

Spring 2012

Agricultural Protection in Montana:

Local Planning, Regulation, and Incentives



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REPORT SUMMARY

The State of Montana has a unique constitutional provision that reflects our state's agricultural heritage, requiring that the Montana Legislature "protect, enhance, and develop all of agriculture." The Montana Code is filled with a myriad of legislative enactments aimed at this very goal, including provisions in our planning and subdivision statutes. Within the parameters of these statutes, local governments work on the difficult task of shaping development opportunities while protecting valuable agricultural lands and heritage.

This report starts by explaining that local governments are both required and empowered by state law to mitigate impacts to agriculture during subdivision review. When Montana law speaks of "agriculture," it does so in the broadest sense to ensure that the overall character and resources of a community are protected. For communities creating agricultural mitigation regulations, the process should thus be designed in a way that accounts for the broad and varied aspects of agriculture. Best practices suggest that the process begin with a strong agricultural element in the growth policy, a clear methodology for assessing adverse impacts to agriculture, and mitigation tools that provide both flexibility and meaningful protection against those adverse impacts.

This report next recognizes that a robust agricultural protection program must include incentives that can be used alongside mandatory agricultural mitigation. These incentives should focus both on keeping agricultural land in production, as well as protecting critical agricultural lands within a development. Communities can design incentive packages that range from the basic to the more complex, and which may involve changes at the state level as well as local initiatives. Ultimately, local governments must work with agricultural operators to identify the most significant incentives to keep agricultural lands in production.

As this report concludes, local governments have many options when contemplating ways to protect agriculture. By understanding their community's needs and building a program with a long view in mind, Montana communities can begin to achieve the people's vision to "protect, enhance, and develop all of agriculture."

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INTRODUCTION

Agriculture has long been a vital ingredient of our Montana communities—as a local food supply, an economic driver, and a cultural way of life. It is so important, in fact, that we adopted a Constitutional provision that instructs the legislature to “protect, enhance, and develop all of agriculture.”¹ Today, many Montana communities are confronting the loss of agricultural land to development. In addition to land loss, there are concerns over local food security and the economic viability of local agriculture due to changes in infrastructure, transportation costs, and globalization of the food market. A related concern is the loss of local agricultural knowledge as access to agricultural land becomes more limited and existing operators retire.

At the same time, communities recognize that agricultural operators need to be supported so that they can earn suitable incomes and leave their families with opportunities. For many operators, land development may appear more profitable than remaining in agriculture. And growing communities require appropriate housing to support their populations. Thus, communities are faced with the difficult task of shaping development opportunities while protecting valuable agricultural lands and heritage. This report provides a starting place for discussing that difficult task.

The law tells us that part of agricultural protection must occur during subdivision review. The Montana Subdivision & Platting Act (MSPA) requires that local governments review and mitigate a subdivision’s “impacts on agriculture.”² The Act, however, provides little guidance about what “agriculture” means. In Part I, this report provides a definition of “agriculture” using traditional legal methods of defining statutory terms. The MSPA is also silent on how impacts to agriculture should be measured and mitigated. Part II of this report outlines possible regulatory approaches that a local government can take to implement the MSPA’s mandate.

Yet subdivision review is only part of the equation. A truly robust agricultural protection program must include incentives for agricultural operators and broad community investment in local food production and marketing. For this reason, Part II continues by discussing a variety of non-regulatory approaches that encourage and reward the voluntary protection of agricultural lands.

Finally, in Part III, the report uses a hypothetical planning scenario to envision how a Montana community might build an agricultural protection program over time — from the short term, to the mid-range, to the long term — using increased community involvement, complimentary incentives, and regulations.

Throughout the report, endnote citations are provided for sources consulted, and, whenever possible, sources have been hyperlinked for the reader’s convenience.

PART I – THE DEFINITION OF AND DUTY TO PROTECT AGRICULTURE

Part I describes the statutory duty and authority of a local government to consider and regulate impacts to agriculture during subdivision review. Since “agriculture” is not defined in the MSPA, this Part also attempts to shed light on the most probable definition of agriculture under the law.

A. The Duty and Authority to Protect Agriculture

Montana local governments have a statutory duty to consider agricultural impacts during subdivision review. Clearly, where a duty to regulate exists, the authority to regulate exists as well. It is nonetheless worth noting that this statutory duty serves merely as a baseline—local governments possess discretionary authority to implement additional agricultural protections as well.

Affirmative Duty to Protect Agriculture. The MSPA requires that local governments consider impacts on agriculture under § 76-3-608(3):

A subdivision proposal must undergo review for the following primary criteria: (a) . . . the *impact on agriculture*, agricultural water user facilities, local services, the natural environment, wildlife, wildlife habitat, and public health and safety.³

If the subdivision is found to have a “potentially significant adverse impact” on agriculture, the governing body may require the subdivider to reasonably minimize the impact.⁴ While the preferences of the subdivider should be considered when requiring mitigation,⁵ the local government’s ultimate duty is to choose a mitigation approach that “reasonably minimizes potentially significant adverse impacts.”⁶ To the extent that impacts to agriculture cannot be reasonably minimized, the unmitigated impacts may be deemed unacceptable and may preclude approval of the subdivision.⁷ Thus, the definition of agriculture (discussed below) is important to understanding both the local government’s duty of review and its duty to require mitigation. Absent an understanding of what agriculture means in § 76-3-608(3), local governments are at risk of conducting subdivision review without adequately mitigating impacts to agriculture under the law.

Additional Discretionary Authority to Protect Agriculture. Beyond the baseline duty to review impacts on agriculture under § 76-3-608(3), local governments also possess additional discretionary authority to protect agriculture through subdivision regulation.

As a starting premise, county powers are construed liberally in favor of a finding of power.⁸ Thus, when there is a statutory structure that implies local government power, the statutes are construed liberally in favor of the local government. With respect to agricultural protection during subdivision review, there are two main sources of discretionary authority.

A local government must not only apply the § 76-3-608(3) review criteria, but it may also “expand on the Act’s minimum requirements and preserve a stricter review process . . .”

Montana Supreme Court,
Burnt Fork v. County Comm’rs (1997)

First, the Growth Policy Act provides strong evidence of the Montana Legislature’s intent to endow local government with broad authority over agricultural protection. Under that Act, local governments may:

- identify how projected development will “adversely impact . . . agricultural lands and agricultural production;” and
- describe “measures, including land use management techniques and incentives, that will be adopted to avoid, significantly reduce, or mitigate [impacts to agricultural lands and agricultural production].”⁹

These measures can then be implemented through subdivision regulations, which must be “made in accordance with” the growth policy.¹⁰ If the Legislature intended local governments to *plan* how to “avoid, significantly reduce, or mitigate” impacts to agricultural lands and agricultural production, then surely it also intended local governments to then *implement that plan* through regulation.

Second, the MSPA expressly provides that its regulatory requirements are “a minimum” standard for subdivision review.¹¹ Because of this express statement, the Montana Supreme Court held in *Burnt Fork Citizens Coalition v. Board of County Commissioners*¹² that local governments can supplement the MSPA requirements with additional, stricter requirements so long as the additional requirements do not “significantly conflict with” and are not “plainly and irreconcilably repugnant” to the MSPA. In that case, the Ravalli County subdivision regulations retained three review criteria that were no longer in the MSPA. The Court concluded:

[T]he Act contemplates that local bodies be able to establish a review process that is particular to their own jurisdiction. The County Regulations expand on the Act’s minimum requirements and preserve a stricter review process for proposed Ravalli County subdivisions, which is consistent with the policy of local government control and suggests no threat to the Act.¹³

Having established that both an affirmative, baseline duty as well as broader discretionary authority exist to protect agriculture, it is appropriate to turn now to the important task of defining what “agriculture” means under Montana law.

B. The Definition of Agriculture

Although the MSPA does not define the term “agriculture,” local governments are nonetheless expected to apply that term in accordance with the Legislature’s intent.¹⁴ The importance of properly defining agriculture cannot be overstated because the scope of the definition ties directly to the scope of the local government’s duty to mitigate impacts on agriculture. Local governments that too narrowly define agriculture could fall short of fulfilling their duties under § 76-3-608(3).

Montana law requires that “[i]n the construction of a statute, the intention of the legislature is to be pursued if possible.”¹⁵ In a 2008 case interpreting another provision of the MSPA, the Montana Supreme Court provided some instructive language about its general approach to interpreting subdivision statutes:

Legislation enacted for the promotion of public health, safety, and general welfare, is entitled to “liberal construction with a view towards the accomplishment of its highly beneficent objectives.” . . . [The MSPA’s] objective [is] ensuring that the public health, safety and general welfare are protected. That objective must be the primary guide to the interpretation of the statute.¹⁶

Keeping the MSPA’s overall objective in mind, the Court will determine the legislative intent of § 76-3-608(3) using one or more of the following tools of statutory construction: (1) plain meaning, (2) legislative history, and (3) other statutory provisions in the code.

The Plain Meaning Rule. When interpreting statutes, courts look first to the plain meaning of the statute.¹⁷ The plain meaning is the common usage of a word in society, such as the term’s definition in an English language dictionary. If the plain meaning of the statute is unambiguous, then a court ends its analysis and applies the plain meaning.¹⁸ If, however, the plain meaning leads to an absurd result, the court will move beyond the plain meaning.¹⁹ Stated another way, the court will “construe a statute by reading and interpreting the statute as a whole, without isolating specific terms from the context in which they are used by the Legislature.”²⁰ Further, if the statute is ambiguous—having more than one commonly understood meaning—the court will look to legislative history to determine its meaning.²¹ When interpreting other agricultural statutes in the past, the Montana Supreme Court has concluded that agriculture has a plain meaning.

Legislative History. Although the terms are similar, legislative history and legislative intent are different. Legislative history is “the background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates.”²² Legislative history includes documents that are created while the legislature is in the process of enacting statutes.²³ In comparison, legislative intent is defined as “the design or plan that the legislature had at the time of enacting a statute.”²⁴ Often, the documents contained in the legislative history shed light on legislative intent.

Other Codified Definitions. A third place that courts look in defining a statutory term is to comparable definitions in other areas of the code. Montana law is instructive here, requiring that “[w]henver the meaning of a word or phrase is defined in any part of [the Montana Code], such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.”²⁵ This rule helps ensure that the various parts of the Montana Code harmonize with one another.

1. The Plain Meaning of Agriculture

In a 1920s case, the Montana Supreme Court resorted to the plain meaning rule in defining the term “agricultural lands” within a tax statute.²⁶ The Court turned to a dictionary definition of agriculture as well as other sources of common usage:

The word “agricultural” is defined as pertaining to, connected with, or engaged in agriculture. *Century Dictionary*.

“The term ‘agriculture’ has been defined to be the ‘art or science of cultivating the ground, especially in fields or large quantities, including the preparation of the soil, planting the seeds, the raising and harvesting the crops and the rearing, feeding, and management of live stock; tillage, husbandry, and farming.” *2 Corpus Juris*, 988, note b.

“It is equivalent to husbandry, and ‘husbandry,’ *Webster* defines to be the business of a farmer, comprehending agriculture or tillage of the ground, the raising, managing, or fattening of cattle and other domestic animals, the management of the dairy and whatever the land produces. * * * But in a more common and appropriate sense it is used to signify that species of cultivation which is intended to raise grain and other field crops for man and beast.” *Simons v. Lovell*, 7 Heisk. (Tenn.) 510-516.

A phrase having much the same meaning . . . is “suitable for cultivation.” This phrase was construed . . . to include all land which, by ordinary farming methods, is fit for agricultural purposes.²⁷

Similarly, in the 1930s the Montana Supreme Court looked to *Webster's Dictionary* and a legal encyclopedia in deciding that the statutory homestead exemption for agricultural lands should be read liberally to include even the keeping of a few horses on the land.²⁸ The Court also observed that Utah and Wisconsin had similarly defined agriculture.²⁹

"[T]he term agriculture has a broad definition in the law."

Montana Supreme Court,
Dussault v. Hjelm (1981)

More recently, in a 1981 case involving a lease dispute, the Montana Supreme Court turned again to the dictionary to determine what "agricultural" means in the Landlord Tenant Act.³⁰ One of the parties argued that agriculture should be defined narrowly to include only farming or ranching operations "engaged in for profit."³¹ The Court disagreed. It looked at the purpose and structure of the statute in question—which listed multiple agricultural exemptions from the Act—and determined that the Legislature intended to broadly exempt agricultural leases from the Act's coverage. The Court also looked to Black's Law Dictionary, which defined agriculture as:

The art or science of cultivating the ground, including the harvesting of crops, and in a broad sense, the science or art of production of plants and animals useful to man, including in a variable degree, the preparation of these products for man's use . . .³²

Based on the statute's overarching purpose and the common understanding of agriculture, the Court held that "the term agriculture has a broad definition in the law" and that it was "clear the legislature intended a comprehensive coverage of all agricultural operations, whether they are large scale operations for profit, or small scale operations secondary to the use of a residence."³³

Nationwide, other courts have similarly examined the plain meaning of "agriculture" and defined the term broadly.³⁴ And the plain meaning of agriculture has remained consistently broad over time.³⁵ One of the leading legal encyclopedias, after listing out several broad definitions of agriculture used by courts throughout the country, concludes that

"Agriculture is a wide and comprehensive term, and statutes using it without qualification must be given an equally comprehensive meaning."

Corpus Juris Secundum, *Agriculture* § 1

"[a]griculture is a wide and comprehensive term, and statutes using it without qualification must be given an equally comprehensive meaning."³⁶ Because the Montana Legislature did not limit the term agriculture in § 76-3-608(3), it signaled an intent that the term hold its plain and broadly understood meaning.

As can be seen from these plain meaning definitions, agriculture includes agricultural land, whether actually in agricultural use or suitable for such use, as well as activities

associated with agricultural land—farming, ranching, food production, and other incidental activities associated with the making of food and related products for human use. In interpreting § 76-3-608(3), the Montana Supreme Court is likely to follow its historic practice of looking to plain meaning, in which case it would adopt this broad definition of agriculture. If, however, the Montana Supreme Court decided to look beyond the plain meaning of agriculture, it might next look towards the legislative history of § 76-3-608(3).

2. The Legislative History of § 76-3-608

An examination of the legislative history of § 76-3-608 reveals that the intent behind the term “agriculture” is broad and consistent with the plain meaning of agriculture. The Montana Legislature first enacted the MSPA in 1973. Originally, the Act mentioned agriculture only with respect to certain exempt divisions of land and in conjunction with a requirement that the environmental assessment include maps and tables indicating the soil types in the proposed subdivision.³⁷ The Legislature has subsequently met eleven times to propose and discuss amendments to § 76-3-608, including a handful of amendments addressing agricultural concerns. The full chronology of amendments is set forth in Appendix 1.

In 1974, agriculture was discussed in connection with HB 1017. As originally proposed, this bill had the primary purpose of defining subdivisions as divisions of land resulting in “parcels containing less than 40 acres”—an increase over the previous 10-acre requirement.³⁸ While agriculture was not featured prominently in the text of this bill, the topic was discussed in the bill testimony. Supporters of the bill appeared to view the 40-acre definition as one way of addressing the concern that subdivisions were affecting grazing lands and agricultural lands. As one commentator stated, “We have come to the realization that subdivision regulation is an absolutely necessity in a day when our most valuable resource, land, and our most valuable industry, agriculture, are threatened by unplanned subdivisions.”³⁹ Cattle ranchers in the Blackfoot Valley supported the 40-acre definition because they felt current law allowed the creation of small-tracts without subdivision review, causing the loss of agricultural lands.⁴⁰ Ultimately, in the bill’s final version, the requirement was reduced to 20 acres.⁴¹

Agriculture was first listed as a subdivision review criteria in 1975 as part of HB 666.⁴² The original version of the bill would have required that a subdivision result in a “net public benefit” to the community.⁴³ The final bill language was later modified to require that the subdivision be “in the public interest.”⁴⁴ When determining whether the development was in the public interest, the governing body was required to weigh criteria that included “effects on agriculture.”⁴⁵ Rep. Vincent, the bill’s sponsor, indicated that he was a proponent of the legislation because of the “tragic intrusion” of subdivisions onto Montana agriculture lands.⁴⁶ Vincent indicated that some of the best agricultural land in the County of Gallatin was being converted to subdivision.⁴⁷

The next discussion of agriculture in relation to § 76-3-608 occurred in 1995 as part of HB 473. That year, the phrase “agricultural water user facilities”⁴⁸ was inserted to account for the effect of subdivisions on an important part of agriculture—“the ditches, canals, and pumping facilities” that are used to irrigate agricultural land.⁴⁹ HB 473 also created a new category of exemption from subdivision review for land transfers intended to remain in agricultural use.⁵⁰ The exemption’s purpose was to ensure that future generations of farming families could continue to use agricultural lands.⁵¹

In 2001, the Legislature in SB 479 added a cluster development provision to the MSPA,⁵² with the primary intent of preserving open lands and spaces for agriculture. The bill’s preamble concluded that “**agricultural land is increasingly being taken out of production for development and becoming unavailable for production of food**; and . . . farmers and ranchers are often forced to sell their land to generate sufficient income to retire”⁵³ Sen. Hargrove, the bill’s sponsor, discussed how cluster development could be used to protect open lands to address these concerns.⁵⁴

1975: The agriculture review criterion was added to address the intrusion of subdivisions into agricultural lands.

2001: The Legislature made a finding that areas of agricultural lands need to be protected to ensure food production and to keep agricultural operators in the business of agriculture.

Later, in 2005, the phrase “effect on agriculture” was replaced with the phrase “impact on agriculture,” which remains today.⁵⁵ The record does not explain the purpose of this word change.

In sum, the legislative history of § 76-3-608 shows an intent over time to broadly protect the same characteristics of agriculture that appear in the plain meaning of the term, including protection of the land base, rural character, food production, and livelihood and economy of agriculture.

3. The Montana Constitution and Other Sections of the Montana Code

Turning to the Montana Constitution and other agricultural statutes in the Montana Code, there is a pattern of broadly defining agriculture and a clear policy aimed at protecting, enhancing, and developing agriculture in the state. This pattern of broadly defining agriculture outside of the MSPA suggests that a similarly broad definition is appropriate within the MSPA. All of the statutes discussed in this section are set forth more fully in Appendix 2.

“The legislature shall . . . enact laws and provide appropriations to **protect, enhance, and develop all agriculture.**”

Montana Constitution, art. XII, § 1(1)

The Montana Constitution. Because statutes must comply with the state constitution, courts look to constitutional provisions to better understand a statute’s intent.⁵⁶ With respect to agriculture, the Montana Constitution indicates that “[t]he legislature shall . . . enact laws and provide appropriations to protect, enhance, and develop all agriculture.”⁵⁷

In proposing this provision, the Natural Resources & Agriculture Committee of the Constitutional Convention stated that it was “necessary to recognize the largest and most important industry in the state . . . and to provide appropriations and authorities to adequately protect, enhance, and develop the agricultural industry of the state.”⁵⁸ This constitutional mandate is important because it provides the policy context in which agricultural statutes will be interpreted. In other words, where a statute could be construed to either promote or harm agriculture, the courts will construe the statute in a way that furthers the constitutional policy of promoting agriculture.⁵⁹

Particularly noteworthy for local governments is the Montana Constitution’s mandate that state laws not only *protect* agriculture, but also *enhance* and *develop* agriculture. This language may shed light on the subdivision review obligation, suggesting that the mitigation of “impacts on agriculture” is something more than just the slowing down of agricultural land loss over time. Rather, it should be an approach that results in the advancement of agriculture in the community.

The Montana Code. Unless indicated otherwise, words or phrases defined in the Montana Code have the same meaning throughout all other code sections.⁶⁰ Thus, the meaning of agriculture in § 76-3-608(3) should “harmonize” with the other agricultural sections of the code.⁶¹ While the word agriculture and its related terms appear in numerous areas of the Montana Code,⁶² there are a handful of key areas that shed the most light on the definition of agriculture:

- Montana Growth Policy Act (addressing agricultural lands and mitigation);
- right-to-farm statutes (defining agricultural activities);
- conservation district statutes (addressing agricultural soil values);
- Child Labor Standards Act (defining agriculture);
- Montana Growth Through Agriculture Act (defining agricultural business);
- county agricultural services statutes (addressing marketing and education).

Growth Policy Statutes. As noted above, the Growth Policy Act makes specific mention of agricultural mitigation due to projected development and uses the phrases “agricultural lands” and “agricultural production” to

A community’s growth policy may include measures and techniques to “avoid, significantly reduce, or mitigate” impacts to “**agricultural lands**” and “**agricultural production**” due to harm posed by projected development.

Mont. Code Ann. § 76-1-601(4)

describe the scope of that mitigation.⁶³ Because subdivision regulations are required to be made in accordance with the growth policy,⁶⁴ it is a fair conclusion that “agriculture” in subdivision includes both the agricultural lands within the community as well as the production activities associated with those lands.

Right-To-Farm Statutes. The right-to-farm statutes—which are located in Title 76 near the MSPA—contain strong legislative findings protecting agricultural activities:

The legislature finds that agricultural lands and the ability and right of farmers and ranchers to produce a safe, abundant, and secure food and fiber supply have been the basis of economic growth and development of all sectors of Montana's economy. In order to sustain Montana's valuable farm economy and land bases associated with it, farmers and ranchers must be encouraged and have the right to stay in farming. It is therefore the intent of the legislature to protect agricultural activities from governmental zoning and nuisance ordinances.⁶⁵

These statutes, which were adopted in 1995, also provide a broad and robust definition of “agricultural activity”⁶⁶ that contains seventeen non-exclusive examples of agricultural activities from “produce marketed at roadside stands or farm markets,”⁶⁷ to “the operation of machinery and irrigation pumps,”⁶⁸ and “the protection [of commercial production of farm products] from damage from wildlife.”⁶⁹ The statutes also define “commercial production of farm products,” and provide fourteen non-exclusive examples.⁷⁰

Land use laws should protect “the ability and right of farmers and ranchers to produce a **safe, abundant, and secure food and fiber supply**” in order to “sustain Montana’s **valuable farm economy and land bases** associated with it.”

Mont. Code Ann. § 76-2-901

Under the right-to-farm statutes, “a county . . . or other political subdivision . . . may not pass an ordinance or resolution” that prohibits or terminates agricultural activities outside of municipal boundaries.⁷¹ The legislative history of the right to-farm statutes shows that legislators and agricultural interests were concerned with the “migration of people into rural areas” and the impact that has on agriculture.⁷²

The right-to-farm statutes are important to understanding the MSPA because both sets of statutes govern local government regulation over land use. Since zoning and subdivision laws work hand-in-hand, the policies stated in the right-to-farm statutes presumably extend to and help inform local government review of subdivisions.

Conservation District Statutes. Also in Title 76, the conservation district statutes contain an important legislative finding about the significance of agricultural lands:

[T]he farm and grazing lands of the state of Montana are among the basic assets of the state and . . . the preservation of these lands is necessary to protect and promote the health, safety, and general welfare of its people.⁷³

This finding makes clear that the protection of agriculture is included within the government's traditional powers to regulate land use on behalf of the public's health, safety, and welfare.

Child Labor Standards Act. The Child Labor Standards Act is noteworthy as the only statute that directly defines the term "agriculture." The types of agriculture in which children can take part are broad and include:

- (a) all aspects of farming including the cultivation and the tillage of the soil;
- (b)(i) dairying; and (ii) the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . .;
- (c) the raising of livestock, bees, fur-bearing animals, or poultry; and
- (d) any practices, including forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market or delivery to storage, to market, or to carriers for transportation to market.⁷⁴

Montana Growth Through Agriculture Act. The Montana Growth Through Agriculture Act, found in Title 90, gives to the Department of Commerce a broad mandate to "strengthen and diversify Montana's agricultural industry" and promote small businesses.⁷⁵ The Act also defines "agricultural business" as "an enterprise engaged in the production, processing, marketing, distribution, or exporting of agricultural products . . . includ[ing] any related business the primary function of which is providing goods or services to an agricultural enterprise."⁷⁶

County Agricultural and Livestock Services. In keeping with state-level agricultural development efforts, Title 7 provides counties the power to use general funds and levies to market local agricultural products and to conduct agricultural education and extension work.⁷⁷

Other Statutes. Title 7 of the Montana Code encourages County Commissioners to apply the multiple-use principle to county-owned lands for the public benefit and welfare, including "grazing and agricultural land improvement."⁷⁸ The Montana tax code reflects a policy of offsetting the impact of land speculation and "urban influences" by taxing agricultural land based at a lower rate.⁷⁹ Also, Title 80 defines "agricultural commodities."⁸⁰

The above list of agricultural statutes is not exhaustive. Yet even this selective list reveals the pervasive use of agriculture throughout the Code and highlights the importance and primacy of agriculture in Montana. Importantly, this list also provides the larger policy context in which § 76-3-608(3) operates. To “harmonize” the subdivision review criteria with these statutes, it is important to read the term “agriculture” broadly to encompass the land bases, activities, food supply system, businesses, and economy protected by the State’s various agricultural laws.

4. Putting it All Together: A Broad Definition of Agriculture

Under all three tools of statutory construction, the law requires that agriculture be defined broadly in subdivision review. What follows is a list of concepts included within “agriculture” based on the cases, legislative record, and statutes discussed:

- Land in agricultural production and land suitable for such production;
- Agricultural activities occurring on the land;
- Cultivation and tillage of the soil;
- Production of food (animal and plant) and fibers;
- Food supply and security;
- Animal husbandry;
- Maintenance of agricultural equipment;
- Agricultural water user facilities;
- Disposal of agricultural wastes;
- Agricultural businesses, including those that serve agriculture;
- Agricultural commodities;
- Transportation of farm products;
- Retention of rural areas for farming activities;
- The economic enterprise of agriculture;
- Agricultural education and culture; and
- Farming families, small businesses, and the agriculture community.

This list demonstrates that, under Montana law, “agriculture” encompasses a broad range of concepts. If these concepts were grouped by topic, we would arrive at a definition of agriculture that includes: (1) the land base; (2) the agricultural activities on the land; (3) the delivery and marketing of agricultural products; and (4) the overall economy, education, and cultural heritage of agriculture in a community.



Some have argued that agriculture in § 76-3-608(3) should be defined narrowly to mean only those agricultural operations near a proposed subdivision. Certainly, the immediately impacted agricultural properties are an important consideration within agriculture. However, such a narrow definition would eliminate nearly every other aspect of agriculture listed above. Further, such a narrow definition would impose a limit on “agriculture” that the Legislature itself did not place on § 76-3-608(3).

A narrow reading of agriculture would also lead to an inconsistent application of the subdivision review criteria in § 76-3-608(3). In addition to impacts on agriculture, subdivision review criteria include impacts on items like “local services,” and “public health and safety.” When considering these criteria, local governments do not artificially limit their inquiry to impacts on neighboring landowners only and ignore impacts to the larger community.⁸¹ As the Montana Supreme Court has observed, the MSPA should be interpreted in a way that *enhances* rather than narrows the government’s ability to review subdivisions for impacts on the public’s health, safety, and welfare.⁸²

Another argument made against a broad reading of agriculture in § 76-3-608(3) is that zoning is better suited to control the impacts of growth on agriculture. While zoning is certainly one tool among many that can be used to protect agriculture, there is no evidence that the Legislature intended local governments to rely exclusively on zoning. The subdivision statutes explicitly state that one purpose of subdivision regulation is to protect against impacts on agriculture.⁸³ Furthermore, the limited number of Montana counties that have actually adopted rural zoning shows the limits of this tool. And the zoning protest provision further limits the tool’s effectiveness.⁸⁴ If the Legislature had intended zoning to be the sole tool for addressing impacts on agriculture, it would not have added agriculture to the MSPA.

On the other side of the spectrum, some argue that the definition of agriculture is so broad that it includes impacts on long-distance transportation, energy costs, and associated environmental concerns. The legislative intent behind agriculture may not be broad enough to support such an all-inclusive definition; nonetheless, these issues

are likely covered by other subdivision review criteria in § 76-3-608(3), such as impacts on local services and the natural environment.

* * *

Although agriculture is not directly defined in § 76-3-608(3), all three tools of statutory construction signal a legislative intent to define the term broadly for purposes of subdivision review. This broad definition is consistent with existing Montana cases and legislative records, furthers the constitutional mandate to “protect, enhance, and develop all agriculture,” and helps “harmonize” § 76-3-608(3) with the other agricultural statutes in the Code. Local governments that include this broad definition in their growth policies and subdivision regulations are thus better positioned to mitigate agricultural impacts in keeping with the Legislature’s intent.

PART II - METHODS TO PROTECT AGRICULTURE

A national review of agricultural protection initiatives reveals that agricultural protections can take many forms, from traditional agricultural zoning districts, to public and private easement acquisitions, to community food programs.⁸⁵ Communities most effective at agricultural protection use a variety of tools together in an integrated approach called “food system planning.”⁸⁶

This Part focuses on a few forms of agricultural protection. Section A discusses mandatory mitigation requirements during subdivision review, as contemplated by the MSPA. Sections B and C then describe incentives local governments may offer to developers and agricultural operators to keep agricultural land in production and protect agricultural land during development. As additional aids for the reader, Appendix 3 contains excerpts from two national planning organizations that have studied and made recommendations concerning agricultural protection.

A. Mitigation During Subdivision Review

This Section examines potential local government approaches to protect agriculture during subdivision review. As the reader considers these possibilities for subdivision review, the possible interrelationship with incentives and other approaches outside of subdivision review should be kept in mind. We will explore some of these incentives in the sections that follow.

In compiling the sample provisions discussed below, we reviewed agricultural mitigation programs used in other rural communities throughout the United States. Many of these programs come from California and Vermont, which, like Montana, are states that mandate local review of agricultural impacts during development. We have

also drawn from comparable communities in Idaho, Wyoming, Colorado, Utah, Washington, and Maryland. Within Montana, our survey turned up few examples of subdivision regulations that expressly address agricultural mitigation.

Based on our survey of these various programs, we have observed that communities typically take the following steps when implementing agricultural mitigation in subdivision review:

- Make the case for agricultural mitigation in the growth policy;
- Make findings in the subdivision regulations that will support the chosen mitigation methods;
- Develop a methodology for identifying the harm posed by a subdivision;
- Choose the most appropriate mitigation methods; and,
- Address related mitigation issues.

1. Make the Case for Agricultural Mitigation in the Growth Policy

Effective agricultural mitigation begins at the planning stage. When a local government addresses agriculture in its growth policy, it then has a long term vision and set of objectives by which to measure its success. As noted above in Part I, the Growth Policy Act expressly contemplates the idea that local governments will describe measures and techniques “that will be adopted to avoid, significantly reduce, or mitigate [adverse impacts to agricultural lands and agricultural production].”⁸⁷ Thus, including an agricultural element in a growth policy can lay an important legal foundation for the mitigation techniques later codified within subdivision regulations.

The APA’s Smart Growth Legislative Guidebook recommends that a community:

- (a) **inventory** agricultural . . . lands within the jurisdiction of the local government;
- (b) **assess** the relative importance of these lands in terms of size, quality, and/or resource significance as well as contribution to the economy of the local government and/or the surrounding region;
- (c) **recognize** that, in addition to their primary value as contributing to the economy of the local government and/or the surrounding region, agricultural . . . lands also have environmental value and may also have historic, cultural, open space, and scenic values; [and]
- (d) **prioritize** such areas containing agricultural . . . lands in order to take subsequent action to preserve them . . . ;⁸⁸

As this checklist suggests, planning involves both a textual discussion as well as data gathering and mapping to document agricultural lands and their significance to the community.

➤ **Textual Provisions.** Based on the broad definition of agriculture discussed above in Part I, local governments in Montana have the authority to address a wide variety of agricultural-related goals in their growth policies. Typical topics that communities address during agricultural planning include protection of the agricultural economy, agricultural lands, food production and food systems, and rural culture and community identity. Analysts are also now suggesting that food security should be another goal listed in a community's plan to ensure a safe, healthy, and reliable local food supply.⁸⁹ The following sample provisions are typical of the agricultural goals contained within a community's planning document:

- *Sample Provision: [Yolo County, California](#).*⁹⁰ "This element seeks to support, sustain, reinvent, and diversify the agricultural economy. Agriculture is the primary business of Yolo County. The division of farmland for nonagricultural purposes is precluded. The use of agricultural conservation easements and/or land dedication to mitigate for loss of farmland from non-agricultural development is required. A new Agricultural District program to promote value-added agricultural endeavors in certain key emerging areas is identified. An innovative program to transfer farm dwelling rights to other farmers for agriculturally-related purposes is also included. Agricultural land also provides important biological habitat and de facto open space. The goals and policies of this element emphasize wildlife-friendly farming, local food preference, community revitalization, creation of jobs and economic health, business outreach, expansion of tourism, and collaboration with the Rumsey Tribe and UC Davis. *** The County's long-standing emphasis on farming and compact communities, as well as its abundant natural resources, has positioned it well to take advantage of the opportunities created by an era of rising food and energy costs. This General Plan looks to build upon the County's past successes by developing a "smart economy" that will afford both residents and the local government the ability to continue to chart the County's course into the future."
- *Sample Provision: [King County, Washington](#).*⁹¹ "It is a fundamental objective of the King County Comprehensive Plan to maintain the character of its designated Rural Area. . . . King County's land use regulations and development standards shall protect and enhance the following components of the Rural Area: a) The natural environment . . . b) Commercial and noncommercial farming . . . and cottage industries; . . . d) Community small-town atmosphere, safety, and locally owned small businesses; e) Economically and fiscally healthy Rural Towns and Rural Neighborhood Commercial Centers with clearly defined identities compatible with adjacent rural, agricultural, forestry and mining uses."
- *Sample Provision: [Calvert County, Maryland](#).*⁹² Providing a more quantitative goal, this county states that "Calvert farming is in the middle of a cultural and

financial crisis, as it moves away from tobacco to other crops. Approximately 24% of the county's land is assessed as farmland. . . . The County has set a goal to preserve 40,000 acres of prime farm and forestland. Over 23,000 acres are permanently preserved. At the current rate of preservation, the County could reach its goal by 2020."

- o *Sample Provision: [Beaverhead County, Montana](#).*⁹³ "[R] rural residential development has resulted in the following problems:

The conversion of quality agricultural land to residential home sites, land wastage, and the interference with adjacent traditional agricultural activities.

Loss of income to agriculture-related businesses and negative impacts on the economic aspects of agriculture in Beaverhead County. . . .

GOAL 1: To conserve, enhance, and encourage agricultural operations within the County and to minimize potential conflicts between agricultural and nonagricultural land use within the County.

Objective 1A: To preserve and maintain agricultural land specifically for continued agricultural uses.

Objective 1B: To discourage future residential development in areas that are incompatible with existing production agricultural activities. . . .

[Implementation Plan:]

Develop a land use map to show areas of the County where productive agricultural activities are preferred over residential development. . . .

Revise the Beaverhead County Subdivision Regulations to better protect agriculture and agriculture related businesses by requiring Agriculture Management Plans, covenants, and other mitigation measures when agricultural land is proposed for non-agricultural development."

Based on the broad definition of agriculture, a local government might consider revisiting its growth policy definitions and goals to ensure they fully reflect the Legislature's intended meaning of agriculture. In keeping with the recommendations of the Sustainable Community Development Code, a local government might also consider adding language and data about food security goals and how projected community food demands compare with projected losses in agricultural land.⁹⁴

➤ **Inventories and Mapping.** The textual goals within an agricultural plan are supported by studies that demonstrate the economic and community importance of agriculture. Going hand-in-hand is the need to provide mapping of important agricultural lands, where current and projected development will impact those lands, and which lands are presently protected. Again turning to the APA’s Smart Growth Legislative Guidebook, the following studies are advised:

(a) an inventory of publicly and privately owned agricultural lands, including such lands subject to conservation easements or other restrictions that ensure that it will remain undeveloped. . . . Agricultural land contained in the inventory shall include land that:

- 1) is classified by the Natural Resources Conservation Service, U.S. Department of Agriculture, as predominantly Class [insert class numbers from soil surveys] soils in [insert regions of the state];
- 2) consists of other soil classes that are suitable for agricultural use, taking into consideration suitability for grazing; climatic conditions; existing and future availability of water for irrigation; existing land-use patterns; technological and energy inputs required; and accepted farming practices;
- 3) contains uses related to and in support of agricultural, including dwellings related to agriculture.
- 4) provides a buffer of sufficient distance between adjoining and nearby land on which farm practices are undertaken and other nonagricultural land that might be adversely affected by such farm practices.⁹⁵

The most fundamental study that a community conducts is an inventory and classification of soil types. As the APA observes, “[t]he relative ranking [of soils] is important as it allows local governments to focus on priority protection areas.”⁹⁶ But soil types are only part of the analysis. The Natural Resources Conservation Service advocates the use of Land Evaluation and Site Assessment (LESA) wherein a number of additional factors are evaluated and given relative “weights” based on community values and considerations.⁹⁷ These factors are combined with the soil inventory to create a community tailored prioritization system for identifying key agricultural lands. While some communities find LESA to be overly formulaic in its approach, its recognition of other community values is worth noting. As one example, Yolo County, California, has identified community values in the areas of water supply, specialty commodities, agricultural distribution systems, and farm worker housing.⁹⁸

A local government may want to conduct an inventory that includes classes of farmland and grazing land. Then, a possible next step for the local government is to study the inventoried lands for other important characteristics. These other characteristics, which can help the community set protection priorities, might include resource and open

space values, risk due to development, availability of water supply, contiguity to other key agricultural lands, agricultural infrastructure, or other relevant community goals.

2. Make Findings that Will Support the Chosen Mitigation Methods

After making the case for agricultural mitigation in the growth policy, local governments are then positioned to adopt implementing regulations. As with any regulatory endeavor, here we recommend strong findings that justify the regulations on the basis of health, safety, and welfare. The best findings make a clear connection between the community's agricultural planning goals and the specific review criteria and mitigation methods applied during subdivision review.

- Sample Provision: [City of Davis, California](#).⁹⁹ “[T]he . . . council finds that this chapter and this article are necessary for the following reasons: [The State] is losing farmland at a rapid rate; . . . County farmland is of exceptional productive quality; loss of agricultural land is consistently a significant impact under [evaluation of environmental impact] in development projects; . . . ; the city is surrounded by farmland; the . . . County general plans clearly include policies to preserve farmland; the continuation of agricultural operations preserves the landscape and environmental resources; loss of farmland to development is irreparable and agriculture is an important component of the city's economy; and losing agricultural land will have a cumulatively negative impact on the economy of the city and the [County].”

* * *

(d) The City Council finds that some urban uses when contiguous to farmland can affect how an agricultural use can be operated, which can lead to the conversion of agricultural land to urban use.

(e) The City Council further finds that by requiring adjacent mitigation for land being converted from an agricultural use and by requiring a one hundred fifty foot buffer, the city shall be helping to ensure prime farmland remains in agricultural use.”

- Sample Provision: [The Town of Shaftsbury, Vermont](#).¹⁰⁰ This town has a finding in its subdivision regulations that “Agricultural land is an important component of the working landscape of the Town. To promote agricultural uses and the retention of productive farms and agricultural land, development of open lands containing primary or secondary agricultural soils should be configured to minimize the encroachment of residential uses on agricultural land.” This finding lays the foundation for the town's lot layout and open space requirements in subdivision.

- *Sample Provision: [City of Brentwood, California](#).*¹⁰¹ “[T]here is a reasonable relationship between the need for preservation of productive agricultural land and the impacts of conversion of productive agricultural land It is appropriate that developers who convert productive agricultural land . . . help offset the permanent loss of land for the future production of food and fiber.”
- *Sample Provision: [Beaverhead County, Montana](#).*¹⁰² “To protect the economic viability of agriculture within Beaverhead County, the planning board and/or governing body may require mitigation measures as necessary when land used primarily for agricultural purposes is proposed for residential or commercial development.” The county then describes forms of mitigation that include set-asides and management plans that encourage agricultural opportunity.
- *Sample Provision: [Teton County, Wyoming](#).*¹⁰³ In support of its open space requirement in rural districts, the county made these findings: “Ranching and farming are agricultural uses that formed the original basis for the communities in Teton County. A large part of the private lands in Teton County are still used in agriculture. Agriculture is crucial to the wildlife and scenic qualities, and western atmosphere of Teton County, and therefore to the tourist-based economy. Every major wildlife species in Teton County is dependent on habitat provided by ranch lands. Any view of a major scenic vista in Teton County from highways or roads encompasses an agricultural scene in the foreground. Maintaining agricultural lands is the most efficient and inexpensive method to preserve open space which is crucial to the wildlife and scenic resources. The ranchers will keep their land undeveloped and unpopulated, control trespassing and poaching, maintain waterways and water rights, and manage vegetation, all without any expense to the public. In all areas of the County, the agricultural industry is threatened with extinction by residential and second home development due to the current basis of Teton County’s economy – tourism. Ironically, the attraction for visitors in Teton County is the scenic and wildlife benefits of open space created by agricultural operations; the very operations that are threatened by increasing tourism and development. The County must protect agriculture in order to preserve the very foundation of the communities in Teton County as well as their precious wildlife and scenic resources.”

Once a local government develops its agricultural mitigation program, it may want to consider adding a full set of findings such as these to its subdivision regulations so that a clear link is made between the county’s planning goals and its agricultural review criteria and mitigation requirements. Additionally, the local government may wish to revisit its regulatory definition of agriculture to ensure that it fully reflects the Legislature’s intended meaning of the term.

3. Develop a Methodology for Identifying the Harm Posed by a Subdivision

Many communities require some form of site assessment to identify the harms posed by a development proposal. This site assessment is more nuanced and property-specific than the general inventories and studies that a community conducts at the planning stage. Communities also commonly enact a set of agricultural review criteria that decision makers can use to gauge the significance of a development's potential impacts.

➤ **Site-Assessment Process.** Local governments should determine the point at which a site assessment is conducted during subdivision review, what data is included in the assessment, and what party is responsible for conducting the assessment.

- *Sample Provision: [State of Vermont](#).*¹⁰⁴ Vermont's Act 250 requires a site assessment for developments that impact natural resources, including prime agricultural soils.¹⁰⁵ A state-created Land Use Panel ultimately issues these development permits. The Land Use panel can delegate the evaluation of potential development harms to a regional planning commission. The regional planning commission in turn conducts investigations to determine if the proposed development complies with state law by not significantly affecting prime agricultural soils.¹⁰⁶
- *Sample Provision: [Stanislaus County, California](#).*¹⁰⁷ In California, the California Environmental Quality Act (CEQA)¹⁰⁸ mandates that local governments assess impacts to the environment, including agriculture, as part of an environmental review process. If the initial study shows the development may cause a significant environmental impact the local government must identify mitigation measures and alternatives by preparing an Environmental Impact Report (EIR). In complying with CEQA, Stanislaus County performs the initial study when the developer submits an application.
- *Sample Provision: [Bannock County, Idaho](#).*¹⁰⁹ As an example of a more flexible approach, the County Engineer has the discretion to require an EIS from the developer when there are natural features such as "important agricultural soils" on the property. If required, this EIS is done at a mandatory "concept plan" stage before a preliminary plat application is submitted.

➤ **Review Criteria.** Review criteria help local governments more consistently analyze agricultural impacts and provide developers with predictable standards.

- *Sample Provision: [State of Vermont](#).*¹¹⁰ In Vermont, the state requires that four criteria be evaluated whenever primary agricultural soils are impacted: 1) if the land to be developed will impact continuing forestry or agriculture; 2) whether the applicant owns other lands (presumably which could be developed instead);

3) whether the project minimizes impacts to primary agricultural soils; and 4) whether developing these primary agricultural soils will “significantly interfere or jeopardize” continuing agricultural activities or reduce the agricultural potential of adjoining lands.

- *Sample Provision: [City of Burlington, Vermont](#).*¹¹¹ Burlington, Vermont extends state law requirements beyond primary agricultural soils by requiring an additional local impact review whenever “significant” lands are affected. This major impact review applies to “[l]and disturbance involving one acre or more” and “[s]ite improvements and land development on parcels that contain . . . natural areas of state or local significance.” “Before a major impact development may receive approval, the [development must meet the following standards]: Not have an undue adverse effect on rare, irreplaceable or significant natural areas”¹¹² The city’s ordinance indicates that “agricultural, forest, and other environmentally significant lands” are included within its scope.¹¹³
- *Sample Provision: [State of California](#).*¹¹⁴ Taking a more regimented approach, California has adapted the LESA system into a mathematical model that local governments can use, assigning varying weights to six factors, including soil quality, project size, water supply, and the developed property’s relationship to the “zone of influence,” which includes high priority areas and areas of existing protected agricultural lands. The model’s numeric score helps local governments determine whether the project’s impact on agriculture is significant.

Table 8. Final LESA Scoresheet

A	B		C		D
Factor Name	Factor Rating (0-100 points)	X	Factor Weighting (Total = 1.00)	=	Weighted Factor Rating
<u>Land Evaluation</u>					
1. Land Capability Classification	<Line 1> _____	X	0.25	=	_____
2. Storie Index Rating	<Line 2> _____	X	0.25	=	_____
<u>Site Assessment</u>					
1. Project Size	<Line 3> _____	X	0.15	=	_____
2. Water Resource Availability	<Line 4> _____	X	0.15	=	_____
3. Surrounding Agricultural Lands	<Line 5> _____	X	0.15	=	_____
4. Protected Resource Lands	<Line 6> _____	X	0.05	=	_____
Total LESA Score (sum of weighted factor ratings)					<Line 7> _____

- *Sample Provision: [Beaverhead County, Montana](#).*¹¹⁵ In determining the appropriate form of mitigation, this county considers: “i) Current land use; ii) Size of the parcel; iii) Location (proximity to other agriculture or communities); iv) Potential

for future agricultural uses; v) Size of the proposed development; and vi) Any other information relevant to determining affect of proposed development to agriculture in Beaverhead County.”

- *Sample Provision: [Carbon County, Montana](#).*¹¹⁶ This county considers the following criteria:
 - “Number of acres that would be removed from the production of crops or livestock.
 - Acres of prime farmland (as defined by the USDA) that would be removed from production.
 - Effect on use of remainder (if any) and adjoining properties as farm or ranch land.
 - Potential conflicts between the proposed subdivision and adjacent agricultural operations including:
 - Interference with movement of livestock or farm machinery
 - Maintenance of fences
 - Weed proliferation
 - Vandalism or theft
 - Harassment of livestock by pets or humans
 - Other items to be considered include:
 - Effect on market value of surrounding land
 - Net effect on taxes resulting from additional services.”

4. Choose the Most Appropriate Mitigation Methods

When the site assessment and review criteria indicate that a development will impact agriculture, subdivision regulations typically describe the acceptable methods for mitigating those impacts. Agricultural mitigation approaches tend to fall into the following categories:

- **Developer Acquisition of Replacement Land**
- **Mitigation Fees In Lieu of Developer Acquisition**
- **On-Site Easements and Open Space Requirements**
- **Transfer of Development Rights**

To provide flexibility for different types of development proposals, communities sometimes use a combination of mitigation approaches. And as noted above, these subdivision-based approaches are used alongside other tools such as agricultural zoning, public incentives, open space initiatives, and marketing programs.

a. Developer Acquisition of Replacement Land

Mitigation through direct acquisition requires the developer to acquire replacement agricultural land of a similar character to that of the subdivided land. This replacement land is then made subject to a conservation easement or other restriction prohibiting non-agricultural uses.

- *Sample Provision: [Stanislaus County, California](#).*¹¹⁷ Stanislaus County uses developer acquisition of land as one of their mitigation techniques. Mitigation is required at a 1:1 ratio. The size of the land that is being converted dictates which methods may be used. If the total land is more than 20 acres, mitigation must be satisfied by the direct acquisition of a conservation easement. If the total land is less than 20 acres, then direct acquisition of a conservation easement or purchase of banked mitigation credits are an option. Additionally, if a conservation easement or banked mitigation credits cannot be attained, the Board of Supervisors may authorize payment of an in lieu mitigation fee.¹¹⁸
- *Sample Provision: [Yolo County, California](#).*¹¹⁹ In Yolo County, agricultural mitigation is required for a change from agricultural to a predominantly non-agricultural use. Mitigation is required at a 1:1 ratio. If the area is being converted is greater than five (5) acres, a conservation easement, granted in perpetuity, must be used. This easement may be bought on land within or outside of the subdivision, as long as the mitigation land is equivalent [in quality] to the land being converted. If the area being converted is five (5) acres or less, either a conservation easement or an in lieu fee may be used.

b. Mitigation Fees In Lieu of Developer Acquisition

In lieu mitigation allows a developer to pay a fee for the land that is being converted from agricultural to non-agricultural use. The local government can later use this fee to fund other agricultural protection efforts. In lieu mitigation is useful when developer acquisition is not possible, when the developed acreage is small, or when pooled funds provide the government with greater buying power. For example, San Joaquin County, California allows the use of in lieu fees when “the applicant has made a diligent effort to obtain a farmland conservation easement . . . and has been unable to obtain such easement.”¹²⁰ With in lieu mitigation it is important to have a clear methodology for how the fee is computed and a clear plan for how the mitigation funds will be spent toward agricultural protection.

- *Sample Provision: [San Joaquin County, California](#).*¹²¹ San Joaquin requires agricultural mitigation, including the option of in-lieu fees, for any zoning reclassification that changes an area’s permitted use from agricultural to non-agricultural.¹²² Agricultural zones are extremely restrictive and limit residential

uses to single family residences only.¹²³ The in-lieu fee is “based on the cost of purchasing farmland conservation easements on land of comparable size and agricultural quality, plus the estimated cost of legal, appraisal and other costs, including staff time, to acquire and manage the farmland conservation easement or other agricultural mitigation instrument.” Further, the fee is updated annually based on inflation indicators compiled by the Office of Federal Housing Enterprise Oversight and the Consumer Price Index.

- *Sample Provision: [Stanislaus County, California](#).*¹²⁴ “1) The in-lieu fee shall be determined case-by-case in consultation with the Land Trust approved by the County Board of Supervisors. In no case shall the in-lieu fee be less than 35% of the average per acre price for five comparable land sales in Stanislaus County. 2) The in-lieu fee shall include the costs of managing the easement, including the cost of administering, monitoring and enforcing the farmland conservation easement, and a five percent (5%) endowment of the cost of the easement, and the payment of the estimated transaction costs associated with acquiring the easement. The costs shall be approved by the Board of Supervisors based on information relating to the costs provided by the [public] Land Trust.” The Land Trust can be a nonprofit public corporation or other legal entity operating, including the County.¹²⁵
- *Sample Provision: [City of Brentwood, California](#).*¹²⁶ In lieu fees are applied “at the time the building permit or other development permit is issued or entitlement is granted which results in the conversion of productive agricultural land.” The fees are then used to prepare and purchase conservation easements. Up to 5% of the fees also may be used for studies, implementation, and administration of the conservation easements.¹²⁷
- *Sample Provision: [City of Davis, California](#).*¹²⁸ Davis also charges an administrative fee and includes an adjustment for inflation:

“(B) The in lieu fee shall include a 10% administrative fee to cover the city’s costs to implement mitigation.

(C) The in lieu fee shall include an inflator that takes into account the inflation of property values and shall include a standard assumption for the time it takes the city to acquire property for agricultural mitigation. The inflator shall be calculated based on a three year average of the House Price Index (HPI) for the Sacramento Metropolitan Statistical Area compiled by the Office of Federal Housing Enterprise Oversight. The inflator shall be based on the three most recent years for which HPI data are available and shall be based on an assumption that the City will spend the in lieu fee within three years from the payment date.”

- *Sample Provision: [Montgomery County, Maryland](#).*¹²⁹ Montgomery County allows the fee to be applied only towards purchase of a conservation easement. The County must purchase easements on land above a minimum acreage. The land must meet soil classification and woodland classification standards as well as certain water and sewer requirements. The Agriculture Preservation Advisory Board may purchase easements that do not meet the above requirements if “the land has significant agricultural value, is consistent with the long term planning goals of the County and the easement is in the public interest.”

The mitigation fee is calculated by determining a base value for the agricultural land plus an “added value for certain farm quality characteristics, the quality of which is determined by the County’s agricultural board.” The “added value” of the agriculture parcel, if any, is based on the size of the parcel, the quality of the land (as determined by national or state standards), land tenure, proximity to transportation (i.e., proximity to a frontage road), and proximity to an agricultural zone.

c. On-Site Easements and Open Space Requirements

Another form of mitigation is to restrict development on the developed property itself by requiring open space for agriculture, rather than substituting agricultural lands elsewhere in the community. The open space is made subject to an easement or other deed restriction that precludes development but allows for ongoing agricultural uses. This method of mitigation is appropriate when the developed parcel contains a mixture of important agricultural lands as well as non-important agricultural lands. In this situation, development can be placed on the non-important lands, leaving the important lands in protected open space.

- *Sample Provision: [Town of Shaftsbury, Vermont](#).*¹³⁰ “The purpose of open space subdivision planning is to enable and encourage flexibility in the development of tracts of land, to promote the most appropriate use of land, to facilitate the economical provision of streets and utilities, and to enhance the environmental quality of the area through maximum preservation of open land, * * *
The following objectives shall be used to guide the design of open space subdivisions and location of conserved open lands: . . . [e]nsure site development on least fertile soils and maximize the usable area remaining for agriculture.”
- *Sample Provision: [Bannock County, Idaho](#).*¹³¹ This county has agricultural zones that are “not intended to accommodate non-agricultural development.”¹³² When subdivision occurs in these zones, the subdivision regulations have site performance standards requiring that “at least ninety (90) to ninety-five (95) percent of all such areas shall remain as permanent open space. Accessory farm

structures (i.e., barns, silos) shall be permitted in the open space. This is to preserve and protect the important agricultural soils, crop lands and grazing areas of the county.” The open space is restricted and the developer has the option of retaining ownership or transferring ownership to a qualified entity.

- *Sample Provision: [City of Davis, California](#).*¹³³ In addition to mitigation requirements on agricultural lands, Davis also requires a 150-foot setback for all developments adjacent to agricultural lands to protect the agricultural viewshed and reduce conflicts between agricultural and non-agricultural uses.¹³⁴
- *Sample Provision: [Beaverhead County, Montana](#).*¹³⁵ This county can “require that a percentage of land proposed for development be made available for agricultural opportunities through use of covenants or other deed restrictions.” The county may also “require a covenant obligating the developer or landowner to either actively use the land for agriculture or make the land available or lease at market prices for agricultural uses as a condition of plat approval.”

d. Transfer of Development Rights

TDRs allow landowners to sever development rights from agricultural property and sell them for use on properties where development is more appropriate. The protected parcel is placed under a conservation easement or deed restriction that precludes development but allows continued agricultural use.¹³⁶ The transferred right is typically bought by a developer, who can then enjoy increased density on the receiving parcel.

Commentators recommend that a basic density zoning be used in sending and receiving areas to determine the value of development rights and create demand for those rights in the receiving areas. Although we were unable to locate an example of TDRs required for agricultural mitigation during subdivision review, TDRs may serve as a way to offset developer costs by providing another mechanism for mitigation other than direct acquisition or fees in lieu. Because TDRs are predominantly used as an incentive tool, they will be revisited in more detail below in Section C.

5. Address Related Mitigation Issues

After choosing the most appropriate mitigation methods, local governments should then consider the various related issues that will arise in mitigation. While the list below is not exhaustive, it reflects the most common provisions that we encountered in our review, as well as some additional provisions that may be important for a Montana local government to consider.

➤ **Quality and Quantity of Replacement Land.** Regardless of the type of mitigation method chosen, the primary concern will be the quality and quantity of the land

protected versus that being developed. In the following passage, the APA makes this observation in the context of wetlands protection:

The key issue in mitigation is equivalency: whether the created critical and sensitive area is roughly equal in size and quality to the area that is to be developed. The goal of mitigation is the preservation of critical and sensitive areas; if a developer could legally build on 100 acres of high quality wetland by creating 100 acres of lower-quality wetland, then there would be a net loss in wetland habitat. Since such areas must be defined in the first place, these definitions are the clear starting place for creating standards for comparing created and destroyed critical and sensitive areas.

But merely providing substitute land that meets the definition of a critical and sensitive area is not enough: 100 acres of low-quality wetland is still wetland according to the legal definition, but is not equivalent to 100 acres of high-quality wetland. Therefore, more detailed standards and criteria for comparing one critical and sensitive area to another are necessary.¹³⁷

The same observations hold true for agricultural lands. The “net loss” concern is particularly compelling if a community allows development of high quality agricultural lands at a rate higher than it requires the protection of such lands.

- *Sample Provision: [San Joaquin County, California](#).*¹³⁸ The county requires that replacement land come from certain designated agricultural districts within the county’s General Plan. Further “[t]he agricultural land should be of comparable or better soil quality than the agricultural land whose use is being change to nonagricultural use. Priority shall be given to lands with prime agricultural soils, which are located in areas of greatest potential development.”

➤ **Farming Versus Grazing Lands.** While the Clinic did not encounter a community that has drawn a distinction between crops and grazing land in its mitigation regulations, this distinction could be of vital importance in determining the amount and types of land that a community wishes to protect. Importantly, the amount of acreage required for livestock grazing can vary considerably from the amount of acreage required for farming. Counties with separate inventory of both types of agricultural lands might consider tailoring mitigation methods so that both types of lands are adequately protected.

➤ **Contiguity of Protected Lands.** Another important consideration is contiguity among protected lands. Fragmented agricultural lands can undermine a community’s ability to retain a functioning agricultural land base. Among other concerns, fragmentation can interrupt water supply delivery, place conflicting land uses beside

one another, and hamper the movement of livestock and agricultural equipment. Contiguity of lands can also promote related open space and conservation goals.

- *Sample Provision: [San Joaquin County, California](#).*¹³⁹ “The Mitigation Strategy shall consider the following issues: 1) The need to include contiguous parcels and areas large enough to preserve agricultural operations. . . . 3) Coordination with other public and private land conservation programs. . . .”

➤ **Model Restrictive Language for Protected Lands.** Each mitigation method discussed above will ultimately involve a restriction placed on the protected agricultural land. Some local governments use model restrictive language that is either codified within or appended to the subdivision regulations. While the unique circumstances of each subdivision may require variations in restrictive language, providing model language lends predictability to the review process. Typical issues that can be addressed through model language include:

- the form of the restriction, whether a restrictive covenant, deed restriction, or conservation easement;
 - the beneficiaries of the restriction;
 - the standard terms that must be set forth on the face of the restriction, including permitted and prohibited uses and best management practices;
 - recording requirements;
 - monitoring requirements and enforcement in the event of violations.¹⁴⁰
- *Sample Provision: [San Joaquin County, California](#).*¹⁴¹ Lands already encumbered by a conservation easement are not eligible for use as mitigation replacement land. When mitigation is used, the legal instrument encumbering the land “shall prohibit any activity that substantially impairs or diminishes the agricultural productivity of the land.” Qualifying entities hold the easements and the County is a “backup beneficiary.”
 - *Sample Provision: [Stanislaus County, California](#).*¹⁴² “To qualify as an instrument encumbering the land for agricultural mitigation: 1) all owners of the agricultural mitigation land shall execute the instrument; 2) the instrument shall be in recordable form and contain an accurate legal description of the agricultural mitigation land; 3) the instrument shall prohibit any activity which impairs or diminishes the agricultural productivity of the agricultural mitigation land; 4) the instrument shall protect the existing water rights and retain them with the agricultural mitigation land; 5) the interest in the agricultural mitigation land shall be held in trust by the Land Trust and/or the County in perpetuity; 6) the Land Trust or County shall not sell, lease, or convey any interest in the agricultural mitigation land except for fully compatible agricultural uses; and 7) if the Land Trust ceases to exist, the duty to hold, administer, monitor, and

enforce the interest shall pass to the County to be retained until a qualified entity to serve as the Land Trust is located.”

- *Sample Provision: [Fremont County, Idaho](#).*¹⁴³ “All open space land shall be permanently restricted from future subdivision and other forms of application through a conservation easement deed restriction running with the chain of title, in perpetuity, and recorded with the Fremont County Recorder. . . . The following title notice shall be filed on the undivided open space property and the wording shall additionally be placed on the face of the plat: **(1)** Lot __, Block__ of _____ Subdivision is an open space lot and uses on the lot are restricted to those approved in the open space management plan. The open space lot is permanently preserved as open space and future subdivision of the lot to allow increased residential density is prohibited. Only those uses identified in the adopted open space management plan shall be allowed.”

➤ **Sufficient Water for Agricultural Uses.** Adequate water supply for the protected agricultural lands is a significant issue. Absent assurances of adequate water supply, mitigation may be undermined by protecting lands that cannot be productively used.

- *Sample Provision: [Fremont County, Idaho](#).*¹⁴⁴ Any land set aside for agricultural purposes must have a “supply of irrigation water.” To qualify, there must be a finding that a water right existed on the land prior to development and that the owner of the water right is willing to sell it for continued agricultural purposes.
- *Sample Provision: [City of Davis, California](#).*¹⁴⁵ “The agricultural mitigation land shall have adequate water supply to support the historic agricultural use on the land to be converted to nonagricultural use and the water supply on the agricultural mitigation land shall be protected in the farmland conservation easement, the farmland deed restriction or other document evidencing the agricultural mitigation.”
- *Sample Provision: [Yolo County, California](#).*¹⁴⁶ The mitigated land must have a water supply sufficient to support ongoing agricultural use. Additionally, any associated water right must remain within the mitigation land.
- *Sample Provision: [State of California](#).*¹⁴⁷ Again taking a more regimented approach, California LESA guidelines consider a variety of factors relating to water supply, including adequacy of supply in both non-drought and drought conditions, as well as economic and physical restrictions that may impact the supply.

Table 5. Water Resource Availability Scoring

Option	Non-Drought Years			Drought Years			WATER RESOURCE SCORE
	RESTRICTIONS			RESTRICTIONS			
	Irrigated Production Feasible?	Physical Restrictions ?	Economic Restrictions ?	Irrigated Production Feasible?	Physical Restrictions ?	Economic Restrictions ?	
1	YES	NO	NO	YES	NO	NO	100
2	YES	NO	NO	YES	NO	YES	95
3	YES	NO	YES	YES	NO	YES	90
4	YES	NO	NO	YES	YES	NO	85
5	YES	NO	NO	YES	YES	YES	80
6	YES	YES	NO	YES	YES	NO	75
7	YES	YES	YES	YES	YES	YES	65
8	YES	NO	NO	NO	-- --	-- --	50
9	YES	NO	YES	NO	-- --	-- --	45
10	YES	YES	NO	NO	-- --	-- --	35
11	YES	YES	YES	NO	-- --	-- --	30
12	Irrigated production not feasible, but rainfall adequate for dryland production in both drought and non-drought years						25
13	Irrigated production not feasible, but rainfall adequate for dryland production in non-drought years (but not in drought years)						20
14	Neither irrigated nor dryland production feasible						0

B. Incentives to Keep Agricultural Land in Production

While the MSPA mandates that mitigation occur during subdivision review, a broader view of agricultural protection recognizes that complementary steps also must be taken to encourage the voluntary protection of agricultural operations and to promote the overall health of a community’s agricultural economy. To keep land in agricultural production, a landowner typically needs financial support and a strong local economy that favors the agricultural goods that the operator produces. The following incentives are among those that governments use to encourage landowners to elect agricultural production over land development. Many of these incentives can be instituted at the local level; others may require legislative changes at the state level; all require voluntary commitments from agricultural operators.

1. Property Tax Incentives

Property tax incentives are a traditional method of protecting agricultural lands. Although the approach varies from state to state, the general idea is to impose a lighter tax burden on agricultural property compared to other types of property. This incentive can be implemented through state-level tax assessments, local mill levies, or some combination of both. The main tax incentives used are:

An Example of Using Tools Together

State laws could be changed to allow a tax incentive for agricultural operators who participate in a local government’s land acquisitions program or enroll their property in an Agricultural Protection Area (described below).

➤ **Preferential Tax Assessment.** This most basic type of tax incentive, which is used in Montana and many other states, applies a lower tax percentage rate to agricultural lands than to other categories of property. The state tax codes then define “agricultural” so as to limit the parcels of land that qualify for favorable tax treatment. Montana, for example, limits qualifying lands to certain parcel sizes and requires certain amounts of income to be derived from agricultural use of the land.¹⁴⁸ These lands are taxed at a percentage rate of 2.82%, which is the same as residential, commercial, and industrial lands, but less than some mining, utility, and other classifications.¹⁴⁹

➤ **Preferential Valuation.** Agricultural lands can also receive preferences during the appraisal process if a state applies a valuation method that results in a lower value for an agricultural parcel than for other types of land. Montana applies a favorable appraisal process to agricultural lands by considering only their value for agricultural use, even though they might be valued more highly for other non-agricultural uses.¹⁵⁰

➤ **Deferred Taxation.** With deferred taxation, preferential tax assessment is combined with a rollback penalty that recaptures taxes if the property is later developed. In [Pennsylvania](#), agricultural landowners who receive preferential assessment are liable for 7 years of back taxes, plus 6% interest, if they develop their land.¹⁵¹

➤ **Restrictive Agreements.** Under a restrictive agreement tax incentive, the landowner must agree not to convert property to non-agricultural use to qualify for preferential tax treatment. The most well known example is the [Williamson Act](#) in California. The minimum parcel for an “agricultural preserve” under the Williamson Act is 100 acres,¹⁵² and the minimum contract term is 10 years.¹⁵³

➤ **Circuit Breaker Tax Programs.** Circuit breaker tax programs operate like a relief valve for agricultural operators faced with excessive local property taxes. The state sets a maximum tax rate for agricultural lands, and when the local government exceeds that rate, the landowner gets a dollar-for-dollar credit against state income taxes. Michigan, New York, and Wisconsin employ circuit breaker programs.¹⁵⁴

In Montana, property tax is a combination of state and local government mill levies. The Montana Code sets the tax percentage rate for agricultural lands, the state appraises the agricultural land, and the tax rate and land value are then multiplied to get a “taxable value.” State and local governments then assess mill levies, which are multiplied by the taxable value to determine the landowner’s property taxes:

$$\begin{aligned} \text{Tax Percentage Rate} \times \text{Assessed Value} &= \text{Taxable Value} \\ \text{Taxable Value} \times \text{Mill Levies} &= \text{Total Property Taxes} \end{aligned}$$

Therefore, there are several ways to approach tax incentives for agricultural land in Montana, which would likely require amendments to the Montana Code:

- Lower the 2.82% tax percentage rate for agricultural land.
- Modify the definition of “agricultural land” to include smaller sized parcels and parcels on which income-production levels may not be met. This may be helpful in communities that are encouraging “truck farming” and shared gardens on isolated pockets of agricultural land found in urbanizing areas.
- Create a mill levy reduction or exemption for agricultural operators that forego development in areas with high development pressure. The Montana Code currently provides tax incentives for various activities such as historically preserved properties, remodeled structures, and business incubators.¹⁵⁵ Similar incentives could be extended to agriculture. For example, [Hughes County, South Dakota](#), imposes school levies differently on agricultural and non-agricultural lands: agricultural land is assessed at 16.68 mills and non-agricultural land is assessed at 23.77 mills. This results in a difference of approximately \$645.21 per \$100,000.00 in assessed value.¹⁵⁶
- Require a “no-development agreement” from landowners before they receive a mill levy exemption or reduction, or consider a rollback provision that recoups waived taxes if an agricultural landowner chooses to develop.

These approaches involve a weighing of benefits and costs, since reduced taxes may help protect agriculture but can also reduce the local government’s revenue stream. The local government will also need to weigh whether the tax incentive is significant enough to persuade landowners to remain in agriculture. The addition of a no-development agreement or rollback provision may help strike the right balance between protecting agriculture as well as local government revenues.

2. Land Acquisitions

Direct land acquisition is another way to maintain agricultural operations in developing communities. Some local governments directly engage in the acquisition, whereas others provide funding and support to third party entities that acquire and manage the land interests. There are three main approaches:

➤ **Fee Simple Acquisition with Retained Ownership.** Under this approach, a local government purchases agricultural land and retains title to protect the land from non-agricultural uses. Typically, these lands are leased to an agricultural operator, which provides income for the local government. This scenario could be funded through open

space bonds or subdivision fees-in-lieu, and the end result is to keep land available and affordable for individuals seeking to expand or begin an agricultural business.

➤ **Fee Simple Acquisition with Subsequent Sale Subject to Easement.** Here, the local government purchases property and subsequently sells the property to an agricultural operator. The property is sold subject to a conservation easement that prevents conversion to non-agricultural use. This scenario may be more appropriate when the local government is not interested in long-term leasing of agricultural lands.

➤ **Conservation Easement or Development Rights Acquisition.** Numerous local governments either directly acquire or facilitate the third-party acquisition of conservation easements or development rights to protect agricultural land. Under this approach, the landowner receives financial compensation (and in some cases income tax relief) while retaining title to the land and the right to continue farming. The terms vary, but generally restrict the operators’ ability to develop the property for non-agricultural purposes.

Comparison of Three Acquisition Models adapted from: The American Farmland Trust Report to City of Bainbridge Island			
	Fee-Simple Acquisition with Retained Ownership	Fee-Simple Acquisition with Subsequent Sale Subject to Easement	Easement Acquisition
Strengths:			
Relatively Inexpensive			X
Control Over Land Use	X		
Income From Leases	X		
Revenue From Land Sale		X	
Can Act Quickly When Land Comes on Market	X	X	
Can Work With a Variety of Landowners	X	X	
Land Stays on Tax Roll		X	
Matching Dollars Available		X	X
Private Ownership		X	X
Weaknesses:			
Relatively Expensive	X		
Less Control Over Use		X	X
Administration Burden	X		
Risk That Land Will be Idle	X		
Liability Risk	X		

- *Example: [Boulder County, Colorado](#).*¹⁵⁷ Boulder County has an active acquisition program for agricultural lands. The County directly purchases land and leases it out to agricultural operators, sometimes on a crop-share basis. The County may also purchase and lease-back to a landowner who wishes to sell but still continue

farming for a set period of years. The County’s [Agricultural Resource Division](#) oversees 120 agricultural leases for a variety of commodity and specialty crops. In addition to full ownership, Boulder County actively purchases and accepts donations of conservation easements. The County cooperates with municipalities to identify agricultural lands of local importance.

- *Example: [King County, Washington](#).*¹⁵⁸ The King County Farmland Preservation Program began in 1979 when voters authorized King County to purchase development rights to agricultural lands. The program focuses on purchasing development rights on high quality agricultural soils and has currently protected approximately 13,200 acres of farmland. King County has also purchased direct title to farmland (172 parcels to date) with 95 parcels subsequently resold subject to development restrictions.
- *Example: [Stanislaus County, California](#).*¹⁵⁹ Stanislaus County’s Farmland Mitigation Program combines mandatory mitigation with voluntary incentives. Landowners that voluntarily donate conservation easements (or developers who protect land beyond the minimum acreage required) receive “mitigation credits” that they in turn can sell to other developers who need to mitigate agricultural land as a condition of development approval.

3. Agricultural Support Programs

Agricultural support programs seek to make agricultural production more economically viable by increasing the demand for locally produced foods and providing needed services and infrastructure to agricultural operators. Models for support programs can be found in both the local government and non-profit sectors; public-private collaborations are also common.

An Example of Using Tools Together

A local government can encourage enrollment in an Agricultural Protection Area (discussed below) or entry into a conservation easement by offering agricultural support services and incentives to landowners.

A local support program should be shaped around the expressed needs and priorities of a community’s agricultural operators. For example, when officials designed the Local Food System in Cabarrus County, North Carolina, they first met with operators to identify barriers to the long-term viability of agriculture and essential services required for operators to remain part of the local economy.¹⁶⁰ Some of the common features included in support programs are:

- **Local Foods Board.** Some local governments have formed food policy boards to oversee a local foods program. For example, Douglas County, Kansas formed a [Food Policy Council](#) to coordinate community-wide efforts to improve access to local foods.¹⁶¹ In Adams County, Pennsylvania, the [Food Policy Council](#) conducts research

on local food accessibility, promotes the local food economy, and works to connect producers and consumers in the county.¹⁶² While a Local Foods Board may make recommendations regarding land use, the scope of the board will generally be much broader, addressing such issues as hunger, nutrition and food availability, issues that are usually beyond the scope of a land planning board.

➤ **Local Foods Position.** Creating a position for a local foods coordinator can greatly enhance the effectiveness of a local foods program. Coordinators work to directly implement the ideas of a food board, connect local producers and local buyers, oversee land leasing and infrastructure initiatives, and engage in grant writing to support the program. Illustrating two different approaches, Cabarrus County has chosen to fund a local foods position within the government, whereas Pottawattamie County, Iowa, provided seed funding for a 5-year [Local Food Coordinator](#) in the regional Golden Hills Resource Conservation & Development, a non-profit that works across eight counties in southwest Iowa.¹⁶³

➤ **Local Marketing.** Local marketing connects agricultural operators to local consumers. A typical local marketing technique is to publish a directory of local producers and buyers. For example, the Northern Piedmont Region of Virginia publishes the [Buy Fresh, Buy Local](#) directory, which lists farmers, producers, retailers, restaurants, orchards, and vineyards who sell locally.¹⁶⁴ In Montana, producers and consumers connect locally through the [Montana Abundant directory](#). The Alternative Energy Resources Organization (AERO) conducts annual [farm tours](#) that introduce citizens to local agricultural operators and inform them about agricultural programs. AERO has also partnered with the Montana Department of Agriculture to create a [food systems mapping project](#) that will visually depict market information related to local food.

➤ **Infrastructure.** A support program can help create infrastructure essential to the success of a local agricultural economy. Some possibilities include:

- *Incubator Farms and Learning Gardens* – To help new farmers gain skills to operate on their own. Along the lines of training future farmers, [The Growing Community Project](#), is developing community gardens within walking distance of all Helena neighborhoods. Cabarrus County, North Carolina, runs an incubator farm that gives new operators important agricultural skills and opportunities, along with serving as a community education center.
- *Local Slaughter and Meat Facility* – To decrease fuel costs for transporting animals to centralized slaughter facilities. Lake County currently has a facility, the [Mission Mountain Food Enterprise Center](#), which allows local meat producers to process their products for a minimal rental fee. Part of the funding for the Center came from the enactment of HB 583 in 2009, which provided funding for

four agricultural and food development centers in Montana – Havre, Ronan, Joliet and Butte/Dillon.¹⁶⁵

- *Mobile Meat Processing Unit* – To allow the facility to be brought to the producer. HB 484, which passed during the 2005 legislative session, instituted a framework for inspecting and licensing mobile meat processing units in Montana. The [Montana Poultry Growers Cooperative](#) in Ronan operates a mobile processing unit for poultry slaughter and processing.
 - *Food Processing Center* – To clean, package, process and transport local foods to grocers and other institutional buyers. The [Mission Mountain Food Enterprise Center](#) in Ronan rents space and equipment for canning, dehydrating, meat processing, food packaging and a commercial kitchen for “food entrepreneurs.”
 - *Outdoor Farmers’ Market Space* – To market fresh produce and other local foods. Farmers’ markets provide a direct means of connecting producers and consumers of local agricultural products, including value-added products. In order to ensure that consumers have adequate access to farmers’ markets, local governments should consider whether to facilitate markets on multiple days of the week, and in different locations in the jurisdiction.
 - *Indoor Farmer’s Market Space* – To extend the market season through the use of cold weather facilities. The [Heirloom Winter Market](#) in Missoula currently operates an indoor market once a week where local operators can sell their products later into the season. Here, too, there is opportunity for expansion.
- **Local Sourcing Policy.** To create a market for local foods, a local government can institute a sourcing policy for all government-sponsored food programs. For example, a 10% local sourcing policy would require that all schools, jails, and any other food programs use at least 10% locally grown foods. Target percentages can begin low and increase as the supply of local food adapts to meet demand. [Woodbury County, Iowa](#) requires all food served “in the usual course of business” be local and organic.¹⁶⁶ Recent changes in Montana law have made local sourcing easier. Prior to the enactment of SB 328, public institutions were required to accept the lowest bid for food products. After passage of the bill, public institutions can select a higher bid for Montana produced food, so long as the higher bid is reasonable in comparison with other bids, and the institution stays within its existing budget.¹⁶⁷

Montana has a statewide food policy coalition called [Grow Montana](#) whose goal is to “build health, wealth, connection, and capacity” in Montana communities. Grow Montana currently operates the [Farm to Cafeteria Connections](#) network, which works to bring local, healthy food to Montana schools, hospitals, and prisons. Additionally, the

University of Montana’s [Farm to College Program](#) seeks to purchase Montana-made products for its dining services.

➤ **Individualized Services.** A local government can also provide individualized services that help agricultural operators stay in business over the long term. This assistance can take the form of direct help through subsidized loans or more indirect help through training and advising. [Carver County, Minnesota](#), for example, provides guidance to operators seeking loans for equipment or other improvements.¹⁶⁸ Wisconsin’s non-profit [Institutional Food Market Coalition](#) provides pamphlets and seminars on food safety and packaging, agricultural practices, crop and liability insurance, business development, accounting, data tracking, and loans and grants — services that could also be provided by a local government program.¹⁶⁹

Aging farmers and ranchers often need assistance in planning how to transfer operations to their children.¹⁷⁰ Beginning and small-parcel operators, on the other hand, need to develop skills and may require assistance to apply for loans and obtain “agricultural lands” status for property tax purposes. A support program can provide resources to help operators surmount these barriers. For example, [Land-Link Montana](#), which operates in seven counties in Western Montana, connects beginning and relocating operators with landowners who want to see their land in production.

➤ **Funding Local Support Programs.** As a long-term venture, a local support program may require greater funding than some of the other incentives described in this report. Nonetheless, the communities that develop support programs appear to make greater inroads into agricultural protection. In addition to federal, state, and private grants, another program funding source might be local businesses. In Dane County, for example, the local hospital subsidized the purchase of several hundred CSA shares (approximately \$200 for each share) within the community.¹⁷¹ Montana local governments also have funding potential through mill levies. Local governments in the state have broad authority to impose a property tax levy for “any public or governmental purpose not specifically prohibited by law,”¹⁷² and more specifically, for agriculture extension work,¹⁷³ public health,¹⁷⁴ and economic development.¹⁷⁵ As a longer term funding source, mill levies can provide dependability to program funding.

An Example of Using Tools Together

Funding for local support programs can come from a combination of sources including developer fees, mill levies, partnerships with state and federal agencies, bond money or support from non-profit or private sources.

The degree of local government involvement in these support programs varies greatly. The above-mentioned [Dane County Food Council](#) is highly involved in the government purchasing policy, researching local food issues, coordinating local partners and providing funding for local food projects, but does not operate any facilities or conduct any direct marketing.¹⁷⁶ Many of those goals are accomplished through partnerships

with local non-profits and advocacy groups. [Cabarrus County, North Carolina](#), on the other hand, employs a local food program manager, owns an incubator farmer where new farmers can hone their skills, and is currently building a slaughter facility for local use. Cabarrus County also sponsors farmers' markets, publishes a local foods directory, and has instituted a 10% local food policy.¹⁷⁷

4. Agricultural Protection Areas

Agricultural Protection Areas (APAs)¹⁷⁸ allow agricultural operators to voluntarily form areas where agriculture is encouraged and protected.¹⁷⁹ APAs are traditionally enabled through state legislation, and have both state and local components. Montana does not currently have APA enabling statutes in place. Although APAs provide benefits to agricultural operators, they are voluntary and thus vulnerable to landowner withdrawal. For this reason, many APA programs require minimum enrollment periods and sometimes impose withdrawal fees to encourage landowner retention.

An Example of Using Tools Together

Agricultural Protection Areas could be implemented as a sort of a "floating zone." Agricultural operators who are located within a designated part of the county could voluntarily enroll their property in an APA to receive protections and incentives such as the ability to sell TDRs.

In the states that use APAs, enrollment entitles agricultural producers to a variety of benefits and protections at both the state and local level.¹⁸⁰ Enrollment may allow an operator to benefit from lower sewer, water, and property taxes, eligibility to sell developmental rights, and access to local agricultural support services. Additionally, an APA can protect against non-agricultural zoning regulations, eminent domain, incorporation into municipal governments, and expansion of local infrastructure. To ensure participating landowners do not frequently enter and exit APAs, local governments may impose fees or a rollback penalty for withdrawing from an area.

Could a Montana local government accomplish an APA without state enabling legislation? One possibility is to modify the traditional APA form to provide local incentives without the traditional state-level protections. For example, enrollment in an Agricultural Protection Area could be a prerequisite for access to agricultural support program services such as local marketing programs, grant opportunities, or county operated infrastructure. To be enrolled in an APA, the agricultural landowner could petition for enrollment and then agree not to develop the property for a period of years. Enrollment in an APA would be on a parcel-by-parcel basis, with the local government outlining the minimum requirements for enrollment. In this way, the APA would act as a sort of a "floating zone" whereby landowners voluntarily enroll to access the benefits offered by the local government. An APA might also be a good candidate for a "sending area" for TDRs, which would allow participants the ability to sell development rights.

In addition, Montana allows citizen-initiated zoning under Part I of the Planning and Zoning Act.¹⁸¹ Citizen-initiated zoning requires 60% of the affected landowners to petition the County to create a zoning district. If citizens initiated a district with similar characteristics to that of an agricultural district, they could qualify for treatment as an APA. Alternatively, the Montana Legislature could enable the use of more traditional APAs. While this method may take lobby efforts and coordination with other local governments, it would provide a more complete array of state protections.

- *Sample Provision: [Isle of Wight County, Virginia](#).*¹⁸² Isle of Wight County has established three Agricultural/Forestral Districts within the County under state statute. The earliest was in 1979 and it has been renewed multiple times, currently through 2015.¹⁸³ The primary benefits are preferential tax assessment, protection from local laws which may unreasonably restrict agriculture, a requirement that local officials consider the districts when implementing policy, and protection from some taxes.
- *Sample Provision: [Cache County, Utah](#).*¹⁸⁴ In 1996, Utah enacted legislation enabling APAs,¹⁸⁵ which Cache County has implemented locally. Landowners voluntarily submit an application describing the area and any limits on the types of agriculture that will be permitted within the area. The County designates the term and minimum size for an APA, and landowners can remove or add land by petition. The APA designation provides protection from zoning changes and nuisance lawsuits, but does not confer any additional benefits.
- *Sample Provision: [Calvert County, Maryland](#).*¹⁸⁶ The purpose of Calvert County's APA program is to protect prime agricultural soils by reimbursing landowners who enroll. Landowners who enroll in the program are eligible for payments from the county for the purchase of development rights or for placing a conservation easement on the property. The APA must remain in effect for a minimum of 5 years.
- *Sample Provision: [Winona County, Minnesota](#).*¹⁸⁷ Winona County adopted Minnesota's [Agricultural Land Preservation Program](#) under which enrolled landowners receive a property tax credit of \$1.50 per acre and protections from municipal annexation, eminent domain, and local services projects unless the landowner consents.¹⁸⁸ In exchange, the land is restricted to agricultural use for a minimum of 8 years.

C. Incentives to Protect Agriculture Land During Development

Whereas the incentives thus far have focused on ways to keep agricultural land in production, these next incentives may be used to protect agricultural land when development of agricultural land is planned. These voluntary incentives could be used

alongside of and even reduce the need for mandatory mitigation requirements imposed during subdivision review.

1. Voluntary Transfer of Development Rights

Previously, TDRs were discussed as a potential mitigation tool that could be required during subdivision review. Here, we note their potential as a voluntary tool that can allow landowners to realize equity in their land while continuing part or all of their agricultural operation. While the use of TDRs ultimately results in development, that development is shifted away from vulnerable agricultural lands into areas more suitable for higher densities.

- *Sample Provision: [King County, Washington](#).*¹⁸⁹ King County has a TDR program in partnership with nearby city governments. Development restrictions in important rural areas can create development rights for additional density, square footage, or height allowances in urban areas. The County runs a TDR bank to facilitate the sale and purchase of TDRs.
- *Sample Provision: [Montgomery County, Maryland](#).*¹⁹⁰ Montgomery County has the most extensive and successful TDR program in the nation, which is partially responsible for keeping nearly 30% of Montgomery's land in agriculture.¹⁹¹ Montgomery County's agricultural protection includes three easement programs and the Building Lot Termination (BLT) program. The BLT program focuses on smaller lots that are more susceptible to development. Landowners can sell development rights to the county for banking, or directly to developers.
- *Example: [Stanislaus County, California](#).*¹⁹² Although Stanislaus County has a mandatory Farmland Mitigation Program, it also combines the program with voluntary incentives that function similar to TDRs. Landowners that donate conservation easements or protect land beyond the minimum acreage required receive "mitigation credits" that they can sell to other developers who need to mitigate agricultural land as a condition of development approval.
- *Sample Provision: [Gallatin County, Montana](#).*¹⁹³ In Gallatin County, TDRs have been used through both citizen-initiated zoning and in absence of any density zoning. The Middle Cottonwood program was implemented through citizen-initiated zoning and has been relatively successful at protecting local mule deer habitat. Another, less successful attempt was made to implement a TDR program without density zoning, using individual assessment to determine quantity of developmental rights per parcel.

2. Agricultural Planned Developments

Communities are beginning to use agricultural conservation design to protect the most significant agricultural lands within a subdivided parcel. [Conservation design](#) is an innovative approach to subdivision where the development's layout integrates and protects key property features, such as agricultural lands of significance.¹⁹⁴

Conservation design might include homesite clustering, designation of preserved agricultural space that connects to other agricultural lands, and restrictive covenants that address agricultural issues such as crop growing, irrigation, and composting.

While some conservation design could be a required part of subdivision review for agricultural lands, it is also possible to have additional design elements that operate as incentives that give developers certain benefits. One approach could be to create an agricultural conservation design option by allowing an agricultural specific Planned Unit Development (PUD) within the subdivision regulations. PUDs allow developers the increased design flexibility needed to protect key agricultural lands within a property and also serve as a vehicle for providing incentives, such as increased density, or one of the many "perks" described below.

- *Example: [Bannock County, Idaho](#).*¹⁹⁵ Bannock County allows one building per 40 acres in its agricultural districts. A clustering incentive is then used to encourage building near existing roads rather than throughout the parcel. Bannock County also allows for a 10% increase in density if a developer chooses to cluster.¹⁹⁶
- *Example: [Howard County, Maryland](#).*¹⁹⁷ In 1992, Howard County began using an incentive for clustering rural subdivisions to preserve farmland. The County allows developers to group residential lots together, thereby protecting agricultural land which is placed in a conservation easement. A developer is allowed a density bonus of one additional unit per 25 acres protected.
- *Example: [The Farmstead at Granite Quarry, North Carolina](#).*¹⁹⁸ The Farmstead is an example of an "Agriburbia" design that focuses heavily on incorporating food production into the development — production for both residents and the nearby community.¹⁹⁹ The vision behind Farmstead was to create a neighborhood where food is grown in close proximity to where people live. The result was a neighborhood with 15 acres of dedicated farmland that provides fresh fruits and vegetables to the residents.

3. Developer Perks

Local governments can use a variety of perks to encourage developers to protect agricultural land during development. While any one of these perks may be sufficient to induce land protection, most communities offer a variety of perks to increase landowner or developer choices. One of the basic elements of a perk is determining how a landowner or project becomes “qualified” to take advantage of the perk. Eligibility may be dependent, for example, on enrollment in an APA, entering a contract that prevents development on a portion of the land, or designing a PUD that protects a property’s agricultural values. Alternately, agricultural producers may qualify for perks if they meet minimum agricultural sales or operate on a minimum property size.

An Example of Using Tools Together

Perks for agricultural developers can be conditioned on other protection measures, such as enrollment in an APA, granting a conservation easement on agricultural land within the development, or designing an agricultural PUD.

Many of the following examples come from other types of incentive programs such as affordable housing, green building, and historic preservation, but can nonetheless be adapted to the agricultural context.

- **Density Bonuses.** Density bonuses offer developers an increase in units allowed on a given parcel and may be used with clustering, TDRs, and other design amenities. The developer benefits by realizing increased profits and the community benefits by protecting agricultural land that would have been lost otherwise.
- **Planning and Building Fee Exemptions.** Under this perk, qualified projects have reduced or waived planning fees. In [Bend, Oregon](#), the city offers incentives to housing projects that qualify for federal and state affordable housing funding.²⁰⁰
- **Free services.** Similarly, some local governments offer free planning and consulting services for qualified projects. [King County, Washington](#) offers free project management and green building consultation for developers who wish to build to specific standards.²⁰¹
- **Expedited Review and Permitting Processing.** Qualifying projects can receive a higher priority in application processing, agency commenting, and decision making by the local governing body. The city of [Eugene, Oregon](#), offers priority review of building applications when an applicant uses green building techniques.²⁰²
- **Off-site Improvement Assistance.** Here, qualified projects can apply for government-sponsored grants to pay for off-site infrastructure improvements that may be needed. For example, if a developer is required to pay for enlarging sewer or water lines, the county would share the cost as long as the development protects agriculture.

[Bend, Oregon](#), offers developers the opportunity to apply for off-site improvement grants if they meet certain affordable housing criteria.²⁰³

- **Subdivision Design Exemptions.** With this incentive, qualified projects are exempted from subdivision design requirements such as minimum lot sizes, frontage requirements, parking requirements, or sidewalk requirements. As an example, [Bloomington, Indiana](#), relaxes side and rear setback requirements for buildings that meet certain green building standards.²⁰⁴
- **Revolving Loan Fund.** Qualified projects can receive a reduced interest rate loan in exchange for providing certain site amenities. [Pittsburgh's Urban Redevelopment Authority](#), for example, offers a 1.0% to 2.5% reduction in the standard interest rate for projects that are LEED certified.²⁰⁵
- **Recognition.** Developments can also be publicly recognized by the local government if they meet certain criteria. Each year Montgomery County, Pennsylvania, presents the [Land Development Award](#) for excellence in development design and planning.²⁰⁶ Similarly, innovative developments in Coconino County, Arizona, can receive a [Sustainable Building Award](#) that generates publicity in the county and allows the development to be featured in tours and other special events.²⁰⁷ Missoula County Rural Initiative's [Land Stewardship Award](#) is another, local example.

* * *

There are a variety of options available to protect agriculture. Subdivision regulations can be designed both to fulfill the local government's duty under the MSPA and to be flexible in addressing the unique characteristics of an agricultural property. Those regulations also can provide for the use of incentives to satisfy some mitigation requirements. Further, a community may use incentives to encourage operators to keep agricultural lands in production in lieu of development.

PART III – AN EXAMPLE AGRICULTURAL PLANNING SCENARIO

In Part II of this report, we separately considered mitigation-based and incentive-based tools, while noting that a robust agricultural protection program will require using various tools in combination with one another. In this final Part, we envision how a hypothetical Montana community might build an agricultural protection program using planning, subdivision regulations, and incentives in a complimentary way. This hypothetical community has a long view on agricultural protection, and takes short-term, mid-range, and long-term steps towards its goal. It is important to understand that this scenario is an example only. **This Part is not intended to be and should not be construed as a proposal or a recommendation as to how a particular county should**

address impacts to agriculture. Each community must design its own approach to agricultural protection based on its unique characteristics and needs.

A. A Hypothetical Montana Community

Montana County is a semi-rural county in Montana. Over the past 20 years, Montana County has experienced population growth and development typical of many locations in the West. Montana County has a diverse economy, with service, natural resource, tourism, recreation, and agricultural sectors. The agricultural sector itself is also diverse, and includes the production of commodity crops and livestock, as well as a variety of small specialty and vegetable farms.

Community members have noted that the agricultural sector of the economy is diminishing. They also note that the vast majority of food purchased in the community comes from outside sources, which is a concern both for local food security and local support of producers. Due to the geography of the area, much of the residential and commercial development occurs on lands previously in agricultural production.

The community decides to build an agricultural protection program that supports the agricultural producers in the community and protects the area's most significant agricultural lands. They identify three key problems they want to address:

- Agricultural lands are being converted to other uses, decreasing the overall land base devoted to the agricultural economy. [*loss of agricultural land*]
- Local producers do not have sufficient access to local buyers and thus capture only a small share of the local agricultural market. [*market barriers*]
- As local producers retire or otherwise leave the agricultural economy, they are not being replaced by new producers. [*loss of knowledge and work force*]

B. Short Term Steps (1-3 years)

➤ Preliminary Planning & Study

- *Agricultural Meetings.* Montana County wants its agricultural protection program to be informed by the people working directly in the agricultural and food sector. It holds community meetings to understand the reasons why operators leave the agricultural business, the reasons why operators hold such a small market share of local food sales, and the difficulties faced by people who would like to join the agricultural sector but are unable to do so. The County

also meets with developers to explore impediments to protecting agricultural land during development. [*addresses all aspects of the problem*]

- *Growth Policy Revisions.* Montana County uses its Growth Policy as a foundational document for envisioning its agricultural protection program. It updates the Policy's agricultural language to more clearly identify the key problems, current data and studies about agriculture, and key goals and tools it intends to adopt to mitigate harm to agriculture. Some of the tools are regulatory requirements; other tools are incentive-driven. [*addresses all aspects of the problem*]
- *Identifying Most Valuable Agricultural Lands.* Integral to agricultural protection is understanding what resources are most in need of protection. For this reason, the County lists those characteristics found in the most valuable agricultural lands in their community — soil quality, water availability, contiguity to other agricultural lands, access to transportation, and the like. This understanding will help the County prioritize its efforts. [*addresses loss of agricultural land*]
- *Legislative Agenda for State Laws.* Because some of the tools the County would like to use are not currently available under state law, the County writes a legislative agenda that will guide its state-level work. In particular, the County focuses on reducing property taxes for its agricultural producers, as well as on enabling Agricultural Protection Areas that offer benefits to producers. The County identifies partners and constituents with whom it will collaborate in proposing these legislative changes. [*addresses all aspects of the problem*]
- *Vulnerable Land Purchase.* Montana County has a general open space bond. The County reviews its policy on open space expenditures to ensure that it appropriately focuses on the most valuable agricultural lands that are especially vulnerable to development. [*addresses loss of agricultural land*]

➤ **Regulatory Actions**

- *Revise Subdivision Regulations.* Because of immediate concerns about future agricultural land development, Montana County revises its subdivision regulations to clarify how it will implement the MSPA's mitigation requirement for harm to agriculture. The County (1) creates criteria that will help developers and officials determine what is relevant when determining harm to agriculture; and (2) lists the specific ways that harm can be mitigated, providing a few options that help tailor the mitigation to the specific characteristics of the property. The County also notes incentives that developers can use to reduce or avoid mandatory mitigation methods. [*addresses loss of agricultural land*]

- *Incentivize Planned Agricultural Developments.* Montana County revises its PUD regulations to add a new category for agricultural developments. This new PUD gives a variety of benefits to developers who design around agriculture and protect the most valuable agricultural lands on the property, including increased density, expedited review, and fee waivers. [*addresses loss of agricultural land*]

➤ **Non-Regulatory Actions**

- *Local Food Board/Local Food Coordinator.* Montana County considers forming a Local Food Board, but determines that existing boards and councils are able to fulfill that role. The County does revisit the composition of those boards to ensure that the various perspectives on agricultural protection are adequately represented. Additionally, the County determines that coordination of a local food and agricultural protection program is best accomplished by having an employee dedicated to the program. It hires a half-time local food program coordinator, funded partially with state agricultural extension money and partially through fees. This coordinator assists with all aspects of the protection program, but marketing and education is the top priority. [*addresses market barriers and loss of knowledge and work force*]
- *Mentorship Program.* Montana County institutes a program to connect new and aspiring operators with experienced farmers and ranchers. In addition, this program identifies landowners willing to lease agricultural lands to new operators for minimal cost to keep the land in production. [*addresses loss of knowledge and work force*]
- *Local Marketing.* Although there is an existing “Buy Local” food directory in Montana County, the County contributes to the enhancement of the directory by increasing public exposure of the directory, facilitating contacts between producers and buyers in the directory, and funding some of the directory’s costs. [*addresses market barriers*]
- *Recognition.* Montana County develops a recognition program for local producers, sellers, and developers who exemplify best approaches to agricultural protection. For example, a local garlic farmer who enrolls in the program is entitled to use the Montana County local food emblem on her produce. A restaurant or a local grocer serving 25% local foods can post the emblem on the front door of the building. A developer who preserves agricultural soils is permitted to advertise the development as sustaining agriculture in the County. [*addresses loss of agricultural land and market barriers*]

C. Mid-Range Steps (4-6 years)

➤ Regulatory Actions

- *Agricultural Protection Areas.* Montana County institutes a voluntary Agricultural Protection Area program to support operators who promise to protect their land from development for a period of years. The County sets minimum acreage and other requirements for entering the program. Operators who enroll become eligible for certain perquisites such as reduced stall fees at the farmer's markets, business management training, marketing support, crop data management, and seminars on crop insurance and food safety requirements. Additionally, the County works to create new state law enabling legislation that would authorize APAs that can provide reduced mill levies and tax exemptions for enrolled landowners. [*addresses land protection and loss of knowledge and work force*]
- *Limited TDR Areas.* While Montana County does not have comprehensive zoning in place, it designates some selected areas where TDRs can be created, including in its APAs. The TDR program is run cooperatively with the municipal government, which has placed some receiving areas within city limits where TDRs can be purchased and used by developers. The municipality benefits by promoting the local food production that supplies its downtown markets and restaurants. Alternatively, developers are also allowed to purchase TDRs and retire them as a way of offsetting agricultural mitigation requirements during subdivision review. [*addresses loss of agricultural land*]

➤ Non-Regulatory Actions

- *Local Food Coordinator.* As the agricultural program gains footing, Montana County converts the Local Food Coordinator position to full-time. The coordinator is now able to support the incubator farm and local sourcing initiatives described below, along with helping the County assess the effectiveness of its subdivision regulations and incentives directed at protection. [*addresses all aspects of the problem*]
- *Local Sourcing.* Montana County institutes a local sourcing policy for all county food operations. To phase in the program and allow food preparers to adjust, the County starts by requiring 7% local foods in the first year of the program, increasing by 2% over the subsequent 4 years, to reach 15%. After that point, the County will reassess whether a further increase would be practical. For institutional food providers not currently equipped to deal with local, fresh foods, the County sets benchmarks for properly equipping those providers. [*addresses market barriers*]

- *Incubator Farm.* Montana County develops an incubator farm to train and support new farmers. The County provides land, water, and some limited materials and equipment to new farmers for up to two years. In addition, the County coordinates with the agricultural extension service to provide classes and instruction to the incubator farmers. In exchange, the new farmers maintain a demonstration area at the farm, which the County uses for events to support community agriculture. Fees charged to new farmers help operate the farm and are also allocated to part of the coordinator's salary. [*addresses loss of knowledge and work force*]
- *Indoor Market Area.* Due to the inclement weather in Montana County, farmers markets in the area seldom last past October. To facilitate year-round markets, the County purchases an older building in a central location, which is remodeled into an indoor farmers market for several days of the week. Stalls in the building are rented to agricultural producers for minimal fees that cover the winter heating costs of the building. [*addresses market barriers*]

D. Long-Term Steps (7+ years)

➤ Regulatory Actions

- *Monitoring and Refinement of Subdivision Requirements.* Montana County monitors whether the subdivision mitigation requirements, and developer incentives, are effective at protecting the most valuable agricultural land and providing viable options to landowners. The County makes adjustments to the requirements to reflect feedback from its constituents. [*addresses all aspects of the problem*]
- *Updated Open Space Bond.* As the funds in the initial bond are spent, Montana County seeks voter approval to issue a new open space bond to continue supporting the acquisition of vulnerable agricultural lands. [*addresses loss of agricultural land*]

➤ Non-Regulatory Actions

- *Update Growth Policy.* Montana County revisits its Growth Policy to ensure that the agricultural goals and tools reflect the community's evolving needs. The County also updates its maps and data. [*addresses all aspects of the problem*]
- *Agricultural Facilities.* Montana County realizes that its agricultural operators can bring important, value-added products to the local market if they have inexpensive access to processing facilities. After spending several years acquiring funding, the County develops a local food center that serves as an aggregation and packaging facility where institutional buyers can buy local

foods at volume. In addition to the facility, the food center provides training and guidance on food marketing, business development, and food safety. The County also builds a local slaughter and packaging facility for livestock that greatly reduces transportation costs for local livestock growers and ensures the meat remains available to local markets. [*addresses market barriers*]

- *Agricultural Revolving Loan Program.* To support both new and existing farmers, Montana County obtains state economic development funding and institutes a revolving loan program for agricultural land and equipment purchases. The program focuses on low interest loans to new farmers or to established farmers wishing to expand operations. Land purchased under the program is required to be placed under conservation easement. [*addresses land protection and loss of knowledge and work force*]
- *Tax Protections.* Montana County and its partners are successful in their proposal that the Montana Legislature amend state property tax law to allow a lower, deferred tax rate on qualifying agricultural properties and allow smaller farming operations to qualify for agricultural tax treatment. The State legislature also permits local governments to exempt qualifying agricultural properties from certain local mill levies. [*addresses land protection*]

* * *

Montana County has recognized that its agricultural protection program requires comprehensive planning and a combination of regulatory requirements, incentives, and outreach initiatives. Some of its efforts protect agricultural land from development; others mitigate the extent of development on agricultural land; others increase public awareness and support of local agriculture; and others decrease financial and practical demands upon agricultural operators, encouraging retention of existing operators and the entry of new operators to agriculture. The County has also recognized that its program requires an immediate, an intermediate, and a long term view, as well as assessment and adjustment along the way.

CONCLUSION

This report has covered a great deal of ground. To return to its initial premise, Montana local governments are both required and empowered by state law to mitigate impacts to agriculture during subdivision review. When the law speaks of “agriculture,” it does so in the broadest sense to ensure that the overall character and resources of a community are protected. For communities creating agricultural mitigation regulations, the process should thus be designed in a way that accounts for the broad and varied aspects of agriculture. Best practices suggest that the process begin with a strong agricultural element in the growth policy, a clear methodology for assessing harm, and mitigation

tools designed to provide both flexibility and meaningful protection against the adverse impacts of development. By building agricultural planning into the growth policy and subdivision provisions, local governments in Montana can develop a program that are individually tailored to their communities and that addresses the legal requirements in § 76-3-608(3).

As the report also recognizes, a robust agricultural protection program must include incentives that can be used alongside mandatory agricultural mitigation in subdivision review. These incentives should focus both on keeping agricultural land in production, as well as protecting critical agricultural lands within a development. Communities can design incentive packages that range from the basic to the more complex, and which may involve changes at the state-level as well as local initiatives. Ultimately, local governments must work with agricultural operators to identify the most significant incentives that will encourage operators to safeguard agricultural resources.

As the final part of this report illustrates, local governments have many options. By understanding their community's needs and building a program with a long view in mind, Montana communities can begin to achieve the people's vision to "protect, enhance, and develop all of agriculture."

ADDITIONAL RESOURCES

- Tax Incentives. The American Farmland Trust has published a short description on [*Differential Assessment and Circuit Breaker Tax Programs*](#).
- Acquisitions. For information on conservation easement programs, see American Farmland Trust's Fact Sheet [*Purchase of Agricultural Conservation Easements*](#).
- Support Programs. Drake Law School hosts a [Food Policy Q&A](#) to answer some of the most commonly asked questions about food policy councils.
- APAs. For ordinances and discussion on agricultural protection districts, see Community Resources Planning, Inc., [*Model Ordinances for Sustainable Development*](#). In addition, the American Farmland Trust publishes an informative [Fact Sheet on Agricultural District Programs](#).
- TDRs. The American Farmland Trust has a [*Fact Sheet on Transfer of Development Rights*](#) that provides a history of TDRs, the benefits and drawbacks of a TDR program, and a survey of communities that have enacted TDRs.
- General Information. For an example of an agricultural protection program that includes both regulations and incentives see Stanislaus County's goals, objectives, policies and implementation plans in [*The Agricultural Element of Planning*](#).

ENDNOTES

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- ¹ Mont. Const. art. XII, § 1.
- ² Mont. Code Ann. § 76-3-608(3) (2009).
- ³ *Id.* (emphasis added). Although the Montana Legislature recently attempted to amend the criteria to read “impacts on surrounding agricultural operations,” Governor Brian Schweitzer vetoed the legislation on April 13, 2011. See *An Act Revising Provisions Governing Criteria for Local Government Review of Proposed Subdivisions and Information Provided as Part of a Review . . .*, HB 542, 62nd Leg. Sess. (Mar. 4, 2011).
- ⁴ Mont. Code Ann. § 76-3-608(4), (5).
- ⁵ Mont. Code Ann. § 76-3-608(5)(b).
- ⁶ Mont. Code Ann. § 76-3-608(4).
- ⁷ Mont. Code Ann. § 76-3-608(5).
- ⁸ Mont. Const. art. XI, § 4.
- ⁹ Mont. Code Ann. § 76-1-601(4)(c)(viii) and (ix) (2009).
- ¹⁰ Mont. Code Ann. § 76-1-606.
- ¹¹ Mont. Code Ann. § 76-3-504(1) (2009).
- ¹² *Burnt Fork Citizens Coalition v. Board of County Commissioners*, 287 Mont. 43, 951 P.2d 1020 (1997).
- ¹³ *Id.* at 46-49.
- ¹⁴ In the Growth Policy Act, the Montana Legislature specifically states that a local government shall explain how it “will define the criteria in § 76-3-608(3).” Mont. Code Ann. § 76-1-601(3)(h).
- ¹⁵ Mont. Code Ann. § 1-2-102 (2009).
- ¹⁶ *State ex rel. v. Board of County Commissioners*, 180 Mont. 285, 291, 590 P.2d 602, 605 (1978) (cited in *Mills v. Alta Vista Ranch, LLC*, 2008 MT 214, ¶ 18, 344 Mont. 212, 187 P.3d 627). While the review criterion at issue in the case was “public interest,” the same logic would extend to the current review criteria in § 76-3-608(3).
- ¹⁷ *State v. Letasky*, 2007 MT 51, ¶ 11, 336 Mont. 178, 181, 152 P.3d 1288.
- ¹⁸ *Letasky*, ¶ 11.
- ¹⁹ *Id.*
- ²⁰ *Montana Sports Shooting Assoc., Inc. v. Montana Dept. of Fish, Wildlife, and Parks*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003 (citations omitted); Mont. Code Ann. § 1-2-106 (“Words and phrases used in the statutes of Montana are construed according to the context and the approved usage of the language . . .”).
- ²¹ *State v. Knudson*, 2007 MT 324, ¶ 23, 340 Mont. 167, 174 P.3d 469.
- ²² *Black’s Law Dictionary* 919 (8th ed. 2004).
- ²³ Stacey Gordon, Helia Jazayeri, *Student Author, Lost Legislative Intent: What Will Montanans Do When the Meaning Isn’t Plain?*, 70 Mont. L. Rev. 1, 4 (Winter 2009) (citations omitted).
- ²⁴ *Black’s Law Dictionary* 919 (8th ed. 2004).
- ²⁵ Mont. Code Ann. § 1-2-107 (2009).
- ²⁶ *State v. Stewart*, 58 Mont. 1, 190 P. 129 (1920), *overruled on other grounds, Stoner v. Timmons*, 59 Mont. 158, 159, 196 P. 519, 520 (1921).
- ²⁷ *Id.* at 1, 190 P. at 131.
- ²⁸ *De Fontenay v. Childs*, 93 Mont. 480, 480-81, 19 P.2d 650, 651 (1933).
- ²⁹ *Id.*, 19 P.2d at 651.
- ³⁰ *Dussault v. Hjelm*, 192 Mont. 282, 286, 627 P.2d 1237, 1240 (1981).

³¹ *Id.* at 287, 627 P. 2d at 1240.

³² *Id.* (citing *Black's Law Dictionary* 91 (Rev. 4th ed. 1968)).

³³ *Id.*

³⁴ 3 C.J.S. *Agriculture* § 1 (2010). See e.g. *County of Lake v. Cushman*, 353 N.E.2d 399, 402 (Ill. App. 2d D. 1976) (citing a 1920s case, which in turn relied on the broad definition in *Webster's Dictionary*, in construing the definition of agricultural in an annexation statute); *Fidler v. Zoning Bd. of Adjustment*, 182 A.2d 692, 694-95 (Pa. 1962) (citing *Webster's New International Dictionary*, *Oxford Universal Dictionary*, and the legal encyclopedia CORPUS JURIS SECUNDUM in construing the definition of agricultural in a local zoning ordinance).

³⁵ See e.g., *Black's Law Dictionary* 91 (Rev. 4th ed. 1968) ("The art or science of cultivating the ground, including the harvesting of crops, and in a broad sense, the science or art of production of plants and animals useful to man, including, in a variable degree, the preparation of these products for man's use. In the broad sense, it includes farming, horticulture, forestry, together with such subjects as butter, cheese, making sugar, etc."); *Webster's Ninth New Collegiate Dictionary* 65 (1986) ("The science or art of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation of these products for man's use and their disposal (as by marketing)."); *Black's Law Dictionary* 80 (9th ed. 2009) ("The science or art of cultivating soil, harvesting crops, and raising livestock. '[Broadly] it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes gardening, horticulture, viticulture, dairying, poultry, bee raising, and ranching.'").

³⁶ 3 C.J.S. *Agriculture* § 1 (2010). This treatise contains a more comprehensive sampling of national court cases defining agriculture.

³⁷ 1973 Mont. Laws 1243, 1246.

³⁸ Mont. H. Comm. on Jud., *An act amending section 11-3861, R.C.M., 1947, to redefine "subdivision" to include only parcels of less than 40 acres in size and to define other terms; . . .*, Hearing on HB 1017, 43rd Leg., 2d Reg. Sess. (Feb. 26, 1974).

³⁹ *Id.* (Susan M. Bryan, Montana League of Women Voters, proponent, prepared statement); see also (Janet Sperry, Montana Division of the American Association of University Women, proponent, prepared statement).

⁴⁰ *Id.* (Julie Hacker, Concerned Citizens of Blackfoot Valley).

⁴¹ 1974 Mont. Laws 1038, 1039.

⁴² 1975 Mont. Laws 1331.

⁴³ HB 666, 44th Leg. 1st Reg. Sess. (Feb. 10, 1975).

⁴⁴ 1975 Mont. Laws 1331, 1334. The public interest requirement appears to have been eliminated in 1993 as part of HB 408.

⁴⁵ 1975 Mont. Laws 1331, 1334.

⁴⁶ Mont. H. Nat. Res. Comm., *An act requiring disapproval of any subdivisions in the absence of a demonstrated public interest; . . .*, Hearing on HB 666, 44th Leg. 1st Reg. Sess. (Feb. 22, 1975) (Comments by chief sponsor of HB 666, Representative Vincent).

⁴⁷ *Id.*

⁴⁸ 1995 Mont. Laws 2255, 2258.

⁴⁹ Mont. H. Nat. Res. Comm., *An act generally revising local subdivision laws; . . . establishing mitigation guidelines; . . .*, Hearing on HB 473, 54th Leg., Reg. Sess. (Feb. 13, 1995) (Dick Knox, Representative, House District 93, Winifred, sponsor) [*hereinafter* Feb. 13, 1995 H. Hrg.].

⁵⁰ 1995 Mont. Laws 2255, 2256.

⁵¹ Feb. 13, 1995 H. Hrg. (Dick Knox, Representative, House District 93, Winifred, sponsor).

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- ⁵² Ch. 348, 2001 Mont. Laws 1673, 1675.
- ⁵³ Ch. 348, 2001 Mont. Laws 1673, 1674.
- ⁵⁴ Sen. Comm. on Local Govt., *An act authorizing local governments to adopt subdivision regulations that promote cluster development and preservation of open space*; . . . , Hearing on SB 479, 57th Leg., Reg. Sess. (Feb. 17, 2001) (Sen. Don Hargrove, sponsor).
- ⁵⁵ Ch. 298, 2005 Mont. Laws 940.
- ⁵⁶ 2A *Sutherland Statutory Construction* § 45:12 (7th ed. 2010) (“A court is justified in holding that a statute was intended to be subject to constitutional requirements and that those requirements are to be considered as embodied in the statute if its terms do not exclude such requirements.”).
- ⁵⁷ Mont. Const. art. XII, § 1(1) (emphasis added).
- ⁵⁸ Montana Constitutional Convention, 1971-1972, Committee Proposals, Natural Resources and Agriculture, page 560 (Feb. 17, 1972).
- ⁵⁹ For examples of when the Montana Supreme Court has construed a statute to promote constitutional policies, see *State v. Boyer*, 2002 MT 33, ¶¶ 21-23, 308 Mont. 276, 42 P.3d 771 (2002) (addressing broad game warden powers to search in light of constitutional right to a clean and healthful environment); *Keller v. Smith*, 170 Mont. 399, 408, 533 P.2d 1002, 1008 (1972) (addressing broad policy in favor of protecting voting rights).
- ⁶⁰ Mont. Code Ann. § 1-2-107 (2009).
- ⁶¹ *Mont. Sports Shooting Assoc., Inc.*, ¶ 11 (“[The court will] harmonize statutes relating to the same subject, as much as possible, giving effect to each.”).
- ⁶² In total, the Clinic located approximately 200 instances of the words “agriculture” and “agricultural” in the Montana Code.
- ⁶³ Mont. Code Ann. § 76-1-601(4)(c)(viii) and (ix) (2009).
- ⁶⁴ Mont. Code Ann. § 76-1-606 (2009).
- ⁶⁵ Mont. Code Ann. § 76-2-901. See also Mont. Code Ann. § 27-30-101(3) (2009).
- ⁶⁶ Mont. Code Ann. § 76-2-902(1) (2009).
- ⁶⁷ § 76-2-902(1)(a).
- ⁶⁸ § 76-2-902(1)(f).
- ⁶⁹ § 76-2-902(1)(k).
- ⁷⁰ § 76-2-901(2).
- ⁷¹ § 76-2-903. The statute prevents agricultural lands from being declared a nuisance if the lands are later incorporated into city limits by annexation. *Id.*
- ⁷² See Mont. S. Ag., Livestock & Irrigation Comm., *An Act Providing Protection for Agricultural Activities from Governmental Zoning and Nuisance Restrictions*, Hearing on SB 207, 54th Leg., Reg. Sess. (Feb. 2, 1995) (written minutes).
- ⁷³ Mont. Code Ann. § 76-15-101(1) (2009).
- ⁷⁴ Mont. Code Ann. § 41-2-103 (2009).
- ⁷⁵ Mont. Code Ann. § 90-9-102.
- ⁷⁶ Mont. Code Ann. § 90-9-103(2).
- ⁷⁷ Mont. Code Ann. §§ 7-21-3201 and -3203 (2009).
- ⁷⁸ See Mont. Code Ann. § 7-8-2501 (1), (2) (2009).
- ⁷⁹ Mont. Code Ann. §§ 15-7-201 (2009). See also Karen E. Powell, *A Historical Perspective on Montana Property Tax: 25 Years of Statewide Appraisal and Appeal Practice*, 70 Montana Law Review 21, 38 (Winter 2009). Although the tax code contains some definitions of agricultural lands, those definitions appear limited to the purposes of taxation and thus may not provide as helpful of a comparison to § 76-3-608(3), which uses “agriculture” without qualification.

Presumably, these qualified definitions in the tax code are designed to control the legitimacy of claims for agricultural lands status.

⁸⁰ See Mont. Code Ann. § 80-4-402(2) (2009) (“any grain, oil seed crops, seed, or other crops designated by rule of the [Montana Department of Commerce]”).

⁸¹ Indeed the 2011 Montana Legislature’s attempt to narrow “agriculture” to “surrounding agricultural operations” appears to corroborate that the current § 76-3-608(3) criteria mean something greater than impacts in the immediate vicinity of the subdivision. See *supra* note 2.

⁸² *Mills v. Alta Vista Ranch, LLC*, 2008 MT 214, ¶ 18.

⁸³ Mont. Code Ann. § 76-3-608(3)(a) (2009).

⁸⁴ See Mont. Code Ann. §§ 76-2-101 and -205 (2009).

⁸⁵ For a helpful resource on the universe of approaches, see Rocky Mountain Land Use Institute, [Sustainable Development Code](#), Food Production and Security (Version 1.5).

⁸⁶ American Planning Association, [Policy Guide on Community and Regional Food Planning](#) (2007).

⁸⁷ Mont. Code Ann. § 76-1-601(4)(c)(viii) and (ix) (2009).

⁸⁸ American Planning Association, [Growing Smart Legislative Guidebook: Model Statutes for Planning and the Management of Change](#) 7-212 (2002 Edition, Stuart Meck, General Editor) [*hereinafter Growing Smart*].

⁸⁹ E.g., American Planning Association, [Policy Guide on Community and Regional Food Planning](#) (2007); Rocky Mountain Land Use Institute, [Sustainable Development Code](#), Food Production and Security (Version 1.5); University of California, Davis, College of Agricultural and Environmental Sciences, Agricultural Sustainability Institute, [Assessing the San Diego County Food System: Indicators for a More Secure Future](#) (December 2010) (Goal 1.5 discusses what is necessary for food stockpiles, distribution, and transportation: “[because of its unique geographic location and environmental conditions, the County] . . . must be prepared for a variety of emergency situations. . . . A successful emergency plan should be designed to connect urban and rural residents to immediate food and water supplies in the event of natural or man-made disaster. At the same time, a strong local food system, in conjunction with prepared community partners, can help to ensure that storage, transportation, and distribution mechanisms are in place to meet these challenges, if, and when, they arise.”).

⁹⁰ Yolo County, California, *Yolo County 2030 Countywide General Plan*, AG-1 to -3 (2009).

⁹¹ King County, Washington, *2008 King County Comprehensive Plan with 2010 Update*, R-201 (2010).

⁹² Calvert County, Maryland, *Calvert County Land Preservation, Parks and Recreation Plan*, IV-1 (2006).

⁹³ Beaverhead County, Montana, *Growth Policy* 13-16 (2005).

⁹⁴ Rocky Mountain Land Use Institute, [Sustainable Development Code](#), Food Production and Security 2 (Version 1.5).

⁹⁵ [Growing Smart](#), *supra* note 88, 7-212.

⁹⁶ *Id.*

⁹⁷ James R. Pease and Robert E. Coughlin, *Land Evaluation and Site Assessment: A Guidebook for Rating Agricultural Lands* 4, Prepared for the U.S.D.A. NRCS (2d Ed. 1996). (“LESA’s role is to provide systematic and objective procedures to rate and rank sites for agricultural importance in order to help officials make decisions.”).

⁹⁸ Yolo County, California, *Yolo County 2030 Countywide General Plan*, AG-1 to -3 (2009).

⁹⁹ City of Davis, California, *Municipal Code* § 40A.03.010 (2007).

¹⁰⁰ Town of Shaftsbury, Vermont, *Subdivision Regulations* § 2.04 (2000).

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- ¹⁰¹ City of Brentwood, California, *Resolution 2354* § 1, E (2) (2001).
- ¹⁰² Beaverhead County, Montana, *Subdivision Regulations* § VI-B (2010).
- ¹⁰³ Teton County, Wyoming, *Land Development Regulations* § 3410(A) (2010).
- ¹⁰⁴ See 10 Vt. Stat. Ann. § 6027(g) (2012).
- ¹⁰⁵ See 10 Vt. Stat. Ann. § 6086(a)(9) (2012).
- ¹⁰⁶ See 10 Vt. Stat. Ann. § 6086 (2012).
- ¹⁰⁷ Stanislaus County, California, *Stanislaus General Plan, Agricultural Element, Ch. 7, Objective No. 2.4* (1994).
- ¹⁰⁸ [California Environmental Quality Act](#), 14 Cal. Code Reg. § 15000 (2011).
- ¹⁰⁹ Bannock County Idaho, *Subdivision Ordinance No. 1997-4* §§ 301.A, 302.C, 302.D (1997). We note that Montana local governments do not have this same level of discretion in that EAs are statutorily required for major and subsequent minor subdivisions. Mont. Code Ann. §§ 76-3-603 and -609 (2009).
- ¹¹⁰ See 10 Vt. Stat. Ann. § 6086 (2009).
- ¹¹¹ City of Burlington, Vermont, *Comprehensive Development Ordinance, Art. 3: Applications, Permits, and Project Reviews, Part 5: Conditional Use and Major Impact Review, Sec. 3.5.2 Applicability, (b) Major Impact Review* (2008).
- ¹¹² *Id.* at Sec. 3.5.6 Review Criteria, (b) Major Impact Review Standards (8).
- ¹¹³ *Id.* at Art. 1: General Provisions, Part 1: General Provisions, *Intent and Purpose*, Sec. 1.1.2 (c).
- ¹¹⁴ California Department of Conservation, *California Agricultural Land Evaluation and Site Assessment Model* (1997).
- ¹¹⁵ Beaverhead County, Montana, *Subdivision Regulations* § VI-B (2010).
- ¹¹⁶ Carbon County, Montana, *Subdivisions Regulations, Appendix J* (2009). Nearly identical provisions are found in the regulations of Fallon County, Sweet Grass County, and the cities of Kalispell and Livingston.
- ¹¹⁷ Stanislaus County, California, *Stanislaus County General Plan, Agricultural Element, Appendix B: Farmland Mitigation Program Guidelines, 7-35* (1994). [San Joaquin County](#) similarly requires a 1:1 ratio. *San Joaquin County Code of Ordinances, § 9-1080.3(c)* (2006).
- ¹¹⁸ This is the only mitigation sample that we believe has been challenged as an unconstitutional taking. In *Building Industry Assn. of Cent. California v. County of Stanislaus*, 190 Cal.App.4th 582, 118 Cal.Rptr.3d 467(2010), the Fifth District Court of Appeal in California held that the mitigation requirements bore a reasonable relationship to the loss of farmland and therefore the County did not act in excess of their police power. The decision was denied review on Feb. 16, 2011.
- ¹¹⁹ Yolo County, California, *Yolo County 2030 Countywide General Plan, AG-20* (2009).
- ¹²⁰ San Joaquin County, *Code of Ordinances, § 9-1080.3(d)* (2006).
- ¹²¹ *Id.* at § 9-1080.3(e).
- ¹²² *Id.* at § 9-1080.3.
- ¹²³ San Joaquin County, California, [Code of Ordinances](#) Ch. 9-600 (2009).
- ¹²⁴ Stanislaus County, California, *Stanislaus County General Plan, Agricultural Element, Appendix B: Farmland Mitigation Program Guidelines, 7-38* (1994).
- ¹²⁵ *Id.* at 7-36.
- ¹²⁶ City of Brentwood, California, *Resolution 2354* §4 (2001).
- ¹²⁷ *Id.* at § 7
- ¹²⁸ City of Davis, California, *Municipal Code* § 40A.03.035 (2007).

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- ¹²⁹ Montgomery County, Maryland, *Code of Montgomery County Regulations* § 02B.00.01.02 (2009)(accessed Mar. 12, 2012 via third party codifier American Legal Publishing, Corp.).
- ¹³⁰ Town of Shaftsbury, Vermont, *Subdivision Regulations*, §§ 6.01, 6.02 (2000).
- ¹³¹ Bannock County, Idaho, *Subdivision Ordinance No. 1997-4* §§ 410.C, 409.E (1997).
- ¹³² Bannock County, Idaho, *Zoning Ordinance No. 1998-1* § 310 (1998).
- ¹³³ City of Davis, California, *Municipal Code* § 40A.01.050 (2007).
- ¹³⁴ *Id.* at § 40A.03.030.
- ¹³⁵ Beaverhead County, Montana, *Subdivision Regulations* § VI-B (2010).
- ¹³⁶ For further background information on TDRs, readers may wish to review the Clinic’s 2007 research provided to Missoula County Rural Initiatives. See Letters to Pat O’Herren and Matt Boulanger from the University of Montana School of Law Land Use Clinic, dated September 28, 2007 and October 19, 2007.
- ¹³⁷ [Growing Smart](#), *supra* note 87, 9-77.
- ¹³⁸ San Joaquin County, California, *Code of Ordinances*, § 9-1080.5(b).
- ¹³⁹ *Id.* at § 9-1080.5(e).
- ¹⁴⁰ For a more detailed discussion of the recommended contents of a land restrictions, see [Growing Smart](#), *supra* note 87, 9-402.1.
- ¹⁴¹ San Joaquin County, California, *Code of Ordinances*, §§ 9-1080.5(e), 9-1080.7(a) and 9-1080.7(b).
- ¹⁴² Stanislaus County, California, *Stanislaus County General Plan, Agricultural Element, Appendix B: Farmland Mitigation Program Guidelines 7-40* (1994).
- ¹⁴³ Fremont County, Idaho, *Fremont Development Code – 2011 Edition*, § 5.59.050 (2011).
- ¹⁴⁴ Fremont County, Idaho, [Fremont County Development Code](#), Management of Open Space 60 (2010).
- ¹⁴⁵ City of Davis, California, *Municipal Code* § 40A.03.040 (2007). For similar wording, see San Joaquin County, California, *Code of Ordinances*, § 1080.5(c).
- ¹⁴⁶ Yolo County, California, *Code of Ordinances*, §§ 8-2.2416.4(d), 8-2.2416.6(c).
- ¹⁴⁷ California Department of Conservation, [California Agricultural Land Evaluation and Site Assessment Model 20](#) (1997).
- ¹⁴⁸ Mont. Code Ann. § 15-7-202 (2011).
- ¹⁴⁹ Montana Department of Revenue, [Classes of Property](#) (accessed Nov. 30, 2011).
- ¹⁵⁰ Mont. Code Ann. § 15-7-203 (2011).
- ¹⁵¹ Pa. Code tit. 7, § 137b.81 et seq. (Westlaw current through March 17, 2012)
- ¹⁵² But see Cal. Gov’t Code Ann. § 51230 (Westlaw current Ch. 8 of 2012 Reg. Sess.)
- ¹⁵³ Cal. Gov’t Code Ann. § 51244 (Westlaw current Ch. 8 of 2012 Reg. Sess.) which allows parcels of less than 100 acres if the smaller sized parcel fits within the general plan of the county or city, and the smaller parcel size is necessary due to the unique character of the agricultural operation.
- ¹⁵⁴ For a broader review of circuit breaker tax programs, see the Center on Budget and Policy Priorities report: [The Property Tax Circuit Breaker: An Introduction and Survey of Current Programs](#) (accessed Dec. 1, 2011).
- ¹⁵⁵ Montana Department of Revenue, [Property Tax Incentives](#) (accessed Nov. 30, 2011).
- ¹⁵⁶ Hughes County, South Dakota, [Hughes County Comprehensive Plan: Part VIII - Economic Study](#) (accessed Dec. 1, 2011).
- ¹⁵⁷ Boulder County Comprehensive Plan, Agricultural Goals, Policies and Maps Element (BCCP Second Edition 1996).

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- ¹⁵⁸ King County Code, Title 26 – Agricultural and Open Space Lands (current through Dec. 26, 2011).
- ¹⁵⁹ Stanislaus County, California, Stanislaus County General Plan, Agricultural Element, Appendix B: Farmland Mitigation Program Guidelines (accessed Dec.1, 2011).
- ¹⁶⁰ Telephone interview with Aaron Newton, Local Food System Coordinator, Cabarrus County, North Carolina (Oct. 07, 2011).
- ¹⁶¹ Douglas County, Kansas, Department of Sustainability - Food Policy Counsel (accessed Mar. 6, 2012).
- ¹⁶² Adams County, Pennsylvania, Adams County Food Policy Counsel (accessed Mar. 6, 2012).
- ¹⁶³ Southwest Iowa Food & Farm Initiative, [Local Food System](#) (accessed Mar. 6, 2012); Telephone interview with Bahia Nightengale, Local Food Coordinator, Golden Hills RC&D (Nov. 16, 2011).
- ¹⁶⁴ Northern Piedmont Chapter of “Buy Local Virginia,” [Northern Piedmont Local Food Directory](#) (accessed March 28, 2012).
- ¹⁶⁵ Ch. 386, 2009 Montana Laws, 2473-2474.
- ¹⁶⁶ Woodbury County Policy for Rural Economic Revitalization “Local Food Purchase Policy” Resolution (accessed Mar. 6, 2012).
- ¹⁶⁷ [Montana Sen. 328, 60th Legis., Reg. Sess. \(Apr. 5, 2007\)](#), amending Mont. Code Ann. § 18-4-132 (2011).
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- ¹⁶⁹ Institutional Food Market Coalition, ["Four Ways to Sell Local"](#) (accessed Dec. 1, 2011).
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- ¹⁷¹ Telephone interview with Olivia Perry, Senior Economic Development Specialist, Institutional Food Market Coalition (Oct. 07, 2011).
- ¹⁷² Mont. Code Ann. § 7-6-2527 (2011).
- ¹⁷³ Mont. Code Ann. § 7-21-3203 (2011).
- ¹⁷⁴ Mont. Code Ann. § 50-2-111 (2011)
- ¹⁷⁵ Mont. Code Ann. § 90-5-112 (2011).
- ¹⁷⁶ Dane County, Wisconsin, [Dane County Food Counsel History](#) (accessed Dec. 1, 2011).
- ¹⁷⁷ Cabarrus County, North Carolina, [Cabarrus Local Food System](#) (accessed Dec. 1, 2011).
- ¹⁷⁸ Agricultural Protection Areas are known by various names; for example: New Jersey, Agricultural Preservation Program; Delaware, Agricultural Preservation District; Maryland, Agricultural Land Preservation Program; Utah, Agricultural Protection Areas; Ohio, Agricultural District; Illinois, Agricultural Conservation and Protection Areas; etc.
- ¹⁷⁹ American Farmland Trust, [Saving American Farmland: What Works](#) 197 (American Farmland Trust, 1997).
- ¹⁸⁰ American Farmland Trust, [Agricultural District Programs](#) (accessed December 1, 2011).
- ¹⁸¹ Mont. Code Ann. § 76-2-101 et seq. (2011).
- ¹⁸² Isle of Wight County, Virginia, *Comprehensive Plan*, Chapter 3 – Rural Character Protection and Agricultural Preservation (accessed Mar. 6, 2012).
- ¹⁸³ Isle of Wight County, Virginia, [Agriculture/Forestral Districts](#) (accessed Dec. 1, 2011).
- ¹⁸⁴ Cache County Code, Chapter 2.70 – Agriculture Protection Area Advisory Board (current through Dec. 11, 2011 and accessed Mar. 6, 2012 via third party codifier and web host Sterling Codifiers, Inc.).
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- ¹⁸⁸ Minn. Stat. Ann. § 40A.01 et seq. (West)
- ¹⁸⁹ King County, Washington, *King County Code*, Ch. 21A.37 (2008).
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- ¹⁹⁶ Bannock County, Idaho, *Subdivision Ordinance No. 1997-4* § 401.C (1997).
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- ²⁰¹ King County, Washington, [Solid Waste Division Green Building Incentives & Grants](#) (accessed Dec. 1, 2011).
- ²⁰² City of Eugene, Oregon, [Green Building Incentives](#) (accessed Dec. 1, 2011).
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