AGRICULTURE AND RURAL AREA STUDY

ANALYSIS OF AGRICULTURAL LAND RETENTION STRATEGIES

TASK 2.B.

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The authors have prepared this analysis in completion of Task 2(b) of the Scope of Services, "Agricultural and Rural Area Retention and Promotion Strategies." It is not the goal of this analysis to propose one solution or another as appropriate to the Study Area, or to suggest one policy approach over any other. Rather, this analysis is intended to set forth alternative techniques that the CAC may recommend and the County may adopt in pursuit of its overarching land use objectives in the Study Area.

Tyson Smith, of the law firm, Freilich, Leitner & Carlisle, and co-author of this analysis, attended the August 21, 2002 meeting of the CAC, presented the findings made herein, and received the initial input of the Committee. This Report reflects the comments received at that meeting, as well as additional comments received from other members of the Consultant Team, staff, and the TAC.

The Task 2(c) report, "Analysis of Rural Land Uses," presents a case analysis of five different communities around the country that have incorporated a number of the preservation techniques discussed in this report. In Task 2(c) we focused on the "value preservation" mechanisms – *e.g.*, purchase or transfer of development rights – applied by the communities to achieve successful agriculture and rural area programs. Value preservation mechanisms make most programs successful, due mainly to the fact that they protect both the agricultural and the preservation interests of the community. This Report provides an overview of zoning and incentive driven programs that may, in the final analysis, constitute the ultimate recommendation of the Consultant Team.

I. INTRODUCTION

A. Task 2: Agricultural and Rural Area Retention and Promotion Strategies

Task 2 of the Scope of Services focuses on a range of agriculture and rural area retention, promotion, and economic development strategies. Task 2(a) presents and analyzes information on various economic development issues; Task 2(c) introduces related programs used in similarly situated rural areas of the country; and, finally, Task 2(d) will include a recommended approach for addressing the specific needs of Miami-Dade County.

B. Task 2(b): Analysis of Agricultural Land Retention Strategies

Objective: *Collect, analyze and present information regarding agricultural land retention strategies and implementing programs used in areas facing similar urbanization pressures, as well as development rights programs, land swaps, or any other means to ensure that landowner equity is maintained, with emphasis on the success of such programs, their ability to solve shortcomings and their applicability to Miami-Dade County without negative effects on agricultural competitiveness.*

The goal of Task 2(b) is to present and analyze information regarding agricultural and rural land use strategies and programs used in areas facing development pressures similar to those in existence or anticipated in the Study Area. Section II of this Report provides a general overview of the range of issues that underlie the overall analysis being undertaken by the Consultant Team (the "Team"). Section III sets out numerous agriculture and rural land use techniques that are available to the County in pursuit of its overall rural policies. Section IV assesses the applicability and legality of various land use policies and preservation techniques within the Study Area. And, finally, Section V sets forth the proposed framework for analyzing or determining a policy approach that will achieve the dual goal of this analysis: the protection of land values and the preservation of agriculture and rural open space within the Study Area.

C. *The Goal*: Protection of Agricultural Land Values and the Essential Character of the Study Area

Preserving the value of agricultural land is imperative to ensuring long term preservation of farming, open space, and managed growth. Farmers, growers, and ranchers own 80 percent of the private land in Florida; land that provides wide-open views of forestlands, green groves, and pastureland.[1] However, many of these large-scale property owners are selling their land because encroaching urban uses have deemed agricultural uses economically non-viable. When land value is diminished, future economic development is limited. During times of economic hardship, the agricultural landowner may have to rely on the underlying value of his or her land to make financing arrangements to cover the cost of operations. If land values are significantly reduced, so are refinancing opportunities, leaving the farmer in difficult financial straits. Preserving land values is beneficial not only for the land owner, but also for the entire community; while the farmer continues to farm, the community benefits from open space and managed growth.

This paper concludes with a proposal for analyzing and developing a "preferred development scenario" for achieving the long-term land use goals for the Study Area. The authors propose that this analysis – this weighing of alternative techniques and approaches – be conducted in light of the actual economic reality that landowners in the Study Area will face over a twenty-year period. Simply put, that decision will be whether to retain existing holdings in their current use, or a significant portion thereof; or to develop those holdings at some undetermined urban or suburban density.

The framework of this analysis presumes, first, that a combination of agriculture/rural open space preservation and reasonable development will characterize the Study Area over the next twenty years. Second, it further presumes that this combination of land use intensities will be defined by adopted County policies, which in turn, may be based significantly on the recommendations of the Team and the Citizens' Advisory Committee (the "CAC"). Third, this analysis contemplates an ultimate "preferred development scenario" – to be determined and articulated under Task 2(d) – that preserves both property rights and rural character, but neither at the expense of the

[1] Florida Farm Bureau, *Growth Management, available at* http://www.fb.com/flfb/issues/2001/Growmgt.htm (August 2, 2002).

other. The authors believe that reasonable policies can be drafted and implemented, which will advance both property rights and the rural policies of the County, while protecting land values throughout the Study Area. The Alternatives Analysis set forth at Section V proposes a framework for arriving at that ultimate recommendation.

II. OVERVIEW

A. Land Use Growth Patterns

Florida is one of the fastest growing states in the nation, and rural lands still constitute a majority of land within the state.[2] While rural populations accounted for only 7 percent of the state's population in 1997, the growth rate of rural Florida has been outpacing the national average.[3] From 1990 to 2000, the population of Miami-Dade County grew 12.3 percent.[4]

Historically, Miami-Dade County's land use patterns have reflected patterns across America: loss of agricultural land to urban development; rising land prices on the urban fringe; and urban sprawl. Since World War II the greatest proportion of growth has taken place in the urban-rural fringes of major metropolitan centers. This type of growth has led to the depletion and deprivation of important environmental resources, including the loss of unique agricultural lands.[5] As urban growth spreads into the rural and semi-rural areas of Miami-Dade County, the character unique to the rural community is threatened.[6]

In 1985, the Florida Legislature passed into law the Local Government Comprehensive Planning and Land Development Regulations Act (the "Growth Management Act"). The Growth Management Act set up a public hearing and permitting process for regional planned growth that protects important public natural resources including rivers, lakes, springs, state parks, and rare wildlife species. The Growth Management Act mandates comprehensive planning for local governments and vested the Florida Department of Community Affairs (DCA) with an oversight role. From local to regional to statewide comprehensive plans, DCA provides checks and balances to growth and development, ensuring that developers and existing taxpayers alike foot some of the costs associated with growth such as new schools, roads, new utilities (drinking water, sewage treatment, electric, telephone), municipal services (fire, police, ambulance), and additional parks and recreation areas. [7]

The County's Comprehensive Development Master Plan and its accompanying Land Use Planning (LUP) map guide land use patterns in Miami-Dade County. The Urban Development Boundary (UDB) is one of the major components of the land use strategy in Miami-Dade County as it demarcates where urban development ends and rural

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[2] Florida Chapter of the American Planning Association & 1000 Friends of Florida, *Rural Florida: Opportunities for the Future*, 3 (February 2002).
[3] *Id.*
[4] South Florida Regional Planning Council, Table: Southeast Florida Components Of Population Change *available at* http://www.sfrpc.com/region/sfcmigc1.htm (August 1, 2002).
[5] Robert H. Freilich & Linda Kirts Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 URB. LAW. 27, 29 (1981).
[6] *See* Fred Heyer, *Perserving Rural Character*, APA Planning Advisory Service Report no. 429, 1 (1990).
[7] *See generally* Fla. Stat. §163 (2002).

development begins.[8] The purpose of the UDB is to ensure that development only occurs in areas where infrastructure is available and to ensure vital natural resources are protected outside the boundary. Development within the UDB will be approved through the year 2005 provided that adequate services and public facilities are available.[9] The LUP also has a year 2015 Urban Expansion Area (UEA) boundary. The UEA is comprised of that area located between the 2005 UDB and the 2015 UEA boundary. It is the area where current projections indicate that further urban development beyond the 2005 UDB boundary is likely to occur between 2005 and 2015. Until this area is brought into the UDB area through plan and review amendment processes, parcels are allowed to be used for agricultural and open space use.[10]

Any person or organization, including the federal government, the State of Florida, Miami-Dade County, any municipality in Miami-Dade County and any of their agencies, authorities and departments may request amendment of the UDB and UEA. The County Commission must review the Comprehensive Development Master Plan every two years and any proposed amendment to the UDB may only be submitted in odd years during a certain period in April.[11] In considering amendments to the UDB the Commission must meet all the requirements of the Growth Management Act and will consider issues such as population trends, demand on urban services, levels of service available, development right demand, infill potential, environmental and agricultural resources, and above all concurrency, which demands that local government phase development so it occurs only after urban facilities or infrastructure have been provided.

In December of 1996, the Miami-Dade County Board of County Commissioners passed Resolution No. 1477-96 establishing an Infill Strategy Task Force to study opportunities and strategies to promote infill within the UDB. The Task Force's 1997 final report recommended, among other things, that the UDB not be expanded for at least ten years and that the policy of discouraging infrastructure investment outside the UDB be continued.[12]

Comprehensive Development Master Plan policies reflect the need to discourage sprawl development outside the UDB in order to preserve agriculture. Policy 8G states that the UDB should contain developable land having capacity to sustain projected countywide residential demand for a total period of 15 years after adoption of the most recent Evaluation and Appraisal Report.[13] Policy 8H further indicates that when considering land areas to be added to the UDB, the Redland area (a prime agricultural location) shall not be considered, and land designated for agricultural land uses on the LUP shall be avoided.[14] The Comprehensive Development Master Plan also indicates that the principal uses in the "Agriculture" district should be agriculture and uses ancillary to and directly supportive of agricultural. While uses ancillary and necessary to agriculture may be permitted, the County should consider whether future schools should

[8] MIAMI-DADE COUNTY, COMPREHENSIVE DEVELOPMENT MASTER PLAN at I-45 (2001).
[9] *Id.*
[10] *Id.* at I-46.
[11] MIAMI-DADE COUNTY ZONING CODE, Sec. 2-116.1. (2002).
[12] MIAMI-DADE COUNTY, *supra* note 8, at I-45.
[13] *Id.* at I-16.
[14] *Id* at I-17.

be located outside the agricultural area within the urban development areas of the County.[15]

Though some agriculturally zoned land exists within the UDB, no new commercial agricultural use of property may be established within the boundary (though limited exceptions exist).[16] This is consistent with a countywide strategy to maximize densities and urban uses within the UDB and to maximize preservation of land values within the community. Conversely, there are lands that are zoned agricultural within the UDB but are re-designated for urban development pursuant to amendments to the Comprehensive Development Master Plan in 1995. These lands shall be converted only pursuant to policies within the Comprehensive Development Master Plan and contingent on a Farmland Conservation Study.[17]

Residential development is only permitted at a density of one unit per five acres (1:5). Smaller residential parcels may be created only if the immediate area surrounding the subject parcel on three sides is predominately parceled in a similar manner and if division of the subject parcel would not encourage further land division in the area.[18] No business or industry (with the exception of packing houses) is allowed in the Agriculture district unless it is directly related to agricultural uses, is located on an existing arterial roadway, and a adequate water supply and sewage disposal exists in accordance with County law. Other uses compatible with agriculture and rural residential character may be approved based on a determination of public necessity or public interest; or if the applicant can prove no other suitable site exists outside the Agriculture district.[19]

B. Agricultural Land

There are approximately 1.55 million acres in Miami-Dade County, ¾ of which are under water, in water conservation areas or considered submarginal for urban or agricultural uses.[20] Agricultural uses in Miami-Dade County are located in the south central portion of the County, also known as the Redland. There are considerable urban land uses scattered throughout this agricultural area.

According to the Census of Agriculture, land devoted to agriculture has remained fairly stable since the 1980s, ranging from 83 to 87 thousand acres, or approximately 7 percent of total county acreage.[21] While the number of farms declined by 17 percent to 1,576 since 1992, the acreage of land devoted to agriculture actually increased 1.7

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[15] *Id*. at I-47.
[16] *Id* at I-45.
[17] *Id* at I-46.
[18] *Id*.
[19] *Id*.
[20] ROBERT DEGNER, TOM STEVENS, DAVID MULKEY, & ALAN HODGES, FLORIDA AGRICULTURAL MARKETING RESEARCH CENTER, ECONOMIC IMPACT OF AGRICULTURE AND AGRIBUSINESS IN MIAMI-DADE COUNTY, FLORIDA p. x (2000).
[21] *Id*.

percent in the same period to 85,093 acres.[22] Agricultural land in Miami-Dade County is considered to be among the most threatened in the nation.[23]

Government agencies have played a significant role in the purchase of agricultural land for conservation purposes. Between 1975 and 1998 over 10,300 acres of farmland were purchased by governmental agencies, in particular by the South Florida Water Management District (SFWMD). In 2000 it is estimated that the SFWMD leased approximately 5,000 acres to private individuals.[24]

C. Economic Impact of Agricultural Land

Florida ranks in the top 10 states in total market agricultural value and its market value per acre of farmland is also among one of the top ten producing states.[25] The total economic impact from all agricultural sales originating in Miami-Dade County exceeded $1.07 billion for the 1997-98 crop year. Fresh vegetable production was the largest contributor to this total with nearly $491 million, or 45.6 percent of the total. The greenhouse/nursery industry was responsible for nearly 41 percent or $439.8 million of the total economic impact. Although sales revenues generated by nurseries and greenhouses exceeded revenues for vegetables by over $7 million during this period, a greater proportion of vegetables are shipped outside the County, thereby generating more "new" dollars and a greater economic impact. Sales of tropical fruits produced in the County created an economic impact of $137 million, representing about 12.7 percent of agriculture's value. Miscellaneous livestock sales, including aquaculture, generated an economic impact of about $8.2 million, representing less than one percent (1%) of agriculture's total economic impact.

Agriculture created an estimated 14,795 jobs in Miami-Dade County for 1997/98. Agriculture's impact on earnings in Miami-Dade County totaled over $362 million for 1997-98. Approximately 46.5 percent, or $168 million, of this earnings impact was generated by the vegetable industry. More than 42 percent, or approximately $153 million, was contributed by the greenhouse and nursery subsector. The tropical fruit subsector generated nearly $41 million (11.2 percent) and miscellaneous livestock was responsible for $450 thousand (0.12 percent) of agricultural earnings impact for Miami-Dade County in 1997.[26]

D. Growth Management Challenges

Miami-Dade County must establish alternative development patterns to encourage managed growth and preserve values of agricultural land. Growth management techniques must preserve the value of agricultural land, the environment, and development rights while protecting urban viability and stability.

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[22] *Id.*
[23] American Farmland Trust, *Farming on the Edge* (1997) *available at* http://www.farmlandinfo.org/cae/foe2/ (July 31, 2002).
[24] DEGNER, *supra* note 20, at x.
[25] American Farmland Trust, *supra* note 23.
[26] DEGNER, *supra* note 20, at x-xi.

Implementation of a program must be legally defensible. Statutorily, local government is required to protect and preserve land and to mitigate impacts on environmental lands.[27] However, in fulfillment of state mandate, private property rights advocates may view any scheme that reduces land values as a taking under the Fifth Amendment of the U.S. Constitution, the Florida Constitution, or the Bert J. Harris Act.[28] Governments must balance the need to protect health, welfare and safety with the guarantee for compensation for land that is taken for public purposes. The land use program for Miami-Dade County must strive to strike equilibrium between these competing interests.

Agricultural preservation must be part of a wider comprehensive planning program. Community input is vital to enhance the quality of planning. Agricultural landowners bring specific information about their needs to the table. In the long run, a plan that combines planning and agricultural knowledge will enhance the quality of the plan. An extensive public input process will also help to avoid unnecessary contention between self-interested parties, including urban and agricultural dwellers and the government. An effective public input process allows interests to resolve their differences prior to adoption of any plan, and to ensure that the plan addresses the needs of different groups.

III. AGRICULTURAL AND RURAL LAND POLICIES AND IMPLEMENTATION TECHNIQUES

This section focuses on techniques for agriculture and rural land retention. The underlying goal is to: (1) achieve preservation of the lands most suitable for future agricultural use; (2) achieve preservation of agricultural land values; and (3) preserve the rural character of the area.

A. Agricultural Zoning

Zoning is the most utilized technique for preserving agriculture and rural lands. Zoning land exclusively for agricultural uses prevents residential subdivisions while simultaneously creating a holding zone to restrict urban expansion.[29]

Miami-Dade County has a specific zone, an AU zone, that allows agricultural and related uses including packing facilities, outdoor storage of farming equipment, farming, cattle grazing, hog and dairy farms (but only after approval at a public hearing), nurseries, greenhouses, groves, truck gardens, single-family homes, schools, day cares, and group homes. Minimum lot size for a residential lot is five acres.

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[27] Julian Conrad Juergensmeyer, James C. Nichols, & Brian D. Leebrick, *Transferable Development Rights and Alternatives After Suitum*, 30 URB. LAW. 441, 443 (1998).
[28] *Id.*
[29] ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 284 (American Bar Association 1999).

1. Area Based Zoning

Fixed area based zoning allows for one dwelling unit for a specified number of acres. For example, the zoning ordinance in Lancaster County, Pennsylvania (See Task 2(c) Report) allows for one non-farm lot for every 50 acres. A non-farm lot subdivided from its parent tract must be at least one acre, but not more than two.[30] Similarly, the quarter-quarter approach operates by splitting off land from the parent parcel, and establishing a maximum or minimum parcel size for building lots. [31]

Sliding scale zoning is another agricultural protection technique in which the number of dwelling units permitted varies with the size of the tract. Owners of smaller parcels may divide their land into more lots on a per-acre basis than owners of larger parcels.[32] Sliding scale zoning may also be used by qualitatively assessing land. For example, Clinton County, Indiana allows denser development on lands with poor soil quality and prohibits development on lands with high soil quality. [33]

The rationale behind sliding scale zoning is to promote development on smaller tracts that are on less valuable soil while prohibiting development on fertile, soil rich lands.[34] High-density development also satisfies the legal requirement that municipalities permit some economically viable use of land when farming is not profitable.[35]

Critics of area based zoning suggest that a successful program must require that properties be restricted with conservation easements to prevent further development after the maximum density is reached.[36] Communities that do not require conservation easements or some other type of deed restriction will be in danger of losing the land to non-agricultural uses in the future. The other potential problem with area based zoning is that, like any zoning ordinance, it only exists as long as the political will to maintain and enforce it exists. Communities must be willing to commit to this type of zoning over an extended period of time for it to be successful.

On the other hand, this type of zoning is a very inexpensive way to protect land because little public expenditure is necessary. Compared to other programs such as TDRs or PDRs (discussed below), zoning can be implemented very quickly, and, furthermore, the public is accustomed to these traditional zoning techniques.

2. Large Lot Zoning

Some communities have tried to slow rapid growth patterns by requiring rural land to be subdivided into lots no smaller than five or more acres, with the intention that

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[30] AMERICAN FARMLAND TRUST, SAVING AMERICAN FARMLAND: WHAT WORKS 59 (1997).
[31] METROPOLITAN MIAMI-DADE COUNTY PLANNING DEPARTMENT & METROPOLITAN MIAMI-DADE COUNTY COOPERATIVE EXTENSION DEPARTMENT, MANAGEMENT OPTIONS EVALUATED FOR THE RETENTION OF LAND FOR AGRICULTURE IN DADE COUNTY, FLORIDA 76 (1981).
[32] AMERICAN FARMLAND TRUST, *supra* note 30, at 317
[33] *Id.*
[34] *Id.* at 60.
[35] *Id.* at 60.
[36] *Id.* at 59.

larger parcels will maintain lower density and rural character. The intent also is to protect water quality and environmental resources. As a rule of thumb, the minimum lot size created is the amount of land necessary to carry on a successful farming operation, thus, lot sizes reflect the economic reality of agriculture.[37]

Though large lot zoning was a traditional strategy to protect farmland in the 1970s and 80s, the resulting development of subdivisions has suggested that it may not be the most effective strategy. The main problem is that the lot size is not large enough to discourage development, yet is too small for effective agriculture.[38]

Large lot zoning, therefore, is widely criticized for promoting sprawl and the degradation of farmland. Large-lot zoning essentially converts farms and valued open space into private property and large lawns, where little community open space is preserved, and neighbors are isolated from each other by their islands of unproductive private land. The resulting pattern becomes "wall-to-wall" subdivision, where every portion of each parcel is developed into yards, roads, and driveways.[39] Many property owners object to large lot zoning because, they allege, "low- and moderate-income homebuyers are excluded from this sector of the housing market".[40] Some critics have dubbed large lot zoning "snob zoning".[41]

3. Cluster Zoning

Cluster zoning utilizes development on part of a property while preserving the remainder for open space and/or agricultural uses. Cluster zoning requires more creativity in urban site design and protects on-site amenities or environmentally sensitive areas.[42] Cluster zoning is also known as "open space zoning" or "density zoning," and cluster subdivisions are sometimes known as "cluster developments", "open space" or "open land subdivisions".[43] Cluster zoning may allow variable lot sizes, setbacks, landscaping, densities, and design standards.

Clustering may be accomplished by the use of a particular zoning district that establishes a fixed or sliding scale area-based dwelling unit allocation and requires clustering on a portion of the site. Clustering can be used in conjunction with existing zoning and allowed as an optional or density bonus.[44] For example, in the Hammocks, a clustered residential development in Florida, single-family housing was built by creating green spaces within neighborhoods and a greenway system between the neighborhoods

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[37] METROPOLITAN MIAMI-DADE COUNTY PLANNING DEPARTMENT, *supra* note 31, at 73.
[38] TOM DANIELS, WHEN CITY AND COUNTY COLLIDE: MANAGING GROWTH IN THE METROPOLITAN FRINGE 217 (Island Press 1999).
[39] Jackson Meadow, *Ecology of the Cluster Model*, *available at* http://www.jacksonmeadow.com/brochure/brochure/brochure_3.htm (August 1, 2002).
[40] The Greenbelt Education Project, *How to Keep the Country in the Lowcountry, available at* http://www.charleston.net/org/greenbelt/tools.html (August 1, 2002).
[41] Executive Order 418 Housing Certification Commonwealth Of Massachusetts Fy2002, *available at* http://www2.massdhcd.com/e418portal/ CommReport02.asp?MNO=317&FY=2002 (August 2, 2002).
[42] METROPOLITAN MIAMI-DADE COUNTY PLANNING DEPARTMENT, *supra* note 31, at 77.
[43] AMERICAN FARMLAND TRUST, *supra* note 30, at 33.
[44] METROPOLITAN MIAMI-DADE COUNTY PLANNING DEPARTMENT *supra* note 31, at 77.

and lakes. The Hammocks was also able to double their gross density to an average net density of 11.5 units per acre.[45]

Cluster zoning may require the landowner of a tract of land to identify the building lots and the open space to be preserved, or it may simply require that a certain percentage of land remain as open space dedicated to agricultural uses. The protected land is usually owned and maintained by a homeowners association. Permitted land uses are either identified in the existing zoning or limited by cluster development regulations. For example, one model ordinance permits residential uses such as clustered single family houses, single family farmstead dwellings, and community living arrangements and agricultural/open space uses such as farming (i.e. crops, farming, and livestock), Christmas tree farming and sales, and passive recreational spaces (i.e. wildlife sanctuaries and nature preserves).[46] Other communities, like Larimer County, Colorado, offer a system of incentives and benefits that gives local administrators and land owners flexibility to tailor land use requirements to the particularities of individual parcels of property.[47]

However, the most effective clustering ordinances are those that are mandatory.[48] When clustering and open space preservation are left optional, few developers take advantage of the approach. Most continue as they have always done: creating checkerboards of house lots and streets. This means that even though the clustering option is in the zoning ordinance, it remains essentially unused. The community is still left with conventional development patterns which destroy agricultural areas.[49]

Though cluster zoning can keep land available for agriculture or open space, it is generally not a viable technique for commercial agriculture.[50] The protected land is generally owned by a homeowners association, and while homeowners may lease it back to local farmers, some residents may object to allowing agricultural production because of noise, dust, and odors related to commercial farming.[51] Utilization of right-to-farm laws (discussed below) will help. One solution creates an ordinance that requires homeowners to lease the land back to local farmers, while limiting the type and scale of agriculture on the property, or ensuring that farmers who sell development rights to homeowners retain title to continue farming.[52] In general, cluster zoning has been used most successfully to preserve open space or to create transitional areas between farms and residential areas.[53]

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[45] Sprawlwatch, *Land Use Planning and Zoning, available at* http://www.sprawlwatch.org/landuseandplanning.html (August 1, 2002).
[46] Southeastern Wisconsin Regional Planning Commission, *Model Zoning Ordinance for Rural Cluster Development, available at* http://www.sewrpc.org/modelordinances/cluster_ordinance.pdf (August 1, 2002).
[47] E. Tyson Smith & Philip Moffat, *An Analysis of the Development and Planning Alternatives to Protect the Character of Eastern Sarasota County while Minimizing Adverse Impacts on Taxpayers* 32 (January 2000) (unpublished manuscript, on file with the University of Florida Conservation Clinic).
[48] *Id*. at 32 (referencing SAMUEL N. STOKES, ET AL., SAVING AMERICA'S COUNTRYSIDE 182 (2nd Ed. 1997)).
[49] Randall Arendt, *"Open Space" Zoning: What it is and Why it Works,* 5 PLAN. COMMISSION J. 4 (1992), *available at* (http://www.plannersweb.com/articles/are015.html#mandatory) (August 2, 2002).
[50] AMERICAN FARMLAND TRUST, *supra* note 30 at 33.
[51] *Id*.
[52] Smith, *supra* note 47, at 31.
[53] AMERICAN FARMLAND TRUST, *supra* note 30 at 33.

Critics of cluster zoning argue that it actually results in "clustered sprawl".[54] Critics also argue that cluster zoning is environmentally unsound because cluster development works best with urban infrastructure, but the remote location requires on-site septic tanks. Failing septic systems require the extension of water and sewer lines, which opens farmland up to more development.[55] Finally, cluster development sometimes is criticized based on the simple presumption that residential and agricultural uses cannot exist in close proximity without unacceptable conflict.[56] Clearly, as mentioned above, certain conflicts must be addressed. Crop dusting and spraying, for example, require that significant buffers between crops and clustered homes be maintained.

Critics of clustering worry that this technique will cause loss of rural character. However, subdivisions designed with this concern in mind can mitigate, if not eliminate, this concern. For example, instead of having separate driveways onto the arterial roads, creating a more urban feel, a subdivision could be designed so the entire tract is set back from the main road, and only one access point exists to the road, with houses accessing a loop or networks of small streets. Those streets should be gravel and narrower than traditional urban subdivisions to create a rural neighborhood feel.

Subdivisions also should be buffered from the street with extensive landscape material; perhaps so well-buffered that passing motorists are not aware that the houses exist. If there are wooded or heavily landscaped areas, the cluster should locate within the wooded areas

The design of the building within the community can also reduce any concerns. Houses can be designed to connote a small town feeling instead of the spreading suburbs. Architects may design homes with human proportions, local architectural styles, local materials, and other techniques to connect the house to the particular community.[57]

Clustered developments are allowed in Miami-Dade County under its Zoning Code.[58] Cluster developments must be single-family dwelling units and common areas are allowed within the zone, including any associated structures.

4. Buffering

Buffering is the physical separation of farms from incompatible uses, usually by landscape, open space, or other barriers. Buffers are narrow bands of land planted with permanent vegetation that are located around and in areas of intensive agricultural production.[59] Buffers help safeguard farms from trespassers and protect adjacent

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[54] DANIELS, *supra* note 38, at 219.
[55] *Id.*
[56] *Id.* at 219.
[57] RANDALL ARENDT ET AL., RURAL BY DESIGN: MAINTAINING SMALL TOWN CHARACTER 62 (Planners Press 1994).
[58] MIAMI-DADE COUNTY ORDINANCES 33-284.6-.9.
[59] National Conservation Buffer Council, *Conservation Buffers: Showing Stewardship, Protecting Productivity, available at* http://www.buffercouncil.org/ (August 1, 2002).

homeowners from the externalities of commercial farming.[60] Field borders, grass buffers, contour grass strips, grassed waterways, and vegetative borders, are several types of buffers which serve to minimize conflicts between residential and agricultural users. [61]

Buffers are advantageous for many other reasons. Buffers create havens for wildlife. Buffers are visible, tangible examples of land stewardship.[62] Buffers enhance quality of life by providing open space in a community and enhancing the value of land conservation. Environmentally, buffers slow down water runoff from fields and block suspended chemicals, pathogens, and sediment from reaching water bodies.[63]

Buffering places the responsibility for construction and maintenance upon the farm owner, the adjacent homeowners or a third party. The Georgia Model Code, for example, requires any non-agricultural use locating next to an agricultural use to provide a 150 foot agricultural buffer.[64] The buffer must consist of trees, hedges, landscaping, and naturally occurring elements as long as there is a semi-opaque screen between the agricultural and non-agricultural uses.[65] Many California localities similarly require agricultural setbacks. In San Luis Obispo County the buffer is mandatory and ranges from 100 to 800 feet depending on the type of agricultural use to be protected. In Sacramento County the buffer is mandatory and generally requires a physical separation of 300 to 500 feet. In Stanislaus County the buffer is mandatory and can be topographical, vegetative or other and is determined on a site-by-site basis.[66]

Some buffers are not mandatory but are farmer initiated. In Suffield, Connecticut an individual farmer may request a buffer with a width of 30 to 100 feet. The buffer is located on the parcel to be developed and maintained by the developer. The law also requires that lot owners be notified that they are responsible for buffer maintenance and that subdivision plans include a provision for active agriculture and recognize agricultural practices that may annoy or irritate residents.[67]

The Natural Resources Conservation Service (NRCS), of the United State Department of Agriculture (USDA), promotes the development of buffers by farmers themselves. The NRCS leads the National Conservation Buffer Initiative, a multiyear effort undertaken by the USDA. The goal of the initiative is to encourage the use of conservation buffers by farmers, ranchers, and other landowners as a means of improving soil, water, and air quality while enhancing fish and wildlife habitat, and adding to the

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[60] AMERICAN FARMLAND TRUST, *supra* note 30, at 318.
[61] National Conservation Buffer Council, *Conservation Buffers: Showing Stewardship, Protecting Productivity, available at* http://www.buffercouncil.org/ (August 1, 2002).
[62] *Id.*
[63] *Id.*
[64] Georgia Department of Community Affairs, Model Code: Alternatives to Conventional Zoning: Agricultural and Buffer Requirements §4-3 (April 2002), *available at* http://www.dca.state.ga.us/planning/ModelCode/4-3AgriculturalBuffer.pdf (August 1, 2002).
[65] *Id.*
[66] Farmland Preservation Report, *Farmland Programs Neglect Buffer Protections,* Volume12, Number 4, (February 2002).
[67] *Id.*

beauty and diversity of farms and ranches across the country.[68] Farmers can receive assistance through the Conservation Reserve Program and other federal, state, and local government programs to help with the cost of implementing buffer practices. These other programs include the Environmental Quality Incentives Program, Wildlife Habitat Incentives Program, Wetlands Reserve Program, and Stewardship Incentive Program.[69]

A significant challenge with buffers is enforcement. Though ordinances may require buffers, they are not always enforced. Buffering ordinances can be effective as long as local government has subdivision review authority to impose the buffer requirement and that they are enforced once in place. Placing the buffer restriction in the landowner's title will assure adequate legal notice to the individual land owner responsible.[70]

Successful buffer ordinances cannot be standard; each buffer must be site based and locally determined. A draft report from a California research group indicates that in some cases structural barriers are actually more effective than swathes of open space. Under this scenario, an ordinance must determine the structural barrier and establish a source of payment for repairs and maintenance [71]

5. Overall Benefits and Drawbacks of Agricultural Zoning

Overall, the aforementioned zoning techniques are an inexpensive way to protect large areas of agricultural land because little public expenditure is necessary to implement zoning ordinances. Communities also favor agricultural zoning ordinances because they are easy and quick to implement as compared to TDR or PDR programs (discussed below) and easy to explain to the public who are accustomed to zoning ordinances. They also separate farms from non-agricultural land uses, and reduce the likelihood of conflicts between farmers and non-farming neighbors. Finally, agricultural zoning is flexible in that it can change with the economic or political climate.[72]

Critics of agricultural zoning suggest that such programs are not permanent. While flexibility may be a benefit it is also a drawback because large agricultural parcels may quickly be converted to developable parcels. Similarly, agricultural preservation ordinances do not prevent annexation by municipalities (unless annexation is forbidden on agricultural lands). Many successful agricultural zoning programs have a mandatory deed restriction or easement requirement to prevent conversion when annexation occurs. These ordinances also generally decrease land values, which decreases a farmer's equity in land. For this reason, many farmers oppose these programs. Finally, such programs may be difficult to monitor and enforce on a day-to-day basis.[73]

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[68] United State Department of Agriculture, *Farm Preservation Report: Buffers, Common-Sense Conservation, available at* http://www.nrcs.usda.gov/feature/buffers/BufrsPub.html#InitiativeBuff_7Anchor (August 1, 2002).
[69] *Id.*
[70] Farmland Preservation Report, *supra* note 66, at 2.
[71] *Id.* at 3.
[72] AMERICAN FARMLAND TRUST, *supra* note 30, at 50.
[73] *Id.*

B. Non-Zoning Techniques

1. Right-to-farm Laws

Since 1963, every state in the nation has enacted a right-to-farm law.[74] Right-to-farm laws are state laws or local ordinances that protect farmers and farm operations from public and private nuisance law suits.[75] The right-to-farm laws strengthen the legal position of farmers against nuisance suits by their neighbors, and protect farmers from anti-nuisance ordinances and unreasonable agricultural regulations.[76] Right-to-farm laws do not protect farmers from state and federal pollution and safety laws, but do underscore the legitimacy of farm uses.[77]

State right-to-farm statutes can be broken into three groups. First, *general* right-to-farm statutes provide that a farming operation cannot be declared a nuisance if it was not a nuisance at the time the operation began.[78] This type of statute is also termed a "coming to the nuisance" statute. It gives farmers a legal defense from residents moving to the area who claim to be harmed by the off-site impacts of agriculture.[79] The second type of statute protects specific types of agriculture such as the cultivation of land, production of crops, and raising of poultry.[80] These types of statutes protect farmers from unreasonable local regulations. The third type of statute protects farmers and food companies from suits over food safety.[81] Florida's Right-to-Farm Act, which applies in Miami-Dade County, is a general right-to-farm law.

Right-to-farm laws have not been extensively litigated, but this is likely to change as the urban fringe creeps nearer to farmland and new residents file suits based on trespass rather than based on nuisance.[82] Plaintiffs may still file a nuisance suit against a farmer regardless of the existence of right-to-farm laws. Though the plaintiff has a slim chance of winning, the cost and aggravation of the suit may be detrimental to the farm.[83] Thus, some statutes, for example Michigan, require plaintiffs to pay farmer's costs in an unsuccessful nuisance suit,[84] while states such as Delaware, Iowa, Kentucky, Missouri, New Mexico, South Dakota, and Wisconsin allow farmers to recover only for frivolous suits.[85]

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[74] *Id*. at 169.
[75] A public nuisance involves actions that injure the public at large, while private nuisances interfere with an individual's use of their property.
[76] AMERICAN FARMLAND TRUST, *supra* note 30, at 169.
[77] DANIELS, *supra* note 38, at 220.
[78] DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 662 (3rd ed. 1999).
[79] DANIELS, *supra* note 38, at 175 (citing NEIL HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO NUISANCE, LAND USE CONTROL AND ENVIRONMENTAL LAW (Drake University Agricultural Law Center 1992)).
[80] FREILICH, *supra* note 29, at 287.
[81] *Id*.; Melody Petersen, *Farmers' Right to Sue Grows, Raising Debate on Food Safety*, N.Y. Times, June 1, 1999 at A-1, col. 1.
[82] DANIELS, *supra* note 38, at 150.
[83] *Id*. at 151.
[84] *Id.*
[85] *Id.* at 176-79.

Right-to-farm laws are effective when metropolitan areas begin to encroach on outlying farm communities.[86] They make urban dwellers that want a rural lifestyle rethink their decision when animal waste, airborne pollution, odors, slow-moving farm machines on roads, and roosters crowing at the crack of dawn disturb their "rural tranquility".[87] Without such laws, public law nuisance suits may succeed. As a political matter these ordinances also encourage elected officials to minimize ordinances that are intrusive on farming. Nonetheless, these laws do not prevent the ultimate problem of incompatibility of uses, which must be addressed through strict environmental enforcement and well-designed agricultural districts. Another resolution is to allow for payment of damages instead of cessation of activities.[88]

One County Commissioner in Larimer County, Colorado suggested a creative "right-to-farm" provision. He drafted the *Code of the West*, which provides advice for people thinking of buying land in the rural part of Larimer County's metropolitan region. The introduction says:

> It is important for you to know that life in the country is different from life in the city. County governments are not able to provide the same level of service that city governments provide. To that end, we are providing you with the following information to help you make an educated and informed decision about whether to purchase rural land.[89]

The *Code of the West* then goes on to describe the realities of country life, including slow tractors, that some lots are not buildable, that farmers work around the clock and that animals and manure can cause objectionable odors.[90]

Right-to-farm laws strengthen growth management techniques such as clustering. In a recent case, *Whitted v. Canyon County Board of Commissioners*,[91] the Iowa Supreme Court concluded that right-to-farm laws encourage full and complete use of agricultural land, yet are still compatible with growth management techniques. A farmer proposed a small subdivision on a portion of his farm with rocky, poor farmland. He intended to continue farming the rest of the land. Neighbors appealed the approval of the subdivision claiming it would deprive them of full use of their agricultural land. The court disagreed and concurred with the county's land use board, stating "[by] allowing development…the development pressure on land more conducive to agriculture would be lessened. Further…requiring deed restrictions and marketing disclosures would aid in preserving the agricultural nature of the surrounding area."[92]

Section 33-28.1 of the Miami-Dade County Zoning Code requires agricultural disclosures for any land that is either designated Agriculture (AU), or zoned Interim (GU) (outside UDB only) and determined to be subject to AU trends of development or located within the UDB and abuts any AU zoned parcel. The seller of such property must inform

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[86] FREILICH, *supra* note 29, at 287.
[87] *Id.*
[88] *See e.g. Boomer v. Atlantic Cement Co., Inc.*, 40 N.Y.S.2d 97 (N.Y.Sup. 1972).
[89] DANIELS, *supra* note 38, at 275.
[90] *Id.* at 275-78.
[91] 44 P.3d 1173 (Idaho 2002).
[92] *Id.* at 1178.

the buyer that the land or adjacent land is zoned agricultural and that there are associated noises, pollutants, and activities that might be offensive to the buyer.

The Florida Right-to-Farm-Act prohibits farms in operation for a year or more from being declared either a public or private nuisance, except under very limited circumstances. In order to enjoy protection under the Act, however, the farm must continue to comply with "generally accepted agricultural and management practices". [93] The Second District Court of Appeals for the State of Florida found that the right-to-farm law was "intended to preserve productive land for agricultural purposes and to protect the established farmer from demands of sprawling urban development."[94] However, very little litigation has occurred pursuant to this law since its original adoption in 1979.

2. Agricultural Districting

Agricultural districting is different than agricultural zoning. Zoning only addresses particular land uses and is one tool that can be used in an agricultural district.

Agricultural districting, on the other hand, allows farmers to form special areas where commercial agriculture is encouraged and protected, establishing a broad array of measures to encourage and protect agricultural activity in the district.[95] Protective measures may include bans on local government laws that restrict farming, enhanced protection from private nuisance lawsuits, eligibility for differential tax assessment, limiting non-farm development around active agricultural areas and conservation easement programs.[96] Pennsylvania created one of the most effective agricultural districting programs in the country. The Pennsylvania law identifies five purposes for agricultural districting: "(1) Encourage landowners to make a long term commitment to agriculture by offering them financial incentives and security of land use; (2) Protect farms from incompatible uses; (3) Assure permanent conservation of agricultural land to protect the agricultural economy; (4) Provide compensation to landowners for development rights; and (5) Leverage state funds for the purchase of agricultural conservation easements and protects [sic] the public investment in easements."[97]

Agricultural districting programs are generally state-level programs. To date, sixteen states have enacted agricultural district laws.[98] Generally, state statutes establish a process for identifying agricultural districts and designate geographical areas for long term agriculture. State statutes also include a combination of measures and management tools, as described above, to protect farmland. The requirements and provisions of the programs differ greatly, but general conclusions can be drawn. The programs are flexible and local in nature, stabilize the land base at a low public cost, provide multiple benefits

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[93] Fla. Stat. 823.14.
[94] *Pasco County v. Tampa Farm Service, Inc.*, 573 So. 2d 909 (2nd DCA 1990).
[95] AMERICAN FARMLAND TRUST, *supra* note 30, at 197; METROPOLITAN MIAMI-DADE COUNTY PLANNING DEPARTMENT, *supra* note 31, at 94.
[96] *Id.*
[97] AMERICAN FARMLAND TRUST, *supra* note 30, at 201.
[98] *Id.* at 197.

to farmers, help protect large blocks of land, and enrollment is voluntary.[99] In contrast, drawbacks associated with agricultural districting include the fact that sanctions for withdrawing land are minimal and do not deter conversion; the limits on non-farm development may not prohibit the development of urban infrastructure in agricultural areas; in some states, the benefits are not a strong enough incentive for farmers to enroll; and, in others, the procedure for creating the districts is long and cumbersome.[100] Florida does not have a similar state law, but that does not preclude Miami-Dade County from implementing some agricultural districting measures typical in state-level programs.

New York has one of the most successful agricultural districting programs in the nation, in part because it is aimed at preserving farmland through maintaining and fostering farming itself. By granting a series of benefits that provide more favorable social and economic conditions, the program encourages an environment that is more beneficial for agriculture. Support from elected officials also has helped to create an agriculture-friendly atmosphere. For example, the legislature passed an act that declares agricultural land to be an "environmental resource of major importance".[101]

In addition to creating an agricultural districting program, the New York program also includes provisions that prohibit local nuisance ordinances from interfering with normal farm operations; requires agency review of development which induces infrastructure expansion; requires alternative consideration for public development proposals that bring agricultural lands into the hands of the municipality through eminent domain; allows for tax incentive programs; and directs all state agencies to maintain viable agricultural districts.[102]

3. Land Evaluation Systems

The land evaluation and site assessment system (LESA) was launched in 1981 by the U.S. Soil Conservation Service to make objective ratings of the agricultural suitability of lands against demands for other uses.[103] LESA effectively rates a tract's potential for agriculture, as well as other social and economic factors.[104] Though the federal government developed LESA, state and local governments have adopted it to meet their specific needs, and it has become part of many governments' land use planning tools.[105] LESA enables the planning of water, sewer, and transportation projects or the creation of agricultural districts, and the assessment and review of environmental impacts. [106]

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[99] Shirley Sternamen & Elizabeth Mumby, *New York State: Protecting Farming with Agricultural Districts* 77, 80, *in* PLOWING THE URBAN FRINGE: AN ASSESSMENT OF ALTERNATIVE APPROACHES TO FARMLAND PRESERVATION (Hal Hiemstra & Nancy Bush wick, eds., 1989).
[100] *Id.*
[101] *Id.* at 86.
[102] *Id.* at 80; *see also* N.Y. AGRI. & MKTS. LAW § 300 et. Seq. (1988 Cum. Supp.).
[103] Frederick R. Steiner, *Introduction, in* A DECADE WITH LESA: THE EVOLUTION OF LAND EVALUATION AND SITE ASSESSMENT 13 (Frederick R. Steiner, James R. Pease & Robert E. Coughlin eds., 1994).
[104] *Id.*
[105] *Id.*
[106] Lloyd E. Wright, *The Development and Status of LESA, in* A DECADE WITH LESA: THE EVOLUTION OF LAND EVALUATION AND SITE ASSESSMENT 36, *supra* note 103.

LESA's land evaluation and site assessment elements form a two-part system that assists in the implementation of the Farmland Protection Policy Act (FPPA), selecting appropriate lands to be included in the program, and establishing minimum parcel sizes for farm subdivisions in agricultural districts.[107] The land evaluation part of LESA is usually designed by the federal Soil Conservation Service (SCS) and local Soil and Water Conservation Districts (SWCD), and implemented by a local committee generally comprised of a district conservationist, a cooperative extension representative, SWCD directors, farmers, planners, local agricultural officials, and others who have knowledge of the land resources of the area.[108]

Local officials or a locally appointed site assessment committee usually design the site assessment component.[109] Site assessment factors include parcel size; on-farm investment; and characteristics external to the parcel of land, such as nearby land uses, zoning, and other farmland protection measures.[110] A local committee may include local planners, members of the planning commission, SWCD directors, a cooperative extension representative, building industry representatives, recreational representatives, public interest groups, concerned citizens, and other government representatives interested in agricultural preservation. [111]

LESA is a flexible system, designed to accommodate differences among states, counties, or areas. Specific systems should be based on existing knowledge of the area, local soil surveys, land use plans, policies, and programs. LESA may be applied consistently to all lands or on a case-by-case basis.[112] LESA may be used to accomplish the following objectives:[113]

i. Select lands to be part of a TDR or PDR program;
ii. Implement the federal Farmland Protection Policy Act;
iii. Choose farm units to be included in agricultural preservation programs;
iv. Determine appropriate lot size for subdivisions in agricultural districts;
v. Plan water, sewer, and transportation projects or the creation of agricultural districts;
vi. Determine the need for an agricultural preservation program and the types of programs to be used;
vii. Assess and review environmental impacts; and
viii. Develop guidelines under which agricultural land conversion to non-agricultural uses should be permitted.

A 1990-91 study identified 212 local and state governments in 31 states as active or former users of LESA.[114] Of these 212 jurisdictions, 138 local and state governments were still using the system in 1994. Those who abandoned the system found it too

[107] FREILICH, *supra* note 29, at 286.
[108] WRIGHT, *supra* note 106, at 35.
[109] *Id.*
[110] *Id*.
[111] *Id*. at 35-36.
[112] *Id*. at 36.
[113] *Id.*
[114] *Id*. at 58 referencing Steiner, F., J Pease, R. Coughlin, J. Leach, C. Shaw, A. Sussman, and J. Pressley. *Agricultural Land Evaluation and Site Assessment: Status of State and Local Programs* (The Herberger Center 1991).

complicated or time consuming; some noted a lack of interest or support by landowners or planners.[115] The unreliability may be attributed to technical problems with a particular LESA system, staffing inadequacies, or local political factors.[116] Seventy-nine percent of respondents were satisfied with the LESA system.

Miami-Dade County does not have a LESA program, but other counties in Florida – Highlands, Marion, and Pasco, for example – have utilized LESA. Although soil quality, a major factor under LESA, is not as relevant in Miami-Dade County, other LESA criteria will be useful should the County adopt prioritization criteria to implement the preferred development scenario.

C. Land Acquisition Programs

1. Conservation Easements

A conservation easement (or conservation restriction) is a voluntary legal agreement between a landowner and a land trust or government agency that permanently limits uses of land in order to protect its conservation values. It allows a landowner to continue to own and use their land and to sell it or pass it on to heirs.[117] Each easement is tailored to meet the owner's personal management objectives and goals for the property.

In essence the landowner sells his or her right to develop the land to a conservation organization or governmental entity. Current uses, including residential and recreational uses, agriculture, forestry, and ranching can continue, although the easement might require the protection of some environmental and aesthetic qualities of the property.[118]

Placing an easement may result in property tax savings and can be essential for passing land on to the next generation. By removing the land's development potential, the easement lowers its market value, which in turn lowers estate taxes. Whether the easement is donated during life or by will, it can make a critical difference in the heirs' ability to keep the land intact.[119]

2. Purchase of Development Rights

In a typical purchase of development rights (PDR) program, the government purchases the owner's right to develop specific parcels of land for managerial purposes, leaving the owner all the rights of ownership.[120] One form of PDR commonly used for agricultural preservation is a purchase of conservation easements (PACE).[121] Landowners

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[115] *Id*. at 59.
[116] *Id.*
[117] Land Trust Alliance, *Conservation Options for Landowners: Conservation Easements, available at* http://www.lta.org/conserve/options.htm (August 1, 2002).
[118] University of Florida, *Conservation Easements, available at* http://www.sfrc.ufl.edu/Extension/ffws/ce.htm (August 2, 2002).
[119] *Id.*
[120] *See* Thompson, *Purchase of Development Rights: Ultimate Tool for Farmland Preservation*?, 12 ZONING & PLAN. L. REP. 153 (1989).
[121] The term PDR will encompass PACE for the remainder of this paper.

sell conservation easements to governments or other private conservation agencies. The price of the development right is generally equal to the diminution in the market value of the land resulting from the removal of the development rights, and thus is the difference between the value of the land for agricultural use or open space and the land's development value.[122] In return for the payment, the landowner agrees to use the land for open space or agriculture in perpetuity, though some programs allow termination of the condition under certain restrictions.[123]

PDRs are designed to be voluntary. Offering an incentive to land owners may convince them to resist selling their land for a potentially high price to subdivision developers. In short, purchasing development rights is cheaper than buying the land in fee simple.

State and local governments may cooperate on PDR programs or work independently. Some states have enacted PDR programs that are funded, implemented, and administered by state agencies. Other states fund the purchase of land by either local governments or non-profit organizations.[124] Cooperative programs are advantageous because they allow the state to set broad policies and implement regional planning strategies. Local governments, with their specific knowledge of the area, then identify land suitable for the PDR program and monitor the land once the easements are in place.[125] Cooperative programs generally increase the level of funding available for PDRs.

According to the American Farmland Trust, PDR programs are very popular with farmers, yet the supply of money has lagged behind the supply of easements offered by farmers. PDR programs are popular with farmers because they offer enticing incentives. PDR programs increase the availability of real capital to farmers without mortgaging land; lower real property taxes due to the decrease in the value of the land once the development rights have been sold; and there are potential estate or inheritance tax benefits.[126] PDR programs offer a more permanent solution than zoning and avoid the takings challenges that hamper zoning efforts.[127]

On the downside, some landowners reject PDR programs because they are perceived as "tying the hands" of the landowners' heirs, who may wish to sell the land for development value.[128] In addition, although buying development rights is cheaper than buying the property outright, a PDR program is still cash intensive and communities may reject PDR programs if they require local monetary support in the form of development fees or taxes. In communities where taxes and fees are already levied for schools, public safety, parks, infrastructure, and community programs, agricultural

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[122] FRANK SCHNIDMAN, MICHAEL SMILEY & ERIC G. WOODBURY, RETENTION OF LAND FOR AGRICULTURE: POLICY PRACTICE AND POTENTIAL IN NEW ENGLAND 18 (Lincoln Institute for Land Policy 1990).
[123] *See, e.g.*, MASS. ADMIN. CODE Tit. 330 Section 22.10 or RI Gen Laws Section 42-82-5e.
[124] *See, e.g.*,: Frank Schnidman, *supra* note 122, Rhode Island 204-5, Vermont 141-43, Connecticut 186, Maine, 306 and Massachusetts 88-91.
[125] *Id.*
[126] PATRICIA E. SALKIN, ZONING AND LAND USE CONTROLS § 56.04[2] (2000).
[127] DANIELS, *supra* note 38, at 223.
[128] SALKIN, *supra* note 126, at § 56.04[2].

preservation may fall by the wayside unless there is heightened community awareness of the necessity of preserving agricultural lands.[129]

Successful PDR programs must be carefully designed and include a set of criteria to determine from which lands the development rights should be purchased. The criteria must take into account the location and surrounding uses of the land. PDR programs make sense if hundreds of acres can be preserved (either through contiguous smaller parcels or a few large parcels) because it makes it more likely that commercial farms will be successful.[130] If only smaller amounts of farmland can be preserved, the adjacent land may be a magnet for housing developers who market "rural lifestyles" and the conflict between farming and residential uses will be maximized.[131] Additionally, the costs of land in PDR programs must be reasonable and should be balanced against the likelihood that land will remain in viable agricultural production for a certain amount of time.[132] At a high expense per acre, little farmland will be saved at enormous costs, and even then the aforementioned issue arises of whether the farm will be big enough to sustain itself.[133]

Although Miami-Dade County has a viable "transferable development rights" program (discussed below), known as "severable use rights" it does not have a PDR program. The advantages of a PDR program are that the governing agency – or a designated land trust – has greater control over which lands are identified for preservation. The challenge, of course, is generating the funds to purchase development rights. However, in communities that are experiencing a decrease in agricultural viability and simultaneous increase in urban growth pressure, the ability to affirmatively secure open space is critical to success. As is discussed in Task 2(c), this has proven to be the case in many communities around the country that have successfully preserved significant agriculture and open space lands. The Task 2(c) report explores five of these communities and suggests ways that Miami-Dade County might successfully implement similar regulatory approaches.

3. Land Banking

Land banking, also referred to as advance acquisition, is a technique where land is purchased before it is ready to be developed.[134] This requires the establishment of land banks for the purpose of acquiring lands in urban areas where expansion is expected to ensure that it is developed at the most advantageous time for the community.[135] The land banks are governmental units that could either purchase agricultural land in fee simple and lease it back to farmers or only purchase the development rights.[136]

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[129] RICK PRUETZ, SAVED BY DEVELOPMENT: PRESERVING ENVIRONMENTAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS 69 (Arje Press 1997).
[130] DANIELS, *supra* note 38, at 224.
[131] *Id*.
[132] SALKIN, *supra* note 126, § 56.04[2].
[133] DANIELS, *supra* note 38, at 224; see also the discussion of Suffolk County in Task 2(c).
[134] DANIELS, *supra* note 38, at 171.
[135] FREILICH, *supra* note 29, at 290.
[136] FREILICH, *supra* note 5, at 42.

Land banks are advantageous because they allow for better control over timing and type of development, and discourage land speculation and leapfrog development.[137] Also, by giving public officials a more personal interest in property and its regulation, it helps promote sounder planning practices such as unrestricted, flexible comprehensive plans. A land bank is flexible because it controls the land being sold and bought.[138]

A successful land bank must have the power to purchase property and condemn land.[139] A land bank should be granted the power to hold land for an indefinite amount of time so that the land bank can pace development appropriately. A land bank must also have the power to borrow money, issue bonds, and obtain government aid.[140] The major drawback to this technique is the expense.

The legality of land banking has been questioned, and the U. S. Supreme Court has not established a bright line rule.[141] Both state and federal courts have declared that if the purpose of condemning the land has a reasonable relationship to the purpose of protecting open space and environmental lands, then the taking is for a public use and legitimate.[142] Land banking is more likely to be upheld by courts than other planning controls because it is a reasonable means of fulfilling a public purpose, particularly where purchases are made consistent with the explicit policies of an adopted comprehensive plan.

4. Transfer of Development Rights

Transfer of development rights (TDR) programs – called "Severable Use Rights" in Miami-Dade – allow for planning on an area wide basis by allowing landowners in restricted areas ("sending areas") to transfer densities and other development rights to landowners in areas appropriate for higher density development ("receiving areas").[143] Landowners in receiving zones are allowed to develop their land but only if they purchase development rights from designated sending areas. Thus, development is directed away from agricultural or environmentally sensitive lands to areas better equipped to deal with heavy development.[144] TDR programs give governments an alternative to purchasing land outright and ameliorate the harshness of restrictive zoning.[145]

TDR programs are popular with citizens and governments because the goal is to have an "everyone wins" outcome.[146] The sending site landowner is able to continue farming without development pressures but with the benefits from the sale of the rights.

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[137] DANIELS, *supra* note 38 at 171.
[138] FREILICH, *supra* note 29, at 291.
[139] *Id*.
[140] *Id*.
[141] *Id*. at 292.
[142] *Id*.
[143] *Id* at 288.
[144] Andrew J. Miller, *Transferable Development Rights in the Constitutional Landscape: Has Penn Central Failed to Weather the Storm?* 39 Nat. Resources J. 459, 467.
[145] FREILICH, *supra* note 29, at 288.
[146] PRUETZ, *supra* note 129, at 3.

The receiving site landowner is able to build at a greater density, and realizes the market value of their land. The community benefits by preserving farmland without incurring significant expense.[147] Local governments particularly find these programs attractive because:[148]

- They encourage increased densities in developed areas making full use of public infrastructure;
- Increased density works together with the need to provide a fair share of affordable housing;
- Often, private developers pay landowners, so no public monies are spent;
- Landowners receive compensation for the restrictions placed on their lands, thus decreasing the likelihood of successful taking claims; and
- Local government can preserve a significant amount of land while funneling growth into desired areas.

TDR programs are a market-based tool, thus municipalities must be certain there is a market for the development rights being bought and sold. A municipality must, through a comprehensive planning process, determine how many development rights are to be bought and sold and where. A TDR program must encourage sales that benefit the entire community, not just a few select landowners.[149] The number of rights to be bought or sold should be based on ecological and populations concerns; the more sprawling the community, the more rights are required.[150]

Successful TDR programs include the following:

- Encouragement of sending area landowners to sell their development rights through development restrictions, development constraints, and transfer ratios;[151]
- Encouragement of receiving area landowners by allowing the highest density appropriate, exemption from certain fees, and exemption from certain development standards;
- A clear separation between resource lands, existing development, and properties planned for development;[152]
- An active real estate market to ensure buying and selling of rights;[153]
- Fast, easy and certain TDR approvals, including certain costs, and a clear, discernible, and transparent process[154]
- A TDR bank or revolving fund that can help set a floor price for TDRs[155]
- Provision of public staff for implementation;
- Monitoring of program performance; and
- A flexible program that can be refined as needed.

TDR programs may be mandatory or voluntary. Mandatory programs are designed to prevent fragmentation of farmland in a way that protects landowners'

[147] *Id.*
[148] DANIELS, *supra* note 38, at 225.
[149] *Id.* at 51; FREILICH, *supra* note 29, at 289.
[150] FREILICH, *supra* note 29, at 289.
[151] PRUETZ, *supra* note 129, at 51.
[152] DANIELS, *supra* note 38, at 226.
[153] *Id.*
[154] PRUETZ, *supra* note 129, at 58.
[155] *Id.* at 61.

equity.[156] Mandatory programs often feature dual zones with the down zoning of a sending area and the designation of a receiving area. Landowners in the sending zones are not required to sell their development rights, but may as a method of receiving compensation for the down zoning. Similarly, receiving area landowners must buy development rights to recognize the full economic potential of their land.[157] Mandatory development restrictions may include virtual prohibition of non-farm development in agricultural areas through zoning, large minimum lot size, or restrictive requirements for infrastructure.[158] Local governments implementing mandatory programs must ensure that adequate public facilities will be available in the receiving areas.[159]

Voluntary TDR programs allow landowners in sending areas to sell their development rights to a party in a receiving area in lieu of development in the sending area. There is no reduction in density in the sending area.[160] Landowners in sending areas may choose to develop parts of their property and sell off development rights on another part, but this may lead to a large number of rural residences amid farmlands.[161] Voluntary programs may be more attractive to local governments because they are less politically controversial.

Successful TDR programs use a revolving fund where purchased development rights are sold on the open market and the funds are reinvested in the purchase of new development rights that will be banked. Communities that invest funds in areas other than the purchase of development rights jeopardize their TDR program because only a finite amount of money is available to purchase development rights.

However implemented, TDR programs must be designed to withstand legal challenges. First, as discussed above, a market for development rights is critical. The market will dictate whether a sending area is appropriate for down zoning or whether such down zoning would leave no economically viable use for those property owners. Designation of sending and receiving districts may also generate significant debate (density in the sending areas is low, while density in the receiving areas is too high). Next, zoning or the right to build in the receiving area should not be so restrictive so as to force purchase of development rights for any type of development. Failure to allow some use by right in the receiving district might be challenged as a taking.[162]

The Miami-Dade Board of County Commissioners adopted the East Everglades Ordinance in 1981 that declares the Everglades an area of critical significance and implements land use regulations that allow the transfer of development rights. The programs is referred to as a severable use rights (SUR) program, because the right to develop is "severed" from the sending property and transferred to a receiving property more appropriate for development. The Miami-Dade County SUR program identifies

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[156] AMERICAN FARMLAND TRUST, *supra* note 30, at 128.
[157] PRUETZ, *supra* note 129, at 128.
[158] DANIELS, *supra* note 38, at 226.
[159] PRUETZ, *supra* note 129, at 128.
[160] *Id.*
[161] DANIELS, *supra* note 38, at 226.
[162] SALKIN, *supra* note 126, at § 56.04[3]; for further discussion of legal issues see Juergensmeyer, *supra* note 27, and Miller, *supra* note 144.

sending parcels within the East Everglades area and receiving parcels within the UDB. The ratio for SURs varies from one SUR per five acres to one SUR per 40 acres.

The East Everglades Ordinance imposes strict environmental regulations within the sending areas that include road standards and excavation limitations. As a result of the environmental limitations and the density restrictions, landowners find it very difficult and expensive to build in the East Everglades, providing incentives for them to sell their development rights.

The receiving site may use the SURs to increase density, lot area, frontage, and other development requirements on residential and commercial receiving sites in the unincorporated parts of Miami-Dade County that are designated for urban development. Sending zones are also eligible for a 10 percent reduction in the minimum lot size, a one third reduction in the required front setback and an 18 percent increase in density. Additional commercial floor area is allowed in commercial and office park zones.

Although initially of limited success, the success of the SUR program has increased since 1995 because the Comprehensive Development Master Plan provides for the use of SURs; the transfer ratios are high in certain areas; the ordinance has eighteen different zones that can receive SURs; the administrative process is predictable and uncomplicated; and the local government is supportive of the program. The Miami-Dade County program is also successful because there is a substantial demand for additional development in the area. Developers have found it cheaper to buy SURs than to buy land. By the end of 1994, 213 SURs had been transferred to receiving sites.[163]

5. Florida Rural and Family Lands Protection Act

Passed by the Florida Legislature in 2001, the Rural and Family Lands Protection Act (Act) allows the Department of Agriculture and Consumer Service (DACS) to protect ranch and timber land by offering four options to willing land owners. DACS may:

- Purchase traditional permanent conservation easements;
- Purchase less restrictive rural land protection easements;
- Purchase agricultural easements, which are 30 year restrictions on development and subdivision with an option for the government to buy the land; or
- Pay farmers to improve wildlife habitat and water resources on their land under a permanent conservation easement.

While conservation easements are a familiar tool in Florida (see discussion above) the Act is innovative in that it institutes options for varying degrees of restriction and time parameters. It adds flexibility for both landowners and easement holders that was not previously available. The Act is supported by the agricultural industry as a means to keep family farms in business and realize value for their property while protecting the property from subdivision and development.

While the Act passed in 2001, no funding has been set aside for the program. In December of 2001, the DACS issued a legislative report that described the types of lands

[163] PRUETZ, *supra* note 129, at 85.

that would receive priority under the program. However, the 2002 and 2003 Legislatures failed to allocate funds to the program. DACS had requested approximately $10 million to fund the project. If future legislatures fund the program, this Act will significantly impact local rural programs around the state, including Miami-Dade County. Funding from the state-level can radically augment local efforts to preserve open space and rural lands.[164]

D. Taxation Programs

The disparity between the market value of agricultural land for agriculture and for other uses increases the pressure on farmers to sell their farms.[165] To reduce the temptation or need to sell many states have enacted legislation giving real property tax deferments, preferences, or exemptions to the owners of agricultural or eligible land. Besides agriculture, eligible uses might be open space or timber production. Tax programs can be effective when used in tandem with other mechanisms. Though tax incentives do reduce the tax pressure, they do not always reduce the development pressure, as the capital gains for land development may still outweigh the property tax incentive in some markets.[166]

The purpose of agricultural tax programs is to help farmers stay in business by reducing their real property taxes; to treat farmers fairly by taxing farmland based on its value for agriculture instead of its value for development; and to protect farmland by easing the financial pressures that force some farmers to sell their land.[167] Tax programs are beneficial because they correct inequities in the tax system created by development pressures and they help farmers stay in business. Tax programs, unfortunately, cannot ensure long term protection of farmland, and are criticized when they inadvertently provide a subsidy to real estate speculators who keep their land in agriculture pending development.[168]

1. Differential Assessment

Differential tax programs provide incentives for landowners to keep their land in agriculture by assessing agricultural lands at its current or farm value rather than its fair market value.[169] Agricultural value represents what farmers would pay to buy land in light of the net farm income they can expect to receive from it. Full market value represents what a willing buyer would pay for the land.[170] Every state except for Michigan has a differential assessment program. There are three kinds of differential assessment programs: preferential assessment, deferred taxation, and restrictive agreements.

Preferential assessment is the least restrictive of the three types because it does not impose penalties for converting land to non-eligible uses. The agricultural value is

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[164] *See* Lancaster County, Pennsylvania, Task 2(c) Report.
[165] *Id*. at 285.
[166] *Id.*
[167] DANIELS, *supra* note 38, at 147.
[168] *Id*. at 151.
[169] FREILICH, *supra* note 29, at 285.
[170] DANIELS, *supra* note 38, at 147.

multiplied by the local tax rate to determine the amount of real value tax due each year. Farm buildings are generally taxed at their fair market value. These programs base farmer's tax bills on the agricultural value instead of the fair value as long as the lands remain in agricultural use.[171]

The principle behind a deferred taxation program is that the tax on the market value of the property is deferred until the property is developed. Deferred taxation programs use the same process as preferential assessment programs to calculate property taxes. The difference is that a tax is imposed on the landowner when the land is converted to non-eligible uses or sold for development. Some states impose "rollback" penalties that are calculated based on the sum of the tax benefits received, while other states just require the landowner to pay a conversion tax.[172] Most states require landowners to renew their application for tax deferment each year.

The taxation programs are designed to target commercial agricultural land rather than small farms used for recreation or land that is vacant pending development. To achieve this goal landowners may be required to sign restrictive agreements (California) or restrictive covenants (Georgia, Hawaii, New York and Pennsylvania). The restrictive agreements must be signed as a condition precedent to the reassessment of the land for agricultural purposes.[173] In Minnesota, this goal is achieved by having fairly restrictive eligibility criteria whereby lots must be at least 10 acres, and meet an ownership and production test. For the ownership test, the land must be the owner's homestead or that of a surviving spouse, child or sibling; the land must have been in possession of one of the previously mentioned parties for seven years; or the land must be the homestead of a shareholder in a family farm corporation. To be considered an eligible use the land must be devoted to production of farm products for sale that provide at least 1/3 of the family's income, or yield at least $300 plus $10 per tillable acre in total income, including rent.[174]

The Florida Constitution provides for a differential assessment for agricultural lands.[175] Whether or not land is considered agricultural land for tax assessment purposes depends on the length of time the land has been utilized as agricultural land; the purchase price paid; the size, as it relates to specific agricultural use; whether effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting, and other accepted agricultural practices; whether such land is under lease and, if so, the effective length, terms, and conditions of the lease; and such other factors as may from time to time become applicable.[176] After land is qualified as agricultural land, it is eligible for differential tax assessment.

2. Circuit Breaker Tax Relief Credits

Circuit breaker programs allow for farmers to take tax credits for part of their local property tax bill. The cost of the tax credit is distributed among all the taxpayers in

[171] *Id.* at 153.
[172] *Id.* at 154.
[173] FREILICH, *supra* note 29, at 286.
[174] DANIELS, *supra* note 38, at 154.
[175] FLA. CONST. ART 7 §4.
[176] FLA. STAT. CH. 193.461 (2002).

the state. A circuit breaker program depends on involvement at the state level. Only Michigan, Wisconsin, New York and Iowa have instituted circuit breaker programs.

The New York program, adopted in 1996, provides farmers who earn at least 2/3 of their total household income from farming with relief from local school taxes levied on agricultural land and buildings. Farmers receive a full credit for up to 250 acres of farmland and a fifty percent credit for more than 250 acres. The amount of credit also depends on a family's income.

The other state programs operate similarly but also can require the farmer to sign a restrictive agreement where the farmer promises not to build any non-farm structure for ten years. In return, farmers are protected against taxes levied by local utilities and receive credits against their state income taxes.[177]

3. Real Estate Transfer Taxes

Real estate transfer taxes are taxes on various property transactions such as the transfer of property deeds and the transfer of a controlling ownership interest in entities which own real property.[178] Many states, including Florida, charge the tax when a deed is recorded. State statutes generally spell out the conditions of the tax and for what purposes the revenue may be used.

Real estate transfer taxes are frequently used for farmland preservation. Maryland is the leading state using this type of tax through a ½ percent tax on the value of all real estate transfers that is divided between parkland acquisition and farmland protection.[179]

Florida's real estate transfer tax, called the documentary stamp tax, is codified in Chapter 201 of the Florida Statutes. The tax is primarily levied by the state and the revenue is used for numerous purposes including the purchase of conservation lands through Florida Forever and the Land Acquisition Trust Fund.[180] Counties may assess documentary stamp taxes in limited situations and only for the purpose of funding the Housing Assistance Trust Fund.[181] Miami-Dade County is the only Florida county that has imposed a documentary stamp tax.[182]

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[177] DANIELS, *supra* note 38, at 155-156.
[178] PETER M. FASS; MICHAEL E. SHAFF; DONALD B. ZIEF, REAL ESTATE INVESTMENT TRUSTS HANDBOOK § 5:71 (2003).
[179] AMERICAN FARMLAND TRUST, *supra* note 30, at 101; *see also* discussion of Montgomery County in Task 2(c).
[180] FLA. STAT. CH. 201.15.
[181] FLA. STAT. CH. 201.031.
[182] MIAMI-DADE COUNTY ORDINANCES 29-7.

E. Funding Programs

1. Impact Fees

Impact fees are mandatory payments paid by developers or builders in return for development approval. They are calculated to be the proportionate share of the capital cost (e.g. roads, schools, sewer lines, or gutters) created by a new development.[183] The charges are generally levied by local governments but are not taxes because impact fees constitute a single payment, unlike periodic payments of taxes. The costs of developing infrastructure for a new development are charged at the time of development, reducing the need of the city or county to rely on bonds,[184] and the community is not forced to pay the high costs of development on the urban fringe or in other areas without existing infrastructure. Impact fees exist in some form or another in every state in the nation.[185]

The power to charge impact fees is derived from local government's police powers. While some states enact enabling legislation for impact fees, others, such as Florida, simply delegate the power to local governments through home rule power. While local governments have limited powers to impose taxes, they have broad powers to regulate in order to protect the health, safety and welfare of the community. Courts have upheld the legality of impact fees if such fees meet the rationale nexus test, which ensures a rational relationship between the demands of new development and assessments against it.[186] There are two prongs to the rational nexus test. First there must be a need for an additional public facility (i.e. schools, public safety, sewers) created by the new development and the fee must not exceed the cost of providing the facility. Second, the property charged the fee must derive a roughly proportional benefit from the new facility.[187] Impact fees that do not meet this test may be considered takings, entitling the property owner to monetary damages.

Impact fee programs must be carefully designed so the fees are reasonable, and fairly and accurately reflect a new development's fair share of the necessary facility.[188] Local governments often use careful economic analysis and planning to determine impact fees. "The most widely implemented and judicially upheld impact fees are based on data which indicate desired level-of-service standards for a particular facility and calculate the cost of maintaining those standards in light of the increased demands created by new development."[189] While impact fees have not traditionally been used as a direct tool to protect agricultural land, they have been used as part of an overall growth management policy.

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[183] Frank, James E. & Paul B. Downing, *Patterns of Impact Fee Use, in* DEVELOPMENT IMPACT FEES 3 (Arthur C. Nelson ed. 1988).
[184] *Id.* at 4.
[185] James C. Nicholas, Julian C. Juergensmeyer & Ellen Margrethe Basse, *Perspectives Concerning the Use of Environmental Mitigation Fees as Incentives in Environmental Protection (Part I),* 7 ENVTL. LIABILITY 25, 28 (1999).
[186] *See Id.* at 30; *Jordan v Village of Menomonee Falls*, 137 N.W. 2d 442 (Wis. 1965).
[187] James C. Nicholas, *supra* note 185, at 37; *see also Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So.2d 180, 183 (Fla.1995).
[188] Nicholas, *supra* note 185, at 30-1.
[189] *Id.* at 31.

2. Environmental Mitigation Fees

A new type of impact fee is being proposed by environmental advocates called environmental mitigation fees, one purpose of which may be agricultural preservation. Environmental mitigation fees are a hybrid between impact fees and market based environmental mitigation models. "The goal of environmental mitigation fees is to harness market forces to make environmental protection profitable."[190]

Traditionally, environmental pollution fees have been assessed on a case-by-case basis.[191] Each individual development or polluting facility has been required to mitigate its own impact on its own site, or mitigate its impact through some regulatory means.[192] The problem with this approach is that it may not meet comprehensive environmental goals for the community because it is not based on a community wide plan.

An environmental mitigation fee requires long-range planning for environmental goals. Agriculture and environmentally sensitive lands, critical habitat, endangered species and other critical resources are identified early on. Then, the comprehensive plan guides the assessment of impact of any development. "Government regulators would determine the units of environmental impact associated with a new or existing project and multiply the number of units by a price per unit."[193] A developer would be charged based on the formula and may choose (1) to pay and proceed with the project; (2) to reduce the adverse impact and pay a reduced fee; or (3) to pay another firm to mitigate adverse environmental impact elsewhere.[194] The money generated by the program could go into preserving agricultural land through the purchase of development rights, a TDR program, or other method discussed in this paper.

Although not a fee-based arrangement, in Miami-Dade, environmental impacts are mitigated through regulatory mechanisms. Section 24-58 of the County Code requires a permit for any development that alters County canal rights-of-way, mangrove trees, tidal waters, submerged bay bottoms, wetlands, natural surface flows, or critical groundwater sources. The environmental mitigation fee would be collected and used in the protection of these same environmental resources.

3. Federal Programs

The United States Department of Agriculture (USDA) has a number of programs to assist state and local governments and individual landowners with conservation. The Food Security Act of 1985 created the Farmland Protection Program (FPP) which provides funds to help purchase development rights to keep productive farmland in agricultural uses.[195] This program was recently reauthorized and modified by the Farm

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[190] James C. Nicholas, Julian C. Juergensmeyer & Ellen Margrethe Basse, *Perspectives Concerning the Use of Environmental Mitigation Fees as Incentives in Environmental Protection (Part II)*, 7 ENVTL. LIABILITY 69, 71 (1999).
[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] The third option might be similar to off site mitigation programs such as pollution trading and wetlands mitigation programs. For more information see James C. Nicholas, *supra* note 185.
[195] Pub. L. No. 99-198, 99 Stat. 354 (1985).

Security and Rural Investment Act of 2002.[196] The general purpose of the program is "to establish and carry out a farmland protection program under which the Secretary shall purchase conservation easements or other interests in eligible land… for the purpose of protecting topsoil by limiting nonagricultural uses of the land."[197]

The program is administered through the Natural Resources Conservation Service (NRCS), a division of the USDA. The NRCS provides technical and financial assistance to state, tribal and local governments and non-governmental organizations that already have farmland protection programs. Through the benefit of the FPP these governments and organizations acquire easements and interests in land, while landowners agree to develop and carry out a conservation plan on the land. A total of $30 million was available in 2001 for the program.

States may cooperate with the federal government to devise creative funding techniques for agricultural preservation. Martin County, Florida recently agreed to pay for the speedy installation of water lines for a Superfund project that will bring clean water to its residents. While a state's portion of Superfund programs is usually only 10 percent, in exchange for Florida's payment of the full cost of the project, the federal agency has agreed to give Florida a credit that can be used to offset the state's share of future cleanups.[198] A similar program could be used for agricultural preservation or the federal government might opt to give credit for farming programs as well as for clean up programs.

F. Regulatory Techniques

1. Growth Tiers

Timing and sequencing development to coincide with the provision of public facilities was first implemented in an innovative plan in Ramapo, New York and was upheld by the courts in the landmark decision *Golden v. Planning Board of Town of Ramapo*.[199] The basic idea is that all residential development must proceed in accordance with the provision of adequate municipal facilities as established by a long-term comprehensive and capital improvement program.[200] The importance of the Ramapo plan is the recognition of the fundamental constitutional principle that development on the urban fringe can be controlled by linking the development with the planned extension of capital improvements over a reasonable time.

A "tier" system utilizes the Ramapo principle by providing for the delineation of functional areas within the region for the identification of goals and objectives and the implementation of growth management techniques.[201] Generally five tiers are created. Tier I consists of the downtown area or urban core. Tier II consists of existing residential areas within the urban area and older suburban areas. Tier III consists of the actively

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[196] Pub. L. No. 107-171, §2503, 116 Stat. 134, 267 (2002)
[197] *Id*. at 268.
[198] John Cushman Jr., *Superfund Makes a Rare Deal with Florida*, N.Y. TIMES, July 31, 2002, *available at* http://www.nytimes.com/2002/07/31/politics/31SUPE.html. (August 2, 2002).
[199] *Golden v. Planning Board of Town of Ramapo*, 334 N.Y.S. 2d 138 (N.Y. App. 1972).
[200] Freilich, *supra* note 5, at 34.
[201] *Id.* at 35.

development area. Tier IV is the rural and agricultural land that is inappropriate or premature for development. Tier V incorporates environmental and agricultural zones that warrant preservation or protection.[202] The number of tiers varies according to the current and desired land use pattern within the urban area, but will be similar to the system described above.

2. Concurrency Programs

Concurrency programs tie development approvals to level of service (LOS) standards. LOS standards measure the ratio of public facility capacity to the need for the facility. Such a program takes into account all demand for the facilities, including existing demand as well as the additional population added by new development proposals. An adopted LOS standard reflects a policy decision concerning the appropriate equilibrium between population and public facilities that may be applied to new development in the standard setting and review process, and to the public capital budgeting process. LOS standards conveniently provide a benchmark for monitoring the growth management system.[203]

Florida was the first state to introduce "concurrency" requirements; the Florida Statutes specifically provide that, "[P]ublic facilities and services needed to support development shall be concurrent with the impacts of such development."[204] The requirement is part of Florida's Growth Management Act of 1985 that was enacted to discourage urban sprawl, improve existing infrastructure to support infill and redevelopment, and to discourage urban development of rural lands.[205]

Concurrency programs do not concentrate on one particular sector of a city or county; they look at a community comprehensively to plan for the entire area. The result is that growth occurs at a rate that is economically beneficial to the community and in a manner that retains land values. The specific techniques discussed above should be implemented within the framework of the comprehensive plan.

Miami-Dade County has a Service Concurrency Management Program. No development order shall be issued where LOS standards for all public facilities will not meet or exceed LOS standards or where such an order would result in a reduction of services, except in certain circumstances, such as when the development is located in a designated urban infill area.

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[202] *Id.*

[203] S. Mark White, *Adequate Public Facilities Ordinances and Transportation Management* 8. PAS Report 465 (1996).

[204] West's Fla. Sta. Ann. Section 163.3177 (10)(h).

[205] *See generally* West's Fla. Sta. Ann. Section 163.

3. Urban Service Boundaries

An urban service boundary (USB)[206] is a relatively simple technique for channeling growth that involves designating an urban services area and a rural service area. Planning studies designate the urban services areas, which are the most suitable to the extension of municipal services such as streets, sewers, and water, and rural service areas where development is restricted.[207] The municipality commits to providing urban services within the urban service area before going beyond it.[208] One of the most important attributes of a USB is that it makes the development pattern predictable for landowners and developers.[209]

There are generally four goals for a USB: (1) to make the most efficient use of public tax money for infrastructure funding; (2) preservation of agricultural and environmentally sensitive lands; (3) efficient provision of municipal services; and (4) promotion of compact urban development.[210] The USB also preserves agricultural land values within the community.

The most challenging issue surrounding a USB is how and under what circumstances the boundary should be moved.[211] The location of a USB significantly impacts how a community develops, and in the agricultural context, may determine what agricultural land is given over to development and what land is preserved for farming. Therefore, adjustments to a USB should only take place after deliberate planning considerations, that take into account both urban and rural interests.[212] An effective boundary adjustment process should be "firm enough to provide predictability for long-range planning, yet sufficiently flexible to respond to changed conditions."[213] Some states, such as Oregon, set out guidelines for adjusting boundaries. These guidelines include compliance with a comprehensive plan, and the analysis of socio-economic impacts on the community and the existence of intergovernmental agreements.[214]

Intergovernmental coordination is required to successfully implement a USB program because most urban cores are associated with a municipality separate from the unincorporated area of the county.[215] Intergovernmental agreements should define the role of each governmental entity involved and describe the process for boundary adjustments.

Miami-Dade County's Urban Development Boundary (UDB) is a USB. Details of the Miami-Dade County UDB are provided above in Section II.

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[206] A USB is different from an urban growth boundary that identifies an urban core and designates certain uses appropriate. The focus is less on urban services than on uses such as siting of future development, protection of natural lands and resources, and compact urban form. *See* Smith, *supra* note 47 at 19.
[207] CALLIES, *supra* note 78, at 642.
[208] V. Gail Easley, *Staying Inside the Lines* 10 PAS Report 440 (1990).
[209] Smith, *supra* note 47, at 19.
[210] *See* Wash. St. Ann. § 36.70A. 110 (2003)
[211] Smith, *supra* note 47, at 20.
[212] *Id.* at 20.
[213] Easley, *supra* note 208, at 10.
[214] *Id.* at 4.
[215] Smith, *supra* note 47, at 21.

IV. ECONOMICS AND THE LAW

A. Economic Value of Land

Preventing sprawl may be the most effective method of preserving the economic value of land in Miami-Dade County. A 1995 Bank of America report stated, "Growth has helped fuel … an unparalleled economic and population boom and has enabled millions … to realize the enduring dream of home ownership … but sprawl has created enormous costs… Ironically, unchecked sprawl has shifted from an engine of … growth to a force that now threatens to inhibit growth and degrade the quality of our life." Indeed, the public infrastructure gap is nearing $4 trillion. Such high costs for infrastructure impede development of community services and inhibit the preservation of open space and agricultural lands. If urban growth consumes agricultural land, and government money is spent building infrastructure, then community services and existing infrastructure suffer. One conservative critic notes that more flexible zoning codes "would allow for more innovative development designs that accomplish conservation goals and satisfy consumer demand for housing alternatives. Ensuring that development covers its infrastructure expenses will allow the marketplace to operate freely and efficiently."[216]

Preserving the economic value of land in Miami-Dade County can be accomplished by concentrating on four goals:

1. Economic development through the preservation of agriculture;
2. Clustering of new development outside the urban area to reduce sprawl and reduce infrastructure costs;
3. Maintain the character outside of the urban area; and
4. Develop strategies that are legally defensible.

B. Legal Framework

The following is intended to give a very general overview of the legal issues that arise when local governments in Florida undertake planning and plan implementation. Further legal analyses should be undertaken to address any specific program or ordinance considered by the County for adoption.

The authority of local government agencies to adopt land use and zoning regulations is derived from a state's police power authority. Generally, comprehensive growth management programs include police power regulations such as a zoning ordinance incorporating density standards. Governments have the authority to regulate the activity or use of property in order to protect or to prevent harm to the public health, safety and welfare.[217] Though there are limitations on a government's police power, the

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[216] Samuel R. Staley & Matthew Hisrich, *True Smart Growth*, The Buckeye Institute Newsletter (May 2002), *available at* http://www.rppi.org/opeds/ohiosmartgrowth052102.pdf (August 2, 2002).

[217] *See Keystone Bituminous Coal Assoc. v. DeBenedictis*, 107 S.Ct. 1232 (1987); *Euclid v. Ambler Realty Co*., 272 U.S. 365 (1926); and *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

courts have recognized the need for plans to deal with critical issues such as urban sprawl, declining land values, environmental degradation, a lack of open space, and agricultural preservation.[218]

Nonetheless, there are several types of legal issues that must be considered. Generally, (1) does the local government have authority or police powers; (2) does the action advance a legitimate governmental purpose; (3) is the system applied equally to persons and land without operating in a discriminatory manner; (4) are the governmental regulations implemented such that there is no "taking" of private property without "just compensation"; and (5) do the government regulations afford substantive and procedural due process to persons affected?

The authority of Florida's local governments to plan is undisputed, and in fact mandated, by Florida's Growth Management Act of 1985. The other issues are considered under three major headings: takings, impact fees/mitigation fees and due process.

1. Takings

The majority of legal challenges to land use regulations fall under the claim that the regulations constitute a "taking" of private property without "just compensation".[219] If the purpose is to protect the public welfare, government may limit use of property through regulation without a finding that a taking has occurred under the Fifth and Fourteenth Amendments of the U.S. Constitution.[220] However, once a regulation[221] has been deemed to effectuate a taking, monetary compensation may be required to be paid[222] or the regulation voided. If the regulation[223] does not involve a physical or title taking, but is in the nature of amenity protection such as open space preservation, environmental protection, or agriculture preservation, the standard used is a balancing test to determine whether the benefit to the public is outweighed by the burden to the land owner. The test has two prongs: (1) does the regulation substantially advance a legitimate state interest, and (2) does it deny an owner economically viable use of land.[224]

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[218] Robert H. Freilich & Jason M. Divelbiss, *The Public Interest is Vindicated*, 31 URBAN L. 731, 734 (1999).

[219] The following analysis involves a discussion of federal takings jurisprudence, which is applicable in both federal courts and state courts in Florida.

[220] *Keystone Bituminous Coal Assoc., supra* note 217.

[221] Since the seminal case *Penn. C. Transp. Co. v. N. Y. C. Landmarks Commn*., 438 U.S. 104 (1978), the United States Supreme Court has recognized three kinds of regulatory takings: physical, title, and economic. A physical taking is one where a governmental entity invades private property regardless of the extent of diminution in property value. *See Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979). A title or exaction taking does not involve land invasion, but results from the government accepting a title dedication or monetary exaction representing a payment in lieu of dedication. *See Nollan v. Ca. Costal Commn*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). An economic taking is one where a regulation does not substantially advance legitimate state interest and denies an owner of economically viable use of his land. *See Agins v. City of Tiburon*, 447 U.S. 255 (1980).

[222] *First English Evangelical Church v. County of L. A.*, 107 S.Ct. 2378 (1987).

[223] *Nollan, supra* note 221.

[224] *See, e.g. Agins supra* note 221; *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); and *Lucas v. S. C. Costal Council*, 505 U.S. 1003 (1992).

Under the first prong, the court will not construe the governmental action to be a taking as long as the governmental entity has reasonably concluded that "the health, safety, morals, or general welfare would be promoted by prohibiting a particular contemplated use of land."[225] The courts also require that the regulation is reasonably calculated to meet the evil without exceeding the public necessity or substantially affecting uses that do not "partake of the offensive character of those which create the problem sought to be ameliorated."[226] In short, the government must craft regulations in a manner that is rationally-related to the legitimate purpose it seeks to advance.

Under the second prong, a court must determine whether the property maintains any permanent beneficial value when viewed as a whole.[227] Both federal and state courts have uniformly held that all substantial use of property must be lost before an economic taking occurs. Economic takings must be viewed in their entirety, and therefore a diminution in value of even 99 percent has not been viewed as a taking.[228]

TDR programs have been particularly susceptible to takings claims, but if the TDR system is designed appropriately it will be upheld. The key to a successful program is effectively protecting the sending area's resources while offering the property owner fair and reasonable compensation. Florida courts have upheld TDR programs in *City of Hollywood v. Hollywood, Inc*[229] and *Glisson v. Alachua County.*[230] In the *Hollywood* case, the court upheld a city zoning ordinance that restricted beachfront lots to single-family dwellings and granted the owner TDRs that could be applied to adjacent lots to increase permissible density. The purpose of the ordinance was to preserve the beachfront property, and the court dramatically noted, "Before us is the last unspoiled beach area on the Gold Coast, a veritable Shangri-La in an otherwise endless Himalayan mountain range of cement to the south."[231] In *Glisson*, the court upheld a TDR program designed to protect threatened wetlands. In both cases, the court found that protecting open space and environmentally sensitive areas was a legitimate state interest.

2. Impact Fees/ Mitigation Fees

Although there is no specific case law on mitigation fees in Florida, a review of the impact fees jurisprudence is relevant because any mitigation fee legal analysis should follow the same arguments. In 1994, the U.S. Supreme Court decided the important case of *Dolan v. City of Tigard*[232] holding that not only must exactions have the required nexus to a development's impacts (a matter settled in *Nollan v. California Coastal Commission*,),[233] but also that the degree of the exaction must be "roughly proportional to

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[225] *Penn C. Transp. Co., supra* note 221, at 125.
[226] *Kirsch Holding Co. v. Borough of Manasquan*, 59 N.J. 241, 281 A.2d 513, 518 (1971).
[227] *See, e.g. Concrete Pipe and Products, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993); *Pennel v. City of San Jose*, 485 U.S. 1 (1988); *Hodel v. Irving*, 481 U.S. 704 (1987).
[228] *Concrete Pipe and Products, supra* note 227; *see also City of Monterey v. Del Monte Dunes*, 119 S.Ct. 1624 (1999).
[229] 432 So. 2d 1332 (Fla. Dist. Ct. App. 1983), review denied, 441 So. 2d 632 (Fla. 1983).
[230] 588 So. 2d 1030 (Fla. Dist. Ct. App. 1990), review denied, 570 So. 2d 1304 (Fla. 1990).
[231] *Hollywood, supra* note 229, at 1337-388.
[232] *Dolan, supra* note 221.
[233] *Nollan, supra* note 221.

the projected impact of the proposed development."[234] Local governments must demonstrate that exactions imposed as a condition of development are not only related in nature, but also in extent, to the impact of the development paying the fee.

The Florida Supreme Court has upheld local government's authority to impose impact fees based on general home rule and police power theories. The Growth Management Act specifically encourages the use of impact fees,[235] and Florida courts have adopted the rational nexus test as the appropriate standard by which to measure their validity.[236] However, just as other land development regulations can only be exercised within the bounds of substantive due process, so too are impact fee impositions similarly bound. The Florida Supreme Court has adopted[237] and reaffirmed[238] the dual rational standard as the appropriate measure of whether a local government has exceeded its constitutional authority in the imposition of impact fees. Based on this case law, it is likely that mitigation fees would be upheld in Miami-Dade County.

3. Due Process

Many land use claims are based on the due process clause of the Fourteenth Amendment. Procedural due process is not discussed here as individuals cannot bring these suits against a government for a legislative action. Substantive due process imposes a requirement that the land use regulations must promote a legitimate public end in a rationale manner.[239] Legitimate state interests are often described in zoning laws in terms of the protection or furtherance of the public health, safety, morals, or general welfare. A landowner may assert that the regulation is arbitrary and capricious, bearing no substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power (an "arbitrary and capricious due process" or "substantive due process" claim).[240] This standard is a heavy burden for a landowner to overcome.[241]

V. MIAMI-DADE COUNTY – VALUE PRESERVATION PRINCIPLE

The following analysis presents a guiding principle for analyzing how the County might develop a program that will retain the value of agricultural land while simultaneously protecting open space and rural areas for future generations. Although the final recommendation (Task 2(d)) will be presented in light of the development scenarios outlined in Task 1(f), the Team, based on the extensive input of the Citizens' Advisory Committee, has determined that the final recommendation – the "preferred development scenario – should set forth a means of protects open space in perpetuity in a

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[234] *Dolan*, *supra* note 221, at 388.
[235] *See* FLA. STAT. ch. 163.3202(3) (2001).
[236] *Home Builders & Contract Assocn. of Palm Beach County, Inc. v. Board of County Commissioners*, 446 So.2d 140 (Fla. 4th DCA 1983).
[237] *Contractors & Builders Assocn., Inc. v. City of Dunedin*, 329 So.2d 314 (1976).
[238] *St. Johns County v. Northeast Florida Builders Assocn., Inc*. 583, So.2d 635 (Fla. 1991)
[239] CALLIES, *supra* note 78, at 349.
[240] *Eide v. Sarasota County*, 908 F.2d 716, 722 (Fla. 1990); *Euclid supra* note 217, at 395.
[241] *Restigouche v. Jupiter*, 59 F.3d 1208, 1214 (11th Cir. 1995) (applying same rational relationship test as in equal protection cases).

manner that also protects the land investments made by property owners in the Study Area. In order to meet the complex, and sometimes competing, goals of open space preservation, a comprehensive program that includes any number of the agricultural preservation techniques discussed in this paper - and more thoroughly in the Task 2(c) report - may be employed. However, the Team recommends that the following principle guide the ultimate recommendation:

> *Is there a regulatory balance that would provide a landowner a return on his or her investment equal to or in excess of the reasonable return under a suburban development alternative, while at the same time preserving important open space and rural lands?*

VI. CONCLUSION

This Report is intended to inform the ongoing analysis being conducted by the Citizens' Advisory Committee and the various consultant Team members. The background concepts set forth here will be refined in forthcoming reports and analysis. Specifically, Task 2(c), "Analysis of Rural Land Uses," describes how five (5) communities from around the country have employed value-preservation techniques – relying heavily on the concept of PDRs – to protect their threatened agricultural economies and rural open space. In each case, these communities have sought to protect the resource most critical to a viable agricultural economy – the land. Furthermore, consistent with the guiding principle set forth in the section above, each of these communities has done so by adopting funding programs that ensure that the community at large, which benefits from the preservation of this discrete area of the jurisdiction, shares in the burden of agricultural preservation.