AGRICULTURAL PRESERVATION TECHNIQUES IN VIRGINIA

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INTRODUCTION

Large amounts of agricultural land within the United States have been irreversibly converted to residential, transportation, commercial and other urban uses within the last two decades. The total number of acres devoted to farming has declined nationwide in the past twenty years.[1] Confronted with statistics showing a dramatic shift in land use, many states implemented legislation aimed at preventing the loss of farmland. In the early 1980's, the U.S. Department of Agriculture conducted a large study of farmland conversion and the programs that various states had adopted to combat the loss of such lands. The National Agricultural Lands Study concluded that agricultural lands were disappearing at a dramatic rate across the nation and proposed that states adopt comprehensive growth management programs to halt the rapid loss of economically and environmentally important lands.[2]

Land use patterns in Virginia have followed the national trend of decreasing agricultural land use and increasing residential and urban land uses.[3] The amount of land devoted to agricultural production has steadily declined since 1960. In 1960 Virginia had 13.5 million acres of farmland; in 1970, 11.4 million acres; in 1975, 10.1 million acres; in 1980, 9.8 million acres; in 1988 9.6 million acres.[4] Conversion of agricultural land in the eastern part of Virginia has occurred more rapidly than in other regions and accounts for most of the shift in land use within the state.[5]

Many factors contribute to the conversion of farmland. Urban growth pressure, farm profitability, land value, taxes, government programs, regulations and incentives, community expectations and personal decisions about work and retirement all affect the conversion process.[6] As urban growth spreads into the countryside, land values increase

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[1] REGIONAL SCIENCE RESEARCH INSTITUTE, NATIONAL AGRICULTURAL LANDS STUDY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 32 (1981) [hereinafter NALS]. In the eight year period from 1967-1975, some 23.4 million acres of agricultural land converted to non-farm uses. The highest conversion rates occurred in the Northeast, Southeast and Appalachian regions; 2 U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, 1982 CENSUS OF AGRICULTURE 1 (1982) [hereinafter 1982 CENSUS]. The total number of farms in the U.S. declined by 0.7%; 27.98 million acres of farmland were taken out of production from 1978 to 1982. Statistics for land conversion from 1982-1988 are currently unavailable. The 1988 AGRICULTURAL CENSUS will be available in 1989.

[2] NALS, *supra* note 1. The study projected that a 60% to 85% increase in demand for U.S. agricultural goods would occur in the next 20 years.

[3] U.S. DEPARTMENT OF AGRICULTURE, SOIL CONSERVATION SERVICE, VIRGINIA NATIONAL RESOURCES INVENTORY DATA 7 (1982) [hereinafter VNRID].

[4] Statistics provided by the Va. Agric. Statistics Service, Richmond, Virginia.

[5] VNRID, *supra* note 3, at 7.

[6] NALS, *supra* note 1, at 16.

and investors begin buying land for development. When scattered development occurs, farming becomes more expensive and farm expansion more difficult. Public services such as water and sewer facilities extend into an area to meet the needs of new residents and enable the area to support more development. Public agencies take land by eminent domain for highways, parks, powerlines and other facilities necessary to support the influx of people. Real estate taxes increase because of these new public services. Consequently, some farmers sell their lands as a result of development pressure; others join the bandwagon in the belief that agriculture in their area is doomed.[7]

A majority of states have implemented some type of farmland preservation program in order to protect important farmlands from development. These programs often include a variety of statutes aimed at making farm areas less attractive to developers, easing the burdens of development for farmers, and preventing farmland from being converted to non-agricultural use.[8] This article examines the agricultural preservation efforts in Virginia. It analyzes five pieces of legislation, comments on their effectiveness and suggests some changes that would better protect important agricultural land from conversion.

FARMLAND PRESERVATION IN VIRGINIA

By 1981, Virginia had implemented several pieces of legislation aimed at preserving agricultural land within the state. These include differential tax assessment for farmlands, agricultural districting, right to farm legislation, agricultural zoning, and a farmland preservation act.[9] Overall, these measures reflect a fairly conservative approach to farm preservation. Each of these acts has a policy provision that affirms the state's commitment to the preservation of farmland as an economic and environmental resource. Nevertheless, the main effect of these acts is to ease the burden of encroaching development on farmers while providing some relief from governmental interference to one sector of the state's economy.

These programs do provide some incentives for farmers to keep farming, but they do not prevent farmland from being converted to more intensive uses. The voluntary nature of the tax relief and agricultural districting acts limits their potential to prevent conversion of farmland. The ambiguities and loopholes present in the right-to-farm legislation and the restricted scope of the preservation of prime agricultural act limit the value of these two acts as tools for farmland preservation. Agricultural zoning provides an effective tool to restrict the amount of farmland eligible for conversion, but its implementation remains in the hands of local governing bodies that may have

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[7] *Id.* at 35-37.

[8] *Id.* at 37-38.

[9] The tax assessment statute was enacted in 1971; the agricultural and forestland districting act in 1977; the right to farm act in 1981; the zoning statute in 1950; and the preservation of prime agricultural land act in 1981.

little interest in preservation. However, they do form a good foundation on which to build.

DIFFERENTIAL TAX ASSESSMENT

Designed to correct the increase in land value that accompanies encroaching development, differential tax assessment permits the farmer to have his land appraised at its agricultural use value instead of its fair market value. It is the most common form of tax relief that states have adopted to further the goal of farmland preservation.[10] There are three different types of differential tax assessments: preferential, restrictive agreement and deferred.[11] Some states have adopted preferential tax assessment programs in which eligible land is assessed at its use value and no penalty attaches for conversion of the land to a non-eligible use.[12] Few states have adopted restrictive agreement programs. In order to obtain differential assessment under this type of tax relief program, landowners must enter into a contract prohibiting the conversion of their land.[13] A majority of states, including Virginia, have deferred tax assessment laws. Under this type of statute, penalties attach to the withdrawal of land from the use value assessment program.[14]

Many localities in Virginia have adopted a use value taxation scheme pursuant to the deferral tax assessment statute.[15] Participation by both localities and individuals is voluntary. Localities must pass ordinances adopting the tax relief measure and individual landowners must apply to the local assessing officer in order to receive any tax relief.[16] A farmowner can receive special assessment of his land and the structures present on the property. Qualifying structures include any structure, except farm houses, which is used in connection with the land's special use.[17] Qualifying land must meet several criteria before the special tax assessment can apply.

First, the land must be devoted to either agricultural, forestal or open space use. The determination of the land's use is the responsibility of the Director of the

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[10] K. MEYER, D. PEDERSON, N. THORSON & J. DAVIDSON, AGRICULTURAL LAW 853 (1985) [hereinafter TEXT]. Every state except Kansas has some program for reducing the tax burden on farmers.

[11] NALS, *supra* note 1, at 18.

[12] *See* NALS, *supra* note 1, at 19; TEXT, *supra* note 10, at 853 n.1. Seventeen states have preferential tax assessment, including Florida, Iowa and the Dakotas.

[13] *See* NALS, *supra* note 1, at 18; TEXT, *supra* note 10, at 853 n.1. California and New Hampshire have restrictive agreements.

[14] TEXT, *supra* note 10, at 853 n.1.

[15] Statistics were unavailable for the number of acres in the states which receive use value taxation. A majority of, but not all, counties have land use taxation.

[16] VA. CODE ANN. Sec. 58.1-3234 (1984 & Supp. 1988).

[17] *Id.* at Sec. 58.1-3236(B)(1984).

Department of Conservation and Historical Resources and the Commissioner of Agriculture and Consumer Services.[18] The special tax assessment is also available for lands which are part of an agricultural or forest district.[19] In 1987, the legislature amended the tax code to provide that, regardless of any deferred tax assessment ordinances, local governments can avoid the application of use value assessment by designating land in certain areas as ineligible for special assessment.[20] Thus, a locality interested in developing a certain area can tax agricultural, forest and open space land in that area at fair market value. This frustrates the purpose of deferred taxation (preventing conversion, or at least easing the burdens of development) by allowing localities to deny tax relief whenever they desire development of an area. While this provision does give more flexibility to the locality for guiding growth, it certainly weakens the act as a land preservation tool.

In addition, the land must be a certain size in order to qualify for special assessment. Land devoted to agricultural, horticultural or open space use must consist of at least five acres; land in forestal use must cover at least twenty acres.[21] Except for properties divided by public right of way, land must be in contiguous parcels in order to satisfy these minimum acre requirements.[22] Because the number of small farms (1-180 acres) is growing in Virginia,[23] such a minimum acre requirement allows more farmers to benefit from the special tax assessment.

Virginia uses the capitalization of income method to determine the use value of qualified land. Each year the State Land Evaluation Advisory Committee [SLEAC] establishes a range of suggestive values for land in each soil classification based on the productive earning power of the property as it is used for agricultural, horticultural or open space purposes. SLEAC publishes these value ranges for the counties and cities which use them as a guide to determine the actual value of land within their jurisdiction. To define the productive earning power, the Committee either looks to the capitalization of the warranted cash rents of the specific property or the incomes of similar properties in the locality.[24]

The deferred tax assessment statute provides for penalties for misstatements made in applications, changes in the use of the land, failures to report such changes and for applying for and receiving a rezoning of the land to a more intensive, nonqualifying

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[18] *Id.* at Sec. 58.1-3240 (1984 & Supp. 1988).

[19] *Id.* at Sec. 58.1-3231 (1984 & Supp. 1988).

[20] *Id.* at Sec. 58.1-3231.

[21] *Id.* at Sec. 58.1-3233(2) (1984 & Supp. 1988). Open space land in cities must be at least two acres.

[22] *Id.* at Sec. 58.1-3233(2) (Supp. 1988). Recorded subdivision lots owned by the same person cannot be included to meet the minimum acre requirement.

[23] 1982 CENSUS, *supra* note 1, at Part 46 at VIII. From 1978-1982, the number of farms that have 1-180 acres of land have increased by 2289 farms.

[24] VA. CODE ANN. Sec. 58.1-3239 (1984).

use. Persons who either make material misstatements in their applications or who fail to report changes in land use are responsible for any taxes which would have been levied otherwise. If a landowner makes a material misstatement with an intent to defraud, then she must pay an additional penalty of 100% of the unpaid taxes.[25] While the statute lists some things that constitute material misstatements, it does not provide any examples of reportable changes in use.

A penalty of additional taxes attaches if a landowner either changes the use of her land so that it no longer qualifies for special assessment or requests and succeeds in having that land rezoned to a more extensive use which is not compatible with an agricultural use.[26] This additional tax is known as a roll-back tax and is equal to the difference between the tax which the landowner would have paid had the land not been under the special assessment program during the past five years plus simple interest.[27] An owner must report a change in use or a rezoning of her land within 60 days after it occurs to the local commissioner of the revenue or the assessing officer.

Once the commissioner has determined the amount of the roll-back tax, the landowner has 30 days to pay or she is assessed an additional penalty.[28] If rezoned land is later zoned for agricultural use, it is not eligible for special land use assessment for three years. However, if the land is taken by eminent domain or a change in ownership occurs, no such penalty accrues.[29] Thus, a farmer can sell her land to someone else who then can develop that land without suffering the withdrawal penalty. Those landowners with good tax advice avoid the penalties for developing their lands.

While tax relief for land devoted to agricultural uses is widely viewed as an important method for preserving farmland, it does not prevent farmland from being converted to other uses.[30] The underlying assumption of differential tax assessment legislation, that tax burdens have a great influence over whether a parcel of land is converted to nonagricultural use, is faulty.[31] Because a multitude of factors influence the conversion of land to nonagricultural uses, decreasing the tax burden for farmers may have little impact on whether land remains in agricultural use.[32] Because of the voluntary nature of the land use taxation program and the weak penalties for

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[25] *Id.* at Sec. 58.1-3238 (1984).

[26] *Id.* at Sec. 58.1-3237(A)(D) (Supp. 1988).

[27] *Id.* at Sec. 58.1-3237(B) (Supp. 1988).

[28] *Id.* at Sec. 58.1-3237(C) (Supp. 1988).

[29] *Id.* at Secs. 58.1-3237(C), 58.1-3234 (Supp. 1988).

[30] H. GAMBLE, O. SAUERLENDER & R. DOWNING, THE EFFECTIVENESS OF ACT 139, THE PENNSYLVANIA FARMLAND AND FORESTLAND ASSESSMENT ACT (1977), *quoted in* TEXT, *supra* note 10, at 852.

[31] Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agricultural and Open Space Lands*, 15 GONZ. L. REV. 675, 689 (1980).

[32] *Id.* at 689-90.

withdrawal, the act affects the preservation of land only to the extent that farmers find it economically worthwhile to participate in it.[33] Thus, even though the special tax assessment in Virginia may postpone conversion of lands to some future time, it is not a preservation measure; instead it operates to offset the tax burden caused by approaching development in order to keep farming economically viable for those farmers who want to farm.[34]

The differential tax assessment actually shifts the tax burden to other groups within the taxing jurisdiction.[35] Local governments may increase the taxes of nonagricultural taxpayers in order to compensate for the loss of income from farmers.[36] Such tax shifting may erode the tax base of rural areas, adversely affecting the quality and availability of services within those areas. This loss of tax base problem could affect the willingness of localities to adopt land use assessment ordinances. Indeed, poorer counties, such as Charles City, have no special assessment for farmland.

AGRICULTURAL DISTRICTING: THE AGRICULTURE AND FOREST ACT

Virginia has also adopted agricultural districting in order to keep land in agricultural use. Districting emphasizes long term preservation of farmland through voluntary compliance and local initiative.[37] It provides an incentive for farmers to continue farming by conferring benefits to those who voluntarily place their land in special districts. Those lands included in districts are taxed at use value and protected from government activities aimed at development.[38]

Currently, Virginia has 547,095.77 acres in 175 agricultural districts located in twenty-two counties and one town across the state.[39] The acres included in the

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[33] *Id.* at 695.

[34] NALS, *supra* note 1, at 37-38.

[35] Dunford, *supra* note 31, at 692.

[36] *Id.* at 693.

[37] Meyers, *The Legal Aspects of Agricultural Districting*, 55 IND. L.J. 1, 2 (1979-80), *reprinted in* 2 AGRIC. L.J. 627, 628 (1980).

[38] *Id.*

[39] Statistics provided by the Virginia Department of Agriculture & Consumer Services, Richmond, Va. Accomack Co. has the most number of acres in districts--83,702.43 acres in 22 districts; Fauquier Co. has the second most--81,988.20 acres in 9 districts; Loudoun Co. has the third most--66,819.91 in 17 districts. Fairfax Co. has 2 districts with 1,261.36 acres and 23 local districts with 2,646.75 acres. Blacksburg is the only town that has any districts; it has 2,529.44 acres in 1 district. Remaining counties: Albemarle (44,962.52 acres in 13 districts), Clarke (24,959.40 acres in 2 districts), Culpeper (45,736 acres in 13 districts), Frederick (15,013.58 acres in 1 district), Green (23,597.43 acres in 7 districts), Hanover (14,301.86 acres in 8 districts), Isle of Wight (8,191 acres in 2 districts), James City (18,209.30 acres in 12 districts), King William (3,729.95 acres in 5 districts), Madison (607.07 acres in 1 district), Montgomery (47,487.91 acres in 11 districts), New Kent (15,241.96 acres in 8 districts), Orange (668 acres in 1 district), Prince William (3,466.83 acres in 2 districts), Rappahannock (16,841.12 acres in 9 districts), Shenandoah (9,702.75 acres in 4 district), Tazwell (7,362 acres in 1

agricultural districts comprise only 0.06% of the state's farmland. Counties in the northern-northwestern region of the state have the most districts, while counties in the southern portion have few, if any. In the Tidewater region, only James City and Isle of Wight have land in districts and both of these are on the outskirts of the Hampton Roads sprawl. In the Richmond-Petersburg area, only Hanover and New Kent Counties have land in districts and these two remain primarily agricultural. In southwest Virginia, Tazwell and Montgomery Counties have districts; on the eastern shore, Accomack County has over 83,700 acres in agricultural districts.[40]

The state purpose in enacting the districting statute is the protection and enhancement of agricultural and forest land as a viable segment of the state's economy and a valuable economic and environmental resource.[41] The Act declares that it is a state policy to protect and conserve these lands as important "ecological resources which provide essential open spaces for clean air sheds, watershed protection, wildlife habitat, as well as for aesthetic purposes."[42] However, the provisions within the Act are directed toward the economic aspect of land preservation and do little to implement the policy of ecological protection. Like the tax relief statute, this act focuses on offsetting the burdens caused by encroaching development rather than preventing the conversion of farmland.

The act applies only to land which has been, is currently or can be retained for agricultural or forestland production.[43] While land which is not currently devoted to production may be included in a district, it may not receive some of the benefits relating to the restriction of governmental activity. Likewise, land devoted to nonagricultural use does not receive any benefits under the act. The statute does not offer any preservation methods to counties that want to preserve open space lands from private development or government interference.

Districts can only exist in the localities which have adopted an ordinance permitting their creation.[44] The absence of such ordinances may account for the lack of districts in certain areas, especially those which faced strong development pressures in the early 1980's. Because some local interest in the districting program must exist before a governing body will adopt it, farmers and members of local governing bodies in areas of high farm conversion rates probably were not interested in establishing districts when the state adopted the districting act. Likewise, rural areas not confronted with approaching development or those wishing to attract development to boost the local economy may have had little interest in implementing such a program.

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district) and Warren (8,069 acres in 1 district).

[40] *Id.*

[41] VA. CODE ANN. Sec. 15.1-1507 (1981 & Supp. 1988).

[42] *Id.*

[43] *Id.* at Secs. 15.1-1508 (Supp. 1988), 15.1-1511(C) (1981 & Supp. 1988).

[44] *Id.* at Sec. 15.1-1511 (1981 & Supp. 1988).

Once a locality does pass such an ordinance, landowners can submit applications to the local governing body requesting to create a district.[45] The locality provides the application forms and may charge a fee, which cannot exceed the cost of processing or $300, whichever is less.[46] Thus the base of the districting program rests on the willingness of farmers with significant landholdings to request that their lands form a district.

The Virginia statute requires that each district contain at least 200 acres of land in a contiguous parcel.[47] The land may be owned by one or more persons.[48] Land not contiguous with the 200 acre core may be included in the district if it lies within one mile of the district's boundary or if it borders on non-core land within the district.[49] A district may extend between two localities provided that both governing bodies grant approval of it.[50] The 200 acre limit may not be sufficient for the needs of Virginia farmers. The average size farm in Virginia is 196 acres and the number of smaller farms (1-180 acres) is growing.[51] A lower limit would provide more protection, especially for counties where development has swallowed most of the farmland.

Once the local governing body receives a districting application, the planning committee provides public notice, holds hearings on the matter and makes recommendations to the local governing body.[52] The land may be evaluated through the Virginia Land Evaluation and Site Assessment System [LESA] or a local LESA system if one exists.[53] The statute lists several factors which the committee should consider when evaluating land. These include the agricultural or forestal significance of land to be included in and adjacent to the district, the presence of any such significant land which is not in agricultural or forestal use, the extent of other uses for land in and around the district, local development patterns, needs and zoning regulations and the environmental benefits of creating a district.[54] Once the local governing body receives

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[45] *Id.* at Sec. 15.1-1511.

[46] *Id.* at Sec. 15.1-1509 (1981 & Supp. 1988). A sample application is provided in the statute.

[47] *Id.* at Sec. 15.1-1511(D) (Supp. 1988). Earlier versions of the statute required a 500 acre minimum.

[48] *Id.* at Sec. 15.1-1511(A) (Supp. 1988). Earlier versions of the act had a 3500 acre limit for any one owner.

[49] *Id.*

[50] *Id.*

[51] 1982 CENSUS, *supra* note 1, at Part 46 at VIII. Statistics on the average farm size provided by the Va. Agric. Statistics Service.

[52] VA. CODE ANN. Sec. 15.1-1511(B)(1) (Supp. 1988).

[53] *Id.* at Sec. 15.1-1511(C) (Supp. 1988).

[54] *Id.* at Sec. 15.1-1511(C).

the committee's final report, it holds a public hearing and may pass an ordinance to create a district. The locality may condition the creation of a district on landowners' obtaining governmental approval before land in the district can be used more intensively or for a more intensive nonagricultural use.[55] After the creation of a district, the local governing may adopt incentive programs which promote certain land use and conservation in a district.

Districts may be reviewed no less than four years and no more than ten years after their establishment.[56] If lands are withdrawn from the district so that it no longer has a 200 acre core or if annexation of the land occurs, the districting ordinance remains in effect until the date set for review.[57] Land may be added to a district by following the creation procedure.[58]

Landowners may remove land from the district by filing a written notice to the local governing body. If the notice is filed at the time of the district review, the landowner must submit written notice to the governing body before it has acted with regard to that review.[59] If a landowner files a notice at any other time, the planning committee must make recommendations regarding the request and public hearings must be held on the matter.[60] If the governing body rejects the landowner's request, the landowner has a right of appeal *de novo* to the circuit court.[61] If the governing body approves the withdrawal, the land is subject to roll-back taxes and to the government actions that were restricted while the land was in the district.[62] If a landowner dies, his heirs can withdraw the land by filing written notice to the governing body within two years after the owner's death.[63] Thus, withdrawal from the program is quite easy.

The creation of agricultural or forestal districts confers two general benefits to landowners: land use tax assessment and the restriction of government activities. Land within a district automatically qualifies for use-value tax assessment if it meets the requirements of the deferred assessment statute.[64] Land within a district must be devoted to an agricultural or forestal use in order for the special assessment to apply. Unfortunately, the same problems of ineffectiveness and tax shifting arise in this

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[55] *Id.* at Sec. 15.1-1511(D).

[56] *Id.* at Sec. 15.1-1511(F) (Supp. 1988).

[57] *Id.* at Secs. 15.1-1511(D), 15.1-1513(F) (Supp. 1988).

[58] *Id.* at Sec. 15.1-1511(E) (Supp. 1988).

[59] *Id.* at Sec. 15.1-1511(F).

[60] *Id.* at Sec. 15.1-1513(A) (Supp. 1988).

[61] *Id.*

[62] *Id.* at Secs. 15.1-1513(B) (1981 & Supp. 1988), 15.1-1513(C) (1981 & Supp. 1988).

[63] *Id.* at Sec. 15.1-1513(D) (Supp. 1988).

[64] *Id.* at Sec. 15.1-1512(A) (1981 & Supp. 1988).

portion of the districting act that appears in the tax relief statute. Thus, one of the two major incentives for farmers to place their lands in districts does not effect the Act's main goal of preservation.

The more important benefit derived from placing land in a district is the restriction on governmental activity. The statute ostensibly limits actions of both local and state governments. A locality cannot enact ordinances which would unreasonably restrict or regulate farming, farm structures or forestry practices in a district unless such regulation has a direct relationship to public health and safety.[65] However, because the Act only prohibits a locality from unreasonable regulation, it adds very little to existing limitations on governmental power.[66] Indeed, the limitation merely provides a functional definition of the locality's police power.[67]

The Act also provides that local water, sewer, electricity or non-farm/non-forest drainage districts cannot impose benefit assessments or special tax levies on land which is primarily devoted to agricultural or forestland production within a district.[68] This limitation specifically focuses on inhibiting the urbanization process by relieving the developmental pressures produced when localities finance public improvements in their areas through special assessments.[69] However, by including comprehensive planning at the district formation stage, the act has provided some leeway for farmers who wish to obtain an increase in public services in order to intensify their farm operations.[70] Additionally, localities can maintain special assessments for one-half acre lots surrounding dwellings or non-farm structures within a district.[71] Before the exemption from special levies attaches, land must meet a use requirement even though it is already included in a district.[72] Such a requirement is consistent with the statute's policy of preservation of land as an economic resource, but does not encourage preservation of land for environmental purposes.

The statute restricts the state's exercise of eminent domain over lands within districts and establishes their maintenance as a policy of state agencies. If any state agency intends to take land within a district by eminent domain,[73] it must notify the

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[65] *Id.* at Sec. 15.1-1512(B) (1981 & Supp. 1988).

[66] Meyers, *supra* note 38, at 643.

[67] *Id.*

[68] VA. CODE ANN. Sec. 15.1-1512(E) (1981 &Supp. 1988).

[69] Meyers, *supra* note 38, at 643.

[70] *Id.*

[71] VA. CODE ANN. Sec. 15.1-1512(E).

[72] *Id.* at Secs. 15.1-1512(E), 15.1-1508(5) (1981 & Supp. 1988). "Agriculturally significant land" is land which either has produced agricultural or forest products or is currently producing or considered important farmland.

[73] *Id.* at Sec. 15.1-1512(D) (1981 & Supp. 1988).

local governing body. The locality then has 30 days to review the state's proposed action. If the locality determines that the action is contrary to state or local policy, it can order the agency to wait an additional 60 days before taking any action. During that period, the locality holds public hearings and issues a final order concerning the proposed action. If that final order decrees that the agency may not act because such actions would adversely affect state or local policy, the agency may appeal the order in the circuit court having jurisdiction over the district.[74] These express procedural limitations on the state's exercise of eminent domain appear to be a significant tool for preserving farmland and guiding growth in rural areas.[75]

While the eminent domain protection for land in a district effectively prevents land from converting to certain intensified uses, it applies only in the limited context of state action so that it only protects against conversion which a landowner probably would oppose anyway. While this provides a good benefit for landowners who do not want their lands to become highways, it does not address the loss of farmland caused by economic development. The act does not offer farmers faced with increased development pressures any incentives, other than the threat of roll-back taxes, to keep their lands in agricultural uses. Instead of actually preventing conversion of farmland, forestland or open space land, the act merely provides a few incentives to the state's agricultural economy mainly by limiting state actions which interfere with lands devoted to production.

The state's policy provision is unlikely to grant farmers any additional rights or to protect against farmland conversion.[76] While state agencies are required to encourage the maintenance of farming and forestry within districts,[77] they are not prohibited from adversely affecting the land within a district.[78] Nevertheless, the existence of state policy to maintain farming in districts could be significant during a judicial review of an agency's actions.[79]

RIGHT-TO-FARM ACT

Virginia's right to farm act insulates farmers from nuisance liability in certain situations, thus, protecting some agricultural land from conversion.[80] It focuses on alleviating the problem of land-use conflict that arises when development borders on

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[74] *Id.*

[75] Meyers, *supra* note 38, at 644.

[76] *Id.*

[77] VA. CODE ANN. Sec. 15.1-1512(C) (1981 & Supp. 1988).

[78] Meyers, *supra* note 38, at 644.

[79] *Id.*

[80] Grossman & Fisher, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against Farmers*, 1983 WIS. L. REV. 95, 118 (1983).

agricultural production areas. When more and more people move into farm areas, residential uses of land begin to conflict with agricultural operations.[81] The new residents object to the noise, smells, pesticides, dust and other by-products associated with farms.[82] These people express their discontent in the form of nuisance suits or by influencing the local governing body to pass an ordinance which declares the farm operation a nuisance. Indeed, nuisance suits have been a problem for Virginia farmers.[83] Defending against nuisance actions and challenging ordinances is expensive for farmers and if they lose, they may have to halt their farm operations. The Act can protect farmers from becoming victims of urban sprawl only by barring nuisance claims and voiding local ordinances in this situation.[84]

The Act does not protect farmers either when their rural neighbors bring nuisance actions or when the conflicting residential use existed prior to the farm operation. It only applies when new residents arrive in the area and initiate actions against pre-existing operations. Thus, the statute codifies the "coming to the nuisance" defense. The Act states that a court cannot declare an agricultural operation a nuisance if it has been operating for one year prior to a change in condition in that locality.[85] Little doubt exists that the legislature intended the change-in-condition clause to refer to urban sprawl; the act's policy declaration specifically identifies the extension of nonagricultural land uses into agricultural area as the cause of farm nuisance suits. In an interpretation of a similar right-to-farm act, the Georgia Supreme Court concluded that "'changed conditions in...the locality'" refer[red]...solely to the extension of nonagricultural land uses...."[86] Thus, in farm nuisance actions, the date of the change in condition becomes extremely important; however, determining the date when that change occurred is difficult.

The statute modifies the "coming to the nuisance" defense by creating a statute of limitations. The act restricts new neighbors from bringing nuisance actions and localities from adopting nuisance ordinances if the farm operation in question has been functioning for more than one year.[87] Such a limitation discourages farmers concerned about potential nuisance actions from establishing new operations, especially feedlots,

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[81] VA. CODE ANN. Sec. 3.1-22.28 (1983). Agricultural operations are defined as any operation producing crops, livestock, nursery, floral or forest products for sale. *Id.* at Sec. 3.1-22.29(B).

[82] NALS, *supra* note 1, at 21.

[83] No reported cases under the right to farm act could be found for Virginia. However, officials at the Va. Agric. Statistics Service were aware of nuisance suits being brought against farmers in the state both prior to and after the passage of the right-to-farm act.

[84] Grossman & Fisher, *supra* note 80, at 122.

[85] VA. CODE ANN. Sec. 3.1-22.29(A) (1983).

[86] Herrin v. Opatut, 248 Ga. 140, 142, 281 S.E.2d 575, 577 (1981).

[87] VA. CODE ANN. Sec. 3.1-22.29(A)(D) (1983).

in areas threatened by development. A developer acquiring land near a young farm operation could easily use nuisance actions to either force the operation to close or contribute to its demise. Conversion of the farmland to nonagricultural uses could easily follow. Thus, the one-year limit favors the expansion of nonagricultural uses over agricultural uses, especially in localities where the two are just beginning to conflict. While the year limit would protect new residents from objectionable activities of new farm operations, it does not further the state's policy of protecting, conserving and encouraging the development of agricultural land. Indeed, the discouragement of agricultural expansion is inconsistent with farmland preservation.

The statutory prohibition against declaring a farm operation a nuisance does not apply to situations where the alleged nuisance resulted from negligence, or improper operation.[88] The act does not define either term. While a court could easily determine the meaning of negligence, it might have difficulties with a vague term like "improper". Some states' right-to-farm statutes include definitions of both negligence and improper standards.[89] States like New Hampshire and Idaho define both terms with respect to compliance with local, state and federal laws and regulations.[90] Including a provision which defines improper operation as a violation of federal, state, or local law or regulation would certainly clarify the Virginia statute. Such a liability standard for farm operations would also accommodate the dual state policies of farmland preservation and environmental protection.[91] Indeed, allowing farmers who pollute or do not exercise due care for the rights of others to escape nuisance liability does not further the act's policy.

The Act also denies protection from nuisance actions when the farm operation has significantly changed.[92] Expansion or other change in the farm operation could remove the Act's nuisance protection completely. While this provision may protect new residents from offensive activities, it also places the farmer in the dilemma of choosing between more efficient farming methods and protection from nuisance liability.[93] Such a situation clearly does not further the act's policy. However, the interpretation of "significant change" determines the extent of the Act's protection.

"Significant change" is a very ambiguous phrase with a wide range of interpretation. If "significant" is construed strictly, the act could penalize farmers for diversifying or investing in a more profitable crop or more efficient farming method. Such a result frustrates the policy behind the Act. If "significant" is interpreted very broadly, its inclusion in the Act could become meaningless as almost nothing would be

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[88] *Id.* at Sec. 3.1-22.29(A).

[89] Grossman & Fisher, *supra* note 80, at 132.

[90] *Id.*

[91] *Id.*

[92] VA. CODE ANN. Sec. 3.1-22.29(A).

[93] Grossman & Fisher, *supra* note 80, at 128.

considered significant. Such an interpretation is very unlikely. Courts addressing this unresolved issue would probably decide the existence of a significant change on a case by case basis in light of the relevant policies. Unfortunately, farmers who are planning changes and are concerned about nuisance actions have no guidance from the statute or the courts.

Likewise, the act does not provide protection in situations where an agricultural operation pollutes or causes a change in the condition of any stream or causes overflow onto neighboring lands.[94] This Virginia Code provision applies regardless of the length of time the operation has been in existence. If the statute provided an exception for agricultural operations that are in compliance with state, local and federal water pollution regulations, the protection against nuisance claims would not be negated. Either the state did not consider the effect of this provision on farmland preservation or the state's interest in preventing water pollution takes priority over its interest in such preservation.

Unlike some right-to-farm statutes, the Virginia act does not mention distribution of the burden of proof. In traditional nuisance actions, if the plaintiff shows an unreasonable interference, then the defendant has the burden of showing that he uses his land in a reasonable manner and does not adversely affect the plaintiff.[95] A few states have included a presumption that farm operations are not nuisances if they meet the statutory requirements of the right-to-farm acts.[96] Because the Virginia statute has no such provision, the defendant farmer probably has the burden of showing that the right to farm act bars the nuisance claim.[97] However, following traditional evidence rules, the plaintiff probably has the burden of showing that the farmer's activities are not afforded protection due to negligence, improper use or significant change in operation.[98]

The Act prohibits a locality from passing an ordinance which declares agricultural operations existing for one year a nuisance on account of a change in condition in the locality.[99] However, the prohibition may not affect zoning ordinances. Because localities are free to designate areas according to the uses they desire in an area, residents could pressure the governing body to zone farm operations protected from nuisance actions out of business.[100] This problem could easily arise in rural areas that have been annexed into a city. The negation of nuisance protection for annexed

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[94] VA. CODE ANN. Sec. 3.1-22.29(C) (1983).

[95] Grossman & Fisher, *supra* note 80, at 133.

[96] *Id.* Arizona, Oklahoma, Vermont and Washington have such a presumption.

[97] *Id.*

[98] *Id.* at 134. Requiring the adversary of one who relies on a statutory exception to prove the exception is a rule of evidence.

[99] VA. CODE ANN. Sec. 3.1-22.29(D) (1983).

[100] Grossman & Fisher, *supra* note 80, at 161.

farmland would combine with other pressures of urbanization to ensure conversion of such land.

PRESERVATION OF PRIME AGRICULTURAL LAND ACT

The preservation of prime agricultural land act establishes a state policy of encouraging the preservation of important farmlands in Virginia and requires certain state agencies to prepare plans to implement this policy.[101] Each agency's plans must contain an impact statement detailing the effect the agency has on conversion of important farmlands.[102] The Act establishes a committee on the preservation of important farmlands to review the effect of an agency's plans. The committee operates as a subcommittee to the Virginia Council on the Environment and annually reports its findings to the Governor and state legislature.[103]

Government land use has a significant impact on the conversion of farmland. The state controls the location of highways, reservoirs and various public facilities which require large tracts of land.[104] The adoption of a farmland preservation program by the state provides an effective tool for preventing the conversion of farmlands. However, state agencies must rigorously adhere to the farmland preservation policy in order to save farmland from unnecessary destruction. Because the Act merely adopts a policy of encouraging preservation, agencies could still ignore the conclusions of an impact statement and convert important farmland. Thus, the degree of protection that this statute affords farmland may depend on how committed a certain agency or an administration is to preservation.

The Act defines important farmlands according to production and soil classification. In general, important farmlands are those which have been or are producing and have soil types suited for agricultural use. Specifically, the Act defines three categories of farmland to which the preservation policy applies: prime farmland, unique farmland and farmland of statewide or local importance.[105] The statute adopts the Soil Conservation Service definitions for prime and unique farmlands.[106] Prime farmlands are those lands with little soil erosion which can produce crops with minimum use of fertilizers, pesticides and labor. Unique farmlands are lands other than

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[101] VA. CODE ANN. Secs. 3.1-18.4(B) (1983), 3.1-18.6 (1983 & Supp. 1988).

[102] *Id.* at Sec. 3.1-18.6.

[103] *Id.* at Sec. 3.1-18.7 (1983 & Supp. 1988).

[104] Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECOLOGY L.Q. 655, 683 (1980).

[105] VA. CODE ANN. Sec. 3.1-18.5 (1983).

[106] 7 C.F.R. Sec. 657.5(a), (b) (1988).

prime farmland which produce high-value food and fiber crops such as grapes, nuts, olives and fruits.[107]

The statute requires localities to designate the important farmlands in their jurisdictions, making adequate provisions for nonagricultural uses.[108] Apparently, a rural county could not designate all of its land as important farmlands in order to avoid future nonagricultural development. In addition, because important farmland does not include land committed to urban development, localities cannot designate a parcel of land as important farmland and stop its conversion once the development begins. However, deciding when a commitment to develop land has occurred is difficult. While the signing of a contract would more than likely satisfy the requirement, any lesser action may or may not constitute a commitment.

AGRICULTURAL ZONING

Agricultural zoning is a common method of land use control.[109] Many states permit localities to adopt zoning ordinances that designate an area for either exclusive or nonexclusive agricultural use. Nonexclusive zoning allows agricultural and other uses within an agricultural zone; exclusive zoning permits only agricultural uses.[110] Because nonexclusive zoning allows nonagricultural uses to exist and expand within areas labeled agricultural, its use is less likely to protect farmland than exclusive zoning.[111] Even though exclusive zoning is a more effective preservation method, its validity is more difficult to sustain in court. In states that permit exclusive zoning, such as California and Wisconsin, courts have generally upheld the use of such ordinances in areas where little developmental pressure exists. However, development surrounding an exclusive agricultural zone could increase to the point where restricting land use in that area becomes unreasonable and thus invalid.[112]

The Virginia zoning statute authorizes localities to classify lands within their jurisdiction according to various uses and to designate zones for the purpose of preserving agricultural and forest lands.[113] The statute establishes a nonexclusive zoning system so that localities can permit various other uses in an area which is

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[107] VA. CODE ANN. Sec. 3.1-18.5.

[108] *Id.* at Sec. 3.1-18.5(3).

[109] Rose, *Farmland Preservation Policy and Programs*, 24 NAT. RESOURCES J. 591, 600 (1984).

[110] *Id.*

[111] *Id.* at 601.

[112] *Id.*

[113] VA. CODE ANN. Secs. 15.1-486, 15.1-489 (1981 & Supp. 1988).

designated as agricultural.[114] Likewise, a locality can grant a special exception or use permit for nonagricultural uses in a pre-existing agricultural zone.[115] Localities can grant these permits at their discretion because the statute does not require them to follow any standards.[116]

The state gives localities a wide discretion regarding the zoning of land within their jurisdictions.[117] The statute limits localities to designating areas only for certain purposes, but it makes no special provision which either encourages or requires localities to protect important farmlands from conversion. Thus, any preservation efforts based on zoning must come from the locality. However, localities cater to local concerns; they cannot effectively tackle a problem, like the conversion of important farmlands, which is statewide in scope. Indeed, the state is a better vehicle for preserving farmland because it has the jurisdictional authority to design a program for lands which cross local political boundaries.[118]

The current zoning system in Virginia is not an effective method for preventing farmland conversion. Localities permit nonagricultural uses to exist and expand within agricultural zones and individuals can readily receive special use permits allowing development in agricultural zones.[119] Virginia could certainly benefit from a detailed agricultural zoning program.

CONCLUSIONS

While several Virginia laws address farmland preservation, they do not prevent the conversion of important farmlands to nonagricultural use. Most of the programs focus on easing the burdens of approaching development for farmers rather than preventing conversion of agricultural lands. Deferred taxation, agricultural districting, agricultural zoning, the right to farm legislation and the preservation of prime farmlands act all protect farmland to some degree. However, each act could be amended to provide stronger incentives for farmers to keep farming, alleviate more developmental pressures and protect important farmlands from conversion. Indeed, the current Virginia programs provide a good base on which to build a comprehensive farmland preservation scheme which would protect this valuable economic and environmental resource.

If Virginia is to have a policy of preserving farmlands from conversion through tax relief measures, then the legislature needs to enact a tax relief program which

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[114] *Id.* at Sec. 15.1-491 (1981 & Supp. 1988).

[115] *Id.* at Sec. 15.1-491(c).

[116] Bollinger v. Board of Supervisors, 217 Va. 185, 227 S.E.2d 682 (1976).

[117] Byrum v. Board of Supervisors, 217 Va. 37, 225 S.E.2d 369 (1976).

[118] Geier, *supra* note 105, at 686.

[119] VA. CODE ANN. Sec. 15.1-491(c).

realizes that policy. If the legislature opts to keep the current system of deferred tax assessment, then it needs to address the problem of tax shifting. Some states have addressed this problem by providing subvention payments to the localities using state monies.[120] Certainly the inclusion of subvention payments in the Virginia tax relief program would alleviate the problem of tax shifting. However, because the overall tax relief structure of deferred taxation is fairly ineffective as a farmland preservation technique, a more effective solution needs to be adopted.

The other major type of tax relief, circuit breaker tax credits, offers an alternative solution to the problem of tax depletion. Two states, Michigan and Wisconsin, place the burden of lost taxes directly on the state by allowing farmers to receive a dollar-for-dollar state tax credit for the local property taxes they pay.[121] Yet, the circuit breaker credits, like deferred taxation, do not prevent land from being converted to nonagricultural uses.

One type of differential tax assessment, the restrictive agreement, appears to be the most effective tax relief technique for promoting the preservation of farmland. It focuses on preventing changes in land use rather than merely easing the burdens of encroaching development. In order to receive use value assessment, farmers must enter into contracts to maintain their land in agricultural use for a certain number of years.[122] This assures the postponement of development and the preservation of economically and environmentally important lands.

The adoption of restrictive agreements along with subvention payments would provide a strong preservation incentive that avoids the tax shifting problem inherent in the current program. However, because tax relief is neither a comprehensive nor effective protection against the conversion of important agricultural lands, additional measures are necessary to slow the trend of changing land use in the state.

The agricultural and forestal districting act provides a good foundation upon which to build a program of land preservation.[123] Modifying the act in certain areas would increase the protection afforded the state's agricultural, forest and open space lands. Lowering the acreage requirement to 100 acres for the core parcel would provide protection for more lands. Loosening the production requirement for the receipt of benefits and extending the act to open space lands would further the policy of preserving land as an environmental resource rather than just for its economic input. Within a district, a limit on the annexation of land by municipalities would slow the conversion of agricultural and forest land bordering on cities and towns.[124] Including a provision requiring district landowners to adopt sound conservation practices would

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[120] Dunford, *supra* note 31, at 694.

[121] NALS, *supra* note 1, at 19.

[122] *Id.* at 18.

[123] Meyers, *supra* note 38, at 646.

[124] NALS, *supra* note 1, at 20.

increase the land's production capabilities and economic profitability so that owners would more likely keep the land in agricultural use. Localities should incorporate agricultural districts in a zoning program which permitted only agricultural and compatible uses in districts. Thus, the legislature could do a good deal to amend the districting act so that it would more likely preserve land and more effectively protect the state's farm economy.

The right-to-farm statute eases some of the burdens placed on farmers by encroaching urbanization. It bars nuisance claims and voids nuisance ordinances in many situations, yet its protection against such actions is far from complete. The number of farms producing cows and hogs in Virginia has declined in the past five years.[125] In counties, such as Amelia, hog farms have all but disappeared in the last decade. The hog industry is more stable in counties such as Smithfield and Surry, yet the farmers there have no nuisance protection for actions initiated by rural neighbors. Removing the significant change exception would contribute both to the conservation of farmland and protection of a vital economic sector by enabling farmers to expand or improve their operations without penalty. Defining "improper" would give farmers better guidance for planning purposes. Including a provision that creates a rebuttable presumption that operations are not nuisances if they meet federal, state and local law regulations would clarify the burden of proof distribution and provide an easily-determined guideline for farmers planning their operations. Extending the Act to cover suits brought by rural neighbors would also better protect the farmer raising livestock.

The designation of important farmlands by the state and localities pursuant to the preservation of prime farmland act provides the basis for a farmland preservation program that affects conversion by private owners. If the state can use these guidelines to determine which lands it should avoid disturbing, it can use them to prevent conversion of important farmlands in general. The land classification system could be used in a state-mandated zoning program, a land banking system, acquisition of negative easements or other farmland preservation programs aimed specifically at land use control. Knowing which lands constitute the most important farmlands allows the state and localities to regulate development more efficiently. A land use control program guided by these designations could prevent important farmlands from being developed while allowing development of lands which are less suitable for agricultural uses.

Because the mechanisms of zoning are present in most localities, the state could easily implement such a program using the existing infrastructure. The adoption of a state-mandated agricultural zoning scheme would further Virginia's policy of encouraging, promoting and preserving agriculture. The legislature should enact a measure which requires localities to place lands classified as important or prime farmlands in special agricultural zones. Development in those zones would be restricted to more intensive farming or farm support operations, with allowances for farm residences.

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[125] Statistics provided by the Va. Agric. Statistics Service. The number of farms with hogs decreased from 14,000 in 1984 to 8,500 in 1987. The number of farms with cattle and calves has decreased from 39,000 in 1984 to 38,000 in 1987.

The major countervailing consideration in establishing such a strict zoning program is that the more control the state has over land use, the less control individual owners have. Even if the courts would find zoning restrictions reasonable in light of the state policy of farmland protection, most landowners would strongly object to any such limitation on the use of their lands.

The creation of such a program would likely face stiff opposition from the legislature especially in areas where development pressure is high.[126] So, a less restrictive alternative may be more feasible. The state could purchase development rights [PDR] for farmland in localities where rapid growth is occurring, thus preserving farmland and avoiding harsh restrictions on landowners. Hampton Roads, northern Virginia and the Richmond-Petersburg areas are ideal candidates for such a program.

Through either purchase or donation, the state could acquire negative easements (PDRs) on farmland which prevent the owners from developing those lands. The difference between the market value of land and its agricultural value would determine the cost of the development right for each farm. In areas with high development pressures, this would be very expensive. Spacing of easement purchases and limiting those to areas in danger of conversion could lessen the initial cost of preserving farmland in certain areas.[127] The legislature could raise money for the purchase of development rights by bonding or levying taxes on either real property transfers, land grants or conversion of agricultural lands.[128] A tax on property transfers would raise more money when development pressures are high, thus enabling the state to purchase more development rights when the need for farmland preservation is great.[129] Likewise, a tax on conversion of agricultural land would both discourage conversion and raise revenues for purchasing development rights during times when they are most needed.

In addition to a PDR program, the state could exercise its power of pre-emption to save important lands already for sale from being developed. The state can substitute itself for the bona fide purchaser of important farmlands, acquire that land, place use restrictions on it and then either resell or lease it, giving preference to the bona fide purchaser.[130] This would certainly be helpful during the initial stages of a PDR program and in cases where the owner of important farmland refuses to sell the property's development rights to the state.

Two other land use regulation techniques exist that Virginia could implement in order to expand its farmland preservation program: land banking and transfer of development rights [TDR]. In a land banking scheme, the state would acquire farmland

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[126] NALS, *supra* note 1, at 148.

[127] *Id.* at 170.

[128] Rose, *supra* note 110, at 617.

[129] *Id.* at 617-18.

[130] *Id.*

before it is for sale, place restrictions on its use and either resell or lease it.[131] Such a program is well-suited for counties on the outskirts of the high development areas. Land prices in those areas have not increased dramatically, but the spread of urban growth is likely in the future. While land banking would further the preservation of farmland in Virginia and benefit the state through the increase in land values, its costs would be high. The state would have to establish an agency to handle the land bank programs and raise considerable amounts of money to purchase important farmlands. Even though the initial costs could be offset by later increases in the value of land and by benefits to the state's agricultural industry, the same preservation results could be achieved by a less-costly PDR program.[132]

Under a transfer of development rights plan, development rights are purchased and then used in a different location.[133] Virginia would have to divide its lands into development and preservation districts. Landowners in preservation districts have development rights for their lands, but they cannot develop their own lands. Instead, they can only sell the development rights to landowners in development districts so that those landowners can develop their lands at higher densities that zoning ordinances would permit.[134] While this may be less costly for the state than a PDR program, the price would be paid by those people living in or near the development zones who could easily face overcrowding and congestion which would not have existed but for the TDR program.[135] A TDR program is certainly a radical means of easing the cost burden on the state of obtaining development rights for important farmlands. Because of its novelty as a legal technique for farmland preservation, the legislature may be suspicious of such a program. Because of its side effects of overcrowding and congestion, landowners in would-be development zones may be greatly opposed to the measure. Thus, a TDR plan may be less attractive than a PDR program for Virginia.

The Virginia legislature needs to strengthen existing preservation programs and to adopt additional measures to protect the state's important farmland. The state should revise its tax relief program by entering into restrictive agreements with farmers and providing subvention payments to localities in order to reduce the financial impact of differential taxation. It should modify the agricultural and forestal districts act to include open space lands, integrate conservation practices and restrict annexation. The legislature needs to reword the right-to-farm statute to give it more substance. It also needs to use the land classification system established under the preservation of prime agricultural land act to halt farmland conversion caused by non-governmental actors. Incorporating the classification system in either a state-mandated zoning scheme or a

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[131] *Id.* at 610.

[132] *Id.* at 614.

[133] NALS, *supra* note 1, at 174.

[134] *Id.*

[135] Rose, *supra* note 110, at 622.

PDR program would ensure the preservation of important farmland in the state. While a zoning scheme would be easier to implement given the existing zoning mechanisms throughout the state, a PDR program would not restrict farmers' use of their lands as much. Whichever plan the state legislature prefers, it needs to act now in order to slow the conversion rate of the important economic and environmental resource of farmland.