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Tools and Incentives to Manage Agriculture and Growth

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I am a lawyer. I was born and raised in Frederick County and basically lived there all my life. I have seen a lot of changes in Frederick County and in Virginia. In Frederick County, we are about 70 miles from Washington, D.C., and I like to say we are about 300 miles too close. When we talk about “foreigners” or “immigrants,” we are talking about people from northern Virginia who move into Frederick County. I was in Albania for a month in the beginning of the year and when I came back I said, “Gosh, I felt right at home there.” People thought that was kind of strange. But then I explained Albania is a land of great natural beauty and man-made disasters, just like Frederick County. I think what Mike was talking about with planning is very important to prevent man-made disasters in the great natural beauty we have in Virginia. Preserving the landscape is a hot issue. In the November 8, 1998 edition of the *Los Angeles Times*, I found this story:

In all the startlement over the Democratic resurrection last Tuesday, no one much noticed the passage of Measure B in Ventura County. Maybe we should have been paying closer attention. This initiative amounts to a sizable revolution in Southern California.

In effect, the citizens of Ventura declared that half a century of rape and pillage by land developers had come to an end, at least in their county. They stripped the Board of Supervisors of the power to approve new subdivisions on land zoned for open space or agriculture. They reserved that power to themselves. In the future, any such proposals would go on the ballot.

In Ventura, California, if a farmer wants to change the use of his land, he has to put it to a vote. The enabling authority does not allow that in Virginia; it is not going to happen here. I would not see the state allowing the change either. We are assuming, at this conference, that preserving open space and agricultural land is desirable—something that we want to do. If you start with that assumption, land use really means property rights. When we are preserving open space through agriculture, property rights come down to really one question—Who pays? The original title of my talk was “Financing Growth.” You might have come in and said, “I’m getting cheated because he is talking about something else.” But the question is who should pay? I am going to talk about two rules today, for each one a different person or group of people is going to pay. Depending on who we choose, the financial burden—and there is a financial burden—is going to fall on a different group of people. Where that burden falls is important.

We learned this morning the free market is not enough (Figure 1). If we leave it to the free market, we are not going to have open space and agricultural land. The first question is what can we, as local governments, do? What is within our power to do? Mike asked how many people had read your comprehensive plan; I want to ask how many people have read the Constitution in the last ten years? I make the students in my class read the U. S. Constitution and the Virginia Constitution at the beginning of class. They are shocked at what they find in them. Their response is, “Wow! Now I know how all this works, now I know why it is—the Constitution says it is that way.” You must start with the Constitution. It says the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States or to the people. One of those powers is police power. Police power is the power of states to legislate for the health, safety, morals, and general welfare of the citizens. Health, safety, morals, and general welfare of people: I have that memorized, I have said it so many times. When you are zoning and planning, health, safety, morals, and general welfare is the power that you are acting on.

Figure 1.

- The free market is not enough. We need incentives and planning tools for agriculture and growth to coexist.
- First, What can local governments do on their own?
- The 10th Amendment to the *U.S. Constitution* states that, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States, respectively, or to the people.”
- *Police Power*: Power of a state to legislate for the health, safety, morals, and general welfare of its citizens.
- Source of Power for local governments: Charter or enabling statute.

The source of power for local governments is their charter or enabling statutes. Here is another really interesting question—how many of you have ever read the charter for your city, county, or town? We have two—was it enjoyable? You need to read your charter because—and I do not want to mix church and state—if we say the enabling statutes are the bible for the localities, then what your charter says is God speaking. What your charter says is even more important than your enabling statutes. Most charters were written a long time ago and some of them say some really funny things. They give localities powers they do not know they have. If I can get you to go back and read your charter, I will have accomplished two things. You might find some really useful powers in it, and you will have no problem sleeping. Some localities in Virginia have powers that other localities do not have, and those powers can be very useful.

One reason you might want to preserve open space and agricultural land is the cost of community services. A number has been developed by various researchers, albeit some question as to how valid it is has been raised. This number calculates, for every dollar of tax revenue that social land use brings in, how much that land use costs the locality in services. The Farmland Trust webpage uses Clarke County, Virginia as an example. According to the American Farmland Trust, for every dollar of taxes that commercial and industrial property brings in for Clarke County, the County spends only \$0.21 in services. The county makes \$0.79 per dollar of taxes as clear profit to subsidize something else. Farming and forestland in Clarke County is an even better bargain—\$0.15 in services for every dollar in taxes that it brings in. Then residential—for every dollar in taxes that residential use brings in, it *costs* the county \$1.26 in services. Again, these numbers might be questioned by some, but you get the general idea. I know Frederick County, Virginia, right now has a good group of people who are doing a good job. In the past the attitude seems to have been—bring on the houses, the more houses the more money we make. Once you start building schools as fast as you can, you still cannot keep up, and things are not better, then maybe you begin to understand that houses are not so profitable.

I want to state Dillon’s Rule clearly (Figure 2). I like to say the Dillon’s Rule means the state is mommy and the localities are kids. You only do what mommy tells you to, and that is what Dillon’s Rule says, “. . . a municipal corporation possesses and may exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers . . .; third, those essential to the declared objects and purposes . . .” Essential does not mean convenient, it means *essential*. The last part of the rule is very instructive—if any doubt arises at to the

existence of the power, the court has to look at it. If it is borderline, the locality does not have the power. If any doubt exists, it is resolved against the locality. Dillon's Rule is very important in Virginia, because that tells you what you can and cannot do.¹

Figure 2. Dillon's Rule

Dillon's Rule: A municipal corporation possesses and may exercise the following powers, and no others:

First, those granted in express words;

Second, those necessarily or fairly implied in or incident to the powers expressly granted; and,

Third, those essential to the declared objects and purposes of the municipal corporation, not merely convenient, but indispensable.

Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the municipal corporation, and the power is denied.

What we can do and is being done, is special use taxation. Most of you know about special use taxation because it is a common tool (Figure 3). Farmland is taxed at its value for farmland and not at fair market value. Again, the effectiveness of this tool is debatable. Issues arise on both sides.

Figure 3. Tools and Incentives Presently Used in Virginia

- (1) Special Use Taxation
- (2) Agricultural and Forestal Districts
- (3) Agricultural Zoning
- (4) Right to Farm
 - (a) Nuisance Protection—Constitutional?
 - (b) Special Use Permits Not Allowed
- (5) Agricultural Stewardship Act
- (6) Proffered or Conditional Zoning
- (7) Purchase of Agricultural Conservation Easements (Virginia Beach program) 3,737 acres; approx. \$8 million
- (8) Income Tax and Estate Tax Incentives for Conservation Easements

Most of you know about agricultural and forestal districts. They are voluntary programs where an individual farmer or forester or a group of farmers or foresters get together, designate the area as an agricultural or forestal district and certain limitations are placed on what they can do with their land. In exchange, they get special use taxation and certain other protections against nuisance lawsuits.

¹ See Jesse Richardson, "Variation on 'Mother, May I?': Dillon's Rule," *Horizons*, 10:6 (Nov./Dec., 1998) for discussion of Dillon's Rule.

I think nearly every county in Virginia has agricultural zoning except in Bedford. They have a very unique zoning ordinance. Right now their entire county is in one zone. You have to apply for a permit for anything other than farming and single-family residential. They are trying to enact a more traditional zoning ordinance. This more traditional zoning ordinance proposes to place, I believe, 82 percent of the land in agriculture. It has been met by a lot of opposition from citizens. The word I heard used was “vested rights.” Vested rights is a term of art in the legal world. You have no vested rights in your zoning classification: it can be changed. Different standards can be applied. We do not really know in Virginia what standards apply to rezoning. It seems if you down-zone the property, the Maryland rule would apply, which means you can only down-zone property if you made a mistake the first time and you are correcting the mistake or if a change in circumstances surrounding the land to be down-zoned has occurred.

Agricultural zoning is one thing you can do to protect farmland. Again, it comes down to who pays. Who pays is the question in Bedford County. If they want to reserve 82 percent of the land for agriculture, who is going to pay for it? Do you put it on the backs of the farmers or do you spread it out over the whole county? You might ask a farmer if he has a 401K program or retirement plan. “I sure do,” he will reply, “you are looking at it, right out the window.” They rely on their farmland to provide their retirement. If, for example, Bedford County, and I know Montgomery County is doing something similar, were to change the zoning ordinance to reduce the number of houses farmers can put on their property, the county has just reduced their retirement benefits. The question is, like the flaming arrows, “Can they do that?” The answer by lawyers is always one of three things: maybe, it depends, or I don’t know. You get charged according to the number of words. Only \$150 for maybe; \$250 for I don’t know. It does depend on each circumstance whether it can be done or not.

The Right to Farm Act is a hot issue right now. Virginia has two of them. One of them is very unique. As far as I know we are the only state with one like this. It says that if the operation is located in an agricultural zone, you cannot require a special use permit anymore. What had happened in the past, and mostly with hog farms, was that localities were requiring special use permits. Hundreds of people would show up for public hearings for the special use permit application, and the Boards of Supervisors or Town Councils would deny the permit based on the public pressure, even though in the land use plan, the requested use was entirely appropriate for that location. But the people had said no, and the Board of Supervisors followed that. You cannot do that anymore. If you have any regulation in an agricultural zone, it has to be up front. You can have reasonable restrictions and setbacks and so forth.

Nuisance protection means that as long as the farm is operated properly, you cannot be sued as a nuisance. That protection has been declared unconstitutional in Iowa, of all places. The Iowa supreme court said that by saying your neighbor cannot sue you as a nuisance as long as your farm is properly operated, you have just taken your neighbor’s private property right without just compensation. I have spoken to the attorneys involved in that case. They are considering whether to appeal to the United States Supreme Court. But the case casts doubt on whether nuisance protection is valid. A footnote to that case, the defendant farmer was a hog farmer, I am sure you predicted that. Do you know who sued the hog farmer? Another hog farmer, right across the road.

Virginia Beach has a unique program you may hear a little more about later. Virginia Beach is now actively seeking to buy the development rights from farmers, that is to purchase the agricultural easements. Perhaps the farmer can build one house per acre on his farm. Virginia Beach is saying we

will pay him/her \$X and put a conservation easement on the property, which means he/she cannot develop it, his/her children cannot develop it, and anyone he/she sells it to cannot develop it. He/she is selling his/her development rights. Property rights are a bundle of sticks. One of the sticks is the right to put houses or other buildings on it. Virginia Beach is buying this right. They have bought the development rights on 3,737 acres, and it is costing them approximately \$8 million. Again, we go back to who paid for that? They added 1.5¢ per hundred to the real estate tax and imposed a cell phone tax to pay for this program. My understanding is they have a lot of other acres in the mill to be dealt with. It is a fairly popular program. Farmers are participating in the program because they do not have to pay for it; they are being compensated for their development rights.

Some income tax and estate tax incentives for donating conservation and selling conservation easements are used. I do not want to get into them, except to say they exist.

I added one other technique that is being used: cluster zoning. Again, the debate as to whether cluster zoning is effective as a means of preserving farmland goes on. Assume a farmer owns 100 acres, under the existing law he/she is allowed to put one house per acre. Under cluster zoning, the farmer can still put 100 houses on that parcel, but the houses have to be grouped together with open space preserved on the parcel. This program is a voluntary program in Frederick County. From anecdotal evidence and observation, it seems to be working in one sense: the open space in these subdivisions is generally being leased or purchased by farmers. They are putting hay or cattle on it. But we have run into one problem, the neighbors in the subdivision do not like it when the farmer spreads manure or sludge.

Circuit breakers are basically a tax credit in certain circumstances (Figure 4). Transferable development rights (TDRs) are different from the purchase of development rights like the Virginia Beach program. TDRs have a target zone and a preservation zone. The preservation zone says landowners cannot build houses on their properties any more. But the landowners get a piece of paper giving them X number of development rights which they can sell to someone in the target zone. We do not have enabling legislation for this program. Again, who pays? The taxpayers do not pay; the farmers do not pay; the developers pay, presumably. The biggest TDR program in the country, I believe, is in Montgomery County, Maryland, and it began in the 1970s. Again, reviews are mixed. Some people say it is the greatest thing since sliced bread; 25 years later, other people are beginning to doubt its validity. Frederick County, Maryland, just north of Montgomery County, has now developed all around the farmland leaving isolated pockets of farmland that in some cases are not viable as farms any more. But the development rights have been sold, so that all one can do is farm it.

Figure 4. Tools and Incentives Not Presently Used in Virginia

- (1) Circuit breakers
- (2) Transferable of Development Rights (TDR's)
- (3) Smart Growth (Maryland Model)

I will close with smart growth. Maryland has enacted smart growth at the state level. If we are going to get it, it will be at the state level, too. Basically, smart growth says we want to have development where we already have development—like Baltimore and Frederick, and areas that are preserved now, we want to keep green and preserved. They have a purchase of agricultural conservation easement program where some of the money comes from the state, some from the locality. They have a really

unique program that if you buy a house near where you work and the employer is a participating employer, your employer gives you \$1,000, the state gives you \$1,000, and the locality gives you \$1,000 toward your closing costs. The aim of smart growth is to keep sprawl from developing. It lets you put development in urban centers and keep the outside part as farmland. Then we do not have the commuting problems, nor do we have a lot of other problems. That seems to be the wave of the future. Whether it will come to Virginia or not, is an interesting question. I do not know the answer.