Preservation by Contract: Public Purchase of Development Rights in Farmland

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Molly Boast**

The urbanization of America has created increasingly conflicting demands on the Nation's land resources. In particular, the outward thrust of cities' growth has focused attention on urban fringe areas where suburban housing requirements confront agricultural land uses.[1] In many locations farmland has yielded in the confrontation.[2]

Few places have felt the crunch of suburbanization and the resulting loss of agricultural land as acutely as Suffolk County, New York, situated on the eastern two-thirds of Long Island. Since World War II half the farmland acreage in this traditionally agricultural area has been converted to other uses.[3] On the tide of rising sensitivity to the County's environmental conservation needs, and in recognition of the uncompromising advance of population from the New York metropolitan region, the Suffolk County Legislature in 1974 enacted a land use law intended to preserve its agricultural

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1. Raup, *Urban Threats to Rural Lands: Background and Beginnings*, 41 J. AM. INST. PLANNERS 371 (1975).

2. One estimate places the current conversion rate of prime farmland into other uses at over 200,000 acres per year. W. WASHBON, THE PRIME FARMLANDS TRANSFER FEE (1976). For other estimates, *see* R. BLOBAUM, THE LOSS OF AGRICULTURAL LAND (1974); ECONOMIC RESEARCH SERVICE, U.S. DEPT. OF AGRICULTURE, MISC. PUB. NO. 1290, OUR LAND AND WATER RESOURCES—CURRENT AND PROSPECTIVE SUPPLIES AND USES (1974); G. PETERSON & H. YAMPOLSKY, URBAN DEVELOPMENT AND THE PROTECTION OF FARMLAND (1976).

For an explanation of soil classifications in Suffolk County, *see* J. KLEIN, FARMLANDS PRESERVATION PROGRAM 23 (1973) [hereinafter cited as FARMLANDS].

3. FARMLANDS, *supra* note 2, at 7.

lands.[4] The statute, Local Law No. 19, authorizes the purchase by the County of development rights to agricultural lands[5] and re-

4. Local Law Relating to the Acquisition of Development Rights in Agricultural Lands, Suffolk County, N.Y. Local Law No. 19-1974 (1974) [hereinafter cited as Local Law No. 19].

The complete text of Local Law No. 19 follows:

Section 1. Legislative Findings

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 agriculture lands, both for the production of food and the protection of such lands as valued natural and ecological resources. It has further stated that the expenditure of county funds to acquire legal interests 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 this local law is intended to indicate generally the procedures which will be employed by the county in its pursuit of its goal to protect and conserve agricultural lands, open spaces and open areas.

Section 2. Definitions

"Agricultural lands" shall mean lands used in bona fide agricultural production.

"Interest or right" shall mean the 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.

"Agricultural production" shall mean the production for commercial purposes of all those items and products as defined in Agricultural and Markets Law, Section 301 as constitute on the effective date hereof.

Section 3. Procedures

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 one 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.

Section 4. Alienation of Development Rights

Unless authorized by local law approved upon mandatory referendum, development rights acquired by the county in agricultural lands shall not be alienated in any manner.

Section 5. Inconsistent Legal Provisions

Notwithstanding the provisions of any special law, charter law, local law or resolution which may be inconsistent herewith, in whole or in part, this local law shall in all respects control in the matter of the acquisition of development rights in agricultural lands.

Section 6. Effective Date

This local law shall take effect immediately.

5. Section 3, Local Law No. 19, *supra* note 4. The "purchase" may be made through contractual arrangement (*see* notes 106-09 and accompanying text *infra*) or by condemnation (*see* notes 107-120 and accompanying text *infra*).

quires public approval through a referendum for any future alienation of those rights.[6]

The Suffolk County scheme represents a far-reaching technique intended to permit maximum public control with minimum intrusion on private property rights. This article investigates both the potential efficacy and flaws of the development rights purchase plan as a model for farmland preservation that attempts to balance public welfare[7] with private decision-making in land disposition. The discussion first considers the nature of the Suffolk County problem and then examines the accommodation of public and private interests that might have been achieved with other preservation approaches. It proceeds to review the particular elements of the Suffolk County solution and concludes with a brief survey of supplemental techniques that could enhance the County's goals.

I. A Theoretical Overview

Property has long been a favored child of the law.[8] Protection of private property is well-ensconced in the U.S. Constitution, most notably in the fifth amendment's just compensation clause.[9] Although the essence of the just compensation clause is recognition that individual property rights are *not* absolute but must on occasion give way to "public" uses, land use control mechanisms have been forced to evolve within the limiting framework established by the fifth amendment and the major interpretative judicial decisions.[10] The public interest, therefore, as guarded by legislative

6. Section 4, Local Law No. 19, *supra* note 4.

7. Section 1, Local Law No. 19, *supra* note 4, declares the effort to "conserve and protect and to encourage the development and improvement of agricultural lands, both for the production of food and the protection of such lands as valued natural and ecological resources" to be "a most important state policy."

8. The notion is perhaps nowhere more emphatically stated than in Blackstone's *Commentaries:*

> The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . . So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.

1 W. Blackstone, Commentaries *78.

9. U.S. Const. amend. V. " . . .nor shall private property be taken for public use, without just compensation."

The just compensation clause was incorporated into the fourteenth amendment's due process clause in 1897. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

10. *See, e.g.*, Justice Holmes' classic opinion in Pennsylvania Coal Co. v. Mahon,

enactment and administrative devices, has existed in tension with the private landowner's rights.[11]

When the parties to a transaction involving land are strictly private, the goal of their arrangements may be regarded as the safeguarding and, if possible, enhancement, of the monetary value of the land. From the point of view of economic efficiency, an individual's rights in property are his "reasonably assured reward" for undertaking the costs of putting the land to an economically beneficial use.[12] In a market economy, rights in property will be transferred when mutually satisfactory values can be assigned by the private parties to the exchange.

However, complete relegation of choices to the market affords no guarantee that the public's interest in the disposition of land and land-based resources will be recognized. The public interest in the conservation and ecological protection of land, in the preservation of existing land uses, and in the planned distribution of services to landowners may not be assigned a value in the private arrangement.[13]

The development rights purchase plan of Suffolk County attempts to merge the exercise of control in the public interest and private choice, vesting these functions in the County's legislative and executive agents. Pursuant to a comprehensive regional land use plan developed by traditional planning processes, the public, through its elected officials, enters the marketplace as would a private actor.[14] So represented, the public places a monetary value on

260 U.S. 393 (1922), in which he imposed the limits of the just compensation clause on regulation under the police power.

For a recent analysis of the property, regulation and compensation snare, *see* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

11. The diffuse nature of public rights has prompted one commentator to suggest that in evaluating whether the application of a particular regulation to an individual landowner requires compensation, the public interest should be considered in addition to the interest of a private adjoining landowner. Thus, the inquiry would shift from an unidimensional focus on the extent of the private landowner's loss to a balancing of his loss against the competing public interest. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 153-58 (1971).

12. R. POSNER, ECONOMIC ANALYSIS OF LAW 28 (2d ed. 1977); *see also* Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

13. For a critique of the absolutes of laissez-faire and the "ideal world" in economic decision-making, *see* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

14. Characterizing the public as a private actor is not novel. According to Blackstone, in the act of eminent domain, "[t]he public is now considered as an individual, treating with an individual for an exchange." 1 W. BLACKSTONE, COMMENTARIES *78.

its desire to control the future of its farmlands and bargains with private land owners to purchase his right to nonagricultural use of the property. The private arrangement comes to the fore of the public regulatory scheme.[15]

II. The Immediate Problem: Suffolk County

Suffolk County remains New York State's leading agricultural county,[16] despite the loss of nearly 70,000 acres of farmland between 1950 and 1972.[17] The sale of agricultural products contributes $70 million annually to the local economy.[17a] Tourism and recreational pursuits, dependent in part on the aesthetic contribution of large amounts of open space and ocean shorefront within a few hours of the New York City area, comprise an estimated $700 million per year industry.[18]

Owners of agricultural land in areas faced with suburban and urban development pressures confront several problems that can force the conversion of farmland to other uses. First, the burden of combined federal and state estate taxes and local property taxes can be especially severe. In Suffolk County, which has no exclusive agricultural zoning,[19] real property taxation based on "highest and best use" values[20] has resulted in annual taxes ranging from $75 to

15. A considerable body of scholarly writing categorizes the social functions undertaken by the law. *See, e.g.*, Summers, *The Technique Element in Law*, 59 CALIF. L. REV. 733 (1971).

16. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1974 CENSUS OF AGRICULTURE (1976) [hereinafter cited as 1974 CENSUS].

17. FARMLANDS *supra* note 2, at 7.

17a. 1974 CENSUS, *supra* note 16. Leading commodities in Suffolk County are potatoes, ducklings, nursery stock, flowers, sod, fruit and vegetables. The $70 million figure does not include roadside retail sales and the income of agribusinesses. *See* D. Newton, *Facts About Suffolk's Agricultural Products* (1975) (published by Suffolk County Cooperative Extension).

18. Interview with County Executive J. Klein, conducted by author D. Newton, 1974.

19. Survey of Suffolk County zoning ordinances by author D. Newton, 1974.

20. N.Y. REAL PROP. TAX LAW § 306 (McKinney Supp. 1971). Real property taxes are determined by application of an equalization rate, established by the State Board of Equalization and Assessment, to the "full value" of the land. " 'Full value' is synonymous with the term 'market value' which means the amount which one desiring but not compelled to purchase will pay under ordinary conditions to a seller who desires but is not compelled to sell." Borst v. Bd. of Commissioners of City of Amsterdam, 6 Misc. 2d 945, 946-47, 160 N.Y.S. 2d 187, 190 (1957). The fact that land is currently devoted to agriculture is theoretically irrelevant to the determination of its present *potential* market value.

$100 an acre in the sparsely populated eastern towns[21] to $100 an acre in the five western towns.[22] In addition, state[23] and federal estate taxes, based on highest and best use valuation, force some farming families to liquidate portions of their land holdings in order to satisfy their tax liabilities upon death.[24]

The relatively heavy tax burdens[25] on farmland owners are attributable in part to the influence of speculation in Suffolk County lands. Anticipating the continued outward population expansion of the New York metropolitan area and the concomitant demand for housing and services, passive investors have purchased undeveloped acreage in eastern Suffolk County. Their purchases increase the market price of county land, including farmland, and its highest and best use tax valuation base. Although Suffolk County land is valued for its agricultural worth at $1000 to $1500 per acre, its market value ranges from $4000 to more than $15,000 an acre.[26]

21. Interview with Suffolk County Assessors by author D. Newton.

22. Because of *de facto* differential assessment, resulting in the use of an equalization rate below the ten percent rate established for most of eastern Suffolk County, these figures do not reflect the full measure of taxation authorized. The gap between the differential assessment tax and the full tax varies with fluctuations in the market values of Suffolk County farmlands; as their market value decreases the actual tax imposed is closer to that which would result from application of the full equalization rate. Interview with County Assessors conducted by author D. Newton.

23. N.Y. TAX LAW §§ 951-63 (McKinney 1971) (amended 1977).

24. Since the Suffolk County plan was developed, federal estate tax relief for farmers was added to the Internal Revenue Code as part of the 1976 Tax Reform Act. *See* I.R.C. § 2032A. To qualify for section 2032A relief as it applies to agricultural lands, the estate property must be located in the U.S., must represent as least 50 percent of the adjusted value of the gross estate, must pass to a member of the decedent's family, and must have been in use for "farming purposes" at the time of the decedent's death. Alternatively, property not in use for farming must constitute at least 25 percent of the adjusted value of the gross estate and must have been owned and used for farming purposes by the decedent or his family for a total of five of the eight years immediately preceding death.

Section 2032A requires that the property continue to be used by the family for farming purposes for a minimum of 15 years after the decedent's death, or a recapture tax is imposed. However, this recapture tax will not exceed the amount that would have been due if the property had been valued at its highest and best use at the time of the decedent's death, and if the cessation of use for qualified farming purposes occurs between ten and fifteen years after death, only a fractional additional tax is imposed.

In no event may section 2032A be applied to reduce the value of the estate property by more than $500,000. Thus owners of large agricultural holdings, or farmers who fail to satisfy the statute's other requirements, will still desire estate tax relief.

25. By contrast, taxes in agricultural areas of Delaware, for example, average $5 per acre, according to one estimate. *See* FARMLANDS, *supra* note 2, at 7.

26. Survey of Real Property Tax Service Agency appraisal documents, Suffolk County, by author D. Newton.

The high market values make the further acquisition of agricultural land prohibitively costly for farmers who wish to expand their operations. They also make the sale of agricultural land to investors an attractive alternative to the continuation of farming.

Farmland by its nature may be particularly susceptible to development pressure. The land is usually level, clear of vegetation and geologic impediments, and well-drained.[27] Site assembly may be easier because farming units are often large enough to be individually useful to developers. In addition, the land may be less costly than that located closer to the urban center.

Population increase and its corresponding demand for housing and services continues unabated in Suffolk County.[28] The County's uninhibited growth mandated an appproach to control of land disposition that would protect the County's ecological balance, preserve farmland as open space, and relieve development pressure on the agricultural industry, but which would not interfere with the traditional independence of area farmers. At the behest of the County Executive,[29] an Agricultural Advisory Committee (AAC) was formed, respresenting both the farming and the agribusiness sectors of the agricultural industry.[30] Their deliberations over a two-year period culminated in a proposal for County purchase and ownership of the development rights of selected agricultural properties through individual contractual arrangements with property owners.[31]

The purchase of development rights is a relative newcomer to the growing arsenal of land use control and preservation techniques.[32] Conceptually, the scheme has its genesis in the separability of a property right from the "bundle of sticks" of the fee simple.

27. Paradoxically, the attractiveness of farmland for development can create unforeseen problems for farmers, such as trespassing, vandalism and theft. In addition, dust, noise and odors associated with agricultural operations, potential nuisances to new residential communities, may lead to the enactment of restrictive ordinances.

28. Suffolk County's 1973 population of 1.25 million is greater than that of fifteen states. *See* FARMLANDS, *supra* note 2, at cover letter, page 1; Long Island Lighting Company, Population Survey (1976).

29. *See* FARMLANDS, cover letter, page 2.

30. *Id.*

31. The Agricultural Advisory Committee proceedings are recorded in a set of unpublished minutes [hereinafter cited as AAC minutes].

32. *But see* State *ex rel.* Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 13, 176 N.W. 159 (1920), in which a statute enabling cities to establish restricted residential districts and to acquire by eminent domain the right to develop for other purposes the properties included in the districts, was held constitutional.

The advent of zoning and more innovative methods of land use regulation nurtured the notion that the development potential of land did not necessarily inhere in the geographical features of the particular parcel.[33] The right to develop, therefore, should be separable from the tangible features of land.[34]

Several states have enacted legislation enabling public acquisition of less than fee interests in land to protect ecologically sensitive areas.[35] The separation of development potential from land ownership has also been used to control development of specific parcels by encouraging development elsewhere.[36] In most development rights programs the governmental unit undergirds the process with its comprehensive plan and zoning ordinances but within those confines, leaves the specific decisions to agreements among private actors. In the Suffolk County plan, however, the County itself, through individual contracts with the owners of agricultural lands, acquires the development interest in the farmland.

The County is empowered by section 247 of New York's General Municipal Law[37] to acquire development rights by "purchase . . . or

33. J. COSTONIS, SPACE ADRIFT 35 (1974). Costonis notes that zoning was the regulatory manifestation of the separability of development potential from land. He suggests, however, that refusal to *transfer* development potential because of the unique character of each parcel might have been a red herring since uniqueness had not prevented the valuation of land, including its development potential, for purposes of condemnation and exchange.

34. Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). Intangible future interests, for example, are separable and legally cognizable through rights of reverter and remainders.

35. *See, e.g.*, CAL. GOVT. CODE §§ 65910-65912 (Supp. 1977); MD. NAT. RES. CODE ANN. §§ 5-1201 to 5-1202 (1974) (amended Supp. 1977); (1973).

36. New York City's zoning laws, for example, include a limited provision allowing the transfer of development rights from one parcel to another nearby. The applicant for development rights transfer, however, must obtain approval from various public agencies. New York, N.Y., Zoning Resolution Art. VII, ch. 4, §§ 74-79 to 74-793 (1975). *See also* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

37. N.Y. GEN. MUN. LAW § 247 (McKinney 1960) (amended 1977). The text of the statute follows:

> 1. *Definitions*. For the purposes of this chapter an "open space" or "open area" is 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 natural or scenic resources. For purposes of this section natural resources shall include but not be limited to agricultural lands defined as open lands actually used in bona fide agriculture production.
>
> 2. The acquisition of interests or rights in real property for the preservation of

otherwise."[38] The explicit statutory purpose of section 247 is the protection of open space that might economically or aesthetically enhance development.[39] Open space is defined to include lands used in bona fide agricultural production as well,[40] thereby authorizing Suffolk County's farmland preservation program.

The specific provisions of the Suffolk County law based on section 247 empower the county executive to purchase development rights to county agricultural lands.[41] But the County's decision to formulate and proceed with a development rights purchase plan was made only after other land use control methods had been considered and rejected by the AAC.[42] By enabling elected officials to represent the public interest in negotiations with individual landowners, the development rights purchase approach was believed to combine greater public control and less interference in private choices than was possible through other land use techniques.[43] The discussion below examines the extent to which both public control

open spaces and areas shall constitute a public purpose for which public funds may be expended or advanced, and any county, city, town or village after due notice and a public hearing may acquire, by purchase, gift, grant, bequest, devise, lease or otherwise, the fee or any lesser interest, development rights, easement, covenant, or other contractual right necessary to achieve the purposes of this chapter, to land within such municipality. In the case of a village the cost of such acquisition of interests or rights may be incurred wholly at the expense of the village, at the expense of such owners and partly at the expense of the village at large as a local improvement in the manner provided by article twenty-two in the village law entitled local improvements.

3. After acquisition of any such interest pursuant to this act the valuation placed on such an open space or area for purposes of real estate taxation shall take into account and be limited by the limitation on future use of the land.

4. For purposes of this section, any interest acquired pursuant to this section is hereby enforceable by and against the original parties and the successors in interest, heirs and assigns of the original parties, provided that a record of such acquisition is filed in the manner provided by section two hundred ninety-one of the real property law. Such enforceability shall not be defeated because of any subsequent adverse possession, laches, estoppel, waiver, change in character of the surrounding neighborhood or any rule of common law. No general law of the state which operates to defeat the enforcement of any interest in real property shall operate to defeat the enforcement of any acquisition pursuant to this section, unless such general law expressly states the intent to defeat the enforcement of any acquisition pursuant to this section.

38. *Id.*, subsection 2.
39. *Id.*, Historical Note.
40. *Id.*, subsection 1.
41. Local Law No. 19, *supra* note 4.
42. AAC minutes, *supra* note 31.
43. *Id.*

and private choice could have achieved through the alternatives considered and rejected by Suffolk County.

III. FARMLAND PRESERVATION ALTERNATIVES

A. *Agricultural Zoning*

Agricultural zoning has proven to be an ineffective means of achieving public control of land use without undue infringement on private choice. Although an agricultural zone may benefit the farmer who has no plans for his land other than to continue his agricultural practices, the speculator or the farmer who may wish eventually to sell his land for nonagricultural uses may view the regulation as a public deprivation of property rights of a magnitude requiring compensation.[44] Drawing the line between valid regulation of land use by zoning and invalid regulation constituting a "taking" of property[45] becomes a particularly knotty problem in areas in which development pressure is great and market values for land correspondingly high.[46]

There are indications that judicial protection of private speculative investment in property is weakening. For example, in *HFH, Ltd. v. Superior Court of Los Angeles County*,[47] the plaintiffs had purchased commercially-zoned land but had not improved it during their five years of ownership. When the property was rezoned for low density residential use, thus frustrating their plans to construct a shopping center on the site, they argued that the reduction in

44. *Cf.* Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 40 N.J. 539, 193 A.2d 232 (1963), in which a Meadowlands Development Zone limiting land use in a flood basin to agriculture or aquaculture was held confiscatory. The court required public acquisition of the wetlands area for preservation.

45. The literature is voluminous. Among the most thoughtful efforts to develop a workable just compensation standard is Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). A recent synthesis of compensation theories and a critique of the doctrines' implications for the future of legal thought and action is B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977). *See also* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1974); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

46. W. BRYANT, FARMLAND PRESERVATION ALTERNATIVES IN SEMI-SUBURBAN AREAS 6 (1975) [hereinafter cited as FARMLAND PRESERVATION ALTERNATIVES]. *See also* Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961), [hereinafter cited as Krasnowiecki and Paul].

47. 15 Cal. 3d 508 (1975).

the parcel's market value from its $388,000 purchase price to $75,000 constituted inverse condemnation. Refusing to recognize the diminution in market value as a "taking," the court noted that the permissible scope of land use regulation under the police power should correspond more closely to the community's interest: ". . . zoning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens. . . ."[48]

Such pronouncements, however, are delivered unpredictably, according to the court's perception of the facts of a particular case, and suggest no reliable trend that would permit a community to deprive a speculator of the investment value of his property through agricultural zoning.[49] In addition, valuable administrative time is consumed at the public's expense in the reformulation and reenactment of judicially invalidated zoning schemes.[50] These costs and uncertainties militate against agricultural zoning as a method of achieving planning control in the public interest. Finally, the public's perception that zoning in a particular area is an ineffectual land use control device, subject to erosion by the arbitrary granting of variances and by the changes made in community planning priorities by newly-elected officials,[51] reduce the political palatability of this approach.

Although exclusive agricultural zoning may be a valid land use regulatory measure, it nonetheless deprives the speculative landowner of most of his freedom of choice in disposing of his property.[52] His limited choices allow him to let it lie fallow, farm it himself, lease it for agricultural purposes, or sell it at a discounted price reflecting the use limitations imposed by the zoning ordinance.[53] Thus argicultural zoning furthers neither individual choice nor public control.

48. *Id.* at 520.

49. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 65-66 (1977).

50. In New York, invalidation of a zoning ordinance by declaratory judgment restores the prior classification. Later enactment of an amendment substantially the same as the ordinance invalidated is not effective to avoid the consequences of the judgment, Davlee Construction Corp. v. Brooks, 26 Misc. 2d 242, 246, 213 N.Y.S.2d 593, 599-600 (1960).

51. FARMLAND PRESERVATION ALTERNATIVES, *supra* note 46, at 6.

52. During Suffolk County's deliberations, several members of the AAC expressed concern about the possible unfairness of agricultural zoning to farmland owners. AAC minutes, *supra* note 31.

53. For a discussion of similar concerns in open space preservation, *see* Krasnowiecki & Paul, *supra* note 46, at 200.

B. *Differential Assessment*

Differential assessment seeks to maintian taxes on agricultural lands at levels that more closely correspond to the farmer's ability to pay. Several states have authorized tax assessment of agricultural property according to its value in farm use rather than its highest and best use, in order to retard the conversion of farmland to non-agricultural uses.[54] Under New York's Agricultural Districts Act[55] farmland owners initiate the process through which they may eventually receive the benefits of differential assessment by submitting to the county legislature a proposal for formation of an agricultural district including their lands.[56] If the county legislature approves the proposal it forwards the plan for certification by the State Commissioner of Environmental Conservation, who must determine the consistency of the plan with state environmental objectives.[57] An appraisal of the plan's feasibility and furtherance of the public interest by the Agricultural Resources Commission, and approval of the Secretary of State are required[58] before the plan is returned to the county legislature for final adoption.[59] The county legislature is also vested with the responsibility of reviewing agricultural districts every eight years and may terminate or modify the arrangement after appropriate findings.[60]

54. MASS. ANN. LAWS ch. 132A, §§ 11A-11D. (Supp. 1977).

55. N.Y. AGRIC. & MKTS. LAW §§ 301-307 (McKinney 1972, Supp. 1977).

56. *Id.*, § 303.

57. *Id.*, subsection 5. "The commissioner of environmental conservation shall have sixty days after receipt of the plan within which to certify to the county legislative body whether the proposal, or a modification of the proposal, is eligible for districting and whether districting would be consistent with state environmental plans, policies and objectives."

58. *Id.* The Agricultural Resources Commission must determine that "the area to be districted consists predominantly of viable agricultural land, and, that the plan of the proposed district is feasible, and will serve the public interest by assisting in maintaining a viable agricultural industry within the district and the state . . ."; the Secretary of State must determine that "the districting of the area would not be inconsistent with state comprehensive plans, policies and objectives."

59. *Id.*, subsection 6. "The proposed district, if certified without modification by the commissioner of environmental conservation, shall become effective thirty days after the termination of such public hearing or, if there is no public hearing, ninety days after such certification unless its creation is disapproved by the county legislative body within such period."

60. *Id.*, subsection 8. "The county legislative body shall review any district created under this section eight years after the date of its creation and every eight years thereafter. . . . The county legislative body . . . may terminate the district at the end of such eight year period . . . or may modify the district. . . ."

The virtue of permitting differential assessment at the initiative of the farmland owner is also the vice of the agricultural districting procedure in New York: he may convert his land to non-agricultural uses at will. Conversion of land within the agricultural district to a nonfarming use subjects the landowner who has received the benefits of agricultural value assessment to a "rollback tax" equivalent to the tax avoided for up to the preceding five years.[61] The possibility of unforeseen circumstances forcing payment of a five-year lump sum tax liability may deter some farmland owners from undertaking the agricultural district formation process. On the other hand, limiting the rollback tax to five years may actually encourage speculation in agricultural lands by permitting long-term investment in property without the usual tax burden.[62]

Control over comprehensive resource planning by a town in which an agricultural district is established is also limited by the modification of certain of its powers over district lands. Local laws and ordinances may not operate to restrict agricultural uses of property within the district unless required for health or safety reasons[63] and elaborate administrative procedures are required before the power of eminent domain may be exercised.[64] The imposition of special benefit assessments and ad valorem levies for school districts and public improvements is also restricted.[65]

Differential assessment, as available to farmland owners in New

61. *Id.*, section 305, subsection 1(e). "If any land within an agricultural district utilized for agricultural production is converted to a use other than agricultural production, each appropriate taxing jurisdiction shall compute an amount ascertained by applying the applicable tax rate for each of the preceding five years to the excess amount of assessed valuation of such land. . . . Such amount shall be the rollback taxes to be levied and collected. . . ."

62. FARMLAND PRESERVATION ALTERNATIVES, *supra* note 46, at 9. The New York Agriculture Districts Act attempts to limit its benefits to *bona fide* farmland owners by requiring that the land have produced agricultural products with a gross sales value of at least $10,000 per year for the preceding two years. *See* N.Y. AGRIC. & MKTS. LAW § 305, subsection 1(a) (McKinney 1971, Supp. 1977).

63. N.Y. AGRIC. & MKTS. LAW § 305, subsection 2 (McKinney 1971, Supp. 1977). "No local government shall exercise any of its powers to enact local laws or ordinances within any agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of this act unless such restrictions or regulations bear a direct relationship to the public health or safety."

64. *Id.*, subsection 4. The procedure requires review by the Commissioner of Environmental Conservation, the Agriculture Resources Commission and the Secretary of State.

65. *Id.*, subsection 5.

York, was rejected as a viable means for preservation of agricultural lands by Suffolk County's AAC.[66] The administrative hurdles and constricted private decision-making imposed by the Agricultural Districts Act reduce the method's appeal to individual landowners. The town's cession of certain sovereign powers, and its inability to prevent the farmer from converting his land to nonagricultural uses or from selling his property to a potential developer who offers a purchase price too attractive to refuse, defeat the public goal of comprehensive land use control.

C. *Fee Simple Purchase and Leaseback*

Purchase by the public, through a governmental unit or agency, of fee simple title to lands designated for preservation, and their subsequent lease for statutorily limited uses[67] is a superficially attractive technique for farmland preservation. Theoretically, as a property owner the public may exercise a high degree of control over its lands, accommodating its land use to a comprehensive plan. Ideally, both the initial purchase and the later leases are based on consensual arrangements.[68]

The AAC rejected the purchase and leaseback method as politically unacceptable,[69] because the system might leave farmers with few realistic choices in managing agricultural production. Relegated to the status of a County tenant, a farmer would have been subjected to the uncertainties of the term of the lease: the lease might have been too short for sound crop planning and management, or too long to permit the farmer to withdraw from farming for other reasons.[70] If the market for farmland were to become increasingly active, a purchase and leaseback system utilizing competitive bidding would offer farmers no assurance that land rents would be maintained at levels they could afford.[71]

Market influences could also operate to erode the public's control of the farmlands it sought to preserve under a purchase and

66. AAC minutes, *supra* note 31.

67. *See, e.g.*, New Jersey's Green Acres Land Acquisition Act, N.J. STAT. ANN. § 13:8A-1 *et seq.* (West 1968).

68. In the interests of reasoned land use patterns and comprehensive planning, however, many purchase and leaseback statutes authorize the governmental unit to proceed by condemnation in order to acquire the requisite parcels. *See, e.g.*, N.J. STAT. ANN. § 13:8A-6 (West 1961).

69. AAC minutes, *supra* note 31.

70. FARMLAND PRESERVATION ALTERNATIVES, *supra* note 46, at 16-17.

71. *Id.*

leaseback system. If agricultural commodity prices were to fluctuate excessively, farmers might refuse to enter leases, at least until rents were made low enough for farmers to insure themselves of profit. The County would then be forced either to create a market by reducing rents or by offering another form of subsidy; alternatively, the county might be forced to turn farmland purchased for preservation to more profitable, nonagricultural uses.

Finally, reliance on outright purchase for farmland preservation may appear prohibitively costly to the taxpaying public asked to finance the system.[72] Even recognizing that control is costly, and that more absolute control is even more costly,[73] the public may not be receptive to being asked to rearrange its expenditure priorities sufficiently to make the farmland purchases possible.

D. *Transfer of Development Rights*

The transfer of development potential, or development rights, has received considerable attention recently as a means of land control and preservation.[74] Among the proposed or implemented plans are 1) those in which the governmental unit, acting as a "banker," issues certificates representative of development rights that are fully transferable within the bounds of the community's zoning regulations;[75] 2) those in which the governmental unit offer additional development rights as incentives for the provision of greater public access benefits in projects to be constructed;[76] and 3) those in which the governmental unit permits development rights transfer only between particular parcels of land.[77]

72. *Id.*

73. *Cf.* C. LINDBLOM, POLITICS AND MARKETS 50 (1977). In this theoretical examination of world political-economic systems, the author states that in an exchange system, such as that in the U.S., control requires offering something of value to induce the desired response. In "authority systems," by contrast, the exercise of control can be costless.

74. Among the early sources on transfer of development rights are MORRISON, HISTORIC PRESERVATION LAW (2d ed. 1965, Supp. 1972). *See also* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROB. 372 (1971).

75. Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space, reprinted in* ROSE, J., TRANSFER OF DEVELOPMENT RIGHTS (1975).

76. These public benefits include building set-backs, plazas, parking facilities and mass transit connections. *See Sonoma County Planning Board, The Potential for Density Transfer in Sonoma County, reprinted in* ROSE, J., TRANSFER OF DEVELOPMENT RIGHTS (1975).

77. The regulated exchange of development rights between parcels or designated

The Town of Southampton in Suffolk County has authorized voluntary development rights transfers from farmland to other parcels within the school district.[78] But the County AAC was unwilling to commit itself to a farmland preservation technique it considered laden with unresolved legal, political and administrative difficulties.[79] Nor would a transfer of development rights plan necessarily have satisfied the aims of achieving public control over the future of the County's farmlands with minimal restrictions on the freedom of the individual property owner.

The transfer of development rights concept incorporates an element of private choice that may prove illusory. Development rights transfer plans are susceptible to attack as confiscatory land use regulation measures,[80] particularly if an initial allocation or reallocation

districts was developed for the preservation of historic or landmark buildings. *See* COSTONIS, J., SPACE ADRIFT (1974); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

A more restrictive version of the concept, allowing transfer of development rights only to nearby parcels, is utilized in conjunction with New York City's Landmarks Preservation Law. New York, N.Y. Zoning Resolution Art. VII, ch. 4, §§ 74-79 to 74-793 (1975); Administrative Code of City of New York, ch. 8-A, §§ 205-1.0 to 207-21.0 (1976). Constitutional challenges to both laws were unsuccessful. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 397 N.Y.S.2d 914 (1977), *aff'd* June 26, 1978, ___ U.S.L.W. ___.

See also Fred F. French Inv. Co., Inc. v. City of New York, 39 N.Y.2d 587, 385 N.Y.S.2d 5 (1976), in which a zoning ordinance attempting to create a special park district with a mandatory "award" to the landowner of development rights for transfer elsewhere was held violative of due process.

78. Town of Southampton Zoning Ordinance, § 2-40-30-03 (1972) *reprinted in* ROSE, J., TRANSFER OF DEVELOPMENT RIGHTS 244 (1975). Although there is no special transfer of development rights enabling legislation in New York, the concept received implicit judicial recognition in Newport Associates, Inc. v. Solow, 30 N.Y.2d 263, 283 N.E.2d 600, 332 N.Y.S.2d 617 (1972), *cert. denied*, 410 U.S. 931 (1973). Without explicit denomination of the development rights transfer process, the court held that the terms of a long-term lease did not preclude transfer of the leased parcel's unused development rights to an adjoining parcel.

79. AAC minutes, *supra* note 31.

80. The potential problems of development rights transfer in agricultural areas are not necessarily as severe as those encountered in the urban context. In a city, the value of land lies in the profit-making structure that can be built on it; farmland, in contrast, is valuable for its productivity without building. The farmer, therefore, may not perceive the "loss" occasioned by imposition of a transfer of development rights program as an unconstitutional deprivation of property. *See* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 77 (1973), in which the author suggests that recent judicial sympathy toward land use regulation may indicate that any reasonable plan can survive constitutional challenge under the just compensation clause. The cases cited by Costonis involve zoning restrictions intended as long-range growth controls or regulations restricting development in

of development rights precedes the opportunity for their exchange.[81] Even if a particular transfer of development rights plan withstands constitutional attack, its perceived unfairness may make it politically inexpedient and impede its passage or administration.[82] And notwithstanding its legal status or perceived unfairness, a transfer of development rights program can operate unfairly by forcing substantial decreases and increases in land market values within and without the area it encompasses.[83]

However, the greater the degree of individual choice allowed the property owner in a transfer of development rights plan, the smaller the extent of public control over sound land use planning. A system in which development rights are distributed to landowners for free exchange within a circumscribed area, transmutes the public into a passive observer of decisions within those areas that may not coincide with public need. Public control may be strengthened by a system in which the government functions as a "banker,"[84] accumulating or releasing development rights according to economic and social needs, or by a more detailed regulatory overlay on the transfer district. But there are limits to a government's ability to manipulate a development rights "market" without resort to coercive techniques that diminish the individual landowner's choice to the point of meaninglessness. On the other hand, rather than prodding development into designated areas, the system might result in no development at all.[85]

ecologically sensitive areas. *See also* Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977); *see generally*, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

81. *See* Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, in J. ROSE, TRANSFER OF DEVELOPMENT RIGHTS 252 (1975), proposing a transfer of development rights scheme based on the issuance to each land parcel of development rights certificates, in amounts determined in accordance with a community zoning plan.

82. Costonis, *Development Rights Transfer: An Exploratory Essay, supra* note 80, at 83.

83. The problem has been described as the "windfall/wipeout syndrome." *See* Costonis, *Development Rights Transfer: An Exploratory Essay, supra* note 80, and notes 147a-152 and accompanying text *infra*.

84. Rose, *Psychological, Legal and Administrative Problems of the Proposal to Use the Transfer of Development Rights As a Technique to Preserve Open Space*, in J. ROSE, TRANSFER OF DEVELOPMENT RIGHTS 293 (1975).

85. Governmental inability to capitalize on market forces may be exaggerated in a semi-rural area such as Suffolk County, where the demand for high intensity development is less than in the urban center. However, in some areas the market's response to conditions perceived as undesirable has been to "leapfrog" over one area

E. *Purchase of Development Rights*

The farmland preservation approach adopted by Suffolk County utilizes a transfer of development rights concept of the severability of land's development potential from the land itself.[86] But in the purchase of development rights plan the government becomes both land use regulator and also a private actor in the land market. Theoretically, the hybrid governmental role in a purchase of development rights program should allow effective public control of farmland and wide latitude of individual choice. The discussion below examines the extent to which these goals may be compatible or mutually exclusive in the actual implementation of Suffolk County's purchase of development rights program.

IV. THE SUFFOLK COUNTY PLAN

A. *Financing the Purchase of Development Rights*

Suffolk County chose to finance its farmland preservation program through the sale of thirty-year serial bonds.[87] In its first offering in September, 1977, the County sold bonds worth $8 million at a 5.9 percent interest rate.[88] The success of the first farmland preservation issue, however, may portend little about future bond sales.[89] Suffolk County appears to be as subject to the uncertainties

to another, without regard to the geographical contiguity of the present population centers to the proposed development. *See* SENATE COMM. ON GOVT. OPERATIONS, PROPERTY TAXATION: EFFECTS ON LAND USE AND LOCAL GOVERNMENT REVENUES, STUDY BY THE CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, 92d Cong., 1st Sess., 1971.

86. *See* notes 32-36 and accompanying text *supra*.

87. The County's outstanding debt was well below that allowable under state law, calculated as seven percent of the latest five-year average of the full value of all taxable real property. N.Y. CONST. art. VIII, § 4; N.Y. LOCAL FIN. LAW § 104 (McKinney 1968). According to calculations dated September, 1977, the County, with a total net indebtedness of $412,357,965, had exhausted only 40.9 percent of its debt contracting power. Official Statement of the County of Suffolk, New York Relating to $8,000,000 Farmland Preservation (Serial) Bonds, 1977, [hereinafter cited as Suffolk County Bond Prospectus].

88. Suffolk County Bond Prospectus, *supra* note 87. The initial debt authorization by the County Legislature was $21 million. Suffolk County Res. No. 320, September 8, 1976, *Proceedings of the County Legislature of Suffolk County* (1976).

89. In 1976, bonds for a county sewer project had to be offered at 9.8 percent. An estimated cost of $300 million for this 57-square mile sewer district project was initially approved in a 1969 bond issue referendum. By 1976, the cost, including debt service, had risen to over $900 million. Suffolk County Bond Prospectus, *supra* note 87, at 11.

of the bond market as any debt-issuing municipality in the New York metropolitan area.[90]

The viability of the County's position as a private actor in the area's land market will also depend upon the availability of cash for its purchases. While the sale of bonds purportedly will provide the County with sufficient purchasing power to meet its debt schedule, the withdrawal of farmland acreage from "highest and best use" tax assessment could deplete the revenue base with which bonds are secured. But County officials conclude that the demands on public services and facilities made by houses valued at less than $50,000 exceeds the contributions of those homes to County revenues.[91] Thus, according to County planners, the conversion of farmland to low or moderate cost housing will create a greater drain on County resources than reduced tax assessment of farmland; only residential developments with homes worth more than $50,000 offer a financially attractive alternative.[92]

The basic arithmetic of the County's argument assumes that an acre of farmland preserved is an acre of low to moderate cost housing foregone. However, developable land is not yet scarce enough in Suffolk County to support that assumption.[93] One estimate

90. New York City's inability to convince the bond market of the security of City issues resulted in legislation creating a state agency, the Municipal Assistance Corporation, to issue state-guaranteed bonds for city use. N.Y. PUB. AUTH. LAW Art. 10 (Supp. 1977). In a further step, the New York State Financial Emergency Act established the Emergency Financial Control Board, composed of city and state officials empowered to implement a financial plan designed to recapture the confidence of the bond-buying public. 1975 MCKINNEY'S N.Y. SESSION LAWS ch. 868-70. *See also* Suffolk County Bond Prospectus, *supra* note 87, at 9.

91. Suffolk County Planning Department, Farmland Development and School Taxation (1973) (unpublished survey). In November, 1977, the average selling price of a new home in the United States was estimated at $57,600. According to the Nassau-Suffolk Regional Planning Board, however, eastern Suffolk County (the focal point of the farmland preservation program) is " 'one of the few spots in the entire New York metropolitan region where it is possible to find new housing for under $30,000.' " *The Bargain House: What Will $30,000 Buy?*, N.Y. Times, Jan. 1, 1978, § 10 (Real Estate), at 1, col. 8.

92. Suffolk County Planning Department, Farmland Development and School Taxation (1973). Using $28,000 as an average house value, the survey demonstrated a school tax deficit of $37,660 for a one acre lot subdivision, of $80,700 for a one-half acre lot subdivision, and of $145,260 for a one-quarter acre lot subdivision. The survey did not include possible deficits for town, county and special district taxes, comprising 45 percent of the total local tax burden. *See also* N.Y. Times, Oct. 6, 1977, section B, at 9, col. 6, for discussion of a purported influx of welfare recipients to Suffolk County.

93. Suffolk County has approximately 270,000 acres of developable land, includ-

suggests that at the County's current rate of population growth, the preservation program's withdrawal of agricultural land from the market will not limit the land available for residential expansion for more than 30 years.[94] Subdivision development that does not pay its own way in taxes and reduced revenue from assessment of farmland at its agricultural value can occur simultaneously. Thus the revenue required to finance the farmland preservation bonds will have to be raised by increasing county-wide taxes.[95]

B. *Selection of Farmland Parcels for Purchase: The "Bidding" Process*

Notice of the farmland preservation program and of the opportunity to offer development rights for sale was mailed to all Suffolk County farmland owners at the same time.[96] The individual landowner's offer to sell was thus dependent on his initiative, as was the offering price named.[97] But the County was not required to accept all development rights sale offers.[98] In selecting parcels for initial purchase, the County weighed criteria reflective of the need both to protect prime farmlands and to control development. Priority was given to land with soil capability ratings establishing it as prime quality farm acreage, currently under cultivation and owned by active farmers.[99] Emphasis was also given to the assembly of tracts totalling 200 acres or more, and to the acquisition of development rights to parcels under imminent threat of development.[100]

The landowner who wishes to participate in the Suffolk County

ing farmland. W. LESHER & D. EILER, FARMLAND PRESERVATION IN AN URBAN FRINGE AREA 17 (1977).

94. *Id.* For the purposes of their calculations the authors assume that 150,000 farmland acres will be preserved and that a residential development averages four persons per house, one acre lots and .75 housing units per acre.

95. *Id.* at 18-19.

96. SELECT COMMITTEE ON THE ACQUISITION OF FARMLANDS, REPORT TO THE SUFFOLK COUNTY LEGISLATURE 1-2 (1974) [hereinafter cited as SELECT COMMITTEE REPORT].

97. The initial solicitation resulted in 380 offers for development rights sale, encompassing nearly 18,000 acres. Farmland owners may offer development rights to less than their full property holdings. Town Tabulation, Opening of Farmland Bids (February 11, 1975) (unpublished estimates).

98. SUFFOLK COUNTY AGRICULTURE ADVISORY COMMITTEE, REPORT TO THE SUFFOLK COUNTY LEGISLATURE 5 (1974).

99. *Id.* at 4.

100. *Id.* at 5.

program is not entirely free to negotiate his sales price as he would in the usual market relationship. Owners of farmland parcels acceptable for development rights purchase must give the County an option period of sixty days and must agree to allow the County to undertake a professional appraisal of the property.[101] If the landowner has "underbid" in determining the offering price named in the option, he is given the opportunity to obtain the development rights value as determined by the County's appraisal. But if he has "overbid" the appraisal value as determined by the County and finds that value unacceptable, no further negotiations of price are possible, and his parcel will be excluded from this phase of the preservation program.[102]

C. *The Contract of Sale*

By the terms of the Suffolk County sale contract, the landowner who parts with his development rights enters a convenant in perpetuity[103] to use the underlying land for purposes of agricultural production only.[104] In addition, the development rights seller must agree to refrain from any subdivision of his underlying title, even if for purposes of agricultural production, without the written consent of the County.[105] While such a provision undoubtedly furthers

101. Suffolk County Option to Purchase Development Rights, *reprinted in* SELECT COMMITTEE REPORT, *supra* note 96.

102. ADVISORY COMMITTEE REPORT, *supra* note 96, at 5.

103. The common law rule in New York denies a municipality enforcement against the successors in interest, heirs or assigns of the grantor of a development right only if the municipality is in privity of estate or in possession of a dominant tenancy. To meet this problem the state enabling legislation authorizing development rights purchase was amended March 24, 1977, by the addition of a paragraph specifically permitting the enforcement of interests acquired under it. N.Y. GEN. MUN. LAW § 247, subsection 4 (McKinney Supp. 1977). The problems associated with use of common law terminology in preservation programs are discussed in McCarthy & Peterson, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447, 468-70 (1977).

104. Contract to Purchase Development Rights in Agriculture Lands in the County of Suffolk, (on file in Suffolk County Executive's office) section 2. As used in the contract, "agricultural production" is defined by N.Y. AGRIC. & MKTS. LAW § 301(3) (McKinney 1972) (amended 1972) as "the production for commercial purposes of crops, livestock and livestock products, but not land or portions thereof used for processing or retail merchandising of such crops, livestock or livestock products."

105. Contract to Purchase Development Rights in Agricultural Lands in the County of Suffolk, *supra* note 105, section 8. An exception is made for division and conveyance "to heirs and next of kin;" the section is clearly directed to prevention of subdivision for development.

public control of land use, it may appear unduly restrictive to a farmer who may be unable fully to cultivate all his lands.[106] Thus the provision might have the effect of deterring farmland owners from the sale of development rights to their entire holdings. The result, a patchwork preservation pattern, would increase the administrative complexity of the development rights acquisition program.

D. *The Condemnation Process*

The Suffolk County purchase of development rights program emphasizes the voluntary participation of farmland owners. However, the landowner who determines not to offer his development rights for County purchase, or who determines to offer only part of his holdings, does not thereby insulate his property. In the final phase of the farmland preservation program[107] the County may move to acquire by condemnation the development rights to parcels interspersed with or adjacent to property from which the County has purchased development rights.[108] Land owned by a farmer actively engaged in farming will be exempt from the condemnation phase.

As a land regulation device,[109] condemnation is the antithesis of individual choice.[110] Its perceived injustices would be exacerbated in the Suffolk County program, where condemnation of less than fee interests might leave non-farmers, or inactive farmers, with land holdings usable only for agricultural production.[111] It would

106. For recommended contract provisions more precisely reflecting the parties' likely needs in development rights purchase, *see* McCarthy & Peterson, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447, 470-74 (1977).

107. The condemnation phase was controversial among members of the committee responsible for proposing the Suffolk County plan. *See* SUFFOLK COUNTY AGRICULTURAL ADVISORY COMMITTEE, REPORT TO THE SUFFOLK COUNTY LEGISLATURE 4 (1974).

108. AAC minutes, *supra* note 31. *See also* J. Klein, *Preserving Farmland on Long Island*, ENVIRONMENTAL COMMENT 11, 13 (January 1978) (published by the Urban Land Institute).

109. Condemnation of less than fee interests is authorized by the New York enabling legislation, which permits the County's acquisition of property interests "by purchase, gift, grant, bequest, devise, lease *or otherwise*. . . ." [Emphasis added.] N.Y. GEN. MUN. LAW § 247, subsection 2 (McKinney 1972).

110. The possibility remains, however, of the holdout landowner who "chooses" condemnation as a means of delaying the sale of his development rights until their value has increased further.

111. Condemnation of less than fee interests has been judicially recognized. *See*

seem more in keeping with Suffolk County's sensitivity to private property rights to condemn fully the remaining parcels, or at least those who disclaim interest in retaining the underlying title to preserved farmlands.

Full fee condemnation of designated farmlands from which the development rights are not voluntarily offered for sale would cost Suffolk County more than development rights condemnation alone,[112] and it might exacerbate the problem of the holdout landowner. Presumably, however, the County could lease purchased farmlands for agricultural purposes or resell the underlying title as easily as the private (but unwilling) owner.

The possibility that condemnation of development rights would not survive a constitutional challenge is suggested by a notable case arising from wetlands preservation efforts. In *State v. Johnson*[113] a Maine statute prohibiting the filling of coastal wetlands was found violative of the state constitution's due process and just compensation clauses. Basing its opinion in part on the lower court's finding that absent landfill, plaintiff's property had no commercial value, the court stated that the costs of preservation should be publicly borne and that under the statute these plaintiffs were charged with "more than their just share of cost of this state-wide conservation program."[114]

In contrast, in *Just v. Marinette County*,[115] the Wisconsin Supreme Court upheld a shoreland zoning ordinance despite a severe depreciation in the value of the plaintiff's land. The court noted, "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state." The *Just* court found a reasonable exercise of the police power in preventing

Pontiac Improvement Co. v. Board of Commissioners, 104 Ohio 447, 135 N.E. 635 (1922), in which a property owner challenged the right of a municipal park district to condemn individual "interests" in regulating and controlling landscaping and construction on private property. The statute was invalidated for its failure to inform the landowner adquately of the property rights that would remain after the condemnation.

112. The average per-acre price of Suffolk County farmland was $7500 in 1975, whereas its estimated agricultural value was $1500 per acre. Thus per-acre development rights values in that year averaged $6000. W. LESHER & D. EILER, FARMLAND PRESERVATION IN AN URBAN FRINGE AREA 6-8 (1977).

113. 265 A.2d 711 (Me. 1970).

114. *Id.* at 716.

115. 56 Wis.2d 7, 201 N.W.2d 761 (1972).

"harm to public rights by limiting the use of private property to its natural use."[116] These cases pose the issue of accommodating the individual landowner's investment in the development potential of land with the public's interest in land preservation. Although the cases arose in the context of regulation by zoning, Suffolk County might encounter similar arguments in condemning the development potential in farmlands.[117]

Condemnation of less-than-fee interests also involves difficult questions of development rights valuation. The task is further complicated when the owner is a nonfarmer who purchased the property for an ultimate use other than agricultural production. He is likely to claim that he "owned" development or commercial expectations requiring compensation.[118] Although one might argue that the farmland owner forewent the opportunity to negotiate a voluntary sale of his development rights, the most he could have received through voluntary sale was an appraised value unlikely to satisfy his expectations.[119] Finally, regardless of the landowner's

116. *Id.* at 17, 201 N.W.2d at 768. *See also* Tax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971), who sees in earlier wetlands cases a traditional inability to recognize public rights: "Current takings law assumes that when the government restricts the use of private property, the public has acquired something to which it did not previously have a right. While scrupulously preventing total loss to the particular owner, it often imposes that loss upon diffusely-held interests. . . ." *Id.* at 160.

117. One commentator has suggested, however, that the diminution in value argument is inapplicable in situations in which the government or public is seeking to preserve the status quo rather than to improve current public conditions. Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 177 (1974).

118. Cases in which landowners' claims that zoning classification entitled them to reimbursement for diminutions in value due to the changes raise issues similar to those hypothesized here. In Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967), landowners seeking a zoning density change for their property from one residence per acre to five residences per acre received, instead, a one residence per five acres classification. In rejecting their claim that compensation was due, the court stated, "[L]andowners have no vested right in existing or anticipated zoning ordinances. . . . A purchaser of land merely acquires a right to continue a use instituted before the enactment of a more restrictive zoning." *Id.* at 602, 55 Cal. Rptr. at 712. *See also* Dale v. City of Mountain View, 55 Cal. App. 3d 101, 127 Cal. Rptr. 520 (1976), in which owners of a golf course alleged that the city's adoption of an open space plan restricting development of their property reduced its value to about one-sixth of that of contiguous parcels. The court's response echoed the court in Morse v. County of San Luis Obispo.

119. To meet this and other valuation problems, a broad "fair" compensation standard that would measure the difference between the landowner's return from his land as restricted and its "reasonable beneficial use" value, rather than its "highest and best use value," has been proposed. *See* Costonis, *"Fair" Compensation and the*

"expectation" values, if development right values increase in Suffolk County, the delay in their acquisition until the final phase of the program will be more costly to the County.[120]

E. *Political Control*

Major decisions in Suffolk County's development rights purchase program require legislative concurrence.[121] The history of the County Legislature's responses to the farmland preservation effort demonstrates that effective land use control can be impeded, if not thwarted, by the impact of political forces and the fragility of coalitions. For example, legislative authorization of the signing of options to the first list of parcels satisfying the selection criteria met a motion to table and was finally approved only narrowly.[122] The two-thirds vote required for approval of County bond issues[123] was not obtained until five months after the farmland preservation bond resolution had been introduced in the Legislature.[124] The continu-

Accommodation Power, 75 COLUM. L. REV. 1021 (1975). The standard is intended to incorporate the variable of community standards into compensation decisions and calculate an award sufficient to "escape invalidation on confiscation grounds." *Id.* at 1051. Suggestions to overcome the practical administrative problems in implementing the proposed standards are conspicuously lacking in the piece.

120. Whether the farmland owner who refrains from voluntary development rights sale stands to gain or lose if his development rights are ultimately condemned depends on circumstances incapable of prediction. But precisely when the "holdout" landowner's property should be valued, and what he should then be entitled to receive, is a source of disagreement among courts presented with the question.

For example, in determining whether a ranchowner whose property was condemned for inclusion in an irrigation and recreation district was entitled to compensation for enhancement in value due to the proposed surrounding improvement, the California Supreme Court directed payment of "the increase in value attributable to the project up until the time when it became probable that the land would be needed for the improvement." Merced Irrigation District v. Woolstenhulme, 4 Cal.3d 478, 498, 93 Cal. Rptr. 833, 846, 483 P.2d 1, 14 (1971). The problem becomes particularly acute when condemnation is announced in advance of its exercise. In the center of urban renewal, owners of land on which a *lis pendens* was filed 13 years before the property was actually condemned were entitled to compensation for the diminution in value attributable to the city's delay, in Foster v. City of Detroit, Michigan, 254 F. Supp. 655 (E.D. Mich. 1966). For an attempted statutory resolution of the problem *see* N.J. STAT. ANN. 20:3-30, providing that just compensation shall be determined as of the date "on which action is taken by the condemnor which substantially affects the use and enjoyment of the property by the condemnee."

121. Local Law No. 19, section 3, *supra* note 4.

122. The vote was tallied as follows: Yes-10; Abstain-7; Absent-1. Suffolk County Resolution No. 533, May 13, 1975, PROCEEDINGS OF THE COUNTY LEGISLATURE OF SUFFOLK COUNTY (1975).

123. N.Y. LOCAL FIN. LAW § 33.00 (McKinney 1968).

124. Suffolk County Resolution No. 320, September 8, 1976, PROCEEDINGS OF

ing reluctance of legislators to undertake the necessary steps can dilute the efficacy of a land preservation program by delay or lead to its destruction by veto.[125]

A provision requiring approval by a County-wide referendum prior to any alienation of development rights acquired in the farmland preservation program gives the public at large a direct voice in land use decisions.[126] Although the referendum provision appears consistent with Suffolk County's attention to the public pulse in its farmland program, as a means of furthering control of land use, it may become an albatross. There is no guarantee that the sequence of development that County planning officials consider desirable will coincide with the voting public's perceptions of County development needs. The popularity of farmland preservation may diminish as County spending priorities are reevaluated or as local politicians find development rights referenda to be appropriate issues for campaign stances. In addition, if development rights referenda are held on a parcel-by-parcel basis rather than on a larger scale, Suffolk County's land use control system may incorporate a capricious element violative of due process.[127]

V. ADDITIONAL MEANS OF ACCOMMODATING PRIVATE CHOICE AND PUBLIC CONTROL

The cost and administrative complexity of the Suffolk County farmland preservation program require active implementation over a period of time much greater than that required by a largely self-executing general land use control enactment such as a zoning ordinance. Throughout that period of time the County runs the risk of an erosion of its goals through the continuing conversion to other

THE COUNTY LEGISLATURE OF SUFFOLK COUNTY (1976). A subsequent resolution to rescind the bond sale was introduced but defeated. Suffolk County Resolution No. 840, November 23, 1976, PROCEEDINGS OF THE COUNTY LEGISLATURE OF SUFFOLK COUNTY (1976).

125. Legislative reluctance also lends decision-making an arbitrary quality. Comprehensive farmland preservation will increasingly appear to be like a zoning ordinance riddled by the granting of variances.

126. Local Law No. 19, section 4, *supra* note 4.

127. A community's mandatory referendum for zoning changes, even in relation to the status of a single parcel, was held consistent with due process by the Supreme Court in City of Eastlake v. Forest City Enterprises, 426 U.S. 668 (1976). Since the release of development rights would function as an authorization of development of particular areas or particular parcels, the due process issue would presumably be similar.

uses of farmland outside the first phase of the development rights purchase program.

In addition farmland owners not involved in the first round of development rights purchases face the possibility of fluctuating market values for their land. The removal from the market of acreage from which the County has acquired development rights may increase the value of remaining developable land, tempting farmers to sell to investors. Conversely, the farmland preservation program could operate as a deterrent sufficient to depress generally the area's land market. The following discussion considers techniques for possible implementation ancillary to the development rights purchase plan. Interim zoning analogues foster public control; guarantees of land values and value recapture mechanisms promote an equitable distribution of property values among private owners.

A. *Interim Zoning*

One phenomenon in areas contemplating the initiation or revision of community zoning schemes is the rush by property owners to establish a vested land use before the actual adoption of a plan that would prohibit that use. This "race for diligence"[128] tends to detract from the thoughtful analysis and evaluation that should inhere in land use control processes. It can force hasty decisions and lead to the abandonment of the full breadth of a comprehensive plan. Some communities, therefore, have adopted interim zoning ordinances that allow them temporarily to deny building permits and limit land uses to those expected to be embodied in the formulated or reformulated plan.[129]

Interim measures have also been implemented prior to the selection of particular parcels to be condemned for public projects. Such development moratoria have been carefully scrutinized by courts to prevent their application to freeze land values to decrease the later

128. The phrase appears in Downham v. City Council of Alexandria, 58 F.2d 784, 788 (D.C. Va. 1931), in which the court described zoning efforts after the establishment of non-conforming uses as being "like locking the stable after the horse is stolen."

129. *See generally*, Comment, *Stop-Gap and Interim Legislation: A Device to Maintain the Status Quo of an Area Pending the Adoption of a Comprehensive Zoning Ordinance or Amendment Thereto*, 18 SYR. L. REV. 837 (1967); Note, *Stopgap Measures to Preserve the Status Quo Pending Comprehensive Zoning or Urban Redevelopment Legislation*, 14 WESTERN RESERVE L. REV. 135 (1962).

costs of acquiring the property through eminent domain.[130] In addition, interim zoning ordinances must withstand due process challenges and have been upheld only when their effects were limited to lengths of time deemed reasonable for the principal task of study and design of land use plans.[131]

The adoption by towns within Suffolk County[132] of interim measures coordinated with the County's preservation program could precipitate development rights purchases in farmland areas apparently threatened by imminent development. The Agricultural Districts Act[133] also offers a functional analogue to interim control measures but would enable the formation of agricultural "zones" for longer than judicially-recognized "reasonable" time periods.[134] The County's incapacity to initiate district formation[135] and the partial insulation from governmental powers afforded farmland owners under the Act[136] suggest that standing alone, agricultural districting

130. *See* Lomarch Corp. v. Mayor and Common Council of City of Englewood, 51 N.J. 108, 237 A.2d 881 (1968). A "mapping freeze" enabled the city to postpone for one year consideration of applications for plot development of lands tentatively mapped to become a public park. The court found an implied option to purchase the land and required payment of an "option price," including property taxes for the year, to compensate for the "temporary taking."

See also Keystone Associates v. Moerdler, 19 N.Y.2d 78, 278 N.Y.S.2d 185 (1966), suggesting that interim zoning measures incident to the police power will not be as closely scrutinized as those preceding condemnation. *Id.* at 88, 278 N.Y.S.2d at 189.

In addition, interim zoning classifications have been invalidated for failure to adhere strictly to procedural requirements. *See, e.g.*, LoConti v. City of Utica, Dept. of Buildings, 52 Misc. 2d 815, 276 N.Y.S.2d 720 (1966), in which informal actual notice of an interim zoning measure was held inadequate when ten-day newspaper notice was required by statute.

131. *See* St. Aubin v. Biggane, 51 App. Div. 2d 1054, 381 N.Y.S.2d 533 (1976), in which the allegation that a development moratorium which had already lasted 2½ years and was likely to extend to 4 years was sufficient to avoid summary judgment of the complaint. The moratorium had been imposed to enable a tidal wetlands study under the auspices of the Environmental Conservation Commission. *But see* Matter of New York City Housing Authority v. Commissioner of Environmental Conservation, 83 Misc. 2d 89, 372 N.Y.S.2d 146 (1975) (slightly under two years was not unreasonable to allow tidal wetlands studies.)

132. Under New York's enabling statutes, only cities, towns and villages are empowered to zone. *See* N.Y. GEN. CITY LAW § 20, subdiv. 24 and 25 (McKinney 1968); N.Y. TOWN LAW §§ 261-284 (McKinney 1965); N.Y. VILLAGE LAW §§ 7-710-7-742 (McKinney 1973).

133. N.Y. AGRIC. & MKTS. LAW §§ 300-307 (McKinney); *see* notes 55-65 and accompanying text *supra*.

134. Mandatory review of agricultural districts by county legislatures occurs every eight years. *Id.* § 303(8); *see* note 60 and accompanying text *supra*.

135. Owners of land devoted to agriculture petition the county legislature for initial district formation. *Id.* § 303(1); *see* note 56 and accompanying text *supra*.

136. Farmlands within an agricultural district may not be taken by eminent do-

is an inadequate means of achieving interim public control for farmland preservation.

B. *"Guarantee" of Market Value*

Preservation of large tracts of farmland in Suffolk County is likely to influence the pattern of other land uses. The unpredictable effect of the program on land prices may result in market value losses both to farmland owners whose property is not acquired in the early stages of the preservation program and to other landowners in the County.

To achieve greater fairness in such situations it has been proposed that land preservation efforts be coupled with a "guarantee" of property values existing at the program's initiation.[137] Under the proposal a guarantee is given to owners of property in the area to be preserved by the governmental unit under whose jurisdiction the program is administered. If preservation efforts or land use controls depress the value of property for the use existing at the time the program commenced, the landowner is entitled to draw on his guarantee in the form of "damages." If the property's value or development worth for a use *not* existing when the guarantee was given is decreased, the landowner may draw on the guarantee only if he offers his property for public sale; he may then collect the difference between the sale receipts and the amount of his guarantee.[138]

In Suffolk County a guarantee program would protect those farmland owners, whose property was not acquired in the preservation program's first phase, against the possibility of declining land values as a result of the program. Such an assurance could also support the public's interest in farmland preservation by forestalling sales of farmland for other uses, at prices discounted by the uncertainties of the program's effect.

On the other hand, unless combined with a limit on the amount the purchasing government unit will pay to acquire development rights in later phases of the program, a guarantee of farmland values could encourage the withholding of development rights from

main without approval of state officials. *Id.* § 305(4). *See* note 64 and accompanying text *supra*.

137. Krasnowiecki & Paul, *supra* note 46, at 198-217 (1961).

138. The public sale requirement is intended to prevent the landowner who is not actually ready to attempt the development or sale for development purposes of his land from taking advantage of the public guarantee. *Id.* at 229-30.

sale.[139] A landowner, having nothing to lose, could await the possibility, however remote, of an attractive offer from a private buyer, or could simply delay sale to the public until the appraised development right value of his holdings increased to his satisfaction. The public thus incurs even greater costs in an already costly program.[140]

Furthermore, the issuance of a guarantee to farmland owners still leaves the nonfarmland owner subject to the possibility of either severe loss or marked gain.[141] To allow a nonfarmland owner to reap the gain of increased value because of the preservation program may encourage further speculation and heighten the public's costs in its development rights acquisition; to allow a nonfarmland owner whose property becomes a pocket of reduced value to suffer severe loss because of the preservation program would sanction unfairness.

C. *Recapture Mechanisms*

Both protection of the public purse and a more equitable distribution of the effects of market value changes may be achieved by a "recapture" plan as an auxiliary technique in a development rights purchase program. Recapture is intended to recover the gain or "betterment"[142] to private landowners that is created by public action.[143] The public decreases its costs by collecting the monetary equivalent of the value its program has produced and, if some form

139. *See* Hagman, *Windfalls and Wipeouts*, *reprinted in* ROSE, J., TRANSFER OF DEVELOPMENT RIGHTS 265 (1975) [hereinafter cited as Hagman].

140. Krasnowiecki & Paul, *supra* note 46 at 195, 205.

141. One commentator has suggested, however, that we should "put aside the idea that ownership of private property necessarily implies a government guarantee to profit from it when and as the owner in his sole discretion wishes. . . ." Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 169 (1971).

142. As part of its Town and Country Planning Act of 1947, England attempted a nationwide freeze of land values and the imposition of a "betterment levy." The first formulation of the program, which tried to tax value increments as they accrued, generated enough political antipathy to nearly drive the Labour Party from power. A second plan collected betterment values only if gain was realized upon sale, lease or development of property. Landowners withheld enough land from the market to force the plan's abandonment in 1971. *See* MacDevitt, *English Land Use Planning, Pt. 1*, 6 URB. LAWYER 483 (1974); Mandelker, *Notes From the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961) and legislation cited therein. *See also* Minton, *Farming on the Urban Fringe*, *reprinted in* J. JOHNSON, SUBURBAN GROWTH (1974).

143. Wexler, *Betterment Recovery: A Financial Proposal for Sounder Land Use Planning*, 3 YALE REV. LAW & SOC. ACTION 192, 195 (1973) [hereinafter cited as Wexler]. *See also* Hagman, *Trading Windfalls for Wipeouts*, 40 PLANNING 9 (1974).

of guarantee program has been instituted, redistributes that value to those who may have been disproportionately burdened by losses.

Several vehicles for betterment recapture have been suggested. Increased property tax assessments on "bettered" parcels is one possibility but has been dismissed as impractical because of the infrequency with which reassessment occurs in most areas.[144] Special assessments on physical improvements, while easy to administer, ordinarily serve to recapture only the cost of the improvement and leave untouched any publicly-created value increments.[145] Still another proposed device, taxes on real estate transactions, embody the assumption that but for increased value, the transaction would not take place. Such a broadside approach to recapture requires sophisticated inquiry and calculation if it is to reach only the betterment value due the public and only parties whose reasons for engaging in property sales are purely profit-motivated.[146]

All recapture mechanisms present formidable problems of separating the publicly-created value from that which might have accrued without public intervention in land investment. In addition, the pressure of a watchful government ready to pounce on profits may reduce incentives to engage in land investment and exchanges.[147] If a recapture mechanism is to produce an overall increase in government revenues, it must be imposed with a moderate hand.

VI. Conclusion

The purchase of development rights to preserve farmland in Suffolk County represents an effort to accommodate the community's interest in maintaining the economy of its agricultural sector and the open space benefits of agricultural land with the exercise of choice by individual landowners in using and disposing of their property. The approach compares favorably with other land use control measures in this two-fold pursuit and may therefore be a more politically acceptable land preservation technique.

The Suffolk County program is not without its flaws, however, both theoretically and in its actual implementation. Other regu-

144. Wexler, *supra* note 143, at 196.

145. *Id.* at 197.

146. *See* Hagman, *supra* note 139.

147. Wexler, *supra* note 149, at 199. Reduced incentives might also be viewed positively as a means of reducing speculative pressures that over-inflate land values in an area. *Id.* at 204.

latory devices exist that, as administrative corollaries of development rights purchase, might augment both public control and private interests in farmland preservation.

A troublesome circularity in the development rights purchase concept raises questions about its applicability to other farmland areas or to other preservation programs. The program is premised on the belief that development is sufficiently imminent to justify expenditure of the large sums required to purchase development rights. However, only in an area subject to development pressure are property values likely to be high enough to generate the tax revenues necessary. Thus a community seeking to undertake a preservation program before development is impending may be unable to afford to do so; and if it delays until land values rise and tax revenues increase correspondingly, the cost of development rights purchase will have escalated. Success may become a question of timing—the program's initiation before development proceeds too far and its expeditious implementation—and of maintaining sound government fiscal conditions. Development rights purchase may be of limited use to governments less solvent than Suffolk County or wishing to act sooner rather than later.