

LAND USE CONTROLS THAT AFFECT AGRICULTURE

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FOREWORD

This report is the product of the jointly operated Agricultural Law/Economics Research Program, which offers leading Law School students an opportunity to research farm law problems. The research studies deal with current farm law problems of importance to a substantial group of farmers. Recent reports include studies of farm fence laws, farm leasing laws, drainage, water rights, grasslands, condemnation of farmland, easements, coal leasing, and surface owners' rights.

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Part I

INTRODUCTION

This report discusses public land use controls and explains their effect upon farming. A person who knows how land use controls are established is in a better position to become involved in their development and to influence the extent and manner of their control. The emphasis is on state and local land use controls because they directly regulate and affect a landowner's use decisions. Federal regulations generally influence land use indirectly and usually only after an owner has decided to use his land for a particular purpose.

Are Land Use Regulations Necessary?

Land has been traditionally viewed as a commodity to be bought and sold like wheat, stock certificates, or corn futures. The result was that private economic decisions dictated the use of land. It was a view that worked fairly well when there was an unlimited supply of land. Most people were satisfied with the results of that system, with few complaints about the resulting uses of land and the role that economics played in determining land uses.

Today, an individual's land use decisions that are based only upon economics often affect neighboring landowners and society in general. For example, steel smelting plants or coal fired electrical generating plants have effects on the air quality of an area far larger than the plant site itself. Removing land from farm production or urbanization of aquifer recharge areas affects food and water supplies of a larger number of people than just the owner. The result is a growing doubt about whether private economic decisions lead to the best use of land.

Today land is being considered as a natural resource, similar to such nonrenewable resources as coal and oil. There are lasting consequences when land is wasted, destroyed, or used. There are no new virgin lands to discover and once the productive nature of land is consumed or destroyed, it is virtually irreplaceable. Decisions on the use and treatment of land need careful consideration in view of all their consequences because of the direct effect on neighboring landowners and because, as a resource, it is nonrenewable.

Individual land use decisions affect society. A

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population may expand but the supply of land to accommodate the growing numbers is limited. This has two effects. More people are placing an increasing demand on the available supply of land. One result is that land is viewed as being too valuable for society to leave decisions about its use to people who are not necessarily concerned about the larger public needs. A parallel can be seen in the current energy situation. Increasing prices of oil and natural gas limit or eliminate their use and give rise to a growing public demand that oil companies be nationalized. Part of the reason is that the privately owned oil companies do not necessarily make decisions that reflect public concern. Yet their decisions have a profound impact upon the way many people live and work.

The second effect is that the limited supply increases the cost of land. This reinforces the economic view that land is a commodity. The rising cost of acquiring land forces the owner to seek a larger return on his investment. He is not likely to be willing to hear arguments emphasizing the social impacts of his land use decision, especially if it does not guarantee his expectation of a proper economic return.

The importance of individual land use decisions is seen when an owner changes the use. The land use change is usually to a more intensive one. Then it is usually difficult or impossible to return the land use to one which is less intensive, such as when farmland is converted to urban use. The cost of removing the more intensive use and returning the land to its original use, or a less intensive use, will probably cost too much. Thus, almost all land use decisions are permanent and need to be made carefully.

Four factors changing the view of land from a commodity to a natural resource are the permanency of land use decisions, land use decisions that affect people not involved in its use or ownership, the scarcity of land, and its nonrenewable nature.

It is natural for some people to view land as a commodity. The immediate economic return of a particular use, the land-as-a-commodity view, is easier to see than any long-term economic cost of that use to society, the land-as-a-natural-resource view. Viewing land as a natural resource requires a consideration of the future. The future is uncertain and it is hard to prepare for it; so it is easy to view land as a commodity. The costs of ignoring the future, by failing to prepare for its needs, problems, and conflicts, only postpones solutions to a future generation.

The best approach is a balanced one. Viewing land only as a natural resource requires considering the social and economic impacts of such an approach. The

social impact might be a restraint on the freedom to buy, lease, or sell land, all essential to the flexibility needed to adjust to changes in today's world. Each restriction probably would have an impact on the cost of buying and using land. This economic impact must be weighed before restrictions or regulations are imposed. The view that land is a commodity whose only function is to enable its owner to make money ignores the growing public realization that a finite supply of land can no longer be dealt with in the freewheeling ways of our frontier heritage. Land needs to be viewed as both a commodity and a natural resource.

Viewing land partially as a natural resource probably involves some public regulation on its use. Public regulation of land use is not new to the United States. It was employed as early as 1886 to control the types of buildings in which potentially dangerous activities could be housed. It has been often proposed and accepted as a way to protect and increase the value of land as a commodity.

An example of public regulation is land which an owner wants used for residential purposes. Public regulation would be sought to protect the residential value by precluding any commercial and industrial uses. Most areas today have land use regulations to protect private interests as much as to promote any public interests.

The earliest example of this regulation, and today the most widespread use of land use regulations, is found in cities. Public regulations restrict the land use alternatives available to the owner and how the permitted use is exercised. Limiting the use of land to residential dwellings is an example of regulations which restrict the land use alternatives available to the owner. Limitations on that residential use are minimum sizes for the front, side, and rear yards or a maximum height of the building.

Today land adjacent to the boundaries of a city as well as land many miles from cities is subject to public regulation.

Objections to Land Use Controls

A landowner may feel that public regulation is an unconstitutional violation of his property rights because it "takes" some of his property rights without compensation. He may believe that he may do whatever he wants with his land. Or, if he does accept public regulation of land use, he might believe that it may never be used to reduce the value of his land. Public regulation of land use, however, is not unconstitutional. The manner in which a local government regulates land use could be unconstitutional.

A person may not do with his land what he pleases. The belief that he can is a myth. An owner does not have the right to do what he pleases since that could interfere with his neighbor's freedom. The freedom to use land is not absolute but relative to the rights of neighboring property owners.

The Fifth Amendment to the Constitution states that "nor shall private property be taken for public use, without just compensation." It is only since 1922 that the U.S. Supreme Court has read this prohibition to include the regulation of land use as one way private property may be taken in violation of the Constitution. Prior to 1922 the Court said that a taking of property for public benefit does not occur when there is public regulation of the use of property.

In 1922 the Supreme Court ruled that although a state could undertake regulations which diminish property values without compensating the owner, at some point the value lost to the owner must be compensated. State courts have followed the view that the regulation is valid as long as the owner has some reasonable opportunity to derive income from his land. Land use restrictions must be used to promote the public health, safety, morals, and welfare, and must be reasonable and not arbitrary or capricious.

Land Use Planning Process

What is it?

Regulation of land use is directly exercised by local governmental bodies. Land use planning should precede exercise of the regulations. Planning permits local government to determine which land use controls to use for the goals it establishes.

Land use planning is a process. "Process" refers to the total procedure and all of the individual steps taken to produce a plan. A plan simply involves looking to the future and anticipating what may happen. Steps of the process involve decisions which define the problems to be addressed, results desired, and the way to achieve the end result. Emphasis should be on following the planning process and not on predetermined conclusions of the final plan.

The planning process is a logical order of activities involving three steps: (1) An assessment or inventory of existing conditions which should reveal "where are we right now?"; (2) Use of the inventory to answer the question "where do we want to be in the next few years?" Step 2 requires those to be affected by a plan to envision what future is right for them, whether any changes should be made, and what kind of changes are desirable; and (3) Development of a plan of action, "how do we get to where we want to go to achieve the future desired?" Planning permits society and its governments to look beyond tomorrow and allows them to better use their limited number of tax dollars.

Some people become suspicious when they hear that a governmental body wishes to plan. Ordinarily the governmental body is only seeking to anticipate and solve or prevent future problems and conflicts before they become too large, too expensive, or impossible to deal with locally.

Why is it necessary?

The need for land use planning is best seen in cities. Conflict is inevitable when people live close together.

It is easy to imagine how upset residents would be if a supermarket were suddenly built in their neighborhood. The noise, traffic, and litter would reduce peace and quiet of the neighborhood. The conflict increases in emotion until it becomes nearly irresolvable between residents and the supermarket. Planning orderly development and then controlling the use of land allows the city to anticipate and prevent conflicts that would otherwise be expensive or impossible to resolve. The city government and citizens benefit from planning by examining possible consequences of alternate courses of action.

Farmers, ranchers, and others in agricultural work may need land use planning for reasons similar to those for city residents. It prevents and avoids future land use conflicts and reduces costs of solving problems by dealing with them now rather than postponing them. Land use planning could influence conversion of farmland to urban uses; control location and effects of power plants, mining, and transportation facilities; assist in flood control; and protect land from misuses.

Why allow productive farmland to be used for urban purposes when there is vacant or unused land already within the city? Urban land is often ignored because it is more expensive than farmland and because of the desire for "country living" or to avoid "city" taxes. Agricultural land substitutes for vacant urban land not because it is inherently better suited for urban development but because it is viewed as a commodity freely available to use. Agricultural land near cities will be converted to urban uses unless controls are imposed. Demands for urban uses extend for miles from Fargo and Bismarck. Once converted, only a complete destruction or removal of the city will allow the land to return to agricultural purposes. Governmental units outside cities also are able to influence land use through planning.

Purpose and Importance of a Land Use Plan

Any effort to control uses of land should follow the preparation and adoption of a land use plan. The plan should be prepared with the full participation of elected officials and residents in the area to be affected.

A land use plan is a guiding framework which is valuable only if the local governing body that prepared it is willing to implement it. Then the plan should serve two purposes: (1) It guides all their land use decisions by setting out in advance general policies so that decisions about specific proposals will be more rational, fair, and easier to agree on, and (2) The plan gives information to the residents who will be affected by it. Since the plan presents general policies residents can determine the intentions of the governing body and adjust their ideas and planned land uses accordingly.

A governing body may not feel that it desires or needs a land use plan. Their inaction establishes the land use policies for their area: telling the residents to do as they please. They should be prepared for the con-

sequences and public costs which may come from their inaction.

The result is that there is little or nothing the public can do to protect itself without land use planning. In addition, courts or other governmental agencies may have to resolve any conflicts that arise. They will attempt to decide not only what is best for someone else, but will make decisions that ordinarily are best made by the locally elected governing body. The effect is that the residents and their local governing body have given up their ability to control the land uses about them.

The lack of a plan fails to recognize that land use decisions affect more than just a single piece of land. It also fails to appreciate the cumulative effect of many separate land use decisions. Residents and their governing body which make land use decisions without considering the present and the future leave to luck and probability the chance that their decision is fair to all parties concerned and that the decision promotes their own best interests.

A land use plan is prepared with the support and participation of both the locally elected officials and the residents. Their participation is needed to ensure that the plan is realistic and fair. Planning is at its best when done in the light of public scrutiny and participation. Planning is a waste of time and money if prepared and implemented without the inputs and support of all those to be affected.

Some people will oppose preparation of a land use plan for philosophical reasons. Yet, it is only through a carefully developed and supported land use plan that an individual landowner gains protection. A governmental body may use its police power to enforce its decisions and regulations about the use of land. Or, it may choose not to exercise that particular power. Conflicts will arise, however, if there is any economic activity in the area. Public opposition will grow until the governing body will agree with it and is forced to find a way to prevent the proposed land use. That is the nature of majority rule. A land use plan, prepared in advance of any controversy surrounding a particular project, would have helped elected officials, residents, and developers achieve decision based upon prior thought and logical reasoning.

PART II

IMPLEMENTING A LAND USE PLAN

A land use plan is important for two reasons: (1) it assists a local governing body with its land use decisions, and (2) it serves as an internal check on the governing body. A consistent and fair application of land use decisions is required of a governing body when its land use decisions must be based upon a land use plan.

The two main tools which a local governing body may use to control land use are zoning and subdivision

regulations. They should be only used to carry out a land use plan. Zoning and subdivision regulations add details to the general policies of the land use plan. They are used to enforce the general policies outlined in the land use plan. Zoning regulations detail what type of uses may be placed upon the land, such as houses, stores, or industry. Subdivision regulations control the manner in which vacant land is to be prepared for these uses. They may require that land be divided into lots, that streets be provided, and that access to the lots be reserved for sewer, water, gas, and electrical connections.

What is Zoning?

Zoning is done by dividing the geographical area of a governmental unit into districts and then developing regulations to apply to those districts. The regulations often include the height and bulk of buildings and other structures; the occupied area of a lot and size of required open spaces; density of population; and uses of buildings and land for trade, industry, residence, or other purposes. Zoning is the most commonly used legal device available for implementing a land use plan.

The legal basis of zoning lies in the state's ability to enact legislation which protects the public health, safety, morals, and general welfare of its citizens. This is called the police power. The state has adopted legislation which permits its political subdivisions (cities, counties, townships) to zone. Zoning is valid as a police power only when each regulation in a zoning ordinance bears a reasonable and substantial relationship to the public health, safety, morals, and general welfare.

Zoning may permit different uses in each zone. For example, homes may be allowed in a residential zone but not in an industrial zone. Because a different mix of uses may be permitted in different zones, a local governing body could give arbitrary and discriminatory treatment to individual property owners. For example, adjacent parcels of land, under separate ownership, may be suited for industrial development. Zoning regulations may allow industrial development on one parcel and not on the other. The decision to apply the zoning regulations in that manner is arbitrary if based only upon the influence of one owner over another. Zoning should follow the land use plan. The land use plan can also be used as a legal tool to show that a contested zoning decision was completed in a fair manner and that it does have a relationship to the health, safety, morals, and general welfare of the public.

How it is Exercised

A governing body generally exercises its zoning authority by appointing a citizens' planning commission to advise it on the boundaries of each zone and the appropriate regulations for each zone. The planning commission is required to hold public hearings on its proposed zoning districts and regulations before submitting a final report to the governing body. The governing body may adopt the proposed zoning after it

has published a notice of the proposal so that interested citizens may learn of the planned action.

A person seeking to influence the governing body's decision on a zoning issue has three opportunities to do so. The first arises when the planning commission is investigating and preparing a recommendation. Interested persons may attend to express their opinions about the proposal when it holds public hearings. The second opportunity is when the governing body receives the recommendation and holds its own public hearings. The governing body is not required to follow the proposal of the planning commission and may reject its recommendation. Third, a person opposed to the decision by the governing body can file a suit in district court.

Rural Zoning

Rural zoning has been used in two general ways. The first is to control land use outside of and adjacent to a city. The purpose is to prevent the imposition of urban standards upon an agricultural area and to regulate land uses to benefit citizens living in the regulated areas. Some people may move out of the city but want features of city life and may try to eliminate the various sounds and smells which are produced by farming operations. Rural zoning can be developed to allow agricultural operations and regulate uses which might interfere with farming. Rural residences might damage water tables and water supplies which can be avoided or limited by controlling land use in rural areas. Rural zoning may prevent a city from expanding faster than its capacity to use the land within its boundaries by prohibiting rural residential subdivisions. Urban sprawl, as such wasteful expansion is called, like efficient and needed urban growth always seems to absorb the desirable farmland. Rural zoning can be used to preserve fertile farmland for agricultural uses.

The second general use of rural zoning deals with controlling land use in relatively undeveloped areas before any impending residential, commercial, or industrial development. For example, development related to the growing energy industry in this state can itself create a need for land use controls such as zoning. An inevitable part of a growing industry will be a need for residential development to house the workers and commercial development to service the needs of the workers and the industry. Public costs will be incurred to provide police and fire protection, schools, streets, and water and sewer facilities. Without public preparation for these costs and an ability to control how and where development occurs it is likely that: public costs are likely to be greater than if the development had been subject to public controls; costs may be imposed on those less able to afford them; the costs may not be in proportion to the benefits received; and the costs may be imposed more rapidly than the ability to pay for them.

Zoning in North Dakota

The four governmental bodies in the state which may adopt zoning regulations are counties, townships, airports, and cities. All receive authority to zone from laws passed by the state legislature. The same laws also detail the manner in which the governmental bodies must exercise the authority. How zoning may be used by each of the four governmental bodies is described to give the reader enough information to participate in zoning decisions and also to demonstrate how these land use controls affect agriculture.

County Zoning

The board of county commissioners must adopt a resolution which creates a county planning commission for a county to utilize its authority to zone the land within its boundaries. The planning commission is composed of nine people. Two must also be county commissioners; two must be members of the governing board of the city which is the county seat; and the remaining five members are to be residents of the county and appointed by the county commission. The duty of the county planning commission is to recommend (1) the boundaries of the various zoning districts and (2) the regulations and restrictions for each type of district.

The county planning commission is required to investigate the necessity of establishing zoning districts and regulations. It must involve the township boards in the areas which may be zoned. When the planning commission has completed its investigation it is required to prepare a resolution which would establish districts and prescribe regulations for each district. The resolution is filed with the county auditor and a public hearing is to be held by the planning commission. The public hearing allows discussion by any interested person on the proposed resolution.

The county commission may adopt the proposed resolution, reject it, or amend and adopt it after the public hearing. Upon adoption the county must publish notice of the resolution in the official county newspaper for two successive weeks. The published notice explains that any person may petition for a separate hearing before the county commission. If no petition for a separate hearing is filed the zoning resolution takes effect. If a petition is filed the county commission must hold a separate hearing to consider the objections to the resolution. At the county commissioners' next regular meeting they must either rescind or affirm their adoption of the zoning resolution. A person who is still not satisfied with the action of the county commission may appeal the decision to the district court. The county commission proceeds to implement the zoning resolution by providing for enforcement if no appeal to district court is made or if it is unsuccessful.

There are a number of exceptions to any zoning regulations adopted by a county. No zoning regulation

or restriction may prohibit or prevent the use of land or buildings for farming or any use which is incidental to farming. Nor may the lawful use of land or building which existed prior to the adoption of the zoning resolution be affected except under two circumstances. An existing use which does not conform to the zoning regulations and is discontinued for two years or more must follow the zoning regulations when the land or building is again used.

Another exception to any county zoning regulation is the application to townships and cities which are exercising their zoning authority.

Township Zoning

Townships in North Dakota may adopt zoning regulations. The process to be followed is similar to that which counties must follow. The township board of supervisors must appoint a township zoning commission. Three of the five members of the zoning commission must be township supervisors. The zoning commissioners must be appointed from the municipalities where zoning is contemplated. The initial duty of the zoning commission is to recommend the boundaries and regulations for zoning districts. The zoning commission holds public hearings on its recommendations before submitting a final report to the township supervisors. The township supervisors must also hold a public hearing where interested persons have had an opportunity to be heard. After the public hearing the township supervisors may adopt or reject the zoning proposal prepared by the zoning commission. Once adopted, the township may take actions to enforce the regulations, however, no township zoning regulation may prohibit or prevent the use of buildings or land for farming or any use which is incidental to farming. An appeal of township zoning rules or regulations may be made to district court.

City Zoning

The ability of a city to zone may seem to be of little importance to a farm operator. Unlike county and township zoning, agricultural uses within a city's zoning jurisdiction are subject to that city's zoning laws. There are two ways agricultural uses may be within city's zoning jurisdiction. The first is when a city annexes agricultural land. The second is when a city exercises its ability to extend its zoning regulations beyond its corporate limits. In either situation it is important for the agricultural landowner to understand the procedure the city uses to zone land so that he may be involved in the city's decision.

A city may extend its zoning regulations for a distance of up to two miles beyond its corporate limits. The precise distance a city may extend its authority to zone depends upon the size of the city. To do so, it must include on its zoning commission from one to three residents from the area outside of the city. They are appointed by the board of county commissioners.

The governing body of the city preparing to utilize its authority to zone must appoint a commission to recommend the boundaries of the zoning districts and the regulations which will be used to enforce them. The commission is required to make a preliminary report and hold public hearings before submitting the report to the governing body of the city. Once the governing body has received the report from the commission it must also hold public hearings before it may take any action on the report. Public hearings are held after the governing body has published notice of its intent to hold a public hearing. The notice must be published in the official newspaper of the city once a week for two successive weeks prior to the public hearing. If 20 percent or more of the affected landowners or the landowners within 150 feet of the affected area sign a protest petition, the city's governing body may approve the zoning action only by a three-fourths majority.

Airport Zoning

The safe operation of airports requires zoning regulations to keep land areas free of any structure, tree, or land use which would obstruct the airspace required for the landing or taking off of aircraft. The governing body which owns an airport within its boundaries may adopt airport zoning regulations. A city airport located outside of the city requires that the governing body which owns the airport and the one which has zoning jurisdiction where it is located may jointly create a zoning board to control land use in areas adjacent to the airport. A citizen commission must be appointed to recommend zoning boundaries and regulations. The citizen commission holds public hearings on its preliminary report before submitting a final report to the governing body. The governing body also holds a public hearing before it is able to adopt, amend, or change any airport zoning regulation. An airport zoning regulation cannot require the removal, change, or alteration of any structure or tree not conforming to the regulations when they are adopted. It may require that a permit be obtained before any new structure or use may be constructed and before any existing use or structure may be substantially changed, altered, or repaired. An appeal of a decision of an airport zoning commission or the governing body may be to a board of adjustment created by the governing body to hear appeals. A person may appeal a decision by the governing body or the decision of the board of adjustment to the district court.

Flood Plain Zoning

Counties, townships, and cities may be qualified to participate in the National Flood Insurance Program. Property located in participating governmental units can be insured at a subsidized rate against loss due to flooding. Governmental units which qualify for the subsidized insurance must take certain steps to minimize the amount of construction in areas susceptible to flooding. Some powers of counties, townships, and cities which are necessary to participate in the

program are zoning authority and the regulation of subdivisions. Counties and townships may limit their zoning authority to areas subject to flooding. The effect of such action is to limit and regulate building in those areas. Persons engaged in agriculture are not affected if they seek to build something which is normally a part of farming. Neither a county nor a township may exercise zoning or subdivision regulations to prohibit or prevent the use of land or buildings for farming.

Subdivision Regulations

Subdivision regulations will not affect a farm operator as long as he continues to use his land for agricultural purposes and does not attempt to develop it for some other use. If, however, he seeks to sell off pieces of his land so that someone can build a house or a store or some other building he is likely to be required to do so in accordance with subdivision regulations.

Once land is divided into smaller parcels and sold to individual owners the prior owner and developer are no longer involved. However, the manner in which the developer has divided, developed, and sold the land affects not only the new owners but also the local unit of government. When problems arise the new owners seek relief from that governmental unit. Often the governmental unit is not financially able to solve the problems. If it is able to solve the problem it must either pass the cost of a solution on to all of the inhabitants of the unit or attempt to collect from the people directly benefited. The first solution may be unfair and the second prohibitively expensive in most cases. The persons who stand to gain from the entire venture are the original owner and developer. Yet they are the ones who created the problem by failing to adequately prepare the land for development. Local government is able to ensure that all development is accomplished in a manner so as to avoid future problems through the enforcement of subdivision regulations. If an owner wishes to subdivide his property but does not follow the subdivision regulations he may be prevented from selling his land.

Subdivision regulations generally require that developers provide information about their proposed development and meet minimum standards. Typically the developer is required to ensure that the development has a safe water supply and sewage disposal system; the streets are of a minimum size, design, and construction; easements obtained for the provision of other utilities; the development plan is coordinated with any other surrounding developments; and the internal street design is compatible with the proposed use and with external streets.

A farm owner whose land is not located near a city may nevertheless be subject to subdivision regulations if he decides to develop his land. Just as a city may extend its zoning jurisdiction beyond its corporate limits, it may extend its jurisdiction over the subdivision of land from one-half mile to two miles depending

upon the size of the city. But even if the land is located beyond the reach of a city's extended jurisdiction, the county and the township have the authority to regulate the subdivision of land.

TAXES WHICH AFFECT AGRICULTURAL LAND USES

Property Taxes

Property taxes can influence the use of land. Land and the improvements on it are to be taxed based upon true and full value. Absent any safeguards, property taxes could force agricultural lands that are next to or within the boundaries of a growing city to be converted to urban uses. The market value of agricultural land adjacent to an expanding city is higher than other agricultural land because of its potential for being converted to urban uses. As a result the property tax is also higher. Often the land is not capable of paying taxes at the same rate as urban land when it is being used for agricultural purposes. Thus it may be necessary for the farm owner to sell the land or convert it to a use which can support the higher taxes.

North Dakota law provides that all farm structures and improvements located upon agricultural lands are exempt from taxation. This is true whether the land is miles from the nearest city, adjacent to a city, or within a city's boundaries. The effect is that as long as a farmer continues to use his land agriculturally, all farm structures and improvements located upon it are exempt from property taxes and his land will continue to be taxed as agricultural land.

The tax exemption for farm structures and improvements located on agricultural lands is not automatic. The person claiming the exemption has to establish the exempt status of his property. The owner of farm structures and improvements located within a municipality seeking the tax exemption must file a certificate with the county auditor. The certificate explains the basis for the requested exemption. This certificate must be filed each year before the assessment date or the auditor may treat the property as taxable.

Special Assessments

Once land is used agriculturally it retains the special property tax treatment described above. Even though agricultural land within the boundaries of a city is not to be taxed any differently than when it was outside of the city, it may be subject to another form of taxation. Special assessments are used to repay the costs of public improvements which are charged against individual parcels of land. They do not go to a governmental body for general uses as do property taxes but are used to pay for special projects which benefit particular parcels of land. The best example is the construction of a street or road. A road which will be used by the general public will probably be paid for with general tax funds. However, where the benefits go to properties which abutt the road, a part of the cost is charged

to those properties. The proportion of the total cost which is charged to the abutting property depends on the amount of benefit that property receives. The usual method used to determine the benefit each property receives is based on the number of linear feet which abutt or front onto the improvement.

Special assessments are used primarily in cities for the construction of streets and water and sewer lines. Streets and water and sewer lines can be used to direct urban growth because they must be constructed before development. Some improvements are put in at the request of the property owners' so they may subdivide, develop, and sell their land. An improvement may benefit a parcel of land whose owner does not wish to be benefited and is unwilling to pay for the benefit to land used for agricultural purposes. He cannot decline the benefits conferred upon his property by not paying special assessments. Special assessments are a lien upon the property assessed until fully paid.

The impact of special assessments on agricultural land within a city depends on the manner in which benefits to property are calculated. The city must try to balance treating everyone fairly by considering both present and future uses. The possibility that a currently vacant or agricultural parcel of land will be used differently in the future and thus utilize a benefit from a present improvement must not be mere speculation and conjecture. It would be unfair to only assess those who have developed their property for urban purposes when others will benefit once their land is developed. It is also unfair to assess agricultural land unless the potential benefit is considered in light of the future reasonable use of the property.

This line of reasoning follows a circular course. Agricultural land within a city probably will be assessed for improvements which encourage urban development because it probably will be developed for urban uses in the future. Because of the special assessment the productivity of the land is unable to pay for the added tax burden and it probably will be sold and developed for urban purposes. Therefore, it is justifiable to assess agricultural land.

There may be two more logical reasons for this result. The first is that urban development of agricultural land within a city is inevitable. If the city is growing at all it will probably be only a matter of time before the agricultural land is surrounded by urban development. The amount that could be realized upon sale of the agricultural land for urban uses could be more than the owner could resist. In addition, as the agricultural land is being surrounded by urban uses it could become a hardship on the farmer to get his equipment to and from the land.

The second reason is based upon the Nuisance Doctrine. A land use which interferes with another's use and enjoyment of his land or which impairs the health, safety, or general welfare of the community may be determined to be a nuisance and be prohibited. Whether this occurs would depend upon the type of uses sur-

rounding the agricultural use. Manufacturing uses would probably be affected less than residential uses. It might also depend upon the type of agricultural use which was involved.

The owner of land used agriculturally within a city could find that the annual special assessment may negate the special property tax treatment he receives. Normally farmland which is annexed into a city would not face this problem immediately. It takes some time for the land needs of a growing city to reach agricultural land located at its edge. The extension of street and water and sewer lines does not precede urban development by a long period of time. The owner of agricultural land thus has some time in which to anticipate the effect any special improvements may have on his farming operation and to adjust it accordingly.

Farmland within a city may be included in a special assessment district whether or not it has been subdivided. This is not true for township and counties since assessments for urban improvements may be made only upon request of a majority of the lot owners in a rural subdivision. It appears that agricultural land that has not been subdivided and is located outside of a city may not be included in special assessments for sidewalks, street lights, and other urban-type improvements. Nor may a city extend its special assessment district beyond its boundaries.

It is appropriate that since a city has the ability to initiate special assessment projects, the procedure which a city must follow is more detailed than that required for townships and counties. One difference between the required procedures is that the city is prohibited from proceeding with the project if the owners of a majority of the area included in a city's special assessment district object. A similar result is achieved where townships and counties may only act when a majority of the lot owners petition for the project.

PART III

HOW STATE AND LOCAL AGENCIES MAY AFFECT AGRICULTURAL LAND USE

A number of state and local agencies can affect land use through regulation of specific activities. Most state and local agencies possess greater authority to regulate than they actually exercise. It is important, therefore, to be aware of the nature and the limits of their authority.

State Agencies

The State Water Commission is able to influence agricultural land use through its authority to grant or deny permits for the use of water. The State Department of Health also is able to influence land use through its authority to control air and water pollution produced by agricultural activities.

Water Permits

A water permit is required before water may be used for most purposes from a river, stream, or lake. A water permit is not needed if the water will be used for domestic or livestock purposes, or for fish, wildlife, and other recreational uses. Domestic purposes include personal or household purposes. Livestock use refers only to water used for drinking by any herds or flocks of domestic animals. It does not include water used for sanitary purposes, such as cleaning cattle pens or feeding areas. Fish, wildlife, and recreation means water for developing and growing fish and wildlife resources and for development and maintenance of water areas necessary for outdoor recreational activities. All other uses of water, such as water to be used for irrigation, require a permit from the State Water Commission.

Additional information on agricultural uses of water is available in the current joint Ag Law/Econ Research Program Report "How a North Dakota Farmer/Rancher Acquires Water Rights."

Water Pollution

National and state efforts to ensure the quality of water have greatly increased since 1972 when Congress passed the Clean Water Act. North Dakota developed a program to prevent the discharge of pollutants into the state's waters. Water pollution is of two types of sources. Specific sources of pollution are called point sources and those not identifiable to a particular use or person are called nonpoint sources.

Both may be caused by agricultural operations. An agricultural point source could be a feedlot where the wastes are deposited or are allowed to wash into a river or lake. All concentrated feeding or feedlot operations require approval by the State Department of Health in four situations: (1) where the number of animals being fed, handled, or held at any one time equals or exceeds 200 animal units; (2) where it is located in the flood plain and the number of animals being fed, handled, or held equals or exceeds 100 animal units; (3) when it is located with two feet, per animal unit, of any waters of the state; and (4) if the Health Department has found that the wastes from the operation cause or are likely to cause water pollution. An animal unit depends upon the kind of animal being fed or handled. For example, one animal unit is either one mature beef animal, or one dairy cow, or one horse, or one and a half feeder cattle, or four swine, or eight sheep; or 30 geese, ducks, or turkeys; or 80 chickens. A concentrated feeding or feedlot is any livestock feeding, handling, or holding operation; or any feed yard where animals are concentrated in an area which is not normally used for pasture or for growing crops and where animal wastes may accumulate or where the space per animal unit is less than 600 square feet.

Nonpoint sources in agriculture may be caused by all types of erosion, by fertilizers, and pesticides which wash into rivers and lakes. Prevention of water pollution from nonpoint sources directly benefits the land-

owner. This has led North Dakota to adopt a voluntary approach to preventing water pollution. The emphasis is on education, technical and cost sharing assistance, research, and monitoring and evaluation.

Air Pollution

The State Health Department has the authority to regulate three areas which may interest farm operators. The first, water pollution, was discussed above.

The second is air pollution. The State Health Department has developed regulations which prohibit the discharge of solid airborne particulate matter. Such a condition could be produced by farming operations such as plowing. However, this type of air pollution is specifically exempted from regulation when caused by agricultural activities related to normal operations of a farm.

The third is the general restriction on open burning. Burning of trees, brush, grass, or wood in the clearing of land, right-of-way maintenance operations, and agricultural crop burning is allowed if a number of conditions are met: oil and rubber may not be burned; the burning may begin only between three hours after sunrise and three hours before sunset; the burning must not be conducted so as to create a traffic hazard, and must be at least one mile from any airport or landing strip; and care must be taken to minimize the amount of dirt on the material being burned.

Local Agencies

Soil Conservation Districts

The dust bowl disasters of the 1930's led the U.S. Congress to pass legislation designed to assist states in promoting soil conservation activities. North Dakota responded with laws permitting the organization of Soil Conservation Districts. Soil Conservation Districts are governmental bodies organized to promote soil conservation in a number of ways. Most districts use education, technical assistance, and encouragement to promote soil conservation, although they can impose land use regulations. Those land use regulations seek to conserve soil and soil resources and prevent and control soil erosion. They may require particular methods of cultivation, cropping programs and tilling practices, and restrict or prohibit cultivation of areas highly susceptible to erosion.

Land use regulations, which a Soil Conservation District might impose, would directly affect agricultural operations much more than other types of land use regulations mentioned above. The district regulations would affect how a farm operator conducts his farming operation. The land use regulations from other governmental bodies affect farming to the extent that agriculture is a permitted use, or when a farm is located near or in a city, or when farmland is converted to a different use, such as industrial or residential uses.

The potential impact upon farming is moderated in two ways. One is in the procedure which Soil Conservation Districts must follow to establish land use regulations. A regulation can be imposed by the district only after it has been approved by three-fourths of the persons voting in the district. Any land use regulation adopted in this manner would probably constitute either minimal control or deal with some obvious and serious problem. The second way the authority to regulate is moderated is the historical approach taken by the Soil Conservation program. Education and encouragement have been the main tools used to deal with soil conservation problems.

Water Management Districts

A Water Management District is a special local governmental entity. It is governed by a Board of Commissioners appointed by the County Commission. The entire state is included within these districts. The basic purpose of the Water Management District is to control and regulate water. For example, they control dams, water channels, and water storage devices within the district. The district board also may control water levels and regulate streams, channels, or water courses.

The district's most significant impact on agriculture is its authority to order or initiate legal action to stop the destruction of native woodland within 200 feet of a riverbank that is subject to overflow flooding. If the native woodland has already been destroyed, the district board may order the planting of a shelterbelt. The authority is limited to circumstances where overflow flooding would cause extensive property damage due to erosion or blocking the river channel. It is possible that a farmer who is planning to clear or has cleared woodland in order to expand his farming operation may find his efforts stopped by the Water Management District Board.

The Water Management District Board also may affect agriculture indirectly. The board can undertake construction projects to control and regulate water and it may acquire land. The County Commissioners may levy a tax upon the property in the county to pay for these activities. The district board also may finance some activities through a special assessment. As with any special assessment, only those properties benefited by the project may be assessed. Agricultural operations may be affected to the extent that the general property tax and the special assessment constitute additional overhead expenses.

Drainage Board

The County Commission may also establish a Board of Drainage Commissioners. The Drainage Board is given the authority to provide for drainage of land and to make rules and to regulate drainage. To finance its activities that cannot be directly allocated to any specific drainage project, the county may authorize a small general property tax upon the property in the

district. The Drainage Board is also able to finance specific drainage projects by assessing a portion of the cost to those properties which benefit. The ability of the county to levy a general property tax and a special assessment appear to be the only primary effect of a Drainage Board upon a farmer's land use decisions.

The Drainage Board has the ability to agree or decline a request to construct drainage channels. A farmer whose interests are in opposition to the proposed actions of the Drainage Board may have his interests altered. There are procedures and hearings with which the Drainage Board must comply before it may authorize a drain. The requirement most important to any affected landowner is that each landowner who may be subject to an assessment for a proposed drain must receive a notice of the hearing at which the proposed drain will be discussed. An affected landowner may appear before the Board, express his views, and offer evidence concerning the proposed drain. Before the Drainage Board may act on a proposed drain, it must allow the affected landowners to vote on the proposed drain. The Board must deny the drainage project if 50 percent or more of the affected landowners oppose the drainage project.

The Drainage Board also is authorized to develop rules and regulations for drainage and drains. It is able to enforce its rules and regulations by requiring that a landowner close a drain which the Board has determined to be contrary to its rules and regulations. The Board may have the drain filled and assess the cost to the landowner if he fails to comply with its order. The landowner may demand a hearing by the Board and may appeal to district court if he is unsuccessful at the hearing.

Irrigation Districts

A majority of the landowners of 80 acres or more, who wish to irrigate their land, may petition the state engineer to create an irrigation district. A hearing will be called to discuss the petition and the estimated cost of the proposed irrigation works. The state engineer may deny the petition after the hearing or approve it subject to an election by the landowners of the proposed district. A board of directors must be elected if the irrigation district is approved.

The powers of the irrigation district of interest to farmers are its ability to build and fund the construction of irrigation projects. The board must formulate a general plan of its proposed operation prior to construction. The plan must state the construction it will undertake, the property it will acquire, and the estimated costs of each. It also must state whether funds to accomplish its projects will be raised by issuing bonds, by special assessment, by charges to water users, or some combination. A majority of both the board and the landowner must approve at a bond election if bonds are to be issued. When special

assessments are used they are apportioned to property according to the amount of benefits it receives. The board may, if it so desires, call a special election to determine if a special assessment should be used to pay for its projects.

Garrison Diversion Conservancy District

The Garrison Diversion Conservancy District includes counties in North Dakota expecting to benefit from the Garrison Diversion Project. The future of the Garrison Diversion Project is uncertain, but there is one major land use control which affects farming operations if irrigation does result. Land which is irrigated by water from Garrison Diversion is subject to regulations which will determine the best management practices on the irrigated land. The regulations are to be prepared by the Director of the Agricultural Experiment Station and include the application of water, fertilizers, pesticides, and herbicides in amounts that maximize crop production and economically efficient farming while minimizing chemical or other pollution and degradation of ground water or surface water supplies. The district is responsible for monitoring compliance with these regulations and is authorized to reduce the water to persons violating the regulations.

How To Live With Land Use Controls

Governmental land use planning and regulation at the state and local level already exist. The ability of these governmental bodies to do so is well established. Whether they actually exercise the powers they possess is within their discretion. When exercised, the purpose to be achieved must benefit the general welfare of the residents in that area. Individuals may feel that they are forced to carry a special burden in pursuit of the general welfare. Whether any individual actually is specifically burdened may be debatable. In either case it is important to realize that there are ways a landowner can influence policies and methods of land use regulation and ensure that any burdens imposed upon are legitimately necessary to benefit the general welfare.

Each governmental body which seeks to regulate or influence land use must derive that authority from state law. The exercise of land use regulations must not exceed the provisions of state law even where state law allows some form of land use control. The state law which authorizes land use controls also describes the manner in which a state or local governmental body must exercise the regulation. When zoning is exercised, virtually all land use regulation schemes require citizen participation prior to the establishment of the regulation, usually in the form of public hearings

Any person who wishes to influence the form and extent of land use regulations should become involved as early as possible in the process. It is usually more difficult to change a regulatory scheme after it is adopted than prior to its adoption.