American Farmland Trust

The First Lutheran Church Case, "Temporary Takings" and Farmland Protection

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In the recent case of First English Evangelical Lutheran Church v. County of Los Angeles, 1/ the U.S. Supreme Court ruled that landowners may recover money damages from government when regulation results in a "temporary taking" of private property. As any departure from precedent is bound to do, this case has caused confusion among planners and other local officials about its effect on their authority to regulate land use in the public interest. This memorandum will discuss the decision and its specific effect on farmland protection regulations.

The First Lutheran Church case arose under the "taking" or "Just Compensation" clause of the U.S. Constitution: "nor shall private property be taken for public use, without payment of just compensation." 2/ Los Angeles County had adopted a regulation prohibiting building in a floodplain. The church was thereby prevented from rebuilding a camp that had been destroyed by a flood. 3/ It sued in a state court, alleging that the regulation denied it all use of its land and was therefore a "taking" of its property. Instead of asking the court to overturn the regulation--the usual remedy for a taking--the church asked for money damages. The California courts dismissed the case, reasoning that, even if the church could prove a taking had occurred, damages were an inappropriate remedy.

On appeal, the U.S. Supreme Court reversed and ruled for the church. In sending the case back to the California courts for further hearings on the merits, 4/ the Court held that if a land use regulation is found to be a taking and is invalidated--thus converting it into a "temporary taking"--damages are appropriate to compensate the landowner for the loss of use of the property during the period when the taking was effective.

This narrow ruling is a far cry from some of the things the case has been claimed to stand for. If the Court's decision in First Lutheran Church is read carefully, and considered in the context of other authoritative judicial rulings on the taking issue, its practical effect on land use planning and regulation--particularly that aimed at protecting farmland--is revealed as far less serious than is commonly believed.

I. Background: The "Taking Issue

The starting point for an analysis of First Lutheran Church is the question of what is an unconstitutional "taking" of private property. The concept of a "taking" defines the limit of what government regulators can and cannot do to affect the use of land.

Private property, said Justice Oliver Wendell Holmes in the landmark case of Pennsylvania Coal Co. v. Mahon, 5/ is "enjoyed under an implied limitation and must yield to the police power"--the authority of government to protect the public health, safety and welfare. 6/ But "if regulation goes too far it will be recognized as a taking." 7 Just how far is too far, he observed, "depends on the particular facts" of each case.

In weighing those facts, courts generally engage in a balancing of public and private interests. 8 The less compelling the public interest served by the government regulation in question, 9/ and the greater the reduction in potential market value of the land affected by the regulation, 10/ the greater is the likelihood that courts will determine that a taking has occurred. 11/

There is no set formula for making the determination, and this tends to make the government regulators nervous. But in actual practice, the courts have generally been quite willing to defer to the judgment of state and local legislators in the matter of the need for regulations to serve the public interest, 12/ and have been equally tolerant of severe diminutions in property values resulting from such regulations. 13/ Indeed, the prevailing judicial philosophy is that where regulation has an arguably legitimate public purpose, it must go so far as to prohibit virtually all economic uses of private property, rendering it practically worthless, before it becomes a taking. 14/

When a regulation is ruled to be a taking, the traditional remedy made available to a landowner by the courts is invalidation of the regulation as applied to his property. This gives the government the choice of allowing the landowner to go ahead with his plans, or of exercising its power of eminent domain and paying compensation for the property. 15/ Courts do not force legislative bodies to condemn land because that would amount to a judicial exercise of legislative powers, violating the constitutional doctrine of separation of powers. 16/

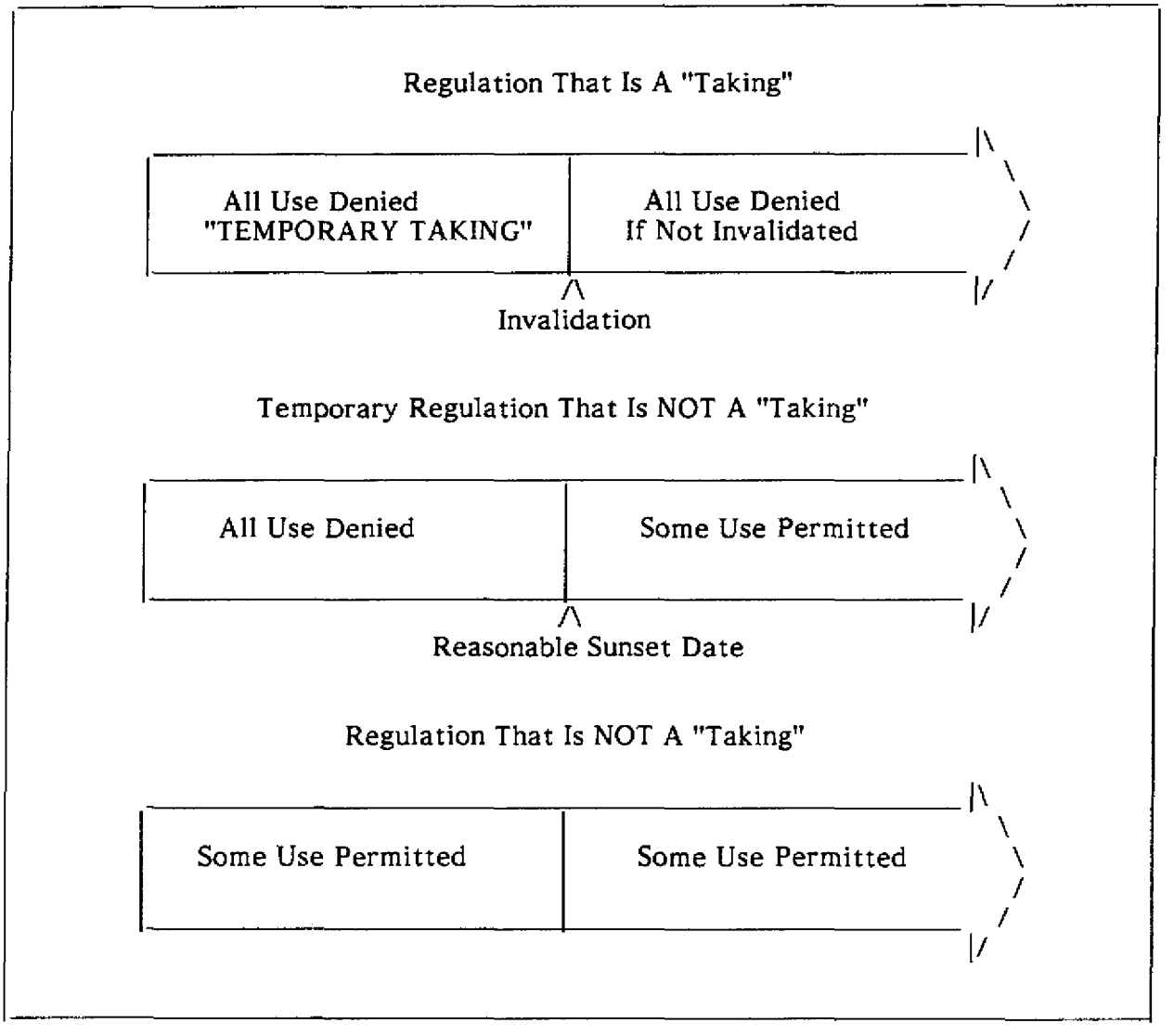
II. Effect of First Lutheran Church

The most important thing about the First Lutheran Church case is that it does not--repeat, does not--redefine a taking. The basic rules outlined above remain the same and, as we shall see below, are particularly favorable to regulations aimed at protecting farmland.

Where the case departs from precedent is on the issue of the remedy available to landowners who can provide that their property has been taken. For the first time, the Supreme Court ruled that the invalidation of an overly-restrictive regulation does not compensate a landowner for the deprivation of the use of his property during the period that the regulation was in effect. That deprivation of use, said the Court, is a "temporary taking" for which government must pay.

This new legal creature--a "temporary taking"--is what has caused all the confusion. But a close reading of the Court's opinion reveals that it is not all that scary.

"'[T]emporary' takings,'" said the Court, "deny a landowner all use of his property, [and] are not different in kind from permanent takings. 17/ Hence, temporary regulations like building moratoria, that are effective only for a period of time, do not ordinarily work a temporary taking. 18/ Nor do normal delays incident to the land use decision making process give rise to temporary takings. 19/ Rather, a temporary taking is what results from the invalidation of a regulation that, if allowed to remain permanently in effect, would have denied a landowner all use of his property, i.e., would have been a taking. 20/



In other words, the Supreme Court did not redefine a taking to encompass the denial of less than all use of private property by temporary regulations. It merely said that, if a land use regulation does deny all economic use of property, the landowner not only has the traditional remedy of having its future application to his property enjoined, but can also recover damages for the loss of its use during a certain period in the past.

The Court's opinion in First Lutheran Church seems to make it clear that the period during which a temporary taking is effective and, thus, when damages accrue, ordinarily begins only when a landowner seeks and is denied permission to use his land in a manner restricted by the regulation, not when the regulation is adopted in the first place. 21/ And damages for a temporary taking stop accruing when the offending regulation is invalidated by a court and compensation is no longer a constitutional imperative. 22/ Thus, the damages "window" that government regulators need be concerned about is fairly narrow.

As for how damages for temporary takings are to be measured, the Court said that government must pay "fair value for the use of the property ... during the period" of the taking. 23/ Comparing the temporary deprivation of use to a leasehold, 24 the Court's opinion further implies that "[i]t is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." Though the difficulties inherent in trying to apply this measure are somewhat troublesome, 26/ the issue is academic if government regulators are careful to leave landowners with some economic use of their property, so that their actions will not be ruled a taking in the first place and First Lutheran Church will not apply.

III. *Takings and Farmland Protection*

There are relatively few appellate court cases that squarely address the issue of whether regulations aimed specifically at keeping land available for agricultural use are a taking. There are a couple reasons for this: first, farmland protection regulations are a fairly new phenomenon; second, it is so abundantly clear that regulations allowing farm use of property are not a taking, that they are seldom challenged on this ground.

The state courts, where most taking claims are adjudicated, are nearly unanimous--especially when it comes to farmland protection—in applying the basic rule that, unless a regulation denies all reasonable, economic use of land, it is not a taking. Since farming generally is an economic use of land, it is only under extremely rare circum- stances that carefully drafted farmland protection regulations are held to be a taking.

Thus, the courts have upheld against taking claims regulations permitting only farm uses of land under exclusive agricultural zoning, 27/ as well as those permitting some nonfarm development on minimum lots as great as 160 acres. 28/ And they have done so even though the effect of regulation has been to reduce the market value of the plaintiff's property up to 90 percent. 29/

In determining whether regulation has left the farmland owner with some economic use of his property—or, in other words, whether farming is a viable use—the courts tend to make an objective rather than subjective inquiry. That is, they ask not whether the specific plaintiff can make money farming the land, but whether anyone could do so. Thus, they have considered soil capability as an indicator of whether farming is a viable use, 30/ but have rejected the argument that a parcel of farmland is too small by itself to be an economic farming unit where it could be incorporated into a larger opera- tion. 31/

Generally speaking, if regulations are based on a carefully prepared comprehensive land use plan that considers such factors relating to agricultural viability as soil capability, and if--erring on the side of caution--they permit some nonfarm development that won't interfere with agricultural uses, they should stand up against virtually any taking challenge. 32/

Footnotes

*/ General counsel, American Farmland Trust. B.A., Cornell University; J.D., George Washington University. Member of the bars of Maryland, Pennsylvania and the District of Columbia.

1/ No. 85-1199, October Term 1986 (June 9, 1987). The case is variously known as First Lutheran Church, First English and "Lutherglen," after the name of the church camp involved. The Supreme Court slip opinion uses First Lutheran Church, so that abbreviation is used herein.

2/ U.S. CONST. amd. V. It applies to state governments through the XIV Amendment. See, Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897). N.B.: Cases cited "U.S." refer to U.S. Supreme Court cases.

3/ Cf., Genesis 6:8 (King James Version).

4/ Contrary to rumor, the Court did not rule that floodplain regulations are a taking. The majority acknowledged that "We accordingly have no occasion to decide whether the [floodplain] ordinance at issue actually denied [the church] all use of its property or whether the county might avoid the conclusion that a compensible taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations. See, e.g., Goldblatt v. Hempstead, 369 U.S. 590 (1962) [(closing of quarry by regulation upheld)]; Hadacheck v. Sebastian, 239 U.S. 394 (1915) [(regulation closing brickyard upheld)]; Mugler v. Kansas, 123 U.S. 623 (1887) [(regulation closing saloon upheld)]. These questions ... remain open for decision on the remand we direct today." Slip op. at 8.

To settle the damages issue, the majority had to assume, as did the California courts, that a taking had occurred. In three previous cases, the Court had declined to address the question of damages because it was not clear that a taking had occurred. See, Agins v. Tiburon, 447 U.S. 255 (1980); San Diego Gas & Electric Co v. San Diego, 450 U.S. 621 (1981); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. ___ (1986). Dissenting Justices Stevens, Blackmun and O'Connor argued that First Lutheran Church was no different and criticized the majority for entertaining the damages issue prematurely. "Especially in the takings context, where the [facts alleged to be a taking] are so significant [to the outcome], the economic drain of litigation on public resources is 'too great to permit cases to go forward without a more substantial indication that a constitutional violation may have occurred.' Pace Resources, Inc. v. Shrewsbury Township, 482 U.S. ___ (1987)." First Lutheran Church, Slip op., dissent at 4.

5/ 260 U.S. 393 (1922).

6/ See, e.g., Mugler v. Kansas, supra n. 4, at 657: "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." In other words, since one does not have a right to inflict harm, there is no right to be taken.

7/ "Government could hardly go on," Holmes wrote, "if to some extent values incident to property could not be diminished without paying for every such change in the general law ... But obviously the implied limitation must have its limits or the [Just Compensation Clause is] gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S., at 413.

Until Pennsylvania Coal, the Just Compensation Clause had been interpreted by the courts to apply only to the actual, physical taking of private property accomplished by the intentional exercise of government's power of eminent domain or by inverse condemnation. See, e.g., Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (compensation required where government dam flooded land). On the other hand, the exercise of government's police power was considered to be limited only by concerns for fair procedures and equal treatment of all citizens. Cf., Mugler v. Kansas, supra n. 4, (no compensation required for saloon closed by prohibition). Holmes' opinion in Pennsylvania Coal blurred this distinction, resting on the proposition that the difference in the effect on property was a matter of degree more than of kind.

8/ "The determination that governmental action constitutes a taking is, essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest, and we recognize that this question 'necessarily requires a weighing of private and public interests.'" [Citation omitted.] Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. ____, 94 L.Ed.2d 472, 493 (1987).

9/ A leading early 20th Century constitutional scholar suggested "that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful ... the former recognizes a right of compensation, while the latter on principle does not." Freund, THE POLICE POWER at 546 (1904); and cf., Pennsylvania Coal, supra n. 5, with Keystone Bituminous, supra n. 8.

10/ See, Pennsylvania Coal, supra n. 5, at 413.

11/ A regulation is a taking if it "does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land." Agins v. Tiburon, supra n. 4, at 260; Keystone Bituminous, supra n. 8; and see, Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 130 (1978): "[D]ecisions sustaining other land use regulations which ... are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution of property value, standing alone, can establish a 'taking.'" [Footnote omitted.]; cf., "Although a comparison of values before and after [regulation] is relevant ... it is by no means conclusive[.]" Goldblatt v. Hempstead, supra n. 4, at 594.

12/ See, e.g., Keystone Bituminous, supra n. 8 (environmental protection and land conservation as public purposes); Agins v. Tiburon, supra n. 4 (open space preservation); Penn Central Transportation, supra (historic preservation). Cases addressing farmland protection are discussed infra in text accompanying n. 27–31.

13/ See, e.g., Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). In this, the first Supreme Court case to uphold zoning, the property suffered a 75 percent reduction in value as a result of regulation. See also, cases collected in Bosselman, et al., THE TAKING ISSUE (1973); and see, farmland cases discussed infra.

14/ This is reflected in Chief Justice Rehnquist's minority opinion in First Lutheran Church: "We ... hold that where the government's activities have already worked a taking of all use of property[.] ... Here we must assume that the Los Angeles County ordinances have denied appellant all use of its property." Slip op., at 16. Emphasis supplied.

Moreover, in determining whether a landowner has been denied all use of his property or retains some "reasonable economic use," the courts typically look at his entire property, not physical or conceptual pieces. "Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a portion or segment have been entirely abrogated." Penn Central Transportation, supra n. 11, at 130 (regulation alleged to have taken "air rights" upheld); "[T]he destruction of one 'strand' of the bundle [of property rights] is not a taking because the aggregate must be viewed in its entirety." Andrus v. Allard, 444 U.S. 51 (1979); cf., "Many zoning ordinances place limits on the property owner's right to make a profitable use of some segments of his property. [If courts did not look at a landowner's entire interest in property, a] requirement that a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area[.]" Keystone Bituminous, supra n. 8, at 496.

15/ Government actually has a third choice: amending or modifying the regulation that was held to work a taking. See, First Lutheran Church, infra n. 22.

16/ "Nothing we say [in First Lutheran Church] is intended to abrogate the principle that the decision to exercise the power of eminent domain is a legislative function ... Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984), quoting Berman v. Parker, 348 U.S. 26, 33 (1954).... [W]e do not ... permit a court, at the behest of a private person, to require the ... Government to exercise the power of eminent domain...." Slip op. at 15.

17/ Slip op. at 15 (Emphasis supplied); but see the dissenting opinion, which is critical of the majority for failing to make a distinction: "Why should there be a constitutional distinction between a permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its useful life—presumably far less than a third?" Slip op., dissent at 11.

18/ There is understandable confusion on this point because, coincidentally, the Los Angeles floodplain ordinance at issue in the case was an emergency, temporary regulation. However, since temporary measures would by definition deny the landowner some, but not all use of his property, they would not ordinarily be deemed a taking at all. This is not to say that no temporary regulation could ever amount to a taking. If a temporary regulation does not advance a legitimate government interest, or so severely limits land uses for such a long period of time as to be tantamount to a permanent restriction, it too could run afoul of the Just Compensation Clause.

19/ "We ... do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are ot before us." Slip op. at 16.

20/ "Invalidation of the ordinance ..., though converting the taking into a 'temporary one', is not a sufficient remedy to meet the demands of the Just Compensation Clause." Slip op. at 14. (Emphasis supplied.)

21/ "[D]epreciation in value of the property by reason of preliminary activity [e.g., steps short of permit denial] is not chargeable to the government." Slip op. at 15, citing Agins v. Tiburon, supra n. 4, at 263 n./9; cf., "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Williamson Co. Reg. Plan. Comm. v. Hamilton Bank, 473 U.S. 172, 186 (1985) (developer had not availed itself of available variance procedure); "[The] economic impact of the challenged action ... simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Id., at 191; and cf., 'Only when a permit is denied and the effect is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." U.S. v. Riverside Bayview Homes, Inc., ____ U.S. ____, 106 S.Ct. 455, 459 (1985); and see, Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981).

In view of this line of precedent, and the lack of any explicit holding to the contrary in the majority opinion in First Lutheran Church, the dissent in First Lutheran Church appears to misread the majority opinion when it states that "the Court boldly announces that ... a property owner ... is entitled to damages for the period of time between [the] enactment [of a regulation] and its invalidation." Slip op., dissent at 11.

22/ In so ruling, the Court put to rest fears that landowners could plunder the public treasury by insisting that government condemn their property. "[T]he landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." Slip op. at 12. "Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain...." Id., at 15; and see. n.16, supra.

23/ Slip op. at 16, 14.

24/ Id., at 13.

25/ Id., at 14, quoting U.S. v. Causby, 328 U.S., at 261 (1946). The "owner's loss" approach suggests that, in may cases, damages for a temporary taking may be entirely theoretical because the value of the property at issue is likely to have increased, rather than decreased, during the temporary taking period. Perhaps government regulatory schemes should require landowners to produce evidence of loss of property value in proceedings seeking variances, changes in zoning, etc. This would better enable government regulators to determine, in the first instance, whether a taking may result from their action, and thus to weigh the risk of going ahead with regulation. By simplifying the matter of proof of damages for a reviewing court, it could also shorten any later judicial challenge and, hence, the period during which the temporary damages clock would run. See, e.g., D.C. Code 5-1004(g) (1979) (historic preservation ordinance which adopts this approach).

26/ As the dissent in First Lutheran Church notes, Slip op., dissent at 10, all the cases cited by the majority as analogous to temporary takings, dealt with actual physical appropriations of property. (See, Slip op. at 12-13.) In such cases, the landowner typically has made an investment to improve the property, and the economic loss of its use can readily be calculated on that basis. However, in the context of temporary regulatory takings, the property is usually unimproved and the extent to which the

Constitution compels government to permit its improvement is unclear. (Recall that there are no hard and fast rules for determining how far regulation may go before it is a taking.) How then can one put a "fair value" on the denial of its use?

27/ Joyce v. City of Portland, 24 Dr. App. 689, 546 P.2d 1100 (1976); Gold Run, Ltd. v. Bd. of Co. Comm'rs., 38 Colo. App. 44, 554 P.2d 317 (1976); Eck v. City of Bismarck, ___ N.D. ___, 302 N.W.2d 739 (1981). In such cases, the legitimacy of the regulation's public purpose is usually established by the fact that agricultural zoning is based on a general land use plan that itself is based on a careful examination of soils.

28/ Wilson v. County of McHenry, 72 111 App. 3d 997, 416 N.E.2d 426 (1981) (160-acre minimum lot); Gisler v. Madera, 112 Cal. Reptr. 919, 38 Cal. App. 3d 303 (1974) (18-acre minimum); and see, Pace Resources, Inc. v. Shrewsbury Twp., 808 F.2d 1023 (3d Cir. 1987) (50-acre sliding scale agricultural zoning), petition for cert. filed ___ U.S. ___ (1987); Codorus Twp. v. Rodgers, 492 A.2d 73 (Pa. Cmwlth 1985) (50-acre sliding scale agricultural zoning); Delucchi v. County of Santa Cruz, 225 Cal. Reptr. 43, 179 Cal. App. 3d 814 (1986) (zoning restructuring building to 10-acre maximum density on agricultural land did not raise "even a colorable claim of a taking"), cert. den'd, 107 S.Ct. 46 (1986).

29/ See, Pace Resources, Inc. v. Shrewsbury Twp., supra n.28 (no taking where property declined 89% in value from $495,000 to $52,000 as result of of 50-acre sliding scale zoning); Wilson v. County of McHenry, supra n. 28 (no taking where property declined 80% in value from $20,000 per acre for residential use to $4,000 per acre for agricultural use); and see, Pinheiro v. County of Marin, 131 Cal. Reptr. 633, 60 Cal. App. 3d 323 (1976) (no taking where open space zoning reduced land value 78% from $960,000 to $210,000).

30/ Wilson v. County of McHenry, supra n. 28 (agricultural zoning of prime soils upheld); but see, Smeja v. County of Boone, 34 Ill. App. 3d 628, 339 N.E. 2d 452 (1975) (striking down agricultural zoning of farmland consisting entirely of "submarginal" soils); and see, Eck v. City of Bismarck, supra n. 27 (agricultural zoning upheld where poor management rather than poor soils were responsible for failure of farming operation).

31/ Wilson v. County of McHenry, supra n. 28 (160-acre minimum lot zoning of 76-acre parcel upheld).

32/ Officials should be aware that there are other grounds on which land use regulations may be challenged, e.g., procedural due process (fairness), substantive due process (reasonable relationship between means and ends—similar to the "taking" issue but focusing more on the legitimacy of the public purpose served by regulations), equal protection (discrimination), ultra vires (beyond enabling authority), etc. These too must be considered in developing farmland protection regulations.

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The American Farmland Trust (AFT) is a private nonprofit organization committed to promoting the conservation of agricultural land resources and the economic conditions conducive to their productive and sustainable use.

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For more information write: American Farmland Trust, 1920 N Street, N. W., Suite 400, Washington, D. C. 20036.