

PRESERVING RURAL-URBAN FRINGE AREAS AND ENHANCING THE RURAL ENVIRONMENT: LOOKING AT SELECTED GERMAN INSTITUTIONAL RESPONSES

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I. INTRODUCTION

Considerable attention has been given to the harm to American rural areas when agricultural activities are abandoned¹ and farmland is lost.² While legislative bodies have advocated and adopted several institutions to assist agricultural producers and encourage the continued use of farmland, there is no clear agreement on a need or an appropriate procedure for supporting and preserving rural areas, or even whether such measures are necessary.³ Since 1956, forty-seven states have adopted incentive programs with differential tax assessment or other provisions for qualifying agricultural uses.⁴ A few states

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1. When agricultural pursuits cease or are abandoned, local spending often decreases and rural communities suffer the loss of economic and social benefits.

2. Lost farmland may jeopardize future production of food and fiber, may reduce open space amenities in given locales, may dissipate viable local economic and social structures, and may detract from orderly development. See James B. Wadley, *The Emerging "Social Function" Context for Land Use Planning in the United States: A Comparative Introduction to Recurring Issues*, 28 Washburn L.J. 22 (1988).

3. Two researchers noted that the traditional market framework for the allocation of farmland was inadequate and that an alternative conceptual framework was needed. David Mulkey & Rodney L. Clouser, *Market and Market-Institutional Perspectives on the Agricultural Land Preservation Issue*, Growth & Change, Winter 1987, at 72, 79. In a somewhat contrasting viewpoint, another researcher concluded that the expansion of nonagricultural uses into farming areas did not have an adverse effect on remaining farmland. William Lockeretz, *Secondary Effects on Midwestern Agriculture of Metropolitan Development and Decreases in Farmland*, 65 Land Econ. 205, 215 (1989).

4. David L. Chicoine et al., *The Effects of Farm Property Tax Relief Programs on Farm Financial Conditions*, 58 Land Econ. 516, 516 (1982) (citing Richard W. Dunford, *A Survey of Property Tax Relief Programs for the Retention of Agriculture and Open Space Lands*, 156 Gonz. L. Rev. 675-99 (1980)). Many of these tax relief programs assess farmland based upon its value for agricultural purposes rather than on its market value. One study found that the lower assessed values resulted in reduced property taxes for agricultural acreages, but did little to encourage open space and agriculture at the urban fringe. *Id.* at 521. For an excellent summary of various

have adopted circuit-breaker programs to provide property tax relief on agricultural lands.⁵ Right-to-Farm legislation constitutes a third institutional device to help preserve agricultural land by providing an affirmative defense in certain nuisance actions that may force producers to cease agricultural operations.⁶ Other devices include state-wide land use programs,⁷ land trusts,⁸ public acquisition of development rights,⁹ inheritance and estate tax reforms,¹⁰ and various agricultural

programs, see K.A. Grillo & D.A. Seid, U.S. Dep't of Agric., *State Laws Relating to Preferential Assessment of Farmland* 1-147 (1987).

5. Richard Barrows & Kendra Bonderud, *The Distribution of Tax Relief under Farm Circuit-Breakers: Some Empirical Evidence*, 64 *Land Econ.* 15, 15 (1988). A circuit-breaker program "gives an income tax credit or rebate to those taxpayers with the greatest property tax burden relative to their income ability-to-pay." Fred C. White et al., *Comparison of Property Tax Circuit-Breakers Applied to Farmers and Homeowners*, 52 *Land Econ.* 355, 355 (1976). Thereby, property owners with tax burdens that exceeded a specified fraction of income would receive some type of dispensation. See also John E. Anderson & Howard C. Bunch, *Agricultural Property Tax Relief: Tax Credits, Tax Rates and Land Values*, 65 *Land Econ.* 13 (1989).

6. Right-to-farm laws modify common law nuisance through a statutory limitation on the use of nuisance law to preclude objectionable agricultural operations. The laws generally only limit future neighbors from maintaining nuisance actions through the incorporation of a "coming to the nuisance" doctrine. The significance of this provision is that persons who move near an objectionable agricultural operation cannot thereafter maintain a lawsuit based on a nuisance cause of action, although exceptions exist. See Terence J. Centner, *Circumscribing the Reduction of Open Space by Scattered Development: Incorporating a German Concept in American Right-to-Farm Laws*, 8 *J. Land Use & Envtl. L.* 307 (1993); Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 *Wis. L. Rev.* 95; Neil D. Hamilton, *Right-to-Farm Laws*, in *Agricultural Law* 124-1 to 124-33 (Neil Harl ed., 1983); Randall W. Hanna, "Right to Farm" Statutes—The Newest Tool in Agricultural Land Preservation, 10 *Fla. St. U. L. Rev.* 415 (1982).

7. Vermont, Hawaii, Wisconsin, and Oregon have adopted state-wide land use programs that assist in the preservation of farmland. See Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 *Ecology L.Q.* 401 (1987). See *infra* text accompanying notes 92-104.

8. A land trust employs a non-profit charitable corporation to acquire and manage land in the public interest. Restrictions requiring agricultural and conservation land uses would preserve the land for future agricultural production and use. Rebecca Rice-Osterhoudt, *Farmland Preservation in Vermont and the Creative Use of Land Trusts*, 11 *Vt. L. Rev.* 603, 619-23 (1986). Researchers Anita Miller and John Wright recently reported that there are 857 local and regional land trust groups in the United States employing various acquisition programs to conserve and protect agricultural land and wildlife habitats, and that "[o]ver 2.4 million acres of private land have been protected via conservation easements" Anita P. Miller & John B. Wright, *Report of the Subcommittee on Innovative Growth Management Measures: Preservation of Agricultural Land and Open Space*, 23 *Urb. Law.* 821, 824 (1991).

9. The purchase of development rights involves payment to the landowner for foregoing development, leaving the landowner with all other rights of ownership. A public agency, legislature, or other body can allocate funds to purchase development

districting or zoning provisions.¹¹ The variety of efforts at preserving rural areas by the states illustrates the lack of consensus on appropriate procedures to employ.¹²

Institutional responses relating to rural land use from the Federal Republic of Germany¹³ disclose additional concepts that may be used to develop strategies for the preservation of rural-urban fringe areas¹⁴ where there exist high population densities and limited open space.¹⁵ Despite the appreciation by many American state and local governments of the need to protect rural-urban fringe areas, the vastness of our agricultural lands has precluded land preservation efforts of comparative detail to those in Germany. Germany's enlightened institutions may be due to the critical need of foodstuffs after World War II, its post-war economic

rights of choice farmland. Robert E. Coughlin & John C. Keene, National Agricultural Lands Study, *The Protection of Farmland: A Reference Guideline for State and Local Governments* 17 (1981).

10. Reforms reduced the amount of estate taxes due to the federal government so that surviving farm family members would be able to retain the necessary assets to continue the farming operation. For example, the Economic Recovery Tax Act of 1981 revised section 2032A of the Internal Revenue Code concerning use valuation of qualifying real property. An increase in the unified credit, the institution of an unlimited marital deduction for estate and gift tax purposes, and an increase of the annual exclusion provided means for persons owning significant real property to reduce their federal estate taxes. See John Mueller, III, *Maintaining Eligibility for Section 2032A Use Valuation, 1981-1982 Agric. L.J.* 645.

11. Agricultural zoning was enacted to exclude nonagricultural land uses or require large minimum lot sizes. Such ordinances helped reduce the fair market value of farm real estate. Agricultural districting designated specific tracts to long-term agricultural uses, generally accompanied by benefits or assurances. Property in districts could qualify for special benefits such as differential assessments. New York and Virginia are two states that adopted provisions for agricultural districting. N.Y. Agric. & Mkts. Law §§ 300-307 (McKinney 1993); Va. Code Ann. §§ 15.1-1506 to -1513 (Michie Supp. 1993). The Agricultural districting and zoning provisions do not guarantee that farmland will remain undeveloped as landowners are free to leave the programs. See David A. Myers, *Farmland Preservation in a Democratic Society: Looking to the Future, 1981-1982 Agric. L.J.* 605.

12. For a good summary of programs to protect agricultural land, see Coughlin & Keene, *supra* note 9.

13. The information on German institutions comes from the laws of the Bundesrepublik Deutschland. Since October 3, 1990, these laws have applied to all of Germany.

14. Urban fringes will be denoted as "broad belts that extend outward beyond the closely settled suburbs of a city to the residential limits of the commuting population." Howard E. Conklin & William G. Leshner, *Farm-Value Assessment as a Means for Reducing Premature and Excessive Agricultural Disinvestment in Urban Fringes*, 59 Am. J. Agric. Econ. 755, 755 (1977).

15. The institutional responses include European Community (EC) structural measures as implemented by the *Länder* (states) as well as measures of the federal government of Germany, but exclude the support provisions of the EC's Common Agricultural Policy. See *infra* note 48.

success, or perhaps its greater population density. Germany has a population density that is more than eight times greater than that of the United States,¹⁶ and has numerous metropolitan areas of high population density that exert pressure on nearby undeveloped areas.¹⁷ Yet over eighty-four percent of the country is used for agricultural and forestry land uses.¹⁸ Although various historic, cultural, political, and economic factors have shaped the German institutions so that they cannot be duplicated, some of their responses provide concepts for developing policy strategies in other countries.

Specifically, this article will address local and federal zoning and planning requirements, tax provisions, right of access rules, and German implementation of European Community (EC) structural measures. It draws upon the selected German institutional responses to develop three policy strategies for preserving rural-urban fringe areas and enhancing the rural environment. The strategies are not envisioned as a remedy for the issues confronting rural-urban fringe areas, rather they constitute policies that assist rural preservation and that promote the rural environment. The first policy strategy is state-wide planning to thwart new land uses that are incompatible with the long-term viability of agriculture in rural-urban fringe areas.¹⁹ The second strategy is to implement more effective state legislation that limits the right of recreational users to recover damages from property owners for injuries arising from recreational usage of rural lands.²⁰ Third, in exceptional circumstances, policy strategies are recommended to establish financial incentives to augment environmental quality.²¹

II. THE GERMAN INSTITUTIONAL RESPONSES

As in the United States, Germany utilizes a wide range of legislation, regulations, programs, and judicial decisions as institutional responses for addressing perceived problems involving the demise of rural-urban fringe areas. The selected German institutional responses include local and federal zoning and planning requirements, tax provisions, right of access rules, and EC structural measures affecting the landscape and preservation of rural areas as implemented by German programs.

16. Statistisches Jahrbuch 1991 19, 54 (1991); Bureau of the Census, U.S. Dep't of Commerce, State and Metropolitan Area Data Book 1991 203, 205 (1991).

17. Germany has 76 cities with over 105,000 inhabitants, Statistisches Jahrbuch 1991, *supra* note 16, at 19, 54. The United States, with about three times the population as Germany, has only 190 cities with over 105,000 inhabitants. Edith R. Horner, 1992 Almanac of the 50 States 411 (1992).

18. Statistisches Jahrbuch 1991, *supra* note 16, at 19, 54.

19. See *infra* text accompanying notes 81-104.

20. See *infra* text accompanying notes 105-114.

21. See *infra* text accompanying notes 115-124.

Local land use planning and federal laws supporting a "rustic agriculture" have significant requirements that support rural areas.²² Land use planning at the local level is based on provisions of the Federal Building Act, the *Baugesetzbuch*.²³ Although local zoning and local alignment plans in urban and rural areas are important,²⁴ the most prevalent regulations concerning the uses of rural areas are the provisions found in section thirty-five of the Federal Building Act.²⁵ For construction in outer, undeveloped areas, called *Aussenbereiche*, section thirty-five asserts that buildings and development are prohibited, with exceptions that allow for farm purposes.²⁶ This preserves open areas for agricultural and forest uses as well as other recreational pursuits. Persons desiring to build in *Aussenbereiche* seek permission from local authorities.²⁷ Farmers in *Aussenbereiche* who fear that too much development will adversely affect their neighborhood may start administrative proceedings against the municipality to halt regulatory approval of incompatible development.²⁸ Thus, these provisions play an important role in making it burdensome to develop rural areas and in allowing farmers to prevent development. In contrast, although zoning permission may be required in the United States, incentives exist in thirty-one states to spur development through the reduction of property tax payments.²⁹ Further, the U.S. provisions seem to place the burden to preclude development on those desiring to maintain agricultural areas.

22. Wolfgang Winkler, *The Law of Agricultural Land Use in the Federal Republic of Germany, in Agrarian Land Law in the Western World* 71-91 (Margaret R. Grossman & Wim Brussaard eds., 1992). See *infra* notes 32-34 and accompanying text.

23. 1986 Bundesgesetzblatt [BGBI] I 2253-2316 (F.R.G.). The BGBI I is a compilation of German federal statutes.

24. *Id.* The two local plans are the *Flächennutzungspläne* and the *Bebauungspläne*. See Winkler, *supra* note 22, at 74. Preparatory planning is achieved through zoning plans (*Flächennutzungspläne*), while municipalities prepare alignment plans (*Bebauungspläne*) in accordance with their zoning plans. *Id.* The alignment plan needs to be in conformity with the zoning plan, but is more specific and only covers a part of the municipality. *Id.*

25. 1986 BGBI I 2253-2316.

26. *Id.* One authority claims that the provisions of section 35 are the "hidden core of effective protection of nature in Germany." Eckard Reh binder, *Agriculture and Environmental Law in the Federal Republic of Germany*, 1 Fla. Int'l L.J. 127, 130 (1986).

27. 1986 BGBI I 2253-2316.

28. *Id.*

29. Robert W. Wassmer, *Property Tax Abatement and the Simultaneous Determination of Local Fiscal Variables in a Metropolitan Area*, 68 Land Econ. 263, 263 (1992). By reducing current property taxes, municipalities often hope to enhance their community's commercial property base and future tax revenues when agricultural properties are converted to commercial use. *Id.* at 279.

The Federal Act on Land Use Planning, the *Raumordnungsgesetz*,³⁰ allows for state³¹ and regional regulations on the use of rural lands.³² One of the most significant provisions of this Federal Act is a requirement for the administrative maintenance of a rustic agriculture entailing "family farms dependent on the cultivation of soil with limited numbers of livestock."³³ When reviewing projects affecting rural areas, governments are obliged to take into account the policy of preserving a rustic agriculture.³⁴ The rustic agriculture requirement restricts governmental approval of plans involving the conversion of agricultural land to non-agricultural uses, encourages a sufficient rural population density with sufficient jobs for an adequate infrastructure, and protects and conserves natural resources.³⁵

German tax laws have favorable provisions for agriculture, including property tax laws with incentives for property owners who cultivate agricultural plots and farms.³⁶ Such laws may be responsible for nearly one-half of a farm's profit and income potential.³⁷ Value-added tax decrees provide tax regulations for farmers that are especially beneficial for the larger farms.³⁸ Other tax provisions tend to provide greater benefits to small farms and contribute to the economic viability of rural areas.³⁹

One of the most notable differences between private property ownership in Germany as opposed to the United States is the public right of access to private

30. 1965 BGBI I 306-10.

31. Germany has 16 states called *Länder*, 11 *Länder* in former West Germany and five *Länder* in former East Germany. States would enact a land use plan to implement the principles of the Federal Act.

32. Laws of the *Länder* implement the federal planning efforts. Winkler, *supra* note 22, at 73.

33. *Id.* Due to the requirements of this provision, the conversion of agricultural land to nonagricultural land uses is curtailed. *Id.*

34. 1965 BGBI I 306-10.

35. *Id.*

36. 1965 BGBI I 1861-95; 1970 BGBI I 1118-19. For example, farmers in private possession of land are taxed on the value of assets with a deduction for borrowed capital. The result is that reduced unit values for farms tend to undervalue agricultural property, which in turn reduces the tax liability for these properties. Beatrice Knerr, *The Impact of Transfers to Agriculture through the German Tax System*, 18 Eur. Rev. Agric. Econ. 193, 196-99 (1991).

37. Knerr, *supra* note 36, at 202. Knerr's analysis considered four categories of taxes: property taxes, income taxes, value-added taxes, and taxes on trade capital. *Id.* at 195.

38. *Id.* at 202. The German tax legislation provides for the presumption that the value-added tax collected on the sale of food-stuffs "equals that which would be paid on their purchased inputs." *Id.* at 201. The effect is that German farmers do not pay a net value-added tax to the treasury.

39. *Id.* at 199. For example, there is an allowance for farmers whose net assets are less than a prescribed amount that provides for tax-free treatment on 10% of a farm's value. *Id.*

forests and agricultural acreage not under cultivation and obligations concerning husbandry. Section twenty-seven of the Federal Basic Act referring to the Protection of Nature, the *Bundesnaturschutzgesetz*,⁴⁰ contains a right for persons to enter private rural lands. In a similar fashion, Section fourteen of the Federal Act on Forests, the *Bundeswaldgesetz*,⁴¹ recognizes that entrance into private forests for the purpose of relaxation is permitted.⁴² This legislation also contains obligations concerning husbandry and allows the states (*Länder*)⁴³ to impose laws addressing cultivation requirements or ecological considerations.⁴⁴

In 1985 the EC began to play a major role in the preservation of rural areas when the Council of the European Communities passed Council Regulation 797/85 on improving the efficiency of agricultural structures.⁴⁵ The objectives of the EC structural assistance regulations include:

- (i) to help restore the balance between production and market capacity;
- (ii) to help improve the efficiency of farms by developing and reorganizing their structures and by promoting supplementary activities;
- (iii) to maintain a viable agricultural community and thus help develop the social fabric of rural areas by ensuring a fair standard of living for farmers and by offsetting the effects of natural handicaps in mountain areas and less-favored [sic] areas;
- (iv) to contribute to the safeguarding of the environment and the preservation of the countryside, including the long-term conservation of natural farming resources.⁴⁶

The EC structural measures help preserve rural areas through subsidies available to producers,⁴⁷ although these subsidies are dwarfed by the funds spent

40. 1987 BGBI I 889-905.

41. 1975 BGBI I 1037-45.

42. More definitive rights of access to rural areas exist in the Scandinavian countries. See Helge Wulff, *Recreational Access to Agricultural Land: The European Experience*, 24 *Ind. L. Rev.* 1641 (1990). Danish law allows people to "walk across the farmer's uncultivated land if it is not fenced." *Id.* at 1642. People in Norway may walk on uncultivated private land and may walk on cultivated land during late fall and winter months if certain conditions are met. *Id.* at 1643. Provisions of Swedish law allow some forms of riding on private land. *Id.*

43. See *supra* note 31.

44. See Winkler, *supra* note 22, at 86-87.

45. Council Regulation 797/85, 1985 O.J. (L 93) 1.

46. Council Regulation 3808/89, 1989 O.J. (L 371) 1, 3.

47. See *infra* text accompanying notes 60-79.

for price supports⁴⁸ and some subsidies arguably detract from the environment.⁴⁹ For most programs, the EC funds a portion of the subsidy, and the individual country must contribute the remaining monies.⁵⁰ The EC's share of financing varies depending on the measure, the country, the product, the date of the producer agreement, the quantity of aid granted by the individual country, and other conditions.⁵¹ In Germany, the federal government and the *Länder* share in supplementing the EC funds for the various programs.⁵² Despite the fact that, as a net food importer, Germany pays more than a proportional share of price support costs, the country backs the EC's expensive Common Agricultural Policy, in part to preserve its rural areas.⁵³

Most of the EC regulations require programs by member countries; however, the regulations allow considerable flexibility so countries may encourage or restrict participation in EC programs depending on regional and cultural needs. In Germany, a commission of federal and state delegates establishes programs that are administered by the *Länder* in accordance with the EC directives for common planning and the financing of special measures within the scope of the Common Action Improvement of Agricultural Structure and the Protection of Coasts.⁵⁴ Qualifying programs must be reported to the EC Commission in order to receive EC financial assistance.⁵⁵

For areas particularly sensitive to environmental protection, containing fragile natural resources, or in need of maintenance of countryside, several *Länder* have developed programs that have been reported to the European Commission.⁵⁶ These programs promote production practices that conserve natural heritage.⁵⁷

48. The agricultural price supports are part of the EC's Common Agricultural Policy. The various agricultural market policies accounted for over 60% of the EC's budget in 1986. Secondo Tarditi et al., *Agricultural Trade Liberalization and the European Community* 2 (1989).

49. For example, the preservation of agricultural farming on steep slopes or thin soils may lead to environmental deterioration. Max J. Pfeffer, *Values and Policy Conflict in West German Agriculture*, 6 *Agric. & Hum. Values* 59, 65 (1989).

50. *E.g.*, Council Regulation 1096/88, art. 9, 1988 O.J. (L 110) 1, 4.

51. *E.g.*, Commission Regulation 223/90, 1990 O.J. (L 22) 62; Commission Regulation 1941/90, 1990 O.J. (L 174) 34.

52. 1969 BGBl I 1573-77.

53. Authorities have stated that Germany's support of the EC's Common Agricultural Policy is primarily the result of Germany's desire to preserve small and medium-sized family farms. Pfeffer, *supra* note 49, at 62.

54. Gesetz über die Gemeinschaftsaufgabe Verbesserung der Agrarstruktur und des Küstenschutzes [Common Action Improvement of Agricultural Structure and the Protection of Coasts] 1969 BGBl I 1573-77.

55. *See, e.g.*, Council Regulation 797/85, arts. 24-25, 1985 O.J. (L 93) 1, 12; Commission Decision 88/152, 1988 O.J. (L 71) 47.

56. *E.g.*, Commission Decision 89/92, Annex, 1989 O.J. (L 32) 38, 39. Programs need to be reported and approved before EC funds are available under the various EC programs.

57. *E.g.*, Commission Decision 89/139, 1989 O.J. (L 51) 25.

reduce environmental pollution, promote the protection of the environment,⁵⁸ and encourage farming in less-favored areas.⁵⁹

Three EC programs are instrumental in encouraging environmental goals through the less intensive use of agricultural land: set-aside,⁶⁰ extensification,⁶¹ and cessation-of-production.⁶² Although these programs seek to reduce production, they act to preserve land for future production and their subsidies to producers maintain income sources to sustain rural areas.

Set-aside, adopted from American regulations, requires that land committed to the program be left fallow,⁶³ fallow with rotation possibilities,⁶⁴ wooded, or used for nonagricultural purposes.⁶⁵ However, farmers may have the option of using land for extensive livestock grazing or for growing lentil, chickpea, or vetch crops.⁶⁶ Land relegated to a set-aside program must be committed to the program for a period of at least five years and must be maintained for future agricultural production.⁶⁷ In exchange, farmers receive a subsidy to offset their loss of income. A recent amendment allows beneficiaries to terminate a set-aside through the cessation of agricultural production or early retirement as long as the land set aside continues to be withdrawn from production for the agreed time period.⁶⁸

Extensification requires the reduction of output under a "quantitative" or "production methods" procedure, and, in return, the farmer qualifies for a subsidy.⁶⁹ Quantitative extensification requires a reduction of at least twenty

58. *E.g.*, Commission Decision 89/92, Annex, Lower Saxony & Schleswig-Holstein, 1989 O.J. (L 32) 38, 40-41.

59. Commission Decision 88/602, Annex, 1988 O.J. (L 328) 64, 65.

60. Council Regulation 1094/88, 1988 O.J. (L 106) 28; Commission Regulation 1272/88, 1988 O.J. (L 121) 36.

61. Council Regulation 1760/87, 1987 O.J. (L 167) 1; Council Regulation 1094/88, 1988 O.J. (L 106) 28.

62. Council Regulation 1096/88, 1988 O.J. (L 110) 1.

63. Land left fallow would need to be kept in good agricultural condition with a green plant cover crop, which must be cut at least once a year. Mary Abbott, *Combining Crops And The EC 93* (1990). Application of fertilizers and pesticides is prohibited, although exceptions exist such as to control certain weeds. *Id.*

64. Rotation possibilities allow the farmer to plant different cover crops to control weeds. A given cover crop may be destroyed and a new crop established as soon as practical. *Id.* at 3.

65. It is significant that Germany had the largest acreage of any EC country in set-aside. *Id.* at 92.

66. Commission Regulation 1272/88, 1988 O.J. (L 121) 36. However, such a producer would receive reduced aid. *Id.* The significance of this option is the flexibility involved and the encouragement of a less intensive use of land.

67. Council Regulation 1094/88, 1988 O.J. (L 106) 28. The program seeks to maintain the land base for future generations.

68. Commission Regulation 466/92, 1992 O.J. (L 53) 12. This allows flexibility in moving from a set-aside program to a cessation-of-production program.

69. Commission Regulation 4115/88, art. 4, 1988 O.J. (L 361) 13, 14.

percent of a participant's yield of surplus products for a period of at least five years.⁷⁰ Surplus products eligible for aid under quantitative extensification include cattle (beef/veal), sheep and goats, cereals, oilseed crops, peas and field-beans, tobacco, cotton, selected vegetables, wine grapes, olive oil, and selected fruit crops.⁷¹ Extensification production methods involve the adoption of appropriate farming techniques and the reduction of intermediate inputs.⁷² The producer submitting the extensification application must continue to farm the holding throughout the period of the undertaking, with exceptions for death or a compulsory sale.⁷³

The cessation-of-production program helps provide older farmers with an adequate income if they would like to cease farming.⁷⁴ To participate, farmers must permanently cease all farming activities for at least five years or until their retirement income becomes available at the normal retirement age.⁷⁵ Under the cessation program, a farmer may use up to one hectare for non-commercial purposes,⁷⁶ and up to one-third of a leased holding may be taken over by the owner.⁷⁷ The German implementing program requires farmers to be at least fifty-eight years of age and to have contributed to the governmental agricultural pension fund for at least 180 months.⁷⁸ Cessation under the German program may involve complete discontinuation of agricultural use, afforestation, or the cessation of land to another farmer with lower payments.⁷⁹

70. Council Regulation 1094/88, art. 1(b), 1988 O.J. (L 106) 28, 30. Thus, producers may continue to farm and their communities would continue to benefit from the business activities of their operations, yet the lesser production would help reduce EC surplus production.

71. Commission Regulation 4115/88, Annex I, 1988 O.J. (L 361) 13, 18.

72. *Id.* at 13. The major changes generally involve the reduction of chemical and fertilizer inputs. No-till planting or changing from fall to spring plowing may be possible in some situations to reduce erosion.

73. *Id.* at art. 14. This precludes the collection of subsidy monies for persons who transfer land to other producers.

74. Council Regulation 1096/88, 1988 O.J. (L 110) 1; Council Regulation 3808/89, 1989 O.J. (L 371) 1. Thus, the program has a social goal of providing for senior citizens while at the same time reducing agricultural output.

75. Council Regulation 3808/89, art. 2, 1989 O.J. (L 371) 1, 7. The EC Regulation specifies age 55, *id.*, the German legislation requires age 58. Gesetz zur Förderung der Einstellung der landwirtschaftlichen Erwerbstätigkeit (FELEG), 1989 BGBl I 233-40.

76. Council Regulation 1096/88, art. 4, 1988 O.J. (L 110) 1, 3-4. This allows for family gardens and orchards.

77. Council Regulation 3808/89, art. 2, 1989 O.J. (L 371) 1, 7. Thus, when a lessee-farmer participates in a cessation program, the lessor-landlord may be able to use part of the acreage for farming operations. *Id.*

78. Gesetz zur Förderung der Einstellung der landwirtschaftlichen Erwerbstätigkeit. 1989 BGBl I 233-40.

79. *Id.*

III. ABSTRACTING POLICY STRATEGIES

Given the differences in German and U.S. agriculture, politics, and governmental institutions, the German responses cannot simply be followed in designing new strategies to help preserve rural-urban fringe areas and enhance the rural environment. Moreover, the selected responses are not the only institutions that shape the character of the German countryside. For example, the EC's support of agriculture through its Common Agricultural Policy has had a significant impact on land use.⁸⁰ The selected institutional responses, however, offer concepts that might be used to supplement or expand preservation efforts. This section draws upon the German institutions as a basis for the development of three policy strategies that may assist citizens in preserving rural-urban fringe areas and enhancing the environment.

A. Strategy One: Development of State-Wide Planning to Thwart New Land Uses that are Incompatible with the Long-Term Viability of Agriculture in Rural-Urban Fringe Areas.

The German institutions show broad public and regulatory support for the preservation of the rural landscape and environment. The Federal Building Act presents a general policy against development on property in *Aussenbereiche*, thereby favoring rural land uses.⁸¹ The Federal Act on Land Use Planning requires administrative promotion of a rustic agriculture⁸² and the German tax laws provide favorable tax regulations for agriculture.⁸³ Various EC programs act to assist in limiting environmental deterioration,⁸⁴ and Europeans seem to give greater importance to diversity in flora and fauna than others through an emphasis on "effective" rather than "efficient" food production.⁸⁵ Such

80. E.g., C.T. DeWit, *Environmental Impact of the CAP*, 15 Eur. Rev. Agric. Econ. 283, 283 (1988). The Common Agricultural Policy (CAP) has encouraged production which has occurred via increased use of chemicals, intensive livestock operations, an overproduction of animal wastes, and the realignment of ditches. *Id.*

81. Baugesetzbuch, 1986 BGBI I 2253-2316. See also *supra* notes 23-28 and accompanying text.

82. Raumordnungsgesetz, 1965 BGBI I 306-310. See also *supra* notes 30-35 and accompanying text.

83. See *supra* text accompanying notes 36-39.

84. See *supra* text accompanying notes 56-59.

85. Effective food production would include items such as achieving market balance, developing new markets, as well as economic efficiency components. D.M. Shucksmith et al., *Pluriactivity, Farm Structures and Rural Change*, 40 J. Agric. Econ. 345, 347 (1989). It might be noted that the EC's CAP may be fostering production at the expense of environmental quality. For example, the CAP's support mechanisms may encourage the greater use of pesticides and marginal land. Moreover, the German

institutional responses help explain the notable absence of scattered residential development over the German landscape, other than existing small villages, and the ability of Germany to have many rural areas despite its relatively high population density.

American institutions do not offer as much protection against incompatible land uses. Zoning laws, right-to-farm laws, legislation granting preferential assessment for farmland, and various state-wide land use programs offer significant institutional responses that assist farmers and help sustain rural land uses, but the responses by the United States do not provide the support offered by the German institutions. Specifically, the United States does not provide for institutional support preventing development in rural areas⁸⁶ or an administrative action to contest incompatible development.⁸⁷

American zoning regulations and local ordinances facilitate conditions to protect rural landscapes and preclude nonagricultural uses, but rarely adopt a general policy against development as set forth in *Aussenbereiche* under German federal law. Instead, the political perspective found in the adoption of zoning regulations, approval of building permits, and procedures for rezoning rural areas at a local level make it difficult to preclude undesirable development or preserve rural landscapes.⁸⁸ Furthermore, American efforts tend to divorce land use priorities from infrastructure investment policies.⁸⁹ Thereby, American local regulations allow scattered development that contributes to the demise of agricultural pursuits. Although the United States may have ample land and other reasons to justify the provision of such development, it is costly,⁹⁰ and some of the costs are generally imposed on neighboring agricultural producers.⁹¹

programs provide support that is not needed. Martin Scheele & Folkhard Isermeyer, *Umweltschutz und Landschaftspflege im Bereich der Landwirtschaft -Kostenwirksame Verpflichtung oder neue Einkommensquelle?*, 67 *Berichte über Landwirtschaft* 86, 109 (1989). Other authorities claim that some of the programs have too much flexibility and may result in national programs that counteract the objectives of the set-aside program. U. Koester, *Financial Implications of the EC Set-Aside Programme*, 40 *J. Agric. Econ.* 240, 247 (1989). Thus, programs may be supporting unprofitable farms and sustaining farmers in areas that are not suited for agricultural production.

86. See *supra* text accompanying note 26.

87. See *supra* text accompanying note 28.

88. There are many reasons that would support a change in a zoning ordinance and allow the development of farmland despite a community's desire to remain rural or the unsuitability of the particular parcel for the proposed development. For example, a retired farmer may want to sell some agricultural acreage for new development to raise sufficient funds for recent emergency medical expenses. Or a majority of the members of local voting body may want additional development to generate more property tax revenues.

89. Local zoning regulations are unrelated to federal tax policies such as depreciation schedules and income credits aimed at stimulating the economy.

90. See generally Rigoberto A. Lopez et al., *The Effects of Suburbanization on Agriculture*, 70 *Am. J. Agric. Econ.* 346-58 (1988). The costs of services such as water, gas, electric and cable TV are greater when development is scattered. Centner, *supra* note 6, at 310. As the density of development decreases, the cost of providing

Several American states have adopted state-wide land use programs that seek to preserve farmland. Wisconsin adopted farmland preservation provisions whereby owners of eligible farmland may apply for a farmland preservation agreement.⁹² Hawaii adopted a state-wide plan,⁹³ and Vermont enacted a state land use act;⁹⁴ however, these programs embody a philosophy that allows farmland to be developed if there exists sufficient need for growth.⁹⁵ Oregon has adopted legislation that offers greater protection: Oregon's Land Use Planning Coordination.⁹⁶ This legislation embodies a philosophy that "farmland may not be developed except in a manner consistent with the long-term viability of agriculture."⁹⁷ The Oregon legislation established urban growth boundaries for developments so that other areas are reserved for agricultural and forestry uses.⁹⁸ Other provisions of Oregon law provide for the designation of zones exclusively reserved for farm use.⁹⁹

The Oregon provisions for exclusive farm use zones provide agricultural land uses special consideration similar to the German provisions for *Aussenbereiche*.¹⁰⁰ The German Federal Building Act, however, goes further by offering an administrative action whereby existing agricultural land owners can bring an administrative action against the municipality to preclude the administrative authorization of incompatible activities.¹⁰¹ This administrative recourse supplements provisions that resolve disputes about objectionable

services increases. Paul P. Downing & Thomas S. McCaleb, *The Economics of Development Exactions*, in *Development Exactions* 48-49 (James E. Frank & Robert M. Rhodes eds., 1987). It has been estimated that low-density family housing is five times as expensive to serve as high-density multifamily apartments. *Id.* at 47 (citing Paul B. Downing, *Local Service Pricing Policies and Their Effect on Urban Spatial Structure*, Table 8 (1977)).

91. The costs of public facilities and services generally increase with development and may be accompanied by increases in property taxes on all property. Downing & McCaleb, *supra* note 90, at 42-58; Louis F. Weschler et al., *Politics and Administration of Development Exactions*, in *Development Exactions*, *supra* note 90, at 15-41.

92. Wis. Stat. Ann. §§ 91.01-.80 (West Supp. 1993).

93. Haw. Rev. Stat. §§ 226-1 to -107 (Supp. 1992).

94. Vt. Stat. Ann., tit. 10, §§ 6001-6092 (Supp. 1993).

95. If an applicant meets the qualifications for a permit, agricultural land can be developed. Duncan, *supra* note 7, at 437. *See, e.g.*, *Southern Associates v. Bongartz*, 980 F.2d 84 (2d Cir. 1992).

96. Or. Rev. Stat. §§ 197.005-.860 (Supp. 1992).

97. *See* Duncan, *supra* note 7.

98. Or. Rev. Stat. §§ 197.295(7), 197.752 (Supp. 1992).

99. *Id.* §§ 215.203, 215.213 (Supp. 1992).

100. *See* Centner, *supra* note 6, at 319-20.

101. *See supra* text accompanying note 28.

activities of existing neighbors¹⁰² and potential nuisances from changes in future land uses on neighboring property.¹⁰³

The German institutional responses suggest that states might adopt state-wide land use plans to offer agriculture greater protection against incompatible nonagricultural uses in rural-urban fringe areas. The land use plan would involve the incorporation of the principle from the Federal Building Act whereby land uses inconsistent with the long-term viability of agriculture are precluded.¹⁰⁴ A permit would be needed before the introduction of a new land use, and would not be issued if the new use would denigrate future agricultural production. In addition, a provision might be added to enunciate a procedure whereby local citizens could bring an administrative action to challenge a permit allowing development. The plan would limit these restrictions to designated rural districts so growth and development in all rural areas would not be unduly precluded.

B. Strategy Two: Implementation of More Effective State Legislation to Limit the Right of Recreational Users to Recover Damages from Property Owners for Injuries Arising From Recreational Usage of Rural Lands.

The German Federal Basic Act referring to the Protection of Nature¹⁰⁵ and the Federal Act on Forests¹⁰⁶ demonstrate that legislative provisions may limit the rights of recreational users to seek remuneration for accidents arising during their recreational pursuits, which might be expected to foster greater preservation of rural land uses. Under German law, people have a right of access to private forested and unused agricultural land.¹⁰⁷ In exchange for the usage of private lands, German recreational users relinquish their right to maintain certain actions to recover damages from accidents occurring on the property.

The German right of access provisions are not practical for the United States and may not be appropriate for other countries. Americans have a rigorous concept of private property whereby property ownership involves the exclusion of

102. This is prescribed by the Bürgerliches Gesetzbuch (Civil Code), Bundesgerichtshof Rechtsprechung, and Zivilsachen. Bürgerliches Gesetzbuch [BGB] § 906 (F.R.G.).

103. 1986 BGB I 2253-2316.

104. The principle of protecting the long-term viability of agriculture is also illustrated in Oregon's Land Use Planning Coordination. See Duncan, *supra* note 7, at 471.

105. Bundesnaturschutzgesetz, 1987 BGB I 889-905. See also *supra* note 40 and accompanying text.

106. Bundeswaldgesetz [Federal Act on Forests] 1975 BGB I 1037-45. See also *supra* notes 41-44 and accompanying text.

107. See *supra* text accompanying notes 40-44.

uninvited persons. Persons who do not own sufficient property for recreational purposes can use governmentally owned parks and natural lands.

However, the German concept of limiting the rights of recreational users deserves further consideration for situations where private property owners voluntarily facilitate additional usage of their property. In recent years, more farmers have leased rural lands to the public for hunting and recreation resulting in greater use of agricultural acreage.¹⁰⁸ Leases of farm property, however, involve a major drawback because private property owners may be liable for damages arising from accidents involving recreational users on their property.¹⁰⁹ American tort law enables injured persons to recover damages for their injuries from persons at fault, and under special circumstances, allows recovery from persons not directly at fault.¹¹⁰ Moreover, a general policy of favoring redress for injuries has increased the likelihood that a property owner will be called upon to pay damages for injuries arising from the use of property. While this encourages property owners to maintain their property in a safe condition, the specter of additional liability also curtails an expansion of property usage by the public.¹¹¹ Given American tort law, this drawback is weighty enough to discourage property owners from leasing rural acreage.¹¹²

Some American states have responded to this drawback with recreational use statutes.¹¹³ While these statutes shield some property owners against damages arising from accidents to recreational users, a limitation precludes the protection for owners who have charged recreational users.¹¹⁴ Thus, recreational use statutes may not provide much assistance for agricultural property owners who wish to lease their property for recreational uses.

108. Alan C. Schroeder & Rich Olson, *Coop. Ext. Serv., U. Wyoming, Minimizing Landholder Liability From Public Recreational Use of Private Lands* 1 (1991).

109. See Martha L. Noble, *Recreational Access to Agricultural Land: Insurance Issues*, 24 Ind. L. Rev. 1615 (1991).

110. E.g., George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, J. Econ. Persp., Summer 1991, at 31.

111. See, e.g., Noble, *supra* note 109.

112. See Schroeder & Olson, *supra* note 108, at 21.

113. Recreational use statutes were enacted to encourage owners to make property available to the public for recreational purposes. Such statutes provide that recreational property owners owe no duty of care to keep their premises safe, but can incur liability "for willful or malicious failure to guard or warn against a dangerous condition . . ." Cal. Civ. Code § 846 (West Supp. 1994). See, e.g., John C. Becker, *Landowner or Occupier Liability for Personal Injuries and Recreational Use Statutes: How Effective is the Protection?* 24 Ind. L. Rev. 1587 (1991); Stuart J. Ford, *Comment, Wisconsin's Recreational Use Statute: Towards Sharpening the Picture at the Edges*, 1991 Wis. L. Rev. 491 (1991).

114. Council of State Governments, *Public Recreation on Private Land: Limitations on Liability*, in 24 Suggested State Legislation 150, 150 (1965).

The German approach suggests that citizens might be able to assist private property owners in preserving rural land uses while simultaneously providing greater public use of private rural acreage. The suggested response would limit the legal rights of recreational users so that private property owners generally would not be liable for damages arising from accidents on their property involving selected recreational activities. By limiting the potential liability of private property owners, the owners would be encouraged to grant recreational leases to garner additional income that may assist in the maintenance of rural lands. Subsets of the public would be able to use private lands for recreational purposes, but would forgo the right of damages for most accidents.

C. Strategy Three: In Exceptional Circumstances, Establish Financial Incentives to Augment Environmental Quality Through Payments to Persons to Stop Objectionable Activities.

The German institutions suggest possibilities for programs that pay people to forgo opportunities or discontinue existing activities that negatively impact the environment in order to augment environmental quality.¹¹⁵ The rustic-agriculture provisions provide for the administrative consideration of the rural landscape and authorize reductions in property taxes for qualifying agricultural land uses.¹¹⁶ German tax laws promote agricultural uses¹¹⁷ and programs adopted pursuant to EC regulations provide financial support for the conservation of natural heritage, the reduction of pollution, and the preservation of environmentally sensitive areas.¹¹⁸ These provisions and programs evince concern for the environment and a willingness to pay for maintaining the environment.

The policy of augmenting positive externalities that arise from the private use of property is not new. American legislation, however, tends to rely on the government's police power to restrict polluting activities or mandate more stringent environmental controls rather than provide financial incentives.¹¹⁹ Although the U.S. Supreme Court recently opined that beachfront management restrictions prohibiting all economically beneficial use of land would be a

115. The set-aside, extensification, and cessation-of-production programs are examples of this type of approach. *See supra* text accompanying notes 60-79.

116. *See supra* text accompanying notes 30-35.

117. *See supra* text accompanying notes 36-39.

118. *See supra* text accompanying notes 56-59.

119. Of course, the USDA's Conservation Reserve Program is an exception to this observation. Participation in federal price and income support programs is limited to producers who voluntarily comply with conservation program provisions for selected situations such as wetlands and highly erodible lands. 16 U.S.C. §§ 3801-3845 (1988). *See* Linda A. Malone, *Conservation at the Crossroads: Reauthorization of the 1985 Farm Bill Conservation Provisions*, 8 Va. Envtl. L.J. 215 (1989).

taking,¹²⁰ the Court's discussion and other recent views of land ownership suggest changes in traditional notions.¹²¹ Rather than private property rights being absolute, land ownership is being redefined to fulfill societal objectives. Legislatures and courts are asking whether holders of property interests can be compelled to accomplish a public purpose without compensation.¹²² Although environmental regulations that are too stringent will be found to be a taking,¹²³ rural landowners are discovering that environmental and other social objectives may legally diminish private property rights.

The German institutions suggest that a government may forgo restrictions and establish incentives through subsidy programs that pay persons to stop an objectionable activity. For example, when farmers have a property right to engage in activities that damage the environment, such as use of a highly toxic pesticide, they could be paid to stop the particularly objectionable practice with compensation based upon the reduced opportunities of using farm property. In the alternative, governmental program benefits might be dependent upon the recipients reducing pesticide or fertilizer usage.¹²⁴ Or federal program participation could be linked with additional husbandry practices such as the use of no-till crops or a percentage of acreage.

IV. CONCLUSION

Citizens should not be satisfied with existing institutions that assist in the preservation of rural-urban fringe areas and protection of the environment. Rather, they should consider alternative ideas that offer greater support to both agriculture and the environment.¹²⁵ Concepts extracted from selected German

120. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

121. See generally Daniel W. Bromley & Ian Hodge, *Private Property Rights and Presumptive Policy Entitlements: Reconsidering the Premises of Rural Policy*, 17 *Eur. Rev. Agric. Econ.* 197-214 (1990) (arguing that the present property regime exists for historical reasons and is not necessarily the optimal plan for the future).

122. Wadley, *supra* note 2.

123. Zygmunt J.B. Plater et al., *Environmental Law & Policy: Nature, Law, and Society* 442-53 (1992).

124. Recent research has suggested that quotas on chemical use may be able to provide environmental benefits. David G. Abler & James S. Shortle, *Environmental and Farm Commodity Policy Linkages in the U.S. and the EC*, 19 *Eur. Rev. Agric. Econ.* 197-217 (1992).

125. Perhaps the greatest impediment to more meaningful preservation of rural-urban fringe areas is not the identification of ideas or institutional responses but rather the political implementation. Societal and political impediments may make implementing the suggested institutional responses more difficult. For example, American politicians may be reluctant to make changes because Americans see their agricultural sector as efficient and progressive, with an established system of

institutions suggest three policy strategies. First, states should adopt state-wide planning to thwart new land uses that are incompatible with the long-term viability of agriculture in rural-urban fringe areas. Second, to encourage greater usage of rural lands, state legislation should limit the right of recreational users to recover damages from property owners for injuries arising from recreational usage of rural lands. Third, more consideration should be given to policy strategies to establish financial incentives to augment environmental quality. The German institutional responses, and the three enumerated policy strategies, show that citizens can do more to conserve and preserve their rural environment. Given the resources of many developed countries and the abundance of their agricultural foodstuffs, greater emphasis should be placed on the preservation of rural areas for future generations.



agricultural support programs. Many citizens may feel they already adequately subsidize agriculture, and it may be difficult to convince the public that new strategies should be adopted to offer further assistance or payments to foster the environment.

A second impediment to implementation of new responses entails concepts of individual freedom and private property. Americans place greater value on individual choice and may be less willing than the Europeans are to sanction new governmental interference in agriculture, especially in the form of land use restrictions.