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EXERCISING EMINENT DOMAIN AGAINST PROTECTED AGRICULTURAL LANDS: TAKING A SECOND LOOK

MARGARET ROSSO GROSSMAN†

Because the quantity of land in the United States reserved for agricultural uses is currently being diminished by increased development, states have enacted various statutory programs to preserve the agricultural use of that land. This article focuses on two such agricultural land preservation programs, each of which has been enacted in a number of states. It analyzes the conflict between these programs and the eminent domain power of states. The author assesses the effectiveness of several alternative approaches in resolving the conflict between the policies of eminent domain and farmland preservation. Finally, the author proposes a more effective balancing approach to be used in managing this conflict.

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(701)
I. Introduction

Recent years have witnessed an enhanced awareness of the vulnerability of this nation’s finite agricultural land resources. Officials at all levels of government have recognized that agricultural land, so essential for the production of food and fiber, faces continually increasing demands.1 These demands have resulted in a pattern of conversion of productive agricultural land to urban and other nonagricultural uses.2 The extent of this conversion can only be estimated. One study suggests that three to five million acres a year are converted from agricultural to nonagricul-

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tural uses; another study suggests an annual conversion rate of 9.8 million acres between 1969 and 1978. Although improved technology has increased agricultural production, it is unlikely that technological advances, such as improvements in fertilizers and crop varieties, can continue indefinitely to compensate for the loss of agricultural land, particularly in light of increased demands expected in the coming decades. Moreover, relatively little additional agricultural land can be put into production; the cropland reserve in the United States stands at 111 million acres, of which only about 24 million acres could be cultivated readily.

Although some writers have disputed the seriousness of the problem of farmland conversion, many commentators believe that the irreversible development of prime and productive agricultural land should be undertaken only with caution. Several rationales are typically recited to justify the retention of farmland

3. Preserving America's Farmland, supra note 1, at 5. See also H.R. Rep. No. 1400, supra note 1, at 10 (suggesting that two to three million acres a year are converted from agricultural to nonagricultural uses).


5. Preserving America's Farmland, supra note 1, at 14-16 (even if technology can be relied on to increase productivity, such reliance results in a growing dependence on high-cost energy and irrigation methods); Batie & Looney, Preserving Agricultural Lands: Issues and Answers, 1 Agric. L.J. 600, 603 (1980) (reviewing techniques that will result in farmland preservation); Wheeler & Harper, In defense of farmland, 38 J. Soil & Water Conserv. 1, 4 (1983) (although the history of American agriculture is one of consistent growth, the future is less certain in terms of per-acre productivity).


8. See, e.g., J. Simon, The Ultimate Resource (1981) (available land data as a whole shows there is no cause for alarm). See also The Cropland Crisis: Myth or Reality (P. Crosson ed. 1982) (essays considering economic and supply/demand issues indicating that although increases in economic and environmental costs of agricultural production are inevitable, this trend will proceed slowly enough to allow implementation of corrective measures); Cook, The National Agricultural Lands Study: In which reasonable men may differ, 35 J. Soil & Water Conserv. 247 (1980) (questioning farmland loss data); Fischel, The Urbanization of Agricultural Land: A Review of the National Agricultural Lands Study, 58 Land Econ. 236 (1982) (criticizing the National Agricultural Lands Study).

9. See, e.g., NALS Guidebook, supra note 2, at 16 (caution is necessary because the adverse effects resulting from loss of agricultural land spill over into cultural and economic disruptions of various ways of life); Senate Comm. on Agriculture, Nutrition and Forestry, 97th Cong., 1st Sess., Agricultural Land Availability 283 (Comm. Print 1981) (research paper by A. DeVito, Conversion of Agricultural Land to Developed Uses) [hereinafter cited as Agricultural Land Availability].
for agricultural uses. First, these lands are viewed as necessary to maintain supplies of food and fiber for this country, as well as other nations. Second, sustained agricultural production is important for local, national, and international economies. Third, undisciplined development of agricultural land often encourages the waste and expense of urban sprawl. Finally, retention of farmland for agricultural uses helps to ensure the maintenance of open space and the existence of a healthy environment. Having recognized the importance of preserving agricultural lands, state and local governments have developed a number of techniques for minimizing agricultural land conversion.

Although legislation preserving agricultural land is generally directed toward protecting farmland from unnecessary conversion to nonagricultural uses, individual legislative schemes often demonstrate specific goals. These goals suggest that agricultural land protection has both long-term and short-term components. For example, one objective of agricultural land preservation is to provide for orderly development in metropolitan fringe areas.

10. The four justifications for farmland preservation that follow are listed in R. Jackson, Land Use in America 176 (1981), and Gardner, The Economics of Agricultural Land Preservation, 59 Am. J. Agric. Econ. 1027, 1028-29 (1977). See also Batie & Looney, supra note 5, at 604-05.

11. United States farmers produce about 25% of the world's wheat and coarse grains. A significant part of this annual grain production is exported. In 1980, United States agricultural exports totaled $39.7 billion, in contrast with $18 billion in agricultural imports. Agricultural Land Availability, supra note 9, at 217, 221 (research paper by D. McClintock, Global Significance of U.S. Cropland).

12. R. Jackson, supra note 10, at 176.

13. D. Berry, K. Bieri, D. Boyce, R. Coughlin, J. Kolhase, E. Leonardo, J. Pickett, T. Plaut, B. Stevens, A. Strong, D. Vining, & K. Wallace, Saving the Garden: The Preservation of Farmland and Other Environmentally Valuable Land, Chs. IV-VII (1977) [hereinafter cited as Coughlin]; Batie & Looney, supra note 5 (techniques include federal legislation, state public purchase programs, and public regulation in the form of agricultural zoning and transferable development rights); Keene, supra note 2, at 1229-43 (reviewing state government efforts in developing promulgating regulations to encourage farming, providing tax incentives, and acquiring interests in land agricultural districts).

14. Legislation preserving agricultural land often contains a declaration of legislative finding and intent. The Illinois Agricultural Areas Conservation and Protection Act, for example, expresses the state's "orderly development" policy:

It is the policy of the State to conserve, protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It is also the policy of this State to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds as well as for aesthetic purposes. Agriculture in many parts of the State is under urban pressure from expanding metropolitan areas. This urban pressure takes the form of scattered development in wide

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Legislation with this objective seeks to avoid the premature departure of agricultural operations from areas whose development potential is uncertain or remote in time. Often the goal is not to preserve agricultural land permanently, but only to keep agriculture in place as long as necessary to avoid undeveloped pockets. Such legislation is designed to reduce the costs of development to society by avoiding situations in which productive land lies idle, while random growth continues to consume agricultural land.

The objectives fostered by other agricultural land preservation legislation go beyond this orderly development rationale. Some legislative schemes declare a policy of maintaining and preserving farmland as a scarce and valuable natural resource, so that it will not be lost to succeeding generations. Thus, rather than belts around urban areas, brings conflicting land uses into juxtaposition, creates high costs for public services, and stimulates land speculation. When this scattered development extends into productive farm areas, ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements. Much agricultural land in Illinois is in jeopardy of being lost for any agricultural purpose. Certain of these lands constitute unique and irreplaceable land resources of Statewide importance. It is the purpose of this Act to provide a means by which agricultural land may be protected and enhanced as a viable segment of the State's economy and as an economic and environmental resource of major importance.


15. In expressing this goal, two authorities have stated: "The goal sought is to keep good farmland in farming until it is really needed for other purposes; in other words, to block the destructive impact of speculation on farming but not to make permanent city parks out of farmland." Conklin & Bryant, Agricultural Districts: A Compromise Approach to Agricultural Preservation, 56 AM. J. AGRIC. ECON. 607, 607 (1974).

16. Vacant lots are not only a waste of resources in themselves, but they also contribute to a further waste of resources in transportation. More money is necessary to develop roads, rails, cars, and buses; travelers spend more time in transit. See C. HAAR, LAND USE PLANNING 683 (1977).

17. The legislative purpose section of the Connecticut Agricultural Lands Statute illustrates this policy:

The general assembly finds that the growing population and expanding economy of the state have had a profound impact on the ability of public and private sectors of the state to maintain and preserve agricultural land for farming and food production purposes; that unless there is a sound, statewide program for its preservation, remaining agricultural land will be lost to succeeding generations and that the conservation of certain arable agricultural land and adjacent pastures, woods, natural drainage areas and open space areas is vital for the well-being of the people of Connecticut.

CONN. GEN. STAT. ANN. § 22-26aa (West Supp. 1985). The Rhode Island Farmland Preservation Act espouses a similar policy:

The general assembly recognizes that land suitable for food pro-
postponing farmland conversion so as to encourage orderly development, legislation adopting this rationale is designed to protect farmland permanently.

Yet another objective of legislation in this area is to ensure open space areas in urban settings. Open space areas with significant scenic and aesthetic value enhance the quality of life. In addition, they constitute important community assets because they add value to existing urban development. Thus, the stated policy of some agricultural land preservation legislation is to encourage open space areas to promote the public health, safety, and general welfare.

The goals of orderly development of urban fringe areas, permanent farmland preservation, and open space for metropolitan areas are pursued through various types of farmland preservation programs. These programs range from voluntary schemes that provide special benefits and legal protections, to mandatory land use controls. Some programs give special tax advantages to farmers to encourage their continued pursuit of farming. Others give farmers in urban growth areas limited immunity from nuisance suits and ordinances that tend to restrict agricultural activity in the state has become an extremely scarce and valuable resource. The amount of good farmland has declined so dramatically that unless a comprehensive program is initiated by the state to preserve what remains it will be lost forever. R.I. GEN. LAWS § 42-82-1(a) (1984).

18. The shortage of open space areas in urban settings is in part a result of the fact that owners of open space lands cannot charge for the environmental amenities they create for others. See Batie & Looney, supra note 5, at 605.

19. Of course, the value of open space depends on its location: "[I]t seems clear that . . . [the] value [of agricultural lands as open space] would be much higher in Los Angeles County in California than in central Wyoming." Gardner, supra note 10, at 1031.

20. The Missouri Open Space Conservation Act, for example, articulates the need for open space areas as follows:

The general assembly finds that the rapid growth and random spread of urban development is encroaching upon, impairing, or eliminating, many open areas and spaces of various sizes and character, including many such sites having significant scenic or esthetic values, which areas and spaces, if preserved and maintained in their present open state, would constitute important physical, healthful, esthetic or economic assets adding to the value of existing or impending urban and metropolitan development. MO. ANN. STAT. § 67.870 (Vernon 1984).

21. See Dunford & O'Neill, An Analysis of Alternative Approaches to Estimating Agricultural Use-Values, 3 AGRIC. L.J. 285 (1981); Pimentel & Pimentel, Ecological Aspects of Agricultural Policy, 20 NAT. RESOURCES J. 555 (1980). Because farmers' property holdings are usually large in relation to their income, most of these programs assess land at its farm use value to maintain property taxes at a manageable level. Pimentel & Pimentel, supra, at 559.
ity. Feedlot statutes and right to farm laws, for example, are designed to protect the farm community from the nuisance litigation precipitated by an influx of newly rural, but urban-thinking, neighbors.\textsuperscript{22} Other programs, like zoning laws that permit only agricultural use, are mandatory.\textsuperscript{23}

This article focuses on two agricultural land preservation programs that are largely voluntary—agricultural districts and conservation easements. Each type of program has been enacted in a number of states in an attempt to create reserves of land where agriculture is the primary activity. Each program restricts the land use of participating landowners, and each offers incentives for participation. Agricultural districts, are designed to prevent the premature departure of farming from the urban fringe by offering special protections to farmers who voluntarily choose to participate. The districts are established for specified time periods, and thus foster the orderly development objective of farmland preservation schemes.\textsuperscript{24} Conservation easements (and several closely related programs),\textsuperscript{25} by contrast, are usually intended to ensure the long-term preservation of farmland for agricultural use. The right to develop the land is separated permanently from ownership of the land itself. Thus, neither the farmer nor any future owners of the agricultural land may convert the property to nonagricultural uses.

Both agricultural districts and conservation easements can be considered legislative reflections of a state public policy that attempts to ensure that farmland remains in agricultural use, either permanently or for a more limited period of time. Occasionally, however, the public policy of farmland preservation may conflict with another public policy, that of making land available to government entities for public use through the power of eminent domain. Land protected by an agricultural district or a conservation easement, for example, may be desirable for interstate highway expansion or another public project. In such situations, the two

\begin{itemize}
\item \textsuperscript{22} See Grossman & Fischer, Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer, 1983 Wis. L. REV. 95 (discussing the interrelationships between principles of nuisance law, right to farm statutes, environmental laws, and other state laws).
\item \textsuperscript{23} For a discussion of agricultural zoning, see Batie & Looney, supra note 5, at 612-17; Zoning for Agricultural Preservation, 36(4) LAND USE L. & ZONING DIG. 3 (1984), [hereinafter cited as Zoning].
\item \textsuperscript{24} For a discussion of orderly development at the urban fringe, see supra note 14 and accompanying text.
\item \textsuperscript{25} For a discussion of conservation easement schemes, see infra notes 62-73 and accompanying text.
\end{itemize}
public policies—farmland preservation and eminent domain—may become incompatible. The conflict may be exacerbated when neither the eminent domain statute nor the farm preservation law provides a resolution to the incompatible policies.

This article is intended to analyze the conflict between the policies of eminent domain and farmland preservation. It is not the purpose of this article to examine in detail either the principles of eminent domain or the effectiveness of individual farmland preservation schemes. Nevertheless, it is important to remind the reader of the essentials of eminent domain and the operation of the relevant farmland protection schemes as background to the analysis in the concluding section of this article. Thus, the article first reviews agricultural district laws and their provisions. It also reviews conservation easement programs and related programs designed to preserve agricultural land permanently. It then presents a brief overview of eminent domain law. The article next examines the conflict between the eminent domain power and state policy regarding agricultural land preservation, as effectuated in agricultural districts and conservation easements. Finally, the article suggests a balancing approach to be used in managing this conflict.

II. FARMLAND PROTECTION SCHEMES

A. Agricultural Districts

A number of states have responded to the problem of undisciplined urban sprawl by authorizing the formation of agricultural districts.26 The purpose of these districts (sometimes called agricultural areas) is to prevent the premature cessation of farming


Some states, in categorizing certain land as "agricultural districts," do not refer to the type of voluntarily organized areas encompassed by this article. Hawaii, for example, has a comprehensive land-use plan in which certain areas are labeled "agricultural districts." HAWAII REV. STAT. § 205-2 to -4.5 (1976 & Supp. 1983). Oregon also has a comprehensive land-use scheme. See Furuseth,
on the urban fringe by offering a number of protections to the agricultural operations of the farmers in that fringe area. These protections are designed both to offset the uncertainties that farmers face in the speculation-dominated atmosphere of urban growth and to alleviate some of the problems a farmer encounters when the character of the surrounding community changes from rural to urban.

Although the extent and timing of commercial development are hard to predict, when rural land eventually passes to urban use, it usually commands a price in excess of its value as farmland. Thus, a farmer whose land is ripe for development may be hesitant to make any substantial new investment in the farm operation when that investment would add little or no increment to the sale price. Yet, without new investment and the improved technology that investment allows, the farmer may be placed at a competitive disadvantage with other producers. Conversely, if a number of farmers fail to reinvest, the area may lose much of the infrastructure, such as farm supply and implement dealers, that is needed to support viable farming operations. Finally, in an urban fringe area characterized by land speculation and increasing property values, the farmer without some special tax relief may pay higher property taxes than a farmer in a rural area.

Ultimately, when the uncertainty, inconvenience and expense become too great, the farmer may become discouraged, quit farming, and sell to developers. If the land is not ripe for development, the result is inefficiency, because the once-productive farmland lies idle. Portents of this scenario helped to engender agricultural districting laws, which were enacted to reduce the uncertainties experienced by farmers and to encourage continued

Update on Oregon's Agricultural Protection Program: A Land Use Perspective, 21 NAT. RESOURCES J. 57 (1981). Such programs are not the focus of this article.

27. For a general discussion of agricultural districts, see Myers, The Legal Aspects of Agricultural Districting, 55 IND. L.J. 1 (1979); NALS GUIDEBOOK, supra note 2, at 76-97; Conklin & Bryant, supra note 15; Geier, Agricultural Districts and Zoning: A State-Local Approach to a National Problem, 8 ECOLOGY L.Q. 655 (1980).


29. Id. at 608. A farmer in this situation might face such problems as rising costs and increased governmental activity. Id.

30. Speculation and uncertainty can be most damaging to farmers who must invest heavily in real estate improvements that have little or no value for nonfarming purposes. Id.

31. For a recent discussion of preferential taxation, see Duncan, Toward a Theory of Broad-based Planning for the Preservation of Agricultural Land, 24 NAT. RESOURCES J. 61, 78-96 (1984) (examining the various preferential taxation programs).
farming of productive agricultural land. These laws attempt to
direct new growth toward existing vacant parcels in semi-
suburbanized areas, so as to achieve the goal of efficient
development.32

Most agricultural districting laws have been enacted since
1965. Although these statutes differ from state to state, they tend
to follow a rather similar pattern. The following account of the
formation of an agricultural district, based on the Illinois law, is
typical.33 Any owner or owners of land may submit a proposal for
the creation of an agricultural district to the local governing body,
usually the county board. The proposal must include a descrip-
tion of the proposed district and indicate its boundaries. No land
can be included in an agricultural district without the owner's
consent,34 and a proposed district may not be smaller than 500
acres.35 After receipt of a petition, the county must publish no-
tice of a public hearing to consider the proposed agricultural dis-

tric.36 The county must act to reject or approve the district
within forty-five days after submission of the proposal.37 If ap-
proved, the agricultural district is established initially for a ten-
year period,38 during which time agriculture is to be the only ac-
tivity conducted on land within that district.

Once a district is established, any person may petition the
county board to withdraw land from the district.39 The with-
drawal petition follows a procedure similar to the creation peti-
tion.40 If an individual withdraws, the rest of the district

32. Conklin & Bryant, supra note 15, at 608.
33. The account is based on the Illinois Agricultural Areas Conservation
1984). For a discussion of a recent amendment to this law, see infra note 311.
34. Id. § 1005.
35. Id. Some states, including Wisconsin, Minnesota, California, and Penn-
sylvania, make agreements with farmers on an individual basis. The acreage
requirement in these states ranges from 10 to 40 acres. See, e.g., Cal. Gov't Code
§ 51222 (West Supp. 1985) (10 acres of prime agricultural land; 40 acres if
otherwise); Minn. Stat. Ann. §§ 473H.03, 473H.05 (West Supp. 1985) (40
acres).
37. Id. § 1010.
38. Id. § 1005. It is interesting to note that the New York law has been
amended recently to allow agricultural district formation for initial periods of 8,
12, or 20 years. N.Y. AGRIC. & MKTS. LAW § 303 (McKinney Supp. 1984).
40. Id. § 1013. For example, once the county receives the petition for with-
drawal, it must publish notice of the petition. This notice must contain a brief
description of the land and a statement of the proposed nonagricultural use of
the land. Id.
continues undisturbed. A district may be dissolved completely after the expiration of the original ten-year term if two-thirds of the landowners within the district request dissolution. 41 If the landowners do not request dissolution, the district remains intact as originally constituted for eight more years. 42

In order to promote such district formation, protections are offered to farmers who organize agricultural districts. Although these protections vary from state to state, several types of provisions are typical. 43 First, farmers in an agricultural district can expect relief from inflated property taxes because farmland will be assessed as if farming were its highest and best use. 44 In effect, the development potential of the farmer’s land is not taxed. Although differential assessment programs for farmland taxation are not unique to agricultural district programs, 45 reduced taxes are one way that agricultural district laws may encourage farmers to rededicate themselves to agriculture. 46

Second, farmers within an agricultural district can also expect protection from local ordinances that restrict and regulate farming activities and structures. The growth of residential subdivisions in areas that were at one time truly rural can evoke friction between the newcomers and the farmers. The new neighbors may take offense at common elements of farm life: odors from farm animals and fertilizers, dust, flies, noise from animals and machinery, pesticide and herbicide spraying, and slow moving vehicles. 47 With an influx of urban-minded people, farmers may en-

41. Id. § 1017.
42. Id. § 1016.
44. Differential assessment is designed to benefit farmers, not to encourage speculation. But see Stradley, Differential Assessment for Agricultural Land Creates a Tax Haven for Speculators, 34 U. FLA. L. REV. 848 (1982) (examining the differential tax system in Florida which encourages development of farmland through speculation). To discourage speculators from investing prematurely in farmland so as to enjoy reduced tax burdens, conversion penalty and rollback tax provisions have been included in many statutes. When a farm is converted to non-farm use, the amount of the tax reduction in previous years may become due. For representative provisions, see N.Y. AGRIC. & MKTS. LAW § 305(1)(d) (McKinney Supp. 1984); PA. STAT. ANN. tit. 16, § 11946 (Purdon Supp. 1984).
45. For a discussion of differential assessment programs, see Duncan, supra note 31.
46. At least two courts have considered and upheld preferential tax treatment for agricultural land, independent of the existence of any agricultural district. See Hoffmann v. Clark, 69 Ill. 2d 402, 372 N.E.2d 74 (1977); Elwell v. County of Hennepin, 301 Minn. 63, 221 N.W.2d 538 (1974).
47. See Grossman & Fischer, supra note 22, at 97.
counter a reduction in their influence on local government. As a result, the local government may enact ordinances unfavorable to the farming community, thus forcing farmers out of the area prematurely. To prevent this situation, agricultural district statutes often limit the powers of local government to regulate agriculture within the districts, unless the regulation bears a direct relationship to the public health or safety.

Agricultural district statutes also typically limit the authority of special purpose districts to impose ad valorem property taxes on land within the districts. Landowners are often taxed on a per-acre basis to finance improved public services such as power, light, sewer, water and nonfarm drainage. Although farmers benefit from these improvements, they often finance a disproportionate share of the costs simply because of the land-intensive nature of farming. By alleviating this potential burden, agricultural districts encourage farmers within the districts to continue farming until their land is needed for immediate development.

Some agricultural district laws also contain provisions that direct state departments and agencies to execute their programs in ways that encourage and support the continuance of agricultural districts. The practical effect of these provisions is not entirely

48. See Coughlin, supra note 13; D. Berry, E. Leonardo & K. Bieri, The Farmer’s Response to Urbanization: A Study of the Middle Atlantic States 17 (Regional Science Research Institute Paper No. 92 (1976)).

49. Virginia’s provision is representative of those in this area:

No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural or forestal district in a manner which would unreasonably restrict or regulate farm structures or forestry and farming practices in contravention of the purposes of this chapter unless such restrictions or regulations bear a direct relationship to public health or safety . . . .

Va. Code § 15.1-1512B (1981). See also N.Y. AGRIC. & MKTS. LAW § 305(2) (McKinney Supp. 1984). Because the Virginia provision prohibits only unreasonable regulations that do not directly affect public health and safety, it merely defines the police power of local governments. It is likely to do little to limit the powers of local governments to pass ordinances regulating odors from farm activities. See Myers, supra note 27, at 35. But see Grossman & Fischer, supra note 22.

50. Iowa’s pertinent provion is typical:

A political subdivision or a benefited district providing public services such as sewer, water, or lights for or nonfarm drainage shall not impose benefit assessments or special assessments on land used primarily for agricultural production within an agricultural area on the basis of frontage, acreage, or value, unless the benefit assessments or special assessments were imposed prior to the formation of the agricultural area, or unless the service is provided to the landowner on the same basis as others having the service.


51. A representative policy directive is found in the Kentucky statute:
clear. But, as this article will later demonstrate, the potential interactions between public agencies and agricultural districts raise significant issues.\textsuperscript{52}

Planners have long recognized that controlled placement of major public works influences land development.\textsuperscript{53} As one group has stated, “[t]he provision of water supply or electric power directly influences the direction and timing of urban development; and the availability of sewers . . . encourage[s] settlement and urbanization. . . . The withholding of these services may be almost as important a tool for the preservation of open spaces.”\textsuperscript{54} One state, acknowledging the importance of the placement of water and related utilities in directing development, has gone beyond merely limiting the imposition of ad valorem property taxes for special purposes; it has also prohibited the development of public sewer and water systems within agricultural districts.\textsuperscript{55}

\begin{quote}
It shall be the policy of all state agencies to support the formation of agricultural districts as a means of preserving Kentucky’s farmlands and to mitigate the impact of their present and future plans and programs upon the continued agricultural use of land within an agricultural district.
\end{quote}


52. \textit{See infra} Part IV.


55. Minnesota’s Metropolitan Agricultural Preserves Act provides:

Notwithstanding Minnesota Statutes, Chapter 429, construction projects for public sanitary sewer systems and public water systems benefiting land or buildings in agricultural preserves shall be prohibited. New connections between land or buildings in agricultural preserves and sanitary sewers or water systems shall be prohibited. Public sanitary sewer or water systems built in the vicinity of agricultural preserves are deemed of no benefit to the land and buildings in agricultural preserves.

Several agricultural district statutes restrict the use of agricultural district land for such public development projects as highways and utilities. These statutes commonly include provisions that modify, but do not totally eliminate, the power of public agencies to acquire land within agricultural districts by condemnation. A later section of this article focuses in detail on these provisions.56

In spite of all the benefits and incentives that agricultural districts offer farmers, the districts do not prevent the ultimate conversion of farmland to urban uses.57 Rather, they function primarily to keep agriculture in place until the protected farmland is truly needed for immediate urban growth, thereby fostering more orderly and efficient development. Indeed, one commentator has criticized agricultural districting legislation for not going far enough: “It is as though the legislature created an elaborate device for metering the consumption of agricultural lands by cities, while forgetting that people may starve for lack of the farmland that cities so rationally consumed.”58

As the description of the process of agricultural district formation has indicated, participation in the districts is generally voluntary. This noncoercive character of agricultural districting has been criticized. One criticism focuses on instances in which developers have failed to use existing vacant parcels of land, and instead have chosen to develop beyond the agricultural districts on land that is even more remote from urban centers.59 Such “leapfrogging” is possible because the voluntary nature of the districts permits landowners receptive to sale to refuse to join a district. Yet the noncoercive aspects of the legislation were probably necessary for the political acceptability of districting.60 In general, voluntary programs are viewed more favorably by farm-

56. See infra notes 178-204 and accompanying text.
57. See Batie & Looney, supra note 5, at 621 (incentives in addition to the formation of agricultural districts will be needed to preclude conversion to urban use).
58. Widman, The New Cancellation Rules Under the Williamson Act, 22 SANTA CLARA L. REV. 589, 647 (1982). Another authority has suggested that legislatures not rely solely on agricultural districting programs: “Legislatures contemplating agricultural districting initiatives might be better encouraged to consider the acts as merely the first stage in the development of a comprehensive program for the preservation of agricultural resources.” Myers, supra note 27, at 38.
59. Batie & Looney, supra note 5, at 611.
60. Conklin & Bryant, supra note 15, at 607. For example, although the New York State Legislature failed to enact into law bills mandating farm value assessment and agricultural zoning, it subsequently instituted an agricultural districting program as a politically feasible compromise. Id.
ers than are mandatory programs, a factor that may be instrumental in the initial enactment of any farmland preservation law. Furthermore, the districtsing programs, despite their voluntary character, probably have been successful in reducing the uncertainty under which farmers make their investment decisions. Thus, these programs have, at least in the short run, contributed to the preservation of agricultural land in metropolitan growth areas.\footnote{61}

B. Restrictions on Development

Agricultural districts provide a means of keeping farmland in agricultural production for specific periods of time, while ensuring that the farmer continues to hold title to the property. Another type of legislative scheme is designed to protect farmland over the long term, while at the same time allowing the farmer to maintain a property interest in the land. Programs in this latter category restrict the farmer's right to develop the land commercially, but leave intact the right to use the property for agricultural purposes. These programs have various titles, such as conservation easements, land preservation easements, deed restrictions, and purchase of development rights.\footnote{62} Despite the va-

\footnote{61} Participation in these programs has not been a major problem in New York:

About 4.7 million acres have been placed within the 336 agricultural districts formed in the six years since the law was passed, and district formation continues. Initially, districts were formed principally in rural areas where farmers felt threatened by proposed government projects or encroaching recreationists. But within recent years a substantial amount of urban fringe acreage has been placed in districts. As of August 1976 approximately 28.9 percent of all district acreage was located in 16 of the state's 21 counties classified as Standard Metropolitan Statistical Areas outside of New York City; and 23.4 percent of all districted acreage was within 25 miles or less of an urban area of over 50,000 population . . . .


Local interest in Kentucky's agricultural districting program is strong. Thirty-one districts have been formed thus far. They encompass 37,972 acres of land owned by 424 landowners. The largest district consists of almost 10,000 acres owned by 60 different landowners. Lexington Herald-Leader, Aug. 17, 1984, at A11.

riety of labels and certain differences in the operation of the programs themselves, these programs share the goal of preserving productive agricultural land and open space for succeeding generations.\(^{63}\) To that end, they attempt to restrict the right of the fee simple owner "to develop, construct on, sell, lease or otherwise improve the agricultural land"\(^{64}\) in ways that are inconsistent with continued agricultural use.\(^{65}\)

A number of states have enacted programs authorizing purchase of development rights or conservation easements on selected parcels of agricultural land.\(^{66}\) In addition, some local pro-


\(^{65}\) The New Hampshire statute defines agricultural land development rights in the following manner:

"Agricultural land development rights" means the rights of the fee simple owner of agricultural land to construct on, sell, lease or otherwise improve the agricultural land for uses that result in rendering such land no longer suitable for agricultural use. Such development rights may be severed from the fee simple right to constitute a restriction for the preservation of the agricultural land.


Two recent laws authorize conservation easements for agricultural as well as other purposes, but do not establish a special program. \textit{See} \textsc{N.Y. Envtl. Conserv. Law} §§ 49-0301 to -0311 (McKinney 1984); \textsc{Tex. Nat. Res. Code Ann.}
grams for purchase of development rights exist. Although the various state schemes are not identical, they are sufficiently similar to permit some generalization about their operation.

Usually, the state legislation creates a committee, board, or other body charged with administration of the development rights program. The Maryland statute, for instance, establishes an agricultural land preservation foundation, governed by a board of trustees and empowered to administer the preservation program. This foundation, funded by the state and by private grants, has authority to consider offers from qualified owners of agricultural land who want to sell their development rights.


Also relevant is the Uniform Conservation Easement Act, 12 U.L.A. 51 (Supp. 1984). The Act is intended to maximize "the freedom of the creators of the transaction to impose restrictions on the use of land and improvements in order to protect them, and it allows a similar latitude to impose affirmative duties for the same purposes." Id., Commissioners' Prefatory Note. Under the Act, restrictions and obligations connected with the land will bind successors, even if the conservation easements are held in gross.


67. For a discussion of one such program in King County, Washington, see Dunford, Saving farmland—The King County program, 36 J. SOIL & WATER CONSERV. 19 (1981). See also E. ROBERTS, THE LAW AND THE PRESERVATION OF AGRICULTURAL LAND 77-83 (1982) (analyzing a similar program in Suffolk County, New York); Newton & Boast, supra note 62 (also analyzing the Suffolk County program).

The West Virginia State Legislature has authorized counties to implement their own land preservation programs by means of deed restriction purchases. W. VA. CODE §§ 8-24-72 to -78 (1984). This law authorizes the purchase of suitable property which is then resold or leased, subject to an agricultural use restriction. Id. § 8-24-76. See also 1984 Conn. Legis. Serv. 153-155 (West) (Pub. Act. No. 84-184, authorizing municipalities to establish an agricultural land preservation fund to be used for acquisition of development rights).

68. Some states have depended on an existing state agency to administer their programs. For example, the New Jersey agricultural preserve demonstration program is administered by the Department of Environmental Protection and the Department of Agriculture. N.J. STAT. ANN. § 4:1B-6 (West Supp. 1984). The New Jersey Agriculture Retention and Development Act is administered by a State Agriculture Development Committee created by a nearly contemporaneous law. Id. § 4:1C-14.


70. Md. AGRIC. CODE ANN. §§ 2-509 to -510 (Supp. 1983). The Maryland law is rather unique because only land located in an agricultural district is eligible for the easement purchase program. Id. § 2-509(d). See also N.J. STAT. ANN. § 4:1C-24 (West Supp. 1984).
The purchase price of any easement is specified by statute. The maximum purchase price is equal to the asking price or the difference between the fair market value and the agricultural value of the land, whichever is lower. In the majority of cases, these statutes also provide that the state may accept gifts of conservation easements.

The objective of the foundation's activity is to protect the maximum acreage of prime farmland that needs protection. Accordingly, decisions for purchasing development rights are governed by priority ranking of the land for which development rights have been offered. Some state statutes include criteria for determining whether development rights may be acquired. In Connecticut, for example, the major factor is the probability that the land will be sold for nonagricultural purposes. Other factors include the current and potential productivity of the land, soil classification and other indicia of the land's agricultural suitability, the land's contribution to the agricultural potential of the state, encumbrances, and the cost of acquiring development rights. At least one court has held that an interested landowner has no absolute right to have development rights purchased by the state.

After the development rights have been acquired pursuant to statute, the land preservation foundation holds them and enforces the preservation restrictions. The restricted land must

71. Md. Agric. Code Ann. § 2-505(b) (Supp. 1984) (funding); id. § 2-510. The law also prescribes formation of county agricultural preservation advisory boards, with review and advisory responsibilities. Id. § 2-504.1. Some conservation easement purchases require local contributions to the state fund. Id. §§ 2-508, -510(g).
72. Id. § 2-511.
74. Md. Agric. Code Ann. § 2-510(d) (Supp. 1984). In determining whether to approve an application to sell an easement, the county agricultural board must take into consideration any priority for the preservation of agricultural land established by the foundation. Id.
76. Id. The Massachusetts Agricultural Preservation Restriction Program has four criteria: "(1) quality of the soils for agricultural production; (2) degree of threat facing the farm; (3) significance of the farm to the state's agriculture; and (4) environmental and community planning objectives." Storrow & Winthrop, Agricultural land retention: The Massachusetts experience, 38 J. Soil & Water Conserv. 472, 473 (1983).
77. Appeal of MacEachran, 121 N.H. 1077, 1073, 438 A.2d 302, 304 (1981) (the statute allowing the purchase of development rights was enacted for the general welfare and not for the welfare of the owners of such rights).
be used for ordinary agricultural operations.79 Commercial residential subdivisions are not permitted, but the owner may construct a personal dwelling under certain conditions.80 The purchase of an easement does not permit any right of access or use to the public.81

Normally, development rights or conservation easements acquired under a state program are held by the state in perpetuity.82 The resulting use restrictions run with the land and bind future owners of the farmland. Usually, the development restrictions or easements can be terminated, if at all, only by following statutory procedures, and only when the public interest no longer requires restriction of development on the property.83 At least one state, however, has enacted legislation that authorizes the purchase of deed restrictions for a finite, specified period of time.84

Many of the development rights and conservation easement statutes include a provision that addresses the issue of eminent domain. But while most of these statutes mention the condemnation of both the farmer’s restricted estate and the newly-acquired rights of the state in that land, the actual provisions vary in their treatment of land subject to the condemnation proceeding.85

79. Id. § 2-513(a).
80. Id. § 2-513(b)(1).
81. Id. § 2-513(c).
82. For example, the Maryland statute provides:
   It is the intent of the General Assembly that the easement purchased under this subtitle be held by the foundation for as long as profitable farming is feasible on the land under easement, and an easement may be terminated only in the manner and at the time specified in this section. Id. § 2-514(a). See also CONN. GEN. STAT. ANN. § 22-26cc(b) (West Supp. 1985).
83. CONN. GEN. STAT. ANN. § 22-26cc(c) (West Supp. 1985); MD. AGRIC. CODE ANN. § 2-514 (Supp. 1984).
   The release of a development restriction is usually accomplished only after a public hearing. MD. AGRIC. CODE ANN. § 2-514(b), (c) (Supp. 1984). If the release is approved at the hearing, the landowner is allowed to repurchase the development easement at a price reflecting the difference between the fair market value and the agricultural value of the land. Id. § 2-514(f).
84. See W. VA. CODE § 8-24-76 (1984). Purchase of a deed restriction can be for “any period of time.” If property is purchased by a county commission and resold subject to a deed restriction, the restriction must limit the use of the property to agricultural purposes for a period of not less than ten years. Id.
85. The Maryland statute, for example, lends no special protection to land that is part of the program:
   (a) This subtitle does not prohibit any agency of the State or of a county from acquiring by condemnation land which is under an agricultural preservation easement held by the foundation if such acquisition is for a public purpose.
   (b) In the event of condemnation of land under an agricultural
Whether land protected by development rights statutes, as well as that embraced by agricultural districting programs, should be entitled to special treatment in condemnation hearings will be addressed in a later section of this article.86

Although a number of states have authorized the purchase of conservation easements or development rights to preserve agricultural land, states are not the only entities engaged in this type of activity.87 Several private, nonprofit organizations, formed to encourage agricultural land preservation, are acting independently to acquire development rights and conservation easements. Organizations like the Trust for Public Land and the American Farmland Trust are engaged in acquiring these interests in farmland.88 Because these organizations are not public in nature, the conservation easements or development restrictions created under their auspices may be treated somewhat differently from those created under state statutory programs.89

Whether the landowner deals with a state or local agency or a private trust, the farmer who conveys a conservation easement or development rights retains title to the land and can continue to farm the property.90 The programs can be particularly attractive

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preservation easement, the condemning authority, whether State or county, shall pay:

(1) To the landowner the full amount to which the landowner would be entitled if the land was not under easement, less any amount paid to the landowner by the foundation for the easement; and

(2) To the Maryland Agricultural Land Preservation Fund, an amount equal to any amount paid by the foundation for the easement.


86. See infra notes 300-10 and accompanying text.

87. The New Hampshire statute permits acquisition of development rights on agricultural lands "by any governmental body or charitable corporation or trust which has the authority to acquire interests in land." N.H. REV. STAT. ANN. § 36-D:8 (Supp. 1983). See also N.Y. ENVTL. CONSERV. LAW § 49-0305(3) (McKinney 1984) (conservation easement to be held only by a public body or nonprofit conservation organization).

88. The Trust for Public Land, according to one case study, has guided the formation of 70 land trusts. This San Francisco-based conservation organization has assisted ranching and farming communities in their efforts to retain land. Barnes, An Alternative to Alternate Farm Valuation: The Conveyance of Conservation Easements to an Agricultural Land Trust, 3 AGRIC. L.J. 308, 312 (1981). For a discussion of several other similar organizations, see Fenner, supra note 62, at 1043-46. For information on private activity in this area, see The California State Coastal Conservancy, The Nonprofit Primer: A Guidebook for Land Trusts (1983). See generally American Farmland Trust, Farmland (newsletter).

89. For a discussion of this different treatment, see infra text accompanying note 271.

90. As two authorities have stated, "Title to the land still rests with the landowner, who enjoys all the traditional rights of property ownership, such as
to farmers because, as landowners, they can realize part of the value of the property without sacrificing their means of livelihood and without being required to relocate. The farmer is free either to sell the conservation easement, thereby realizing the cash value of the land's development rights, or to donate it, thereby realizing value in the form of an income tax deduction.91

Another reason why programs for the sale of development rights or conservation easements may be attractive to farmers is that these programs, like agricultural districting programs, are generally voluntary. Normally, the transfer of development rights to the state takes place only if the farmer is willing to cooperate. Indeed, at least one statute articulates the legislature's intention to prohibit any use of eminent domain in acquiring development easements on prime agricultural land.92 Only two states permit the acquisition of development rights by condemnation.93

Once the farmer has conveyed the development rights or conservation easement, the value of the farmer's land is reduced by the value of its development potential. Thus, the farmer can expect lower property taxes.94 In addition, the reduced value of the land may, in some situations, decrease the size of the farm estate. The farmer will thus be faced with fewer obstacles in pass-

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Capital gains from the sale of development rights to a farmland preservation foundation may be subject to IRC § 55 alternative minimum tax. Gain from the sale of development rights is not tax exempt. Warfield v. Commissioner, 84 T.C. 179 (1985).


The program shall be conducted on a voluntary basis for all landowners in the program area; the provisions of any law to the contrary notwithstanding, it is the intention of this act to prohibit the exercise of eminent domain by the State, or any agency or instrumentality thereof, in acquiring development easements to prime agricultural lands pursuant to the provisions of this act.

Id.


94. This benefit may not help the farmer who already qualifies for a state preferential taxation program designed for agricultural land. For a discussion of preferential taxation programs, see supra notes 44-46 and accompanying text.
ing the farmland intact to future generations. Moreover, proceeds from the sale of development rights may be available to revitalize the farming operation.95

These programs, with their voluntary nature and tangible benefits, offer many advantages to landowners. And while productive agricultural land could be protected at substantially lower cost through exclusive agricultural zoning, this method is usually far less attractive to farmers because there is no compensation for the resultant loss of the right to develop their property. In addition, although agricultural zoning is commonly used to preserve agricultural land from developmental pressures, it is far from clear that such zoning is immune from judicial challenge.96 Nor is zoning immune from political pressures in local communities; these pressures may lead to amendments and variances in conventional zoning plans,97 and sometimes result in windfalls to landowners. Of course, in certain limited circumstances, a state agency may relinquish development rights or conservation easements, but this transaction does not usually result in a windfall to the individual landowner, as do zoning changes. Typically the development rights can be released only upon payment of their value as of the time of sale. The proceeds are then available for acquisition of development rights and conservation easements on other land.98

As the preceding paragraph suggests, the major drawback of a program to acquire development rights or conservation easements is the high cost of acquisition.99 The land with the greatest need for protection, prime agricultural land in a high growth area, also holds the most valuable development rights. The price of acquiring development rights for a given parcel theoretically equals the difference between the fair market value of the land


96. See Zoning, supra note 23, at 4 (new theories, such as antitrust challenges, for failure to rezone an agricultural district to permit development of a shopping center may pose severe threats to attempts at farmland preservation).


98. See R.I. GEN. LAWS § 42-82-5(e) (Supp. 1984). Even if an individual did reap a windfall, the gain would not completely evade society's grasp. The windfall may be subject to a capital gains tax upon transfer or an estate tax upon death. See Young, The Saskatchewan Land Bank, 40 SASK. L. REV. 1, 24 (1975).

99. See Batie & Looney, supra note 5, at 608.
and its agricultural value. 100 This means that in some instances, where land with the potential for development enjoys inflated values, the development rights may cost almost as much as the fee simple title itself. 101 Because of the limited appropriations currently available, the scope of the programs is restricted severely. The fiscal realities facing most states suggest that development rights acquisition programs may be better suited to providing open space preserves in urban areas than to protecting any significant acreage of farmland. 102 State priorities can change over time, however, and development restriction programs eventually may play a more important role in the preservation of agricultural land.

III. EMINENT DOMAIN

As the foregoing has demonstrated, both agricultural district-

100. The Maryland law describing the value of an easement provides in part:

The maximum value of any easement to be purchased shall be the asking price or the difference between the fair market value of the land and the agricultural value of the land, whichever is lower.

(1) The fair market value of the land is the price as of the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay for the property if the property was not subject to any restriction imposed under this subtitle.

(2) The agricultural value of land is the price as of the valuation date which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay for the property as a farm unit, to be used for agricultural purposes.


101. Batie & Looney, supra note 5, at 608.

102. The New Jersey demonstration program, for example, was intended to create an agricultural preserve of only 5,000 acres. See N.J. Stat. Ann. § 4:1B-5 (West Supp. 1984). In Connecticut, the state bond commission has power to issue up to $14.75 million in bonds to finance purchases of preservation easements. Conn. Gen. Stat. Ann. § 22-26hh (West Supp. 1976-1983). New Hampshire has appropriated $3 million for the acquisition of development rights. N.H. Rev. Stat. Ann. § 36-D:13 (Supp. 1983). These efforts protected 1068 acres in 15 farms. In 1985, an additional $2 million was authorized, with funds to be raised through bond sales. New England Legislators Debate Farmland Protection, Farmland Notes, Aug. 1985, at 1 (monthly newsletter of NASDA Research Foundation Project). In Massachusetts, the recent acquisition of development rights on the one hundredth farm to enter the program brings the total protected land to over 9,000 acres. Another 20 farms, constituting 1,735 acres, are currently under contract to sell their preservation rights. Since the program's enactment in 1977, $45 million has been committed to it. Wisconsin and Massachusetts Differ in Farmland Protection Techniques But Not in Success, Farmland Notes, Aug. 1984, at 1, 2.
ing laws and programs for the conveyance of development rights or conservation easements have been enacted to implement an important public purpose—to conserve farmland, either until the time is ripe for orderly development or for the permanent benefit of future generations. Yet that farmland may be desirable or even required for activities other than farming. When one of these activities furthers a purpose for which a governmental entity has the right to condemn land through its power of eminent domain, the agricultural land becomes vulnerable. Thus, there is an important relationship between eminent domain and these farmland preservation statutes. Before focusing on that relationship, however, this article will sketch some of the background of the eminent domain power.

A. Origins

Eminent domain is "the power of the sovereign to take property for public use without the owner's consent upon making just compensation."103 Although this power has been exercised since the days of the ancient Romans,104 it was not until the end of the medieval period that takings for public use evolved as a separately-identified branch of governmental power.105 The origin of the term eminent domain has been traced to Hugo Grotius, who referred to "dominium eminens" in a 1625 treatise.106 He described it as the power to take private property, not only in instances of extreme necessity, but also as a means to achieve public utility.107 Grotius reasoned that the power grew out of the principle that the state had held original and absolute ownership of the land before any individual had obtained possession. Thus, the sovereign held an implied reservation in the land and could resume ownership when the land was required for the public good.108 Although subject to extensive judicial criticism,109 Grotius' concept of ultimate ownership by the sovereign was eventu-
ally adopted by several American states.110

The majority of modern writers recognize eminent domain as an attribute of state sovereignty, rather than as a reserved property right or as the state’s exercise of ultimate ownership of the soil.111 The power "springs from . . . a necessity of government."112 It is an inherent power of the sovereign, which does not depend on recognition by constitutional provision,113 and is based on the superior right of the state over private property. In this country, a state can enact any law affecting persons or property within its jurisdiction unless prohibited from doing so by the federal Constitution or by that state’s own Constitution.114 Thus, because the federal Constitution does not prohibit the taking of private property for public use when the owner receives just compensation,115 eminent domain is within the states’ authority. Moreover, a state, through proper legislative enactment, can delegate its authority to exercise eminent domain to counties, municipalities, and other public bodies or corporations.116

The federal government also enjoys the power of eminent domain.117 For the first century of its existence, however, it did not exercise that power. Instead, it relied on state governments to condemn land and transfer it to the federal government.118 Then, in 1875, the Supreme Court decided that the federal government, although one of limited, delegated powers, could condemn land in its own name, in spite of the fact that the Constitution does not grant that power expressly.119 The Court

110. Id. § 1.13. These states include Arkansas, Connecticut, Florida, Indiana, Michigan, Missouri, New York, Oklahoma, Pennsylvania, South Carolina, Tennessee, and Washington. Id.
111. Id. § 1.13[4].
112. Id. § 1.11.
113. Id. §§ 1.14[4], 5.1. For cases holding that the federal government’s eminent domain power is inherent, see United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668 (1896); Boom Co. v. Patterson, 98 U.S. 403 (1878).
114. See U.S. Const. amend. X.
115. See U.S. Const. amend. V (prohibiting the taking of private property for public use without just compensation). The eminent domain clause of the fifth amendment has been incorporated into due process clause of the fourteenth amendment and thus applies to the states. See Chicago B. & O. R.R. v. Chicago, 166 U.S. 227 (1897).
later found eminent domain to be an implied power, necessary and proper for the execution of other powers expressly delegated to the federal government.\textsuperscript{120} The Court characterized the power as an "offspring of political necessity."\textsuperscript{121} More recently, the Court remarked that the fifth amendment's prohibition of taking private property for public use without just compensation\textsuperscript{122} constituted a tacit recognition of the existence of the eminent domain power.\textsuperscript{123}

\textbf{B. Elements of Eminent Domain}

Reduced to its most essential terms, then, eminent domain is the power to take private property without the owner's consent for the public use.\textsuperscript{124} Another element, compensation of the property owner, while not essential to the meaning of eminent domain, is nonetheless crucial to its valid exercise.\textsuperscript{125}

Although the power to take private property would appear to be relatively straightforward, the taking issue continues to raise difficult analytical issues.\textsuperscript{126} When the sovereign or a properly-delegated subunit of government condemns property to build a road, a school, or a courthouse, there is general agreement that a taking has occurred and that compensation is due. Similarly, appropriation of even a minute portion of an individual's property through actual, physical intrusion will almost invariably constitute a taking.\textsuperscript{127} Where the governmental action is less clearly a physical appropriation of private property, however, conceptual

\textsuperscript{121} Bauman v. Ross, 167 U.S. 548, 574 (1897) (quoting Searl v. Lake County Sch. Dist., 133 U.S. 553, 562 (1890)).
\textsuperscript{122} U.S. Const. amend. V.
\textsuperscript{123} United States v. Carmack, 329 U.S. 230, 241-42 (1946). The fifth amendment itself does not grant this power to the federal government. \textit{Id}.
\textsuperscript{124} 1 P. Nichols, \textit{supra} note 103, \S\ 1.11.
\textsuperscript{125} Id. See U.S. Const. amend. V. See also Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 689 (1897) ("constitutional guarantee of just compensation is not a limitation on the power to take, but only a condition of its exercise").
problems are raised. Should governmental regulation that merely restricts property use, or reduces the value of property, be deemed a taking for constitutional purposes? For example, a zoning change from commercial to residential use can diminish property value significantly. Yet such action often will not be deemed a taking even though the diminution in value is far greater than that occasioned by many physical intrusions that are held to be takings.\textsuperscript{128}

In the recent case of Penn Central Transportation Co. v. New York City,\textsuperscript{129} the Supreme Court acknowledged that the question of what constitutes a taking for purposes of the fifth amendment is "a problem of considerable difficulty."\textsuperscript{130} The Court has articulated "no set formula to determine where regulation ends and taking begins."\textsuperscript{131} Instead, it has adopted an \textit{ad hoc} balancing test. Factors that must be considered include the economic impact of a regulation, its interference with investment-backed expectations, the character of the governmental action,\textsuperscript{132} and whether the interference is an actual physical invasion.\textsuperscript{133} Recent Supreme Court decisions seem to indicate that a taking exists only if the individual demonstrates either a permanent physical invasion of property\textsuperscript{134} or an interference that nearly destroys the

\textsuperscript{128} See, \textit{e.g.}, HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P.2d 237 (1975) (zoning change from commercial to residential, reducing value from $400,000 to $75,000, held not to constitute a taking), \textit{cert. denied}, 425 U.S. 904 (1976). \textit{See also} Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

\textsuperscript{129} 438 U.S. 104 (1978).

\textsuperscript{130} \textit{Id.} at 123. In \textit{Penn Central}, the City of New York had denied the owners of Grand Central Terminal permission to build a 50-story structure atop the terminal on the basis of a local statute restricting the development of this and other historical landmarks. \textit{Id.} at 115. In holding that this restriction did not constitute a taking, the Court found that "the restrictions imposed [were] substantially related to the promotion of the general welfare and not only permit[ed] reasonable beneficial use of the landmark site but also afforded appellants opportunities to enhance further, not only the Terminal site proper, but also other properties." \textit{Id.} at 138.


\textsuperscript{132} See Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (Court considered governmental action involving the exercise of the public right of navigation over interstate waters that provided highways for commerce.)

\textsuperscript{133} See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); \textit{Penn Central}, 438 U.S. at 124 (a "taking" is more likely when the governmental action constitutes a physical intrusion).

\textsuperscript{134} Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
value of the property by leaving no reasonable use.135

Although the taking issue is significant and raises difficult conceptual problems, this article focuses on the full exercise of eminent domain rather than on regulatory action bearing the characteristics of a taking. Moreover, the element of the eminent domain power that focuses on the lack of the property owner's consent is not particularly problematic, although the impending involuntary loss of property may cause the landowner to challenge the eminent domain action.

Likewise, and notwithstanding many challenges to eminent domain actions that have raised the issue, the question of just compensation for the taking of property through eminent domain is not predominant in the context of this article. As a general rule, compensation is determined by the amount that the individual property owner has lost through the taking.136 This is usually ascertained by reference to the value of the property when applied to its highest and best use in light of its present and potential uses.137 Fairness is another important consideration.138 It should be noted that agricultural land may present special compensation problems. When agricultural land is condemned and part of a farmer's tract is taken, the condemning entity may leave behind other parcels of land that are made less valuable or even useless for farming. Highway construction, for example, often results in isolated triangular and circular fields that are inaccessible or difficult to farm with large equipment.139 In addition, some projects for which land is condemned affect the drainage patterns so crucial to productive agriculture. The determination of the compensation that a farmer should justly receive is thus a rela-

135. See Agins v. City of Tiburon, 447 U.S. 255, 262-63 (1980) (although certain ordinances limit the development of particular land, they do not violate the fifth and fourteenth amendments because the appellants are still free to pursue their reasonable investment expectations).

136. Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910) (Ask "what has the owner lost, not what has the taker gained."). See generally 3 P. NICHOLS, supra note 103, § 8.61.

137. See United States v. 564.54 Acres of Land, 441 U.S. 506 (1979) (property owners received fair market value, although below replacement cost).

138. United States v. Fuller, 409 U.S. 488, 490 (1973) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, ... as it does from technical concepts of property law." (citations omitted)).

139. See generally Schmidt, Freeway Impact on Agricultural Areas, 20 NAT. RESOURCES J. 587, 589 (1980) (dividing up farms in a variety of ways has adverse impacts on the farms' ability to produce efficiently and economically). But see NEB. REV. STAT. §§ 76-710.03 (1981) (the condemnor of agricultural land must select a route that follows section or half-section lines if at all possible).
tively complex issue, and one that will usually require analysis beyond mere appraisal of the land actually taken.140

The proper exercise of eminent domain also requires that property be taken for a "public use."141 Although at one time in its history this element of eminent domain meant that the general public had to have the right to use the property taken,142 the current understanding is much broader. In May 1984, the Supreme Court rearticulated the liberal public use requirement in Hawaii Housing Authority v. Midkiff.143 Midkiff involved a public use challenge to the Hawaii Land Reform Act of 1967, which created a land condemnation scheme designed to reduce concentration of land ownership by taking title to real property from lessors and transferring title to lessees. In holding that the statutory scheme did not violate the public use test,144 the Court relied in part on Berman v. Parker.145 In Berman, the Court had upheld the state's use of eminent domain to take blighted urban property, which it then reconveyed to private developers.146 Invoking the reasoning of Berman, the Midkiff Court concluded that eminent domain is a product of the police power, and thus, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."147 This suggests that once the object of the action is within the legislature's authority, the right to use eminent domain as a means to achieve that objective is clear. The Midkiff Court


142. Some public use challenges emerged when railroads were delegated power to condemn private property for expansion of the rail system. 2A P. Nichols, supra note 103, §§ 7.1-1[1]. Additional opposition arose when municipal governments began to include proprietary service activities. See, e.g., Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923) (condemnation for public highway). Efforts were made to restrict the use of eminent domain to situations when the condemned property would be used by the public. See Ross, Transferring Land to Private Entities by the Power of Eminent Domain, 51 GEO. WASH. L. REV. 355, 360 (1983).

144. Id. at 2331-32.
146. Id. at 34-36.
147. Midkiff, 104 S. Ct. at 2329 (quoting Berman, 348 U.S. at 32).
viewed public use as "coterminous with the scope of a sovereign's police powers." 148

As the Court noted in *Midkiff*, the role of the courts in reviewing the legislature's judgment on public use is narrow indeed. 149 The judiciary should defer to the legislative determination unless that determination clearly has no reasonable foundation. Thus, courts should endorse legislative determinations of public use whenever "the exercise of the eminent domain power is rationally related to a conceivable public purpose." 150 Even an appropriation in which the property taken is transferred to private beneficiaries, as in *Midkiff*, can have a public purpose. The Court imposes no requirement that condemned property be used by the general public. 151 The state may be able to advance its legitimate public purpose without ever taking possession of the condemned property. As the Court noted, "[I]t is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." 152

148. *Id.*
149. *Id.* (citing *Berman*, 348 U.S. at 32).
150. *Id.* at 2329-30.
151. *Id.* at 2331. *See also* Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923); Block v. Hirsch, 256 U.S. 135, 155 (1921).
152. 104 S. Ct. at 2331. The scope of review of the public use issue may be more stringent in the state courts. Although subject to some variation, the majority rule appears to state that while the legislatures initially determine the issue, the ultimate decision is for the courts. 2A P. *Nichols*, *supra* note 103, § 7.4. One state court defined a public use in these broad terms:

The public uses for which property may be condemned include the following: (1) to enable government to carry on its functions, and to preserve the safety, health and comfort of the public, whether or not its individual members may use the property so taken, provided the taking is by a public body; (2) to serve the public with some necessity or convenience of life required by the public as such and which cannot readily be furnished without the aid of the government, whether or not the taking is by a public body, provided the public may enjoy such service as of right; and (3) in special and peculiar cases, sanctioned by custom or justified by the existence of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner not otherwise possible, if their success will indirectly enhance the public welfare, even though the taking is by a private individual and the public has no right to the enjoyment of the property taken or to service from him.


Uses are "public" in Illinois, for example, when they meet four criteria: (1) the use affects the community rather than an individual; (2) the law controls the property's use; (3) title does not vest in a person or corporation as private property to be used and controlled privately; and (4) the public receives the benefit of public possession and use, with only the public body exercising con-
EXERCISING EMINENT DOMAIN

C. Conflicting Public Uses

Before analyzing the provisions that concern eminent domain in agricultural districting and conservation easement laws, it is useful to reflect briefly on the situation that arises when a single piece of property is needed for more than one public use. Because the power of state government has become more diffuse as a result of an increase in the number of state departments and agencies, as well as municipalities and other governmental units, the number of conflicting land needs has also increased.

The ordinary condemnation proceeding involves the state or federal government, or a properly delegated subunit of government, and the individual property owner. After it has been determined that the proposed action of the condemning authority is intended to achieve a legitimate public use and is not arbitrary or capricious, the only real issue remaining is the proper compensation for the taking. The individual landowner cannot thwart the public interest.

Occasionally, however, a public entity that enjoys the power of eminent domain, either by virtue of its status or through delegation, finds it necessary or expedient to condemn property already committed to public use. The proposed condemnation may impair or destroy that already existing public use. The general rule used to resolve conflicts of this nature is that property already devoted to public use "cannot be taken and appropriated to another and different use unless the legislative intent to so take it has been manifested in express terms or by necessary implication." To ensure immunity from subsequent condemnation trol. See Department of Public Works & Buildings v. Farina, 29 Ill. 2d 474, 194 N.E.2d 209 (1963).

153. For a more detailed analysis of conflicting public uses, see Dau, supra note 118.


155. See Blank v. Columbia Gas of Pa., Inc., 11 Pa. Commw. 304, 314 A.2d 880 (1974) (property may be condemned for the public good only if just compensation is made).

156. City of Moline v. Greene, 252 Ill. 475, 477, 96 N.E. 911, 912 (1911) (city sought to widen street by taking 10 feet of property from public library); City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957) (municipality could condemn land not essential to owner in operation of public service); cf. Illinois Cities Water Co. v. City of Mt. Vernon, 11 Ill. 2d 547, 144 N.E.2d 729 (1957) (municipality may acquire property of existing public utility devoted to the same use as that contemplated by condemnor). See generally 1 P. Nichols, supra note 103, § 2.2 (discussing whether property already devoted to public use can be subjected to eminent domain); id. § 2.2[1] (nature of proposed use is determining factor of when publicly-used land can be con-
for another public use, an entity acquiring the land through eminent domain must devote the property to public use and have a legal obligation to maintain that use. Several recent decisions illustrate this basic principle, as well as related exceptions.

The Minnesota Supreme Court faced the issue of conflicting public uses in *City of Shakopee v. Clark.* The city had petitioned to condemn land for a street easement. The Metropolitan Waste Control Commission (MWCC), a public body established to coordinate waste disposal in the metropolitan Minneapolis-St. Paul area, challenged the petition. MWCC had acquired options on the condemned land for a sludge disposal site, and had exercised those options several months before Shakopee attempted to condemn the easement. Having encountered some difficulty in acquiring the necessary permits, MWCC had not yet actually begun to use the property for a sludge site.

In deciding the case, the court first ascertained that MWCC had a property interest in the land when the city filed its condemnation petition. The court next recited the general rule that a condemnor with the right of eminent domain may not condemn public property or property devoted to public use without authority expressly or impliedly granted by statute. In addition, the court discussed several corollaries to the general rule. First, an implied legislative intent to permit condemnation may be found if the land has not actually been put to the prior public use. The owners, however, should be allowed to show that the property is condemned by necessary implication from statute; Annot., 12 A.L.R. 1502 (1921) (explaining the right to condemn land originally purchased for public use but no longer in actual use).

If, however, the United States is the condemning entity and is acting within its constitutional powers, a supremacy issue may arise. The federal use may preempt other uses. See United States v. Carmack, 329 U.S. 230 (1946) (in order to build a post office and courthouse, federal government condemned land that was held in trust and used for public purposes by the city); United States v. Pleasure Driveway & Park Dist., 314 F.2d 825 (7th Cir. 1963) (federal government condemned portion of municipal park for use in construction of highway). See also Dau, supra note 118, at 1518-20 (discussing development of principle of supremacy of a federal public use over all other uses).

158. 295 N.W.2d 495 (Minn. 1980).
159. *Id.* at 496-97.
160. *Id.* at 497-98. When MWCC exercised the options in a timely manner, the contract became a purchase and sale agreement. As vendee, MWCC had an interest in the property. *Id.* at 497.
161. *Id.* at 498. For a further discussion of this rule, see supra note 156 and accompanying text.
162. 295 N.W.2d at 498. See also Michigan State Highway Comm'n v. St.
needed for the prior public use, and that it will be applied to that use without undue delay.\textsuperscript{163} The Shakopee court found that MWCC did need the property and was making a diligent effort to set up its sludge disposal site. Second, an implied right to condemn may be inferred if the two public uses are not substantially inconsistent, as in the case of an intersection of two public easements, such as a street and a railroad.\textsuperscript{164} The Shakopee court found, however, that the city's proposed street would have interfered with the sludge site.

Another circumstance in which an implied statutory right to condemn publicly-used property may exist, according to the court, is a situation in which the potential condemnor simply cannot carry out its powers without appropriating the property.\textsuperscript{165} Shakopee could not prove the absolute necessity of obtaining the property, though it did suggest that building a street elsewhere would be more expensive. The court concluded that, because Shakopee had neither express nor implied statutory authority, the city could not condemn the property for which MWCC had a present need and a proposal for use.\textsuperscript{166}

In Shakopee, then, the court found no express statutory or implied legislative authority for the city to take property already committed to public use. Other decisions, however, have found such authority. In City of East Peoria v. Group Five Development Co.,\textsuperscript{167} for example, the court relied on statutory authority to permit condemnation. In an effort to engage in a road improvement project, the city of East Peoria had attempted to condemn land held by a community college district. The district objected to the proposed taking. The case posed only one issue: whether the city could condemn property already committed to public use. Looking to the legislative history behind the relevant statute that gov-

\begin{itemize}
\item 163. Shakopee, 295 N.W.2d at 498 (quoting Board of Water Commissioners v. Roselawn Cemetery, 138 Minn. 458, 463, 165 N.W. 279, 281 (1917)).
\item 164. \textit{Id.} at 499. See also Tenneco, Inc. v. Central N.Y.R.R., 51 A.D.2d 676, 378 N.Y.S.2d 157 (1976) (allowing condemnation of lands already acquired for public use because second public use would not interfere with or destroy the first).
\item 165. 295 N.W.2d at 500. See also 1 P. Nichols, supra note 103, § 2.2[1] (explaining the right to condemn publicly-used land by necessary implication due to the nature of proposed use); \textit{Id.} § 2.2[2] (explaining the degree of necessity that gives rise to the implication).
\item 166. 295 N.W.2d at 500-01.
\item 167. 87 Ill. 2d 42, 429 N.E.2d 492 (1981).
\end{itemize}
cerned the taking of property by cities, the Illinois Supreme Court observed that the legislature had originally authorized the condemnation only of private property for local improvements. In response, however, to judicial decisions limiting eminent domain power to private property, the legislature had later amended the statute to permit taking of private or public property. The court concluded that the legislature had thus intended, through this amendment, to permit condemnation of property already committed to public use. As the court acknowledged, the legislature could confer a broad eminent domain power without naming specific kinds of property to which the power applied. Any abuses of that broad grant of power could be corrected in the courts.

Both Shakopee and East Peoria involved conflicting public uses, where each entity claiming a necessity to use the land was a governmental or quasi-governmental body with an obligation to use land under its control for a public purpose. Another decision, Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc., involved a public utility and a private, nonprofit corporation. Wildlife Preserves had assembled in New Jersey a 1400-acre preserve named Troy Meadows, one of the most important inland fresh-water wetlands in the northeast. Relatively free from man-made encroachments when assembled, the preserve was the subject of a condemnation action by Texas Eastern Transmission Corporation, which planned to build a gas pipeline and related facilities on portions of the preserve. Wildlife Preserves alleged that the right of way sought by Texas Eastern "would cause substantial and irreparable damage by disturbing the natural habitat of animals and destroying the flora and fauna."

Wildlife Preserves challenged the condemnation, raising the issue of prior public use and offering an alternate route for the pipeline that would cause less damage to the preserve. The trial court rejected the challenge, stating that the "mere voluntary assumption of public service which may be abandoned at any time does not carry with it protection from the exercise of eminent do-

169. 87 Ill. 2d at 47, 429 N.E.2d at 494.
main."172 The intermediate appellate court affirmed.173 On appeal the New Jersey Supreme Court agreed with the dismissal of the prior public use defense, noting that Wildlife Preserves was a private organization and lacked the power to condemn lands.174 The court acknowledged, however, that Wildlife Preserves’ voluntary consecration of its lands as a wildlife preserve, while not giving it the cloak of a public utility, does invest it with a special and unique status. Qualitatively, for purposes of the present type of proceeding, the status might be described as lower than that of a public utility but higher than that of an ordinary owner who puts his land to conventional use. Unquestionably, conservation of natural resources can and would become a legitimate public purpose if engaged in by the federal or state government or an authorized agency thereof.175

Also noting that a relevant federal law authorized the taking of lands already committed to public use,176 the court remanded the case to give Wildlife Preserves the opportunity to present evidence on alternate routes for the pipeline.

Despite its “special and unique status,” Wildlife Preserves did not prevail in the lower court hearing on alternate routes. The New Jersey Supreme Court, in reviewing the decision on remand, upheld the trial court’s conclusion that the right of way sought by Texas Eastern “represented a reasonable exercise of judgment.”177 The Wildlife Preserves litigation indicates that a merely voluntary action designed to devote property to public use carries little weight when that property is needed for another public use proposed by an entity with the power of eminent domain. The portion of the supreme court opinion quoted above suggests, however, that conservation activity implemented by the government itself would receive greater deference than that of a private corporation.

172. Id. at 4-5, 213 A.2d at 195. The court continued: “It must appear that the public has an enforceable right to a definite and fixed use of the property. The test is not what the owner may choose to do but what under the law he must do, and whether a public trust is impressed upon the land.” Id. at 5, 213 A.2d at 195 (citations omitted). See 1 P. Nichols supra note 103, § 2.2.
174. 48 N.J. at 267-68, 225 A.2d at 134.
175. Id. at 268, 225 A.2d at 134.
176. Id. at 267, 225 A.2d at 133 (citing Federal Natural Gas Act, 15 U.S.C. § 717(f)(h) (1982)).
IV. EMINENT DOMAIN AND PROTECTED AGRICULTURAL LANDS

A. Eminent Domain Provisions in Farmland Protection Laws

As the foregoing discussion has indicated, the power of eminent domain is quite extensive and can be exercised by a large number of governmental entities. Productive agricultural land, which has geographic characteristics that make it suitable and even attractive for many types of public improvements, often may be the object of condemnation proceedings. The takings that result from such proceedings may destroy the agricultural viability of the land or remove the land from production entirely. Legislatures have recognized the importance of protecting productive agricultural land from development by enacting agricultural district statutes and conservation easement laws. It can be argued that these lands should also be protected from development and other changes implemented through condemnation. But as the following analysis suggests, legislatures have been reluctant to protect agricultural land from eminent domain incursions.

1. Agricultural District Laws

Legislatures that have enacted agricultural district laws have approached the problem of eminent domain takings of protected land in several different ways. The legislatures of Illinois and Iowa, for example, have simply ignored the issue and have failed to indicate what protection district land enjoys in the face of condemnation. The Pennsylvania legislature, in instituting a program of covenants that operate like agricultural districts to preserve farmland use for specific time periods, seems to have made clear that this program will not affect eminent domain proceedings. The relevant statute provides that the landowner’s covenant to preserve the land is not breached because of the “acquisition by . . . eminent domain, and use of rights of way or underground storage rights in such land by a public utility or other body entitled to exercise the power of eminent domain.”

Other states have accorded some degree of protection to


land in agricultural districts from powers of eminent domain. The scope of this protection, however, varies. Kentucky legislation, for example, merely provides for a public hearing on the taking. A recent amendment to the Kentucky agricultural district law states that a member of a district who receives a condemnation proceeding summons concerning his land in the district may request the local soil and water conservation district board of supervisors (the body that administers the act) to hold a public hearing on the proposed taking.\textsuperscript{180} A hearing need not be held if the condemnor is a utility with a certificate of convenience and necessity for the project.\textsuperscript{181} Moreover, the amended statute provides only for a hearing, and not for dismissal of the condemnation suit.\textsuperscript{182}

Several states with agricultural district statutes have attempted to protect district land from unnecessary condemnation by adopting a procedure that might be called the "second look" approach. The laws that incorporate this approach generally apply the procedure both to acquisitions of land and to the advancement of public funds for facilities to serve nonagricultural uses.\textsuperscript{183} Although these state law provisions vary somewhat, they seem to be based on a common model, perhaps the early New York statute, enacted in 1971.\textsuperscript{184}

The Ohio provision is representative. Any public or private agency that intends to appropriate more than "ten acres or ten percent of an individual property under one ownership and currently in agricultural production in an agricultural district"\textsuperscript{185} must notify the department of agriculture at least thirty


\textsuperscript{181} Id. Another recent Kentucky law designed to protect farmland may in fact prevent condemnation of some land in agricultural districts. The law creates the Inter-Agency Farmland Advisory Committee, which must review all of the projects proposed by state agencies that will require acquisition of more than 50 acres of farmland. The Committee will review the proposal before the state agency initiates action to take the farmland. After the Committee reviews the proposal and holds a public hearing if one is requested, the Committee files its report. It may recommend that the governor alter the proposed state project if necessary "to balance the public interests." Ky. Rev. Stat. § 262.875 (Supp. 1984).


\textsuperscript{183} N.Y. AGRIC. & MKTS. LAW § 305(4) (McKinney Supp. 1984-1985).

\textsuperscript{184} Ohio Rev. Code Ann. § 929.05(A) (Page Supp. 1983). The level of interference with agricultural district land required for the statute to extend pro-
days before beginning condemnation proceedings. The notice must justify the proposed action and evaluate alternatives that would not involve land within the agricultural district. If, after the department reviews the proposal, it decides that the proposed action would adversely affect the district and that this adverse effect would outweigh the enhancement of public welfare from the proposed project, the department must so inform the governor. The governor must then issue an order suspending the project for sixty days, during which time a public hearing is to be scheduled. After the hearing and before the end of the sixty-day period, the director of the department of agriculture must issue findings and recommendations in writing. The public agency with authority to approve or deny the proposed action must use these findings and recommendations in reaching its final decision.

The protection that Ohio law gives to land in agricultural districts is not absolute. The statute does not actually prohibit takings even if this land will be affected adversely, but it does ensure that the effects of the proposed project will be recognized by the agency having ultimate authority over the project. Moreover, the protection does not extend to all types of condemnation. The provisions described above, for instance, do not apply to plans for electric lines, gas and oil pipelines, or telephone lines, nor do the provisions restrict any activity under the jurisdiction of the state power siting board. In addition, the provisions do not apply if the proposed action is an emergency project "immediately necessary for the preservation of the public health, safety, or general welfare."
A comparable statute in New York extends similar protection, although its application varies somewhat from that of Ohio's provision. Virginia's law is also similar, but it has a more severe impact on the condemning entity. In Virginia, after the local governing body reviews the proposed action, it reports its decision to the entity proposing the action through issuance of a final order. If the proposing entity is aggrieved by the order, it may appeal to the court of the circuit in which a majority of the land is located. By shifting the burden of an appeal to the condemning entity, the Virginia statute may help to discourage the taking of land in agricultural districts.

The Minnesota legislation, which authorizes agricultural preserves in several counties in the Minneapolis-St. Paul metropolitan area, provides for a "second look" similar to those described above, but also includes an additional means of delaying condemnation actions that will adversely affect land in preserves. The environmental quality board, the reviewing agency under the Minnesota legislation, has authority to suspend any eminent domain action for up to one year when the action is contrary to the purposes of the metropolitan preserve law and when "there are feasible and prudent alternatives which have less negative impact on the agricultural preserves." The Minnesota law also prohibits construction of sanitary sewer systems and public water systems that benefit land or buildings in agricultural preserves. The purpose of this provision is to protect the relatively scarce lands in the metropolitan area for long-term agricultural use.

or transfers of land for the purpose of the construction of a dwelling in which the receiving family member will live. *Id.* § 929.05(F). See generally Comment, *Farmland Preservation in Ohio—Good News for Land Speculators?*, 12 CAP. U.L. REV. 229, 239-48 (1982) (critically evaluating Ohio's agricultural districting statute).


192. *Id.*


194. *Id.* § 473H.15(9).

195. *Id.* § 473H.11.

196. *Id.* § 473H.01. In California, the Land Conservation Act (also called the Williamson Act) adopts a second-look approach. The law allows cities and counties to declare areas as agricultural preserves. See CAL. GOV'T CODE § 51230 (West 1983). The city or county may then contract with landowners to restrict agricultural land to agricultural uses. *Id.* § 51240. Strictly speaking, this arrangement does not create "agricultural districts" as the term is used in this article, but the effect is similar.

The California statute further a policy of avoiding, wherever possible, the
Perhaps the most comprehensive protection of land in agricultural districts is found in the New Jersey Agriculture Retention and Development Act of 1983, which implements a two-tiered scheme of protection. Under the New Jersey law, local agricultural development boards can establish “agricultural development areas” in which agriculture is the preferred, albeit not necessarily the exclusive, use of the land. Once an agricultural development area has been established, any entity that intends to acquire land in the area through eminent domain must file a notice of intent that justifies the acquisition and evaluates alternatives. This notice is followed by a review similar to the review procedure enacted in Ohio.

Certain New Jersey landowners within an agricultural development area may petition for the creation of a “municipally approved program,” which is established after review in a way similar to the creation of agricultural districts. Landowners within a municipally approved program must agree to keep their land in agricultural production for a minimum of eight years. The land then qualifies for the higher tier of protection from eminent domain:

The provisions of any law to the contrary notwithstanding, no public body shall exercise the power of eminent domain for the acquisition of land in a municipally approved program . . . unless the Governor declares that

location of various public improvements in agricultural preserves. When such avoidance is impossible, the policy is to locate the necessary improvements on land that is not under contract. Id. § 51290. Land under contract cannot be taken without special justification. Id. See generally id. §§ 51290-51295. Despite articulation of this policy, however, the provisions may not be effective in preserving agricultural land. See Comment, supra note 140, at 559-60 (explaining factors that diminish effectiveness of the Williamson Act). See also 58 Op. Cal. Att’y Gen. 729, 749 (1975) (State Energy Commission decision to build a nuclear power plant overrides any determination by local authorities that plant construction should be prohibited on land restricted to open space use under the Williamson Act).

198. Id. § 4:1C-18.
199. Id. § 4:1C-19.
200. For a discussion of Ohio’s review procedure, see supra notes 185-89 and accompanying text.
202. Id. § 4:1C-24. Landowners who petition for creation of a “farmland preservation program” also contract to retain land in agricultural production for at least eight years. Id. § 4:1C-20. It seems, however, that land in this program does not qualify for the more stringent protection provided under “municipally approved” programs. See id. § 4:1C-25.
the action is necessary for the public health, safety and welfare and that there is no immediately apparent feasible alternative. 203

If the governor does find that the eminent domain action is necessary and that no alternative exists, the proposed condemnation is still subject to the lower-tier review. 204 The New Jersey law does not completely eliminate condemnation of land in a municipally

203. Id. § 4:1G-25. This protection also applies in cases of proposed funding to construct facilities to serve nonfarm structures. Id.

204. Id. See also id. § 4:1C-19 (public body intending to exercise eminent domain must file notice with the board).

A recent opinion by the Wisconsin Attorney General holds promise for the interpretation of farmland preservation laws. See Opinion Letter from Wisconsin Attorney General Bronson C. LaFollette to James E. Murphy (Feb. 26, 1985) (copy on file at Villanova Law Review office). The opinion analyzed the interaction between the Wisconsin Farmland Preservation Law, Wis. Stat. Ann. § 91.13 (West Supp. 1985) and its eminent domain law, id. § 32 (West 1973). Specifically, the opinion addressed the issue of whether a county highway committee could condemn land which was subject to a farmland preservation agreement executed under § 91.13.

In this instance, Michael and Gail Kubiak had placed their 122-acre farm in the state farmland preservation program for 25 years, under an agreement that restricted their right to develop the land. Subsequently, the Marinette County Highway Commission proposed to condemn seven acres of the Kubiaks' farmland to expand an existing roadway. Opinion Letter, supra, at 1.

The Attorney General stated that "the state's Farmland Preservation Law does not permit unilateral violation by county highway committees to construct highways through farmland, in spite of local eminent domain power." Id. The Attorney General noted that structures could be built on land subject to a farmland agreement only in two instances. Either the changes had to be consistent with the land's agricultural use or both the local governing body and the State Department of Agriculture, Trade and Consumer Protection (DATCP) had to approve the changes. Id. at 2-3. Neither of these two instances was present. First, as the Attorney General noted, building a road on farmland "cannot reasonably be said to be 'consistent with agricultural use.'" Id. at 2 (citing Wis. Stat. Ann. § 91.13(8)(a) (West Supp. 1985)). Second, neither the county nor the DATCP had approved the highway plan. Id. at 3.

The opinion went on to note that the DATCP has approved special uses for farmland under agreements only when the proposed uses do not conflict with the land's agricultural use and it is necessary to use the land because there are no alternative locations available. Id. Even if the county could have approved the road construction, it could not satisfy the two DATCP criteria. Based on an agricultural impact statement which stated that the Kubiaks' land was of "statewide importance," the Attorney General concluded that the proposed condemnation conflicted with the land's agricultural use. Id. Additionally, there were two alternative proposals which could have accomplished the highway commission's goal of expanding the existing roadway. Id. Thus, it was not essential to condemn the Kubiaks' land.

The Attorney General supported his conclusion by stating that under a general rule of statutory construction a later law prevails over an older law if the two conflict. Id. at 4. Accordingly, he concluded that the Wisconsin Farmland Preservation Law should prevail over its older eminent domain law. Otherwise, he noted, if the county commission could unilaterally remove land under a preservation agreement, the purpose of the Farmland Preservation Law would be frus-
approved program; nonetheless, it imposes significant procedural obstacles designed to discourage all but the most crucial condemnations of protected agricultural land.

2. Conservation Easements and Related Programs

Like agricultural district laws, statutes that authorize conservation easements or purchase of development rights approach the issue of eminent domain in a variety of ways. Some statutes that establish conservation easement programs fail to address the condemnation issue at all.\textsuperscript{205} Other laws have provisions that seem to indicate that eminent domain actions against protected land may proceed, though subject to certain slight restrictions. For example, Michigan requires that any development rights easement must provide in its terms that no nonfarm structures can be built on the land without the approval of the local governing body.\textsuperscript{206} This provision seems to recognize the continued vulnerable
treated and those sections which give the DATCP final authority to determine special uses would be negated. \textit{Id}.


\textsuperscript{205} \textit{See}, e.g., \textit{CONN. GEN. STAT. ANN. §§ 22-26aa to -26ii (West Supp. 1985); W. VA. CODE §§ 8-24-72 to -78 (1984); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (Vernon Supp. 1984) (authorizing conservation easements, but establishing no state or local program to purchase such easements). While the Massachusetts program does not restrict eminent domain takings, it does protect agricultural land from takings to a limited degree. \textit{See MASS. GEN. LAWS ANN. ch. 79 § 5B (West 1969 & Supp. 1984-1985); id. ch. 132A, § 11A (West Supp. 1984); id. ch. 184, § 31 (West 1977 & Supp. 1984-1985). For a discussion of Massachusetts' law, see infra text accompanying notes 244-50. Missouri's statute is silent on the issue of whether land in easements can be taken by eminent domain for general public purposes. \textit{See MO. ANN. STAT. §§ 67.870-.910 (Vernon Supp. 1984). It does, however, permit the exercise of eminent domain power to acquire private property for the conservation program itself, subject to certain conditions. \textit{Id}. § 67.885. Nonprofit organizations cannot acquire property for conservation through eminent domain. \textit{Id}. § 67.890.

The Uniform Conservation Easement Act also fails to address the eminent domain issue. "[T]he Act neither limits nor enlarges the power of eminent domain; such matters as the scope of that power and the entitlement of property owners to compensation upon its exercise are determined not by this Act but by the adopting state's eminent domain code and related statutes." 12 U.L.A. 51, 53 commissioners' pref. note (Supp. 1984).

\textsuperscript{206} \textit{MICH. COMP. LAWS ANN. § 554.707(5)(a) (West Supp. 1984-1985). The provision does not apply to lines for utility transmission or distribution. \textit{Id}.

§ 554.707(5)(c). It must be noted, however, that few states protect agricultural
ability of the land at least to some condemnations. Pennsylvania legislation goes even further, providing that state or county ownership of an "open space property interest" does not preclude acquisition—by eminent domain or otherwise—and use of rights of way in the property by a public utility or other body with eminent domain power. Such acquisition, however, is subject to requirements for notice, hearing, and approval.207

Maryland's provision is quite explicit in its treatment of the exercise of eminent domain. Its agricultural preservation law does not prohibit "any agency of the state or of a county" from condemning land under an agricultural preservation easement held by the state-established foundation, "if such an acquisition is for a public purpose."208 The law also determines who will receive the just compensation in case of condemnation of land under an agricultural preservation easement. The landowner will receive the full amount that would have been due but for the easement, less any amounts paid to that landowner by the state foundation. The condemnor must pay to the state land preservation fund the amount that the foundation paid for the easement.209

Several states with development easement programs do grant substantial protection to land encumbered by easements. In New Jersey, development easements may be purchased under certain conditions from landowners whose land is part of a municipally approved program and who have contracted to keep their land in production for at least eight years.210 The New Jersey law pro-

lands against utility development. Another Michigan provision directs all agencies of state government to cooperate in the exchange of information concerning projects and activities that might jeopardize land preservation under the Act.

See id. § 554.716.

New York's scenic easement law, which authorizes private easements to preserve farmland, also seems to permit condemnation:

No general law of the state which operates to defeat the enforcement of any interest in real property shall operate to defeat the enforcement of any conservation easement unless such general law expressly states the intent to defeat the enforcement of such easement or provides for the exercise of the powers of eminent domain.


208. MD. AGRIC. CODE ANN. § 2-515(a) (Supp. 1984). The public purpose requirement, of course, is necessary for any lawful exercise of eminent domain. For a discussion of the public purpose requirement, see supra notes 141-52 and accompanying text.

209. Id. § 2-515(b).

provides that "[n]o development easement purchased pursuant to
the provisions of this act shall be sold, given, transferred or other-
wise conveyed in any manner."211 It is possible that this restriction
may be invoked to prevent condemnation of land in
easements, though it is not at all clear that the restriction was
intended for this use. Even if the restriction does not prevent con-
demnation, however, land in development easements will receive
the two-tiered protection described in connection with agri-
cultural districts in New Jersey.212 Only land that is already under
contract qualifies for the purchase of a development easement.
That land receives the higher tier of protection, which should not
be lost merely because a development easement is transferred as
authorized by statute.

Both New Hampshire and Rhode Island also restrict eminent
domain actions against land in the state's development rights pro-
grams. New Hampshire's protection, however, is relatively weak.
That state's law provides that powers to acquire land for public
use by eminent domain are not diminished, "provided, however,
alternative land areas are considered."213 Public utilities may use
eminent domain to obtain easements if the utilities thoroughly
consider alternative areas, guarantee minimum practicable inter-
ference with agricultural operations, obtain necessary authoriza-
tions from government agencies, and compensate the landowner
as if the land were not an agricultural preservation site.214 A tak-
ing in violation of these restrictions can result in a court action
filed on behalf of the landowner.215 This provision suggests that
the New Hampshire legislature intended a level of judicial review
more stringent than the usual deferential "look" to determine if
the condemnor's action was arbitrary or capricious.

Rhode Island gives protection similar to that afforded by the
higher tier in New Jersey's system. The Rhode Island law pro-
vides that "[a]ny state or local agency must demonstrate extreme
need and the lack of any viable alternative before exercising a
right of eminent domain over any farmland to which the develop-
ment rights have been purchased . . . on behalf of the state . . ."216 An agency attempting to condemn such land must file a

211. Id. § 4:1C-32(a).
212. For a discussion of New Jersey's two-tiered protection plan, see supra
notes 197-204 and accompanying text.
214. Id. § 36-D:12(II).
215. Id. § 36-D:12(III).
report showing the necessity of the condemnation. The report must be endorsed by the governor after public hearings. Moreover, if the land preservation commission believes that necessity for the taking has not been demonstrated, it may sue for a decision on the issue.\textsuperscript{217} The Rhode Island statute does not define “extreme need” or “viable alternative.” Nonetheless, the law demonstrates the intention to discourage all but the most critical incursions into protected agricultural land.

As with agricultural district statutes, no conservation easement law entirely prohibits the exercise of eminent domain against protected farmland. It is interesting to note, however, that the states with the more stringent protection—New Hampshire, New Jersey, and Rhode Island—are located in the heavily populated Northeast, where farmland may be most urgently in need of protection.

3. Some Policy Background

As the above survey of statutes indicates, agricultural land in special programs receives relatively little protection from condemnation. No statute gives absolute exemption from eminent domain.\textsuperscript{218} Some do require a second look or restrict takings to cases of extreme need, but others either ignore the issue entirely or imply that condemnation is not affected by the farmland protections laws.

Both the agricultural district and conservation easement programs have the general goal of protecting productive agricultural land. Moreover, a number of statutes intend that state departments and agencies cooperate in exchanging information—sometimes including information on eminent domain\textsuperscript{219}—on projects and programs that might jeopardize successful implementation of the law.\textsuperscript{220} Yet the simple directive that state agencies should mitigate the adverse effects of their programs on the continued use of agricultural land in agricultural districts\textsuperscript{221} can hardly be said to abrogate, or even restrict, the power of eminent domain.

One might expect that land in conservation easements and

\textsuperscript{217} Id.
\textsuperscript{218} For a discussion of the inalienability of eminent domain, see infra notes 272-81 and accompanying text.
related programs would receive greater protection from eminent domain than land in agricultural districts. As earlier discussion has indicated, agricultural districts are intended to delay, not to prevent entirely, the conversion and development of farmland. Conservation easements, on the other hand, are usually donated or sold in perpetuity and are designed for the long-term preservation of agricultural land for agricultural uses. Thus, while condemnation of land in agricultural districts would simply hasten eventual conversion, condemnation of land protected by a conservation easement would contravene the very purpose of that easement: the permanent preservation of the land.

Another difference between agricultural districts and conservation easements is also relevant. Although land in agricultural districts is normally restricted to agricultural uses, fee interest in that land is still held by the farmer. The agricultural district agreement, though often filed in real estate records for the purpose of public notice, does not generally involve a transfer of title in the property. In contrast, when land is subject to a conservation easement or similar development restriction, the landowner has actually conveyed part of his interest in the property. Another entity now enjoys an interest in the land, that is, the right to develop. That entity may be the state or a subunit, depending on the structure of the state’s conservation easement program. In other instances, the conservation easement may have been conveyed to a private, nonprofit corporation. When the easement is held by a government entity, the issue of public use may be raised in any subsequent condemnation proceedings. When a private organization holds the easement, there is less chance that public use will be an issue.

Although at the outset both agricultural districts and conservation easements are normally voluntary in nature, their natures change after the district is formed or the easement conveyed. Generally, the district remains in effect for a specified period of time, subject to renewal. Nonetheless, many programs

222. For a discussion of the public use requirement, see supra notes 141-42 and accompanying text.
224. Some state statutes, however, provide for the acquisition of development rights by condemnation. For examples of two such statutes, see supra note 99.
leave some flexibility to the landowners, so that an element of choice remains. For example, some district laws permit either an owner or his heir to withdraw rather easily from the district.\textsuperscript{[225]} Other programs permit heirs of the member landowner to withdraw.\textsuperscript{[226]} In some programs, when land in a district is sold to a new owner, that owner may withdraw from the district within a certain period of time.\textsuperscript{[227]} In other programs, land can be released from a district in instances of severe hardship or for other cause.\textsuperscript{[228]} In contrast, when a conservation easement is conveyed under a statutory program, the public body that accepted the easement is usually charged with enforcement of the easement.\textsuperscript{[229]} Moreover, this statutory duty is usually ongoing because the easements are either permanent\textsuperscript{[230]} or releasable only in limited circumstances.\textsuperscript{[231]} Thus, the public entity has the duty to protect the land from development in the interest of the public welfare.

Given the foregoing analysis of the practical and policy-based differences between agricultural districts and conservation easements, it could be asserted that land held in a conservation easement is devoted to a public use and deserves some degree of protection from eminent domain actions. No decision has so held. In fact, the rather sketchy protection accorded conservation easements in the relevant statutes tends to weigh against this conclusion.

4. \textit{Eminent Domain and Unprotected Farmland}

At this juncture, it may be useful to look briefly at a few statutes that discourage eminent domain takings of all types of productive farmland, rather than solely farmland in special agricultural district or conservation easement programs. This brief survey is not intended to be comprehensive. Furthermore, the statutes considered here are from states that also have special

\begin{itemize}
\item \textsuperscript{225} See, \textit{e.g.}, \textit{Ky. Rev. Stat.} \textsection 262.850(11) (Supp. 1984) (allowing withdrawal upon written notification to the local district board).
\item \textsuperscript{226} See, \textit{e.g.}, \textit{Va. Code} \textsection 15.1-1513(D) (1981) (allowing heirs and devisees of landowners in agricultural district to withdraw as a matter of right).
\item \textsuperscript{227} See, \textit{e.g.}, \textit{Ohio Rev. Code Ann.} \textsection 929.02(C) (Page Supp. 1983). The withdrawal, however, may be subject to penalty. \textit{Id.}
\item \textsuperscript{228} See, \textit{e.g.}, \textit{Md. Agric. Code Ann.} \textsection 2-509(7)(i) (Supp. 1984).
\item \textsuperscript{229} See, \textit{e.g.}, \textit{N.J. Stat. Ann.} \textsection 4:1C-33 (West Supp. 1984-1985).
\item \textsuperscript{230} See, \textit{e.g.}, \textit{id.} \textsection 4:1C-32.
\item \textsuperscript{231} See, \textit{e.g.}, \textit{N.H. Rev. Stat. Ann.} \textsection 36-D:7 to D:8 (Supp. 1983) (allowing release if site is no longer suitable for farming or if municipality requests release for the public good).
\end{itemize}
farmland protection programs. It is interesting to note that these statutes are generally narrow in scope.

Pennsylvania law creates an agricultural lands condemnation approval board. Before productive agricultural land is condemned for certain purposes, the board must have the opportunity to determine that there is no reasonable and prudent alternative to the use of the productive agricultural lands. This board’s jurisdiction, however, is quite limited. It encompasses condemnation only for highway and waste disposal purposes.

Similarly, certain condemnations of agricultural land in Minnesota are subject to review under a law that implements a state policy to preserve agricultural land and conserve its long-term use for agricultural production. Any agency action, including a taking for nonagricultural use that adversely affects ten acres or more of agricultural land must be reviewed. The agency must attempt to find alternative methods or locations, or attempt to reduce the adverse effects of the proposed action. In so doing, the agency must perform a cost-benefit analysis. Although this law seems to extend broad protection, its scope also is limited because it applies only to state agencies and not to the numerous other governmental entities with eminent domain power.

Wisconsin has a law that requires potential condemners to provide notice of projects in which the exercise of eminent domain may affect a farm operation. If more than five acres of

283. Id. § 106(d)(1), (2). For an explanation of a similar program in California that attempted to avoid public improvements in agricultural preserves, see supra note 196.
285. Id. § 17.81(2).
286. Id. § 17.82 (planned agency action must be referred to the commissioner who reviews the action and makes recommendations based on policies set forth in statute).
287. Id.
288. Id. § 17.81(5). See id. § 15.01 (West 1977 & Supp. 1984) (defining “state agencies”). Other states also have laws that direct state agencies to ensure that their programs do not convert agricultural land unnecessarily. See, e.g., ILL. ANN. STAT. ch. 5 §§ 1301-1308 (Smith-Hurd Supp. 1984-1985).
289. One such type of governmental entity—the municipality—is charged with protecting agricultural land in its planning activities. See MINN. STAT. ANN. § 462.351 (West Supp. 1984).
290. WIS. STAT. ANN. § 32.02 (West 1973) (defining who may exercise eminent domain powers).
291. Id. § 32.035(3) (West Supp. 1984-1985). Condemnors of easements who desire to construct some types of electric transmission lines, however, are not required to provide such notice. Id. § 32.035(2).
farm operation will be affected, the law requires preparation of an agricultural impact statement. This statement must include a description of land that will lose agricultural production, as well as analyses and recommendations concerning the proposed project.242 Although the impact statement receives rather wide distribution,243 an adverse recommendation will not in itself halt a project with harmful effects on farmland.

Massachusetts also protects property used for agriculture or farming.244 In its earliest version, the relevant statute stated that no such property could be taken without consent of the owner, except after a hearing at which the owner could introduce evidence that other nonagricultural land was available for the proposed public use.245 In a case involving the taking of agricultural land for the building of a school, a landowner invoked the provisions of the statute.246 The owner suggested seven alternative sites for the school, but after these sites were inspected, all were rejected in favor of the owner’s farmland.247 The Supreme Judicial Court of Massachusetts, upholding the rejection of the alternative sites, held that the statute did not require the selection of a nonagricultural site.248 The statute was subsequently amended to encompass easements taken without consent and to provide that if evidence of alternative sites is introduced and accepted as valid, agricultural property is exempted from the taking.249 The statute, however, does not apply to takings on behalf of the Commonwealth for highways or for public utilities.250 Thus, its impact

242. Id. § 32.035(4). The Department of Agriculture, Trade and Consumer Protection is to prepare the impact statement. The condemnor pays the cost. Id. § 32.035(3), (4).

243. Id. § 32.035(5). The impact statement is distributed to the governor’s office, legislative committees on agriculture and transportation, local units of government in affected jurisdictions, local news media, public libraries, individuals and groups either requesting or demonstrating an interest in the information, and the condemnor. Id.

244. MASS. GEN. LAWS ANN. ch. 79, § 5B (West 1969 & Supp. 1984) (providing a hearing at which owner can show that alternative land is available).


247. Id. at 345-46, 220 N.E.2d at 913.

248. Id. at 346, 220 N.E.2d at 913-14. The court explained that the effect of the statute was to ensure owners of agricultural land subject to condemnation a full opportunity to be heard. Id.


250. Id. ch. 79, § 5B.
is quite narrow.

This sampling of state laws protecting farmland from eminent domain indicates that, as with agricultural districting and conservation easements, protection is limited. The laws tend to impose restrictions only on selected entities with eminent domain power. In addition, they tend to exempt from restriction certain kinds of eminent domain takings, such as those for utility easements and highways. Ironically, however, it is these exempted takings that may cause the greatest damage to farming operations. In fact, the most that these laws accomplish is to require a “second look” at a limited classification of takings of agricultural land.

B. Condemning Protected Agricultural Land: The Likely Judicial Outcome

Agricultural district laws and conservation easement programs are relatively recent legislative developments. As a result, few decisions interpreting their provisions have been reported. Similarly, courts have had little opportunity to rule on challenges to eminent domain actions against protected farmland, despite the significance of this issue. Nonetheless, it is useful to review one recent decision on the condemnation issue and to project the likely results should other cases arise.

1. Agricultural Districts

Agricultural district statutes offer at best only limited protection against condemnation actions. A recent Illinois circuit court decision, Gass v. Kramer, suggests that agricultural districts may be ineffectual in protecting farmland from condemnation for nonagricultural uses.

In late 1981, Gordon and Mary Jane Gass, corn and soybean farmers in Madison County in southwestern Illinois, petitioned to designate 899 of their more than 2200 acres as an agricultural area, in accordance with the Illinois agricultural areas statute. Having followed the proper statutory procedure, the Madison County Board granted the designation in January, 1982. At about

251. But see Neb. Rev. Stat. § 76-710.03 (1981) (requiring condemnor to select route that follows section or half-section lines if possible).

252. For a general discussion of agricultural district laws, see supra notes 178-204 and accompanying text.

the same time, the Illinois Department of Transportation revitalized its plans to construct an extension of Interstate 255 in Madison County. As planned, the extension would divide the Gass farm in half. Moreover, a five and one-half mile segment of the extension would require the acquisition of thirty-two acres of the Gass land that formed part of the agricultural area.\footnote{254}

The Gass family challenged the acquisition of their land by petitioning for injunctive relief in Madison County Circuit Court. They alleged that the Department of Transportation’s threatened condemnation action would contravene the Illinois agricultural district law.\footnote{255} They also alleged that if the Department initiated the condemnation suit, they would suffer irreparable damage. Arguing that Illinois eminent domain law did not provide for the withdrawal of lands from “agricultural areas,” and that those lands were to be protected and enhanced for the public purpose of preventing the irreplacable loss of agricultural land,\footnote{256} the Gass family petitioned the court for preliminary and permanent injunctions against the threatened condemnation.\footnote{257}

The court denied the petition. Acknowledging that the Gass land was part of a properly formed agricultural area, the court noted that the Illinois agricultural areas law did not address the question of eminent domain. The state, said the court, has the inherent power to condemn, limited only by the state constitution and specific statutes. The state eminent domain act grants to the Department of Transportation the right to exercise that power on behalf of the state. There could be no limit on the exercise of that power except as set forth specifically in the statutes.\footnote{258} Although the Gass family had asserted that the legislative history of the agricultural areas law demonstrated the legislative intention to restrict eminent domain proceedings against land in agricultural areas,\footnote{259} the court refused to infer this intention from the statute

\footnote{255. Id. at 2-3 (citing ILL. ANN. STAT. ch. 5, §§ 1001-1020 (Smith-Hurd Supp. 1984-1985)).}
\footnote{256. Id. at 3 (citing ILL. ANN. STAT. ch. 5, § 1002 (Smith-Hurd Supp. 1984-1985)). The petitioners inferred that if the Department of Transportation succeeded in condemning the land, the agricultural value of that land could never be replaced. This would result in a violation of the state’s public policy, a violation for which there was no adequate remedy at law. Id. In addition, the land was already devoted to a public use and therefore was entitled to a certain amount of protection.}
\footnote{257. Id.}
\footnote{258. Gass, No. 83-CH-263, order at 2.}
\footnote{259. Id. at 2-3. The legislative history of the agricultural areas law indicates}
as enacted. The court reasoned that the statute restricted some local government actions affecting the protected land, but did not expressly prohibit actions by the state or its agencies. Stating that general policy statements directed toward protection of land in agricultural areas did not suffice to prohibit the exercise of eminent domain, the court held that “the language contained in this statute is not express and explicit enough to so limit the Department of Transportation’s right to exercise eminent domain over the properties in these areas.” Thus, the court denied the petition for injunctive relief.

Gass v. Kramer involved an agricultural district statute that failed to address the eminent domain issue. Unfortunately, there is little reason to anticipate that different results will flow from other statutes. As the Gass decision indicates, eminent domain is deemed an inherent power of the state that can be exercised in the absence of contrary legislative pronouncements. Moreover, the argument that agricultural district land is already devoted to public use, and therefore protected from certain condemnation proceedings, is likely to fail. Title to the land is still held by the landowner rather than by a public entity, and most agricultural district programs allow the landowner to retain some element of choice, albeit limited, as to continued participation in the program.

Thus, it is clear that land in agricultural districts can be condemned in those states whose statutes permit condemnation of land in districts. Even states requiring a second look at certain

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261. Gass, No. 83-CH-263, order at 5. In so doing, the court ruled solely on whether the petitioner’s property was exempt from the attempted exercise of eminent domain. It did not limit the Gass family’s right to challenge the condemnation on grounds of necessity and public use in the eminent domain proceeding. See id.

262. For a discussion on the origins of eminent domain, see supra notes 103-23 and accompanying text.

263. For a discussion of the problem of conflicting prior public uses, see supra notes 153-69 and accompanying text.
proposed condemnations generally provide little real protection because review recommendations need not be followed. Lacking that requirement, and assuming review procedures have been followed, it is improbable that a court would hold that the agricultural district law actually prohibits the eminent domain proceeding. Only in a state like New Jersey, with clearly articulated limitations on eminent domain actions, can courts be expected to prevent condemnation of protected land. And even the New Jersey law does not confer absolute protection.264

2. Conservation Easements and Related Programs

Although conservation easements are normally conveyed with the intention of preserving farmland permanently for agricultural uses, it is unlikely that land protected by such easements will fare much better than agricultural districts in a condemnation proceeding. Some statutes make clear that eminent domain is not affected. In the few states with statutory directives that restrict the exercise of eminent domain, alternative land areas must be considered, or the condemnor must demonstrate "extreme need."265 Yet these protections are not absolute, and condemners may be able to meet their statutory burden.

When the conservation easement is silent on the question of eminent domain, or when protection against condemnation is minimal and the condemning agency decides to proceed with the action, successful judicial challenges may be rare. Challengers could argue that when a public entity, such as a farmland preservation agency, is holding the conservation easement, the land is already devoted to a public use. Indeed, several courts have acknowledged that a scenic easement is a public use, although public access to the land is visual, rather than physical.266 But no state has recognized the prior existing public use defense267 as a com-

264. For a discussion of New Jersey's provisions, see supra notes 197-204 and accompanying text.

265. For a discussion of state conservation easement programs that restrict the use of eminent domain, see supra notes 206-17 and accompanying text.

266. See, e.g., Kamrowski v. Wisconsin, 31 Wis. 2d 256, 265, 142 N.W.2d 793, 797 (1966). See also Finks v. Maine State Highway Comm'n, 328 A.2d 791 (Me. 1974) (scenic easement is public use; excessive taking is abuse of power); Hardesty v. State Roads Comm'n, 276 Md. 25, 343 A.2d 884 (1975) (attempt to abandon proceeding after scenic easement was taken); Richley v. Crow, 43 Ohio Misc. 94, 394 N.E.2d 542 (Ct. Com. Pleas 1975) (scenic easement is public purpose and use, but may be taken constitutionally through eminent domain).

267. For a discussion of this defense, see supra notes 156-69 and accompanying text.
plete bar to the condemnation of land subject to a conservation easement designed to protect agricultural uses.\textsuperscript{268}

Even if the conservation easement were to be recognized as a public use, that characterization may be of little help in preventing condemnation. The state itself generally enjoys the right to take property already committed to public use for a different public use.\textsuperscript{269} Moreover, the prior public use defense is subject to a number of exceptions that serve to weaken its protection.\textsuperscript{270} Finally, where the conservation easement is held by a private organization such as the nonprofit corporation in \textit{Wildlife Preserves}, the prior public use defense may be deemed wholly irrelevant.\textsuperscript{271} Thus, those state projects that are often most damaging to agricultural land, such as highway construction, may face little hindrance from conservation easement programs.

C. \textit{Desirable Statutory Directives: Taking a Second Look}

Several states have carefully designed programs intended to protect valuable agricultural land for short-term and permanent

\textsuperscript{268} Cf. \textit{Wade} v. \textit{Kramer}, 121 Ill. App. 3d 377, 459 N.E. 2d 1025 (1984). In \textit{Wade}, plaintiffs sought an injunction to prohibit construction of a highway bridge across the Illinois River. The bridge and connecting highway would be built through part of the Pike County Conservation Area. Plaintiffs alleged that the public trust doctrine prevented removal of property from the conservation area. Not disputing its status as trustee for the public, the state argued that it had authority to alter the use of public trust property if the public interest required the alteration. The court agreed. \textit{Id.} at 381, 459 N.E. 2d at 1028. The court noted that the state can “reallocate property from one public purpose to another without violating the public trust doctrine.” \textit{Id.} To hold otherwise would prevent the government from accommodating new public needs. \textit{Id.} In this case, the legislature and Department of Transportation had decided that benefits to citizens from construction of the new highway outweighed the damage to the conservation area.

\textsuperscript{269} See \textit{Dau}, supra note 118, at 1520-26 (discussing the condemnation of property already devoted to public use); Annot., 35 A.L.R. 3d 1293, 1304 (1967) (examining power of state to condemn property of governmental subdivision or property held by another state agency).

\textsuperscript{270} For a discussion of these exceptions, see supra notes 158-69 and accompanying text. In states like Missouri and Pennsylvania, where conservation easements themselves can be condemned, the prior public use defense may be more successful. The holder of the conservation easement then enjoys a mutual power of eminent domain, as does the condemnor for the competing public use.

agricultural production. Yet some of these states have addressed the issue of eminent domain actions against protected land only obliquely, if at all. In most instances, protected agricultural land remains vulnerable to condemnation by numerous public entities for a wide variety of public uses. The valid exercise of eminent domain against this protected farmland can render ineffectual the protections conferred by agricultural districting and conservation easement statutes. Moreover, a law that does not address the question of condemnation will usually allow the condemnation of protected farmland. Weak provisions will have the same result. Thus, it is essential that consideration of eminent domain be an integral part of the development or modification of statutory programs designed to protect agricultural land.

1. Alternative Approaches

a. Inalienability of Eminent Domain

At first glance, it would seem that the easiest way to protect agricultural districts and conservation easements from condemnation is for the state simply to declare lands in these programs immune from the eminent domain power. Immunity could be granted either by a statutory provision denying the power or by a contractual agreement. This approach must be rejected, however, because of the universal principle that a state is forbidden to alienate its power of eminent domain.272 The power of eminent domain is "an essential attribute of sovereignty [that] cannot be even partially bargained away. Without it, a state cannot be a state."273 Indeed, this principle may explain in part the evident reluctance of state legislatures to restrict in any significant way the exercise of eminent domain against protected agricultural land.274

West River Bridge Co. v. Dix275 is a leading case on the inaliena-

272. 1 P. Nichols, supra note 103, § 1.141[3]. See West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848). For a discussion of West River Bridge, see infra text accompanying notes 275-78. See also Southern Indiana Gas & Elec. Co. v. City of Boonville, 215 Ind. 552, 20 N.E.2d 648 (1939) (eminent domain power cannot be surrendered; if attempted to be contracted away, it can be resumed at will); Trustees of Phillips Exeter Academy v. Exeter, 90 N.H. 472, 11 A.2d 569 (1940) (eminent domain power is similar to the police and taxation powers of government in that it cannot be alienated or impaired); Bowling v. State Bd. of County Comm’rs, 428 P.2d 331 (Okla. 1967) (eminent domain power is inalienable and cannot be contracted away).

273. 1 P. Nichols, supra note 103, § 1.141[3].

274. See Ag Districts and the Taking Issue, Farmland Notes, Mar. 1984, at 1, 3 (monthly newsletter of NASDA Research Foundation Project).

bility of a state's eminent domain power. In *West River Bridge*, the
state of Virginia had granted to a company a franchise to erect a
bridge and collect tolls. When the state later decided to exercise
its eminent domain power to open the bridge to free public use, the
bridge company asserted that the state was violating its con-
tract in a way that contravened the impairment of contracts clause
of the Federal Constitution.\textsuperscript{276}

The United States Supreme Court upheld the state's right to
exercise eminent domain. The Court found the power of eminent
domain to be an essential means of "guarding [the state's] own
existence, and of protecting and promoting the interest and wel-
fare of the community at large . . . . This power [is] . . . para-
mount to all private rights under the government."\textsuperscript{277}
Reasoning that every contract is made in subordination to the
higher, pre-existing authority of the laws of the community to
which the parties belong, the Court stated that all contracts must
yield to the laws' control as an unwritten yet paramount condition
to the contract. Thus, the right of eminent domain did not impair
the contract, but only required that certain conditions be fulfilled
before the contract could be carried out.\textsuperscript{278}

Similarly, a state cannot entirely divest itself of the power of
eminent domain through statutory enactment.\textsuperscript{279} *Village of Hyde
Park v. Oak Woods Cemetery Association*\textsuperscript{280} involved a situation in
which the state, through a special act, had promised that lands
taken by a cemetery association would not be condemned for the
use of roads. When the Village of Hyde Park later wanted to con-
demn part of the cemetery for roadways, the court, reflecting the
reasoning of *West River Bridge*, held that any legislative bargain in
restraint of eminent domain is unwarranted and void. The court
said that the state "had no power to divest itself of the right of
eminent domain, by any act it might pass which would prevent the
exercise of that right in the future, when, in the opinion of the
legislature, a case arose wherein the public interest demanded the

\textsuperscript{276} U.S. Const. art. 1, § 10.
\textsuperscript{277} 47 U.S. (6 How.) at 531.
\textsuperscript{278} Id. at 532. \textit{See also} Bowling v. State Bd. of County Comm'rs, 428 P.2d
331 (Okla. 1967) (res judicata and collateral estoppel do not constitute defenses
to condemnation actions initiated subsequent to agreement settling previous
condemnation actions between same parties); State Parks & Recreation Comm.
bind state to restricted exercises of eminent domain).
\textsuperscript{279} 1 P. Nichols, \textit{supra} note 103, § 1.141[3].
\textsuperscript{280} 119 Ill. 141, 7 N.E. 627 (1886). \textit{See also} Hollister v. State, 9 Idaho 8, 71
P. 541 (1903).
exercise of the power.”

Hyde Park suggests that a statutory declaration that completely prohibits the exercise of eminent domain against land in agricultural district or conservation easement programs would not be upheld. Even if such wholesale protection were upheld, however, it might not be desirable, because it would codify a legislative decision that agriculture is always the preferred use of the protected land. Even the most avid proponents of farmland protection would no doubt acknowledge that other public purposes may sometimes compete legitimately for priority. For example, although highway construction and public utility development are damaging to productive farmland, they may be essential to serve the needs of a large segment of a state’s, or even the nation’s, population. The acquisition of protected land for nonagricultural uses may be easier to justify under an agricultural district program than under a conservation easement program, with its goal of permanent protection. Yet even in the latter situation, goals and priorities can change over time; some element of flexibility is therefore desirable. Complete prohibition of eminent domain, even if otherwise acceptable, would eliminate this flexibility.

b. Prior Public Use

Establishing the viability of the prior public use defense might be another way to prevent condemnation of protected agricultural lands. The statute itself could declare protected agricultural land uses to be public uses. But at least as they are presently constituted, agricultural districts are unreceptive vehicles for establishing this defense. The nature of conservation easements held by private entities would present similar difficul-

281. 119 Ill. at 149, 7 N.E. at 630. Nonetheless, the court in Hyde Park did not allow the village to condemn the cemetery property for use as a roadway. The dispute involved two entities endowed with the similar right to take lands; thus the court reasoned that the legislature should make the ultimate decision regarding the preferred public use. Because the legislature had already stated specifically that the cemetery lands should be free of roads and had never reversed that decision, the court held that the cemetery association had a superior right to the land. Id. at 150, 7 N.E. at 631.

282. This desire for flexibility may explain in part the provisions in some conservation easement statutes that permit the release of easements under specified circumstances. See e.g., N.H. REV. STAT. ANN. §§ 36-D:7 to -D:8 (Supp. 1983) (allowing release if site is no longer suitable for farming or if municipality requests release for the public good).

283. For a discussion of the prior public use defense, see supra notes 156-69 and accompanying text.

284. For a discussion of the problem of conflicting prior uses, see supra notes 155-69 and accompanying text.
ties. State or public ownership of conservation easements and development rights would make the assertion of public use more acceptable for those programs. But the prior public use defense would not prevent all condemnations. It is subject to numerous exceptions that are likely to permit damaging takings of protected farmland, perhaps without careful consideration.\footnote{285}

Even if accepted and effectively employed, however, the prior public use defense would not resolve the conflict between competing land uses any better than does the traditional approach, which reasons that the condemnor’s decision is conclusive in the absence of clear abuse of discretion.\footnote{286} The prior public use defense simply favors the landowners over the condemnor in a condemnation action. But the public use first established by the landowner may not be the more compelling of the competing uses.\footnote{287} Indeed, the landowner’s defense may ignore the equities of the conflict.\footnote{288} Like the traditional approach, the prior public use defense carries with it the potential for encouraging decision-making that avoids careful evaluation of the merits of competing land uses.

c. Zoning and Eminent Domain

In one sense, the relationship between agricultural districting and conservation easement laws and the eminent domain power is similar to the traditional relationship between zoning enactments and eminent domain. In both instances, an entity perceived to enjoy superior power (that is, the eminent domain power) attempts to exercise the power in the face of a conflicting, though legislatively authorized, land use scheme. It is instructive to look briefly at the typical resolution of conflicts between zoning and eminent domain.\footnote{289}

In a number of jurisdictions, it has been held that the power

\footnote{285. For a discussion of these exceptions, see supra notes 158-69 & 269-70 and accompanying text.}
\footnote{286. See, e.g., Blank v. Columbia Gas of Pa., Inc., 11 Pa. Commw. 304, 314 A.2d 880 (1974) (burden is on party challenging condemnation to show fraud, bad faith, unreasonableness, or arbitrariness of condemnor; without these, courts should not interfere with the choice of condemnor).}
\footnote{287. Cf. Note, supra note 154, at 795-96.}
\footnote{288. Id. at 796, 813. See also Comment, Balancing Interests to Determine Governmental Exemption from Zoning Laws, 1973 U. Ill. L. F. 125, 140 (criticizing a decision in which the New Jersey Supreme Court refused to exempt Rutgers University from zoning laws that prohibited the building of college apartments).}
\footnote{289. See generally Sackman, The Impact of Zoning and Eminent Domain upon Each Other, 1971 PROCEEDINGS OF THE INST. ON PLAN. ZONING & EMINENT DOMAIN 107 (Southwestern Legal Foundation); Note, supra note 154; Note, Governmental Immunity
of eminent domain is inherently superior to the zoning power. Thus, a governmental entity with the power of eminent domain is generally held to be immune from zoning regulations. This traditional rule is articulated in City of Des Plaines v. Metropolitan Sanitary District, which involved the location of a water reclamation plant, as authorized by the Metropolitan Sanitary District of Greater Chicago. The placement of the plant violated the Des Plaines zoning ordinance. The only issue before the Illinois Supreme Court was whether the zoning ordinance had any effect on the sanitary district’s power of eminent domain.

The court held that the sanitary district could condemn land to build its water reclamation plant, although the plant’s location would violate the city’s zoning ordinance. In so holding, the court noted that “[t]he possibility that eminent domain would conflict with local zoning regulations does not demonstrate legislative intent to withhold the eminent domain power.” Recognizing that the sanitary district enjoyed statutory power to condemn, the court stated that “[t]o find that the condemnation power of the district is subject to the restrictions of local municipal zoning ordinances would be to relegate the authority of the district to that of a private land owner, and would thereby frustrate the purpose of the statute.”

A dissenting judge objected to what he perceived as an unjustified grant of superior authority to one of the two municipal corporations involved, when both had received power through legislative enactments and therefore should be considered equal in status. In his opinion, the effect of the decision was to give the

from Local Zoning Ordinances, 84 Harv. L. Rev. 869 (1971) (examining the traditional judicial responses to governmental exemptions from zoning laws).

290. Sackman, supra note 289, at 119. Sometimes the immunity applies to governmental functions but not to proprietary ones. See Town of Oronoco v. City of Rochester, 293 Minn. 468, 197 N.W.2d 426 (1972).

291. 48 Ill. 2d 11, 268 N.E.2d 428 (1971).

292. Id. at 13-14, 268 N.E.2d at 430 (quoting Village of Schiller Park v. City of Chicago, 26 Ill. 2d 278, 186 N.E.2d 343, 345 (1962)).

293. Id. at 14, 268 N.E.2d at 430. See also City of Scottsdale v. Municipal Court, 90 Ariz. 393, 368 P.2d 637 (1962) (municipality exercising governmental function is not subject to zoning of another municipality in which condemned land is located); Howard v. City of Atlanta, 190 Ga. 730, 10 S.E.2d 190 (1940); State ex rel. Askew v. Kopp, 330 S.W.2d 882, 888 (Mo. 1960) (“Local zoning ordinances are not applicable to public uses of property for which an agency of the government has the power to exercise eminent domain.”); Kedroff v. Town of Springfield, 127 Vt. 624, 256 A.2d 457 (1969) (municipality not subject to zoning in performing governmental functions); South Hill Sewer Dist. v. Pierce County, 22 Wash. App. 738, 591 P.2d 877 (1979) (city’s power of eminent domain superior to county’s zoning regulations).
sanitary district “plenary authority to exercise its powers of eminent domain in total disregard of the zoning ordinances” of the city. The dissenting judge found no evidence of effective protection against abuse of this plenary power.

Some jurisdictions have rejected this traditional approach in favor of an approach that uses a “balancing of public interests” test to resolve conflicts between the power of eminent domain and zoning ordinances that prohibit the proposed use. These jurisdictions have recognized that “‘superior authority’ in the political hierarchy does not necessarily imply superior ability in allocating land uses.”

The Supreme Court of Ohio faced such a conflict in *Brownfield v. State*. The state had purchased a single-family residence to use as a halfway house for rehabilitating psychiatric patients. This use violated the local zoning ordinance. The state argued that the power to zone is subordinate to the power to condemn and that because the state had the power to condemn property for the halfway house, the house should be immune from zoning regulations. On appeal, the central issue was whether the privately operated, state-owned facility was automatically exempt from municipal zoning restrictions.

The Supreme Court of Ohio recognized that both the municipal zoning power and the state eminent domain power were intended to effectuate public purposes. The court found that the correct approach in cases involving governmental entities with conflicting interests is “to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens.” Conceding that zoning ordinances may frustrate the exercise of eminent domain, the court nevertheless refused to invoke absolute immunity from the ordi-

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294. *Metropolitan Sanitary Dist.*, 4 Ill. 2d at 15, 268 N.E.2d at 431 (Goldenhersh, J., dissenting).


296. Note, supra note 289, at 878.


298. 63 Ohio St. 2d at 285, 407 N.E.2d at 1367.
nances. As the court reasoned, in many instances, projects involving eminent domain can be completed in harmony with zoning ordinances. Absent a clear statutory grant of immunity, the condemning entity must attempt to comply with the zoning restrictions. A court required to balance the interests of the condemning entity and the municipality to decide whether the condemnor should be immune from zoning regulations should consider "the essential nature of the government-owned facility, the impact of the facility upon the surrounding property, and the alternative locations available for the facility."²⁹⁹

2. The Balance of Interests: Imposing the Second Look by Statute

The reasoning one court used in resolving a conflict between eminent domain and zoning restrictions could, with slight modification, apply also to conflicts between eminent domain and protected agricultural land uses:

Granting absolute immunity to political subdivisions with the right to condemn . . . can undermine the essential purpose of [farmland preservation programs]; that is, to rationally coordinate land-use planning to promote orderly development . . . . Taken to its logical conclusion, this kind of automatic exemption could lead to absurd results . . . . This sort of unilateral decision on the part of the condemning authority is the antithesis of sound land use planning.³⁰⁰

As the foregoing discussion has indicated, it is not desirable simply to permit all entities with eminent domain power to condemn land that is part of an agricultural district or conservation easement program. The enactment of a farmland preservation program is a statement of legislative purpose and public policy. Indeed, most of the relevant statutes state explicitly that public

²⁹⁹. Id. at 286-87, 407 N.E.2d at 1368. In discussing the "superior sovereign" approach as a means of determining immunity from zoning regulation, one commentator has stated:

If a political unit of superior authority has made no attempt to examine alternative locations for the proposed institutional facility, if there is no independent supervisory review of the agency's determination, or if the social utility of the particular facility is subject to question, this presumption of immunity [from the local zoning ordinance] could certainly be rebutted . . . .

Note, supra note 289 at 878.

policy requires the preservation of farmland.\textsuperscript{301} Moreover, these statutes enact programs that have been designed to carry out the public policy. To permit the exercise of eminent domain in the face of agricultural land protection programs, without requiring at least a balancing of alternatives, is to weaken the implementation of the public policy of farmland preservation. To permit eminent domain in all circumstances is to recognize tacitly that every other public purpose is superior to the continued preservation of farmland.

On the other hand, it is equally undesirable to restrict condemnation unduly. The needs of society often change, and the eminent domain power is designed to allow governmental entities to accommodate those changing needs. Agriculture may not always be the preferred use of the land that is part of a farmland preservation program. It is doubtful, however, that the condemning entity itself is optimally suited to determine the preferred use of the agricultural land. It would be overly optimistic to assume that a condemning entity will always balance the public interest and thus condemn property only when its proposed use is more advantageous to society than the current use. It would be equally optimistic to assume that the condemning entity is even capable of recognizing the competing interests and the many factors that influence decisions concerning land allocation. Finally, to assume that the condemnor will always reach an impartial decision, in spite of its own interest in the outcome, is to deny the realities of the situation.\textsuperscript{302} Clearly, unbiased outside review is needed.

One must recognize, however, that abandoning the traditional approach to eminent domain—that the decision of the condemnor is conclusive in the absence of abuse of discretion—will involve some costs. The traditional rule is rather mechanical and therefore easy to apply.\textsuperscript{303} It works well in the majority of eminent domain cases, involving ordinary condemnations against private individuals. These proceedings do not require the time-consuming process of weighing the competing interests. The imposition of a "second look" at condemnations of protected agricultural land will therefore cause increased costs and delay, though only in evaluating the takings subject to the second look.

\textsuperscript{301} For a discussion of the goals of agricultural land preservation, see supra notes 14-20 and accompanying text.

\textsuperscript{302} See Note, supra note 154, at 795-96.

\textsuperscript{303} See id. at 813; Comment, supra note 288, at 136 (explaining courts' reluctance to abandon traditional tests for upholding zoning laws in favor of a multifactor analysis).
Yet the delay may serve to bring controversial projects before the public eye and may result in wiser use of public resources. A second look may also encourage cooperation between governmental entities that might otherwise plan and carry out projects in disregard of conflicting programs.

Despite the increased costs and delays that the additional review will entail, a second look at proposed condemnations of protected agricultural land is justified in light of the importance of farmland preservation programs. As the split of opinion in cases involving conflicts between zoning and eminent domain suggests, however, the judiciary cannot be expected to provide the impetus for the balancing of interests that such a second look will require. Instead, agricultural districting and conservation easement statutes must be drafted to require that "second look." To protect land in agricultural districts and conservation easements effectively, the statutes enacting these programs should not ignore the question of eminent domain, nor should they allow condemnation of the protected farmland to occur without justification. At the very least, the condemning authority should be required to justify a public need for the proposed project, and to demonstrate both that alternative sites have been considered and that those alternative sites are not satisfactory. This requirement should apply to all condemnations that could affect the protected land adversely.

Statutes that protect selected parcels of farmland should ensure that this second look at proposed condemnations is thorough by providing an appropriate review procedure. Timely notice to the state department of agriculture (or an analogous agency) and to the agency that supervises the farmland protection

304. See Note, supra note 154, at 810.
305. Id. at 795.
306. Compare Metropolitan Sanitary Dist. v. Illinois, 48 Ill. 2d 11, 268 N.E.2d 428 (power of eminent domain is inherently superior to zoning power) with Brownfield v. Metropolitan Sanitary Dist., 63 Ohio St. 2d 282, 407 N.E.2d 1365 (applying test weighing general public purposes served by the exercise of each power). For a discussion of these two cases, see supra notes 291-99 and accompanying text.
307. The recommendations that follow are drawn from various statutes that are discussed in detail earlier in this article. For a discussion of these statutes, see supra notes 178-217 and accompanying text. The source of each individual recommendation in this section is not noted.
308. The recommendations intended to restrict condemnation of protected agricultural land are geared toward eminent domain actions of states and their delegated subunits. State statutes may not prevent condemnations by the federal government. See Dau, supra note 118, at 1519-20 (explaining the supremacy of federal public use over all other uses).
program should be required. If a preliminary review of the proposed project, preferably by a statewide farmland protection agency, indicates that the condemnation will have unreasonably adverse effects on the protected agricultural land, the condemnation should be delayed long enough to permit a public hearing and careful investigation.

After the hearing and a careful review, the reviewing agency should balance the competing interests. Among the factors that should be considered are the condemning entity's need to use the protected farmland, the type of project proposed, the project's compatibility with agricultural land uses, the extent of potential damage to protected farmland (both to individual parcels and to the farmland preservation program itself), the existence or lack of alternatives, and the cost.\(^{309}\) In considering these and other relevant factors, the reviewing agency should weigh the interests of the condemning entity, the farmland preservation program, and society at large. This balancing process should result in a written report explaining the agency's rationale. The agency should recommend that the project be permitted as proposed, permitted with modifications, or not permitted.

Although this procedure will ensure the balancing of the various interests involved, it still may not prevent condemnation even if the agency recommends that the proposed project not be permitted. Thus, the statute should also require that the recommendation be considered by the public agency with ultimate authority over the condemnation. An even more effective approach would be to prescribe that the recommendation be entered as a final order of the reviewing agency, and as such, be subject to judicial review. This approach would shift the burden of appeal to the condemnor\(^{310}\) and thereby avoid the situation in which an unfavorable recommendation is ignored by the condemnor. Alterna-

\(^{309}\) For a list of several fundamental considerations a court should employ when resolving analogous conflicts between governmental functions and local zoning ordinances, see Note, supra note 289, at 883-84.

California's farmland protection program includes a provision that states: "No public agency or person shall locate a public improvement within an agricultural preserve based primarily on a consideration of the lower cost of acquiring land in an agricultural preserve." \textit{Cal. Gov't Code} § 51292 \textit{(West 1983)}.

\(^{310}\) In dealing with the analogous conflict between eminent domain and zoning, one author has proposed a "rebuttable presumption of governmental nonimmunity from local zoning regulation." Note, supra note 289, at 884. The presumption could be overcome by showing that the proposed function is critical to the local community or to a broader community, that alternative sites have been considered, and that the proposed site is least destructive to land-use plans and adjoining property. \textit{Id.}
tively, the statute could require that proposed condemnations that receive unfavorable recommendations proceed only upon certification of the governor or an appropriate state agency. Neither of these approaches would totally prohibit the exercise of eminent domain and thus run afoul of the inalienability problems discussed above. Yet each would ensure careful consideration—a "second look"—before protected land is condemned.

When a farmland preservation statute authorizes the conveyance of conservation easements or development rights to a state or local agency, rather than to a private organization, even more stringent protection might be in order. This enhanced protection may be justified by the permanent nature of these programs and by the ownership interest that the state or local agency enjoys in the agricultural land. Here, the statute should be drafted to prevent all but the most critical condemnations. A provision prohibiting condemnation absent a showing of extreme need and lack of viable alternatives would impose this heavier burden on the condemning agency. Such a showing should be documented in a review process similar to that suggested above, but the balancing of interests should reflect the heavier burden required to justify the proposed condemnation. An unfavorable recommendation should be conveyed in a final agency order subject either to appeal in the courts or to an overriding decision by the governor.

V. Conclusion

Some of the state statutes establishing agricultural districts or authorizing conservation easements have included provisions similar to those recommended here. But even those statutes demonstrating legislative consideration of the question of eminent domain fall short of the optimal levels of review. A state committed to the preservation of farmland, either in the immediate future or for succeeding generations, should be willing to commit the relatively insignificant additional time and resources needed to ensure that protected agricultural land can be taken for other conflicting public uses only after careful consideration of the competing interests. To permit condemnation without this careful review is to diminish the import of otherwise effective farmland protection statutes. 311

311. Since this article was typeset, the Illinois legislature has amended the Illinois Agricultural Areas Conservation and Protection Act, ILL. ANN. STAT. ch. 5, §§ 1001-1020 (Smith-Hurd Supp. 1984). See Pub. Act 84-456, 1985 Ill. Legis. Serv. 662 (West). Several of the amendments are of particular interest. The
minimum size of a district has been reduced from 500 to 350 acres. *Id.* at 663. Use of land within an agricultural area is restricted to agricultural production and limited mining operations. *Id.* The amended law provides that there shall be no restrictions on buying and selling land in an agricultural area, and that the area designation will not be affected by a change in ownership. *Id.* at 666. The amended statute will include some additional reporting requirements. *Id.* Pub. Act 84-456 becomes effective January 1, 1986. *Id.*

For a discussion of the Illinois agricultural areas law prior to the 1985 amendment, see *supra* notes 33-42 and accompanying text.