

Eastern Farmland Preservation Techniques: An Assessment

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Introduction

When we think of farmland, we have a tendency to think of the traditional farm states of the Midwest, West, and, of course, California. But in the East, agriculture is alive and perhaps even well. In Pennsylvania, my home state, our Secretary of Agriculture proudly boasts of agriculture as being the number one industry.¹ The Dean of Penn State's College of Agricultural Sciences talks about our farms being within a day's drive of two-thirds of the nation's population. This latter fact poses one of the challenges to farmland preservation, the pressure for land to "house" metropolitan expansion and the need for public uses such as roads, schools, and parks versus land for food and fiber production. Those of us who are "insiders" in agriculture are cognizant of still another major pressure - suburban life-style choices versus the realities of farm production - including noise, odor, trucking and other (depending on your point of view) nuisance-like activities of modern agriculture. Finally, and most important, is the economic pressure upon agriculture and the need to keep the industry economically viable.² All areas of the country feel these pressures, but I do not think I am incorrect in stating that the eastern states felt them earlier and have some years of experience in the techniques for slowing the loss of farmland. I will discuss four of these techniques which have been used more - or less - successfully in Pennsylvania and the East.

I. PREFERENTIAL TAXATION

Many state constitutions contain provisions requiring "uniformity of taxation over all classes of property." Subject of course to interpretation by the state's highest court, such a constitutional limitation requires all real estate to be taxed at its fair market (development) value rather than its actual use value. Pennsylvania's constitution contains this common provision and has been interpreted in this way. Pa. Const. Art. VIII §1. In light of this provision, and at the urging of agricultural interests, Pennsylvania passed an amendment to its constitution in 1973 which reads:

The General Assembly may by law:

- (i) Establish standards and qualifications for private forest reserves, agriculture reserves, and land actively devoted to agricultural use, and make special provision for the taxation thereof. (Pa. Const. Art. VIII § 2(b)(i)).

Codified at 72 P.S. § 5490.1 et seq., and implemented by 7 Pa. Code § 137a.11 this program allows preferential taxation of agricultural land, forest reserve land, and agricultural reserve land. The program is commonly known as "Clean and Green."³ The statutory scheme results in a real estate tax rate of about 30% of the non-agricultural rate.

The penalty for a change in use is the payment of rollback taxes for the seven years prior to the change.

1. Does preferential taxation deter development?

Let me give you an example and you decide:

120 acres of land - Fair market value of undeveloped tract	\$300,000
Assessed value	\$52,390
Taxes without "Clean and Green" (Year 2000)	\$2,200
Taxes under "Clean and Green" (Year 2000)	\$660
Tax savings per year	\$1,540
7 year rollback* (approximation based on expected increase in taxes and interest)	\$20,000
Sale price of land divided into 10 acre lots** (11 lots at \$80,000 each)	\$880,000

** Obviously the sale price is not all profit because of development costs and land lost to roads, etc.

2. Does preferential taxation protect the land from suburban lifestyle pressures?

The program could actually be detrimental to agriculture because "preferential taxation" carries a negative connotation. The recent amendments to Pennsylvania's program (7 Pa. Code § 137a.11) which extended the alternate use value to farmstead land (land under the residence and buildings but not the improvements thereon) received mixed press coverage when tax assessors and school districts (the prime beneficiaries of the real estate tax) tallied up the cost of supporting agriculture in this way.

3. Does preferential taxation relieve economic pressures?

Certainly a tax savings increases cash flow and relieves the economic pressure of taxes, especially when the land is located in a developing area. Farmers who own or rent land have found this program very helpful because it reduces their tax liability and their rental costs.

II. AGRICULTURAL ZONING

Many communities have turned to zoning and especially agricultural zoning as a method of directing orderly development. "Agricultural zoning" has been recommended as a technique, not only because of its benefits to agriculture but also because it results in the preservation of open space.

In Pennsylvania, only about one-half of the local governments (there are 2,561 of them!) have zoning. Rural areas are the most resistant because, in the words of one citizen I recently heard at a land use forum, "It makes some people rich, and farmers poor!" He was, of course, referring to the loss of development value for a farm zoned for agricultural use only. In addition to landowner resistance, agricultural zoning must be done very carefully so that it does not include areas where agriculture is not an economically viable use because of marginal soils. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

Owner resistance can be somewhat offset by Transfer of Development Rights plans (TDR's) but sometimes a TDR plan is difficult to institute because of the assignment of development rights to properties. When zoning is late in coming, the owners in the receiving zone resist both the allocation of and the need to purchase additional development rights because they believe they have already paid for the right to develop their land. Farmers resist such plans because they want to be assured of buyers at a fair price. Some communities, such as Bucks County, Pennsylvania have instituted PDR plans. They float bonds for the Purchase of Development Rights from their farmers, bank them, and sell them at a later date.

1. Does agricultural zoning deter development?

To the extent that any zoning plan orders growth, it does. With the addition of TDR's or PDR's the preservation is permanent, at least until some act of government changes it.

However, in Lancaster County, Pennsylvania, one township now considers itself "full", i.e., without any space for development. A major business is threatening to leave unless it can expand and the only space for this expansion is farmland. Needless to say, there is a big public problem and it will not be resolved easily.

2. Does agricultural zoning protect the land from suburban lifestyle pressures?

By instituting zones, a plan may legitimize otherwise objectionable behavior.

After much debate, Pennsylvania recently amended its Municipal Planning Code to read:

Zoning ordinances shall encourage the continuity, development and viability of agricultural operations. Zoning ordinances may not restrict agricultural operations or changes to or expansions of agricultural operations in geographic areas where agriculture has traditionally

been present, unless the agricultural operation will have a direct adverse effect on the public health and safety. Municipalities Planning Code, 53 P.S. § 10603(h) (as amended, 2000).

This amendment is considered a "big win" for agriculture. In general, zoning ordinances restrict expansion or make it very costly.

3. Does agricultural zoning relieve economic pressures?

Theoretically, under a TDR or PDR plan, the land should be taxed at a lower rate because it has lost its development value. However, this is not always the situation and a tax assessor can take the position that the land is "part of an estate."

The sale of the development rights can put money into the pocket of the farmer and with appropriate tax advice, the farmer can improve his financial position. (This author cannot overemphasize the need for good tax advice to avoid capital gains taxes when making these sales.)

III. AGRICULTURAL SECURITY AREAS

Many states have programs which establish Agricultural Security Areas.⁴ The Pennsylvania Code at 7 Pa. Code § 138.3 describes the benefits of the Pennsylvania program to landowners:

- (a) The local government unit shall encourage the agricultural area by not enacting laws or ordinances which would restrict farm structures or farm practices unless the laws or ordinances bear a direct relationship to the public health or safety.
- (b) A local law or ordinance defining or prohibiting a public nuisance shall exclude from the definition of the nuisance agricultural activity or operation conducted using normal farming operations within the agricultural area if the agricultural activity or operation does not bear a direct relationship to the public health and safety.
- (c) Commonwealth agencies with programs that might negatively affect farmers shall conduct their programs in a manner that will encourage the continuance of viable agriculture in the areas.
- (d) Limitations are placed on the use of land condemnation procedures - eminent domain - by Commonwealth and local agencies unless approval is obtained from the Board.
- (e) There may be financial benefits to the participants if they elect to sell the rights to develop their land to the county governing body as part of a purchase program that counties may authorize. The purchase of development rights program is voluntary for the counties to begin and voluntary for the area participants to use, so it will not be a benefit in all cases.

Only counties, not local government units, are permitted to purchase and sell development rights; and they may incur debt to do so.⁵

1. Do Agricultural Security Area programs deter development?

To the extent that they deter the acquisition of land for public infrastructure, the programs can be effective. Before land can be taken by eminent domain, the condemning government must go before the Agricultural Land Condemnation Approval Board (ALCAB), which Board determines whether the land is needed by the government or whether there is a "viable alternative" to the taking of agricultural land. Most condemnations have been successful but anecdotal evidence suggests that the process has slowed down some proceedings and resulted in public pressure or negotiations to seek other building sites.

(Some litigation has taken place. See White v. Pennsylvania Department of Transportation, 738 A.2d 27 (1999). This case is now on appeal to the Pennsylvania Supreme Court.⁶)

2. Do Agricultural Security Area programs protect agriculture from suburban lifestyle pressures?

Yes, in two ways. The establishment of an Agricultural Security Area encourages landowners to work together to obtain the minimum acreage; and the resulting larger tract fences out suburban pressures.

There have been very few nuisance suits against agricultural operations in Pennsylvania. To this writer's knowledge, there have been no successful suits. Two fairly recent cases, one trial, Dunn v. Rogers, 1 BRADFORD COUNTY L. J. 217 (1992), and one appellate, Horne v. Haladay, 728 A.2d 954 (1999), were unsuccessful under Pennsylvania's "Right to Farm Law", 3 P.S. § 951 et seq. which was interpreted as a statute of limitations.⁷ Neither one of these farms was located in an Agricultural Security Area. In contrast, see Bormann v. Board of Supervisors Kossuth County, 584 N.W. 2d 309 (1998), Iowa's landmark Agricultural Security Area/Right to Farm case. Pennsylvania's Agricultural Security Area law discourages nuisance ordinances; it does not prohibit them.

3. Does the establishment of an Agricultural Security Area relieve economic pressure?

Yes, to the extent that the location in an Agricultural Security Area makes a farm eligible for participation in the Conservation Easement Purchase Program.

IV. CONSERVATION EASEMENT PROGRAMS

The preservation programs which are most popular with farmers at this time.⁸ and which are receiving a great deal of public support in the eastern states.⁹ are conservation easement programs - public, private, and a combination of public and private.

A. Public Programs

While private easement programs have been in existence for a long time, public easement programs are relatively new.

The federal government has put some money into easement programs.

Pennsylvania has spent \$303 million on its program thus far and hopes to ease its 2001st farm in 2001. Begun with a \$100 million bond issue in 1987, the program will add \$100 million of easements this year.

The program is targeted to preserve prime farmland which is ripe for development. Requirements are:

- (1) the land (at least 50 acres) must be in an agricultural security area;
- (2) the county in which it is located must be experiencing development pressures;
- (3) a majority of the land must be productive farmland; and
- (4) the farmer must be utilizing good conservation practices.

Land is ranked on these factors and the ranking determines order of purchase for the county.

The easement is an agricultural easement, allowing expansion of the agricultural enterprise but only limited expansion for residential purposes. The easement is held and enforced by the county.

The farmer is compensated in an amount equal to the difference between the non-agricultural value and the agricultural value up to \$10,000 per acre. (The average price at the present time is approximately \$2000 per acre). Payment is either in cash or by tax free municipal bond interest over a period of years.¹⁰

B. Private Easement Programs

It is difficult to describe the various private easement programs with any precision. However, most share the following characteristics:

- (1) Easements are donated to (not purchased by) a trust; the landowner receives no compensation, only a charitable deduction;

(2) The easement expenses - surveys, recording, and legal fees - are borne or shared by the donor; and

(3) The landowner is required to contribute some cash to the trust's "war chest" for enforcement of the easement.

C. Public-Private Plans

In Pennsylvania, the Bureau of Farmland Protection is working with private trusts for the purpose of obtaining easements on large tracts of land. If a portion of a farm does not qualify for the public easement program because it has poor soil, the state can make limited grant money available to a private land trust to cover the expenses of the private easement.

1. Do conservation easements deter development?

Both public and private easements can prohibit development in perpetuity. A court of equity may lift the easement under the doctrine of "changed conditions." The Pennsylvania plan runs in perpetuity but contemplates a twenty-five year "review."

Private easements can be written for any period of time. Most are written in perpetuity for tax reasons; few are written for less than twenty-five years.¹¹

2. Do conservation easements relieve suburban lifestyle pressures?

To the extent that all of the land in a given area is eased, suburban lifestyle pressures in the area are relieved.

Because of the restrictions on residential building in the Pennsylvania easement regulations, some farmers are not including their entire farm in the easement, reserving some lots for children, grandchildren, or retirement homes. Eventually such mixed areas generate suburban lifestyle pressures when the homes are sold to non-family or non-farming family members.

Private easement programs are not as successful in easing entire areas because it is not every landowner who can afford to donate a valuable property right.

Often private easements restrict land that is marginal or no longer used for farming by the landowner. Suburban lifestyle pressures are not as important to the owners in this situation. The easement, in effect, becomes an "open space" as opposed to an "agricultural" easement.

Additionally, some land trusts write their easements so as to restrict expansion of the agricultural enterprise. In French & Pickering Creek Conservation Trust, Inc. v. Natale, 538 Pa. 646, 647 A.2d 901 (1994), the easement was worded so as to prohibit any additional structures "other than small buildings accessory to" farming and the other permitted uses. Litigation ensued when a new owner built a large home on the land. The lower court permitted the residence but the appellate court reversed in favor of the land trust and the landowner was forced to demolish his house. The basis for the reversal is not known (the

appellate court ruled in an unpublished opinion) but the trial court was concerned about the "small building" wording. One can only speculate as to the result if the building had been a large barn rather than a large house.¹² In a case such as this, the easement itself could turn out to be the suburban lifestyle pressure.

Practitioners should be very careful to advise their clients of the **restrictions** and the **permanence** of these easements.

3. Do conservation easement programs relieve economic pressures?

Public easement programs are designed to relieve economic pressure. Depending on the method of payment, they can result in a needed large cash infusion and/or they can provide guaranteed, tax free income over a period of time.¹³ (Pennsylvania and Maryland have such plans.)

Private easement programs can be used for income tax and inheritance tax avoidance.¹⁴

But easements can limit borrowing power by reducing the value of the land as collateral, and, they do not necessarily result in a tax assessment reduction.

Easements which are permanent in nature, limit economic flexibility not only for expansion but also for side businesses such as petting zoos, campgrounds, etc. which farmers sometimes operate on the side in order to earn extra income.

CONCLUSION

All of the above techniques have been used more or less successfully in preserving farmland. Depending on the dominant pressure - development, suburban lifestyle, or economic - some plans have been more successful than others. But no one technique excludes the use of another and together they can be used to relieve some of the pressures for farmland conversion.

¹ In 1999 upon the recommendation of Secretary of Agriculture, Samuel E. Hayes, Jr., this author was fortunate enough to be appointed to Pennsylvania Governor Tom Ridge's Sound Land Use Advisory Committee. The Committee brought together representatives from all types of land use interests - government officials, developers, planners, environmentalists, and historical and farmland preservationists. The Committee's task was to assess "sound land use practices" not only in Pennsylvania but also in other states. This presentation is based in no small part on the work of that Committee. The resulting publication of the Committee is "Land Use in Pennsylvania: Practices and Tools An Inventory" and is available from the Governor's Center for Local Government Services, 325 Forum Building, Harrisburg, PA 17120.

² In his presentation "Loss of Cropland: Seen and Unseen Market Pressures" at the 1997 AALA conference, Luther Tweeten, Ohio State University, stated that most farmland (75%) is lost for economic reasons. However, we often focus on development (which is responsible for only 25% of the loss) because that loss is irreversible. AALA proceedings, 1997, p. A-1-1.

³ See Kanagy, "Lower Your Property Taxes with Clean and Green," Agricultural Law Research and Education Center, The Pennsylvania State University, July 1999 at <http://www.dsl.edu/aglaw/aglaw.html>.

⁴ See "State Farmland Protection Statutes," American Farmland Trust Farmland Information Center Library, April 30, 2000 at <http://www.farmlandinfo.org/fic/laws/fpkeytab.html>.

⁵ See Brucker, "Understanding Pennsylvania's Agricultural Security Area Law," Agricultural Law Research and Education Center, The Pennsylvania State University, June 2000 at <http://www.dsl.edu/aglaw/aglaw.html> for a detailed description of Pennsylvania's program.

⁶ See Feirick, "Condemnation of Agricultural Security Area Farmland," Agricultural Law Research and Education Center, The Pennsylvania State University, September 1999 at <http://www.dsl.edu/aglaw/aglaw.html> for a synopsis of this case.

⁷ Those interested in "Right to Farm Law" developments can see several publications prepared by the Agricultural Law Research and Education Center, The Pennsylvania State University available at <http://www.dsl.edu/aglaw/aglaw.html>.

⁸ In Pennsylvania, there is presently a 1600 application (200,000 acre) backlog for the easement program. It will cost \$400 million to ease the farms in the pipeline and new applications are being received daily.

⁹ See 3 Pa. Cons. Stat. § 901 (2000) and 7 Pa. Code § 138e.1 (2000) and Brucker, "Understanding Pennsylvania Conservation Easements" at <http://www.dsl.edu/aglaw/aglaw.html> for a description of the Pennsylvania program. Maryland and New Jersey also have programs. Number of acres preserved: Pennsylvania 156,031; New Jersey 67,245; and Maryland 342,503. Maryland's Annual Report is available from the Maryland Agricultural Land Preservation Foundation, The Wayne A. Cawley, Jr. Building, 50 Harry S. Truman Parkway, Annapolis, MD 21401. New Jersey's Annual Report is available from New Jersey's State Agriculture Development Committee, John Fitch Plaza, P.O. Box 330, Trenton, NJ 08625-0330.

¹⁰ Details on the payment plans are available from the Bureau of Farmland Protection, Pennsylvania Dept. of Agriculture, 2301 N. Cameron Street, Harrisburg, PA 17110.

¹¹ See Unif. Conservation Easement Act §1 et seq., 12 U.L.A. 170 (1996).

¹² The Pennsylvania court reached this result utilizing the presumption that an easement must be construed against the drafter. Some states are considering legislation (see e.g., Pa.

H.B. 788, 1999 session) which reverses this presumption to one in favor of the easement holder.

¹³ As a like-kind exchange, the cash can be used for the acquisition of additional land and avoid some or all capital gains taxes. Under an installment purchase agreement with a balloon payment at the end of the period, capital gains taxes can be deferred. A brochure describing the Pennsylvania Installment Purchase Agreement (IPA) plan states "In the opinion of bond counsel, interest payments received under the IPA will be exempt from federal and Pennsylvania state income tax".

¹⁴ See Lawson and Poole, "Tax Incentives for Land Preservation and Cleaner Livestock Production: Opportunities for Farmers in the Public," AALA proceedings, 1999, p. J-2-1.