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Evaluating Farmland Preservation through Suffolk County, New York's Purchase of Development Rights Program Comment

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Evaluating Farmland Preservation Through Suffolk County, New York's Purchase of Development Rights Program

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I. Introduction

Agricultural land is a vital national resource that is disappearing rapidly. It would be difficult to overstate the adverse impact this trend has on the physical, cultural, and economic landscape of America from the local to the national levels. Conse-

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quently, many states are attempting to protect farmland through various measures. Suffolk County, New York, is typical of many agriculturally productive counties on the fringe of large cities, which have lost farmland to development at a rapid rate. Suffolk County's response was to innovate America's first purchase of development rights (PDR) program to protect its dwindling farmland. While Suffolk's PDR program has been successful, success has come at a price that other counties may be unable or unwilling to pay.

This comment analyzes the purchase of development rights program employed by Suffolk County and the five Peconic Bay towns to protect their farmland. The effects of farmland loss are far reaching, and Part II discusses the importance of protecting farmland in general and for Suffolk County, in particular. In addition to explaining the legal framework on the state and local level for Suffolk County's PDR program, Part III details the substance and procedure of the program. Finally, Part IV evaluates Suffolk County's PDR program using a variety of factors, which critics and proponents have highlighted as characteristic of PDR programs in general. The conclusion of this analysis of Suffolk County's program is that PDR is an important mechanism for protecting farmland, but is best considered as a tool in a larger preservation regime.

II. Background

A. Disappearing Farmland

The abundance of food we encounter at the supermarket belies the serious threat to the future of agriculture from the rapid loss of farmland throughout the United States. According to an American Farmland Trust study, the United States loses approximately 1.5 million acres of farmland per year to development.¹ The same study revealed that New York suffers the loss of about

1. See *Farming on the Fringe*, DEVELOPMENTS, July 1993, at 11. The estimated number of acres lost per year varies. A calculation of the numbers from the USDA's 1997 Census of Agriculture reveals a lower, yet still significant, national rate of loss of about 844,000 acres per year. See U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Census of Agriculture Highlights of Agriculture: 1997 and 1992*, <http://www.nass.usda.gov/census/census97/highlights/usasum/us.txt> (last modified Jan. 28, 1999). By contrast, another commentator estimates the loss at 4.2 million acres per year, based on a drop from 1.1416 billion acres of farmland in 1945 to 945.5 million acres in 1992. See Luther Tweeten, Essay, *Food Scarcity and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237, 240 (1998).

100,000 acres per year.² Between 1950 and 1987, the number of farms in New York decreased 70% to 37,000, and the acreage decreased 47.5% to 8.5 million.³ The USDA's 1997 Census of Agriculture in New York indicates that these numbers have dipped further, finding 7.25 million acres in farmland and 18,426 full-time farms.⁴

Rapid urbanization is probably the greatest contributor to the conversion of farmland to non-agricultural uses. Conventional suburban zoning encourages a sprawling pattern of growth that consumes land disproportionately to the growth in population. For example, while Chicago's population has grown 4% in the last twenty years, its metro area has expanded by 40-60%.⁵

The adverse effects of such land-consumptive growth on farmland is exacerbated by the fact that "one-third of [the nation's] prime farmland - accounting for more than half of gross U.S. agricultural sales - is located in or adjacent to metropolitan areas."⁶ The development pressure of an expanding metropolitan area is intense in New York where 96% of farming takes place in proximity to cities.⁷ The consequence of this pressure is evidenced by the fact that the state's cropland and pastureland declined by 707,000 acres between 1982 and 1991.⁸

B. The Ripple Effect of Farmland Loss

A variety of unintended and interrelated environmental, economic, and cultural costs accompany the loss of significant percentages of our farmland. Beyond issues of national food security, which arise from a reduced capacity to produce food domestically, potentially serious environmental threats also accompany the loss

2. See *Farming on the Fringe*, *supra* note 1, at 11; see also David L. Szlanfucht, *How to Save America's Depleting Supply of Farmland*, 4 DRAKE J. AGRIC. L. 333; see also Sean F. Nolon & Cozata Solloway, Note & Comment, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591 (1997) [hereinafter Nolon & Solloway].

3. See Nolon & Solloway, *supra* note 2, at 595.

4. See U.S. Dep't of Agric., N.Y. Agric. Statistics Serv., *1997 Census of Agriculture State Profile*, <http://www.nass.usda.gov/census/census97/profiles/ny/nypst.pdf> (last modified Jan. 28, 1999).

5. See *Farming on the Fringe*, *supra* note 1, at 11.

6. *Farming on the Fringe*, *supra* note 1, at 11.

7. See KIRSTEN FERGUSON ET AL., CALL TO ACTION: FARMLAND PROTECTION SUCCESS STORIES IN THE EMPIRE STATE 7 (1998); see also John R. Nolon, *The Stable Door is Open: New York's Statutes to Protect Farm Land*, 67 N.Y. ST. B.J. 36 (1995) (noting that 58% of New York's agricultural production areas are within developing areas, and 38% of which is immediately adjacent to developing areas).

8. See FERGUSON ET AL., *supra* note 7, at 7.

of farmland.⁹ Farmland provides various beneficial environmental functions. For instance, farmland has value as wildlife habitat, is compatible with wetlands protection, and provides stormwater filtering.¹⁰ The effectiveness of farmland in performing these functions is demonstrated by findings that the conversion of farmland to more urban uses results in a 140-180% increase in nonpoint source pollution.¹¹ As prime farmlands disappear, these ecological services are lost while more marginal lands must be brought into cultivation to meet demand.¹² Transforming those lands into productive use usually requires significant irrigation and fertilization, activities that detrimentally affect water supply and quality.¹³ Furthermore, the added cost of these activities may make farming prohibitive for new farmers, and many smaller farmers already struggling to survive.¹⁴

The loss of farmland has other significant economic costs as well.¹⁵ In New York, agriculture is the state's principal land use and routinely produces about \$3 billion a year in gross cash income.¹⁶ The importance of farming to Suffolk County and the State is demonstrated by the fact that, "[b]ecause Suffolk County has one-third of all the irrigated farmland in New York State, the farming industry is able to sustain itself in droughts, such as the 1995 growing season."¹⁷ Moreover, at the local level, farms have a mutually dependent relationship with non-farming industries, including suppliers, marketers, and tourism.¹⁸ Suffolk County benefits economically from agriculture, which "generates a positive 'trickle down' effect by lessening the county's tax burden and stim-

9. See *Farming on the Fringe*, *supra* note 1, at 11.

10. See Jeanne S. White, *Beating Plowshares into Townhomes: The Loss of Farmland and Strategies for Slowing its Conversion to Nonagricultural Uses*, 28 ENVTL. L. 113 (1998).

11. See John Tippet, *Relating Land Use and Buffer Areas to In-stream Water Quality: The Salt Fork Watershed in Illinois*, <http://www.epa.gov/OWOW/info/NewNotes/issue26/nps26wqm.html#Relating> (last modified Nov. 3, 2000).

12. See *Farming on the Fringe*, *supra* note 1, at 11.

13. See *Farming on the Fringe*, *supra* note 1, at 11.

14. Ensuring the continued viability of farming is the ultimate goal not only of a PDR program, but of an entire framework of law in New York State, including right to farm laws and agricultural zoning. See generally Gregory Poe et al., *The P's of Farmland Protection*, POLICY ISSUES IN RURAL LAND USE, Dec. 1997.

15. See generally Holly Thomas, *The Economic Benefits of Land Conservation*, Feb. 1991 (published by the Dutchess County Planning Department).

16. See FERGUSON ET AL., *supra* note 7, at 7; see also Nolon & Solloway, *supra* note 2.

17. AGRICULTURAL & FARMLAND PROTECTION PLAN, SUFFOLK COUNTY, EXECUTIVE SUMMARY 1990 (on file with author) [hereinafter SUFFOLK PROTECTION PLAN].

18. See White, *supra* note 10.

ulating sales tax and tourism.”¹⁹ Suffolk County’s Planning Director suggests that without farming, “Suffolk County’s \$2 billion tourist industry would be seriously weakened.”²⁰ The Town of Southampton has recognized that “[f]armland is essential to the continued success of [its] second home and tourism industries.”²¹ The loss of farming, therefore, would mark the loss of many of these dependent industries.

Protecting farmland also makes a significant positive impact on the local economy, while its loss often results in adverse impacts on the long-term fiscal stability of a local government. After studying the fiscal impact of different types of development in over fifty eight communities, American Farmland Trust concluded that farm, forest, and open lands cost the local community an average of \$.37 per acre in community services, as opposed to \$1.15 per acre for residential development.²² In other words, farms, forests, and open spaces pay more in local taxes than they cost the local government to provide services to those properties. By contrast, residential development is a net drain on the local government.²³ In addition, protecting farmland in critical areas such as flood plains can reduce the costs associated with drainage projects.²⁴ The fact that communities with land preservation programs typically receive higher bond rating provides another economic incentive for a local government to preserve farmland.²⁵

Finally, the less tangible negative result of losing a way of life cannot be overstated. Working farms are among the special features of a town, and, consequently, are intimately linked to its

19. FERGUSON ET AL., *supra* note 7, at 12.

20. FERGUSON ET AL., *supra* note 7, at 12.

21. TOWN OF SOUTHAMPTON, FARM AND FARMLAND PRESERVATION OPTIONS FOR FARMLAND OWNERS (1998).

22. See Am. Farmland Trust – Farmland Info. Ctr., *Cost of Community Services Studies: Fact Sheet*, <http://www.farmlandinfo.org/fic/tas/tafs-cocs.html> (last modified Jan. 2000). A fiscal impact analysis of the Town of Pittsford in 1993 supports AFT’s findings. The Pittsford study concluded, in part, that a new home must be worth \$350,000 if tax rates are to remain constant after the home is built. In other words, a home sold for less than that “break even” price will not cover in property taxes what the town must spend to service the home. CENTER FOR GOVERNMENTAL RESEARCH, INC., FISCAL IMPACT OF COMMUNITY DEVELOPMENT ALTERNATIVES 10 (1993).

23. One commentator concluded from similar statistics that 1) farmland preservation should receive consideration when looking at the economic future of a region, and 2) the guiding principle of American land use planning, asserting that development is the key to economic prosperity at the local level may be incorrect. See Henry E. Rodegerdts, *Land Trusts & Agricultural Conservation Easements*, 13-SUM NAT. RE. SOURCES & ENV’T 336 (1998).

24. See Szlanfucht, *supra* note 2, at 333 n.57.

25. See Szlanfucht, *supra* note 2, at 333 n.57.

character, which residents seek to preserve.²⁶ The Suffolk County Planning Commission highlighted the value of preserving farmland, calling it an important planning tool to “buffer against suburban sprawl and maintain[] the rural character of the area.”²⁷ This cultural loss seems especially sad when it is replaced by sprawl development that paves over open space, draws businesses out of the inner cities, and pushes recreational areas farther away from urban residents.²⁸

Suffolk County mirrors the trend of agricultural land loss throughout New York State and the nation.²⁹ Located at the East end of Long Island and home of “the Hamptons,” Suffolk County is subjected to development pressures from urbanization as well as from the construction of second homes. Recognizing the importance of stemming the loss of one of their most important assets,³⁰ Suffolk County established the nation’s first county purchase of development rights program in 1974.³¹

26. A proponent of the two percent transfer tax, used to fund some local PDR programs, argues that placing the burden on the buyer is fair since the buyer is purchasing in that location because of the character of the place. Kevin MacDonald, Address at Katonah Community Center on Suffolk County’s PDR experiences (Oct. 12, 1999) (Mr. MacDonald is vice president of The Group for the South Fork, a non-profit organization working to protect farmland and open space). Wendell Berry is a modern essayist who expresses the value of reconnecting with the land and promoting a simpler way of life in the face of the fast-paced commercialism that pervades modern society. See e.g. WENDELL BERRY, *THE GIFT OF THE GOOD EARTH*.

27. SUFFOLK COUNTY PLANNING COMMISSION, *SUFFOLK COUNTY FARMLAND PRESERVATION PROGRAM: HISTORY AND CURRENT PERSPECTIVE 1* (1990) [hereinafter *SUFFOLK PROGRAM HISTORY*].

28. See Szlanfucht, *supra* note 2, at 340; see also James Howard Kunstler, *Home from Nowhere*, *Atl. Monthly*, Sept, 1996, at 43 (discussing the negative effects of suburban sprawl).

29. See SUFFOLK COUNTY PLANNING COMMISSION, *SUFFOLK COUNTY FARMLAND PRESERVATION PROGRAM* (1990) [hereinafter *SUFFOLK PRESERVATION PROGRAM*] (noting a loss of 8,099 acres, or 16.2 percent, of farmland between 1985 and 1990); see also, *Farming on the Fringe*, *supra* note 1; see also, U.S. Dep’t of Agric., N.Y. Agric. Statistics Serv., *1997 Census of Agriculture State Profile*, <http://www.nass.usda.gov/census/census97/profiles/ny/nyfst.pdf> (last modified Jan. 28, 1999). According to a 1997 census of agriculture in New York, land in farms decreased by three percent and the number of full time farms decreased by eight percent (a real number loss of just over 1,500 farms) between 1992 and 1997. A similar census for the United States reveals a loss of 13,736,251 acres of farmland between 1992 and 1997, or approximately 2,747,250 acres per year.

30. See *SUFFOLK PROGRAM HISTORY*, *supra* note 27 (listing the benefits of the farming industry as jobs, buffering of suburban sprawl, maintenance of rural character and the tourism industry); see also U.S. Dep’t of Agric., Econ. Research Serv., *New York Fact Sheet*, <http://www.ers.usda.gov/StateFacts/NY.htm> (last modified Jan. 1, 2001).

31. See *SUFFOLK PROGRAM HISTORY*, *supra* note 27.

C. Purchasing Development Rights (PDR)

A PDR program arranges to restrict the right of an owner to construct nonagricultural uses on his land, a right that has traditionally accompanied land ownership.³² Participation in the program is entirely voluntary.³³ Technically, the restriction is a negative easement in gross,³⁴ which is memorialized in a legal instrument recorded with the property deed so that it runs with the land.³⁵ The buyer of this lesser interest, the county or local government in Suffolk County's program, acquires the right and responsibility to prevent development on the land.³⁶ The landowner retains all other rights of ownership, including the rights to farm, to prevent trespass, or to transfer the land.³⁷ Compensation for the permanent restriction of the land is valued as the difference between the full market value of property for its highest and best use (full value) minus the value of the agricultural rights (residual value).³⁸

32. See Nick Williams & Nelson Bills, *Protecting Farmland: State Funded Purchase of Development Rights (PDR) Programs in the Northeast*, POLICY ISSUES IN RURAL LAND USE (Jan. 1991).

33. *Id.*

34. Although the terms "development rights" and "easements" are used interchangeably, they are distinguishable. "Strictly speaking, development rights are negative easements in gross. A positive easement gives one party the right to use another party's land, such as for a hiking trail. A negative easement restricts what a landowner can do with their land. An easement also may be either appurtenant, connected with the ownership of nearby land, such as a right-of-way; or in gross, which grants the holder of the easement a claim upon the property, such as the right to develop." Thomas L. Daniels, *The Purchase of Development Rights: Preserving Agricultural Land and Open Space*, J. AM. PLAN. ASS'N 430 n.1 (Autumn 1991). Conservation easements are discussed in depth in Joseph Stinson & Liane Wilson, *Preserving Open Space with Land Trusts and Conservation Easements*, available at <http://www.law.pace.edu/landuse/Indtrs.html> (1996).

35. See Daniels, *supra* note 34; see also American Farmland Trust, PURCHASE OF AGRICULTURAL CONSERVATION EASEMENTS, FACT SHEET, Sept., 1998 [hereinafter American Farmland Trust].

36. See American Farmland Trust, *supra* note 35. The PDR program is somewhat flexible and terms may be included in the agreement to allow the construction of new farm buildings and housing for family and employees. See American Farmland Trust, *supra* note 35. Monitoring compliance is likely to slip where government agencies are more preoccupied with acquiring the development rights. See Daniels, *supra* note 34.

37. See American Farmland Trust, *supra* note 35.

38. See also JOHN R. NOLON, WELL GROUNDED (1998); see also Michael N. Morea, *New York Statutes that Provide for the Protection of Agricultural Lands*, Part III, available at <http://www.law.pace.edu/landuse/morea.html> (last modified Nov. 21, 2000); see also Rodegerdts, *supra* note 23.

III. Suffolk County Farmland Preservation Program

A. The Legal Authority to Preserve Farmland Through PDR

Suffolk County's Farmland Protection Program functions within a state statutory framework that supports and authorizes agricultural land preservation in general, and the purchase of development rights in particular. New York State has officially recognized the importance of farmland by making farmland preservation an official state policy.³⁹ Article XIV, section four of the New York State Constitution states that, "[t]he policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products."⁴⁰ Subsequent farm bills continue to declare that it is in the public interest for the State "to encourage the preservation of farmland" and "to prevent the forced conversion of farmland . . . to more intensive uses as a result of economic pressure."⁴¹ In support of this view, the State Legislature has found that farmland is vital "in order to maintain a readily available source of food . . . to conserve the state's natural resources and to provide for the welfare and happiness of the inhabitants of the state."⁴²

Suffolk County's PDR program has relied on Section 247 of the General Municipal Law, which provides local governments with explicit authority to acquire interests or rights in real property to preserve farmland used in bona fide agricultural production.⁴³ The law specifically states that:

The acquisition of interests or rights in real property for the preservation of open spaces and areas shall constitute a public purpose for which public funds may be expended or advanced, and any county, city, town or village may acquire . . . the fee or any lesser interest, development right, [or] easement . . . necessary to achieve the purpose of this chapter.⁴⁴

39. See N.Y. CONST. art. XIV, § 4.

40. *Id.*

41. S. Res. 1632-A, 1999 Leg., 222d Sess., Reg. Sess. § 1 (N.Y. 1999).

42. *Id.*

43. See N.Y. GEN. MUN. LAW § 247 (McKinney 1999).

44. *Id.* § 247(2).

The natural resources to be protected "include . . . agricultural lands defined as open lands actually used in bona fide agricultural production."⁴⁵

Given the State's constitutional policy and its explicit grant of authority to local governments to purchase development rights, PDR programs are a legally sound mechanism that local governments in New York can use to preserve farmland. A legal challenge could arise only if the PDR program was administered in a manner that would defeat the public purpose requirement attached to the expenditure of public funds. It would not be a public purpose, for example, if the only applications approved were friends or relatives of the Town Board.

B. An Overview of Procedure and Funding

Originally, the Suffolk County Legislature passed Local Law 19-1974, establishing the procedures to acquire development rights in agricultural land.⁴⁶ The enactment was subsequently replaced in 1981, by Local Law 16, which is presently codified in Chapter 8 of the Suffolk County Code.⁴⁷ Accordingly, the county solicits offers or accepts recommendations from a Farmland Committee for the sale of development rights on agricultural land.⁴⁸ The County Executive then orders the appraisal of the market value of the development rights.⁴⁹ The Farmland Committee reviews the applications and decides which to recommend to the County Legislature after public hearing.⁵⁰ The County Legisla-

45. *Id.* § 247(1). Section 301 of the New York Agriculture and Markets Law defines "[l]and used in agricultural production." N.Y. AGRIC. & MKTS. LAW § 301(3) (McKinney 1999).

46. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 7-8; N.Y. LOCAL LAW § 19.

47. See N.Y. LOCAL LAW 16-1981; SUFFOLK COUNTY, N.Y., CODE, ch. 8 (1981).

48. See SUFFOLK COUNTY, N.Y., CODE § 8-3 (1981). This law also established the Farmland Committee to carry out the following duties: (1) recommend available lands to the County Legislature, (2) review requests to subdivide the remainder fee of lands, (3) review any matters relevant to development rights and agricultural economy, (4) serve as review board for permitting construction and farm stands, (5) and to promulgate rules and regulations to carry out intent of program. See *id.* § 8-5.

49. See Daniels, *supra* note 34, for a discussion of some difficulties surrounding the appraisal of agricultural land, especially under agricultural zoning.

50. See SUFFOLK COUNTY, N.Y., CODE § 8 (1981); N.Y. LOCAL LAW 16-1981 § 4(a). Because funds are limited, available land is prioritized using a variety of criteria. These criteria are generally based on two major considerations: the degree of development pressure on the land, and the likelihood that the land will continue as working farm. See Williams & Bills, *supra* note 32. A list of Suffolk County's criteria is available from the Suffolk County, N.Y. Planning Department.

ture's decision is required within thirty days after it holds its own public hearing.⁵¹

The Suffolk County Farmland Preservation Program has been funded almost exclusively by municipal bonds issued for a thirty-year period.⁵² The 1974-1976 Capital Program for the county authorized \$45 million to acquire the development rights on 9,000 acres of agricultural land.⁵³ In 1975, a year after the county authorized the Agricultural Program,⁵⁴ 382 bids were submitted totaling 17,949 acres at a cost of \$6,491 per acre, or \$116.5 million.⁵⁵ Subsequently, on September 8, 1976, the County Legislature authorized negotiations for Phase I,⁵⁶ which included sixty parcels containing 3,883 acres in Riverhead, Southold, and Southampton.⁵⁷ The following year, the county legislature authorized the issuance of \$21 million in bonds for the purchase of the development rights on these parcels at a cost of \$5,408 per acre.⁵⁸ In 1977, the county sold its first bonds and purchased its first development rights on 211 acres in the Town of Riverhead.⁵⁹

Phase II began in 1978 with the receipt of bids for 249 properties totaling 11,356 acres which would have required \$68 million to acquire.⁶⁰ Since \$9 million of the original \$21 million had not been committed by the end of 1979, the county executive recommended the money be spent and an additional \$10 million be authorized for Phase II.⁶¹ This additional commitment would bring

51. See SUFFOLK COUNTY, N.Y., CODE § 8-3.

52. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 13.

53. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 13.

54. See Suffolk County, N.Y. Leg. Res. 573-1974, (1974) (adopting Local Law 19-1974 Relating to the Acquisition of Development Rights in Agricultural Lands); see also SUFFOLK COUNTY PLANNING COMMISSION, *supra* note 27 (1990).

55. See Memorandum from Roy Fedelem, Principal Planner, Suffolk County Planning Department [hereinafter Suffolk County Memorandum] (on file with author); see also SUFFOLK PROGRAM HISTORY, *supra* note 27.

56. The phases refer to periods when new applications were accepted and new funds were allocated. While the county usually did not target properties, it did allocate monies to purchase in-fill farm parcels after early phases failed to protect contiguous parcels. See Daniels, *supra* note 34. The problem with fragmented farmland is discussed later in Part IV(A).

57. See Suffolk County Memorandum, *supra* note 55; see also SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

58. See Suffolk County Memorandum, *supra* note 55; see also SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

59. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9. Nathaniel Talmage sold development rights to 131 acres for \$2,725 per acre and George Reeve sold rights to 80 acres for \$3,262 per acre. See Suffolk County Memorandum, *supra* note 55.

60. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

61. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

the total to \$31 million, less than the \$55 million originally envisioned at the outset of the program.⁶² Responding to a call for assistance from the county executive, Southampton, East Hampton, and Southold established their own PDR programs using the same criteria as the county to prioritize their purchases.⁶³

In 1988, Phase III was recommended and the county legislature authorized \$5 million in 1989, and \$5 million in 1990.⁶⁴ In 1989, development rights on the first twenty-two acres in Phase III were acquired.⁶⁵ By 1990, Suffolk County had spent upwards of \$20 million to acquire 4,965.5 acres of development rights in eight towns, with municipal PDR programs adding another 1,084 acres.⁶⁶ In 1996, these numbers had risen to \$46 million to buy development rights to 6,941 acres on 154 farms by 1996.⁶⁷ The Peconic Land Trust⁶⁸ had also protected more than 2,500 acres of Long Island farmland by 1995 through donations of land and conservation easements.⁶⁹

In 1998, the Suffolk County Legislature sought to expand the farmland protection program by passing Resolution 559-1998, "adding Article XII-A to the Suffolk County Charter to Provide a Suffolk County Community Greenways County Fund."⁷⁰ After a vote in which about 65% approved of the Fund,⁷¹ the legislature authorized the issuance of \$62 million in serial bonds to ensure the protection of "unique environmental resources."⁷² Twenty million dollars of the Fund was authorized for the acquisition of farmland development rights.⁷³ The appropriation and expenditure of these moneys was made contingent on the receipt of matching funds from the State, town or federal government of at least thirty percent of the actual cost of acquisition.⁷⁴

62. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

63. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

64. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

65. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

66. See Suffolk County Memorandum, *supra* note 55.

67. See Suffolk County Memorandum, *supra* note 55.

68. There are over 1,100 local land trusts nationwide, which provide needed funding, lobbying, and grassroots support for preservation efforts. See Poe et al., *supra* note 14.

69. See FERGUSON ET AL., *supra* note 7, at 15.

70. Suffolk County, N.Y. Leg. Res. 559-1998(1) (introduced Feb. 10, 1998).

71. See *Local and National Interest in Farmland Preservation*, Memorandum from William Sanok, Program Director at the Cornell Cooperative Extension (Dec. 1998) [hereinafter Sanok Memorandum].

72. Suffolk County, N.Y. Leg. Res. 559-1998(1).

73. See *id.* 559-1998(3).

74. See *id.* 559-1998(3)(a).

C. Participation of the East End Towns⁷⁵

With only \$35 million allocated by Congress, in the 1996 Farm Bill, to support state and local farmland protection programs across the country, municipal participation became a critical element in the effectiveness of Suffolk County's PDR program. By 1998, all five East End towns had established their own farmland preservation programs and created Community Preservation Funds to support them, using revenue from a two percent tax on all real estate transfers.⁷⁶ The New York State Assembly, in 1998, authorized the transfer tax with the passage of bill A9692, amending "the town law by adding a new section 64-e to provide for the establishment of Peconic Bay Community Preservation Funds."⁷⁷ Bill A9692 also amended the tax law to authorize the East End towns to impose a real estate transfer tax to raise revenues for the Funds.⁷⁸

Although the drafters of the bill recognized that using a tax to raise revenue contradicted "the stated purpose of this legislature to reduce the state and local tax burden,"⁷⁹ other considerations militated in favor of authorizing another tax. First, the Legislature noted that the preservation of "community character,"⁸⁰ including open space and "significant natural areas,"⁸¹ was a "public purpose."⁸² Second, the Legislature had already enacted the Environmental Protection Fund and the State Clean Air/Clean Water Bond Act to provide a dedicated source of funding to effectuate these public purposes.⁸³ The drafters also noted that there was already an "unprecedented commitment of local funds" by Peconic Bay governments, who had spent over \$50 million since 1980 to protect community character.⁸⁴ Third, the Peconic Bay region is seeing "open space and farmland converted to other land uses at

75. The term "East End towns" refers to Southampton, East Hampton, Southold, Riverhead, and Shelter Island.

76. See FERGUSON ET AL., *supra* note 7, at 14. Governor Pataki vetoed a transfer tax bill in 1997, which sought to establish a Community Preservation Fund for the town of East Hampton. Previous attempts, over the prior twelve years, had failed to get the issue on the ballot. See Liz Egbert, *Pataki Vetoes Transfer Tax*, INDEP. ONLINE, Sept. 10, 1998, at 14, at <http://www.indyeastend.com/news/09109804.htm>.

77. Assemb. B. 9692-A, Reg. Sess. (N.Y. 1998).

78. *Id.* § 1.

79. *Id.*

80. *Id.*

81. *Id.*

82. Assemb. B. 9692-A, Reg. Sess. § 1.

83. See *id.*

84. *Id.*

an alarming rate" because of "extreme development pressure" which threatens the significant financial investment in preservation.⁸⁵ Finally, the Legislature recognized that "existing traditional funding mechanisms . . . will not provide adequate funding to preserve fundamental community character in the Peconic Bay."⁸⁶

The residents of each East End town agreed and voted in favor of creating the Community Preservation Funds in a mandatory referendum.⁸⁷ The procedures in each town are substantially similar, though far more detailed than the county code provisions. Riverhead, for example, codified the "Community Preservation Fund Law" in Chapter 44 of its Town Code, entitled Agricultural Lands Preservation, which details regulations and procedures for the acquisition of development rights and the regulations governing the imposition of the transfer tax and the creation of the Fund.⁸⁸ Riverhead's Code establishes an Advisory Board "to review and make recommendations on proposed acquisitions of interests in real property using monies from the fund."⁸⁹ The Code further specifies the procedures and requirements for the acquisition,⁹⁰ management,⁹¹ and alienation⁹² of the acquired fee or interest. Finally, section fourteen details the regulations

85. *Id.*

86. *Id.*

87. See Sanok Memorandum, *supra* note 71.

88. RIVERHEAD, N.Y., CODE § 44-5 (1999).

89. *Id.* § 14-6.

90. See *id.* § 14-7. Before any "interest or right in real property shall be acquired," a "public hearing [must be] held as required by § 247 of the New York General Municipal Law." *Id.* Prior to the public hearing, however, the Town Board may enter into a "conditional purchasing agreement." *Id.* Finally, the Town Board, in any resolution approving an acquisition, must find that the acquisition was the "best alternative for the protection of community character of all reasonable alternatives available to the town." *Id.*

91. See RIVERHEAD, N.Y., CODE § 14-8. This provision establishes management requirements, like natural and historic preservation, and allows the town to contract with a not-for-profit land trust, which will "provide for the management and supervision of lands acquired by the fund." *Id.* § 14-8(B).

92. See *id.* § 14-9. The rights or interests, which are acquired by the fund, may be alienated only for the "purposes permitted by this chapter" and only with "the express authority of an act of the State Legislature." *Id.* Moreover, if the Legislature does allow the alienation, it is "required to provide for the substitution of other lands having equal environmental and fair market value and reasonably equivalent usefulness and location to those to be discontinued." *Id.* § 14-9(A).

governing the imposition,⁹³ payment,⁹⁴ liability,⁹⁵ and exemptions⁹⁶ of the real estate transfer tax.

IV. Evaluation of Suffolk County's Farmland Protection Program

Suffolk County has relied on the purchase of development rights as the primary method of farmland preservation.⁹⁷ To date, Suffolk County's Farmland Preservation Program has succeeded in purchasing the development rights of over 9,000 acres of farmland.⁹⁸ Despite these efforts, Suffolk County continues to lose farmland for a variety of interdependent reasons, including development pressure, high land values, and limited funding.⁹⁹ The number of farm acres in Suffolk County has decreased from 123,000 in 1950, to approximately 31,000 today.¹⁰⁰ As a result, the Suffolk County Farmland Protection Plan has had to reduce its initial farmland preservation goal from 35,000 to 20,000 acres.¹⁰¹ Tellingly, the Plan predicts that "at their present rate there will be only 10,000 acres [of farmland] left in Suffolk in 2012."¹⁰²

93. See RIVERHEAD, N.Y., CODE § 14-12. The two percent tax shall be imposed on all conveyances of real property or lesser interest over \$500, and shall be deposited into the Fund.

94. See *id.* § 14-13.

95. See *id.* § 14-14. While the grantee must pay the tax, the grantor becomes jointly and severally liable should grantee be exempt or fail to pay. This provision also creates a presumption that all conveyances are taxable.

96. See RIVERHEAD, N.Y. CODE § 14-16. Exemptions from the transfer tax include the following: (1) conveyances to government agencies, (2) conveyances where the entire parcel is subject to certain development restrictions, and (3) conveyances to any not-for-profit corporation for conservation, environmental, or historic preservation purposes. See *id.* In addition, an exemption is allowed of \$150,000 on unimproved property and \$75,000 on improved property. This latter exemption is intended to avoid increasing the price of otherwise affordable housing and real estate.

97. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 14. Other preservation methods used by Suffolk County include transfer of development rights, cluster and agricultural zoning, and outright purchases.

98. Telephone Interview with Roy Fedelem, Principal Planner, Suffolk County Department of Planning (Sept. 8, 1999).

99. See U.S. Dep't of Agric., N.Y. Agric. Statistics Serv., 1997 *Census of Agriculture County Profile, Suffolk, N.Y.*, <http://www.nass.usda.gov/census/census97/profiles/ny/nyp052.pdf> (last modified Jan. 28, 1999); see also KEVIN McDONALD & STUART LOWRIE, PRESERVING THE EAST END: THE CASE FOR THE EAST END COMMUNITY PRESERVATION FUND (1998).

100. See SUFFOLK PROTECTION PLAN, *supra* note 17.

101. See McDONALD & LOWRIE, *supra* note 99, at 4.

102. McDONALD & LOWRIE, *supra* note 99, at 4.

Despite the crisis rhetoric demanding more land preservation, a successful program will accomplish more than the protection of acreage. Beyond a farm's physical and environmental impacts, working agricultural land has broad and multifaceted effects on the economic, social, and cultural landscape of a community.¹⁰³ A farm, therefore, is more than undeveloped land; rather, it is a functional landscape that often serves to anchor many other activities and community characteristics that residents value. The interplay of farming and other values is indicated by the fact that protecting working farms near urban areas can effectively channel development while increasing the profitability of the farms by providing a market for their goods.¹⁰⁴ A worthwhile farmland preservation program recognizes this fact, and, in turn, encourages ongoing farming operations.¹⁰⁵ The following analysis of Suffolk County's PDR program will address this issue of farm viability as well as other aspects of PDR programs.

A. Viability - Do the Protected Farms Work?

Although agricultural land has significant value as open space, the ultimate purpose of farmland preservation is defeated if the farm cannot sustain itself once it is protected. Because a PDR program is exclusively interested in protecting the land from more intense future development, however, purchasing development rights must be considered merely a tool in a larger preservation program. Notably, of the 7,000 acres Suffolk County had protected before 1998, 6,900 acres were being farmed, according to Suffolk's Planning Director.¹⁰⁶ This high percentage is likely due to an effective combination of state and local incentive and protection measures.¹⁰⁷

PDR programs, however might unintentionally contribute to a decline in agricultural viability by promoting what some have termed the "impermanence syndrome."¹⁰⁸ Because PDR programs are limited in the amount of land they can preserve, due to the cost and the landowner's willingness to sell, they risk creating farmland that is fragmented and, therefore, not economically via-

103. See discussion *infra* Part II. A-B.

104. See FERGUSON ET AL., *supra* note 7, at 16.

105. See generally Rodegerdts, *supra* note 23; see also White, *supra* note 10.

106. See FERGUSON ET AL., *supra* note 7, at 16.

107. See Poe et al., *supra* note 14; see also SUFFOLK PROGRAM HISTORY, *supra* note 27.

108. Daniels, *supra* note 34, at 423; see generally Szlanfuct, *supra* note 24.

ble.¹⁰⁹ With a "less-than-critical mass" amount of farmland, farmers sense that development is inevitable, especially as complaints and nuisance suits from surrounding residential developments increase.¹¹⁰ Farmers, therefore, refrain from long-term investment in new farm equipment, and overall agricultural productivity of the area lags.¹¹¹

Proponents of the Community Preservation Funds also clearly recognized the interplay of these forces in their campaign for voter approval on the Funds. The Group for the South Fork and the Nature Conservancy, for instance, lobbied with a warning that "[i]f we lose more land to development, we'll have a continuous suburban landscape with rural pockets - nothing more than museum pieces of farms and open space. We want to protect as much as possible of what remains to avoid the catastrophic effects of fragmenting our rural landscape."¹¹²

Unfortunately, because of the cost of development rights and the voluntary nature of the PDR program, Suffolk has not been entirely successful in avoiding the fragmentation that leads to the impermanence syndrome. One observer noted that because "only one-quarter of the PDR applicants accepted offers in the second phase of the [program], . . . the land under protection was scattered and not in contiguous blocks."¹¹³ Because this pattern of protection could lead to "farmland being surrounded by incompatible nonfarm uses over time," Suffolk appropriated \$10 million to purchase the development rights on "in-fill parcels to create blocks of preserved land."¹¹⁴

Right to farm laws serve to combat the impermanence syndrome by protecting farmers when conflicts arise with other land uses, usually in the form of nuisance suits.¹¹⁵ The Town of Riverhead, for example, passed a law that explicitly lists protected farm practices that are presumed reasonable, including spraying, raising livestock, constructing barns, and pumping water.¹¹⁶ Riverhead's ordinance also requires that, during the approval process, the Town Board and Planning Board shall give notice that a

109. See *Farming on the Fringe*, *supra* note 1, at 12; see also Daniels, *supra* note 34, at 423.

110. *Farming on the Fringe*, *supra* note 1, at 12.

111. See *Farming on the Fringe*, *supra* note 1, at 12.

112. McDONALD & LOWRIE, *supra* note 99, at 5.

113. Daniels, *supra* note 34, at 424.

114. Daniels, *supra* note 34, at 424.

115. See Poe et al., *supra* note 14.

116. See RIVERHEAD, N.Y., CODE § 44-4.

proposed development is in proximity to an area encumbered by an agricultural easement or is within an agricultural district.¹¹⁷

Some State legislators have recently proposed bills offering a variety of financial incentives to enhance the ability of a farmer to operate viable farms. State Senator LaValle, for instance, sponsored a bill that encourages farmland preservation through tax incentives for landowners of farmland near metropolitan and suburban areas.¹¹⁸ Specifically, the bill assesses farmland and open space at its use value rather than at its full value, thereby reducing the owner's burden in maintaining the land as a farm or open space and, consequently, the incentive on the owner to sell.¹¹⁹ Senator Kuhl also sponsored a bill to amend the Agriculture & Markets Law to direct the Commissioner to create a farmland viability program, including matching grants to improve the profitability and efficiency of farms.¹²⁰ Finally, Senator Hoffman sponsored the "First Farm Financing Act" that will help keep farmland in agriculture by establishing a revolving loan fund to assist first-time buyers of farms.¹²¹

B. Permanence

Permanence is widely considered the greatest strength of a PDR program. This permanence stands in marked contrast to the permanent loss of the farmland once developed. The purchase of development rights was chosen by Suffolk County as "the primary method of farm preservation since it creates a restriction that runs with the land,"¹²² and, therefore, is binding on future owners for an agreed upon time period.¹²³ The language of section 247 of the New York General Municipal Law states clearly that the development rights, once purchased, may never be used by the landowner or her successors. Accordingly, "any interest acquired . . . is hereby enforceable by and against the original parties and the successors in interest, heirs and assigns of the original parties,"

117. *See id.*

118. *See* S. Res. 1632, 1999 Leg., 222d Sess., Reg. Sess. (N.Y. 1999).

119. *See id.*

120. *See* S. Res. 3089B, 1999 Leg., 222d Sess., Reg. Sess. (N.Y. 1999).

121. *See* S. Res. 5053, 1999 Leg., 222d Sess., Reg. Sess. (N.Y. 1999).

122. SUFFOLK PROGRAM HISTORY, *supra* note 27, at 14.

123. *See* Am. Farmland Trust – Farmland Info. Ctr., *Agricultural Conservation Easements: Fact Sheet*, <http://www.farmlandinfo.org/fic/tas/tafs-ace.html> (last modified Sept. 1998) (noting that the holder of the easement is charged with the duty of enforcing the easement or development restriction).

provided the acquisition is properly recorded.¹²⁴ Furthermore, "[s]uch enforceability shall not be defeated because of any subsequent adverse possession, laches, estoppel, waiver, change in character of the surrounding neighborhood or any rule of common law."¹²⁵

In keeping with this strict rule, the Suffolk's PDR program does not provide a procedure through which the farmer may reserve the right to buy back the development rights.¹²⁶ This is the case even though "State enabling laws often contain release clauses" under which an owner can petition to buy back the land after a number of years and after a showing that the "land is no longer economically viable."¹²⁷

As a permanent restriction, PDR also avoids the pitfalls of other preservation mechanisms. Relying on rezoning, for instance, places the protection of important resources at the whim of political uncertainty and may even be counter-productive.¹²⁸ "Upzoning to larger lot sizes," for instance, "has been damaging to farm preservation because it is based on a suburban sprawl model of single family detached homes and requires more land, more roads, more uniform development. It has also promoted sterile, cookie-cutter development and discouraged rural, farm-based commercial and industrial development."¹²⁹ Consequently, development pressure on farms has increased, which triggers concerns about the viability of farming and the effects of the impermanence syndrome discussed above.¹³⁰

In its overall preservation regime, the Suffolk County Planning Commission recognizes agricultural districts as merely a "temporary holding pattern for farmland preservation."¹³¹ Agricultural districts provide farmers with a renewable eight year tax deduction period, thereby allowing the farmer to continue farm-

124. See N.Y. GEN. MUN. LAW § 247(4). The enforcement of an acquisition can be defeated only by a general state law that "expressly states the intent to defeat the enforcement of any acquisition" pursuant to section 247. *Id.*

125. *Id.*

126. See SUFFOLK COUNTY, N.Y., CODE ch. 8.

127. Williams & Bills, *supra* note 32, at 3.

128. See White, *supra* note 10 (discussing some problems with exclusive reliance on agricultural zoning in Part II); see also FERGUSON ET AL., *supra* note 7, at 20 (noting that 50/50 zoning was ineffective in preserving farms). But see *Farming on the Fringe*, *supra* note 1, at 11 (discussing where and why zoning has worked to preserve farmland).

129. SUFFOLK PROTECTION PLAN, *supra* note 17.

130. See discussion *infra* Part III. A.

131. SUFFOLK PROGRAM HISTORY, *supra* note 27, at 16.

ing, while giving the county an additional number of years to purchase a wider variety of agricultural lands as funds become available.¹³² The program, however, is voluntary, and in a rising real estate market like Suffolk County, participants are unlikely to stay in the program when selling their land can be very advantageous.¹³³ Without the guarantee of permanence offered by PDR, preservation efforts may fail to be effective planning tools to channel and buffer the growth of an expanding urban area.¹³⁴

C. Equity

A variety of features make PDR programs generally fair and equitable. First, a PDR program compensates the owner for the lost development opportunities, something a zoning restriction does not.¹³⁵ The farmer, therefore, is able to reinvest the money back into farming, thereby helping maintain a profitable operation, keeping the money in the local economy and the property on the tax rolls, and preserving the retirement nest egg that farmers might rely on.¹³⁶ Second, the owner's participation is voluntary and he retains all other rights of ownership.¹³⁷ The most convincing testament to the fairness of the PDR program to the landowner has been its popularity with farmers, as evidenced by the long waiting lists of owners offering their development rights for sale.

Some PDR agreements may be flexible enough to be tailored to meet the needs of the owner.¹³⁸ For example, to provide for additional housing, an easement may permit the construction of new farm buildings and the termination of the easement if surrounding conditions make the continuation of farming operations impossible.¹³⁹ Suffolk's program, however, does not allow residences to be constructed on any land in the program, since that would be

132. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 16.

133. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 16.

134. See *Farming on the Fringe*, *supra* note 1, at 12.

135. See Daniels, *supra* note 34, at 424.

136. See FERGUSON ET AL., *supra* note 7, at 12.

137. See Am. Farmland Trust – Farmland Info. Ctr., *Agricultural Conservation Easements: Fact Sheet*, <http://www.farmlandinfo.org/fic/tas/tafs-ace.html> (last modified Sept. 1998).

138. See *id.*

139. See AMERICAN FARMLAND TRUST, FACT SHEET: NEW YORK ASSISTANCE PAYMENTS FOR PURCHASE OF DEVELOPMENT RIGHTS (1999); see also SUFFOLK PROGRAM HISTORY, *supra* note 27, at 18. Suffolk's policy allows for the construction of farm related buildings but not residences or subdivisions which would be "clearly contrary to the preservation of open land."

contrary to the purposes of preservation.¹⁴⁰ Consequently, owners are encouraged to exclude any dwelling units or carve out a lot for housing before selling the rights.¹⁴¹

Some critics do challenge the equity of PDR programs. One argument maintains that the development value of farmland is a function of the public infrastructure that makes development possible.¹⁴² Thus, buying development rights to land with these infrastructure services is essentially paying twice with taxpayer money – “once to create the added value in the land and again to buy it out.”¹⁴³ This unfairness is compounded by the fact that the purchase price may be paid to speculators.¹⁴⁴ Even early on in Suffolk County’s program, “over two thousand acres were purchased from speculators who were not farmers.”¹⁴⁵

The equity of the particular fundraising approach chosen by Suffolk County, namely the two percent transfer tax, has also been questioned.¹⁴⁶ The primary concerns are that the entire burden falls on the buyers of homes rather than the residents, which may be unfair and may chill the real estate market.¹⁴⁷ Proponents of the tax have defended the tax by arguing that people buy in a particular community because it has amenities like open space and a rural character. Therefore, if they want to protect those amenities, they should be willing to pay a small premium for their property. Moreover, proponents argue that the tax is fair because it has been structured to include exemptions for those seeking to buy affordable housing or land.¹⁴⁸

140. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 18.

141. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 18.

142. See *Farming on the Fringe*, *supra* note 1, at 12.

143. *Farming on the Fringe*, *supra* note 1, at 12.

144. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 4; see also *Farming on the Fringe*, *supra* note 1, at 12 (citing a 1979 Rutgers study finding only 44% of farmland in New Jersey was actually owned by farmers).

145. Daniels, *supra* note 34, at 424 (citing Frances Cerra, *Suffolk Plan to Save Farms is Still at Issue After Four Years*, N.Y. TIMES, Apr. 3, 1980, at B8).

146. Residents of Katonah raised this issue in a public meeting with Kevin MacDonald, Vice President of the Group for the South Fork, during which they considered the pros and cons of a PDR program in their community. Public hearing with Kevin MacDonald, Vice-President of the Group for the South Fork, in Town of Katonah Community Center, Oct. 21, 1999.

147. See Stephen J. Kotz, ‘Outsiders’ Take Aim at Land Bank Proposal, THE EAST HAMPTON STAR, Oct. 8, 1998, available at <http://archive.easthamptonstar.com/eh-query/981008/news1.htm>.

148. See Assemb. B. 9692-A, Reg. Sess. § 1449-EE(3).

D. Cost

The most significant problem with a PDR program remains its expense. Purchasing development rights is certainly less expensive than acquiring fee simple and allows the buyer to avoid the cost of maintaining the land. Where the price of land is high, however, as in Suffolk County, PDR programs may have limited effectiveness. At one point, the Suffolk County program had spent \$33.8 million to acquire 108 easements totaling 6,470 acres.¹⁴⁹ Even at that level of spending, Suffolk County could not purchase the development rights on hundreds of acres that were offered for sale. For example, the second phase of Suffolk's PDR program, which began in July 1978, received bids for 249 properties totaling 11,356 acres, for which \$68 million was needed to acquire.¹⁵⁰ The Town of Southampton wanted to spend \$2,038,000 for the development rights on fifty-four acres on three farms.¹⁵¹ The Town of Riverhead spent \$4,800,000 for the development rights to 217 acres on five farms.¹⁵² Finally, the Town of Southold was ready to spend \$1,860,000 on 178.5 acres on six farms.¹⁵³ Although the cost of these purchases is shared between the state and the municipality, the local costs in these instances range from \$465,000 (Southold) to \$1.2 million (Riverhead), with Suffolk County prepared to spend \$4 million.¹⁵⁴

Unfortunately, the nature of a PDR program may itself bolster the high price of the land it seeks to preserve. According to one commentator, "land acquisition programs may even suffer a fatal paradox of diminishing returns."¹⁵⁵ Simply stated, as more land is placed out of reach of developers, the value and the development pressure on the remaining land to those developers increases. The high cost of land is further exacerbated by speculative buying of land for development.¹⁵⁶ The result is that money buys less land. Evidence of this theory may be the huge sums of money that some estimate are required to achieve the

149. See Am. Farmland Trust – Farmland Info. Ctr., *Status of Selected Local PACE Programs: Fact Sheets*, <http://www.farmlandinfo.org/fic/tas/tafs-paceloc.pdf> (Mar. 2000).

150. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

151. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

152. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

153. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

154. See SUFFOLK PROGRAM HISTORY, *supra* note 27, at 9.

155. Kevin Kasowski, *Rural America at a Crossroads*, DEVELOPMENTS, July 1993, at 4.

156. See Daniels, *supra* note 34.

farmland preservation goals. According to the Group for the South Fork and the Nature Conservancy, \$230 million will be required to achieve their preservation goals.¹⁵⁷

E. Erosion of Local Authority

Notably, PDR programs may unintentionally cause long-term adverse consequences to the ability of local governments to efficiently regulate the land use activities in their communities. The option of buying out the owner's rights to the land in order to protect an important resource is often the simplest method of achieving the necessary control over the parcel. As an essentially two party transaction, however, the purchase of development rights transaction is more private than public in nature.¹⁵⁸ As a result, acquisitions lack the political accountability that inheres in the "fundamentally public" zoning process, which "affords the opportunity for public debate and dialogue."¹⁵⁹ The "buy out" option is chosen to avoid a takings issue, even though "the legislative exercise of zoning authority finds sufficient foothold to withstand takings challenges with some degree of certainty."¹⁶⁰ The argument continues that, although the purchase of development rights is politically expedient, it is neither fiscally conservative nor appropriate for a local government to buy the resources it seeks to protect when it can achieve the same level of protection through the exercise of existing authority.¹⁶¹ When a local government purchases property to limit its use to its current use rather than exert its land use authority, that action "reinforces erroneous expectations on the part of many members of the public that their property rights are inviolate."¹⁶² This in turn fuels a false view of the need

157. See McDONALD & LOWRIE, *supra* note 99, at 6. This report states the preservation goals as follows: 80% of farmland at risk in Riverhead and Southold, 90% in Southampton and East Hampton, and 75% on Shelter Island. See McDONALD & LOWRIE, *supra* note 99, at 5; See also FERGUSON ET AL., *supra* note 7, at 15. By acquiring donations and conservation easements to more than 2,500 acres, the Peconic Land Trust not only helped preserve significantly more land than would otherwise be protected, but kept the public from spending close to \$40 million to purchase the land.

158. See John M. Vandlik, *Waiting for Uncle Sam to Buy the Farm. . . Forest, or Wetland? A Call for New Emphasis on State and Local Land Use Controls in Natural Resource Protection*, 8 FORDHAM ENVTL. L. J. 691 (1997).

159. Vandlik, *supra* note 158, at 703.

160. Vandlik, *supra* note 158, at 704.

161. See Vandlik, *supra* note 158, at 711; See e.g., SUFFOLK PROGRAM HISTORY, *supra* note 27, at 16 (establishing agricultural districts is a zoning mechanism that Suffolk County has used to protect farmland – as of 1990, almost 12,000 acres were in agricultural districts).

162. Vandlik, *supra* note 158, at 712.

for government compensation for diminution in value irrespective of whether there is an actual taking and, ultimately, makes it politically more difficult for local governments to enact zoning restrictions.¹⁶³

Although the "possibility of a challenge to agricultural zoning under the taking doctrine is very real,"¹⁶⁴ there is little evidence of such challenges in Suffolk County. This may be because of Suffolk's relatively limited use of zoning to protect farmland. Because of the limited effectiveness of agricultural districting, Suffolk County has relied on it merely to support its PDR program. By providing the farmer with an eight year tax reduction, agriculture districts act as a "temporary holding pattern for farm preservation."¹⁶⁵ This is "useful to the Suffolk County [PDR] Program since it allows farmers to continue farming for an additional number of years and gives Suffolk County the opportunity to purchase a wider variety of agricultural lands as new funds become available."¹⁶⁶

F. Political Controversy

Finally, the ability of Suffolk County and the East End towns to respond to the farmland crisis suffered somewhat from its choice of a two percent transfer tax as the funding mechanism for acquiring development rights. Local news stories reveal the level of real and political capital that was expended in order to pass the referendum in favor of the transfer tax.¹⁶⁷ In 1997, despite strong local support and the adoption of a transfer tax by the East Hampton Town Board, Governor Pataki vetoed a bill that proposed to create the East Hampton Community Preservation Fund, with money from a two percent transfer tax on all real estate purchases in East Hampton.¹⁶⁸ While Pataki noted that the bill failed to in-

163. See Vandlik, *supra* note 158, at 712.

164. Daniels, *supra* note 34, at 425 (citing U. DEL. AGRIC. EXPERIMENT STATION, PURCHASE OF DEV. RIGHTS PROGRAMS IN THE NORTHEAST (John Mackenzie, ed. 1988)).

165. SUFFOLK PROGRAM HISTORY, *supra* note 27, at 16.

166. SUFFOLK PROGRAM HISTORY, *supra* note 27, at 16.

167. Both opponents, primarily the realtor associations, and proponents of the tax spent approximately \$250,000 campaigning on the issue in the period before the referendum. Telephone Interview with Kevin MacDonald, Vice President of The Group for the South Fork, (Sept. 23, 1999); see also Stephen J. Kotz, 'Outsiders' Take Aim at Land Bank Proposal, THE EAST HAMPTON STAR, Oct. 8, 1998, available at <http://archive.easthamptonstar.com/ehquery/981008/news1.htm>.

168. See Carissa Katz, *Pataki Strikes Down Local Land Tax Vote*, THE EAST HAMPTON STAR, Sept. 11, 1997, available at <http://archive.easthamptonstar.com/ehquery/970911/real2.htm>.

clude other East End towns and to exempt farmer-to-farmer transfers and sales, others highlighted the strong lobbying done by the State Board of Realtors who feared the chilling effect of adding a premium to the price of a home.¹⁶⁹ After more than a decade of lobbying, failed attempts to get a transfer tax bill on the ballot, and executive vetoes, Pataki signed the East End Land Bank Bill in 1998.¹⁷⁰ Later that year, voters in all five East End towns supported the transfer tax at the polls.¹⁷¹ Popular support came despite what was characterized as a “despicable” \$250,000 ad campaign against the proposal funded by state and national realtor associations.¹⁷²

IV. Conclusion

The purchase of development rights provides a legally sound, permanent way to preserve farmland. An evaluation of Suffolk County’s farmland preservation efforts, however, reveals that the effectiveness of a PDR program is limited, and is most successful when undertaken as part of a larger farmland protection effort. Although purchasing the development rights on agricultural land promises the preservation of the land in perpetuity, this approach is severely limited by the expense of acquiring these rights. As the Suffolk County plan suggests, “[e]ven with all of the funds authorized, it is still necessary to use [other] methods of preservation.”¹⁷³ Less affluent communities, therefore, may find a PDR program out of reach. Purchasing permanent protection to preserve the character of a community from the threat of sprawl development, however, may be worth the cost.

169. See Carissa Katz, *Transfer Tax on Hold*, THE EAST HAMPTON STAR, Sept. 4, 1997, available at <http://archive.easthamptonstar.com/ehquery/970904/news3.htm>; see also Carissa Katz, *Pataki Strikes Down Local Land Tax Vote*, THE EAST HAMPTON STAR, Sept. 11, 1997, available at <http://archive.easthamptonstar.com/ehquery/970911/real2.htm>. The State Farm Bureau also opposed the bill at the last minute because the farmer-to-farmer exemption was removed from the original bill. *Id.*

170. See Carissa Katz, *Land Bill is Signed; Now It's Up to Voters*, THE EAST HAMPTON STAR, June 25, 1998, available at <http://archive.easthamptonstar.com/ehquery/980625/news1.htm>.

171. See Carissa Katz, *Transfer Tax Approved*, THE EAST HAMPTON STAR, Nov. 5, 1998, available at <http://archive.easthamptonstar.com/ehquery/981105/news2.htm>. The percentage of favorable votes were as follows: East Hampton 66.4; Southampton just under 60; Shelter Island almost 72; Southold 59; and Riverhead 58. *Id.*

172. Stephen J. Kotz, *'Outsiders' Take Aim at Land Bank Proposal*, THE EAST HAMPTON STAR, Oct. 8, 1998, available at <http://archive.easthamptonstar.com/ehquery/981008/news1.htm>.

173. SUFFOLK PROGRAM HISTORY, *supra* note 27, at 19.