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Agricultural Land Preservation by Local Government

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AGRICULTURAL LAND PRESERVATION
BY LOCAL GOVERNMENT

I. INTRODUCTION

Farmland is one natural resource which is scarce in the Mountain State, yet farming is an important part of our heritage. Many people wonder whether farming as a business can survive into the next century in West Virginia. This is because no economic activity can remain viable without the inputs needed to sustain it. In the case of agri-business in West Virginia, farmland is one necessary input for agricultural production which is being shifted to competing uses through a combination of market forces and government activity. In response to concerns about the loss of farmland to development, the West Virginia Legislature has passed a bill entitled "Farmland Preservation Programs". This legislation is an enabling act which empowers counties to preserve farmland.

This note deals with the legal and constitutional issues raised by the enabling Act. Initially, the economic and physical aspects of agriculture in West Virginia will be considered, then the legal environment of agriculture in West Virginia and the impotency of local government efforts without enabling legislation is discussed. This will serve to place the enabling Act in the context in which it will take effect.

II. THE DEVELOPMENT PROCESS

Prime farmland is also prime land for almost every other use to which land can be put. Residential sub-division, second-home developments, industrial parks, water impoundments and the surface activities of mineral extraction all consume farmland, often irreversibly. The infra-structure for these developments, that is, sewage systems, roads and utilities, is often supplied by government through the mechanisms of bond issues, planning and land acquisition. Thus, attempts to preserve farmland do not involve intervention in a "free" market, but rather the co-ordination of

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government powers and market forces so that the maximum amount of development is achieved with the least amount of damage to existing economic activity.³

The word agri-business more precisely describes what is at stake than the word farming. It includes not only the farmer on his land, but also the community of other farmers and businessmen with whom he labors. For agri-business to survive in an area, a "critical mass" of land is necessary. This does not refer to the size of any particular farm, or even to the average farm size. Rather, it means that without a sufficient acreage of land being farmed in a given area there will be no farm equipment dealers, no seed and fertilizer suppliers, no livestock and produce markets, no need for transportation services, and ultimately, no agri-business in the community.⁴

The farmland issue is concerned with maximizing the economic product of an area. That is, it is not an argument for no growth to argue for farmland retention. It is an argument for directed growth. Preserving farmland is a growth strategy because as fuel and energy prices increase in the future, food grown for local consumption will have a lower relative cost than imported food.⁵ Also, as a regional food market develops, farming in West Virginia will be advantageous relative to other areas of the country.⁶ Thus, preserving productive farmland will contribute to the development of the local economy as food prices rise in the future.

Farmland retention, then, is really only another way to look at economic development. No one would tear down a factory to provide a housing site for the workers, yet market forces will cause the destruction of agri-business if government does not intervene.⁷ The essential need for the products of agriculture demands that the industry be protected from short run destructive forces.⁸


⁴ M. Lapping, R. Bevins & P. Herbers, Differential Assessment and Other Techniques to Preserve Missouri's Farmlands, 42 Mo. L. Rev. 369, 404 (1977).


⁶ Id.


In ecological terms, we must not draw down the carrying capacity of the earth any more than necessary.\(^9\) Obviously, development of farmland must stop at some point.\(^10\)

III. WEST VIRGINIA: THE PHYSICAL ENVIRONMENT

West Virginia is not a major producing state for agricultural products. It ranks forty-fifth among states in the value of agricultural goods produced.\(^11\) In 1975, the value of agricultural goods produced was 3\% of all the goods produced in the state. From 1940 to 1974, agricultural acreage in West Virginia decreased from some nine million acres to three and a half million acres.\(^13\) Significantly, the proportion of food consumption produced in the state has also declined in the same period. During the 1930's, roughly 90\% of our food was produced in the state. In 1979 we imported about 55\% of our food needs.\(^14\)

These statistics reflect the fact that much of our land is unsuited for agriculture. Not quite 15\% of the land is Class I, II or III.\(^15\) Only 0.4\% is Class I.\(^16\) Fully 68\% of the land has a slope greater than 25\%.\(^17\) In sum, only 22\% of our land is suitable for cultivation as cropland using the best conservation practices.\(^18\) Another 15\% is suitable for pasture.\(^19\)

A recent study showed that 14.5\% of the land in West Virginia is now being farmed.\(^20\) The immediacy of the problem is evident

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10 Supra note 2, at 47.
12 Id.
13 Id.
14 Id.
17 Id.
19 Id.
from the fact that 19.4% of the farmlands in a fifteen county survey were lost in one five year period, from 1969 to 1974.21 The recent National Agricultural Lands Study estimated that West Virginia would lose 73% of its farmland by the year 2000.22

Accompanying the loss of farmland has been a dramatic rise in the price of farm real estate. During the decade of the 70's, farm real estate value per acre increased by 264%.23 About two-thirds of the state's population is rural or non-metropolitan. This segment has grown by 15.5% from 1970-80, while metropolitan growth was 2.8% for the same period.24 Rising prices and increasing population increase the pressure on farmers to sell to developers.

IV. West Virginia: The Legal Environment

Taxes.

West Virginia has had differential assessment for many years—a preferred place for agricultural assessment was constitutionally mandated in 1932. Article X, § 1, of the West Virginia Constitution, also known as the Tax Limitation Amendment, contains several references to agriculture. It provides that personal property employed exclusively in agriculture, and the products of agriculture while owned by the producer, shall be taxed at a rate not to exceed 50¢ per $100. Taxation on farmland, whether occupied by the owner or a tenant, shall not exceed $1 per $100.25 These exceptions are specified even though the Amendment calls for equal and uniform taxation.26

Agri-business is also exempt from the Business and Occupation Tax.27 This exemption has been construed to extend to producers but not processors.28 In 1981, the Legislature amended the inheritance tax law to provide that the value of farmland estates

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21 VII Appalachian Land Ownership Study 44 (Advance Draft 1980).
23 Supra note 5, at 444.
25 Current rates in Monongalia County, West Virginia, are 14.3¢ per $100 on Class I property. The Dominion Post, Morgantown, W. Va., Aug. 20, 1981, at 4-B, col. 3.
shall be the use value as a farm regardless of the market value for development purposes.29

The intent of these tax breaks for agriculture is to encourage farming, but the empirical evidence suggests that such preferential tax policies do not prevent loss of farmland and may be actually counter-productive, by encouraging speculators to buy and hold farmland.30

State.

In the Regional Planning and Development Law31 the Legislature delegated to the Governor the responsibility for state planning and development. The Governor's office has issued a document on land use planning which calls for state programs and investment policies to recognize the problem of farmland retention and minimize the adverse impact of state fostered growth on the agricultural base.32 One study of state land ownership patterns has expressed the view that there is little chance of this plan being implemented.33

The function of the Regional Planning Councils is beyond the scope of this note. However, it should be noted that they can have an influence on decisions affecting the location of public works and industrial and residential development.34

Under the West Virginia Surface Coal Mining and Reclamation Act,35 prime farmlands36 shall be located on a soil survey which must accompany the permit application.37 The soil is to be replaced and reconstructed to standards set by the United States Soil Conservation Service.38

Counties.

The power of counties is potentially vast, but dependent on

\[30\] Supra note 7.
\[32\] Governor's Office of Economic and Community Development, Proposed State Land Use Summary (March 1980).
\[33\] Supra note 21.
\[35\] W. Va. Code § 20-6-1 to 42 (1981 Replacement Vol.).
\[36\] W. Va. Code § 20-6-3(s) (1981 Replacement Vol.).
enabling legislation. Article IX, § 11 of the West Virginia Constitution provides that county "commissions may exercise such other powers, and perform such other duties, not of a judicial nature, as may be prescribed by law."

Counties, as well as municipalities, have the power to adopt building codes and permit systems in order to comply with the National Flood Insurance Act of 1968. The eligibility criteria under the Act are intended to restrict the development of land which is exposed to flood damage and to guide the development of proposed construction away from locations which are threatened by flood hazards. This may have the effect of protecting bottomland farms in West Virginia where implemented.

The County Development Authorities, which have been effective in fostering industrial growth, are also authorized by statute to promote and advance agricultural development. In order to accomplish this and other purposes they have the power to enter into contracts, to purchase or otherwise acquire real estate, to borrow and spend, to issue revenue bonds, and to do any and all things necessary or convenient for the advancement of the economic welfare of the county. Real estate may be conveyed to the Development Authority by the county commission without consideration. In addition, the county commission may levy taxes for the use of the Development Authority.

The Housing Development Fund may not use its powers of eminent domain to acquire land which is being used in the production of agricultural products.

Counties have broad planning and zoning powers under the Urban and Rural Planning and Zoning Law. The object of this law is to encourage planning by local government for future development, including a recognition of the needs of agriculture

31 W. VA. CODE § 7-1-2 (1976 Replacement Vol.).
32 W. VA. CODE § 7-12-2 (1976 Replacement Vol.).
33 W. VA. CODE § 7-12-7 (1976 Replacement Vol.).
34 42 U.S.C. § 4102(c)(1, 2).
35 W. VA. CODE § 7-12-11 (1976 Replacement Vol.).
36 51 Op. ATT'Y GEN. 759 (1966). Note that under this broad grant of power, an Authority could assemble blocks of agricultural land and purchase the development rights to the land. In a legal sense, this is no different from the assembling and purchase of a block of land for an industrial park.
41 W. VA. CODE §§ 8-24-1 et seq. (1976 Replacement Vol.).
as future growth occurs. Generally, the procedure established by this statute is as follows: the county commission may create a planning commission which will develop a comprehensive plan and a proposed zoning ordinance which may be amended, rejected or enacted by the county commission. Also provided are public hearings and the right to petition for a referendum on the zoning ordinance enacted by the commission.

The comprehensive plan may apply only to a part of a county, if it is an effective region for planning purposes. The plan may recommend a land classification system which shows the general location of agricultural areas. One of the purposes of such a plan is to promote the efficient and economic utilization, conservation and production of the supply of food. The plan may include maps showing the present use of the land by agriculture and the needs for the conservation of soil and agricultural resources.

The zoning powers granted to a county include the ability to restrict the location of industry, to classify and designate rural lands among agricultural and other uses, and to divide the county into districts in order to carry out the purposes of the law. In establishing districts the county commission must give reasonable regard to the most desirable use for which the land in each district may be adapted.

The power to restrict land use through zoning ordinances is substantially limited by a section of the Act entitled “Existing Uses Safeguarded”. In spite of the title, this section protects not only existing uses but also provides that no prohibition against alteration or addition shall apply to:

the use of land presently owned by any farm, industry or manufacturer but not used for agricultural, industrial or manufacturing purposes, or to the use or acquisition of additional land which may be required for the protection, continuing development or expansion of any agricultural, industrial or manufacturing operation or any present or future satellite agricultural, industrial or manufacturing use.

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47 W. VA. CODE § 8-24-1 (1976 Replacement Vol.).
48 W. VA. CODE § 8-24-16(3) (1976 Replacement Vol.).
49 W. VA. CODE § 8-24-17 (1976 Replacement Vol.).
50 W. VA. CODE § 8-24-39 (1976 Replacement Vol.).
51 W. VA. CODE § 8-24-41 (1976 Replacement Vol.).
52 W. VA. CODE § 8-24-50 (1976 Replacement Vol.).
52a W. VA. CODE § 8-24-41 (1976 Replacement Vol.).
53a W. VA. CODE § 8-24-41 (1976 Replacement Vol.).
54 W. VA. CODE § 8-24-16(3) (1976 Replacement Vol.).
55 W. VA. CODE § 8-24-50 (1976 Replacement Vol.).
Id.
The zoning authority may provide for higher standards than required by any other statute, ordinance or rule, and such higher standards will prevail.53

As of 1974, 6 counties had adopted zoning, 7 had adopted subdivision controls, 39 had comprehensive plans, and 30 had active planning commissions.54

An example of local action.

Jefferson County, West Virginia, has a substantial agricultural industry and is experiencing intense development pressure. Zoning has failed to pass every special election on the subject,55 in spite of the loss of 1600 acres of farmland per year to development.56 The population has increased 41% in ten years.

As a result of the concern of some farmers, however, 5300 acres are not voluntarily restricted from development, and another 8000 acres are pending review by the county commission. The farmers have not received any money for agreeing to restrict the development of their land for five years. The agreement entered into with the county commission provides, in part, as follows:57

We the landowners of the subject property described below, agree with the County Commission of Jefferson County to maintain the subject property in agricultural use beginning on the date this Agreement is recorded among the land records of Jefferson County, West Virginia, and continuing thereafter for a period of five (5) years. This Agreement shall preclude the subdivision and development of land for residential, commercial or industrial purposes and structures other than those directly related to farming, and the construction of buildings or structures on the subject property other than farm buildings or structures.

This Agreement shall be binding upon the parties, their heirs, successors and assigns, and shall constitute an encumbrance on the land. . . . The County Commission agrees to provide direct and indirect support to agriculture on the subject property. The County Commission agrees to refrain from the adoption of any nuisance laws or to take any action that would

53 W. VA. CODE § 8-24-70 (1976 Replacement Vol.).
56 Supra note 11. Following statistics are from the same source.
57 Id.
impede normal agricultural activity on the subject property. The County Commission agrees to consider the purchase of development right easements on the subject property if and when funds become available for this purpose through a Federal, State or County agricultural land preservation program.

This Agreement was perceived by the parties as buying time until a farmland preservation program could be implemented under state legislation.55

By the Agreement the county commission agreed not to adopt any nuisance laws. The county commission has the power to declare that the violation of any zoning ordinance shall be a common nuisance.56 In effect, then, the county commission has agreed not to adopt any zoning ordinance which regulates farming activities. This amounts to zoning by contract.

In an Illinois case,60 the Appellate Court of Illinois was confronted with a zoning ordinance which was passed by a city council only on the condition that the landowner execute a restrictive covenant. Three lots were re-zoned from residential to local business. In return, the landowner covenanted that 26 specified uses, otherwise allowed in a local business zone, would not be allowed on his lots. The court held that this was contract zoning and was therefore void. The court’s rationale included the rule that actual zoning requirements cannot be determined by agreements extrinsic to the zoning ordinances.

A recent West Virginia case is based on the same requirement that the zoning power must be exercised through the use of ordinances as prescribed by statute. In Singer v. Davenport,61 the court struck down the refusal of the Jefferson County Planning Commission to record a sub-division plat. The court held that the statute gave the planning commission power to regulate the sub-division of property, but not the power to prohibit sub-division on unzoned land. Justice Neely, writing for the court, warned against attempts to enforce zoning under the guise of sub-division regulation. This ruling by the court is grounded on the proposition that zoning can only be accomplished by adherence to the procedures in the enabling statute, that is, by ordinance.62 Under

55 Id.
58 Supra note 55.
this analysis, the Agreement may be an attempt to zone an agricultural district, albeit with the consent of the landowners, without enacting any ordinance. Thus, the Agreement with the farmers would be an ultra vires and void act.

In addition, the agreement to purchase development rights whenever the funds become available violates the statutory prohibition against incurring obligations beyond the current fiscal year.

Thus, this well-intentioned attempt of the Jefferson County Commission to preserve some of the valuable farmland of the county runs afoul of the severe limits on county powers. The Agreement is in apparent violation of statute and case law. The experience in Jefferson County demonstrates that there was a clear need for the enabling Act passed by the West Virginia Legislature.

V. THE FARMLAND PRESERVATION ACT

The Farmland Preservation Act is a grant of legislative authority to counties, empowering them to develop preservation programs at their option. The county commission may appoint a farmland advisory committee, which can propose a farmland preservation program for adoption, in turn, by the county commission. Any program adopted must be consistent with any existing county comprehensive plan.

A basic element of the Act is that participation by farm owners must be voluntary. The advisory committee may negotiate with and compensate eligible property owners. Eligibility is determined by uniform standards which the advisory committee promulgates.

The Act provides for two methods of farmland preservation.

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63 Such de facto zoning may, however, lead to increased development pressure on other lands without the consent of these other landowners. By comparison, all affected landowners would be able to participate in conventional zoning procedures.
69 Supra note 67.
But, importantly, the county commissions are not limited to the methods specified. This provision will allow local governments to experiment and adjust program details to local needs and political realities. The two methods specified are: 1) purchase of a "deed restriction", and 2) purchase of the land followed by lease or resale with a restriction to agricultural use.

Finally, the county commissions are authorized to use any funds, not specifically limited to other uses, to pay for a preservation program.

The balance of this note will consider the constitutionality of this Act, and the nature of the deed restrictions.

VI. CONSTITUTIONAL ISSUES

The Police Power.

The Legislature may delegate its police power to counties and municipalities. In granting such authority, however, the Legislature may not act arbitrarily or unreasonably. Yet the scope of the police power is broad. In a case in which the regulation of "junk yards" was upheld, the court had reason to speak on the extent of the police power:

[T]he police power is an inherent attribute of sovereignty, existing independently of a constitutional grant thereof. In general terms it may be said that it is as broad and comprehensive as the demands of society for its exercise. It is not static, but is capable of evolving within constitutional limits to meet the demands or needs of an increasingly dense population and an increasingly complex society. Its scope is not to be determined on the basis of precedent alone, for there may be no precise precedent for the needs or demands of a given time; but such needs or demands also may furnish a measure of its scope.

The exercise of the police power is not unlimited, however. Thus, while zoning is recognized as a proper exercise of the police power, a zoning ordinance may not, under the guise of the police

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70 Supra note 68.
71 Id.
power, impose arbitrary or unreasonable restrictions upon the use of private property or the pursuit of useful activities.\textsuperscript{77} To be a valid exercise of the police power an ordinance must bear a substantial relation to the health, safety, morals and general welfare of the people.\textsuperscript{78} Or, in other words, a court will not strike down an ordinance which substantially advances a legitimate legislative goal.\textsuperscript{79}

To determine whether the application of a zoning ordinance is arbitrary or unreasonable, the court has adopted the "fairly debatable" rule.\textsuperscript{80} This rule recognizes that zoning authorities are legislative bodies;\textsuperscript{81} and, if the decision of the zoning authority is fairly debatable, the court will not interfere.\textsuperscript{82} A zoning ordinance which restricts the use of property in designated districts and excludes certain business or commercial enterprises is valid if it stands up under the foregoing tests.\textsuperscript{83}

In addition, a zoning ordinance may not be discriminatory. That is, one property owner may not be treated differently than other property owners.\textsuperscript{84} However, the fact that a zoning ordinance lessens the value of property to some extent and limits the use of property does not show that there has been unreasonable discrimination.\textsuperscript{85} Every zoning ordinance limits the rights and privileges of some individuals.\textsuperscript{86}

Thus, any farmland preservation program to be valid, must advance the public welfare without being discriminatory.

In the case of \textit{Lingamfelter v. Brown},\textsuperscript{87} an act taxing commercial apples at 1\textsuperscript{c} per bushel was declared an unconstitutional taxing for a private purpose.\textsuperscript{88} The purpose of the tax was to pro-

\textsuperscript{77} Id.
\textsuperscript{78} Anderson v. City of Wheeling, 150 W. Va. 689, 149 S.E.2d 243 (1966); Carter, \textit{supra} note 76.
\textsuperscript{79} Stonewood, \textit{supra} note 74.
\textsuperscript{80} Anderson, \textit{supra} note 78. G-M Realty, Inc. v. City of Wheeling, 146 W. Va. 360, 120 S.E.2d 249 (1961); Carter, \textit{supra} note 78.
\textsuperscript{81} G-M Realty, \textit{supra} note 80; Carter, \textit{supra} note 76.
\textsuperscript{82} Anderson, \textit{supra} note 78.
\textsuperscript{83} State ex rel. Cobun v. Town of Star City, 157 W. Va. 86, 197 S.E.2d 102 (1973); Carter, \textit{supra} note 76.
\textsuperscript{84} Anderson, \textit{supra} note 78.
\textsuperscript{85} G-M Realty, \textit{supra} note 80.
\textsuperscript{86} Id.
\textsuperscript{87} 132 W. Va. 566, 52 S.E.2d 687 (1949).
\textsuperscript{88} There is no express provision in the Constitution to this effect, but the
mote the apple growing industry. The court found that the business of growing apples was not large enough in monetary terms to partake of the public interest. Apple growing, said the court, could not be characterized as one of the principal agricultural enterprises of the state. Presumably, then, a similar act intended to benefit the agricultural industry in general would be valid.

More recently, our court has declared in strong language that the preservation of land for agriculture is a legitimate state goal. In the case of *Stephens v. Raleigh County Board of Education*, the court construed the repurchase privilege found in Chapter 18 of the West Virginia Code. The Code provides that if a school board determines that land is no longer needed for school purposes, then, "in rural communities the grantor of the lands, his heirs or assigns shall have the right to purchase . . . the land . . . at the same price for which it was originally sold."

Justice McGraw, writing for the court, held that "[t]he repurchase privilege was designed to protect the interests associated with rural estates; that is, the preservation of 'home places' and operative agricultural units." Therefore, if the community was no longer rural there would be no repurchase privilege, since the statute was not intended to preserve the windfall profits which might accrue for future generations. Justice McGraw then addressed the constitutionality of a statute favoring agriculture as follows:

We cannot say that the classification of 'rural community' embodied in the statute is an unreasonable one. It has always been the policy of the State of West Virginia to encourage rural and agricultural endeavors, and, indeed, this policy is a desirable one. The classification upon which the legislature has premised the privilege involved here is a natural one, recognized throughout the history and jurisprudence of our State and Nation. Despite recent trends of urbanization and industrialization, the tilling of the earth remains the highest and best use to which land can be put. It is impossible to conceive of a more fundamentally important endeavor than the cultivation and harvest of food for the maintenance of the race.

Considering this policy favoring agricultural pursuits, and

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257 S.E.2d 175 (W. Va. 1979).
99a 257 S.E.2d at 179.
the relation of this statute to that purpose . . . we cannot say that the Legislature has acted in an inviduous fashion. The preservation of land fit for agriculture-related uses is a legitimate state goal. . . . The means chosen by the Legislature appears reasonably calculated to preserve the rural character of non-urban communities and thereby accomplish this proclaimed legislative purpose. That is all the Constitution requires.91

The West Virginia Supreme Court of Appeals has also recognized the need for and validity of restrictions on the use of property in rural areas.92

Therefore, preserving agricultural land is clearly a legitimate state action for the public welfare.

The Taking Issue.

Landowners participating in a preservation program would be prevented from developing their land. The enabling Act allows for programs which compensate the landowner for his lost development rights. Furthermore, the Act requires voluntary participation by the farmers involved. These requirements designed in part to avoid the "taking" issue. The United States Supreme Court has recently addressed the issue of whether development rights are property which can be taken.93

The case of Penn Central Transportation Co. v. New York City, involved New York City's Landmarks Preservation Law.94 The issue to be decided was whether the restrictions on exploitation of the affected property amounted to a "taking" within the meaning of the fifth and fourteenth amendments.95

The Court recognized that interference with distinct, investment-backed expectations was a relevant consideration. However, such expectations are not "property" unless they are reasonable.96 Furthermore, a mere reduction in property value, standing alone, is not a "taking".97 Regulations may even prohibit

91 Id. at 180-81 (citations omitted).
92 G-M Realty, supra note 80, 120 S.E.2d at 253.
93 For a West Virginia case holding that regulations limiting the use of property are not a "taking", see Farley, supra note 75.
95 Id. at 122.
96 Id. at 124-25.
97 Id. at 131.
the most beneficial use of the property without being a "taking". The focus is on the uses which the regulations permit.93

The Court specifically held that, "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable".97 The court also rejected the argument that restrictions which impose a "servitude" on the land must be "takings".100

Importantly, the Court refused to limit their inquiry to the question of whether the development rights themselves had been "taken".

'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated .... this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole .... 101

The Court also found that, although Penn Central was burdened by the restrictions, it was also benefited by the improvement of the quality of life in the City as a whole. The fact that they may have been burdened more than they were benefitted did not show a "taking".102

Significantly, the Court pointed out that the regulations did not interfere in any way with the present uses of the property. By continuing their present use of the land, Penn Central could obtain a reasonable return on their investment. Therefore, the court held that the regulations did not disturb Penn Central's "primary expectation" concerning the use of its land.103

Since the Court did not find that "taking" had occurred, they did not reach the issue of whether transferable development rights constituted "just compensation." However, the Court stated that whatever value the rights had would mitigate the burden imposed

93 Id. at 125, 131.
97 Id. at 130.
100 Id. n.27.
101 Id. at 130.
102 Id. at 134-35. Cf. Stonewood, supra note 74.
103 Id. at 136.
by the restrictions and was relevant in determining whether a “taking” had occurred.\textsuperscript{104}

All of the reasoning supporting the Court’s ruling in this case is equally applicable to the restriction of the development rights of farmland owners. Thus, even a mandatory preservation program would not be a “taking.”

VII. THE NATURE OF DEVELOPMENT RIGHTS

The enabling Act provides two methods of preserving farmland:\textsuperscript{105}

(a) \textit{Purchase of deed restriction}.—With the consent of a property owner, the county commission may purchase and place on record a deed restriction prohibiting the use of specified property for any purpose other than agriculture and related activities for any period of time. . . .

(b) \textit{Land purchase and resale}.—The county commission may purchase any property which qualifies for agricultural preservation under terms established by an adopted farmland preservation program. Property so purchased may be leased by the county commission for agricultural purposes or may be restricted to agricultural uses and sold to a buyer who demonstrates the willingness and ability to farm the land.

It will be noted that the Act speaks in terms of “deed restrictions.” No reference is made to easements or covenants. This may be an attempt to avoid the common law rules relating to restrictions on the use of real property. Indeed, one commentator has suggested avoiding the use of the word “easement” in the hope of avoiding the legal baggage which accompanies it.\textsuperscript{106} However, it is unlikely that the courts will allow labelling to obscure the actual nature of the encumbrance, especially when real property is concerned.

Therefore, the following discussion assumes that “deed restrictions” are either easements or restrictive covenants. That is, when a deed restriction is purchased from a landowner, the landowner is either conveying his development rights to the county or covenanting not to exercise his rights. And when the county sells land with a restriction to agricultural use, the county is either

\textsuperscript{104} Id. at 122.
\textsuperscript{105} \textit{Supra} note 68.
\textsuperscript{106} \textit{Supra} note 4, at 398.
reserving the development rights from the conveyance or conveying land with a restrictive covenant.

**Easements, Covenants and Equitable Servitudes.**

An easement may be either appurtenant or in gross. An easement appurtenant is attached to land, that is, it is an "appropriate and useful adjunct to a tract of land." An easement in gross is a mere personal right or interest in the land of another. It is not appurtenant to any estate in land. The word easement is hereafter used to mean easement appurtenant. An easement is an incorporeal hereditament, which means that it is a type of real property. But even though an easement is an estate in land, it may not be created unless two other distinct estates exist: the dominant to which the rights granted by the easement belong, and the servient upon which the obligation created by the easements rests. Easements may also be divided into affirmative and negative. An affirmative easement imposes a duty to perform some act or maintain some condition, while a negative easement precludes acts which the landowner would otherwise be able to do.

A covenant is an agreement or promise, usually made in a conveyance or other instrument relating to real estate. In its broadest sense it means any contract. Unlike an easement, a covenant does not transfer an interest in land but is rather a contractual right. However, a restrictive covenant is an encumbrance on the land.

Since the Act contemplates the transfer of deed restrictions, the issue is raised whether development rights easements can be severed from the land. The mere novelty of a use or privilege

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118 Id. at 913. A negative restrictive easement in gross is not enforceable against subsequent purchasers. Infra, note 113 at 566.
110 Cottrell v. Nurnberger, 131 W. Va. 391, 47 S.E.2d 454, 457 (1948). If there is no dominant estate, any easement would be in gross, see supra note 108.
111 Bennett, supra note 109, at 563.
112 BLACK'S LAW DICTIONARY 327 (5th ed. 1979).
Cf. Fritts v. Gerukos, 273 N.C. 116, 159 S.E.2d 536 (1968) (restrictions imposed by statute or ordinance are not an encumbrance upon the land).
115 See Carmichael, Transferable Development Rights as a Basis for Land Use
will not prevent it from being considered an easement so long as the "aggregation of legal relations" represented by the use is definite in content and can be conceived of as a distinct entity. 116 The right to sub-divide and develop land is a privilege that can be severed from other rights of the landowner with little conceptual difficulty. Also, we are not concerned here with the creation of a new type of estate, rather the issue is what content is permissible within an old type, the easement.

Furthermore, if the deed restrictions are not easements then they must be negative covenants, since the enabling Act expresses the intent to restrict the use of the land. The distinction is somewhat blurred, however, since restrictive covenants can create easements. 117 That is, it is possible for a court to construe a covenant which imposes negative duties on the convenantor as being the grant of an easement. 118 Nonetheless, the possibilities raised by this principle are constrained by the rule in West Virginia that easements, as a species of real property, must be created by deed or will. 119

Apart from the question of whether development rights can be served from the land and granted as easements, there is the separate question of whether restrictive covenants are enforceable. Initially this problem could be formulated as an inquiry into the ability of covenants to run with the land at law. Fortunately, this technically complex area need not be explored. The issue is no longer important. The West Virginia Supreme Court of Appeals has stated more than once that the technical distinctions used to decide whether a covenant runs with the land at law are irrelevant to the real issue, which is the enforceability of the covenants as equitable servitudes. 120

The theory of equitable servitudes is that it would be unjust for a grantee to use land in a manner inconsistent with a contract entered into between his grantor and another, as long as he has

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116 RESTATEMENT OF PROPERTY § 450 comments k, l, and m (1944).
117 Bennett, supra note 109, at 563; Hennen v. Deveny, 71 W. Va. 629, 77 S.E. 142 (1913).
118 Supra note 114.
119 Bennett, supra note 109, at 563; W. VA. CODE § 36-1-1 (1966).
However, there are still a sufficient number of technical distinctions to be made in deciding whether a covenant imposes an equitable servitude. Primarily, the restrictions must benefit the land itself and not merely the covenantee personally. An example of a personal covenant which does not benefit the land and is not enforceable is a covenant in restraint of trade.

A covenant not to develop the land may also benefit the land. Importantly, these covenants will be obtained from all the landowners participating in the program. This is strongly analagous to the situation of restrictive covenants in the deeds of all the landowners in a planned sub-division. The modern rule is that each lot is not merely burdened but also benefited by the restrictions on other lots. The burdens and benefits are reciprocal. The sub-division forms a network of cross-easements or cross-servitudes which run with each lot. This analysis can be applied to a Farmland preservation program with little modification. The only important factual difference is that there is no common grantor in the case of the purchase of deed restrictions. This would be important in the case of covenants at law, as showing lack of privity of estate. This is not a requirement for an equitable servitude however. In a program of purchase and resale of the land with restrictions, the County would be the common grantor.

Thus, a court could find that the deed restrictions are an interest in land which is equitable in nature. Equitable relief serves the public purpose well. The county could enforce the covenants to prevent the destruction of or force the restoration of farmland.

The enabling Act states that the deed restrictions may be for any period of time. A grant of an easement could contain words of perpetuity without running amiss of the Rule Against Perpetuities, which does not apply to easements. If the grant were neither limited to a term nor stated to be in perpetuity, then the courts would likely imply a requirement that the duties imposed be carried out as long as it is still reasonable for the public good.

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121 Cole, supra note 120.
123 Cole, supra note 120.
124 Wallace, supra note 122, at 751.
125 Cole, supra note 120.
considering the character and relation of the parties.\textsuperscript{127} Covenants can be nullified by a change of conditions so radical that the object and purposes of the agreement are destroyed.\textsuperscript{128}

The Public Trust.

The only technical problem remaining is what estate of the county the covenants are intended to benefit. Or alternately, what is the dominant estate for which the easement exists? The public trust is an interest in land, vested in the state, to protect or promote the public good. West Virginia has acknowledged the public trust in navigable waters.\textsuperscript{129} The operation of the public trust doctrine has been described as follows:

Under certain circumstances, either because it is unique and irreplaceable or because it is of such special significance to the people that any use incompatible with the long term good of society becomes unconscionable, real property becomes vested with the public interest and subject to the public trust.\textsuperscript{130}

As was pointed out above, traditional theory requires the existence of a dominant estate before an easement can be granted. Recognition of the public trust as a dominant estate vested in the State would allow the creation of development rights easements while satisfying all the current rules of real property law.

VIII. CONCLUSION

Local government attempts to preserve farmland, such as that of Jefferson County, which are of doubtful legality, point to a need for the enabling legislation which the Farmland Preservation Act represents. However, counties already possess ample authority to zone agricultural districts.\textsuperscript{131} Yet, as Jefferson County again demonstrates, current political reality makes this power illusory. While County Development Authorities may have the ability to purchase development rights,\textsuperscript{132} their mission is perceived as

\textsuperscript{128} Morris, \textit{supra} note 120, at 847.
\textsuperscript{130} Yannacone, \textit{Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law}, 51 N. Dak. L. Rev. 615, 621 (1975).
\textsuperscript{131} \textit{Supra} notes 46 to 54, and accompanying text.
\textsuperscript{132} \textit{Supra} note 44.
fostering development, including the development of agricultural lands. Also, farmers occupy a special place in what has been called the "Politics of Rights." That is, there is a widespread belief that farmers have a right to be compensated for any restraint on the use of farmland. The enabling Act gives deference to these political and cultural values, at the same time making it easier and more expensive to preserve farmlands through local government action.

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133 S. Scheingold, The Politics of Rights (1974); McLaughrby, Farmers, Freedom and Feudalism: How to Avoid the Coming Serfdom, 21 S.D.L. Rev. 486 (1976). The purchase of development rights retains private property and avoids the excess use of the police power leading to social property.
