, contiguous parcels. In the Oregon Scenic Waterways Program, landowners must notify the government about proposed changes in land use along specified waterways.¹²⁴ After receipt of notice, an administrative agency is permitted by statute to defer the proposed change in use for one year if it is deemed to damage the waterway's natural beauty. During that period, negotiations may take place between the administrative agency and the owner, including discussions of potential scenic easement purchases.¹²⁵ The statute also provides that the landowner may serve a written notice and force such negotiations to occur.¹²⁶

Even when a DR program is based upon voluntary offers by landowners or when the government may defer changes in land uses, the power to condemn land is essential. The effects of open space programs on the social and economic life of urban and

122. Recognizing that owners of key parcels might not offer DR's, the Suffolk County Program contemplates the expenditure of \$15 million to condemn DR's so as to fill gaps between otherwise contiguous parcels. B. Keller, *Moment of Truth on Farms Nears*, *Newsday* (April 23, 1976).

123. In the New Jersey program, for example, no offer is entertained unless it relates to at least 80% of the total farm acreage of the parcel. See, N.J. RULES AND REGULATIONS 7, at 10-15. Some Suffolk County farmers have stated their intent to withhold offers on especially valuable waterfront or road frontage land, ostensibly because its value was far in excess of the county's acquisition budget. Selective withholdings by offerors were based on other stated reasons also, the most common of which probably encourages agricultural preservation: to permit construction of residences for the farming descendants of existing owners.

124. ORE. REV. STAT. §390.845(3).

125. ORE. REV. STAT. §390.845(4).

126. ORE. REV. STAT. §390.845(5). Another potential approach is to permit acquisition of DR's only after a landlord temporarily objects to some attempt by the local government or pursuant to the zoning ordinance to place restrictions on the land.

suburban communities are too serious to allow them to be exposed to haphazard implementation through consensual arrangement with willing property owners.¹²⁷ However, where condemnation is used, special safeguards should be considered. For example, a government should restrict surrounding tracts to low intensity uses under the police power so that the development value of the condemned tract is not merely shifted to surrounding land, as a windfall to the owner of that land.¹²⁸ Additionally, failure to restrict development of surrounding land to very low density could undercut the purpose of agricultural preservation. Absent such a buffer zone, neighboring landowners might object to spraying, dust, and noise. Their pressure could lead to local restrictions decreasing the economic and social usefulness of the condemned¹²⁹ land.

4. *Procedures and standards for possible dispositions of acquired DR's generally should be patterned after those proposed by the Model Land Development Code.*

If zoning and other land use guidance systems based upon the police power are any guide, the goal of permanent preservation of agricultural land may be short-lived¹³⁰ because appropriate land use tends to change with time. Realizing this, the Reporters to the Model Land Development Code provide for occasional dis-

127. Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L.REV. 179, 183 (1961).

128. Evelth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L.REV. 559 (1964).

129. Krasnowiecki & Strong, *Compensation Regulations for Open Space as a Means of Controlling Urban Growth*, 29 J. AM. INST. PLANNERS 87, 91 (1963).

130. The process of change initiated by landowners is perhaps more important than the ordinance itself; as a 1974 state court opinion observes:

For most communities, zoning as long range planning based on generalized legislative facts without regard to the individual facts has proved to be a theoretician's dream, soon dissolved in a series of zoning map amendments, exceptions and variances—reflecting, generally, decisions made on individual grounds—brought about by unanticipated and often unforeseeable events: social and political changes, ecological necessity, location and availability of roads and utilities, economic facts (especially costs of construction and financing), governmental needs, and, as important as any, market and consumer choice.

Kroft v. City of Sterling Heights, 391 Mich. 139, 168, 215 N.W.2d 179, 191-92 (1974) (Levin, J., concurring).

position of DR's.¹³¹ Such disposition decisions should be governed primarily by specific statutory restrictions¹³² and be based largely on planning considerations.¹³³ Consequently, the Model Code rejects the traditional "ownership in trust for the people" concept and includes several well-conceived sections that provide for disposition procedures.¹³⁴

Statutory procedures for the disposition of DR's should, as do the Model Code provisions, grant to the local governmental entity great flexibility to deal with changes in its comprehensive plan. For instance, the disposing government should be able to attach conditions or restrictions.¹³⁵ It also should be permitted to impose covenants to control the future use of the land¹³⁶ which could be enforced by the seller "whether or not it owns any land which may be benefited by the covenant and whether or not the performance of the obligation will benefit the transferee."¹³⁷ Because disposal would be proper only when it furthers "proper planning of the area,"¹³⁸ government normally would be expected to impose use restrictions incident to DR dispositions.¹³⁹ Also, the price obtained must correlate to the use contemplated by the disposing government. Hence a "use-value" rather than "fair market

131. MODEL LAND DEVELOPMENT CODE §5-106, 5-401.

132. Statutes authorizing public "land banking"—a process of acquiring, holding and disposing of land when it is ripe for development, subject to conditions—afford some, but rather modest guidance here. See KY. ACTS ch. 125 (1972); ILL. REV. STAT. ch. 67 1/2, §307.12 (1971); LA. REV. STAT. ANN. §33:7613 (West); N.Y. UNCONSOL. §6251-85 (McKinney); OHIO REV. CODE ANN. §349.

133. Part IV of Article 5 of the Model Land Development Code addresses in some detail the disposition of "Land held for Planning Purposes." Such land includes development rights acquired to preserve open space. Sale or disposal powers include the power to lease the land if that would further the proper planning of the area. See note to Section 5-401. See also N. WILLIAMS, JR., 1 AMERICAN LAND PLANNING LAW 4-5 (1975).

134. See MODEL DEVELOPMENT CODE §5-104 and accompanying notes.

135. MODEL LAND DEVELOPMENT CODE §5-402(2). The provision is designed to permit "conditions relating to purchases contingent on the granting of a necessary rezoning."

136. MODEL LAND DEVELOPMENT CODE §5-403(1). "Covenants of this type have been common in connection with the urban renewal program."

137. MODEL LAND DEVELOPMENT CODE §5-403(2). And conversely, persons other than the selling government or agency may not enforce the covenants, "unless the instrument creating the covenants expressly specifies the classes of beneficiaries which may enforce the covenants, if any." *Id.* at §5-403(3). Also, a five year statute of limitations is provided. *Id.* at §5-403(4).

138. MODEL LAND DEVELOPMENT CODE §5-401.

139. MODEL LAND DEVELOPMENT CODE §5-402.

value" which implies the highest and best use, would be specified.¹⁴⁰ Sometimes use-value would be difficult to determine: "for some planning purposes it will be difficult to put any monetary price tag on the use to which the transferee is limited. What is the value of 'open space' for example?"¹⁴¹ In common cases of sales by public bidding, the "price offered by the bidder whose bid is accepted would be regarded as establishing use value . . . even though disposition is at less than cost or any appraisal ordered or made by the selling agency."¹⁴²

The Code contemplates that most DR's would be sold by public bidding.¹⁴³ However, if the government determines that a negotiated sale would further the planning purposes, then it could use that method.¹⁴⁴ In addition, section 5-411(1) of the Code provides in pertinent part that "any substantial modification of the terms . . . which increases the value of the fee is a 'disposal' of a portion of that interest . . ." ¹⁴⁵ and subject to Code disposition rules. Also, uncompensated releases by the government would require special approval of that subsidy¹⁴⁶ by way of a governmental determination that the "less than use value" disposal has a public purpose.

140. MODEL LAND DEVELOPMENT CODE §5-404:

(1) No governmental agency shall dispose of land held for planning purposes at less than its use value for the uses permitted thereon except as provided in Section 5-407 on sale at less than use value; Section 5-408 on disposition to a governmental agency; Section 5-409 on disposition by lot.

(2) In determining the permitted uses the agency shall take into account any restrictions to be attached to the disposition and any other covenants, easements or terms enforceable by the local government having jurisdiction over the land.

(3) If the land is to be disposed of by public bidding under Section 5-405 the price offered by the bidder whose bid is accepted is to be regarded as establishing use value under subsection (1) even though disposition is at less than cost or any appraisal ordered or made by the selling agency.

141. *Id.*

142. *Id.* at 5-404(3).

143. The bidding procedures are articulated in detail in the MODEL LAND DEVELOPMENT CODE §5-405.

144. Other procedures would govern dispositions to other agencies (Section 5-408), by lot (Section 5-409), and by short term lease (Section 5-410). In the views of the authors, a full adjudicative hearing similar to the ones suggested at notes 109-11 and accompanying text would be preferable to a legislative type hearing proposed by the Model Code Reporters.

145. MODEL LAND DEVELOPMENT CODE §5-411(1).

146. *Id.*

Any requirement of a public referendum before a disposition can occur, such as that contained in the Suffolk County Plan, would undermine due process because it would blunt the advantages of prior planning that tend to promote fairness.¹⁴⁷ Whether DR dispositions, or for that matter DR acquisitions, are analyzed as "adjudicatory" or "legislative,"¹⁴⁸ the procedural and substantive fairness standards being refined by some state courts in land use cases are in our view inconsistent with a referendum technique.¹⁴⁹ State court decisions in land use referendum cases, generally involving rezonings, frequently distinguish zoning decisions respecting particular parcels from decisions on general or comprehensive plans or zoning ordinances.¹⁵⁰ DR disposition decisions

147. The authors draw heavily in this portion of the Article from Babcock, Callies & Smith, Brief of Amici Curiae, National Association of Home Builders, American Society of Planning Officials and American Institute of Planners, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976).

It is highly unusual for planners and developers to join forces in litigation. However, the City Charter Amendment attacked in *Eastlake* required a referendum approval of all individual rezonings, a procedure which the NAHB regarded as creating uncertainty and impeding the construction of new housing. The planning amici took the position that the provision undermined the use and value of ongoing planning.

148. Despite the low intensity or "downzoning" impact of a DR acquisition, which is distinguishable from a typical rezoning to a more intensive use, DR acquisitions should be regarded as fundamentally administrative. See notes 89-104 and accompanying text *supra*. An even stronger argument for an "administrative act" analysis is presented when DR's are disposed of (rather than acquired) because if the DR and the underlying agricultural title are merged, development of farmland could thereafter take place, to the extent permitted under the applicable zoning classification (or as rezoned) and the governing subdivision ordinance. Such development might have an adverse impact on neighboring property and the community in general.

149. We do not here contend that a referendum would be unconstitutional as a denial of due process. The U.S. Supreme Court's holding in *Eastlake* suggests that it could well withstand such attack. Our argument is that planning becomes meaningless in the setting of a referendum. Of the various roles of urban planning (*e.g.*, social, aesthetic, and fiscal), perhaps the most important is its tendency to promote fairness and rationality in allocating benefits and detriments.

150. *Foreman v. Eagle Thrifty Drugs & Markets, Inc.*, 89 Nev. 533, 537-38; 516 P.2d 1234, 1237 (1973).

We think that whether or not the citizens of a state wish to embark upon a policy of zoning for the purpose of regulating and restricting the construction and use of buildings within fixed areas is a legislative matter subject to referendum. But when, as in the present case, such policy has been determined and the changing of such areas, or the granting of exceptions has been committed to the planning commission and the city council in order to secure the uniformity necessary to the accomplishment of the purposes of the comprehensive zoning ordinance, such action is administrative and not referable.

are quite similar to those individualized zoning decisions, as has been previously argued regarding DR acquisitions. Although the leading land use referendum cases¹⁵¹ are contrary to the thrust of the previously discussed state court opinions,¹⁵² it is our argument that DR enabling statutes and local DR ordinances should be drafted so as to rely on administrative procedures rather than on disposition referenda.

The disposition of DR's presumably are an exercise of the police power, and must be reasonable¹⁵³ and for the public welfare. These requirements are probably met with ease in most cases.¹⁵⁴ Yet, because the consequences of improper disposition of DR's are of a serious nature, a detailed judicial review procedure patterned generally after the Code should be established.¹⁵⁵ All standing requirements for judicial challenge should be included in one statutory location. This would reduce confusion and generally apprise citizens of judicial safeguards.

Id. See also *O'Loane v. O'Rourke*, 231 Cal.App.2d 774, 42 Cal. Rptr. 283 (1963). In *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 3036 (1974) (rezoning not subject to a referendum), the court cited with approval *Bird v. Sorenson*, 10 Utah 2d 1, 102, 394 P.2d 808 (1964). See also *Kelley v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956); *Elkind v. City of New Rochelle*, 5 Misc.2d 296, 301-02, 163 N.Y.2d 870, 876-77 (1957), *aff'd*, 5 N.Y.2d 836, 181 N.Y.2d 509 (1958).

151. See discussion of *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) at note 147 *supra*. In the other major case, *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970), the court upheld the application of a city-wide referendum requirement that resulted in nullification of a rezoning to a multi-family classification (necessary for the construction of federally financed housing); the rezoning was consistent with a draft master plan that had been informally abandoned by the city.

152. In one case illustrating the distinction between individualized and comprehensive rezoning the Minnesota Supreme Court construed a referendum provision in the state enabling act to apply only to a "comprehensive type of zoning ordinance and . . . not to an altering or amending ordinance." *Minneapolis Honeywell Regulator v. Nadasdy*, 247 Minn. 159, 165, 76 N.W.2d 670, 676 (1956). A more recent Nevada case, also in a rezoning context, supports the proposition that decisions respecting use limitations on particular parcels should be distinguished from general zoning plans. *Foreman v. Eagle Thrifty Drugs & Markets, Inc.*, 89 Nev. 533, 537-38; 516 P.2d 1234, 1237 (1973).

153. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962). See *Alton R. R. v. Tranbarger*, 238 U.S. 67, 76-77 (1915); *Galvan v. Superior Court*, 70 Cal.2d 851, 869, 452 P.2d 930, 942, 76 Cal. Rptr. 642, 654 (1969).

154. See Comment, *Judicial Review of Land Bank Dispositions*, 41 U. CHI. L. REV. 377, 383-86 (1974).

155. MODEL LAND DEVELOPMENT CODE, Commentary on Article 9 Judicial Review of Orders, Rules and Ordinances.

Judicial review of individual DR dispositions should focus primarily on whether the action complies with the standards outlined in the local DR ordinance.¹⁵⁶ Even if there are no such standards, if there is a plan developed to implement stated legislative purposes, then such plan should be given great weight in the judicial review process.¹⁵⁷ Further, drawing on general judicial approaches to reviewing individual rezonings when reviewed as exercises of legislative authority, perhaps the DR dispositions could be tested by a general welfare analysis.¹⁵⁸ This analysis of whether the disposition is reasonably related to legislative purposes might be three pronged:¹⁵⁹

- (a) whether there is substantial evidence of compliance with statutory objectives, considering stated standards;
- (b) whether any prescribed statutory procedures were followed, and if none, whether procedures for full consideration (e.g. expert and lay views, findings and reasons) were followed; and
- (c) whether the action served merely a private rather than a public purpose.

5. *The involvement of various governmental units.*

The well documented "quiet revolution in land use controls"¹⁶⁰ reflects a new perspective on the proper level of government to regulate the development of land. Until the late 1960's, local government was regarded as the appropriate agency to exercise the states' powers, but recognition surfaced that the parochialism of municipalities could have adverse consequences for the development of larger regions.¹⁶¹ The Model Land Development

156. This discussion assumes that the decisions are not subject to referendum, but rather are made by a government agency or a local legislative body pursuant to detailed standards set forth in a Local Ordinance.

157. As regards land banking dispositions, it has been argued that judicial deference to a plan is appropriate because it reflects technical expertise and an understanding of competing public interests; also it is the result of thorough consideration of relevant information. Recent zoning cases indicate greater emphasis on the contents of plans in reviewing rezonings. See Comment, *Judicial Review of Land Bank Dispositions*, 41 U. CHI. L.REV. (1924).

158. *Id.*

159. *Id.*

160. BOSSELMAN, *THE QUIET REVOLUTION IN LAND USE CONTROLS* (1971).

161. A basic counter-argument should not be overlooked, though: that local or county

Code suggests that local governments should continue to act on matters of only local concern, but that states should plan and regulate areas of important state or regional interests.

Farmland preservation is of more than local significance. Also, some DR programs might not be administratively feasible for county or local government. For instance, the requirement for establishing administrative officials and particularized services to administer the program might be prohibitively expensive on a small scale.¹⁶² Additionally, state taxation legislation and administrative rulings would have a bearing on many aspects of a DR approach which suggests that state involvement might be appropriate.

Several potential approaches exist for state involvement in the administration of farmland preservation plans. First, the acquisition of DR's could be made at the state level by administrative departments of agriculture and environmental protection. Another alternative would be the establishment by the state legislature of a commission to be appointed by the governor expressly on a non-partisan basis and approved by the state legislature.¹⁶³ That approach would promote concern for the interest of the entire state but would not involve "representatives" of particular areas. The commission would include, but not be limited to, persons with expertise in such disciplines as conservation, recreational planning, landscape architecture and regional planning. Such a group could recommend to state government the acquisition of particular DR's.

programs are more logical than state or regional ones, because the same agency or agencies administering other land use planning and control processes should be coordinating and administering a farm preservation program, to insure continuity and consistency in approach as well as ensuring that appropriate township and county plans are taken into account.

162. For example, appraisal costs could be reduced by establishment of specialized appraisal departments within the administrative or legislative agencies.

163. A special state commission was apparently quite helpful in preserving [through a variety of land use control techniques] the privately held land in the Adirondack Park private areas. The commission was answerable to the state legislature, drawing its authority in part from the Department of Environmental Conservation and also directly from the state constitution. The Adirondack experience is described and utilized in a recent report proposing reservation of "green-lined parks" administered by a state level commission, with local government representation but not decisional control. Congressional Research Service, *Green-Line Parks* (1975).

Another potential method combining different levels of governmental involvement is the so-called "Cape Code formula."¹⁶⁴ Under this system, the Secretary of the Interior, by a grant from a federal statute, has the authority to condemn private property in those communities in which local zoning ordinances meeting certain federal standards have not been submitted to and approved by the Secretary.¹⁶⁵ This system, however, has not always been successful because local government jurisdictions in some cases have failed to submit zoning ordinances for approval.¹⁶⁶ Perhaps a state or county government which wanted to implement a DR program could establish as a policy the condemnation of a certain number of farmland acres within particular local jurisdictional boundaries. The state or county government acquisition would be prohibited if the local government having jurisdiction over those boundaries implemented a voluntary program in conformance with standards established by the state or county government and using funds partly provided by the higher level of government.

To the extent that township or other small local government circumstances suggest the desirability of DR projects specially tailored to local conditions, perhaps the state enabling act should establish standards and procedures, but permit state intervention for ineffective activity. This "integration of legal tools and organizing for their use at a regional or state level"¹⁶⁷ is not unlike the general proposals contained in the Model Land Development Code for areas of critical state concern and developments of regional impact. Any such indirect approach should incorporate a requirement that the local government report semiannually to higher governmental bodies and to the public on DR's presently owned by the unit, the availability of other potentially desirable parcels within the area, and present and anticipated needs.

Such an approach at least partially meets a basic counter-

164. MODEL LAND DEVELOPMENT CODE §5-402(2). The provision is designed to permit "conditions relating to purchases contingent on the granting of a necessary rezoning."

165. See generally BABCOCK, REPORT TO THE NATIONAL PARK SERVICE ON DEVELOPMENT OF THE FIRE ISLAND NATIONAL SEASHORE (1976).

166. Draft of the General Management Plan, Fire Island National Seashore (1976) (U.S. National Park Service).

167. BEUSCHER, SCENIC EASEMENTS AND THE LAWS (1966).

argument to extensive state or regional involvement: that local or county programs are more logical than state or regional ones. The same agency or agencies administering other land use planning and control processes should be coordinating and administering a farm preservation program, to insure continuity and consistency in approach as well as the consideration of appropriate township and county plans.

CONCLUSION

This Article has had two broad purposes: first, to describe and evaluate an innovative county effort to preserve farmland by the purchases of DR's; second, to identify and comment on selected problems and opportunities that should be addressed by governments considering adoption of a DR program. Future adoption of some or all of the authors' recommendations will depend largely on public attitudes, political considerations, and available resources. We predict that the most important determinant in the adoption and administration process will be early and active participation by a broad cross-section of citizens.

The authors hope to conduct a series of workshops to solicit responses to these recommendations, and to generate additional proposals. These workshops would be convened in locations in several regions. The locations would be selected by reference to their differing characteristics, such as degree of development pressure and agricultural productivity. Invited participants would include public officials, environmental groups, farmers, planning professionals and other interested citizens.