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INNOVATIVE TECHNIQUES TO PRESERVE RURAL LAND RESOURCES

Charles E. Roe*

I. INTRODUCTION

The nation is increasingly concerned with the intensive development of its rural lands.¹ The present net development of over one million acres of land annually² cuts deeply into those remaining rural land reserves of public importance: prime agricultural land, environmentally sensitive land, and unique natural areas. Public concern has been focused primarily on development of rural lands that have served as de facto greenbelts for urban areas, and on development of critical environmental areas such as floodplains, wetlands, watersheds, steep slopes, wildlife habitats, and other unusual natural areas.³ The public is also increasingly aware of the necessity of preventing indiscriminate conversion of agricultural land.⁴

Much of the development of rural lands is a result of urban expansion. The total urban land area is expected to increase from 196,958

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¹ The distinction between "urban" and "rural" is not clearly defined by geographers. THE FOURTH ANNUAL REPORT OF THE PRESIDENT TO CONGRESS ON GOVERNMENT SERVICES TO RURAL AMERICA (1974), laid out a continuum from rural to urban character. For many federal programs, the metropolitan/nonmetropolitan dichotomy is used, although it should be recognized that standard metropolitan statistical areas (SMSAs) often encompass geographic areas still rural in character.

² The net loss of agricultural land in the United States is estimated at about 1.4 million acres/year. R. Blobaum, *The Loss of Agricultural Land*, STUDY REPORT TO THE CITIZENS' ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY (1974) [hereinafter cited as Blobaum].

³ THE NATURE CONSERVANCY FOR THE U.S. DEP'T OF THE INTERIOR, THE PRESERVATION OF NATURAL DIVERSITY: A SURVEY AND RECOMMENDATIONS (1975).

⁴ Brown, *The World Food Prospect*, 190 SCIENCE 1053 (1975); Miner, *Agricultural Retention: An Emerging Issue*, ENV'T'L COM., May, 1975, at 1; G. PETERSON & H. YAMPOLSKY, URBAN DEVELOPMENT AND THE PROTECTION OF METROPOLITAN FARMLAND (1975); ROCKEFELLER BROTHERS' FUND, THE USE OF LAND: A CITIZEN'S POLICY GUIDE (W.K. Reilly ed. 1972). Agricultural lands include rural lands used for farming, timber, livestock, and horticultural production.

square miles in 1960 to 486,902 square miles by the year 2000, that is, from 6.6% to 16.4% of the total land area of the contiguous United States.⁵ Ironically, many of the forty-seven million acres in the category of prime agricultural land are also the most attractive for intensive development because of their deep soils, good drainage, resistance to erosion, and slight slopes.⁶ Similarly, unique natural areas attract recreational and residential development which destroy ecological resources. Thus, the pattern of rapid, low intensity urbanization with its associated leapfrog development can be expected to continue to take a heavy toll on valuable rural lands⁷ unless strong public programs of rural land conservation are initiated.

Success in preserving important rural lands depends on widespread recognition of their value to the public. The increase in public concern for protecting natural resources offers hope that a reevaluation of traditional assumptions toward land as a private commodity is occurring.⁸ Observers of recent trends in property law conclude that traditional land-as-private-property attitudes may be shifting to allow greater public control of land uses.⁹ The surrender or restriction of private development rights would promote a rational policy of land management based on social and ecological criteria.

This study will review four innovative methods for preserving rural lands: compensable regulations, development rights easements, transferable development rights, and land banking. As will be seen, the traditional means of protecting valuable open space

⁵ Blobaum, *supra* note 2, at 7; Miner, *Agricultural Preservation: A New Issue in Open Space Consideration*, ENV'T'L COM., Oct., 1974, at 9 [hereinafter cited as *Agricultural Preservation*].

⁶ Blobaum, *supra* note 2, at 5; ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, PUB. NO. 1290 (1974); SOIL CONSERVATION SERVICE, U.S. DEP'T OF AGRICULTURE, STATISTICAL BULL. NO. 461, NATIONAL INVENTORY OF SOIL AND WATER CONSERVATION NEEDS (1967). The criteria for classifying farmland as "prime" are limited to physical characteristics of the soil, including: its moisture content, acidity, temperature, frequency of flooding, erosion, permeability, and available water supply. The Soil Conservation Service has undertaken an inventory of the nation's best farmland which will classify not only prime soil values but also farmlands outstanding for production of high-value food and fiber crops and farmlands of special statewide and local importance. SOIL CONSERVATION SERVICE, U.S. DEP'T OF AGRICULTURE, LAND INVENTORY AND MONITORING MEMORANDUM 3 (Oct. 15, 1975).

⁷ M. CLAWSON, *SUBURBAN LAND CONVERSION IN THE UNITED STATES* (1971); REAL ESTATE RESEARCH CORPORATION, *THE COSTS OF SPRAWL* (1974).

⁸ F. BOSSELMAN & D. CALLIES, CEQ, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972); CEQ, *ENVIRONMENTAL QUALITY* 49-54 (1974).

⁹ Caldwell, *Rights of Ownership or Rights of Use?—The Need for a New Conceptual Basis for Land Use Policy*, 15 WM. & MARY L. REV. 759 (1974); Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039.

land resources by public acquisition through eminent domain, tax incentives, or police power regulation have generally proven deficient for a combination of economic, constitutional, political, and administrative reasons. The innovative methods examined offer greater hope for success than these traditional regulatory and incentive efforts.

II. INADEQUATE TRADITIONAL TECHNIQUES FOR MANAGING LAND USE

Conventional control efforts have taken three forms: police power regulations, tax incentives, and acquisition of fee simple title by eminent domain.¹⁰ The following sections review the general limitations of each of these techniques:

A. *Police Power Regulations*

The police power is the power of the state to “. . . [promote] the public welfare by restraining and regulating the use of liberty and property.”¹¹ It is the recognized power of the state to promote the health, safety, and welfare of the public.¹² Attempts to use police power regulations to control the patterns and quality of land development typically have been restricted to zoning, subdivision ordinances, and building permits.

Zoning is the most prevalent form of such “police power” regulations applicable to open space land preservation. Zoning rural areas as a means of segregating and specifying particular land uses, however, has been ineffective in preserving agricultural and environmentally important land. Although zoning per se has inherent problems as a means of land use control,¹³ these problems are often exacerbated by poor administration of zoning problems.¹⁴ Local governments authorized to use zoning, if they, in fact, adopt zoning regulations, are too often permissive, arbitrary, and uncoordinated in their enforcement of those regulations. Zoning ordinances are

¹⁰ Among the traditional but lesser used methods for managing growth are: public investment controls (roads, electricity, etc.), capital programming processes, development moratoria, and development timing.

¹¹ E. FREUND, *THE POLICE POWER*, iii (1904).

¹² *E.g.*, *Bronx Chamber of Commerce v. Fullen*, 174 Misc. 2d 524, 530, 21 N.Y.S. 2d 474, 481 (1940); *State v. Cromwell*, 72 N.D. 565, 576, 9 N.W.2d 914, 919 (1943).

¹³ R.F. BABCOCK, *THE ZONING GAME—MUNICIPAL PRACTICES AND POLICIES* (1966); D. MANDLKER, *THE ZONING DILEMMA* (1971); Tarlock, *Toward a Revised Theory of Zoning*, *ASPO LAND USE CONTROLS ANN.* 141 (1972).

¹⁴ Reimer, *Traditional Zoning: Precursor to Managed Growth*, in 1 *MANAGEMENT & CONTROL OF GROWTH* 211 (R.W. Scott ed. 1975).

often unrelated to community or regional plans and objectives, or to other regulatory devices.¹⁵ Thus, the fragmented structure and parochial views of local government defeat the potential of zoning regulations for conserving open space resources on a regional scale.¹⁶

The potential of police power regulations for rural land preservation is severely limited by the short-sighted administration characteristic of most local governments. Piecemeal and ad hoc administration fail to meet broader regional needs. To better control land resources of areawide importance, regulatory powers should be exercised by regional governing boards with review by state agencies. Yet, a major reordering of governmental authority is unlikely, and police power regulations as presently administered remain ineffective for protecting rural lands.

Zoning has other shortcomings. Under prevalent legal and societal concepts of property rights, conventional zoning can too easily amount to an invalid "taking" of property without compensation.¹⁷ To avoid this dilemma, authors and administrators of open space land zoning regulations must justify their choice of particular zoning regulations by basing the regulations on the natural conditions of the land and the public needs. A line of recent court decisions in several states has accepted restrictive land use regulations to preserve ecologically-sensitive areas.¹⁸ This trend signals a new relationship between property rights and the public interest.¹⁹

Police power regulations, particularly more innovative forms of zoning, can be used successfully in combination with other techniques to protect rural lands.²⁰ But, few local governments have

¹⁵ Reps, *Requiem for Zoning*, PLANNING 56 (1964).

¹⁶ Levine, *Land Conservation in Metropolitan Areas*, 30 J. AM. INST. PLANNERS 204 (1964).

¹⁷ See U.S. CONST. amend. V & XIV; Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking?*, 57 MINN. L. REV. 1 (1972); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING* (1973); D. BROWER, D. GODSCHALK, CENTER FOR URBAN AND REGIONAL STUDIES, *CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT* (1976); Sullivan, *The Taking Issue*, 5 ENV'T L. REV. 515 (1975); Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039; Hagman, Book Review, 87 HARV. L. REV. 482 (1974).

¹⁸ See cases note 20, *infra*.

¹⁹ Norman & Derr, *The Legal Aspects of an Agricultural Open Space Preserve Through Exclusive Agricultural Zoning in New Jersey*, ENV'T L. COM., May, 1975 at 11.

²⁰ E.g., *Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (Ct. App. 1970); *In re Spring Valley Dev.*, 300 A.2d 736 (Me. 1973); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE U. L. J. 1; Lamm & Davison, *The Legal Control of Population Growth*

actually adopted such innovative forms of zoning as impact (performance) zoning, incentive zoning, or planned unit development zoning. Even when effectively and innovatively used, police power regulations alone are inadequate methods for preserving important rural lands. Conservation of such agricultural and environmentally important lands demands a fuller range of techniques.

B. Tax Incentives

The negative impact of property taxation practices on planned land use development and rural land preservation are well-recognized.²¹ Local fiscal dependence on property tax revenues forces owners of rural land to sell their land for development, particularly when the land is on the urban fringes or other growth areas.²² Where property tax assessments are based on potential land development value, the taxes may substantially exceed the owner's income from the open space use of his land and the landowner may be pressured to sell the land for development. The public is the real loser, for the landowner who is forced to sell his property pockets a handsome individual profit.

Preferential tax assessment for farmland and other rural land has become a popular method to counteract the negative effects of property taxes.²³ Over thirty states have adopted forms of preferential taxation, but this method's effectiveness in preserving rural lands remains extremely dubious.²⁴ Preferential taxation encourages landowners to continue current and publicly desirable uses of land by tax assessments which are less than the land's full market or

and Distribution in a Quality Environment: *The Land Use Alternatives*, 49 DEN. L. J. 1 (1972); M. LEVIN, J. ROSE & J. SLAVER, *NEW APPROACHES TO STATE LAND-USE POLICIES* (1974); Strong, *Incentives and Controls for Open Space and Natural Processes*, in *METROPOLITAN OPEN SPACE & NATURAL RESOURCES* (D.A. Wallace ed. 1970).

²¹ Gaffney, *An Agenda for Strengthening the Property Tax*, PROPERTY TAX REFORM (G. Peterson ed. 1973); Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628; R. NETZER, *ECONOMICS OF PROPERTY TAX* (1966).

²² Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974) [hereinafter cited as Henke]; *Agricultural Preservation*, *supra* note 5; Slitor, *Taxation and Land Use*, THE GOOD EARTH OF AMERICA; PLANNING OUR LAND USE 67 (1974).

²³ ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, *AGRICULTURAL ECONOMIC REP.* No. 256 (State Programs for the Differential Assessment of Farm and Open Space Land, 1974).

²⁴ CEQ, *ENVIRONMENTAL QUALITY*, 64-68 (1974); Vogel & Hahn, *On the Preservation of Agricultural Lands*, 48 LAND ECON. 190 (1972); CEQ, *UNTAXING OPEN SPACE* (1974); MONTANA DEP'T OF COMMUNITY AFFAIRS, DIV. OF PLANNING, *DIFFERENTIAL TAXATION AND AGRICULTURAL LAND USE* (1975).

potential development value.²⁵ Most states penalize the owner of land which has received preferential tax assessments when it is subsequently sold for development. This penalty may amount to three to five years' back taxes at the non-preferential rate. However, the "rollback" penalty is seldom more than a fraction of the profits realized on the sale for development.

Several states have experimented with preferential tax programs with varying degrees of success. The California experience under the Land Conservation Act of 1965,²⁶ has been studied in most detail.²⁷ The California program authorizes counties to designate "agricultural preserves," and to enter into contracts with landowners to place binding land use restrictions on their agricultural or open space land for extendable terms of ten years,²⁸ in exchange for preferential property tax assessments. The penalty for selling the land before the term has expired is both a tax rollback and a penalty equal to half the full cash value of the land in its unrestricted use.

Recent analyses conclude that the preferential tax laws in California and other states have not significantly deterred farmland con-

²⁵ HAGMAN, AM. SOC. OF PLANNING OFFICIALS NAT'L PLANNING CONFERENCE, WINDFALLS FOR WIPEOUTS (1974) [hereinafter cited as WINDFALLS FOR WIPEOUTS]; *Agricultural Preservation*, *supra* note 5. Use-value assessment, the assessment of property based on its current use rather than its market value is another term for preferential taxation. Int'l Ass'n of Assessing Officers, *Use-Value Farmland Assessments*, ENV'T'L COM., May, 1975, at 3 [hereinafter cited as Assessing Officers].

²⁶ CAL. GOV'T CODE §§ 51200 *et seq.* (West 1966), *as amended* (Supp. 1975).

²⁷ Alden & Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination?*, 42 S. CAL. L. REV. 54 (1969); Dean, *A Panacea That Wasn't: The Williamson Act Needs Repair*, CRY CALIFORNIA, Summer, 1975, at 18; Land, *Unraveling the Urban Fringe: A Proposal for the Implementation of Proposition Three*, 19 HASTINGS L.J. 421 (1968); Mix, *Restricted Use Assessment in California: Can It Fulfill Its Objectives?*, 11 SANTA CLARA LAW. 259 (1971); Comment, *Assessment of Farmland Under the California Land Conservation Act and the "Breathing Space" Amendment*, 55 CALIF. L. REV. 273 (1967); Comment, *The Dilemma of Preserving Open Space Land—How to Make Californians an Offer They Can't Refuse*, 13 SANTA CLARA LAW. 284 (1973). CAL. LEGISLATIVE JOINT COMM. ON OPEN SPACE LANDS, STATE OPEN SPACE AND RESOURCE CONSERVATION PROGRAM FOR CALIFORNIA (1972).

The New Jersey Farmland Assessment Act has incorporated the California and New York approaches of special districting with exclusive agricultural zoning. See *Agricultural Preservation*, *supra* note 5 and Vermont's approach of combining capital gains taxes with tax relief for property owners based on a progressive income scale. VT. STAT. ANN. tit. 32, § 10001 *et seq.* (Supp. 1975); Rose, *Vermont Uses the Taxing Power to Control Land Use*, 2 REAL ESTATE L.J. 602 (1973); Baker, *Controlling Land Uses and Prices by Using Special Gain Taxation to Intervene in the Land Market, The Vermont Experiment*, 4 ENV. AFF. 427 (1975). See Assessing Officers, *supra* note 25, for a general review of the 30 states with rural land preferential tax programs.

²⁸ "'Agricultural Preserve' means an area devoted to either agricultural use, recreational use . . . or open space . . . or any combination of such uses and compatible uses as designated by a city or county . . ." CAL. GOV'T CODE § 51201(5)(d) (West Supp. 1976).

version. Rather, preferential tax assessment has caused a substantial loss of local government tax revenues,²⁹ has raised taxes for other property owners,³⁰ and may have stimulated leapfrog development.³¹ The goal of preserving open space lands is achieved only in those instances where the property owner is firmly inclined to continue his current rural use of the land and needs the tax break to afford his preferences. Otherwise, the reduced tax can shelter the speculator willing to hold the land at low cost in order to realize a windfall development profit in the future which will far exceed a rollback tax deferred penalty. Thus, preferential tax treatment may provide only a weak holding action until speculative desires are satisfied or until stronger restrictions are imposed.

Preferential tax assessments can be a more effective tool if a number of changes are made. First, there must be strict regulations which prevent future land use conversions. Second, the preferred tax treatment must be *specifically* linked to those uses designated to be publicly acceptable. At present preferential taxes are only *generally* linked (*i.e.*, all farmlands, all commercial forest lands, etc.), are usually eligible for tax shelters, instead of linked to lands specifically identified as important to the public interest for their agricultural or natural value. Third, capital gains taxes or betterment levies should be imposed to recapture private windfall profits from rural land conversion, particularly when the gains result from public investments in the area.³² Finally, state governments must be responsible for administering the program and associated agreements and restrictions on landowners. The California experi-

²⁹ Assessing Officers, *supra* note 25; Henke, *supra* note 22; CEQ, ENVIRONMENTAL QUALITY (1974); Dean, *A Panacea That Wasn't: The Williamson Act Needs Repair*, CRY CALIFORNIA, Summer, 1975 at 18.

³⁰ Henke, *supra* note 22; Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland; California, 1968-69*, 24 NAT'L TAX J. 24 (1971); J. KOLESAR & J. SCHOLL, CENTER FOR ANALYSIS OF PUBLIC ISSUES, MISPLACED HOPES, MISSPENT MILLIONS: A REPORT ON FARMLAND ASSESSMENTS IN NEW JERSEY (1972).

³¹ When preferential taxation is not supplemented by other development controls intensive development can simply "leapfrog" over the scattered landowners who agree to keep their property in rural uses by agreeing to preferential tax assessments. CEQ, UNTAXING OPEN SPACE (1976).

³² Capital gains taxes are imposed to recapture windfall profits on land conversions in Vermont, note 27 *supra*, and VERMONT STATE PLANNING OFFICE, THE VERMONT FARM AND LAND REFORM PROGRAM (June, 1973); and are proposed in Oregon, EXEC. DEP'T, INROADS TOWARD POSITIVE LAND USE MANAGEMENT: A LAND VALUE ADJUSTMENT PROPOSAL (August 1974); for a detailed study of this use of capital gains taxes, see WINDFALLS FOR WIPEOUTS, *supra* note 25. A "betterment levy" is a fee or tax used to recapture windfall profits. WINDFALLS FOR WIPEOUTS, *supra* note 25.

ence reveals the frailties of depending on local government administration or on the voluntary participation of landowners.³³

C. Eminent Domain

The power of eminent domain can be exercised only for a public use.³⁴ This requirement, however, should not prohibit the public acquisition of fee simple title to rural lands.³⁵ The Supreme Court has broadened the scope of the public purpose doctrine, particularly as public purpose relates to urban renewal programs.³⁶ Other courts have approved the public purpose of programs for the taking of land for parks,³⁷ flood control,³⁸ irrigation,³⁹ pollution control,⁴⁰ prevention of soil erosion,⁴¹ wildlife management,⁴² and recreation.⁴³ Although courts are willing to allow legislatures wide latitude in determining what constitutes a public purpose,⁴⁴ only the Supreme Court of Puerto Rico has upheld the use of eminent domain for the large-scale public "banking" of land.⁴⁵

The trend of court decisions indicates that the use of eminent domain to acquire property to preserve important rural lands may be a legally acceptable public purpose.⁴⁶ The New Jersey Green Acres Land Acquisitions Program⁴⁷ has been used extensively to acquire both full title and less-than-full title development rights to

³³ Dean, *A Panacea That Wasn't: The Williamson Act Needs Repair*, CRY CALIFORNIA, Summer, 1975, at 18.

³⁴ 2A NICHOLS, EMINENT DOMAIN §7.1 (3rd rev. ed. 1976). The terms "public use" and "public purpose" are synonymous.

³⁵ Note, *Open Space Legislation: Suggestions for a Model Act*, 2 GA. L. REV. 294 (1967).

³⁶ *Berman v. Parker*, 348 U.S. 26 (1954).

³⁷ *Shoemaker v. United States*, 147 U.S. 282 (1893); *Halpert v. Udall*, 231 F. Supp. 574 (S.D. Fla. 1964).

³⁸ *United States v. West Virginia Power Co.*, 91 F.2d 611 (4th Cir. 1937).

³⁹ *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896).

⁴⁰ *Doering v. South Euclid*, 112 Ohio App. 177, 168 N.E.2d 16, *reversed on other grounds*, 112 Ohio App. 177, 186, 170 N.E.2d 87 (1960).

⁴¹ *United States v. Carey*, 143 F.2d 445 (9th Cir. 1944).

⁴² *In re United States*, 28 F. Supp. 758 (W.D.N.Y. 1939).

⁴³ *Johnson City v. Cloninger*, 213 Tenn. 71, 372 S.W.2d 281 (1963).

⁴⁴ *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 680 (1896); *United States ex rel. TVA v. Welch*, 327 U.S. 546, 551 (1946).

⁴⁵ *Puerto Rico v. Rosso*, 95 P.R.R. 488 (1967), *appeal dismissed mem.*, 393 U.S. 14 (1968). Land banking is discussed at III(D) *infra*.

⁴⁶ F. BOSSELMAN, NAT'L COMM'N ON URBAN PROBLEMS, 49 RESEARCH REP. NO. 15, ALTERNATIVES TO URBAN SPRAWL: LEGAL GUIDELINES FOR GOVERNMENT ACTION (1968).

⁴⁷ New Jersey Green Acres Land Acquisition Act of 1961, N.J. STAT. ANN. §§ 13:8A-1 *et seq.* (1968); New Jersey Green Acres Land Acquisition Act of 1971, N.J. STAT. ANN. §§ 13:8A-19 *et seq.* (Supp. 1975).

open space lands in the state's urban areas.⁴⁸ But, state legislatures have not used eminent domain to protect rural land of agricultural or natural value, and the legality of using eminent domain to acquire development rights to protect rural land has not been fully tested.

Two problems are inherent in the use of eminent domain to protect large tracts of rural land by outright purchase. First, the number of acres involved would make the public cost prohibitively expensive, even with a rigorous system of land classification and ranking for public importance. Second, much of our rural land is agriculturally and naturally productive and should be retained, for the most part, in private use. For these reasons, it is inconceivable that vast public acquisition of full title to rural lands would be economically feasible or politically acceptable to the public. Government agencies will continue to use eminent domain for advance site acquisition for parks, schools, and the like, but will rarely condemn land to acquire sizable tracts for large-scale public or private use.

In short, it is futile to rely exclusively on police power, preferential tax incentives, or eminent domain to protect rural land from development. The need is to establish stringent preservation controls over important rural lands, and, at the same time, to accommodate the legitimate concerns of private interests by providing fair compensation. The traditional methods of land management cannot support this difficult and delicate balance.

III. INNOVATIVE TECHNIQUES FOR LAND PROTECTION

This section will assess the utility of four innovative approaches to rural land preservation: compensable regulations, acquisition of less-than-fee interests, transfer of development rights, and land banking.⁴⁹

A. *Compensable Regulations*

Advocates of compensable regulations view the scheme as a method of exercising strict public control over land use by providing compensation for property value losses (sometimes termed "wipeouts")⁵⁰ due to regulation.⁵¹ The concept was advanced in this

⁴⁸ LEVIN, ROSE & SLAVET, *NEW APPROACHES TO STATE LAND POLICIES* 32-34 (1974).

⁴⁹ For a comprehensive collection of evaluations of these and other development control methods, see *MANAGEMENT AND CONTROL OF GROWTH* (R.W. Scott ed. 1975).

⁵⁰ *WINDFALLS FOR WIPEOUTS*, *supra* note 25.

⁵¹ *STAFF REPORT TO THE GOVERNOR'S PROPERTY RIGHTS STUDY COMMISSION, FLORIDA, COM-*

country by three planners who proposed to integrate traditional zoning principles with legal compensation.⁵² Under this concept, before any land is regulated, each parcel is assessed and a "guaranteed value" set. After the regulations are imposed, the landowner is immediately compensated if, and to the degree that, the regulation reduces the value of the land for uses actually being made at the time the regulation is imposed. A landowner may be compensated again when he sells the land if the price received is less than the original guaranteed value. The landowner, however, may never be compensated at the time the land is sold for any more than the original, preregulation guaranteed value. The guaranteed value fails to take into consideration increases in inflation and real estate values after the regulation is imposed.

Compensable regulations, although used very little in the United States,⁵³ are included in the American Law Institute's Model Land Development Code.⁵⁴ The Model Code would permit a local government to validate a land use regulation which a court had determined would constitute a taking of property without just compensation, simply by compensating the landowner. Similarly, the Oregon Executive Department has proposed a land value adjustment system which would compensate landowners when rezoning depreciates land values by more than twenty percent.⁵⁵

The compensable regulation approach is somewhat effective in preserving open spaces in urban fringes and in more rural areas. It threatens, however, to over-compensate landowners for valid restrictions on land use, particularly as American law begins to accept stricter land controls for the public good.⁵⁶ The provision for compensation might result in a large increase in the number of judicial determinations that a "taking" had occurred and that compensation was due. If development is imminent, it may be no more expen-

PENSABLE REGULATIONS: POLICY ISSUES AND OPTIONS (1975).

⁵² Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Krasnowiecki & Strong, *Compensable Regulations for Open Space: A Means of Controlling Urban Growth*, 29 J. AM. INST. PLANNERS 87 (1963).

⁵³ England, Australia, and New Zealand have been more generous than the United States in providing compensation for land use regulations. English courts presume all compensable regulations to be valid and English property owners are paid for regulations that would be found invalid in American courts. See WINDFALLS FOR WIPEOUTS, *supra* note 25, and The Town and Country Planning Act of 1947, 10 & 11 Geo. 6, c. 51.

⁵⁴ ALI, MODEL LAND DEVELOPMENT CODE, art. 5 (1975).

⁵⁵ OREGON EXEC. DEP'T, INROADS TOWARD POSITIVE LAND USE MANAGEMENT: A LAND VALUE ADJUSTMENT PROPOSAL (1974).

⁵⁶ See note 9, *supra*.

sive for a state or municipality to acquire property interests than to compensate for rigorous regulations. Finally, if compensable regulations are administered by local governments there is the possibility of misuse, political dealing, and social exclusion. The advantages of public purchase of development rights may then outweigh those of compensable regulation of development.

B. Acquisition of Less-Than-Fee Interests: Development Rights and Conservation Easements

State acquisition of less-than-fee simple interests has gained increasing attention as a way government can permanently prevent misuse of land while leaving it in productive private ownership. Little distinction exists among this method's various appellations: "conservation easements," "scenic easements," and "development rights acquisition."⁵⁷ This technique, which was popularized in the 1960's through the writings of several planners,⁵⁸ allows the state to acquire the less-than-fee simple development right to land which the state wants left undeveloped. By purchasing development rights, the public or other recipient acquires the right of the owner to intensively develop open space land. Accordingly, the holder of this development right has the power to prevent development of the land.

The general term "conservation easement" covers easements acquired for a variety of purposes. The easement may be, by the landowner's agreement, a positive easement—giving the public certain rights to use the land for designated purposes such as hiking

⁵⁷ The term "conservation easement" will be used hereafter in reference to the acquisition of development rights.

⁵⁸ W. WHYTE, URBAN LAND INSTITUTE, TECH. BULL. NO. 36, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (1959) [hereinafter cited as SECURING OPEN SPACE]; W. WHYTE, THE OUTDOOR RECREATION RESOURCE REV. COMM'N, REP. NO. 14, OPEN SPACE ACTION (1962); W. WHYTE, THE LAST LANDSCAPE (1968); E. LITTLE, OPEN SPACE ACTION INST. REP., CHALLENGE OF THE LAND (1968); Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559 (1964); INSTITUTE OF GOVERNMENTAL STUDIES, OPEN SPACE AND THE LAW, (F.W. Herring ed. 1965); Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274 (1966); Comment, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960); Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development*, 57 IOWA L. REV. 126 (1971); OPEN SPACE ACTION INSTITUTE, OPEN SPACE PRESERVATION METHODS (1967); H. PLATT, OPEN LAND IN URBAN ILLINOIS—ROLES OF THE CITIZEN ADVOCATE (1971); SHOMON, AUDUBON SOC'Y, OPEN LAND FOR URBAN AMERICA (1971); SUTTE & CUMMINGHAM, HIGHWAY RESEARCH BOARD, RESEARCH PROGRAM NO. 56, SCENIC EASEMENTS: LEGAL, ADMINISTRATIVE AND VALUATION PROBLEMS AND PROCEDURES (1968).

or fishing.⁵⁹ The more common conservation easement is a negative easement, one that limits the owner's use of the land.⁶⁰ This type of conservation easement usually removes development rights. Both types of conservation easements are binding on present and future landowners.

Any government agency or public trust, with legal authority to accept interest in land, may accept or buy conservation easements. The landowner who has donated or sold the conservation easement may retain the land and continue to use it for various low intensity open land purposes or the landowner may sell or transfer the property to a private party at any time.

A landowner who donates or sells a conservation easement benefits in several ways. The property owner who sells a conservation easement is compensated by payment or tax benefit for the difference between the fair market value of the property and the reduced value of the property under the easement. The donor of a conservation easement is entitled to a charitable reduction on her income taxes.⁶¹ The greatest bonus for sale or donation of an easement, however, can be from reduced real estate taxes. To the degree that the easement lowers the development value of the property, the landowner is entitled to a property tax reduction calculated on the difference between the assessed fair market value of the land before conveyance of the development right, and the value of the land subject to the development restriction. The assessment of the underlying fee simple for property tax purposes should reflect both the decrease in current fair market value and the elimination of potential market appreciation. This would be especially important for rural land now taxed at full market value and in some instances could mean the difference between maintaining ownership of the

⁵⁹ A.L. STRONG, URBAN RENEWAL ADMIN., OPEN SPACE FOR URBAN AMERICA 70 (1965); W. WHYTE, THE OUTDOOR RECREATION RESOURCE REV. COMM'N, REP. NO. 14, OPEN SPACE ACTION, 68-72 (1962).

⁶⁰ L. BRENNEMAN, THE CONSERVATION AND RESEARCH FOUNDATION, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND (1967); A. PLIMPTON, THE NATURE CONSERVANCY, CONSERVATION EASEMENTS: LEGAL ANALYSIS OF CONSERVATION EASEMENTS AS A METHOD OF PRIVATELY CONSERVING AND PRESERVING LAND (undated); A.L. STRONG, URBAN RENEWAL ADMIN., OPEN SPACE FOR URBAN AMERICA (1965); SECURING OPEN SPACE, *supra* note 58.

⁶¹ The Internal Revenue Service permits several alternative methods of deduction. I.R.C. §§ 170(c)(1), 2522(c); Rev. Rul. 339, 1973-2 C.B. 68; Campbell, *Conservation Easements: An Effective Tool in the Environmentalists' Kit*, POPULAR GOV'T 3638 (April, 1973); 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). Lafargue, *Practical Legal Remedies to the Public Beach Shortage*, 5 ENV. AFF. 447 (1976).

land in its rural condition or being forced by rising taxes to sell for development.

Although development rights acquisition has yet to be used for large-scale preservation of rural lands, it has been used by state and federal governments for related purposes. The National Park Service has acquired development rights easements⁶² to preserve scenic views along national parkways such as the Blue Ridge Parkway⁶³ and Natchez Trace,⁶⁴ and to provide protected buffers on the borders of other national monuments and parks. In national seashore and lakeshore areas, where condemnation or fee simple purchase of all private property is infeasible, the National Park Service has purchased development rights around and within park boundaries to conserve natural conditions.⁶⁵ The federal government has used conservation easements to remove development rights to protect national recreation areas, most notably the Cuyahoga Valley National Recreation Area.⁶⁶ The Department of the Interior also acquires easements for the protection of scenic and wild rivers.⁶⁷

Similarly, numerous states have purchased conservation easements to protect natural resources. California, New York, and Wisconsin have used conservation easements along and across their trail systems and for fishing and hunting access.⁶⁸ Others, like North

⁶² NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, SOME TECHNIQUES OF ENVIRONMENTAL PROTECTION OF FEDERAL PARK AND CULTURAL VALUES (undated).

⁶³ LILES, APPALACHIA S. U. CONF. ON RURAL PLANNING, LAND MANAGEMENT WITHIN THE BLUE RIDGE PARKWAY CORRIDOR (1975); Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L. J. 181 (1968); Williams & Davis, *Effect of Scenic Easements on the Market Value of Real Property*, 36 APPRAISAL J. 15 (1968).

⁶⁴ Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L. J. 168, 181 (1968); A.L. STRONG, URBAN RENEWAL ADMIN., OPEN SPACE FOR URBAN AMERICA (1965); The scenic easement device was at first often used, and later de-emphasized by the National Park Service. The sometimes unsatisfactory experiences were due as much to improper education of landowners and inadequate administration, as to high costs of purchase and difficulty with enforcement of restrictions. More recently, the National Park Service has returned to limited use of conservation easements over privately-owned lands that are not needed for public use. NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, SOME TECHNIQUES OF ENVIRONMENTAL PROTECTION OF FEDERAL PARK AND CULTURAL VALUES (undated); and letter on file with author from Thomas J. Harrison, Chief Environmental Planning and Research, Gettysburg, Pa.

⁶⁵ *E.g.*, NATIONAL PARK SERVICE, CAPE CODE NATIONAL SEASHORE MASTER PLAN (1970); 16 U.S.C. § 459(a) (1970).

⁶⁶ 16 U.S.C. § 460ff (Supp. IV 1974); see also Knibb, *National Recreation Areas: Evolving Legislative Answer to Land Use Conflicts*, 6 LINC. L. REV. 1 (1970); KUSLER, U. OF WIS. INST. FOR ENV'T'L STUDIES, REP. 16, PUBLIC/PRIVATE PARKS AND MANAGEMENT OF PRIVATE LANDS FOR PARK PROTECTION 22 (1974).

⁶⁷ National Scenic and Wild Rivers Act, 16 U.S.C. §§ 1271 *et seq.* (1970).

⁶⁸ SECURING OPEN SPACE, *supra* note 58; A.L. STRONG, URBAN RENEWAL ADMIN., OPEN SPACE

Carolina have acquired development rights paralleling state scenic rivers and trails.⁶⁹ Wisconsin successfully accumulated conservation easements (there called "scenic easements") along the Great River Road adjacent to the Mississippi River in the 1950's and 1960's.⁷⁰ Many other states have preserved scenic corridors along rural highway stretches by acquiring developments rights.

The experience with these programs shows that acquisition of development rights in rural areas is not expensive.⁷¹ States have not generally used conservation easements to control urban growth or protect extensive rural areas. In the absence of any critical deficiencies in the technique, however, increasing use of conservation easements is predicted as states become more inclined to adopt innovative methods to meet growing needs for protecting important rural lands.

Local governments are beginning to experiment on a scattered basis with conservation easements for rural land protection. State authorizations for local governments or public trusts to accept less-than-fee acquisition rights in open space land vary in form. Notable local experiences with conservation easements have occurred in California,⁷² New York,⁷³ Connecticut,⁷⁴ Maryland,⁷⁵ and Colorado.⁷⁶

FOR URBAN AMERICA (1965).

⁶⁹ N.C. GEN. STAT. § 113A-38 (1975); N.C. GEN. STAT. § 113A-90 (1975); N.C. GEN. STAT. § 113A-76 (1975).

⁷⁰ Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343 (1963); P. WYKERT, U. MICH., ENVIRONMENTAL EASEMENTS (Sept. 1965); Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 181, 183-186 (1968); A.L. STRONG, URBAN RENEWAL ADMIN., OPEN SPACE FOR URBAN AMERICA 68-69 (1965).

Much of the Wisconsin success stemmed from the Highway Commission's power to condemn land whenever an agreement on the price of the easement could not be reached with the owner. The Wisconsin Supreme Court upheld the Highway Commission's right to use eminent domain to acquire scenic easements in perpetuity, as a legitimate public purpose. *Kamrowski v. State*, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).

⁷¹ SUTTE & CUNNINGHAM, HIGHWAY RESEARCH BOARD, RESEARCH PROGRAM No. 56, SCENIC EASEMENTS: LEGAL, ADMINISTRATIVE AND VALUATION PROBLEMS AND PROCEDURES (1968). By the end of 1965, Wisconsin had acquired some 11,685 acres of scenic easements, usually extending 350 feet along each side of 281 miles of state highways. Through 1964, easements had cost an average of \$43/acre; the actual purchase price was slightly under \$20, the remainder being administrative costs. Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343 (1963).

⁷² In California, the Open Space and Scenic Land Acquisition Act of 1959, CAL. GOV'T CODE §§ 6950 *et seq.* (West 1966); the Open Space Easements Act of 1969, CAL. GOV'T CODE §§ 51050 *et seq.* (West Supp. 1976); and the Williamson Act, CAL. GOV'T CODE §§51200 *et seq.* (West 1966), *as amended* (Supp. 1976) authorize local governments to acquire development rights on open space lands by voluntary agreement with landowners, who in return receive reduced tax assessments. The bulk of development rights easements acquired have been in

Besides federal, state, and local governments, private groups acting as public trust organizations have been highly successful in preserving ecologically sensitive areas through the acquisition of conservation easements. This is particularly important since non-governmental conservation organizations acting in the public interest can take the lead in protecting land resources and perhaps stimulate greater conservation action by government. The Maine Coast Heritage Trust and various Connecticut land conservation trusts⁷⁷ provide examples of ways concerned citizens may join in "public trust" to preserve natural areas by acquiring development rights.⁷⁸ Common recipients of fee-simple titles and less-than-fee property rights also include public interest organizations of a national scale — The Nature Conservancy, the Trust for Public Lands, and the National Trust for Historic Preservation — all of whom have acquired extensive easements and development rights for conservation purposes.⁷⁹

A major advantage of the development rights easement is its specificity of regulation. Lands use prohibitions, through use of nega-

the more rural regions distant from expanding urban fringes and most development pressures. See Comment, *Easements to Preserve Open Space Land*, 1 *ECOLOGY L.Q.* 728 (1971).

⁷³ The town of Ramapo, N.Y., for example, acquires conservation easements over open space lands in conjunction with its timed development program. As of July, 1974, Ramapo had short-term development easements on 1,700 acres of land which could eventually be released to permit development. Emanuel, *Ramapo's Management Growth Program*, *PLANNER'S NOTEBOOK* (Oct., 1974).

⁷⁴ *CONN. GEN. STAT.* § 7-1316 (1972), *as amended* (Supp. 1976); *CONN. GEN. STAT.* §§ 47-42a to 47-42c (Supp. 1976). Conservation easements have been assembled in Connecticut by over 55 local land conservation trusts, which are private, non-profit organizations acting in "public trust." In addition, the state has acquired easements in conjunction with its Connecticut River Greenway Program. *CONN. GEN. STAT.* §§ 25-102(a) *et seq.* (1975).

⁷⁵ *MD. ANN. CODE, REAL PROP.* § 2-118 (1974); *MARYLAND ENVIRONMENTAL TRUST, CONSERVATION EASEMENTS: TO PRESERVE A HERITAGE* (1974).

⁷⁶ Boulder, Colorado, is acquiring development rights easements to preserve an urban "greenbelt." Rosall, *Boulder Pauses To Update Its Growth Management Plan*, *PRACTICING PLANNER*, Feb., 1976, at 13-15, 45.

⁷⁷ *MARINE COAST HERITAGE TRUST, GUIDE TO CONSERVATION EASEMENTS* (undated); Emory, *Protecting a Heritage*, *YACHTING*, April, 1973, at 88; Gunther, *How To Preserve Small Natural Areas*, 3 *CATALYST* 19 (1973).

⁷⁸ While a private conservation trust acting in the public interest may be exempt from federal income taxes, and secure charitable deductions for contributions, *see note 61, supra*, an unresolved and unexamined issue is whether the development rights held by the private trusts are subject to state and local real estate taxes. By contrast, development rights or conservation easements held by a state or local government are exempt from property taxation, if held for a public purpose. Local trusts must provide, in case of their own termination, that their perpetual property interests will be transferred to a designated successor organization.

⁷⁹ *THE NATURE CONSERVANCY, CONSERVATION EASEMENTS* (1976).

tive easements, can be adapted to the natural, cultural, or agricultural values to be protected. A comprehensive acquisition plan by the responsible public agency could specify particular characteristics of land which it sought to protect depending on a classification system determined by public need. Thus, easements are very flexible legal agreements which may be tailored to the interests of the individual landowner and to the special characteristics of the specific property in order to protect the natural or cultural values of the property.

A program of development rights acquisition permits the purchase of rights in private property without need for condemnation. The landowner who fully understands the concept, and wishes to retain the current rural uses of his property, may be persuaded to donate or sell certain development rights to preserve the rural nature of the land and receive reduced tax rates. Most programs of conservation easements in this country have been conducted on a voluntary basis. An improved program designed to educate the public and property owners is necessary for a large-scale public acquisition program to be successful on a voluntary basis in protecting whole districts of agricultural lands and areas of natural importance.

The alternative, of a public agency exercising its power of eminent domain to acquire development rights remains, for the most part, politically unrealistic. In rural areas especially, the use of eminent domain raises so much popular resistance that it is practically political suicide for any elected official to support such action. Yet, without the availability of eminent domain, it may be difficult to overcome the reluctance of some landowners to give up hopes of future development windfalls, even though the development and purchase values of their rural property may be low.⁸⁰ Thus, a development rights program based on the use of eminent domain may be necessary, but such a program must be well-understood by the public and must be implemented with extensive public participation and support.

There are four principal limitations to public or quasi-public acquisition development rights and conservation easements: legal problems, acquisition costs, financing, and loss of tax revenue. The

⁸⁰ Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L. J. 635 (1974); Rose, *Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Rights as a Technique to Preserve Open Space*, 51 J. URB. LAW 471 (1974).

legal problems involved in acquiring development rights to property are beyond the scope of this paper.⁸¹ The major legal issues raised by conservation easements concern the constitutional and statutory power of the public agency to acquire such lesser interests in land,⁸² and the technicalities of easement law, such as the distinction between appurtenant easements and easements in gross,⁸³ the possible automatic termination of easement rights,⁸⁴ and the administrative difficulties which result from split ownership.⁸⁵ Many states have enacted legislation to overcome legal difficulties.⁸⁶ These statutes are designed to circumvent the vagaries of the common law of easements by providing a solid legal base for conservation easements,⁸⁷ and provide an additional basis for including conservation easements within the scope of public purpose.⁸⁸

Acquisition costs will vary greatly for rural land and land which is becoming increasingly urbanized.⁸⁹ Where development potential is low, as is often the case in rural areas, development rights are inexpensive. Consequently, a state program for acquiring development rights over areas of prime agricultural, ecological, and recreational importance in rural regions should have bearable public costs. It is only when open space lands of similar importance are located within the spheres of urban expansion or in highly speculative land markets (such as in mountain or coastal resort areas) that the acquisition costs and tax losses become inflated. In the latter case, where the loss of the land resource to development is most

⁸¹ See generally, WILLIAMS, REPORT TO THE OUTDOOR RECREATION RESOURCES REVIEW COMMISSION, REP. NO. 16, LAND ACQUISITION FOR OUTDOOR RECREATION: ANALYSIS OF SELECTED LEGAL PROBLEMS 45-53 (1962) [hereinafter cited as WILLIAMS].

⁸² See case cited note 70, *supra*.

⁸³ The term conservation easement, as generally used in this study, refers to an easement in gross, *i.e.*, one not created to serve the direct benefit of an adjoining piece of land as is an easement appurtenant. RESTATEMENT OF PROPERTY §§ 453, 454 (1944).

⁸⁴ WILLIAMS, *supra* note 81, at 52.

⁸⁵ *Id.* at 53.

⁸⁶ See, *e.g.*, CAL. GOV'T CODE §§ 51050-51065 (West Supp. 1976); MD. ANN. CODE art. 66c, § 357A (1970); N.Y. GEN. MUN. LAW § 247 (McKinney 1965); MASS. ANN. LAWS ch. 184, §§ 26-33 (1969), *as amended* (Supp. 1976); VT. STAT. ANN. tit. 10, § 6303 (1973).

⁸⁷ Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development*, 57 IOWA L. REV. 126, 154 (1971); Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 284 (1966); Sicard, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENV. AFF. 481, 488 (1975).

⁸⁸ Silverstone, *Open Space Preservation Through Conservation Easements*, 12 OSGOODE HALL L. J. 105, 120 (1974).

⁸⁹ Comment, *Easements to Preserve Open Space Land*, 1 ECOLOGY L. Q. 728, 740-43 (1971); Gale & Yampolsky, *Agri-Zoning: How They're Gonna Keep 'em Down on the Farm*, PLANNING, Oct., 1975, at 17.

likely, the land conservancy agency may find outright fee simple purchase or condemnation more advisable than paying nearly equivalent amounts for development rights.

The recent experience of Suffolk County, Long Island, illustrates the financial obstacle of purchasing the development rights of agricultural land when an area is becoming increasingly urbanized. Under the Suffolk County law,⁹⁰ the County could not force a farmer to sell his development right as long as the land remained in agricultural use, however, it could acquire the fee simple title to the land through eminent domain if the owner decided to convert the land from agricultural use. After much debate, Suffolk County officials have issued twenty-one million dollars in county bonds to begin buying development rights to nearly 4000 acres of farmland in the first phase of a seventy-five million dollar development rights purchase program for 50,000 acres.⁹¹ The agricultural value of the remaining county farmland is only twenty percent of the land's total value, while the development value constitutes the remaining eighty percent.⁹²

Financing is the greatest obstacle to public acquisition of conservation easements. A modest acquisition program for a few selected areas can be financed by general appropriations or by encouraging donations of conservation easements. But, large-scale public acquisition carries considerable costs for purchase, administration, and enforcement.⁹³ The most logical source of financing is the state because reliance on local financing would severely limit the scope of any development rights acquisition program to the protection of only small tracts, at best, of crucially important lands. When the funds needed for a development rights acquisition program exceed those which can be provided by appropriations, allowance must be made to permit the use of general obligation bonds, a revolving fund, or alternative sources of tax revenues. Examples of special

⁹⁰ Suffolk County, Local Law No. 19, Local Law Relating to the Acquisition of Development Rights on Agricultural Lands (1974).

⁹¹ AMERICAN SOC'Y OF PLANNING OFFICIALS, *PLANNING*, Oct., 1976 at 8; KLEIN, SUFFOLK COUNTY EXECUTIVE, REPORT TO THE SUFFOLK COUNTY LEGISLATURE FROM THE SELECT COMMITTEE ON THE ACQUISITION OF FARMLANDS, (November 7, 1974); Gale & Yampolsky, *Agri-Zoning: How They're Gonna Keep 'em Down on the Farm*, *PLANNING*, Oct., 1975, at 17.

⁹² Blobaum, *supra* note 2, at 24; REGIONAL PLAN ASS'N, *THE FUTURE OF SUFFOLK COUNTY* (1974), at 59-60.

⁹³ The extensive acquisition of development rights would be more affordable than public purchase of land in fee simple, even if the latter were intended for later lease or sale back to private owners. Land purchase and banking of fee simple interests carries, in the short-run, huge acquisition costs, management costs, inflated market prices, and reduced tax bases.

taxation include an increased land transfer tax,⁹⁴ an unearned increment tax on land values,⁹⁵ or increased capital gains tax on land sales.⁹⁶

Public acquisition of development rights will reduce the tax base of local governments, which are heavily dependent upon property taxes. While property owners will continue to pay taxes on the agricultural or natural value of their land, the property encumbered by an easement will receive reduced tax rates according to the degree of use restriction. A local government may not suffer loss, even though the real property tax must be reduced for lands encumbered by easements, because the lower taxes are commonly recouped through the increased value of nearby property, which results from the assurance that neighboring land will not be despoiled by development.⁹⁷ The burden on a local government, however, may be intolerable if the development rights and taxable values of large land tracts are removed and tax revenues are not replaced. To avoid fiscal hardship and to overcome local concerns over a dwindling tax base, a development rights acquisition program might consider state remuneration or in-lieu-of-tax payments to local governments.⁹⁸

C. Transferable Development Rights

The technique of transferable development rights (TDR) recognizes that development rights are separable from land ownership, and can be sold or traded on the open market from one property to another. When applied to a program of protecting important areas,

⁹⁴ An expanded land transfer tax of 0.4% on all real estate transfers was proposed by a New Jersey committee to finance state purchase of development rights. Gross proceeds at 1971 prices would have been \$22 million. See REPORT OF THE BLUEPRINT COMMISSION OF THE FUTURE OF NEW JERSEY AGRICULTURE (1973).

⁹⁵ For a discussion of the unearned increment tax relative to the American property tax system see, Harriss, *Land Value Increment Taxation: Demise of the British Betterment Levy*, 25 NAT'L TAX J. 567 (1972); McClaughry, *Taxes for Land Acquisition*, THE PEOPLE'S LAND 154 (P. Barnes ed. 1975).

⁹⁶ Vermont is the first state to enact a capital gains tax on land. See note 27 *supra*.

⁹⁷ Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 283 (1966).

⁹⁸ Michigan's Wilderness and Natural Areas Act of 1972, MICH. STAT. ANN. §§ 13-734 (1)-(13), attempts to compensate local governments for tax revenue lost due to "wilderness, wild or natural area[s]" within their jurisdiction. Connecticut provides its municipalities with a grant in lieu of taxes for state-owned property within the town. CONN. GEN. STAT. ANN. § 12-19a (1972). Proposed federal legislation would provide for payment of \$0.75/acre to counties containing public lands, less amounts equal to county receipts from forestry and mineral leases. H.R. 9719, 94th Cong., 2nd Sess. (1976).

the TDR system would involve the sale of development rights from a restricted "preservation district," to another area more suited for growth. The second area could then be developed more intensively than before, but the development right on the first area would be foregone.

The TDR device was introduced as a means of preserving urban landmarks.⁹⁹ The technique allowed the unused (and unusable) development rights on the site of a landmark to be sold or transferred to another location where more intensive development was permissible. A TDR program requires that the responsible government: establish a district into which the rights may be transferred, determine the number of transferable rights from the landmark, set a maximum density permitted on any one tract, provide for variances in zoning requirements, and permit condemnation of the development right if the owner will not voluntarily comply with the landmark designation.¹⁰⁰ This version of the TDR program has been used to protect environmentally-sensitive areas. A privately held area can be designated for open space use, and instead of receiving government compensation for the regulation, the owner is permitted to sell or transfer the development rights to areas where development is permitted.

A variation proposes that TDRs be applied to rural lands as follows: (1) the community determines the desired intensity of development and designates which land is to remain undeveloped in a zoning ordinance; (2) the local government allocates development rights to owners of land which is to remain undeveloped — the number of certificates for each owner based on the proportion that his property contributes to the total assessed value of all undeveloped land in the area; (3) the owner of land zoned for development who wishes to develop his land more intensively must then buy

⁹⁹ Much of the work in this area has been done by Professor Costonis of the University of Chicago Law School. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: Easing the Police Power-Eminent Domain Deadlock*, 26 LAND USE LAW & ZONING DIG. 6 (1974); Costonis, *The Costs of Preservation: The Chicago Plan and the Economics of Keeping Landmarks in the Marketplace*, FORUM, Jan./Feb., 1974, at 61; Costonis, *Whichever Way you Slice It, DRT Is Here to Stay*, PLANNING, July, 1974, at 10; J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* (1974). Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974) [hereinafter cited as Marcus]; Note, *Development Rights Transfer in New York City*, 82 YALE L. J. 338 (1972).

¹⁰⁰ Hagman, *A New Deal: Trading Windfalls for Wipeouts*, PLANNING, Sept., 1974, at 9.

additional development rights on the open market from a holder of TDR certificates. The development rights certificates would be subject to *ad valorem* property taxation. The type and number of development rights could be adjusted to allow for changing growth management policies in the community.¹⁰¹ This program differs from others in its elaborate use of "certificates."

Although the TDR concept is attractive there has been little real experience with the system in the United States. A number of localities are at present using or proposing to use TDRs as a means of protecting environmentally-sensitive or agriculturally-important areas.¹⁰² Proposals for broader use of TDRs have been or are being

¹⁰¹ Chavooshian & Norman, *Transfer of Development Rights: A New Concept in Land Use Management*, 32 URB. LAND 11 (1973); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L.J. 635 (1974); ROSE, RUTGERS U. CENTER FOR URBAN POLICY RESEARCH, *THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATIONS* (1975).

¹⁰² Collier County, Florida—program of TDRs to protect areas of environmental sensitivity, such as beaches, estuaries, wetlands, and cypress domes. Spagna, *Can "ST" Save Collier's Unspoiled Lands?*, 2 FLA. ENV'T'L & URB. ISSUES (1975).

Stowe, Vermont—proposal to use TDRs to preserve agricultural districts.

Sunderland, Massachusetts—proposed TDR program to protect prime agricultural districts and areas of environmental sensitivity and to control growth rate. *THE LAND USE CONTROVERSY IN MASSACHUSETTS: CASE STUDIES AND POLICY OPTIONS* (L. Susskind ed. 1975).

New York City—an effort to adapt the TDR program for landmark protection to preservation of urban open spaces. Marcus, *supra* note 99; *Fred F. French Investing Co. v. New York*, 77 Misc. 2d 199, 352 N.Y.S.2d 762 (Sup. Ct. 1973).

Fairfax County, Virginia—a proposal by the county supervisor to rely solely on the marketing of development rights to determine the land use of any site; unlike other proposals, the local government would not designate or zone any areas off-limits to development. See A. MOORE, *TRANSFERABLE DEVELOPMENT RIGHTS: AN IDEA WHOSE TIME HAS COME* (1974); M.E. HALBEIN, *FAIRFAX COUNTY OFFICE OF COMPREHENSIVE PLANNING, FEASIBILITY OF A TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM FOR FAIRFAX COUNTY* (1974).

Sonoma County, California—proposed TDR program to allow the "selling" of zoning rights; the Sonoma proposal is for a "development rights bank" operated by a governmental agency for which funds would be raised by development rights charges. The funds would finance the purchase of development rights from owners of open space lands. Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330, 347-48 (1975) [hereinafter cited as *Evolving Concept*].

Southampton, N.Y.—a program to encourage construction of low- and moderate-income housing through the public "transfer" of additional development rights (a type of "bonus zoning" program) by which the developer receives the right to increase the floor area ratio. *Evolving Concept, supra*, at 348-49; Southampton Zoning Ordinance §§ 2-10-20, 2-10-30 (1972).

Phosphorescent Bay, Puerto Rico—a plan to use TDRs to protect ecologically-sensitive areas from development. The development rights would be transferred from "protected environmental zones" to sites in "transfer districts" where greater density would not only be unobjectionable but would implement the island's comprehensive planning objectives. The Puerto Rico proposal would not directly transfer the right to develop from one property to another but instead would transfer the dollar equivalent of the loss of the right to develop in

considered by several states.¹⁰³ In New Jersey, for example, The New Jersey legislature has twice considered (and failed to enact) TDR enabling legislation. The first bill was a proposal to preserve prime woodlands and farmlands by transferring the right to develop such land to other designated districts. Landowners in the preserve districts would receive development rights certificates which could be sold on the open market to those wishing to build more densely in a designated developable area.¹⁰⁴ The second and more recent bill would have permitted any municipality to adopt a TDR ordinance for the preservation of land of historic, environmental, or economic significance.¹⁰⁵

The attractions of TDRs in rural land preservation include: the ability to satisfy the legal rights of private landowners,¹⁰⁶ and the flexibility to protect areas where public funds are unavailable to

the "protected environmental zones." J. COSTONIS & R. DeVoy, URBAN LAND INSTITUTE, THE PUERTO RICO PLAN: ENVIRONMENTAL PROTECTION THROUGH DEVELOPMENT RIGHTS TRANSFER (1975).

¹⁰³ See proposals introduced in the Maryland state legislature S.255 (1972) and 730 (1973). Development rights certificates would be assigned by local governments to landowners, based on the percentage of property owned in districts approved for commercial and residential use and rights could be traded on the open market. Sen. Goodman, *Problems and Solutions to Planning and Land Use*, SOUTHERN LAND ECONOMICS RESEARCH COMM. PUB. NO. 10, PROPERTY TAXATION, PUBLIC FINANCE AND LAND USE (1972). For a Florida suggestion to apply the TDR concept, see FLORIDA ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, FINAL REPORT TO THE GOVERNOR AND THE LEGISLATURE: ENVIRONMENTAL LAND MANAGEMENT 116 (1973).

¹⁰⁴ Chavooshian & Norman, *Transfer of Development Rights: A New Concept in Land Use Management*, 32 URB. LAND 11 (1973); REPORT OF THE BLUEPRINT COMMISSION OF THE FUTURE OF NEW JERSEY AGRICULTURE (1973); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L. J. 635 (1974).

¹⁰⁵ N.J. Assembly Bill 3192, Municipal Development Rights Act (1975). The bill included for the first time, provision for preserving a district whose continued economic vitality is threatened by increasing land values, such as in older industrial districts. The program provides for allocation and marketing of development rights for commercial, industrial, and residential uses. The certificates are to be allocated to landowners in the preservation districts on the basis of uses permitted there prior to adoption of the local TDR ordinance. Restricted property would receive preferential tax treatment, as already done for farmland under the Farmland Assessment Act. N.J. STAT. ANN. §§ 54:4-23.1 *et seq.* (1975). Municipalities may coordinate their plans and ordinances to provide for more coherent preservation and transfer zones. Of special interest is the provision for municipal development rights banks (§26), which allows a municipality to acquire and sell certificates to raise public revenues and to regulate a market for all development rights certificates. Helb & Reifer, *New Jersey General Assembly Has Passed Enabling Legislation for Use of TDR*, AIP NEWSLETTER 11 (Oct., 1975).

¹⁰⁶ Carmichael, *Transfer of Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35, 83-89 (1974); J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE 145-66 (1974); Marcus, *supra* note 99; ROSE, CENTER FOR URBAN POLICY RESEARCH, RUTGERS U., THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATIONS (1975).

purchase either fee simple title or a less-than-fee simple title, such as a development rights easement. TDRs also promise to recoup part of the publicly-induced increases in the development potential of private properties.¹⁰⁷

A number of TDR issues remain unresolved and are beyond the scope of this article. Remaining questions include: are TDRs conceptually acceptable to the American public and their governments; are TDR certificates, as considered by the courts, "just compensation" for severe land use regulations; what are the administrative costs of implementing TDRs; would TDRs satisfy the provisions of most state zoning enabling acts that require that all zoning regulations be uniform for each class of building throughout each district; would TDRs satisfy due process and equal protection clauses of federal and state constitutions.¹⁰⁸

D. Land Banking

Land banking is usually conceived of as public acquisition, by condemnation or voluntary purchase, of land in fee simple title for some future use. Conservation easements and transferable development rights both involve some form of public acquisition and administration of interests in property rights. Each open space land preservation technique thus contains elements of land banking principles. While conventional land banking may not be a feasible solution to the need for open space land preservation, land banking can be adapted to modern American needs by combining its administrative principles with other methods of managing land development.

The most familiar form of land banking is the advance acquisition of small sites which will eventually be required for public facilities. On a large-scale, the approach usually involves the public acquisition of extensive undeveloped land, either for permanent public ownership of areas such as parklands, or for subsequent resale of parcels and tracts to developers in a manner that effectively controls the rate and pattern of urban growth.¹⁰⁹ A slightly different form of

¹⁰⁷ *Evolving Concept*, *supra* note 102.

¹⁰⁸ J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE* 145-66 (1974); Rose, *Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Rights as a Technique to Preserve Open Space*, 51 *J. URB. LAW* 471 (1974). For a criticism of TDRs as inadequate compensation for the "taking" of development rights, see Note, *The Unconstitutionality of Transferable Development Rights*, 84 *YALE L. J.* 1101 (1975).

¹⁰⁹ See generally, Fishman & Gross, *Public Land Banking: A New Praxis for Urban Growth*, 23 *CASE W. RES. L. REV.* 897 (1972), updated in 3 *MANAGEMENT AND CONTROL OF GROWTH* 61

land banking, which was enacted into law in Puerto Rico,¹¹⁰ involves the public acquisition of undeveloped land for some future unknown use. That is, the land is acquired solely to be banked, not for a specific project.

In the United States, the modern use of large-scale land banking has been reserved for assembling land for public parks or for development of new communities. The new community developer, often with public assistance, will acquire a large tract of undeveloped land and then prepare a master land use plan and provide the physical infrastructure. Land banking, in theory, enables the controlled development of the community so that the construction of residences, commercial centers, industries, recreation areas, and public facilities are efficiently timed and coordinated. The community thus is ensured a more orderly growth and is able to preserve lands for future public facilities and for open space enjoyment at relatively low cost.¹¹¹

Although major land banking is rare in the United States, the concept of using publicly-owned land to guide growth and development to meet desirable public ends is historically rooted in the American experience. Into the nineteenth century, urban growth in the United States commonly was based on state or municipal platting of publicly-owned land. Only after the establishment of most American cities, and in the last century, did public land banking give way to the reign of private speculative initiative.¹¹²

Land banking, as a means of return to public control of future community development, has not been revived in the United States but has been the frequent subject of academic discussion and governmental policy recommendations.¹¹³ The strong interests in the

(R. W. Scott ed. 1975); Fitch & Mack, *Land Banking*, the THE GOOD EARTH OF AMERICA: PLANNING OUR LAND USE 134 (C.L. Harriss ed. 1974); H.L. FLETCHER, LAND BANKING IN THE CONTROL OF URBAN DEVELOPMENT (1974); KAMM, URBAN INSTITUTE No. 112-128, LAND BANKING: PUBLIC POLICY ALTERNATIVES AND DILEMMAS (1970); Kamm, *The Realities of Large-Scale Public Land Banking*, in 3 MANAGEMENT AND CONTROL OF GROWTH 86 (R.W. Scott ed. 1975); K.C. PARSONS, NEW YORK STATE URBAN DEVELOPMENT CORP., PUBLIC LAND ACQUISITION FOR NEW COMMUNITIES AND THE CONTROL OF URBAN GROWTH: ALTERNATIVE STRATEGIES (1973) [hereinafter cited as PARSONS]; A.L. STRONG, URBAN RENEWAL ADMIN., OPEN SPACE FOR URBAN AMERICA 126 (1965).

¹¹⁰ See note 118 *infra*.

¹¹¹ PARSONS, *supra* note 109, at 27.

¹¹² REPS, *The Future of American Planning— Requiem or Renaissance*, PLANNING 47 (1967); J.W. REPS, THE MAKING OF URBAN AMERICA (1965); J.W. REPS, PUBLIC LAND, URBAN DEVELOPMENT POLICY, AND THE AMERICAN PLANNING TRADITION IN MODERNIZING URBAN LAND POLICY 15 (M. Clawson ed. 1973).

¹¹³ M. CLAWSON, SUBURBAN LAND CONVERSIONS IN THE UNITED STATES 355-63 (1971);

resumption of public land banking and responsibility for urban development are reflected in the American Law Institute's provisions for land banking in its Model Land Development Code.¹¹⁴

Public land banking programs are used extensively in other countries, particularly in northern Europe and England.¹¹⁵ The relevance to the American situation of much of the foreign experience with land banking is limited, however, for property laws and traditions accentuate the constitutional issues facing large-scale land banking of fee simple property titles. A state or municipality wishing to engage in land banking will have to use eminent domain to assemble large tracts and to overcome the problems of holdouts and it is not clear whether land banking would satisfy the courts' requirement that eminent domain be used only for a public purpose. The case of *Puerto Rico v. Rosso*,¹¹⁶ decided by the Puerto Rico Supreme Court in 1967, is frequently cited as establishing the constitutionality of using eminent domain for land banking purposes,¹¹⁷ but it

NATIONAL COMMITTEE ON URBAN GROWTH POLICY, *THE NEW CITY* (1969); U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH* 161 (1968); U.S. NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 250-53 (1968); PRESIDENT'S COMMITTEE ON URBAN HOUSING, *A DECENT HOME* 144-46 (1968); PRESIDENT'S COUNCIL ON NATIONAL RECREATION AND NATIONAL BEAUTY, *FROM SEA TO SHINING SEA* (1968); CANADIAN TASK FORCE ON HOUSING AND URBAN DEVELOPMENT, *REPORT ON HOUSING AND URBAN DEVELOPMENT* 41-43 (1969); D. HEETER, *PLANNING ADVISORY SERVICE REP. NO. 250, TOWARD A MORE EFFECTIVE LAND-USE GUIDANCE SYSTEM: A SUMMARY AND ANALYSIS OF FIVE MAJOR REPORTS* 58-60 (1969).

¹¹⁴ ALI MODEL LAND DEV. CODE art. 6 (1975).

¹¹⁵ Sweden's municipal land reserves have impressed many American urban planners. Pasow, *Land Reserves and Teamwork in Planning Stockholm*, 36 J. AM. INST. PLANNERS 179 (1970); Sidenbladh, *Stockholm: A Planned City*, SCIENTIFIC AMERICAN, Sept., 1965, at 107; Roberts, *Land Storage—The Swedish Example*, 38 MOD. L. REV. 121 (1975); URBAN LAND RESEARCH ANALYSTS CORP., *ULRAC MONOGRAPH NO. 6, SWEDEN-MUNICIPAL LAND RESERVE POLICIES* 44 (1968).

England's new town system has been developed on publicly acquired land. P. HALL, *THE CONTAINMENT OF URBAN ENGLAND* (1973); PARSONS, *supra* note 109.

German cities own large amounts of land, both inside and outside municipal boundaries, and use this land primarily for agriculture and forests. A.L. STRONG, *PLANNED URBAN ENVIRONMENTS* (1971).

The Canadian provinces of Alberta and Saskatchewan have used land banking schemes to guide the expansion of their cities. PARSONS & BUDKE, *AM. SOC. OF PLANNING OFFICIALS, PLANNING ADVISORY SERVICE REP. NO. 284, CANADIAN MUNICIPAL LAND ACQUISITION AND DEVELOPMENT CONTROL* (1970).

¹¹⁶ *Puerto Rico v. Rosso*, 95 P.R.R. 488 (1967), *appeal dismissed mem.*, 393 U.S. 14 (1968).

¹¹⁷ See Fishman, *Public Land Banking: A New Praxis for Urban Growth*, in *MANAGEMENT AND CONTROL OF GROWTH* 69-73 (Randall W. Scott ed. 1975) [hereinafter cited as Fishman]; Callies, *Commonwealth of Puerto Rico v. Rosso: Land Banking and The Expanded Concept of Public Use*, 2 PROSPECTUS 199 (1968); Roberts, *The Demise of Property Law*, 57 CORNELL L. REV. 1, 44 (1971).

is the only American case to have ruled on land banking. *Rosso* may be of limited relevance to the United States because the decision was based, in part, on unusual public property rights in Puerto Rico.¹¹⁸ It appears, however, in view of recent trends in public interest and property rights law, that land banking may be accepted as a legitimate public purpose.¹¹⁹

There are two principal advantages of land banking on urban fringes: first, the promotion of orderly development according to publicly-determined urban growth plans, and second, a reduction in the cost of land through a more controlled land market and the elimination of land speculation.¹²⁰ Yet, these may be conflicting advantages; the problems of controlling land price inflation without undermining the aims of promoting rational development patterns may be impossible.¹²¹ To accomplish its objectives, a public land bank must have the financial capacity and legal authority to purchase or condemn land throughout a wide area.¹²² It must be empowered to make public decisions regarding optimal land use and to

¹¹⁸ The Puerto Rico Constitution, like the constitutions of most states, provides that "[p]rivate property shall not be taken or damaged for public use except upon payment of just compensation and in the manner provided by law." P.R. CONST. art. 2, § 9. However, Act 13 (May, 1962) created the Puerto Rico Land Administration, a public corporation authorized to "acquire . . . private property and keep it in reserve, for the benefit of the people of Puerto Rico." P.R. LAWS ANN. tit. 23, § 311f(q) (1964). Land could be acquired by purchase or condemnation, and could be held in reserve for an indefinite period without any designated future use at the time of taking. The American Law Institute recommends similar authorization for state land reserve agencies, ALI MODEL LAND DEV. CODE § 6-101 (1975).

¹¹⁹ See notes 9, 46, *supra*.

¹²⁰ Fishman, *supra* note 117, at 65-68.

¹²¹ Kamm, *The Realities of Large-Scale Public Land-Banking*, 3 MANAGEMENT AND CONTROL OF GROWTH 88-90 (Randall W. Scott ed. 1975).

¹²² Note the ALI proposed enabling provisions for a state land reserve agency, ALI MODEL LAND DEV. CODE § 6-102, would make land banking an endeavor at primarily the state government level. A state land reserve agency would develop banking policies and acquire land according to the policies and limitations of the state land development plan, § 8-502. Local government would be involved in the banking program through contractual arrangements in which the state land reserve agency would act as the purchasing agent for the municipality. The state would hold basic control over the banking process and would doubtless concentrate banking efforts on areas deemed by state plan to be of "critical state concern," § 7-201. Authorization for partial or complete local funding of acquisitions by the land reserve agency would perhaps take advantage of the new availability of federal funds for land banking, now authorized by the Community Development Act of 1974, 42 U.S.C. § 5305(a)(1) (1974). That section of the Act authorizes the use of federal funds for the purchase of land by local governments for "the conservation of open spaces . . . the guidance of urban development . . . or . . . other public purposes." The ALI CODE then provides the institutional mechanism that can create and sustain a program of extensive public land ownership. See *American Law Institute Endorses Land Banking*, 5 ENVIR. L. REP. 10152 (1975).

hold land in reserve for indefinite periods until ready for timed release into sound development.

These prerequisites raise many questions of the feasibility of a land banking system of full property rights. Chief among those, are the financial limitations of high public acquisition costs, foregone taxes, and interest costs and the question of the power of eminent domain.¹²³ Other issues concern: what public agency could adequately administer such a program, whether a public agency could bear the cost of holding large land inventories, whether sufficient planning capability exists to direct such a complex strategy, whether the system could be guarded from corruption, and, of great significance, whether the concept could win public and political acceptance. The fundamental attitude that ownership of land for controlled development is not an appropriate governmental function, will not be easily overcome.

While public land banking of full property titles may gain some headway in the United States, there is little likelihood in the near future that land banking will become a commonly used device for metropolitan regions or rural areas. Nevertheless, the land banking concept can serve as the framework for combining and administering the innovative methods of public acquisition of less-than-fee development rights for the protection of rural and other open space lands. Public purchase or condemnation of important natural areas and prime agricultural lands in full title may be necessary in the near reaches of urban areas where speculation has increased development values to the levels of the full property worth. But, outside the urban peripheries, protection of rural lands can be much better achieved through public acquisition of less-than-total property rights and control of development rights. A public banking program of development rights would overcome many of the limitations of the conventional land banking concept and would better serve the objectives of protecting important rural land resources.

IV. CONCLUSION

A wide range of tools and techniques exists for conserving rural lands that are important to public interests and are endangered by development. Traditional control efforts have too often proved incapable of preserving rural land resources. It has become clear that

¹²³ See II(C), *supra*.

protective land use control cannot come exclusively from police power regulations or tax relief measures or by outright public purchase of fee simple property titles. The need and search is for a middle path between police power regulations and eminent domain takings.

One of the most practical concepts aimed at achieving the middle path involves splitting the fee interest in land. The acquisition of less-than-fee simple interests has gained increasing attention as a public means to prevent misuse of land, while leaving the land in productive private ownership. While the feasibility and acceptability of a transferable development rights system is new and, as yet, unproven, there has been sufficient experience with conservation easements to suggest that the concept could both protect important rural lands and maintain economic welfare.