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Farmland Preservation

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I. Introduction

What recourse is there for a farmer who owns a farm, and finds that farm threatened by increased residential and commercial developments? Such a farmer, while receiving more and more complaints about normal and necessary farm operations, may also be tempted to sell the land by offers to purchase pieces of the farm here and there. These problems are the focus of farmland preservation measures—measures designed to preserve farmland in use as farmland.

The primary purpose of farmland preservation techniques is maintenance of agricultural land as a food source. The question necessarily arises whether there is even a need for as much farmland as presently exists. There are surpluses of most crops and the government is still paying farmers not to plant their land. Although there may be no immediate crisis of reduced acreage, agriculture has pushed farmland to its limits. Technology has been pushed to its limit in terms of yields per acre. The soil has been pushed to its limit in terms of what it can sustain. Although we may not have experienced yet any repercussions from the declining number of acres in use as farmland, in the near future we may experience such repercussions as demand for agricultural products begins to exceed supply.

The primary threat to farmland is development. Although the metropolitan areas in this country encompass only 17% of our total land mass, they encompass 20% of our prime farmland. As a result, there is an additional reason for farmland preservation in rapidly developing areas: preservation of open space and scenic beauty. In highly developed areas farmland is now a natural resource and a rare commodity. In these areas, such as Suffolk County, New York, and Montgomery County, Maryland, the most direct, effective and stringent farmland preservation measures in use are being imposed.

II. Farmland Preservation Techniques

Farmland preservation techniques are either direct or indirect. The most commonly utilized, the most widely accepted, and the least effective are indirect measures, which are primarily tax reforms. Such measures simply attempt to put cash back into the pockets of the farmer in order to encourage the farmer to continue farming. One such tax measure is differential assessment of agricultural land for property taxes, by which agricultural land is assessed at its agricultural use value rather than at its usually higher current market value. A similar tax reform is farm use valuation for inheritance taxes. The idea behind farm use valuation for inheritance taxes is keeping the farm in the family upon a death in the family, that is, not to have the family lose the farm as a result of high inheritance taxes. Again, the farm is valued at its farm use value rather than at its higher current market value. A somewhat more effective indirect method is the utilization of income tax credits, as in Michigan and Wisconsin. In these states the farmer may use some or all of his or her local property taxes as dollar for dollar credits against state income taxes.

The more direct measures for farmland preservation vary widely in their effectiveness and in their implementation. The most widespread is agricultural zoning, that is, zoning that restricts uses
in the zone to agriculture and related uses, either exclusively or nonexclusively. A second method is agricultural districting: the non-binding designation for long term agricultural use of an area within the state on a voluntary basis. Farms that participate on a voluntary basis within the district become eligible for certain designated governmental benefits and programs. Somewhat similar is comprehensive planning, which is usually statewide planning combining land use and other programs designed to encourage an area to remain in long term agricultural uses. Development permit systems require a special permit over and beyond the usual building and zoning permits for construction on agricultural land, so that more serious consideration will be given to an increase in development in an agricultural area.

The final three direct methods are the most complex, the most interesting, and possibly the most effective. The first is right-to-farm legislation, or the so-called right-to-farm acts. These acts insulate farmers from nuisance suits under circumstances that vary from statute to statute. The other two programs are purchase of development rights and transfer of development rights. These last two programs are best explained by way of an illustration.

Assume that an area is zoned so that ten housing units can be built per acre. Within this zone is a farm which has only one house built on it, and the zoning board decides that it would like to maintain the entire area at that level of development. The zoning board then zones the area so that it can have only one housing unit per acre. It may be that an area landowner would bring a taking challenge to the zoning restriction. To forestall that possibility, the zoning board could sever the development rights from the property and make them available either for immediate sale to the local planning agency or a “land bank,” in which case it is a purchase of development rights program, or to other landowners in a designated receiving area, in which case it is a transfer of development rights program. In essence, then, the right to develop the property is severed from the property so that it cannot be used on that property, but it is severed so that it can be sold either to a local planning agency or land bank, or to other landowners in a designated receiving parcel.

III. Farmland Preservation in Arkansas

A. Tax Measures

The Arkansas statutes provide for both an indirect method and a direct method of farmland preservation. The indirect method is, as might be expected, a tax measure: differential assessment of agricultural land for property taxes. Section 84-483 of the Arkansas Statutes provided for differential assessment of agricultural land for state property taxes. For a brief period this provision was deemed unconstitutional; in Arkansas Public Service Commission v. Pulaski County Board of Equalization, the Arkansas Supreme Court struck down differential assessment for agricultural land as being in violation of the state constitution’s uniformity clause. The uniformity clause provides that all land within the state has to be assessed at the same value. In November of 1980, however, through Amendment No. 59 to the Arkansas Constitution, the old section 5 of Article 16 was repealed and new sections 5 and 15(b) were added to Article 16. These now provide that agricultural land can be valued for taxation purposes upon the basis of its agricultural productivity or use.

B. The Right-to-Farm Act

The one direct method of farmland preservation in Arkansas is the Right-to-Farm Act. In 1981, the Arkansas legislature passed right-to-farm legislation to protect Arkansas farms from nuisance suits often brought by owners of nearby residences or other private development. Section 34-122 provides:

An agricultural facility or its appurtenances or the operation thereof shall not be or become a nuisance, private or public, as a result of any changed conditions in and about the locality thereof after the same has been in operation for a period of one (1) year or more, when such facility, its appurtenances or the operation thereof was not a nuisance at the time the operation thereof began.

Therefore, an agricultural facility cannot be a nuisance as a result of changed conditions in its locality after it has been in operation for one year. The principle is to strengthen the familiar “coming to the nuisance” defense that the common law of nuisance has always treated somewhat diffidently. Courts applying the common law treat “coming to the nuisance” as a factor to be resisted, but not as an absolute defense. If a person moves next door to a poultry operation, at common law that person may still complain about the normal operations of the poultry operation after having moved into that area. The act changes this, by making “coming to the nuisance” a defense with real teeth.

“Agricultural facility” is defined under § 34-121 to include, but not be limited to, “any plant, facility, structure or establishment used for the feeding, growing, production, holding, processing, storage or
distribution, for commercial purposes, of crops, livestock, poultry, swine or fish or products derived from any of them. The act also provides under § 34-123 that the provisions of the act do not have any effect on legal actions to recover damages from injuries sustained from “any pollution of, or change in the condition of, the waters of any stream or on account of any overflow of the lands of any person, firm or corporation.” Not only does the act protect the farmer from nuisance suits, but under § 34-124 it also renders void any municipal or county ordinance making the operation of an agricultural facility a nuisance under the circumstances prohibited in the act. Finally, under § 34-126, an agricultural facility will lose the protection of the act if the facility “materially changes its character of operation or materially increases the size of its physical plant.” For example, if an individual moves next door to a vegetable farm, and it subsequently becomes a feedlot, the operation would not be protected under the act from the neighbor’s nuisance suit.

There are no reported cases in Arkansas under the Right-to-Farm Act. There are two possible explanations. First, it may be that the lack of case law is attributable to the conflict between farmland and development not having reached a point at which there is a need for the act. The alternative explanation is that there is a lack of awareness of the protections of the act both on the part of farmers and their lawyers.

There are many unanswered questions under the Arkansas Right-to-Farm Act due to the lack of judicial interpretation and the very broad statutory language. For example, is the definition of an “agricultural facility” as broad as it seems? It includes a facility processing products “derived from” crops, livestock, poultry, swine or fish. Would a fertilizer processing plant be included? It is difficult to imagine any facility that has any connection with agricultural products that would not be included within the definition.

A facility is protected from nuisance suits as a result of “changed conditions” in the locality. What constitutes “changed conditions”? How extensive must the encroaching development be? If an area that was used only for farming is still primarily a farming area but is experiencing increased residential development, and complaints are being brought against a farm in that area, can the farmer defend on the ground that there are changed conditions in the locality?

If the facility has to be in operation for more than one year before any “changed conditions,” what is necessary for it to be “in operation?” How consistent must the operation be during that period of time?

Is a barn on a lot sufficient to have the facility qualify as being “in operation?”

A facility will not be protected under the act if it was a nuisance at the time it began. Who proves that the facility was or was not a nuisance at the time it began? What kind of evidence is necessary? Would evidence of complaints by landowners be sufficient, or would the evidence have to be more formal—for example, complaints filed with local agencies or lawsuits filed?

A facility loses its protection under the act if there is a “material change” in the character or size of the operation. What is such a “material change”? Is a material change for the better from a nuisance law perspective nevertheless enough to make the facility lose its protection under the act? Ultimately, will this provision discourage innovative farming techniques or improvements in farming techniques by farmers?

As mentioned earlier, the act does not prohibit suits based on water (not air) pollution, changes in the condition of water, or any overflow of the land. How would these provisions interrelate with any applicable state permits or federal permits for discharges into streams and the farmer’s compliance with those permits? If a farmer is complying with all state and federal permits, and a nuisance lawsuit is brought, is the nuisance lawsuit then not based on water pollution?

How may the farmer utilize the provision making local ordinances void under the circumstances prohibited in the act? Can this provision only be used as an affirmative defense to a prosecution under the ordinances? Or can the farmer somehow utilize the provision to prevent passage of such ordinances in the first place?

The biggest potential “loophole” in the act should also be noted. Although the act restricts actions based on nuisance, it may not restrict suits predicated on negligence or trespass, which can sometimes bring essentially the same type of complaint before a court. The extent to which this potential loophole exists for causes of action predicated on negligence is problematic, however, due to disagreement over what types of conduct are encompassed in the term “nuisance.” According to the Second Restatement of Torts and the fourth edition of PROSSER ON TORTS, nuisance is a field of tort liability with reference to interference with land uses, rather than a separate and distinct type of tortious conduct. According to this approach, liability for “nuisance” may rest upon an intentional invasion of the plaintiff’s interests, negligence, or strict liability. In contrast the most recent edition of PROSSER rejects the approach of the Second Restatement and the late William Prosser and char-
acterizes nuisance as encompassing only intentional interference of a substantial and unreasonable nature in another’s use and enjoyment of land.26

This scholarly disagreement is of significant practical importance to what causes of action are precluded under the Arkansas Right-to-Farm Act. Under the act, a qualifying agricultural facility may not be held liable on a “nuisance” theory. By using the term “nuisance,” did the legislature intend to insulate agricultural facilities from tort liability predicated on intentional interference, strict liability and negligence, or simply from liability for intentional interference constituting an unreasonable interference with the plaintiff’s land? This determination is complicated by the fact that the Arkansas statute did not retain the provision in the North Carolina statute on which it is modeled which expressly retains an agricultural facility’s liability for negligence. Did the Arkansas legislature omit that provision because it intended to insulate agricultural facilities from negligence liability, or did it omit the provision on the assumption that insulation from “nuisance” liability did not encompass liability for negligence, thus obviating the need for an express provision so providing?

IV. An Innovative Technique for Farmland Preservation—Transferable Development Rights

One of the more innovative techniques for farmland preservation is the transfer of development rights (“TDR’s”). As discussed earlier, TDR’s sever the development rights from a piece of property so that they can be sold to developers or landowners in a designated receiving parcel with a higher density of zoning.

There are many practical problems with TDR programs. From the perspective of the farmer, the farmer may wish to develop his farmland due to approaching retirement, desire for profit, or any number of reasons. Because the development rights have been severed from his property, he may sell those development rights but he may not utilize those development rights on his own property. The primary practical problem with TDR’s is creation of a market for sale of the TDR’s. It is very difficult to assess what the market value of TDR’s should be so that the landowner receives sufficient economic return on those development rights. Added to this difficulty is the difficulty in selecting a receiving parcel with a high enough potential for density to create a demand for sale of TDR’s that will reflect that market value in the purchase and sale between the farmer and the landowner.28 The purpose of the TDR’s is defeated if the farmer is stuck with TDR’s that he cannot sell. The farmer will have no economic return for the restrictions based on his property, he may bring a taking challenge, and the local planning agency will be threatened with a lawsuit.

An alternative to TDR’s is to have the local planning agency or a “land bank” agree to purchase the development rights from the landowner to hold in abeyance or to sell to individual landowners or developers in a designated receiving parcel. In this situation the program is a purchase of development rights (“PDR”) program rather than a true TDR program. A PDR program would shift the economic risk from the farmer to the local planning agency or land bank, but in that case the local planning agency or land bank must have sufficient money to engage in widespread purchase of the development rights.29

The primary legal issue that arises in connection with zoning schemes utilizing TDR’s is the question of whether there is a taking without just compensation. Overly restrictive government regulation may constitute deprivation of private property without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution.30 TDR’s are essentially designed to forestall such a taking challenge by providing the landowner with sufficient economic return on the development rights to undermine the constitutional claim. Under the traditional taking test a taking occurs when the landowner is deprived of all or almost all of the economic value of his property as a whole.31

The principal Supreme Court opinion in this area is Penn Central Transportation Company v. City of New York.32 In Penn Central, there was a taking challenge to New York City’s landmarks preservation law designating Grand Central Station as a landmark and granting TDR’s in return for restrictions on the right to develop. The Supreme Court in an opinion by Justice Brennan upheld New York City’s landmarks preservation law, concluding that there was no taking because there were sufficient economic uses remaining in the property as a whole so that a taking had not been established. In determining whether there had been a taking, the court suggested that the value of TDR’s granted to the landmark owner was a factor to be considered in whether there was a taking.33

Justice Rehnquist in his dissent took a very different approach. He focused only on the particular property right that had been taken, the right to develop the air space above Grand Central Station, and concluded that there was indeed a taking of the property right and, therefore, a taking in the
constitutional sense. He also concluded that TDR's were relevant only to the issue of whether "just compensation" had been given once a taking had been found.\textsuperscript{34}

These are two very different approaches, with significant repercussions for the future of taking law. On the taking issue generally, since Penn Central there has been a series of Supreme Court cases suggesting that the members of the court are moving away from Justice Brennan's traditional approach on the taking issue and toward Justice Rehnquist's approach, which focuses on the extent of governmental interference with a particular property right (e.g., the right to develop) rather than on the economic effects on the property as a whole. In these later cases, Kaiser Aetna v. United States,\textsuperscript{35} Loretto v. Teleprompter Manhattan CATV Corporation,\textsuperscript{36} and Ruckelshaus v. Monsanto Company,\textsuperscript{37} there is a strong suggestion that the court is beginning to focus more on the particular property right that is taken rather than on the economic effects of the property as a whole. As a result, remaining economic uses of the property after interference with a particular property right have become less significant than they were under the traditional taking test. The end result is that there is a greater likelihood of successful taking challenges. If a particular property right is taken in its entirety, and that economic right is determined to be economically significant, there may be a taking although there may still remain economically viable uses of the property.

The Supreme Court has recently avoided several cases in which restrictive zoning coupled with a grant of TDR's have been challenged as a taking.\textsuperscript{38} Such scenarios appear likely to recur until the court is squarely confronted with the issue. The ramifications for taking law upon adoption of Rehnquist's approach would be that it would be easier to bring a taking challenge and concomittantly more difficult for planning agencies to engage in innovative land use techniques.

There are several criticisms to which Justice Rehnquist's approach may be subjected. From an economic perspective, it makes little sense to evaluate a purported taking from the perspective of its economic effect on a single property right rather than from the perspective of the economic effects of the regulation on the property as a whole. As Justice Rehnquist points out, however, the traditional taking approach raises the dilemma of defining the unit of property upon which the economic effects are to be evaluated. However, this problem can be adequately dealt with by the Court by simply deferring to the factual findings and economic determinations of the local planning agency. There is authority for such an approach under the present formulation of the so-called Ben Avon doctrine of judicial review.\textsuperscript{39} Also, from a legal perspective, relegating the value of TDR's to the issue of just compensation would render TDR's irrelevant to a taking challenge under the takings clause although ostensibly they would still be relevant to a related due process challenge. For these reasons and from a public policy perspective of preserving our natural resources, Justice Brennan's approach in Penn Central should prevail over that of Justice Rehnquist. Land use innovation has made many traditional legal concepts of takings obsolete. What is needed in taking law is more flexibility, not less flexibility, and Justice Rehnquist's approach promises a more formalistic, rigid approach.

TDR's, whatever their future might be, are only one of several recent innovative techniques in farmland preservation. Greater awareness of all available preservation techniques, both in Arkansas and in other jurisdictions, should be encouraged from the threat of expanding residential development if agriculture is to be protected as an industry within Arkansas.

FOOTNOTES

1. R. COUGHLIN & J. KEENE, NATIONAL AGRICULTURAL LANDS STUDY (NALS) 16 (1981) [hereinafter cited as NALS STUDY].
2. Id.
5. NALS STUDY, supra note 1, at 17.
6. Id. at 19.
7. Id.
8. Id. at 21-24.
9. Id. at 20-21.
10. Id. at 17.
11. Id.
12. Id. at 21.
13. Id. at 24-25.
14. For further explanation of each of these preservation techniques, see NALS STUDY, supra note 1.
16. 266 Ark. 64, 582 S.W.2d 942 (1979).
17. ARK. CONST. art. 16.
In addition, Arkansas uses the federal estate tax law to define the taxable estate for state estate tax purposes, and imposes a state estate tax in the amount of the permissible state death tax credit under federal law. ARK. STAT. ANN. § 63-103 (Cum. Supp. 1983). This incorporation of the federal definition of taxable estate means that farms qualifying for section 2032A valuation of agricultural land under federal law will have the benefit of 2032A valuation for their state estate taxes as well.
22. Id. § 34-123.
23. Id. § 34-124.
24. Id. § 34-126.
30. See text accompanying notes 32-37 infra.
31. Id.
33. Id. at 137.
34. Id. at 151-52 (dissenting opinion).
37. 52 U.S.L.W. 4886 (June 26, 1984).