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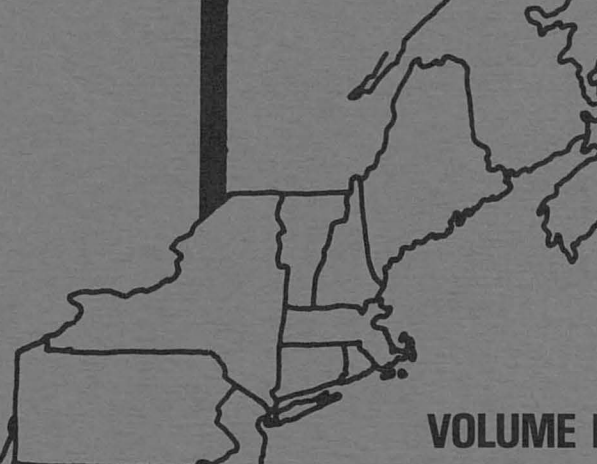
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TRANSFER OF DEVELOPMENT RIGHTS - ITS PROBLEMS AND POTENTIAL
AS A LAND-USE CONTROL TECHNIQUE*

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Introduction

In the Northeast, major problems relating to natural resource use, particularly agriculture, can be attributable in large part to outgrowths of the rural-urban interface. As communities (cities, towns, boroughs, townships, and counties) strive to fulfill their basic needs for health, education, police protection, recreation, housing, highways, and productive open space, new and more sophisticated methods of implementing land-use controls are needed. Experience indicates that in rapidly urbanizing areas traditional land-use mechanisms for directing growth do not guarantee the degree of permanence that is required to preserve productive open space. An alternative land-use control mechanism to ensure open space preservation explored in this paper is the transfer of development rights and the purchase of development easements.

*The concepts and procedures discussed in this paper were developed over a period of several months through work with the Governor's Blueprint Commission on the Future of New Jersey's Agriculture. Specific assistance was provided by William L. Park, John M. Hunter, B. Budd Chavooshian, Victor Kasper, Jr., David Burns, members and staff of the Governor's Blueprint Commission, New Jersey Department of Agriculture, the New Jersey Farm Bureau, and the New Jersey State Grange.

Why a More Permanent Mechanism

Of major concern to those interested in maintaining open space is the dwindling total acreage of open space and, in particular, the conversion of "prime agricultural lands" to other uses. Because responsibility for the planning function generally exists at the municipal level for many states in the Northeast, several decision-making bodies are involved. Thus, efforts to coordinate open space use are difficult and externalities frequently occur.

Municipalities vary in size, land use, proximity to major population centers, topographic features, population density, and wealth. Also, goals and objectives towards growth vary considerably. Where growth is rapid, intense demand is placed upon the prime open space since it is generally easy to develop. It is difficult for certain open space uses of land like agriculture to compete for land which is rapidly rising in value. At the same time, urban pressures are present for additional revenues for the delivery of community services. The problem of increasing taxes on farmland is one result, although this has been alleviated in part by differential taxation. However, other tax burdens in the form of the Federal estate taxes and inheritance taxes are always present. Taken together, this results in a "land rich and capital poor" situation in which heirs who represent the new generation of farmers are forced to sell all or part of their estates to meet the Federal tax obligation.

As communities lose their remaining open space, the accessibility to and the number of supporting industries dwindle. In certain regions agricultural acreage for certain products is falling below a threshold or critical mass level. Agriculturally related businesses do not have sufficient volume to cover their costs.

Coastal as well as inland states have been forced to consider the multipurpose use of agricultural lands including using land as the disposal medium for sewage sludge because of certain prohibitions on ocean dumping. In populous areas, sufficient acreages are not available to properly handle the sludge. Water supply is a growing problem due to the loss of an adequate aquifer recharge. Lack of sufficient ground recharge areas exist in rapidly growing communities. Agricultural lands could be used to remedy these problems and also serve as recreational areas for hunting, etc.

Because of the change in land use, off-farm opportunities, and uncertainty, a great deal of pessimism exists about the future of agriculture in the Northeast. Planning horizons are short and little long-range planning and investment takes place. There are a number of people interested in staying in production agriculture. But adequate land-use controls currently do not exist to permit a more permanent agricultural open space situation. Various units of government are beginning to recognize the need to maintain open space but often lack the necessary mechanisms for achieving such an objective. One approach involves the use of development rights.

Development Rights Defined

A development right is one of a number of rights which together equal ownership of land. For example, air rights or mineral rights are two forms of rights which a property owner usually acquires when he purchases real estate. Development of the parcel for residential, industrial, or commercial use is another right -- the right to development. To a certain extent this right is restricted mainly by zoning regulations which prescribe what type of development is permitted or prohibited.

A property owner can identify any particular right, i.e., mineral or air or development, and separately transfer it and still retain the ownership of the raw land subject to deed restrictions. By permitting the transfer of development rights according to a formal system, a property owner can: (1) either transfer his right to development in return for development right certificates; (2) receive immediate compensation; or (3) wait for compensation to be paid in the future. Each of these constitute a separate method and will be discussed as alternatives.

The value of development rights is essentially the difference between the fair market value and the agricultural value of the parcel involved. The agricultural value is based upon the income-producing capacity of the parcel, while the market value would reflect its potential for higher or more intensive use.

Recent Legislative Patterns

The acquisition by purchase or transfer of development rights to preserve open space is not a new or unique concept. The concept is, however, being examined closely by some state legislatures as a solution to some of their land-use problems.

Senator William V. Goodman introduced a Senate bill to the Maryland State Legislature which provided for the development of a mechanism for transferring of development rights. ^{1/} The purpose of the mechanism was to permanently conserve open space by creating conservation districts while utilizing a system of development rights for development purposes.

Once the mechanism is formulated, development rights could be transferred from the landowner to a unit of government in order to provide permanent agricultural open space.

In New York, the town of Southampton on Long Island recognized this critical need to preserve the prime farmland and its productive farm economy. The Southampton Planning Board in cooperation with the villages of Southampton and Quogue established a procedure to designate agricultural

^{1/} Maryland Senate, A Bill to Promote the Conservation of Open Space Through the Creation of Conservation Districts, Bill No. 792, Senator William V. Goodman, March 15, 1971.

reserve residence areas.^{2/} In these areas farmers were given the right to transfer the entire development potential of their land to a small portion (e.g., 20 percent) of their property. The remainder would then be dedicated to an established public land trust held in agricultural use for the community. Once the development potential was transferred to a portion of his land the farmer could sell the tract for development or hold it in expectation of future appreciation. Also, the farmer and his heirs are given first option to rent the dedicated acreage from the community to continue their agricultural operations.

A similar mechanism involving the transfer of development and air rights is currently being evaluated by the New York City Planning Board.^{3/} Amendments to current zoning provide the Planning Board with a mechanism for "preserving existing privately owned open spaces by allowing transfer of development rights from such areas (e.g., private parks) to other zoning lots within a designated portion of the central business district."

In New Jersey, preliminary state enabling legislation is currently being drafted to enable individual municipalities to create open space preservation districts in which only agricultural pursuits will be allowed.^{4/} In consideration for this restriction, certificates of development rights will be given to the owners in the preservation district. These certificates of development rights will be made a prerequisite to development.

Consideration is also being given to a state program whereby development rights would be transferred from the fee owner to a state agency through an easement program. Each municipality would be required to designate a permanent agricultural open space preserve composing at least 70 percent of its existing prime farmland.^{5/}

^{2/} "Preservation of Farmland through Zoning and a Community Land Trust" - Frederick H. Reuter of McCrosky - Reuter Planning Consultants in Cooperation with the Southampton Town Planning Board and Thomas M. Thorsen, Town Planning Director, October 29, 1971 (mimeograph).

^{3/} New York City Planning Commission, Amendments to the Zoning Resolution Pursuant to Section 200 of the New York City Charter Concerning the Establishment of Special Park Districts, CP-22128A, November 8, 1972.

^{4/} The Open Space Preservation Act - A Proposed Bill, prepared by an advisory committee of the College of Agriculture and Environmental Science, Rutgers University, B. Budd Chavooshian, Chairman, Thomas Norman, Esq., legal consultant.

^{5/} The Blueprint Commission on the Future of New Jersey Agriculture, Report of the Blueprint Commission on the Future of New Jersey Agriculture, State of New Jersey, Trenton, April, 1973, p. 15.

Program Objectives and Land Designation

Lands to be a part of an open space program should promote and maintain the general health, safety, and welfare of the economy. Specifically, lands included in such a program should: (1) provide productive, tax-paying, privately maintained open space; (2) enhance air and water quality and other environmental benefits; (3) ensure rural aesthetics; (4) encourage the continued productive use of the lands and its associated natural resources which contribute to the economy; (5) achieve multipurpose uses including land disposal of sewage wastes on farmlands; and (6) assure future open space. ^{6/}

The land to be preserved should consist of both open and productive agricultural acreage. The area should contain a critical mass so as to retain the supply industries needed to provide the inputs. To best fulfill the purpose of the program, lands should consist of capability Class I, II, and III soils.

If other nonagricultural lands are to be preserved as a section of the program other criteria may become relevant; however, the lands which are facing the highest degree of pressure for development are the Class I, II, and III soils. The reasons being that these soils have few limitations, such as slope, drainage, and permeability, require only moderate conservation practices, and the range of plant choice is relatively extensive. Recreational land, conservation areas, wildlife preserves, and similar uses could be included as part of the program.

Alternative Enactment Programs

Three basic approaches to the enactment of a program to preserve open space are suggested here. They include: (1) the private transfer of development rights between fee holders; (2) a state easement acquisition program; and (3) a state easement program with controlled resale of development certificates. Each of these alternatives will be examined from the standpoint of: (1) amount of staff and public administration required; (2) cost of operation and potential sources of revenue; (3) where the alternative would be most applicable; and (4) degree of public control.

The Private Transfer Alternative

Under a system of the private transfer of development rights a local ordinance would be enacted which would provide that in certain geographical districts ^{7/} all development would be prohibited other than

^{6/} Ibid., pp. 9-10.

^{7/} The terms designated area, agricultural zone and open space preserve are used interchangeably throughout this paper to indicate an area where further development will not be permitted.

development consistent with agricultural or similar open space activity. A second area consisting of all other undeveloped land (developable area) would be indicated in which development is permitted. The remaining area of the community is the built-up districts which do not enter into this process.

A requirement would be incorporated so that in order to construct a building on a given tract of land in the developable portion of the town, the builder-landowner would be required to purchase a development right from a given amount of land in the agricultural district from a farmer-landowner.

For example, in Figure 1, if a developer wanted to build a one-family home on a given lot (Parcel X) in a residential district (R-1) he would be required to negotiate with the farmer-landowner of the parcel marked "Y₁" or "Y₂" or with any other individual owning land in the agricultural zone. If a developer wanted to build 12 garden apartments on a tract (Parcel Z) in the R-12 zone, he would similarly negotiate with the owner or owners in the agricultural zone for the number of development rights required. ^{8/}

The number of rights could be on the basis of a one to one ratio (purchase rights on 1 acre in preserve for each acre developed) or some other established ratio. Thus, for each acre of land developed in the developable portion of the town, an equivalent amount or some other ratio of land area would have to be preserved for open space in the agricultural zone. Both the farmer and the developer contribute to the preservation of productive open space and they both share in the development profit. The flow of activity and development rights are illustrated in Figure 2.

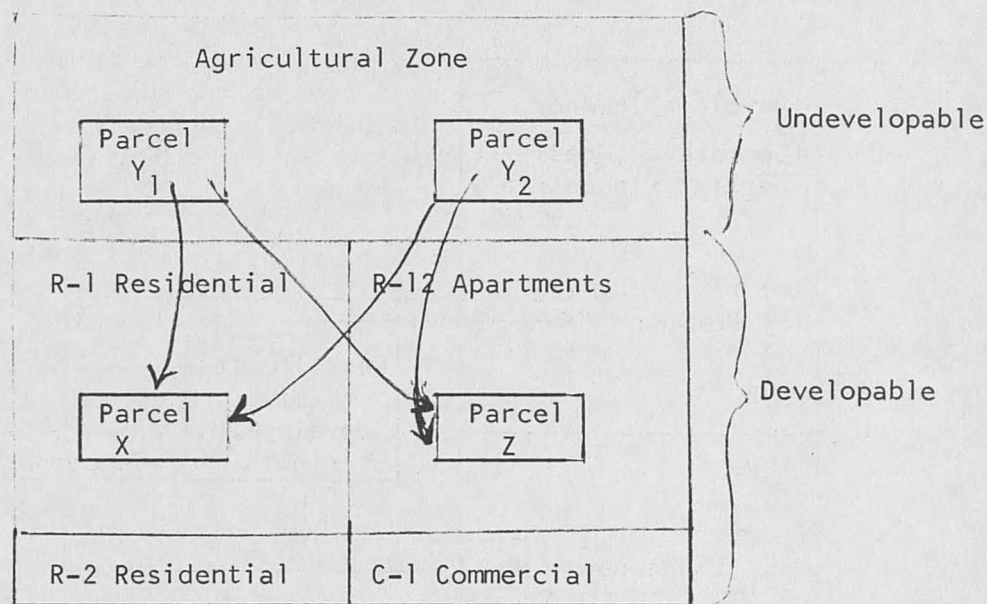
From an administrative viewpoint this system could be managed by local officials like the building inspector and zoning officer but will most likely require some additional staff. A state advisory council composed of environmental protection, agriculture, planning and private citizens would be helpful. In all probability, the governing body or planning board would designate the areas to be preserved on the basis of statutory standards. Hearings and notices thereof would be sent to all affected property owners. Disputes could be dealt with by a public hearing at the local government level, such as the planning board or governing body with an appeal directly to the courts. Procedural due process of the law would have to be observed in all instances.

The financing necessary for this approach involves the costs of designating the preserved areas, notifying the owners therein of the possibility of the enactment of the restrictions and the expenses of public hearings and record keeping. The funding for this alternative could be met by the local municipal budget or through special state appropriations.

^{8/} This example is for illustrative purposes and there are many variations possible. The important point is that in order to develop, a builder must purchase development right(s) from a fee owner in the agricultural zone.

FIGURE 1

Developable and Non-Developable Designated Areas



This approach is best suited in the more densely populated, highly built-up areas or in those areas in relatively close proximity to rapidly growing centers where land values are high because there is strong pressure to develop residentially, commercially, and industrially. The remaining supply of open land would be relatively small.

The degree of public control is certainly visible, but it manifests itself at the local level and does not involve direct county or state participation except perhaps in an advisory capacity. There would be reliance on the market mechanism to determine the price or value of the certificates of development rights. However, the supply and demand would be influenced by the amount of land area designated as a part of the program.

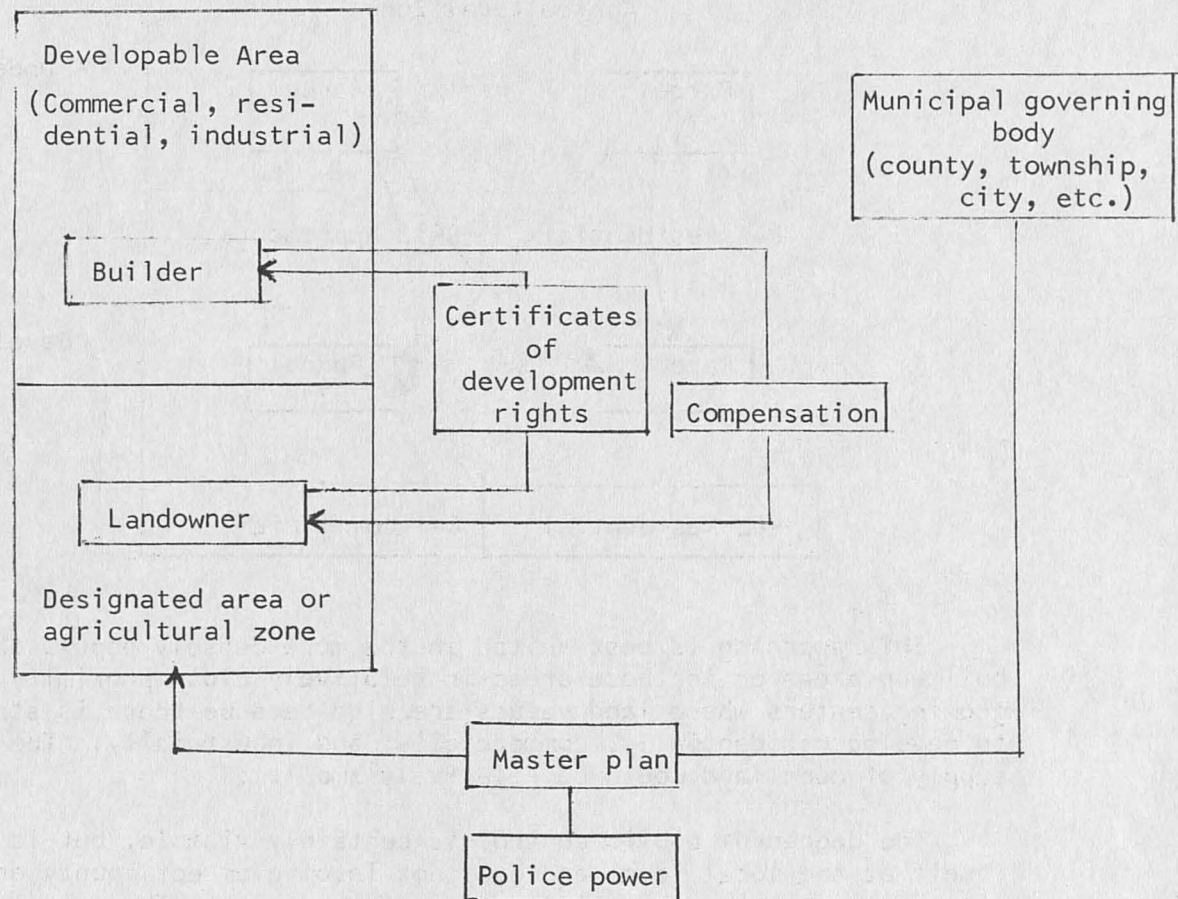
The State Easement Alternative

Under a State Easement Program the development rights of the landowner would be purchased and transferred to a state agency. This agency would have the responsibility for establishing the guidelines for local governing bodies to designate the developable and non-developable areas. The lands to be included would be selected in conformity with state standards and incorporated into the planning process (master plan).

Since this alternative is a state program, more staff (legal council, surveyors, and appraisers) and administration would be necessary. In

FIGURE 2

Flow of Activity for Private Transfer
of Development Rights



addition to the development of guidelines to aid local governments in designating lands, it would have to handle the surveying and the recordation involved. Also, the agency would have to establish the fair market value of the easements.

The financing of this program would be quite substantial. In addition to the staff, the cost of acquisition of the development rights would have to be paid. A large initial reserve would be required because the state agency would have to stand ready to purchase rights involving several acres the first few years of the program. If not, the program could very well be ruled unconstitutional because of the taking of rights but no compensation paid.

The source of funds could be from several sources. Financing could include: (1) state appropriations; (2) bonds; (3) capital gains on real

estate; (4) realty transfer tax; and (5) other sources, like gasoline tax and user fees. Also, there would be more public control over the program as compared to the private transfer method. Refer to Figure 3 for the flow of activity.

In order to encourage the acceptance of the program, it may be necessary to enact a revenue sharing program to compensate for potential tax revenue foregone.

This program would tend to be most applicable where: (1) there are large acreages of land involved; and (2) the supply of development rights is large relative to the demand. Where the supply is large relative to demand there would be a "buyer's market" and thus potentially low compensation for rights which could place the program in jeopardy.

State Easement with Resale of Certificates of Development

This program would differ from the previous alternative by permitting the sale of the development easements as development certificates by the public agency. By requiring builders to purchase development certificates in addition to having: (1) the land; (2) necessary zoning; and (3) building permits, control could be placed on the rate and location of growth. The rate of growth could be controlled through an allotment program for the development certificates. The flow of control, easements, and certificates are illustrated in Figure 4.

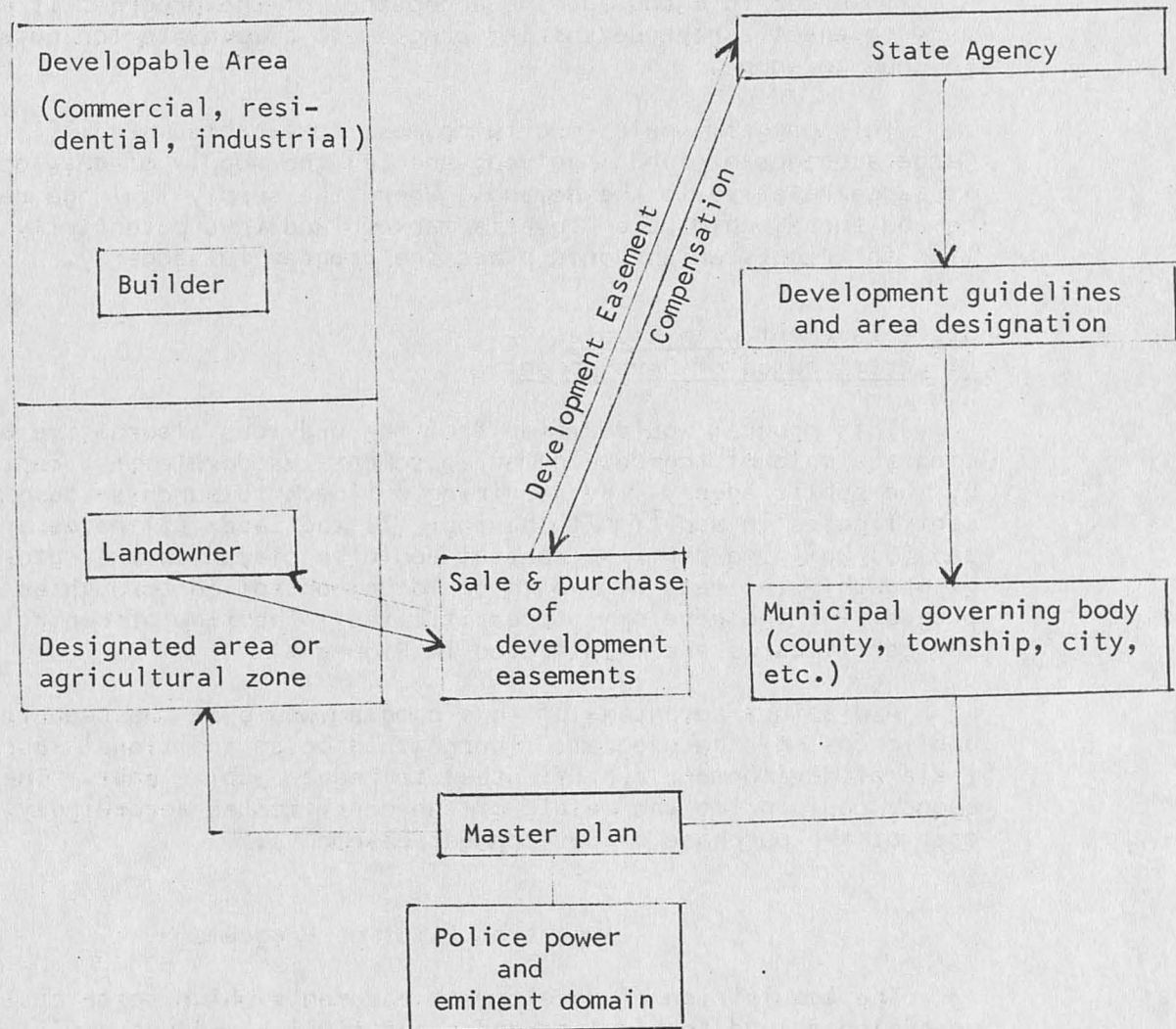
A distinct advantage of this program would be the reduction in the public cost of the program. There would be an additional source of funds (sale of development certificates) to reduce public cost. The state agency could price the resale of the certificates accordingly to meet the cost of the purchase of development easements.

Impact on Existing Programs

The acquisition of development easements which restrict the use of undeveloped land to farmland and other similar land uses will certainly have an impact upon existing public programs incorporated in State policies and legislation and in local policy which in many cases is based on state enabling legislation, particularly in the area of planning and zoning. The amount of farmland to be included in the development rights or easement program is a very significant factor. Several major programs designed for the acquisition of open space tracts become expensive duplications. For example, in New Jersey there is the "Green Acres" legislation which provides for the acquisition of large amounts of open space lands with funds raised through the bonding process. Similar programs designed to permit the acquisition of land for state facilities, such as reservoirs, and similar uses of relatively extensive amounts of

FIGURE 3

Flow of Activity for State Easement Program

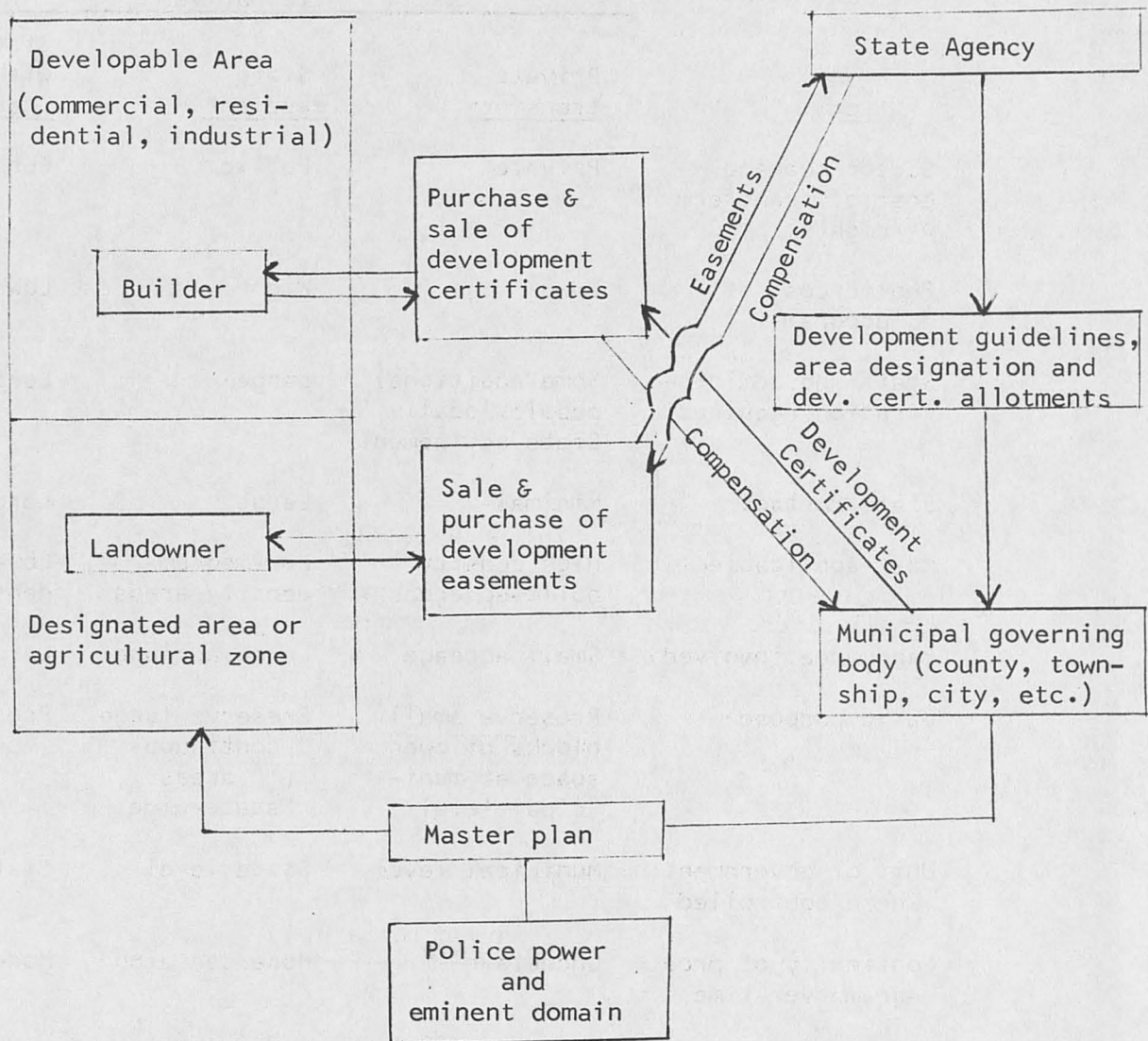


land can be adjusted to reflect the need to acquire land at its remaining agricultural value only. This should have an indirect, if not direct, impact upon state budgeting.

State policy in the field of real property taxation where farmland is assessed at its use value will have to be reconsidered. Normally, such laws require that farmland be assessed at its agricultural value as opposed to market value which includes the development potential of the property. It is anticipated that even after the purchase of development rights, land values will continue to rise, thus making it necessary to maintain differential or use value assessment programs. Also, all agricultural land may not be in such a program.

FIGURE 4

Flow of Activity for State Easement Program
with Sale of Development Certificates



A comparison summary of the three alternative methods is shown in Table 1.

In other program areas a reorientation or redirection may be relevant. The direction and scheduling of state capital facilities will probably have to be redirected to reflect the permanence of the low-density agricultural regions as well as the corresponding higher density

TABLE 1

Comparison of the Three Proposed Alternative Approaches to
the Establishment of Productive Open Space Preserves

<u>Item</u>	<u>Alternative</u>		
	<u>Private transfer</u>	<u>State easement</u>	<u>State easement with resale of certificates</u>
Sector bearing cost of transfer of rights	Private	Public	Public-Private
Public cost of program	Low	High	Low
Staff and administration required	Some additional people locally State advisement	Large	Large
State control	Minimal	Large	Large
Most applicable	High density built-up areas	Low-medium density areas	Low-medium density areas
Land area involved	Small acreage	Large acreage	Large acreage
Basic purpose	Preserve small blocks of open space at municipal level	Preserve large continuous areas state-wide	Preserve large continuous areas state-wide
Unit of government where controlled	Municipal level	State level	State level
Continuity of program over time	Uncertain	More certain	More certain
Potential loss of tax revenue locally	Low	High	High

developable areas. The State planning program will have to be at least amended and probably revised to plan for this new expanse of open land.

Local programs will also be directly affected by the acquisition of development easements. The policy governing local land-use controls including zoning and subdivision regulations will come under different pressures depending upon whether an area can be developed. For example, in several communities a substantial portion of the underdeveloped land will qualify for development easement treatment and will be frozen into agricultural activity. One possible counter effect of this may be strong pressure to develop the remaining undeveloped and unrestricted land for very high residential density. In many cases, this will be justified and proper, and sound planning must be available to the community officials who are responsible for orderly growth and development.

Summary and Future Outlook

Only certain concepts and administrative procedures were considered. Several questions still remain unanswered. For example, what would be the impact of a state easement program on the supply of land on housing and subsequently housing costs? To what extent would the geographic location of the population be altered?

Crucial to the success of a state easement program would be the fair and just compensation due the landowners. Where differential assessment programs exist, valuation will not be that difficult as compared to areas without it because of prior established valuation procedures. Also, there could be an "inside-outside" problem with valuation where a large portion of the open space land mass is in the program. Undoubtedly, such a program would influence the value of land within an agricultural zone. Where then can comparable sales data on fair market value be collected so that the value of the development rights can be estimated?

General acceptance of such a program remains uncertain. How would such proposed legislation be perceived by state and local officials and also property owners? Timeliness of the enabling legislation may be crucial also.

In many areas the turnover of land is small, thus there is little need for title examinations. Where several contiguous parcels are involved property description deficits are often uncovered and would have to be corrected.

The incidence of costs and benefits of each of the alternatives are not fully known and understood. The best method(s) of financing the open space programs examined here needs further study.

Thus, there are several areas in which there is a general lack of research to assist with the development of many of the details regarding the legislation and also the guidelines to local units of government.