

Conservation of Private Lands: Opportunities and Challenges for the States

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Executive Summary

Private land conservation initiatives are a critical component of any state-level quality of life agenda. Although concerns over sprawl, including the loss of prime agricultural lands and significant green space, continue to be one of the underlying rallying cries in support of state-level smart growth initiatives, the fact remains that with few exceptions, conservation of privately-owned working lands has not received significant attention in smart growth literature or conferences. Yet, land conservation and growth management are inextricably intertwined and policy initiatives must work in concert to be effective. To date, a good amount of state attention has focused on the purchase of open space and farmland, an agenda that is costly both in terms of taxpayer dollars going toward purchase and in economic development, since the preserved land is often relegated to “pristine” or “non-working” status. Lack of strategic implementation of these programs has produced, in many cases, fragmentation of working lands, placing even greater pressure on remaining farms, ranches and forests. Governors have the opportunity to demonstrate their leadership and commitment to private land conservation by complementing smart growth initiatives at the state level to directly address the need for partnerships in the promotion of private land conservation.

Myriad tools and techniques are available to states to provide a menu of options and incentives for private landowners to ensure the continued viability of important agricultural lands (including farmlands and forestry lands), preservation of wetlands, protection of significant scenic vistas and open spaces, and the aesthetics of our nation’s countryside. These goals are also critical to an integrated approach for preservation’s key environmental concerns including water, soil and air quality as well as for the promotion of sustainable economic development in our sectors that are dependent upon the use of large tracts of land. While governors can and should assume a leadership role with respect to state-level initiatives, they must also work to forge important partnerships with: the federal government; local governments; and the non-profit sector. Successfully implemented, the strategies discussed in this paper can yield documented results in the area of private land conservation that are supported and lauded by all stakeholder interests.

Part I. Introduction

The growth of our nation's urban areas continues to alter the natural landscape¹ posing serious ecosystem threats and challenges to conservation initiatives. Excluding Alaska, nearly 75% of the land in the United States, or approximately 1.5 billion acres, is in private ownership.² According to the National Resource Inventory (NRI), in the five year period from 1992 to 1997, approximately 6.6 percent of farmland and forest land was converted to developed land, resulting in one and a half times more land lost to development than the previous ten year period from 1982-1992, and increasing the total acreage of developed land by more than 25 million acres or one third of the privately-held land area.³

Cognizant of the need to develop effective strategies for private land conservation, in 1999 the USDA sponsored five forums on private land conservation across the country. Common themes expressed at these programs support the voluntary nature of conservation programs, emphasize the need for financial incentives and collaborative approaches (among all levels of government and the public), and echo the demand for education, training and technical assistance.⁴ The challenge for states now is to develop a toolbox of incentives that encourage private landowners to conserve critical land resources while still achieving sustainable economic development.⁵

The "smart growth" movement, which gained popularity at the end of the last decade and continues to spur significant land use reform initiatives at the state level, has been focused primarily on urban revitalization, modernization of planning and zoning enabling statutes, and interjurisdictional cooperation in land use decision making. Although concerns over sprawl, including the loss of prime agricultural lands and significant green space, continue to be one of the underlying rallying cries in support of smart growth initiatives, the fact remains that with few exceptions, conservation of privately-owned working lands has not received significant attention in smart growth literature or conferences. Yet, land conservation and growth management are inextricably intertwined and policy initiatives must work in concert to be effective.⁶ To date, a good amount of state attention has focused on the purchase of open space and farmland, an agenda that is costly both in terms of taxpayer dollars going toward purchase and in economic development, since the preserved land is often relegated to "pristine" or "non-working" status. Lack of strategic implementation of these programs has produced, in many cases, fragmentation of working lands, placing even greater pressure on remaining farms, ranches and forests. Governors have the opportunity to demonstrate their leadership and commitment to private land conservation by complementing smart growth initiatives at the state level to directly address the need for partnerships in the promotion of private land conservation.

Private land conservation initiatives are a critical component of any state-level quality of life agenda.

¹James Boyd, Kathryn Caballero and R. David Simpson, "The Law and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions," 19 *Stan. Envtl. L. J.* 209 (2000), citing USDA Census of Agriculture statistics showing that urban land in the U.S. nearly quadrupled from 1945 to 1992, increasing from 15 million acres to nearly 59 million acres during that time.

²U.S. Dep't of Agriculture, Natural Resources Conservation Service, "National Resources Inventory: Highlights" at 1 (visited January 2001). See <http://www.nhq.nrcs.usda.gov/land/pubs/97highlights.html>.

³*Id.*

⁴USDA, *Conserving Private Land: America's Future*, National Summit on Private Land Conservation, A Summary (2000). See, www.nhq.nrcs.usda.gov/CCS/pastmtgs.html.

⁵Ian Bowles, David Downes, Dana Clark and Marianne Guerin-McManus, "Economic Incentives and Legal Tools for Private Sector Conservation," 8 *Duke Env. L. & Pol'y F* 209 (1998).

⁶Lawrence W. Libby, "Farmland Protection Policy: An Economic Perspective," Paper presented at Department of Economics seminar, Northern Illinois University (October 14, 1996), at <http://www.farmlandinfo.org/cae/we/wp97-1.html>.

Part II of this paper will explore myriad tools and techniques that can be employed to provide a menu of options and incentives for private landowners to ensure the continued viability of important agricultural lands (including farmlands and forestry lands), preservation of wetlands, protection of significant scenic vistas and open spaces, and the aesthetics of our nation's countryside. These goals are also critical to an integrated approach for preservation's key environmental concerns including water, soil and air quality as well as for the promotion of sustainable economic development in our sectors that are dependent upon the use of large tracts of land. While governors can and should assume a leadership role with respect to state-level initiatives, they must also work to forge important partnerships with the resources of the federal government as evidenced by the 1999 National Summit on Private Land Conservation. Part III of the paper focuses on the opportunities for state-federal partnerships. Recognizing the delicate relationships between state and local governments, Part IV focuses on effective strategies for engaging the support and cooperation of local government. Part V addresses effective partnerships with the non-profit sector to gather meaningful input into the design of state-specific programs, and strategies to engage these same groups as effective allies in public education and training, and in ensuring acceptance of private land conservation efforts. Part VI of the paper discusses briefly how the strategies outlined in this document are not in conflict with the generally accepted beliefs of the private property rights movement.

Part II. State Strategies for Private Land Conservation

With more than half of the states implementing new smart growth initiatives or coordinating active smart growth type task forces and/or commissions, it is imperative that private land conservation strategies be incorporated into these programs. Policies labeled as farmland and open space preservation and promoted by advocates who simply desire to "save the countryside," are not as effective as techniques to promote private conservation of working lands. Often, a drawback to some of the programs discussed below is that they may not require a landowner to implement conservation strategies, but simply provide incentives for keeping the land from being developed. States could include provisions in many of these programs that would require landowners to implement conservation programs as a condition of receiving benefits.

A. Non-Tax Incentives for Private Land Conservation

Ensuring the success of incentive programs may be largely dependent upon how the private landowners view the benefit(s) of their participation in the program(s). One author has suggested that the following considerations be kept in mind:

- Is the reward big enough to induce landowners to take a significant loss to themselves?
- In cases where a payment is at issue, is the dollar amount large enough, or will landowners choose to bargain for more either through public programs or in the private sector?
- Where possible, have regulatory barriers been removed, have regulations been streamlined, and is easily understandable information available?
- Is there flexibility in the implementation of the program(s) so that administrators can meet the differing needs of landowners?
- Do the incentive programs meet broad conservation needs?⁷

⁷Sarah Vickerman, National Stewardship Initiatives: Conservation Strategies for U.S. Land Owners," at <http://www.defenders.org/pubs/nsi04.html> (visited January 2001).

1. Conservation Easements

A conservation easement is a private land use restriction entered into voluntarily for the purpose(s) of preserving open space, important environmental resources, and significant historic, scenic, or architectural conditions.⁸ Currently forty-eight states and the District of Columbia authorize the use of conservation easements by statute.⁹ The public purposes underlying these statutes include protecting and preserving open space, farmland, historically or architecturally significant sites, natural habitats, endangered plants and wildlife, and certain recreational areas.¹⁰

The use of conservation easements is increasing across the United States. In the ten year period between 1988 and 1998, land trusts protected 378% more land with conservation easements to reach a total of 1.4 million acres.¹¹ The reasons for the increased popularity of easements are varied. Conservation easements often cost less for public agencies to purchase than fee simple interests in land. In addition, these easements are flexible and allow protection strategies to be crafted for the specific parcel of land. They are often attractive because the land remains in private ownership, allowing owners to protect the land and to continue to live on the land using it for farming, forestry and other activities. Landowners often prove to be better stewards than the government can be by virtue of the simple fact that they are present around the clock to monitor the success of conservation practices, whereas government officials would be managing the land from afar and on a sporadic basis. Furthermore, landowners may receive significant income and estate tax benefits by donating a fee simple or less than fee interest.

In addition to the state incentives, the federal government has recognized that a conservation

⁸Janet Diehl, et al., *The Conservation Easement Handbook* (10th Ed. 1998).

⁹See Ala. Code § 35-18-2 (2001); Alaska Stat. §§ 34.17.010 to 34.12.060 (Michie 2000); Ariz. Rev. Stat. Ann. §§ 33-271 to 33-276 (West 2000); Ark. Stat. Ann. §§ 15-20-401 to 15-20-410 (Michie 1999); Cal. Civ. Code §§ 815 to 816 (West 1982); Colo. Rev. Stat. §§ 38-30.5-101 to 38-30.5-110 (2000); Conn. Gen. Stat. Ann. §§ 47-42a to 47-42c (West 1995); Del. Code Ann. tit. 7 §§ 6901 to 6906 (1999); D.C. Code Ann. §§ 45-2601 to 45-2605 (1981); Fla. Stat. Ann. § 704.06 (West 2000); Ga. Code Ann. §§ 44-10-1 to 44-10-8 (2000); Haw. Rev. Stat. §§ 198-1 to 198-6 (2000); Idaho Code §§ 55-2101 to 55-2109 (2000); 765 Ill. Comp. Stat. 120/0.01 to 120/6 (West 1993); Ind. Code Ann. §§ 32-5-2.6-1 to 32-5-2.6-7 (West Supp. 2001); Iowa Code Ann. §§ 457A.1 to 457A.8 (West 1997); Kan. Stat. Ann. §§ 58-3810 to 58-3817 (1999); Ky. Rev. Stat. Ann. § 382.800 (Banks-Baldwin 2001); La. Rev. Stat. Ann. §§ 9:1271 to 9:1276 (West 1991); Mass. Gen. Laws Ann. ch. 184, §§ 31 to 34 (1991); Md. Code Ann., Real Property § 2-118 (2000); Me. Rev. Stat. Ann. tit. 33, §§ 476 to 480 (West 1998); Mich. Comp. Laws § 324.2140 to § 324.2144 (2000); Minn. Stat. Ann. §§ 84C.01 to 84C.05 (West 1995); Miss. Code Ann. §§ 89-19-1 to 89-19-15 (1999); Mo. Ann. Stat. §§ 67.870 to 67.910 (West 1998); Mont. Code Ann. §§ 76-6-201 to 76-6-211 (2001); Neb. Rev. Stat. §§ 76-2,111 to 76-2,117 (2000); Nev. Rev. Stat. §§ 111.390 to 111.440 (1999); N.C. Gen. Stat. §§ 121-34 to 121-42 (2000); N.H. Rev. Stat. Ann. § 477:45 (2000); N.J. Stat. Ann. 13:8B-1 to 13:8B-9 (1991); N.M. Stat. Ann. §§ 47-12-1 to 47-12-6 (Michie 2000); N.Y. Agric. & Mkts. Law §§ 300 to 309 (McKinney 1991), N.Y. Env'tl. Conserv. Law §§ 49-0301 to 49-0311 (McKinney 1997); Ohio Rev. Code Ann. §§ 5301.67 to 5301.70 (West 2000); Okla. Stat. Ann. tit. 60, §§ 49.1 to 49.8 (West Supp. 2000); Or. Rev. Stat. §§ 271.715 to 271.795 (1999); 32 Pa. Stat. Ann. §§ 5001 to 5008 (West 1997); R.I. Gen. Laws §§ 34-39-1 to 34-39-5 (1995); S.C. Code Ann. §§ 27-8-10 to 27-8-80 (Law Co-op. 2000); S.D. Codified Laws Ann. §§ 1-19B-56 to 1-19B-60 (Michie 2000); Tenn. Code Ann. §§ 66-9-301 to 66-9-309 (1999); Tex. Nat. Res. Code Ann. §§ 183.001 to 183.005 (West 1993); Utah Code Ann. §§ 57-18-1 to 57-18-7 (2000); Va. Code Ann. §§ 10.1-1009 to 10.1-1016 (Michie 2000); Vt. Stat. Ann. tit. 10 §§ 821 to 823 (2000); Wash. Rev. Code Ann. § 64.04.130 (West 1994); W. Va. Code §§ 20-12-1 to 20-12-8 (2000); Wis. Stat. Ann. § 700.40 (West Supp. 2000).

¹⁰Kemble Hagerman Garrett, "Conservation Easements: The Greening of America?" 73 Ky. L. J. 255 (1984).

¹¹Martha Nudel, "Conservation Easements Emerge as the Decade's Top Land Protection Tool, Exchange," Land Trust Alliance, Winter 1990, at 5.

easement can be considered a tax-deductible, charitable gift provided that the easement is perpetual and is donated “exclusively for conservation purposes” to a qualified conservation organization or public agency.¹² Conservation easements may prove to be an effective estate planning tool for those individuals who may have significant wealth in the value of real property, as the easement can have the effect of reducing the fair market value of the land.¹³

Proponents of property rights have supported the creation of private land trusts and the use of conservation easements.¹⁴ While conservation easements have more traditionally been used to promote conservation of farmland, states such as Massachusetts are beginning to use easements for forest lands. Massachusetts Environmental Affairs Secretary, Robert Durand, recognizing that 78% of the forest land in that state is in private ownership, has called for the state to focus on the purchase of conservation easements since the state could hardly afford to buy outright all the forest land that needs to be protected.¹⁵ In a unique three-way partnership between the State, a landowner and a non-profit organization to conserve a forest in private ownership, two Massachusetts state agencies and municipal and environmental groups agreed to pay 3.4 million dollars over several years to the buyer, a forest products company, in return for an agreement that the company would not develop the land and that it would harvest the land with “green” forestry methods.¹⁶

2. Transfer of Development Rights

Transfer of development rights programs (TDR) are authorized in 15 states and have been recently studied and recommended by task forces and study commissions in a half a dozen more states.¹⁷ Also referred to as marketable development rights and tradable development rights, in general, these state statutes authorize municipal governments to enact local laws implementing a TDR scheme whereby certain areas are designated as “sending districts” and other areas are identified as “receiving districts.” The area designated as the “sending district” usually contains significant tracts of open space, forested lands, agricultural lands and other environmentally sensitive lands. Private landowners in the sending districts may, if the market permits, voluntarily sell the allowable development rights on their property to a developer for use in a designated receiving district.

TDR programs, once facilitated by appropriate enabling and implementing legislation, can minimize costs to current residents in that the government is not purchasing the development rights, rather two private entities are involved in the transaction. Effective use of TDR programs, however, can be a challenge particularly since residents in the designated receiving districts may be unhappy with the authorized increase in density that may be transferred from the sending district. Furthermore, it is possible that TDRs will not always lead to the most socially desirable pattern of conservation especially since the programs tend to encourage owners of privately valuable land to purchase development rights from owners of less privately valuable land, and in situations where the most expensive/valuable private land is the land most desired for conservation incentives, the TDR market system may not work.¹⁸ Although “trading differentials” including a

¹²Janet Diehl et al., *The Conservation Easement Handbook*, 10th ed. at 8 (1988); IRC § 170(h)(2)(C); *see* IRC § 170(h)(4)(A).

¹³*Id.*; *see* IRC § 2031(c).

¹⁴Sam Staley, “The Vanishing Farmland Myth and the Smart-Growth Agenda,” Reason Public Policy Institute (Policy Brief no. 12) (2000).

¹⁵Richard Higgins, “Plotting to Stay Forever Green State Brokers Historic Pact to Keep 8,000 Acres of Private Land Forested,” *Boston Globe*, B1, 7/23/2000 at 2000 WL 3335802.

¹⁶*Id.*

¹⁷Arizona, Delaware, Indiana, Montana, Michigan, Ohio and Texas.

¹⁸Boyd, Caballero and Simpson, “The Law and Economics of Habitat Conservation: Lessons From an Analysis of Easement Acquisitions,” 19 *Stan. Env'tl. L.J.* 209 (2000).

price or ration to reflect property-specific characteristics of the lands have been suggested as a way to address this problem, this option is mired in administrative and subjective decision making that may be too difficult to overcome.¹⁹ The complexity of creating a new TDR market and the time needed to develop comfort in this system is still ongoing.

Case Study:

In 1981, Montgomery County, Maryland enacted a TDR ordinance to preserve agricultural lands under threat of conversion for residential and commercial uses. Under the program, rural areas were rezoned from one dwelling unit for every five acres to one unit per twenty-five acres.²⁰ Landowners in the downzoned areas received five transferable rights that could be used in the receiving areas to build one additional dwelling unit per twenty-five acres. The receiving areas were along the main transportation corridors to Washington, D.C. By 2000, of the approximately 91,000 acres targeted for preservation, over 38,000 acres had been preserved. One commentator concluded that the success of the program is based in part on the strength of the development pressure and a receiving area that is concentrated in nature. An additional factor in the program's success is the authorization of a TDR bank that helps create a market for the rights, increasing their value.²¹

3. Purchase of Development Rights

Nineteen states²² and some local governments currently use Purchase of Development Rights (PDR) programs to preserve significant agricultural lands. Through PDR programs, states provide funding for farmers to sell the development rights to their farmland, allowing for a one-time infusion of cash to the farmer to cover costs, expenses, retirement, or whatever else the landowner desires. The major difference between the TDR program and the PDR program is that in TDR the development rights are often being used to increase building density somewhere else in the municipality. In PDR schemes, the government is holding onto these development rights in a land bank, so the purchase cost is borne by government and not recouped financially (although this is one part of balancing sustainable environmental protection and economic development). PDR programs differ from conservation easements in a number of significant ways. Most important, however, is that a conservation easement is donated by the landowner in exchange for various tax benefits, whereas easements created by PDRs are accomplished with an up front cash payment by the

¹⁹Id.

²⁰See John B. Bredlin, *Transfer of Development Rights: Cases, Statutes, Examples, and a Model*, (2000 APA Nat'l Planning Conference), at <http://www.asu.edu/caed/proceedings00/BREDIN/bredin.htm>.

²¹Similarly, New Jersey has a statewide TDR Bank within the Department of Agriculture. The bank is authorized to purchase and sell development right. See *Agricultural Development and Farmland Preservation Act*, N. J. Rev. Stat. §§ 4:1C-1 to 4:1C-55 (1998).

²²Ariz. Rev. Stat. Ann. § 9-464.01 (1996), Ariz. Rev. Stat. Ann. § 11-935.01 (1990); Cal. Pub. Res. Code §§ 10200 to 10277 (1996), Cal. Pub. Res. Code §§ 31150 to 31156 (1996); Colo. Rev. Stat. Ann. Const. Art. 27 §§ 1 to 11 (West Supp. 2000), Colo. Rev. Stat. Ann. §§ 33-60-101 to 33-60-107 (West 1998); Conn. Gen. Stat. §§ 22-26aa to 22-26jj (1985), Conn. Gen. Stat. § 7-131q (1999); Del. Code Ann. tit. 3, §§ 901 to 930 (2000); Florida Stat. § 259.041(11)(b), § 259.101, § 259.105(9)(k) (1999); Ky. Rev. Stat. Ann. §§ 262.900 to 262.920 (Banks-Baldwin 2000); Mass. Gen. Laws ch. 132A, §§ 11A to 11D (1991), Mass. Gen. Laws ch. 184, §§ 31 to 34 (1991); Md. Code Ann., Agric. §§ 2-501 to 2-516 (2000), Md. Code Ann., State Fin. & Proc. § 5-408 (2000); Me. Rev. Stat. Ann. tit. 5, §§ 6200 to 6210 (West 1989); Mich. Comp. Laws §§ 324.36101 to 324.36117 (2000); Mont. Code Ann. §§ 2-15-3312 to 2-15-3322 (2000); N.C. Gen. Stat. §§ 106-735 to 106-744 (2000); N.H. Rev. Stat. Ann. §§ 432:18 to 432:31-a (2001); N.J. Rev. Stat. §§ 4:1C-1 to 4:1C-55 (1998); N.Y. Gen. Mun. Law § 247 (McKinney 1999); 1998 Ohio Laws File 237 (SB 223); 3 Pa. Cons. Stat. Ann. §§ 901 to 915 (West 1995), 3 Pa. Cons. Stat. Ann. §§ 1201 to 1208 (West 1995); R.I. Gen. Laws §§ 42-82-1 to 42-82-16 (1993); Utah Code Ann. tit. 11, ch. 38 (2000); Vt. Stat. Ann. tit. 6, §§ 31 to 33 (2000), Vt. Stat. Ann. tit. 10, §§ 6301 to 6309 (2000); Wash. Rev. Code Ann. §§ 84.34.010 to 84.34.922 (West 1991); W.Va. Code §§ 8-24-72 to 8-24-78 (1990).

government to the landowner.

In support of PDR programs, the advocates point out that while the program may be costly, it is still less expensive than a fee simple purchase of the land. Furthermore, since the program is voluntary, there are likely to be few challenges, if any, by property rights proponents.

Drawbacks to using PDR include the significant out-of-pocket cost to state and local governments for the purchase of these rights, as well as the questionable long-term benefit to farmers who may choose to sell their development rights during a short term fiscal crisis, reducing their land assets significantly and leaving a considerable future problem in the event of subsequent financial hardship. While most states require permanent easements for participation in the program, Maryland for example, has addressed the long term fiscal challenge for landowners by authorizing the purchase of less than permanent easements. In addition, while some municipalities have opted to dedicate a small portion of the real property transfer tax to support PDR programs, local governments remain desirous of state revenue programs to assist them with the fiscal challenges of a diminution of tax base. Despite some drawbacks, PDR programs remain popular with farmers, creating the need for states to prioritize those lands most suitable for the program. Creative funding mechanisms for PDRs and conservation easements are detailed state-by-state in a recent NGA report.²³

Case Studies:

King County, Washington

King County, Washington began a Farmland Preservation Program in 1979 after voter approval for a local PDR program. As of 2000, approximately 12,800 acres of land are permanently protected through PDRs. The land includes dairies, beef, horse and other animal operations, as well as nurseries, turf farms, and farms raising hay, silage, berries, row crops, flowers and Christmas trees. The program is voluntary, and owners who sell their development rights allow restrictive covenants to be placed on their land, limiting the property's use and development. The covenants restrict the property to agriculture and open space uses, limit the number of residences permitted, require that 95% of the property be kept open and available for cultivation, require a minimum lot size if the property is subdivided, and restrict activities that would impair the agricultural capability of the property.²⁴

Montgomery County, Maryland

Montgomery County, Maryland, began its PDR program in 1987, seven years after initiating a farmland preservation program utilizing other tools such as zoning, limits on rezoning after annexation, and TDR.²⁵ The County PDR program²⁶ is modeled after the state program,²⁷ which was established in 1979.²⁸ The program, while voluntary, requires that participants sell all their

²³State Investment Strategies to Save Open Space and Steer Development (1999).

²⁴King County, Washington, Farmland Preservation Program.

<http://splash.metrokc.gov/wlr/lands/farmpp.htm>.

²⁵See Edward Thompson, Jr., "Hybrid" Farmland Protection Programs: A New paradigm for Growth Management, 23 Wm. & Mary Envtl. L. and Pol'y Rev. 831 (1999) (discussing Montgomery County's PDR program and its relationship to other preservation tools).

²⁶See Montgomery County, Md. Code § 59-C-2.442 (1997).

²⁷See Md. Code Ann., Agric. §§ 2-501 to 2-515 (2000). Farms must be in an agricultural district to sell easements to the state.

²⁸See Thompson, *supra* note 28 at FN 58 (citing the 1998 Maryland Agricultural Land Preservation Foundation Annual Report at 37). The state program had protected 152,000 acres of farmland by 1998. *Id.*

development rights.²⁹ A formula is used to determine the price but, if farmers willingly reduce their price, it may increase their chance to sell in the competitive bidding system.³⁰ While a “perpetual conservation easement” is required, they may be extinguished after 25 years under limited circumstances.³¹ An additional feature allows farmers to create one building lot per child within the density requirement of 1 lot per 25 acres.³² The PDR program is funded by real estate transfer tax proceeds and from the county general fund.³³ By 1999, the County had preserved almost 50,000 acres of farmland through use of both PDR and TDR programs.³⁴

4. Incentives for Voluntary Management Agreements

States have developed a variety of programs to provide landowners with incentives to manage their land in a more environmentally-sensitive manner. For example, in 1995, the Minnesota Department of Agriculture began an Agricultural Best Management Practices Loan Program.³⁵ Under the program, the state lends money to local governments for the establishment of revolving loan accounts to provide farmers with low-interest loans that help cover the cost of preventing or reducing non-point source pollution.³⁶ As of March 2000, \$41 million have been allocated to fund 2,800 projects affecting approximately 700,000 acres of farmland.³⁷ Minnesota also provides financial assistance to private individuals through forest management programs, habitat improvement programs, recreational programs, and water programs.³⁸ The State also offers a wetland tax exemption to “provide a financial incentive to maintain wetlands in their natural state,³⁹ and a Rural Development Through Forestry” Program that provides “technical assistance and financial assistance to promote sustainable use of forest resources to increase economic benefits to rural resource owners and communities in Minnesota.”⁴⁰

Similarly, Virginia has a variety of conservation incentive programs⁴¹ including an Agricultural Best Management Practices Program to “encourage voluntary installation of agricultural best management practices,” and to improve water quality.⁴² This cost-share program is funded by a combination of state and

²⁹Id. at 841.

³⁰Id. at 841-2 (noting that the current price was between \$1,500 and \$4,500 per acre.

³¹Montgomery County, MD. Code § 59-C-2.442 (1997) See also Thompson, *supra* note 28 at FN 56 and accompanying text (discussing the limited circumstances for extinguishing the easement).

³²See also Thompson, *supra* note 28 at 56 and accompanying text (adding that the building lot location and size is also subject to county approval, following set criteria).

³³Id. at 842 (noting that funding sources have generated about \$18 million per year for the PDR program).

³⁴Id. at 843. The author further noted that, because the majority of landowners in the County’s Agricultural Reserve area have sold their development rights, they have a “vested interest in the new low-density status quo, rather than relaxing the zoning to permit sprawling subdivisions.” Id. at 844.

³⁵See MN Dep’t of Agriculture News Release, MDA Awards Fund for Low-Interest Loans to Farmers and Other Rural Landowners for Water Quality Projects (March 2, 2000), at <http://www.mda.state.mn.us/newsreleases>.

³⁶Id.

³⁷Id.

³⁸See Minn. Dep’t of Natural Resources, Financial Assistance Program Matrix, at http://www.dnr.state.mn.us/omb/financial_assistance/matrix.html. Many of these programs provide matching grants and technical assistance for eligible projects. Id.

³⁹See Minn. Dep’t of Natural Resources, Wetland Tax Exemption Program, at http://www.dnr.state.mn.us/omb/financial_assistance/wetland_tax.html.

⁴⁰See Minn. Dep’t of Natural Resources, at http://www.dnr.state.mn.us/omb/financial_assistance/rdtf.html.

⁴¹See Conservation Incentive Programs, Cost Share Matrix, at <http://www.dof.state.va.us/mgt/matrix.html>.

⁴²See Conservation Incentive Programs, Best Management Practices, at

federal monies with an individual cost-share limit of \$50,000.⁴³

B. Tax Incentives for Private Land Conservation

One of the effective incentives for farmers and other large landowners to keep their land as working conservation land is the availability of tax relief programs to enable them to balance the economics of farming while promoting open space preservation. Real property tax programs provide a host of incentives that relieve farmers of a portion of their tax burden. All states have at least one program designed to reduce the amount of money farmers are required to pay in local real property taxes.⁴⁴ One important type of agricultural tax program is known as “differential assessment.”⁴⁵ Differential assessment allows localities “to assess farmland at its agricultural use value, rather than its fair market value which is generally higher.”⁴⁶

A second type of agricultural tax program allows farmers to claim state income tax credits to offset their local property tax bills. Known as “circuit breaker” programs, they provide farmers with real property tax relief in excess of a certain percentage of their income. As of September 1998, New York, Michigan, and Wisconsin had enabling legislation providing for circuit breaker tax programs. In addition, Iowa offers a credit against school taxes on agricultural lands.

Differential assessment and circuit breaker programs have several benefits. In addition to helping farmers stay in business by lowering their real property tax liability, these programs address inequities in the property tax system⁴⁷ and protect farmers who want to continue farming from the financial pressures that force them to sell their land for development. While these programs provide ways for farmers to keep their lands working, they have drawbacks. An effective tool in providing real property tax relief, agricultural tax programs do not ensure long-term conservation of privately-owned farmland. Differential assessment programs often provide a subsidy to farmers who are keeping their land in agriculture pending development.⁴⁸

1. Agricultural Districts Programs

Beginning in 1971 with New York, fifteen other states⁴⁹ have created agricultural districts programs that provide tax incentives and other benefits for farmers who voluntarily agree to keep their land in agricultural use for a certain number of years. In the event a landowner decides to withdraw prematurely from the agricultural district, penalties are assessed reflecting a loss of some of the previous tax benefits that

<http://www.dof.state.va.us/mgt/mbmp1.htm>.

⁴³Id.

⁴⁴American Farmland Trust, “Differential Assessment and Circuit Breaker Tax Programs,” Fact Sheet at 1 (September 1998), at <http://www.farmlandinfo.org/fic/tas/tafs-dacb.html>.

⁴⁵Id. Differential assessment is also known as current use assessment and use value assessment.

⁴⁶According to a report of the American Farmland Trust, every state except Michigan has a differential assessment program.

⁴⁷Tax rates that are based on the value of agricultural land for residential or commercial use generally do not reflect the current use of the land or the farmer’s ability to pay.

⁴⁸American Farmland Trust, *supra* note 35.

⁴⁹Delaware, Del. Code Ann. tit. 3, §§ 901 to 930 (2000); Illinois, 505 Ill. Comp. Stat. § 5/1 to 5/20.3 (West 1993); Iowa, Iowa Code Ann. §§ 352.1 to 352.13 (West 2000); Kentucky, Ky. Rev. Stat. Ann. § 262.850 (Banks-Baldwin 2001); Maryland, Md. Code Ann., Agric. §§ 2-501 (2000); Massachusetts, Mass. Gen. L. ch. 40L, §§ 1 to 10 (1994); Minnesota, Minn. Stat. §§ 40A.01 to 40A.19 (West 1998), Minn. Stat. §§ 473H.01 to 473H.18 (West 1994); New Jersey, N.J. Rev. Stat. §§ 4:1C-1 to 4:1C-55 (1998); New York, N.Y. Agric. & Mkts. Law §§ 300 to 310 (McKinney 1991); North Carolina, N.C. Gen. Stat. §§ 106-735 to 106-744 (2000); Ohio, Ohio Rev. Code Ann. §§ 929.01 to 929.05 (West 2000); Pennsylvania, 3 Pa. Cons. Stat. §§ 901 to 915 (West 1995); Tennessee, Tenn. Code Ann. §§ 43-34-101 to 43-34-108 (2000); Utah, Utah Code Ann. §§ 17-41-301 to 17-41-307, §§ 17-41-401 to 17-41-406 (2000); Virginia, Va. Code Ann. §§ 15.2-4300 to 15.2-4314 (2000).

were received in anticipation of longer term participation. Incentives typically provided include: modified eminent domain rules to keep public facilities out of the district, protection from infrastructure advancement and costs, right to farm law protections, and requirements that other planning and zoning decision making afford consideration to the fact that an agricultural district exists in the area in question. According to 1999 estimates, New York has successfully attracted almost 8.5 million acres of farmland into its agriculture districts program.⁵⁰ The program provides an agricultural value assessment system for farmland in agricultural districts to reflect the land's value for farming, not its value for development.⁵¹ This assessment system, in effect, reduces farmers' property taxes allowing them to cut costs, keep their land in agriculture and preserve open space.⁵²

In general, agricultural districts programs work as a viable and cost-effective voluntary technique for ensuring the economic viability of working agricultural land. They are created in concert with local governments (counties) and the establishment of the district signals a strong commitment to the support and maintenance of an agricultural quality of life. They are relatively easy to administer and generally do not require significant expenditure of public funds.⁵³ Among the challenges to establishing effective agricultural districts is the need for a critical mass of land to constitute an agricultural district. This critical mass requirement is an important consideration because without it there may not be enough land to support necessary agri-businesses such as farm machinery, feed, supplies, marketing outlets, etc., all needed to ensure the viability of farming and to support a sustainable economic base for the community.⁵⁴

2. Farmers' School Tax Credit Program

Another effective tax relief program is designed to provide relief to the school tax portion of the local property tax. In 1996, the farmers' school tax credit was enacted in New York State,⁵⁵ allowing a credit against the farmer's personal income tax or corporation franchise tax, to reimburse some or all of the school district property taxes paid by farmers. Under the program, a tax credit may be taken by an "eligible farmer,"⁵⁶ who receives at least 2/3 of his or her excess federal gross income from farming.

To take advantage of the credit, the land must be "qualified agricultural property," and the amount of the credit equals 100% of school taxes paid where acreage does not exceed the base acreage amount, and 50% of the school taxes paid on acres in excess of the base acreage amount. Unused credits can either be refunded or carried over to future tax years.

⁵⁰Salkin, ed., *New York Zoning Law & Practice*, 4th Ed., Chap. 14 (2000). This figure includes the voluntary creation of 370 agricultural districts including more than 22,000 farms.

⁵¹Richard McGuire, *New York Agriculture and the Law*, 66 *New York State Bar Journal* 22, 23 (May/June, 1994). See also N.Y. Agri. & Markets Law § 304-a (McKinney 1991) (detailing the agricultural assessment value system for lands placed in agricultural districts).

⁵²Id.

⁵³Nelson Bills and Jeremiah P. Cosgrove, *Agricultural Districts: Lessons from New York 3*, Proceedings. The Performance of State Programs for Farmland Retention. A National Research Conference (September 10-11, 1998 Columbus, Ohio). See <http://www.farmlandinfo.org/fic/ft/ohio/bills.html>.

⁵⁴Ralph Grossi, "The Performance of State Programs for Farmland Retention: The Next Generation of State Policy," *American Farmland Trust* (1998), available at: <http://www.farmlandinfo.org/fic/ft/ohio/grossi.html>.

⁵⁵This tax credit program was enacted as part of the Farmer's Protection and Farm Preservation Act of 1996. See, NYS Department of Taxation and Finance, *Questions and Answers on New York State's Farmers' School Tax Credit*, Publication 51 (11/97).

⁵⁶An eligible farmer includes: a corporation subject to the corporate franchise tax, an individual, an estate or trust, or beneficiaries of an estate or trust, a partner or a shareholder of a New York S corporation that owns property used in agricultural production.

The New York Farmer's School Tax Credit program is neither a real property tax exemption nor part of the State's agricultural assessment program, and it is fully funded by the State. Because of this State funding, the credit program does not affect the revenue received by local school districts and, thereby, does not shift the school tax burden to the farmer's neighbors.

Iowa's Agricultural Land Credit Fund,⁵⁷ enacted in 1939, was the first state program to provide farmers with real property tax relief. Under the program, a farmer is entitled to a credit against school taxes on "agricultural lands" in which the levy for the general school fund exceeds a statutory amount of the land's assessed value.

3. Forestry Tax Programs

In an effort to promote long-term voluntary management and conservation of forest lands, governors have support various forest incentive and stewardship incentive programs.⁵⁸

For example, New York provides a partial property tax exemption to land owners who are committed to long-term management of lands for forestry and open space use.⁵⁹ Under 480-a, private forest land owners possessing at least 50 acres of land who are willing to commit to managing the forest land according to an approved forest management plan for a period of ten years are eligible to receive a property tax exemption of 80% of the assessed value of the land. Like many other tax incentive conservation programs, stewardship under the program is voluntary and permits the landowner to withdraw his or her land from the program. However, withdrawal could result in significant financial penalties.⁶⁰

Although forestry incentive programs provide economic incentives to landowners and allow conservation of privately-owned working lands, they place significant burdens on local governments. In addition to the lack of reimbursement to local governments and school districts that bear the cost of these programs, landowners often do not enroll because of concerns or pressures at the local level to not allow the partial tax exemption.⁶¹ States could address this issue through a reimbursement program, whole or partial, with local governments.

C. Estate Tax Exemptions

Estate tax issues may plague private landowners, particularly those in agriculture who may, for tax considerations, be forced to sell family-owned farms and forests or subdivide valuable land at the expense of conservation considerations.⁶² The American Farmland Trust and others have documented the difficulties presented by the often insurmountable financial hardships of inheriting property when the tax bill may be as high as 55% of the value of the land.⁶³ Governors must work with the federal government to go beyond the 1997 tax reform legislation, which did little more than increase the amount exempt from inheritance taxes

⁵⁷Iowa Code Ann. §§ 426.1 to 426.9 (West 1998).

⁵⁸Dana Clark and David Downes, "What Price Biodiversity? Economic Incentives and Biodiversity Conversion in the United States," 11 J. Envtl. Law & Litigation 46 (1996).

⁵⁹N.Y. Real Prop. Tax Law § 480-a (McKinney 2000).

⁶⁰The landowner is required to pay back the ten years of taxes saved plus a penalty based upon the percentage of tax savings.

⁶¹Andy Beers, Transcript of Presentations, The Government Law Center Symposium on Property Assessment and Conservation Easements 63, 65 (December 3, 1999).

⁶²Vickerman, *supra* note 9.

⁶³Id.

(which was not done specifically for the aforementioned conservation purpose).⁶⁴ There are a number of options that could be considered to provide incentives for private land conservation. For example, landowners could be granted an estate tax exemption as consideration for keeping the land as a working conservation land for a pre-determined number of years. In the alternative, an estate tax waiver could be offered until such time as the land is no longer used for viable conservation purposes, or until it is sold (regardless of the purpose for which the land is used by the new owner(s)). Another option would be to allow heirs to donate conservation easements and other land donations to tax-exempt land trusts and other conservation organizations for the receipt of tax credits to offset the estate tax burden.⁶⁵

The conservative Reason Public Policy Institute has called for repeal of the estate taxes on farmland, “which can prevent farming families from keeping their land after the death of a parent.”⁶⁶

D. Other Tax Reform Options

One study suggests that conservation may be achieved through the implementation of non-property tax subsidies or penalties equal to the difference in value between developed and undeveloped uses.⁶⁷ The major difference between the subsidy and the penalty being that subsidy costs are borne by the taxpayers as a whole while penalties or higher tax costs are borne by the private landowners.⁶⁸

The greatest drawback to many of the tax-based programs for conservation purposes is that the tax incentives cannot target specific properties for conservation, hence a pattern or patchwork of disconnected lands may emerge, which may not be the most efficient way to ensure long term, sustainable environmental and economic development. Furthermore, added administrative costs would be required to enable monitoring of the lands to ensure landowner compliance with the terms of the tax relief program.⁶⁹

E. Right-to-Farm Laws

All fifty states have state-level right-to-farm laws, and in many states, local governments have adopted their own programs.⁷⁰ Right to farm laws are designed to protect farmers and ranchers from nuisance lawsuits brought against them by neighbors and from anti-nuisance ordinances and unreasonable controls on farming operations.⁷¹ In addition to state zoning enabling statutes which include right to farm provisions, a “growing number of counties and municipalities are passing their own right to farm legislation to supplement the protection provided by the state.”⁷²

To qualify for benefits under the Right to Farm Laws, including protection from private nuisance claims,⁷³ many states require farms to meet minimum standards such as best management practices⁷⁴ or

⁶⁴Id.

⁶⁵Id.

⁶⁶Sam Staley, “The Vanishing Farmland Myth and the Smart-Growth Agenda,” Policy Brief no. 12 (2000).

⁶⁷Boyd, Caballero, and Simpson, “The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions,” 19 Stan. Envtl. L. J. 209 (2000).

⁶⁸Id.

⁶⁹Id.

⁷⁰Jean O. Melious, “Takings, Nuisance and ‘Socialism for Hoglots:’ Invalidation of a Right-to-Farm Law, 8 Land Use Law & Zoning Digest at 3 (August 1999).

⁷¹American Farmland Trust, “Right to Farm Laws,” Fact Sheet at 1 (September 1998). See <http://www.farmlandinfo.org/fic/tas/tafs-rtfl.html>. See also “The Farmland Protection Toolbox,” Fact Sheet at 3 (February 9, 1999). See <http://www.farmland.org>.

⁷²Id.

⁷³For example, in Iowa, farms meeting certain standards have an “absolute defense” to a private nuisance

“generally accepted agricultural and management practices.”⁷⁵ Depending upon how this language is implemented, regulations may require a manure management plan for livestock or soil and water conservation plans for crop land.⁷⁶ States not requiring such standards may require that the farming operation in question not have changed substantially within some time period, such as within one year from the date of the nuisance action.⁷⁷ In addition, states may require both minimum standards and that the operation was in place prior to the nonagricultural use.⁷⁸ States may also put outer limits on an operation by mandating that the operation cannot be the cause of conditions dangerous to health or life,⁷⁹ or undertaken in a negligent manner.

Because right to farm laws are intended to discourage neighbors from suing farmers, they aid farmers who use good management practices to prevail in private nuisance lawsuits.⁸⁰ They not only document the importance of farming within the state and locality, but also give non-farm rural residents notice of the generally accepted practices that are expected and considered reasonable in farming areas.⁸¹ Considered a benefit to farmers and ranchers, right to farm laws limit a neighbor’s ability to challenge local rules that governing farming practices which some may argue have an adverse affect on the surrounding community. Consequently, even if farmers are engaging in sound farming practices, “social pressures will arise if the community is not educated about what to expect from farms.”⁸²

F. Effective Private Land Conservation Programs Incorporate a Menu of Options

The following discussion highlights three other approaches offered by state task forces and/or governors.

1. Colorado’s Commission on Saving Open Spaces, Farms & Ranches

In May 2000, the Commission on Saving Open Spaces, Farms and Ranches was established by Governor Bill Owens to examine Colorado’s public and private land preservation efforts and identify the most efficient and effective strategies for protecting the state’s natural landscape. Although the Commission determined that the state’s preservation efforts are substantial, devoting significant public and private resources to the preservation of open space,⁸³ more needs to be done to promote a statewide conservation

claim. Iowa Code Ann. § 172D.3 (West 1999).

⁷⁴See e.g., Me. Rev. Stat. Ann., tit. 17 § 2805 (West Supp. 2000).

⁷⁵See e.g., Minn. Stat. § 561.19 (West 2000). The American Farmland Trust website lists twenty-four state utilizing generally accepted agricultural and management practices or the “equivalent” best management practices. See <http://www.farmland.org>. Alaska may have recently joined their ranks, see below.

⁷⁶See e.g., 2001 AK H.B. 82 (SN), 22nd Leg., First Session (introduced 1/19/01) (Ala. 2001), amending Section 1. AS 09.45.235(a) to read: “For purposes of this subsection, the time an agricultural facility began agricultural operations refers to the date on which any type of agricultural operation began on that site regardless of any subsequent expansion of the agricultural facility or adoption of new technology. An agricultural facility or an agricultural operation at an agricultural facility is not a private nuisance if the governing body of the local soil and water conservation district advises the commissioner in writing that the facility or operation is consistent with a farm conservation plan developed and implemented in cooperation with the district.”

⁷⁷See e.g., Tex. Code Ann. § 251.004(a) (1982).

⁷⁸See e.g., Nev. Rev. Stat. Ann. § 40.140 (2)(a) (Michie 1999).

⁷⁹See e.g., N.Y. Pub. Health Law § 1300-C (McKinney 1998).

⁸⁰Id.

⁸¹Id.

⁸²Sean F. Nolon and Cozata Solloway, “Preserving our Heritage: Tools to Cultivate Agricultural Preservation in New York State,” 17 Pace L. Rev. 591, 619 (1997).

⁸³In 1992, voters created Great Colorado Outdoors, a constitutionally chartered agency that invests lottery funds in open space, parks, wildlife and outdoor recreation. State funding has been allocated to conservation projects throughout the state and local governments have initiated various open space and smart growth programs in

effort. According to the Commission's Report, "state and local governments, conservation groups and private citizens [must] work together to preserve Colorado's natural heritage for present and future generations."⁸⁴ The Report recommends "not a complete overhaul of how Colorado approaches current land preservation efforts, but rather additional tools and resources to enhance and promote the current efforts."⁸⁵

The Commission's recommendations include:

- create incentives for farmers and ranchers who voluntarily sign management agreements to protect valuable wildlife, soil or water resources on their land;
- strengthen conservation tax credit programs,⁸⁶ e.g., Colorado's conservation easement tax credit;
- support the end of the federal estate tax on farms and ranches;
- Enhance local and state preservation efforts through cooperation and explore additional funding options at both the state and local levels.

While Colorado's recommendations are not inclusive of all the types of conservation preservation tools governors can use to promote private land conservation in their states, they provide examples of how state and local partnerships could work to further the goal of preserving our nation's natural resources.

2. Iowa's Commission on Urban Planning, Growth Management of Cities and Protection of Farmland

In 1997, The Commission on Urban Planning, Growth Management of Cities, and Protection of Farmland was created⁸⁷ to study issues relating to land use and planning, with attention, in part, to policy and trends affecting the status and preservation of Iowa farmland and natural areas. Of the 21 voting members of the Commission, seven subcommissions were appointed to consider specific issues, including: Farmland Preservation, Public Parks and Recreation/Natural and Historic Areas and Private Property Rights.⁸⁸ Each subcommission submitted reports responding to the issues presented by the Commission and the Commission, subsequently held ten public meetings.⁸⁹ In January of 1999, the Commission issued its final report highlighting its findings and recommendations.

The Commission encourages state agencies and local governments to strengthen existing programs and implement new programs promoting the conservation of farmland, including PDR and TDR programs, differential assessment of farmland, agricultural districts programs, right to farm laws, private land trusts, and conservation easements.⁹⁰

According to the Report, as long as farming remains a profitable use of land, the land will remain productive for agricultural use.⁹¹ In accomplishing land conservation goals, the Commission recommends that the following be considered:

their municipalities. See Colorado's Legacy to Its Children: A Report from the Governor's Commission on Saving Open Spaces, Farms & Ranches (December 2000), at http://www.state.co.us/issues/open_space8.pdf.

⁸⁴Id. at 5.

⁸⁵Id.

⁸⁶One suggestion would be to allow for the incremental increase of the value of the tax credit the longer the land is held or managed for conservation purposes. Id. at 10.

⁸⁷Commission on Urban Planning, Growth Management of Cities, and Protection of Farmland, Final Report (January 1999).

⁸⁸Id. at 6.

⁸⁹Id.

⁹⁰Id. at 8.

⁹¹Id.

- creation of a tax structure that encourages perpetuity of land for agricultural uses;
- creation of tax incentives that promote agricultural uses, including tax credits and planning assistance; and
- promotion of programs that serve to balance private land conservation with private property rights concerns.⁹²

3. Maryland's Rural Legacy Program

The Rural Legacy Program was enacted in 1997 and launched in 1998 as part of Maryland's Smart Growth initiative.⁹³ A goal of the program is to accelerate voluntary land conservation to protect land "at nearly the same pace as development."⁹⁴ The program provides state funding to preserve over 50,000 acres of agriculture and open space in strategic locations and in large, contiguous blocks.⁹⁵ Grants are awarded on a competitive basis to local governments and private trusts seeking to conserve areas identified as Rural Legacy areas, areas representing the state's "most valuable agricultural land, natural resources and cultural heritage."⁹⁶ Applications are reviewed by an Advisory Committee, which makes recommendations to a Board. The Board then makes final recommendations to the Governor and Board of Public Works. Funding may be used to create new initiatives or to complement existing land conservation programs such as the Agricultural Land Preservation Program. In Fiscal Year 2001, \$28 million has been approved covering over 12,000 acres. Since inception, the program has spent \$82 million to preserve almost 38,500 acres.⁹⁷

Part III. State-Federal Partnerships

A number of federal government agencies including the USDA, US Fish and Wildlife Service, and the EPA sponsor active private land conservation programs. Conservation advocates however, have called for better coordination among state, federal and private land managers, including coordination for a strategic conservation framework to ensure that even the small projects are contributing to the common or shared vision.⁹⁸ Many of these programs provide funding streams for conservation programs that could be consolidated into block grant programs for the states to administer allowing each state to effectively prioritize their conservation agenda and make more efficient use of available fiscal resources. In addition, technology could allow for enhanced technical assistance from the federal to state governments, as well as allowing for a data sharing cooperative for GIS programs that could identify and map significant information to enhance states' abilities to promote private land conservation initiatives in a more strategic fashion. The federal government is in a better position to monitor trends, develop uniform benchmarking criteria, and provide vehicles for dissemination of useful information to states. States need to partner with federal offices to advocate for congressional changes to the tax code, as well as increased conservation appropriations directed to the states for implementation of state and local private lands conservation programs.

⁹²Id.

⁹³See The Rural Legacy Program, Dep't of Natural Resources Web site, <http://www.dnr.state.md.us/rurallegacy.html> (noting that funding is provided through general obligation bonds and the Maryland Program Open Space funds).

⁹⁴Id.

⁹⁵See Id. See also Governor's Press Office, Governor Glendening Announces Creation of Three New Rural Legacy Areas, Expansions of Two Existing Areas (2000), at <http://www.gov.state.md.us/gov/press/2000/jun/html/rural.html>.

⁹⁶See The Rural Legacy Program, Dep't of Natural Resources Web site, <http://www.dnr.state.md.us/rurallegacy.html> (noting that funding is provided through general obligation bonds and the Maryland Program Open Space funds).

⁹⁷Id.

⁹⁸Vickerman, *supra* note 9.

Part IV. Effective Strategies for State-Local Partnerships

In the area of private land conservation, the state-local relationship can be based upon a variety of power-sharing and revenue-sharing scenarios, but states must take the lead in initiating and defining these relationships as local governments often lack the ability to initiate policy innovation of this type.⁹⁹ Many of the approaches described in Section II require a strong state-local partnership to achieve success. In general, so long as there are no unfunded mandates, there is little political resistance to the establishment of specific minimum private land conservation policies, standards and guidelines set by the state to be followed by local governments. Local governments welcome authorization for more flexible and innovative zoning tools and techniques, such as TDRs and incentive zoning¹⁰⁰ to better enable municipalities to balance land conservation and land development pressures, pre-emption of local land use control, however, remains a hot-button issue in most states. Even the property rights advocates have called upon state governments to move away from traditional Euclidean zoning, the long accepted method that essentially discourages flexible development.¹⁰¹

Technical assistance from the state to local governments is a critical component of empowering municipalities to partner with state-level conservation initiatives. The Governor's Center for Local Government in Pennsylvania and the Maryland smart growth initiative are leading examples. For example, the Maryland Planning Department provides a variety of models and guidelines aimed at managing growth.¹⁰² Available information covers topics such as smart growth, comprehensive plans, infrastructure needs, environmentally sensitive areas, and more.¹⁰³ A summary of the guidance is available on-line, and full publications are available at nominal cost upon request.¹⁰⁴ In addition, Maryland recently enacted a Smart Codes program to provide local jurisdictions with additional models and guidelines for infill development and compact mixed-use tools.¹⁰⁵ These codes are voluntary, and local governments may reject them or amend them, but local jurisdictions that "accept them without amendment will be eligible for priority funding for [other] initiatives."¹⁰⁶

Recognizing the importance of the state-local partnership, in 1996 Governor Mike Leavitt created the Utah Critical Lands Conservation Committee to find ways, among other things, to encourage local governments to identify and preserve a variety of critical lands including agricultural.¹⁰⁷ The Committee issued a white paper in 1997 that discusses the importance of agricultural preservation and recognizing that "the heart of the agricultural preservation issue [is] that the long term value of agricultural land is often greater

⁹⁹ Alvin D. Sokolow, *Farmland Protection Policy as a State-Local Arena*, Prepared for Panel on State-Local Relations Today: How Much Discretion for Local Managers and Policy Makers?, Annual Meeting of the American Society for Public Administration, Kansas City, MO (Jul7 23-23, 1994), at <http://www.farmlandinfo.org/fic/ft/ads/ads-farm.html>.

¹⁰⁰ Incentive zoning enabling acts authorize local governments to grant developers bonus density incentives in return for the provision of desired and identified community amenities.

¹⁰¹ Sam Staley, "The Vanishing Farmland Myth and the Smart-Growth Agenda," Reason Public Policy Institute (Policy Brief no. 12) (2000).

¹⁰² See *Models and Guidelines, Managing Maryland's Growth*, Maryland Department of Planning Web site at <http://www.mdp.state.md.us/planning/m&gmain.html>.

¹⁰³ *Id.*

¹⁰⁴ See *id.* (publications cost \$2.00).

¹⁰⁵ See *Smart Codes 2000 Report*, at <http://www.op.state.md.us/smartgrowth/smartcode/smartcode00.html>.

¹⁰⁶ Governor Parris N. Glendening, *State of the State 2000, Our First Steps Into Maryland's 21st Century*, at <http://www.gov.state.md.us/gov/speech/2000/html/sos00.html> at 3.

¹⁰⁷ See <http://www.governor.state.ut.us/planning/UCLCC.htm>.

than its immediate market value.”¹⁰⁸ In addition, Governor Thomas J. Ridge of Pennsylvania has issued important executive orders making sound land use planning the policy of the state and requiring state agencies to factor in reasonable measures to promote the preservation of farmland and open space.¹⁰⁹

Part V. Engaging the Non-Profit Sector As a Conservation Partner

1. Stewardship Councils

Based upon the stewardship council model, statewide conservation councils can be an effective tool for facilitating cooperative public-private non-profit partnerships.¹¹⁰ Vested not with any regulatory authority, but rather with the mission of addressing threshold issues that cross jurisdictional lines and various economic sectors, conservation councils can offer a leadership role for prominent public and private citizens with a vision for private land conservation.

Stewardship councils, created at either a statewide or regional level, address the need for coordination and leadership of individual conservation efforts.¹¹¹ A statewide council could be responsible for “natural-resource issues with an emphasis on facilitating cooperative, public/private partnerships for conservation that do not require new legislation,”¹¹² while regional councils could provide assistance and coordination to private landowners and resource agencies and serve as a liaison to the statewide council, helping to implement its recommendations.¹¹³

They could either be “publicly or privately organized and funded,” and “could be appointed by governors, authorized by state legislatures or established informally by resource agencies and private organizations.”¹¹⁴ Their membership could consist of members of the community with an interest and expertise in conservation and economics, who would be committed to developing and promoting a long-term plan to conserve the state’s natural resources.¹¹⁵

2. Information Clearinghouse

Incentive programs may fail simply because people are unaware of the programs that are available.¹¹⁶ The fact that no central registry exists for where and how to take advantage of many existing programs at the local, state and federal levels¹¹⁷ creates a opportunity for the non-profit sector. In addition, the non-profit sector can be a conduit for communication and education to their members about important new state

¹⁰⁸See <http://www.governor.state.ut.us/planning/CriticalLands/white.htm>.

¹⁰⁹See Ex. Order 1999-01, Land Use Planning (1999), at http://www.dced.state.pa.us/PA_Exec/DCED/government/exec-order.htm; Ex. Order 1997-6, Agricultural Land Preservation Policy, (October 14, 1997), at http://sites.state.pa.us/oa/Executive_Orders/1997-6.pdf (stressing the importance of prime agricultural land and directing agencies to mitigate and protect against its conversion).

¹¹⁰Vickerman, *supra* note 9.

¹¹¹Id.

¹¹²Id. “Statewide councils might focus on policy and tax reform issues,” create “guidelines under which regional councils might operate” and help to establish statewide priorities with respect to public and private conservation initiatives. Id.

¹¹³Id.

¹¹⁴Id.

¹¹⁵Id. A long-term conservation plan would include addressing issues such as: financing conservation, managing information, encouraging cooperation, integrating land-use planning activities, and generally streamlining government to produce better results at a lower cost, with the least amount of conflict. Id.

¹¹⁶Id.

¹¹⁷Id.

initiatives. Non-profits accomplish this through newsletters, magazines, conferences and other forums and outlets. This is a no-cost benefit of engaging their support. In addition, non-profits may be eager to apply for training and education grants from state and federal entities enabling them to do innovative grass-roots programming in a cost-effective manner.

Part VI. Private Land Conservation is Consistent with Property Rights

A critical component of the private land conservation dialogue is who should pay for what. Addressing the issue of why the public should pay in terms of government fiscal incentives to conserve privately, not publicly, owned lands is important and should be dealt with in public. There is no doubt that the mainstream economic and environmental literature supports the need for public fiscal incentives as a key to sustainable development. This is a leadership commitment that has been made publicly by most state governors. Yet, government cannot afford to pay the total cost of all land conservation initiatives. The Fifth Amendment of the United States Constitution states, "...nor shall government take private property for public use without just compensation." The clearest example of a "taking of property" is in situations where there is a physical invasion or occupation of the land.¹¹⁸ There may also be a taking of property where a government regulation "goes too far"¹¹⁹ in restricting or limiting the bundle of rights owned by the landowner.¹²⁰ When properly exercised, the police power of government to regulate for the health, safety and welfare of its citizens, can withstand Fifth Amendment challenge.

There is suspicion on the part of private landowners that in cases where government presents voluntary opportunities and/or incentive programs to enable private land conservation the acceptance of these incentives will imply a right of public access on private lands.¹²¹ This fear can be addressed through statutory or regulatory language. Property rights advocates tend to oppose government programs designed to fund open space initiatives, arguing that only a relatively small percentage of the land mass in the United States is developed.¹²² Private conservation programs are not about preserving open space for the sake of open space; rather, these initiatives are tailored to forge public-private partnerships that enable private landowners who use their land in responsible ways to benefit the citizens of the states and country to continue to do so where there are significant private costs that are not balanced by the significant public benefits. As Ralph Grossi, President of the American Farmland Trust, explained, "New programs need to capture the value of agricultural conservation to the whole of society, the values that aren't captured in the marketplace. The public needs to share the costs for wildlife, open space and other conservation benefits."¹²³

Although a discussion of what is and what is not a takings is important in the land conservation arena, where government sets forth a series of programs and incentives designed to encourage voluntary public-private partnerships for the purpose of achieving meaningful private land conservation, government cannot effect a regulatory taking where there is no requirement to participate. Many states have taken into account the concerns of private property rights advocates in crafting effective smart growth programs.¹²⁴

¹¹⁸Loretto v Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed.2d 868 (1982).

¹¹⁹Pennsylvania Coal v Mahon, 260 U.S. 393, 43 S. Ct. 58, 67 L. Ed 322 (1922).

¹²⁰Lucas v South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

¹²¹Vickerman, *supra* note 9.

¹²²Testimony of Dr. Samuel R. Staley, Director, Urban Futures Program, Reason Public Policy Institute, "Land Conservation Tax Issues," July 25 (2000) at 2000 WL 238318939. Dr. Staley argues that since only 5.4 percent of the land is developed, government should not be investing in preservation programs.

¹²³Statement made at the 1999 National Conservation Summit in Ames, Iowa, cited in Successful Farming (Jan.1, 2000) at 2000 WL 12038404.

¹²⁴For example, the Utah Quality Growth Commission included an ad hoc committee on "free market" that

These programs tout incentives, education, and voluntary compliance as key elements.

Part VII. Conclusion

States are making record policy and financial commitments to open space preservation initiatives. While this funding is important to achieve certain desired state and local goals, it is time to pause to consider whether and how any of the existing fiscal resources can be harnessed to support strategic private land conservation efforts. A combination of legislative authorization, regulatory reform, training and technical assistance offer an impressive array of options for private land conservation. In addition, conservation councils, task forces, and key alliances and partnerships between the public, private and non-profit sectors are critical to develop targeted and effective private land conservation programs.

considered: how to ensure that the rights of property owners are protected; how to implement a balance of free market and public sector planning solutions to growth management problems; how to encourage voluntary partnerships with the private sector; and what governmental actions affect the free market system and the measures that should be taken to minimize that effect.