

AGRICULTURAL MITIGATION CASE STUDIES

**Program Summaries and Stakeholder Perspectives
from Seven Western Communities**

LAND USE & NATURAL RESOURCES CLINIC
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CLINIC STUDENTS

Andrea Collins

Jordan Fitzgerald

Katelyn Hepburn

CLINIC DIRECTORS

Professor Michelle Bryan, Supervisor for Project

Professor Martha Williams

LAND USE & NATURAL RESOURCES CLINIC

University of Montana School of Law

32 Campus Drive

Missoula, MT 59812

406.243.2528

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BACKGROUND

This report supplements an earlier clinic report entitled *Agricultural Protection in Montana: Local Planning, Regulation, and Incentives* (Spring 2012). That earlier report discussed Montana law governing the protection of agriculture during subdivision review, and outlined possible approaches to mitigating impacts on agriculture due to land development. Subsequent to that report, the Missoula community raised additional questions, including: how well different types of mitigation are working on the ground; how to calculate a value for conserved lands; how to ensure responsible management of conserved lands; and how mitigation works alongside voluntary land protection measures.

To assist Missoula County with these additional questions, the Land Use & Natural Resources Clinic has gathered information from seven western communities engaged in regulatory protection of agricultural lands. The subject communities use a variety of approaches from land acquisitions or set asides, to fees-in-lieu, to a blending of these tools. We attempted to gather information that speaks to the questions currently raised by Missoula County stakeholders, and we sought input from various stakeholder perspectives such as local planners or officials, land trusts, agricultural interests, and developer interests. However, representatives from each perspective were not always available in each location. The summaries below describe the community's background, its approaches to mitigation, and key stakeholder observations and lessons.

We hope this information proves useful as Missoula County continues to engage its stakeholders in the complex, important conversation of how to best implement agricultural mitigation in our community.

COMMUNITY SUMMARIES

King County, Washington¹

Overview of Community

King County is located in western Washington. The County is dominated by the City of Seattle, but it also contains numerous fertile valleys that support a vibrant agricultural community. In 2013, the County had an estimated population of 2,044,449 (an approximate 5.9% increase from 2010, compared to a 3.7% increase statewide).² King County is comprised of approximately 2,115 square miles, resulting in a population density of about 966 persons per square mile.

¹ The participants interviewed in the King County, Washington area were: Ted Sullivan, Program Manager for King County's Farmland Preservation Program; Leann Krainick, King County dairy farmer; and Maia Barmish, Outreach Manager for Forterra Land Trust.

² United States Census Bureau, *State & County QuickFacts: King County, Washington*, <http://quickfacts.census.gov/qfd/states/53/53033.html> (accessed December 6, 2014).

Rural unincorporated King County covers central and eastern King County, which are areas outside the Urban Growth Boundary. These areas are designated Rural, Agricultural or Forest Resource by the King County Comprehensive Plan. Uses include forest, farmland, woodlands and low-density residential. Rural and Resource areas, which cannot be annexed into a city, cover the majority of King County's land area but contain less than one-tenth of the county's population. This area has grown very slowly since growth management took effect in the mid-1990s: less than 5% of countywide new residential construction and population growth occur there.³

As of 2011, King County contained around 1,800 farms comprising approximately 50,000 acres. There are also 41 farmers markets in the county that provide dozens of locally grown products to consumers in the area. The total agricultural sales for the county stood at over \$127 million in 2007.⁴

Voluntary Easement Purchases

The Farmland Preservation Program (FPP) is the county's primary method of agricultural protection. It is a voluntary program that purchases development rights from farmland owners to permanently protect agriculture or open space uses. The county places covenants on the property that restrict its use and development in perpetuity. The FPP's history and current challenges are outlined in a 2009 study (attached as Appendix A). The covenants are contained in an agricultural conservation easement known as the Deed of and Agreement Relating to Development Rights (Appendix B). The Deed and Agreement is both an easement and a contract, as it places restrictive covenants on the property and imposes contractual obligations on the property owner.⁵ It is, however, a more simplified document than a conservation easement.

King County holds the development rights in trust on behalf of its citizens. The covenants restrict the land to agricultural or open space uses, permanently limit the number of dwelling units, and require that 95 percent of the property remain open and available for cultivation. Although the covenants do not require that the property be actively farmed, they prohibit any activities that would permanently impair the use of the property for agriculture.⁶ The Deed and Agreement also reserves a county right of access for compliance monitoring.

Voters approved the FPP in 1979 when they authorized an initiative allowing the County to collect a \$50 million bond to protect rapidly diminishing farmland. It took three

³ King County, Washington, *2007 Annual Growth Report*, <http://www.kingcounty.gov/exec/PSB/Demographics/DataReports.aspx> (accessed December 6, 2014).

⁴ King County, Washington, *Agriculture*, <http://www.kingcounty.gov/environment/waterandland/agriculture.aspx> (accessed December 6, 2014).

⁵ King County, Washington, *Farmland Preservation Program*, <http://www.kingcounty.gov/environment/wlr/sections-programs/rural-regional-services-section/agriculture-program/farmland-preservation-program.aspx> (accessed December 6, 2014).

⁶ *Id.*

separate attempts to pass the initiative. Initially, the language only considered agricultural protection. However, after discussions with conservationists, open space language was added, which helped the initiative to pass.

During the 1980s, King County acquired the development rights on 12,600 acres of high quality farmland within its boundaries. The county is continuing to purchase development rights on select properties, and there are now approximately 13,200 acres that are permanently protected. Landowners are compensated according to the difference between the farm value and market value of the property. FPP properties include dairies, beef, horse and other animal operations as well as nurseries, turf farms, and farms raising hay, silage, berries, row crops, flowers, and Christmas trees.⁷ These protected farmlands are located primarily in the Green, Sammamish, and Snoqualmie River Valleys and on the Enumclaw Plateau and Vashon Island.

According to the FPP program manager, the program is currently attempting to expand by adding new farmland. However, a lack of funds presents a challenge to acquiring new development rights. The FPP is constantly seeking funds through local, state, and federal governmental grants and private funding sources, which primarily support the monitoring of protected parcels.

The primary source of current program funding is the Washington Wildlife Recreation Program (“WWRP”). Although originally enacted to protect lands used for recreation, the WWRP in 2005 expanded to include protection of the state’s valuable agricultural lands. The program is administered by the Recreation and Conservation Funding Board, a governor-appointed board. Cities, counties, and nonprofit conservation organizations are eligible for grant funding through the program. Typically approved projects include acquisition of development rights, or a combination of acquisition and restoration projects. Grant money may also be used for the development of a farm stewardship plan of up to \$10,000, which focuses on farming practices that also protect habitat. The WWRP defines what qualifies as farmland and includes minimum acreage requirements. All participants in the grant program are required to provide a minimum of a 50% match for each WWRP project. For a detailed overview of the program, how the legislature allocates funds, and how projects are evaluated, see Appendix C.

Additional potential sources of funding include the King Conservation District (“KCD”), and the National Fish and Wildlife Foundation (“NFWF”).⁸ The KCD awards grants for projects that will improve natural resources in the county and provide educational opportunities to county residents. In 2014, the KCD awarded over \$1 million in grants for various projects. Although very few of those dollars have been utilized for agricultural land protection, it is a potential future funding source. The NFWF has teamed with Wells Fargo to offer over \$2.5 million to support “highly-visible projects that link economic

⁷ *Id.*

⁸ Water and Land Resources Division: King County Conservation Futures and Open Space Capital Improvement Program.

development and community well-being to the stewardship and health of the environment.”⁹ Among the many types of projects eligible for funding in 2015, the acquisition of land and conservation easements is one.

King County balances its farmland protections with “critical areas” protections that support farms in using best practices near streams and habitat areas. The county also complements the FPP with its Local Food Initiative and CSA directory.¹⁰ In 2009, the county also released an important “FARMS Report - Future of Agriculture Realizing Meaningful Solutions,” which studied measures “to ensure the continued success” of the county’s agricultural economy and recommends measures “to reduce barriers and create support so that a viable future may be realized for agriculture.”¹¹ (Appendix A).

Financially, farms, including those protected under the FPP, do especially well in King County. This is due to an on-going demand from the Seattle metropolitan area for locally grown food products. Producers are able to charge a higher value due to higher demand, thanks in part to the absence of a middleman processor or distributor. Farmers that participate in the program enjoy a 90% reduction in state property tax as well, which lessens the financial burden on local farms. One large dairy farmer in the area said that this property tax reduction, as well as the up-front cash payment for the purchase of their development rights, was the primary motivator for participating in the program.

Interestingly, with the readily available market, beginning producers are actually seeking *smaller* parcels of farmland. Smaller parcels fit with the specialized foods provided to the metropolitan area and are easier to manage for small operators. The largest producers, which are normally dairy operations, only comprise about 300 acres at the most. One of those large dairy farmers noted that when they were looking to expand their operation, they specifically targeted lands in the program because they were much more affordable. The same farmer highlighted the downside to participating in the program – that the pool of buyers shrinks when lands can be used only for agriculture. The county also faces a challenge with growing splits in farm ownership, such as in the case of family heirs or partial sales of a farm.

FPP deed restrictions do not require the parcels to be actively farmed. The County specifically studied this option and rejected it for a number of reasons. The program manager stated that such a requirement would make the farmland more expensive to purchase and more difficult to sell. This result would work against a primary goal of the FPP, which is to provide farmland at a reduced cost to emerging producers. Overall, the

⁹ National Fish and Wildlife Foundation, *Environmental Solutions for Communities Grant Program 2015 Request for Proposals*, <http://www.nfwf.org/environmentalsolutions/Pages/2015rfp.aspx#.VSLNbuEsosI> (accessed April 2, 2015).

¹⁰ King County, Washington, *Agriculture*, <http://www.kingcounty.gov/environment/waterandland/agriculture.aspx> (accessed December 6, 2014).

¹¹ King County, Washington, *FARMS Report*, <http://www.kingcounty.gov/environment/waterandland/agriculture/documents/farms-report-future-of-agriculture.aspx> (accessed May 27, 2015).

benefits would be overshadowed by the burdens of such a requirement. The manager maintained that other methods, such as tax incentives, work better to encourage on-going production on the protected lands.

Other Considerations

Comprehensive Plan Language. King County also cites the strong language in its comprehensive plan in support of agriculture, which states:

It is a fundamental objective of the King County Comprehensive Plan to maintain the character of its designated Rural Area. . . . King County's land use regulations and development standards shall protect and enhance the following components of the Rural Area: a) The natural environment . . . b) Commercial and noncommercial farming . . . and cottage industries; . . . d) Community small-town atmosphere, safety, and locally owned small businesses; e) Economically and fiscally healthy Rural Towns and Rural Neighborhood Commercial Centers with clearly defined identities compatible with adjacent rural, agricultural, forestry and mining uses.¹²

This established language provides support for the FPP to continue and expand its mission to protect agricultural land in the county.

Impacts on Land Trusts. The FPP maintains good relationships with land trusts in the area. This is especially encouraging because the program does impact the land that land trusts are able to protect under conservation easements. Essentially, separate spheres have emerged between the FPP and land trusts. The FPP is the primary conservation method for agricultural land while land trusts focus on other vital areas of the region. Even when land trusts are contacted by agricultural land owners, the land trust will direct the producer to the FPP for consideration of its program before the land trust will act.

A staff member at the Forterra Land Trust, the largest land trust in the King County area, expressed a generally positive view of the FPP. She highlighted the broad opportunities for land trusts in the area to acquire conservation easements with a multitude of conservation goals and purposes, including agricultural lands, but also critical wildlife habitat, riparian areas, and forested areas. Forterra focuses most of its agricultural protection efforts outside of King County, in the Yakima Valley.

Impacts on Farmers. One program participant highlighted that the county has been easy to work with, both through the negotiation phase and the ongoing monitoring of the property. That same farmer shared a unique example of the benefits of being a member of the program. Adjacent to her particular agricultural operation is a subdivision. Developers began building an access road that was encroaching on her farmland. She immediately notified FPP staff who intervened, sent a survey crew out the next day, and resolved the conflict. The farmer stated that, had the farm not been in the program, it likely would not

¹² King County, Washington, *2008 King County Comprehensive Plan with 2010 Update, Rural Legacy Area and Natural Resources Lands R-201* (2010).

have had the resources to react as quickly as the county did. She was grateful and felt as though the county was standing by their commitment to protect farmers and farmlands.

The same farmer explained there is a general misunderstanding of conservation easements and program benefits among many farmer and ranchers in her community. She further expressed that there was no strong educational component when the program was launched. The county held very few open meetings or informational sessions. The success of the program hinged on a few key individuals within the county that targeted particular leaders in the farming community, made farm visits, knew how to talk to farmers, and often had a farming background which gave them additional credibility. But she highlighted that even today, there are a lot of misconceptions about how the program works, the level of control the county has over the property, and the economic benefits of participating in the program.

Finally, in offering advice to other local governments looking to implement agricultural protection measures, that same farmer highlighted the importance of incorporating flexibility into easements, or the willingness to amend easements in light of new technologies. She said for example, that her farm would like to expand and process milk on site, but that development would require additional infrastructure, and her current operations already use the total 5% impervious surfaces allowed by the easement. In this farm's case, a lack of flexibility is hindering its ability to maximize profitability and capitalize on the growing local food movement in the region, a point of frustration for the landowners and operators. In spite of this frustration, this farmer is still satisfied with her choice to participate in the program, and encourages other areas to adopt similar programs.

Conclusions and Lessons

King County's method of agricultural protection centers on its Farmland Preservation Program, which has survived for over three decades and continues to protect prime agricultural land in perpetuity. The county balances farm protection with habitat protection and also complements its FPP with other farmer support programs. King County provides a model of "hands on" local government involvement in agricultural mitigation, but it has resulted in a high percentage of protected lands and a strong agricultural economy. The county and local land trusts have carved out separate spheres of land protection, and established beneficial relationships that further each party's goals.

Bannock County, Idaho¹³

Overview of Community

Bannock County is located in southeastern Idaho and contains the City of Pocatello, the county seat, along with vast areas of rural lands. The rural lands are composed primarily of agricultural land along with a substantial amount of federal and state public lands. In 2013, the County had an estimated population of 83,249 (an approximate 0.5% increase in population from 2010). In comparison, the entire state of Idaho experienced a 2.8% population increase in the same period.¹⁴ Bannock County is comprised of approximately 1,112 square miles, resulting in a population density of about 75 people per square mile.

Access to higher education and the intersection of major north-south and east-west interstate highways fuel Bannock County's population and economic growth. The county has benefited from expanding research and energy related programs at Idaho State University, especially alternative energy research and spin-off business activity. Over the last decade, food manufacturing and construction in the County increased dramatically. Pocatello and Bannock County, like the rest of southeastern Idaho, benefit from profits generated by local agriculture and food-related manufacturing, mostly in relation to the dominant potato industry in the area. However, the County has suffered from an economic downturn in conjunction with the recession. In 2012 Bannock County's annual unemployment was 7%. The rate in 2013 stood at 6.3% and is likely to drop further in 2014. Despite decreased unemployment, the county is still far from the unemployment 2.7% levels experienced just before the recession.¹⁵

On-Site Set Asides

Bannock County's agricultural mitigation measures start with established agricultural districts under the county's zoning ordinance. There are accompanying rules for development review in both the zoning ordinance and the subdivision ordinance for these lands. The agricultural zones are "not intended to accommodate non-agricultural development." Bannock County allows only one building per 160 acres in its agricultural districts.¹⁶ Aside from limiting density, the rules have a primary aim of protecting open space and do not specifically discuss types of agricultural soils. Agricultural open-space is just one form of open space restriction in the county, along with elevation and wildlife interface open spaces.

¹³ The participants interviewed in the Bannock County, Idaho area were: Linda Tigert, Bannock County Planning Director; Lori Harris, local farmer in adjacent county; Jerry DeBacker, Sagebrush Steppe Land Trust Executive Director, and Gary Ratzlaff, a former developer in the Bannock County area.

¹⁴ United States Census Bureau, *State & County QuickFacts: Bannock County, Idaho*, <http://quickfacts.census.gov/qfd/states/16/16005.html> (accessed December 4, 2014).

¹⁵ Idaho Department of Labor, *Bannock County Workforce Trends*, <http://labor.idaho.gov/publications/lmi/pubs/bannockProfile.pdf> (accessed December 4, 2014).

¹⁶ Bannock County, Idaho, *Zoning Ordinance No. 1988-1 § 310* (1988).

When subdivision occurs in agricultural zones, the subdivision regulations have site performance standards requiring that “at least ninety (90) to ninety-five (95) percent of all such areas shall remain as permanent open space. Accessory farm structures (i.e., barns, silos) shall be permitted in the open space. This is to preserve and protect the important agricultural soils, crop lands and grazing areas of the county.” The open space is placed under a deed restriction and the developer has the option of retaining ownership or transferring ownership to a qualified entity.¹⁷ A clustering incentive is used to encourage building near existing roads rather than throughout the parcel when subdivision occurs. Bannock County also allows for a 10% increase in density if a developer chooses to cluster.¹⁸ The one building per 160 acres regulation works in conjunction with the percentage requirement for open space. The single building requirement focuses on dwellings utilized for housing, while the percentage requirement limits the total ground that the dwelling and accompanying structures may cover.

The county adopted these regulations in 1997 in response to the County’s concern over the loss of agricultural lands to subdivision development. However, under the tenure of the current county planning director, which began in 2008, no subdivision has required an on-site easement for agricultural mitigation. The planning director cited the County’s economic downturn for the lack of development on agricultural lands. She indicated there were signs of recovery in the area, which may lead to agricultural development consideration in the near future. In addition, currently, there is land available for subdivision in areas closer to Pocatello, which have very little open space requirements. This has helped to steer development away from established agricultural zones.

Since 2008, the planning director is aware of subdivisions subject to open-space restrictions for elevation and wildlife interfaces. Since 2008, ownership of the open-space set asides has either been retained by the developer or held in common by a homeowners’ association for the accompanying subdivision. When the developer has retained the open-space ground, there have been instances of the developer using the ground for grazing livestock. Under the current planning director, there have been no examples of a developer using the County’s option to transfer the set aside land to a qualified entity.

In terms of land stewardship and enforcement, the County has focused on noxious weeds and has no specific requirement that agricultural land remain in production. The fact that the County has no such requirement may be due to the intergenerational land ownership patterns (discussed below), as well as the strong market for agricultural produce, in this area.

Other Considerations

Political Nature of the Community. According the executive director of the Sagebrush Steppe Land Trust, an organization dedicated to conserving open-space in seven

¹⁷ Bannock County, Idaho, *Subdivision Ordinance No. 1997-4* §§ 410.C, 409.E (1997).

¹⁸ Bannock County, Idaho, *Comprehensive Plan*, p. 38 (2008).

counties of southeastern Idaho, the dynamics of the agricultural community in the area present challenges for the enforcement of the County's agricultural regulations.

The region is composed of small communities with a very conservative population. Landowners in the area belong to an older generation and maintain the ownership of agricultural land in multi-generational patterns. Many of the landowners share the same religious affiliation, which creates an even stronger familial connection and continuation of the agricultural industry. The established agricultural community maintains land ownership in large tracts and has ready access to established markets in the area, such as Frito Lay and Budweiser. These dynamics impact the pool of lands available for local food production and new, young farmers wanting to get into agriculture.

One local farmer in a neighboring county who voluntarily sold her development rights to the Sage Brush Steppe Land Trust expressed concern that, with the current mentality of farmers in her region, if agricultural conservation is solely voluntarily, there "won't be enough conservation." She emphasized the importance of framing regulations as a means to protect land for farming into the future. Education and outreach are important components of the effort, as most members of her farming and ranching community know very little about conservation easements, have misconceptions about who holds them, and believe they are synonymous with government control. Aside from sharing the financial benefits, it is also helpful and important to communicate to the farming and ranching community that conservation easements are a way of protecting family heritage and preserving a way of life, which resonates with many in the community.

In addition, the trust director noted that it would help the county to have a plan for which agricultural lands it most wants to protect, with an eye toward "functioning" lands that have water supply and are connected to road systems, services, and one another. Additionally, although Bannock County's regulatory scheme does not allow for fees in lieu of on-site easements, this individual supported the idea of fees in lieu in order to further protect agriculture. He had experience in a prior community with fees in lieu and emphasized the importance of maintaining a segregated account for the funds to specifically be used in agricultural mitigation measures. He stated that fees in lieu would be especially beneficial where a locality could avoid establishing numerous small parcels for protection, which would provide problems of management, monitoring, and enforcement.

Importantly, due to the conservative nature of the population, the land trust director also noted a lack of political will to actually enforce agricultural regulations in the area. Although the director could not point to any specific violations of the regulations that are in place, he cited to the overall view and sentiment of the community and county government to enforce the regulations in the agricultural areas zoned in the county. There is also a lack of funding among local governments to effectively protect agricultural interests outside of the development process. The director for the land trust stated he would be happy to cooperate with local governments in mitigating harms to agriculture, but both the lack of political will and funding make cooperation challenging.

Impacts on Developers. A local retired land developer expressed mixed feelings regarding the on-site set aside requirements for Bannock County. He felt the 1:160 requirement, in conjunction with the open space percentage requirement, were too restrictive for the area. He felt that the already large and diverse agricultural community in the area does not require such strict regulation. He said however, since he has retired, he has eased on his views of the set aside regulations. He understands the importance of agriculture in the area and the need to ensure that the community continues to survive and thrive.

The developer also cited the availability of land in non-agriculturally zoned areas as a contributing factor to a lack of development on agricultural lands. The lower density residential zones provide for a sustainable growth area for the County. Overall, he credited the recent economic downturn and slow housing market for steering development away from agricultural areas.

Conclusions and Lessons

Bannock County's subdivision regulations regarding agricultural mitigation remain largely untested. Although agricultural mitigation measures have not been used in the last six years, other open space measures in the County can be considered as examples. The demographic and political makeup of the region presents a particular difficulty for local governments to enforce agricultural protections. There also is a lack of robust collaboration between the county and the land trusts, which may be affecting agricultural protection. And while operators in this community have been able to transfer their agricultural operations to the next generation, the community may not have adequate plans in place for the production of local food or access to lands for new farmers. Finally, the county may need to further examine whether its on-site set aside approach will result in a lack of connectivity among agricultural parcels as well as the services on which they depend.

Teton County, Wyoming¹⁹

Overview of Community

Teton County is located in the northwest corner of Wyoming.²⁰ As of 2013, the population estimate for the county was 22,268,²¹ and the county's total area is around 3,995 square miles, or 2,556,800 acres.²² Approximately 97% of the total land in the county

¹⁹ The participants interviewed in Teton County, Wyoming were: Katrina Van Every, Teton County Staff Planner; Shawn Means, Teton County Staff Planner; Liz Long, Director of Conservation for Jackson Hole Land Trust; and Tom Garlock, Teton Land & Development Group.

²⁰ Teton County, Board of County Commissioners, *About Teton County*, <http://www.tetonwyo.org/bcc/topics/about-teton-county/250746/> (accessed Dec. 11, 2014) [hereinafter *About Teton County*].

²¹ U.S. Census Bureau, *State & County QuickFacts: Teton County, Wyoming*, <http://quickfacts.census.gov/qfd/states/56/56039.html> (last revised Dec. 4, 2014).

²² *Id.*

is under federal ownership, including Yellowstone and Grand Teton National Parks.²³ The only incorporated town in the county is Jackson, located in the Jackson Hole Valley.²⁴ About 45% of the residents in the county live in Jackson, and the remaining 55% live in the unincorporated areas.²⁵

The economy of Teton County is primarily tourism-based.²⁶ However, the ranching and farming heritage is long-standing in the county and the scenic, agricultural, and wildlife views play an integral role in the local economy.²⁷ The county estimates over half of the economy is dependent on the county's natural resources in some way.²⁸ Directing growth away from habitat, scenery, and open space, including agricultural lands, is an important identified county goal.²⁹ The county tracks its progress in meeting its planning goals through an annual indicator report.³⁰ Of the total privately owned land, approximately 28% is held in conservation easements.³¹ The average home price is very high (one developer estimates \$1 million), and affordable housing is a required component of all new residential developments. The entire county is zoned.

In the 1970s, the county established a Scenic Preserve Trust for the purposes of carrying out the scenic resources and wildlife habitat goals stated in the Comprehensive Plan. While that county trust still exists and holds approximately 50 easements,³² it is not actively acquiring easements today because it has not been adequately funded. The Jackson Hole Land Trust (JHLT) is the predominant land trust in the area, and the county is interested in transferring its easements to JHLT in situations where the land trust holds easements on adjoining properties. The county contracts with private entities to conduct its easement monitoring.

Set Asides

Teton County requires set asides of land during development to protect for wildlife values, scenic values, and open space.³³ The percentage of land set aside varies according to several factors, including the zoning designation, type of development, and type of values

²³ Jackson/Teton County Comprehensive General Plan, *Appendix B: Current Conditions Analysis*, 12, <http://www.tetonwyo.org/compp/topics/jackson-teton-county-comprehensive-plan/251817/> (accessed Dec. 12, 2014).

²⁴ *About Teton County*, *supra* n. 20.

²⁵ Jackson/Teton County Comprehensive General Plan, *supra* n. 23, at Appendix B-9.

²⁶ *About Teton County*, *supra* n. 20.

²⁷ Teton County Land Development Regulations § 6.1.3 (effective Jan. 2015), <http://www.tetonwyo.org/pdplan/topics/teton-county-land-development-regulations/201979/> (accessed Dec. 12, 2014).

²⁸ *Id.*

²⁹ *Id.*

³⁰ See e.g., 2014 Annual Indicator Report, *available at*

<http://www.tetonwyo.org/compplan/CompPlanAdmin/IndctrRprt2014.pdf>.

³¹ Jackson/Teton County Comprehensive General Plan, *supra* n. 23, at Appendix B-10.

³² For a list of easements, see <http://maps.greenwoodmap.com/tetonwy/mapserver/tcspt.php> (accessed June 3, 2015).

³³ Teton County Land Development Regulations, *supra* n. 27, at § 6.1.3.

present on the developed parcel.³⁴ While agriculture is identified as an important county value, it is ranked below the higher priority values of wildlife habitat and scenic vistas.³⁵ Presently, the county protects agricultural lands primarily within its “Rural-County (R-TC) Zone,” which has the purpose of “provid[ing] lands for the continuation of agriculture, as well as compatible related uses, and to preserve rural character by encouraging forms of development that protect large tracts of agricultural land and natural and scenic areas.”³⁶ The county also uses overlay zones to protect habitat and scenic resource areas.

All planned residential development must submit an environmental analysis that identifies the natural resource values of the land proposed for development.³⁷ A proposed residential development in the R-TC Zone generally must provide a 50-85% set aside.³⁸ The county regulations emphasize locating set asides in non-fragmented areas or places that expand existing protected areas.³⁹ If an agricultural operation currently exists, then the county “encourages” the agricultural operation to continue, but the main objective is to maximize open space values.⁴⁰ The JHLT director indicated that there is not a difficulty keeping the land in production, noting that most land has continued to be used by the same families originally operating the land, or has been leased to new agricultural operators.

The county also incentivizes land protection by offering increased density in exchange for additional land set aside.⁴¹ For example, in a planned residential development in a rural zone, the law allows 1 unit per 35 acres with a 50% open space requirement.⁴² But with an increased set aside of 85%, the developer can increase to 9 units per 35 acres.⁴³ The payment of fees-in-lieu is not available to mitigate for the loss of open space values.⁴⁴

Teton County updated its Comprehensive Plan in 2012 and is now updating the rural portion of its land regulations to implement the comprehensive plan updates. The proposed amendments include new “character zones” that more rigorously protect agricultural character in areas of highest value through limiting density and restricting commercial uses to outfitting and bed & breakfast businesses. Significant set asides of over 90% are also envisioned.⁴⁵

The Teton County Planner indicated that each proposed development is evaluated on a case-by-case basis. The land set aside does not need to be located within the same

³⁴ *Id.* at §§ 7.3.1 – 7.3.3.

³⁵ *Id.* at § 7.3.3.

³⁶ *Id.* at § 3.3.5.

³⁷ Teton County Land Development Regulations, *supra* n. 27, at § 8.2.2.

³⁸ *Id.* at § 6.1.3.

³⁹ *Id.* at § 7.3.3.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at § 3.3.5.

⁴³ *Id.*

⁴⁴ *Id.* at § 7.3.4.

⁴⁵ Teton County Rural Area Land Development Regulations (March 6, 2015 Draft), *available at* <http://www.tetonwyo.org/complan/LDRUpdate/RuralAreas/150306RuralLDRs.pdf>.

parcel of land as the proposed development, although that usually is the case. Further, prior conservation can be counted if it satisfies the goals of the county, as determined on an ad hoc basis. For example, if a landowner wishes to develop a parcel of agricultural land and has not yet submitted a development plan for review, he may set aside a portion of the land in a conservation easement in anticipation of development. Even if the development did not occur for an extended period of time (ten or more years), the set aside may satisfy the regulations if the county determines the projects are sufficiently linked.

Ultimately, the applicant is responsible for finding a qualified easement holder to manage the set asides placed under conservation easement. The process of obtaining a conservation easement on the set aside land runs parallel to the county development application process, with the land trust negotiating directly with the developer. Nonetheless, the county must review and concur on the easement terms before the development application is approved.

Conclusions and Lessons

Co-Existence of County and Private Trusts. Despite its underfunded status, both county planners and the JHLT see a need for the county Scenic Preserve Trust to continue. The principal reason is to ensure a “fall back” option for protecting those set asides which the JHLT is unable to accept into its program. The JHLT director noted that sometimes a set aside is “just not a fit” with the mission of the trust. For example, the parcel may be small or have a lot of land activity nearby. Interviewees thus call the county a “holder of last resort” for purposes of such set asides. The county is currently considering a resolution to renew its Scenic Preserve Trust, and planning staff are urging the county to include funding to make the program more robust. (Appendix D). The trust director also noted that the county set aside regulations are important because not all landowners are motivated to voluntarily protect lands with a land trust.

Flexibility in Mitigation. One planner highlighted the need for flexible regulations that provide different tools for developers. She also noted that ad hoc development review has allowed development to continue, while protecting the multiple recognized open space values of the county simultaneously. The planner characterized this ad hoc review as a positive aspect of the structure of the county’s regulations, and did not indicate that it extended the length of the review process. In Teton County, development is centered outside of the rurally zoned areas, and she felt the county’s analysis of projected development areas in the county’s Comprehensive Plan was an effective tool to help the county identify what areas were important to protect. The Planner further indicated the “best use of land” analysis for each proposed development, along with an in-kind set aside, is effective in her county. Finally, she believes that having a good working relationship with a land trust that is willing to manage the conservation easements is vital.

Developer Perspective. The owner of a land development company in the county expressed a desire that developers continue to have control over choosing what entity manages the set asides within a development. He also noted that his company has used

innovative design and lot layout to make set aside requirements work without undermining profit to the developer.⁴⁶

Boulder County, Colorado⁴⁷

Overview of Community

Boulder County, located in north-central Colorado along the eastern slope of the Rocky Mountains, encompasses 741 square miles and is home to 294,567 residents.⁴⁸ Agriculture has played a significant role in Boulder County since its settlement in the 1860s.⁴⁹ During the past century the county has seen a substantial increase in population and land value, resulting in the loss of a significant portion of prime agricultural lands.⁵⁰ Studies conducted in the 1970s revealed that between 1959 and 1974, Boulder County led the state of Colorado in the amount of agricultural land consumed for other purposes.⁵¹ The county's comprehensive plan of 1978 sought to address this high rate agricultural land conversion by including a strong directive to mitigate the conversion of agricultural lands.⁵² However, between 1978 and 1992, an additional 18,000 acres of agricultural land had been annexed into Boulder County's municipalities.⁵³ The cumulative impact of agricultural land conversion has resulted in a decrease in acreage from 287,466 farmland acres in 1959 to 107,629 farmland acres in 2002.⁵⁴ However, with the implementation of multiple mitigation strategies, that number has been steadily increasing over past decade. The county's political composition has historically resulted in support for agricultural protection.

The general impetus for the action to conserve agricultural lands in Boulder County centered on concerns about growth and development. Guided by the policy directives in the 1978 Comprehensive Plan, Boulder County has pursued multiple methods to mitigate

⁴⁶ The interviewee cited as an example the work of Rick Harrison Site Design Studio, at <http://www.rhsdplanning.com/> (accessed June 3, 2015).

⁴⁷ The participants interviewed in the Boulder County, Colorado area are: Kathy Sandoval, Boulder County Planning Department; Arnold Turner, Boulder County Realtor; Ron Stewart, Director of Boulder County Parks and Open Space Department; and Jason Condon, Owner of Isabelle Farm, Boulder County, CO.

⁴⁸ Boulder County, *History & Demographics*, <http://www.bouldercounty.org/gov/about/pages/about.aspx> (accessed Nov. 22, 2014).

⁴⁹ Deon Wolfenbarger, Boulder County Parks and Open Space Department & Land Use Department, *Boulder County Agricultural Heritage*, 1, <http://www.bouldercounty.org/doc/landuse/agriculturalheritagewolfenbarger.pdf> (2006).

⁵⁰ *Id.*

⁵¹ Boulder County Comprehensive Plan, *Agriculture*, 1, <http://www.bouldercounty.org/property/build/pages/bccpupdate.aspx> (accessed Nov. 28, 2014).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ U.S. Department of Agriculture, National Agricultural Statistics Service, *2007 Census of Agriculture County Profile, Boulder County Colorado*, http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/County_Profiles/Colorado/cp08013.pdf (accessed Dec. 3, 2014).

the loss of agricultural lands. The first, in 1979, was the adoption of a non-urban planned unit development process.⁵⁵ This offered agricultural landowners an increased development density while requiring a minimum of 75% of the land to be placed in a conservation easement held by the county. In the mid-1990s, the county supplemented this process with a transferable development rights program.⁵⁶

Around the same time, voters passed a sales tax to increase funding for aggressive open space initiatives, including its purchase of development rights program, agricultural land conservation easement program, and agricultural land fee purchase and lease back program.⁵⁷ In addition, County Commissioners spent nearly a decade negotiating intergovernmental agreements with each of the county's eight municipalities which address issues related to transportation, affordable housing, open space development and acquisition, and defining urban and rural growth boundaries.⁵⁸ These regulatory processes, programs, and planning documents have resulted in tens of thousands of acres of agricultural lands being conserved.

County-Held Conservation Easements

Boulder County is the primary entity holding agricultural conservation easements, and it holds over a total of 26,000 acres of agricultural land in the county. The Department of Parks and Open Space negotiates easement acquisitions and manages all of the land in the program. It has over 90 personnel on staff, many of whom are involved in the acquisition and management of conservation easements, and one full time employee solely dedicated to the administration of the conservation easement program. The primary goals of acquiring conservation easements is to maintain the rural character of the county, provide scenic open space for the public, continue agricultural uses, and protect important historical agricultural resources. The program includes easements held by the county over both private property and local government property. Of the lands encumbered with an easement, the largest is 2,006 acres and the average is 49 acres.⁵⁹ The county holds a total of 841 conservation easements with the goal of acquiring 10-15 new easements per year. Private land trusts do not play a major role in agricultural protection because of the county's program.

Acquisition. Conservation easements are required with the development of a new rural subdivision, referred to as non-urban planned unit developments.⁶⁰ The Boulder County Land Use Code allows a landowner to receive additional density above the

⁵⁵ Boulder County Comprehensive Plan, 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Boulder County, *Intergovernmental Agreements*, <http://www.bouldercounty.org/property/build/pages/igas.aspx> (accessed Dec. 1, 2014).

⁵⁹ Boulder County Parks and Open Space, *Conservation Easement Program Overview Presentation*, <http://www.bouldercounty.org/doc/parks/ceprogram.pdf> (June 2011).

⁶⁰ Boulder County Land Use Code, Art. VI, <http://www.bouldercounty.org/doc/landuse/landusecode.pdf> (Nov. 24, 2014).

regulatory density of one residence per 35 acres, but imposes requirements including that development must be clustered, no more than 25% of the original acreage can be developed, and at least 75% of the original property must be left as open space.⁶¹ The portion of land left undeveloped is placed under a conservation easement held by the county. Because these easements are required as a condition of subdivision approval, they do not qualify for tax benefits and the county does not award additional compensation to the landowner beyond what is approved for the related subdivision development.⁶² By 1996, this development process had conserved 11,160 acres of land.⁶³ Although these programs were very popular from the late 1970s through the 1990s, there are very few remaining lands that are large divisible parcels and the process is rarely used today.⁶⁴

One realtor recounted that under the initial program, the county allowed a landowner to develop five acres if they conserved 30 acres. However, this setup resulted in isolated development and an odd mix of agricultural and residential land uses. There are a number of these arrangements still in existence and in recent years, a market has developed for these small parcels because they are attractive to small sustainable agricultural operators.

In addition to mandatory conservation easements in subdivision review, the county acquires conservation easements from willing land owners, along with outright purchases in fee. Since the adoption of the Comprehensive Plan in 1978, the county has developed agricultural land inventories and used them to strategize priorities for possible agricultural land acquisitions. The Real Estate Division of Parks and Open Space uses this information to reach out to agricultural land owners that have been prioritized for conservation.⁶⁵ Realtors or landowners also contact the division directly.⁶⁶ The division is responsible for negotiating all county easement acquisitions, regardless of whether they are donations, bargain sales, or market price purchases. A realtor, who is also a farmer, said that the county purchase of a conservation easement on his land enabled his family to stay in operation and buy out a sibling who wanted to leave the family operation. In his words, easement purchases “allow families to stay on their land.” He also described some examples where the county has acquired an option to buy in the future to allow producers to own their land outright for a period of years.

The county uses both long-form and short-form conservation easements. Long-form conservations easements are most common for agricultural properties because they contain restrictions that meet state and federal standards to qualify for tax benefits. (Appendix E). County staff measure potential donations of agricultural easements against county Property Assessment for a Conservation Easement (PACE) criteria to determine

⁶¹ *Id.*

⁶² *Conservation Easement Program Policies and Practices*, 10.

⁶³ Boulder County Comprehensive Plan, 2.

⁶⁴ *Conservation Easement Program Policies and Practices*, 4.

⁶⁵ *Id.*

⁶⁶ *Id.*

how well a proposed project meets Comprehensive Plan goals.⁶⁷ Short-form conservation easements are used where the property is relatively small and the county seeks to have control over the development and use of the parcel. These do not contain the same conservation values that are protected under the long-form easements; rather they focus on restricting square footage and preventing annexation and subdivision. In addition, short forms do not meet federal and state standards to qualify for tax benefits. A realtor noted that the form of conservation easements used has changed drastically over the years, and the county is currently in the process of modifying some of the originals.

Funding. Boulder County uses a variety of funding sources for conservation easement acquisition and stewardship including: open space sales and use taxes, county general fund revenue, Colorado lottery proceeds, state and federal grants, and funds from partner municipalities and local interest groups.⁶⁸ The primary source of funding for the conservation easement program is three open space sales taxes, approved by county voters, totaling 0.60%. Although the majority of open space sales taxes are set to expire by 2030, a 0.05% portion will remain in perpetuity to fund maintenance and stewardship costs. Because of this perpetual tax, Boulder County does not require landowners to provide stewardship endowment funds.⁶⁹

Management and Stewardship. The County keeps protected agricultural lands in operation by entering into leases with operators. Leases are often extended to those family members who have traditionally worked the land, at least for an initial term of years. Nonetheless, one interviewee noted the risk that in future years the county could elect to lease the lands to a new operator. There are presently some political tensions around whether preference should be given to organic producers, which could mean out-of-area operators taking over leases historically held by local operators. This individual felt that the county's leasing discretion was overly broad and that it should have more definite criteria. The county is also facing questions about whether it should acquire and provide operating equipment as part of its leasing program.

The County reports that its success in stewarding these lands lies in its strong working relationships with property owners and the individuals who work the land.⁷⁰ Parks and Open Space staff conduct annual site visits to ensure compliance with the easements. They provide support in maintaining properties by giving landowners access to their noxious weed control team and other resources. In addition, they send annual reminders of what is allowed and prohibited for each easement. There are two staff members dedicated to conservation easement stewardship who are primarily responsible for monitoring, answering questions, and assisting the negotiation of new easements.

⁶⁷ *Id.* at 7, and App. 4.

⁶⁸ *Id.* at 3.

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 27.

Other Considerations

Water Rights. Boulder County requires that all conservation easements tie the water rights associated with the land to the property to be used in perpetuity.⁷¹ The county additionally requires private landowners to grant the county an undivided interest in the water right.⁷² The county then ties this interest back to the land through a restrictive covenant.⁷³ Essentially, no farmer under a county conservation easement can sell water for other uses. This helps ensure that water rights remain on the land and promote productive agricultural use into the future. As one realtor said, this is a really important step for the conservation of viable agricultural lands. Practically, it also restricts growth because it limits sources of municipal water.

Inter-Governmental Agreements. Through the 1990s, the county negotiated comprehensive planning agreements with nearby municipalities. The primary purpose of these inter-governmental agreements (IGAs) is to project growth and draw urban growth boundaries. But they also address joint open space management initiatives, transfer of development rights, buffer zones, revitalization areas, and historic landmark designations. These agreements have been an important tool in conserving agricultural lands. One planner said, the IGAs “help us to predict how growth will occur and help us work with developers and municipalities to find proper places for certain types of development.”

A former county commissioner involved in negotiating these agreements indicated that the IGAs essentially allow the county to funnel development back to the municipalities to ensure growth and development are in accordance with the vision for the county and to protect open space and agricultural lands. However, a realtor highlighted the creation of an “artificial supply and demand” through the IGAs. For example, where there are two relatively similar parcels side by side, the parcel inside the growth boundary is significantly more valuable than the parcel outside the boundary. He believes the agreements have had an odd effect on land price distribution in the county.

Enhancing the Agricultural Community. In recent years, the conversation around agricultural land protection in Boulder County has shifted to include the goal of enhancing the local agricultural community and economy. The county promotes conservation success stories by providing farm biographies on its website. It organizes tours and workshops where urban residents learn about local farms and farming practices. One planner said the goal is to create a bridge between the agricultural community and urban residents, to foster relationships that will benefit the local agricultural economy, and to interest urban residents in protecting agriculture in the county. That same planner highlighted the importance of providing adequate flexibility in the regulations to allow for sustainable agricultural components, small scale farming, produce washing facilities, and local product

⁷¹ *Id.* at 20.

⁷² *Id.*

⁷³ *Id.*

stands. Another planner emphasized the importance of bolstering the local food market through supporting small market farm operations that sell most of their produce locally.

Conclusions and Lessons

Boulder County has made significant progress in conserving agricultural lands through a number of strategies. As a former county commissioner said, the agricultural community voiced a lot of concern at the outset, but most members of the agricultural community would now say “if it weren’t for the programs, agriculture in Boulder County would look very different today.” He emphasized the importance of knowing what local residents want related to the conservation of agricultural lands. During the development of these programs, the county conducted public polling to give decision makers a sense of where residents stood on the issues. Residents overwhelmingly prioritized open space and agricultural land protection which justified the county’s strong action. He said, “The more the goals are aligned with what the public wants, the better off you are going to be.”

As expressed by a local realtor, it is challenging to keep abreast of the local ordinances and rules, land use regulations, and to have an understanding of the open space and agricultural land conservation programs. Consistency and predictability becomes the most important thing for the development community. The debate is often centered on whether a community wants to grow or not. “The reality is, managing growth will benefit some residents and industries, and harm others. That can’t be helped, it’s the way it is.” He offered this piece of advice, “As far as preserving agriculture, nothing is better than going to the farmer with money to spend, and working it out with them.”

Boulder County Parks and Open Space may be at a crossroads as the Director of the department said, “Many residents here feel that we are as big as we need to be” and have expressed that our mission should now shift to managing lands and promoting the agricultural economy rather than acquiring additional lands. A local farmer and participant in the county’s conservation easement program said that the programs and conservation efforts have been a success. He said, “As much as I hate to admit it, if Boulder hadn’t acted when and how it did, we would be looking at a very different community, area, and landscape . . . I would be standing in suburbia right now rather than on my farm.”

Stanislaus County, California⁷⁴

Overview of Community

Stanislaus County is an historically agricultural community located in California's Central Valley.⁷⁵ There are nine incorporated cities in Stanislaus County, including Modesto, which is the largest.⁷⁶ The majority of Stanislaus County's residents reside in the nine cities. As of 2013 the population of the entire county is approximately 525,491.⁷⁷ The total area of the county is 1,495 square miles, or 956,800 acres.⁷⁸

Northwest of Stanislaus County is California's Bay Area. To the south of Stanislaus County are Merced, Madera, and Fresno Counties, of which Merced is also a noted agricultural county.⁷⁹ The Stanislaus County General Plan notes agriculture is the leading industry in the county with an annual gross value of over one billion dollars,⁸⁰ and the county is among the top ten agricultural counties in California.⁸¹ The types of agriculture produced in the county include cattle and dairy products, almonds, tomatoes, alfalfa, peaches, and chicken and eggs.⁸² The Stanislaus County Planner noted the county is not considered a "high growth" community. County lands are subject to zoning and the county has specific agriculture zones.

Under the Stanislaus County General Plan, the primary techniques identified for agriculture mitigation are set asides of agricultural land in conservation easements, purchase of banked mitigation credits, and fees paid in lieu of set asides for developments on smaller acreage.⁸³ Statewide, California requires agricultural protection under the California Environmental Quality Act (CEQA). The state also has the Williamson Act, which provides tax incentives to farmers who agree not to develop their lands for a period of

⁷⁴ The participants interviewed in the Stanislaus County, California area are: Kristin Doud, Stanislaus County Assistant Planner; Angela Freitas, Executive Director, Stanislaus County Planning & Community Development; Sara Lytle-Pinhey, Assistant Executive Officer, Stanislaus Local Agency Formation Commission; Maxwell Norton, local farmer and Farm Advisor for the UC Davis California Cooperative Extension, and former employee of the Central Valley Farmland Trust; Shawn Fitzpatrick, Fitzpatrick Homes; and Bill Martin, Executive Director of Central Valley Land Trust.

⁷⁵ Kenneth W. Umbach, Ph.D., *A Statistical Tour of California's Great Central Valley*, <http://www.library.ca.gov/crb/97/09/#Heading1> (Aug. 1997).

⁷⁶ *Id.*; U.S. Census Bureau, *State & County QuickFacts: Stanislaus County, CA*, <http://quickfacts.census.gov/qfd/states/06/06099.html> (last revised Dec. 4, 2014).

⁷⁷ U.S. Census Bureau, *State & County QuickFacts: Stanislaus County, CA*, <http://quickfacts.census.gov/qfd/states/06/06099.html> (last revised Dec. 4, 2014).

⁷⁸ *Id.*

⁷⁹ U.S. Census Bureau, *State & County QuickFacts: California County Selection Map*, http://quickfacts.census.gov/qfd/maps/california_map.html (accessed Dec. 11, 2014); Umbach, *supra* n. 75.

⁸⁰ Stanislaus County General Plan, 7-1, <http://www.stancounty.com/planning/pl/general-plan.shtm> (accessed Dec. 11, 2014).

⁸¹ *Id.*

⁸² Umbach, *supra* n. 75.

⁸³ Stanislaus County General Plan, *supra* n. 80, at Appendix B, 7-36–7-37.

years.⁸⁴ Thus, there is a state overlay of agricultural protection that exists beyond the local county measures.

Local attitudes about agricultural land protection are strongly affected by the historical presence of agriculture in the county. There is high demand for agricultural land, along with a general concern that urban sprawl will spread from the Bay Area and other urban counties into Stanislaus County, causing loss of farmland.⁸⁵ In 2008, the voters in Stanislaus County enacted “Measure E” that placed a thirty-year restriction on rezoning agricultural or open space land in unincorporated areas to residential without the approval of the majority of county voters.⁸⁶ According to county planners, the mitigation techniques outlined in the General Plan are largely unused because of the economic downturn, decline of the housing market, and the enactment of Measure E. As one local farmer and the Farm Advisor of the UC Davis California Cooperative Extension said, many people in the region are lacking a sense of urgency to act to protect agricultural land because of the lag in development.

Set Asides

The Stanislaus County Farmland Mitigation Program uses of agricultural conservation easements to combat the loss of farmland.⁸⁷ Specifically, it requires developers converting agricultural land to offset the loss by a one-to-one ratio.⁸⁸ If the total land to be converted is twenty acres or larger, then land must be set aside in perpetuity in a conservation easement held by a land trust or the county.⁸⁹ If the land is less than twenty acres in size, then (1) the land may be set aside in a conservation easement, (2) the developer may purchase banked mitigation credits, or (3) the developer may pay an in-lieu fee (discussed below).⁹⁰

Mitigation land must be located in the county, in a designated agriculture zone, and outside of the mapped “sphere of influence” of a city.⁹¹ The soil quality of the mitigation land must be of equal or greater quality to the converted land, and the water supply to the land must be protected in the easement.⁹² The final approval of any development project is contingent on the execution of the agriculture conservation easement or the payment of an

⁸⁴ Information on the California Land Conservation Act of 1965 (Williamson Act) can be found at <http://www.conservation.ca.gov/dlrp/lca/Pages/Index.aspx> (accessed Dec. 11, 2014); information on the California Environmental Quality Act (CEQA) can be found at <http://resources.ca.gov/ceqa/> (accessed Dec. 11, 2014).

⁸⁵ Stanislaus County General Plan, *supra* n. 80, at 7-1.

⁸⁶ Garth Stapley, *Stanislaus County voters back growth limits*, The Modesto Bee, <http://www.modbee.com/news/politics-government/election/article3101038.html> (updated Oct. 20, 2014); the full text of Measure E can be found at <http://www.farmland.org/programs/states/CA/documents/measure-e-english.pdf> (accessed Dec. 11, 2014).

⁸⁷ Stanislaus County General Plan, *supra* n. 80, at Appendix B, 7-36.

⁸⁸ *Id.*

⁸⁹ *Id.* at 7-36, 7-39.

⁹⁰ *Id.* at 7-36.

⁹¹ *Id.* at 7-39.

⁹² *Id.*

in-lieu fee.⁹³ Although agriculture easements do not count toward any other open space or park requirement, the Program does allow stacking of habitat and agriculture conservation easements upon approval by the Board of Supervisors, so long as the habitat easement will not restrict active agricultural use of the land.⁹⁴

Conservation easements are held by qualified land trusts. An individual seeking to develop may establish an easement through any qualified entity. The county does not have any formal or informal agreements with local or national land trusts. But the planner cited the usefulness of having a well-respected local land trust to work with, and the importance of using the land trust resources and knowledge in the development and implementation of the program.

When the county started its Program, the first developer required to comply expressed frustration with the guidelines because the development plan had been submitted prior to enactment of the Program. His proposal was ultimately put on hold and not completed. The developer also expressed concern over housing prices in the area, which he believed would increase based on costs required by the Program. He felt the costs ultimately will be passed on to the consumer. At the end of the day, however, the program remains untested due to market conditions.

Banked Mitigation Credits and Fees-in-Lieu

As noted, if the land to be converted is less than twenty acres, then a developer can purchase banked mitigation credits.⁹⁵ These credits arise when a landowner protects agricultural land at a ratio greater than 1:1, thereby banking the excess for future sale on the market. A future developer can then contact the land trust or other entity operating the bank to purchase the credits.⁹⁶ The County is specifically excluded from the negotiation process and the price of the credits is subject to the market value.⁹⁷ Due to market conditions, there is no mitigation bank currently operating in the County.

While in-lieu fees are an option for a developer to pursue, they are only available if the purchase of an easement or banked mitigation credits is not feasible.⁹⁸ Permission to use the in-lieu fee option is given at the discretion of the Board of Supervisors.⁹⁹ The Board determines the in-lieu fee amount on an ad hoc basis, but the fee must not be less than thirty five percent of the average per-acre price for five comparable land sales in the county.¹⁰⁰ The fee may cover costs for managing, administering, enforcing and monitoring

⁹³ *Id.*

⁹⁴ *Id.* at 7-40.

⁹⁵ *Id.* at 7-38.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 7-37.

⁹⁹ *Id.* at 7-38.

¹⁰⁰ *Id.*

easements, as well as paying for any transaction costs associated with easements.¹⁰¹ A land trust holds the fee until it can be applied toward agricultural protection work.

The Central Land Trust director recommended some modifications to the county in-lieu fee concept. He noted that in-lieu fees should be amended to reflect the current market price of acquiring a conservation easement. He further emphasized that regulatory language should be written to allow land trusts flexibility in using in-lieu fees to carry out their missions. For example, he noted one county in California that drafted regulatory language specifically disallowing the payment of monitoring and enforcement costs with in-lieu fees, which undermines the land trust's ability to perform its functions. He said because of this type of language, the land trust would either not be able to take on any easements in the county or do so at a great risk.

Other Considerations

Litigation. After the enactment of the Farmland Mitigation Program, the local builders sued the county to enjoin the Program. Although the court initially found in favor of the builders, the decision was overturned and the county 1:1 ratio was deemed reasonable on appeal.¹⁰² A county planner noted both the land trust and the development communities were quiet during the process of enacting the regulations, until after the Program was enacted and the building association brought suit.

Land Trust Perspectives. The Central Valley Farmland Trust is the primary land trust working in the area, and the executive director said generally that the land trust chooses to remain neutral on county mitigation policies. He feels that his role is to identify foreseeable problems with regulations, but not what specific protection is needed. One foreseeable problem the land trust relays to the counties is the size of parcel to be put into conservation. It is the unwritten policy of the land trust to only take on 40-acre or larger parcels, and it would not accept a 20-acre parcel. Indeed, he would prefer a 100-acre or larger easement because the costs associated with an easement are generally the same, regardless of easement size.

The trust director also prefers a fee structure or banked mitigation credits to handle mitigation because his land trust has determined which areas are critical for farmland protection, and a payment system allows land trusts flexibility to dedicate resources to critical areas. In his opinion, land trusts and the government entity should identify and quantify areas of the community where the loss of farmland is threatened and work to specifically protect those areas. Additionally, if a community wants to allow stacking of habitat and agriculture conservation easements, he cautioned the community to avoid drafting habitat easements that hinder agriculture.

¹⁰¹ *Id.*

¹⁰² Shute, Mihaly & Weinberger, LLP, *SMW Successfully Defends Stanislaus Farmland Mitigation Program*, <http://www.smwlaw.com/news/show/67> (accessed Dec. 11, 2014); the appellate court's full opinion can be found at <http://caselaw.findlaw.com/ca-court-of-appeal/1546223.html> (accessed Dec. 11, 2014).

With respect to monitoring and enforcement, the Central Valley Land Trust relies primarily on volunteers, but does factor administrative costs into the amount it charges a developer per acre of land protected. The organization has not encountered major enforcement issues, and relies on a self-funded land trust insurance program to cover potential litigation.

Developer Perspectives. A developer noted that programs like that in Stanislaus County reduce the universe of properties that are chosen for development. He emphasized how programs like these will change the composition, look, and feel of a community. As the first developer to work with the program, he expressed frustration with how disorganized its implementation was. He also felt it was unclear to him exactly how much agricultural land was being converted in the area, yet he felt that the development community was being blamed for this undefined “loss.”

Farmer Perspectives. A local nut and fruit farmer, and former employee of the Central Valley Farmland Trust, highlighted the importance of incorporating higher ratios of set asides in order to actually save agricultural lands. He recommends a sliding scale of set aside ratios based on soil designations and agricultural uses (i.e. produce, grazing, etc.). Incorporating a sliding scale approach would require a higher ratio of land to be set aside for prime agricultural lands to achieve the goal of protecting agricultural lands. This model also discourages developers from targeting prime agricultural lands and incentives them to seek less prime agricultural lands for development.

Conclusions and Lessons

Stanislaus County has one of the more detailed and flexible programs for responding to agricultural land loss, but it is largely untested due to a change in the housing market and passage of Measure E. The county’s 20-acre benchmark may not match the acreage size that local land trusts are willing to accept, which poses potential problems. The program may also not guarantee protection of the most critical farmland due to developer selection of the conserved land. The county may also need to do greater education and outreach on the need for and value of its agricultural protection program. Nonetheless, it has done detailed thinking about how to select conserved land, how to value fees-in-lieu, and how a banking program might function, providing models other communities can build upon.

City of Hughson, California¹⁰³

Overview of Community

The City of Hughson is the smallest incorporated city in Stanislaus County with a population of 7,118.¹⁰⁴ The city was once a 5,000-acre grain ranch owned by Hiram Hughson,¹⁰⁵ and now it is a strong agricultural community in the epicenter of California's Central Valley. Recently the city implemented its own Farmland Preservation Program, modeled after Stanislaus County's Farmland Mitigation Program with a few small, but important differences. The program's guidelines apply to all development projects that convert 1 acre or more of agricultural land to residential use, and they require a 2:1 set-aside ratio for conversion of agricultural lands.¹⁰⁶ A planner who worked on developing the program said the city decided on a 2:1 ratio because the community felt that a 1:1 ratio still results in agricultural loss overall, and does not do enough to protect prime agricultural lands or a viable agricultural economy.¹⁰⁷

Set Asides

Under the city's program, when a development proposal is greater than 20 acres, the developer is solely responsible for obtaining the required agricultural conservation easement.¹⁰⁸ The program is designed to have the developer work directly with a nonprofit 501(c)(3) land trust to acquire the conservation easement.¹⁰⁹ The Planning Commission reviews each easement for consistency with city guidelines and makes a recommendation to the City Council.¹¹⁰ When a development proposal is less than 20 acres, developers are required to mitigate by direct acquisition of an agricultural conservation easement, banked mitigation credits, or in-lieu mitigation fees (if the developer can show diligent effort to acquire an easement was unsuccessful).¹¹¹

To be eligible for agricultural land conservation easements, the protected land must be located in Stanislaus County, zoned A-2 (General Agriculture), and within one-half mile of the Local Agency Formation Commission (LAFCO)-adopted sphere of influence of the city.¹¹² The land must also have equal or better soil quality than the land underlying the

¹⁰³ The participant interviewed in the City of Hughson, California area was Thomas Clark, Public Service Director for City of Oakdale and former Planner for City of Hughson.

¹⁰⁴ The City Hughson, *Welcome to the City of Hughson*, <http://hughson.org> (accessed Dec. 4, 2014).

¹⁰⁵ The City of Hughson, *History of Hughson*, <http://hughson.org/for-residents/learn-about-the-city-of-hughsons-history/> (accessed Dec. 4, 2014).

¹⁰⁶ City of Hughson Farmland Preservation Program, *Methods of Farmland Preservation*, 2, <http://hughson.org/wp-content/uploads/2012/03/1-Exhibit-A-Hughson-Farmland-Preservation-Program-2.pdf> (accessed Dec. 1, 2014).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 4.

proposed development.¹¹³ Although the program is similar to Stanislaus County's program, one planner noted that the City of Hughson made it a priority to strengthen its program particularly in the area of water rights.¹¹⁴ The program requires that the land proposed to be conserved has adequate water supply to support the current agricultural use, and that the appurtenant water right be tied to the land in the conservation easement.¹¹⁵ This helps to ensure the land will be productive into the future.

Fees-In-Lieu

As noted, when a proposed development is less than twenty acres, and developers can show that they were unable to acquire a conservation easement despite good faith efforts, they may pay an in-lieu fee. The fee amount is determined on a case-by-case basis by the land trust and the City Council, but at a minimum must be 35% of the average price per acre for five comparable land sales in the county.¹¹⁶ The fee must also include the cost of managing the easement, a 5% endowment of the cost of the easement, and the estimated cost of the transaction fees. The Planning Commission reviews the in-lieu fee proposal and makes a recommendation to the City Council. Approved projects are subject to a 2.5% administration fee. The land trust uses the fees to acquire additional lands, and to administer, monitor, and enforce existing easements.¹¹⁷

Conclusions and Lessons

Although Hughson adopted its program in 2013, the city has not yet had the opportunity to use it. As a planner noted, Hughson is a small community that does not see a lot of development proposals, especially after the economic downturn. He also noted that, in his opinion, it was relatively easy to implement the 2:1 set aside. There was significant input from the farming community. The city held an agricultural mitigation workshop prior to the program's adoption, where a number of farmers spoke about what the program meant to them. The planner recounted that one key to working with agricultural landowners to protect their farmlands was to provide them access to an estate planner. This allows the farmer to get answers and evaluate the entire economic picture, including the costs and benefits of protecting the land under an easement, while simultaneously planning for their future. Finally, he said these types of initiatives will only be successful with education, conversations about what this type of protection means for the community, and somebody who will push hard to get it done.

¹¹³ *Id.* at 2.

¹¹⁴ *Id.* at 4.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 3.

¹¹⁷ *Id.*

Yolo County, California¹¹⁸

Overview of Community

Yolo County is centrally located within the Sacramento River Delta and California's Central Valley.¹¹⁹ The Sacramento and Feather Rivers flow through the county, and many of the county's towns sprung up along the rivers' banks.¹²⁰ As of January 2014 the county's estimated population is 206,381. The total area of Yolo County is 1,021 square miles, or 653,549 acres.¹²¹

To the east lies Sacramento County, where California's state capitol Sacramento is located. To the southwest is California's Bay Area, including Solano and Napa Counties, both of which are noted agricultural counties with Napa famous for its wine production.¹²² There are four incorporated cities in Yolo County: Davis, Winters, Woodland, and West Sacramento.¹²³ Most of Yolo County's residents reside in the four incorporated cities (87% as of May 2012).¹²⁴ The county itself provides many of the municipal services cities would normally provide to its unincorporated areas, including trash collection, patrol services, road maintenance, in addition to administering state and federal services. West Sacramento is located across the Sacramento River from the city of Sacramento and serves as a port city that ships one million tons of Yolo County's agricultural production each year to the rest of the world.¹²⁵

Yolo County prides itself on its agricultural heritage and its generally pastoral landscape,¹²⁶ and it is one of the twenty-seven original counties in existence at the time of California's statehood in 1850.¹²⁷ The largest industry in Yolo County is agriculture, and the largest employer is the University of California, Davis. In fact, the Davis location of the University of California was specifically established in 1906 when the University acquired

¹¹⁸ The participants interviewed in the Yolo County, California area are: Eric Parfrey, Principal Planner Yolo County; Stephanie Cormier, Planner at Yolo County; Maxwell Norton, local farmer, Farm Advisor for the UC Davis California Cooperative Extension, and former employee of the Central Valley Farmland Trust; Michele Clark, Executive Director, Yolo Land Trust; Greg Forest, Attorney-at-Law, Harrison, Temblador, Hungerford & Johnson.

¹¹⁹ Yolo County, *About Us - Yolo County's Statistical and Demographic Profile*, <http://www.yolocounty.org/general-government/about-us> (accessed Dec. 12, 2014).

¹²⁰ *Id.*

¹²¹ Yolo Executive Summary, at 1, <http://www.yolocounty.org/Home/ShowDocument?id=2975> (accessed Dec. 12, 2014).

¹²² *About Us - Yolo County's Statistical and Demographic Profile*, *supra* n. 119; Solano County, California, *County Facts & Figures*, http://www.solanocounty.com/about/county_facts_n_figures.asp (accessed Dec. 12, 2014); Visit Napa Valley, <http://www.visitnapavalley.com/> (accessed Dec. 12, 2014).

¹²³ Yolo Executive Summary, *supra* n. 121, at 1; *About Us - Yolo County's Statistical and Demographic Profile*, *supra* n. 122.

¹²⁴ *About Us - Yolo County's Statistical and Demographic Profile*, *supra* n. 119.

¹²⁵ *Id.*

¹²⁶ Yolo County 2030 Countywide General Plan, AG-2, <http://www.yolocounty.org/general-government/general-government-departments/county-administrator/general-plan-update/adopted-general-plan> (accessed Dec. 12, 2014).

¹²⁷ Yolo Executive Summary, *supra* n. 121, at 1.

local farmer Jerome Davis' farm to serve as the University of California's farm, which was intended to support the University's College of Agriculture.¹²⁸

The 2013 reported agriculture production value for Yolo County was \$721,636,091, which reflects an all-time high and an almost thirteen percent increase over 2012.¹²⁹ More than sixty-three percent of the soils are classified Class I and Class II soils.¹³⁰ Most of the county's landscape is dominated by irrigated agriculture, primarily alfalfa and rice.¹³¹ The number one crop production in value is processing tomatoes, followed by wine grapes, almonds, rice, and walnuts.¹³² Ninety-two percent of the land in the county is restricted from development inconsistent with agricultural use.¹³³

The county's Zoning Code uses two main agricultural mitigation techniques: set asides of agricultural land and fees paid in lieu,¹³⁴ although they have not been applied frequently because the housing market declined after the techniques were codified in 2008. The strong agricultural heritage of Yolo County significantly affects local attitude about agricultural land protection. The Yolo County Planner, the Executive Director of the Yolo Land Trust, and a land use attorney who works primarily for developers all cited the strength of the agricultural community as a driving force behind the success of the regulations. In comparison to other farming communities in the state, they also said Yolo County is more liberal and proactive about protecting agricultural lands. The Planner noted the county's original General Plan, adopted in 1980, contained strong protective language for agriculture and is the basis for the current regulations. The Planner saw this long-standing history of protective regulations for agriculture as one of the reasons why the county has not experienced push-back on the increasingly more protective amendments to the regulatory scheme.

Set Asides

The zoning regulations in Yolo County require a 1:1 set aside when agricultural land is converted to a non-agricultural use.¹³⁵ If the land that is to be converted is five acres or larger, then the land must be set aside in perpetuity in a farmland conservation easement or a farmland deed restriction to the benefit of the county or land trust.¹³⁶ If the land that is

¹²⁸ *Id.*; UC Davis Centennial, *Looking Back: UC Davis historical timeline*, <http://centennial.ucdavis.edu/timeline/> (last updated June 19, 2008).

¹²⁹ Yolo County, *County Press Releases: Yolo County Releases 2013 Crop Report*, <http://www.yolocounty.org/Home/Components/News/News/2804/26> (Aug. 6, 2014).

¹³⁰ Yolo County 2030 Countywide General Plan, *supra* n. 126, at AG-4-5.

¹³¹ *Id.* at AG-10.

¹³² *County Press Releases: Yolo County Releases 2013 Crop Report*, *supra* n. 129.

¹³³ Yolo County 2030 Countywide General Plan, *supra* n. 126, at AG-2.

¹³⁴ Yolo County Zoning Code § 8-2.404-405 (adopted July 2014), <http://www.yolocounty.org/community-services/planning-public-works/planning-division/land-development-zoning-ordinance> (accessed Dec. 12, 2014).

¹³⁵ Yolo County Zoning Code, *supra* n. 134, at § 8-2.404(c).

¹³⁶ *Id.*

to be converted is less than five acres, then an in-lieu fee can be paid (discussed below).¹³⁷ The set aside or in-lieu fee must be completed as a condition of approval prior to county acceptance of a final parcel or subdivision map, the issuance of a building permit, or other final approval.¹³⁸

Agriculture set asides typically do not count toward other development requirements such as open space or park requirements.¹³⁹ Further, the regulations specifically discourage the stacking of easements for different purposes, and only allow stacking in certain circumstances in riparian corridors.¹⁴⁰ However, it is possible for prior agricultural protection to count toward the county's development mitigation requirements if the protection occurred prior to enactment of the 2008 ordinance.¹⁴¹

The land to be placed into a conservation easement must be voluntarily acquired from a landowner; viable in size, configuration, and location for continued agricultural use; have an equivalent class or better of soil composition to the proposed converted land; and have an adequate water supply to maintain ongoing agricultural use.¹⁴² The land also must be within a two-mile radius of the land proposed to be converted.¹⁴³ The Zoning Code does provide if land is unavailable within a two-mile radius, then land within a four-mile radius may be used. The developer purchases the development rights from the landowner at a pre-determined price per acre, and the land trust holds the easement in perpetuity. Although the agricultural landowner's participation is voluntary, there is no donation and therefore no federal income tax benefit.

The county desires that conservation easements be acquired by or transferred to a land trust for the purpose of monitoring and enforcement of the easement terms.¹⁴⁴ The county must be named as a third-party beneficiary with full enforcement rights, and the easement must be in perpetuity.¹⁴⁵ The conservation easements prohibit uses or activities that would impair or diminish the agricultural productivity of the land (except that 5% of the set aside can be for habitat purposes). The easements must also protect the water rights on the land for the purposes of agricultural use.¹⁴⁶ The Zoning Code does not allow developers to set aside land previously encumbered by any other type of easement or deed restriction, land publically owned, or land that is subject to physical conditions that make it legally or practicably unavailable for conversion.¹⁴⁷ Further, no housing can exist on the

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at § 8-2.404(d).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at § 8-2.404(f).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at § 8-2.404(e).

land unless the home has been present for a minimum of twenty-five years prior to the land being put into conservation.¹⁴⁸

In practice, the Yolo Land Trust plays a leadership role in set asides by maintaining a list of agricultural landowners who would like to receive compensation, in the form of a cash payment, for placing their lands in a conservation easement. The land trust director indicated there are currently 75 landowners on their waiting list, with a total of 22,000 acres. There is currently not enough money available to meet landowner requests for conservation. The land trust also has identified priority lands most critical for protection based on adjacency, soils, and other considerations. When a developer needs to do mitigation, he contacts the trust, which in turn contacts priority landowners to arrange for the purchase of the easement. The Yolo County Planner emphasized it is essential for the success of the county's mitigation program to have a good working relationship with the local land trust, which was echoed by the land trust's Executive Director.

The planner highlighted that the county does not have a formal agreement with the land trust, and that the regulations only require a developer to acquire a conservation easement through a "qualified" entity. Often, however, the county will recommend that landowners or developers talk with the staff at the local land trust if they have questions or concerns. One planner noted that because the local land trust has a great reputation, they are great to work with, and very involved in the local community, it is easy to recommend to landowners and developers that they utilize the local land trust's services. That same planner said that one of the aspects that makes the local land trust such a credible organization is the fact that they know the local issues, they are on board with the planning board's policies and conservation goals, they work closely with the county in redrafting ordinances, and they have farmers and planning commissioners on their board. This involvement and local connectivity is paramount to the successful working relationship the land trust and the county maintain.

While the Planner felt the county's mitigation program was "absolutely successful," the Land Trust director identified only two development projects that have used the regulations since their enactment in 2008. The Land Trust director believed this was mainly due to the timing of the economy and the housing market. The vast majority of the Land Trust's work is thus funded through other means.

Both projects undergoing mitigation used the set aside option. One project, a solar development, involved land set aside within the same parcel; the other project, an industrial development, involved land set aside on an immediately adjacent parcel. Both projects set aside more than the 1:1 minimum. The attorney representing the latter project explained that the developer purchased the adjacent parcel prior to making his proposal. Further, due to the lucrative nature of farming in the region, the developer had been leasing the land for farming and therefore the land easily met mitigation requirements. The Land

¹⁴⁸ *Id.*

Trust director believes neither project is truly indicative of how the regulations would work in the aggregate. She also observed that these two examples reveal that it is cheaper for developers to set aside land within a project than to purchase a conservation easement on the market. A copy sample Agricultural Conservation Easement from Yolo Land Trust (with the county as beneficiary) is attached as Appendix G.

Fees-in-Lieu

As noted, if the agricultural land to be converted is less than five acres, then a fee may be paid in lieu of a set aside.¹⁴⁹ The fee amount is based on the cost of conserving one acre of agricultural land for every one acre converted.¹⁵⁰ According to the Zoning Code, the formula for determining the in-lieu fee *may* be updated quarterly, and the indices used are the Consumer Price Index's measure of inflation and the housing price index for the Sacramento Metropolitan Statistical Area.¹⁵¹ Prior to the 2008 amendments to the agriculture mitigation provisions, the county conducted an economic study to determine the specific costs associated with putting land in a conservation easement. The per-acre fee includes easement acquisition costs, transaction costs, monitoring and enforcement costs, administrative costs, and contingency costs.¹⁵²

Currently, the Zoning Code lists the total mitigation fee per acre as \$10,100.00,¹⁵³ which has not been updated since 2007.¹⁵⁴ The county allows some flexibility in the amount of in-lieu fees assessed for a specific project. If the per-acre fee does not reflect the projected impacts to the converted land, then the developer can provide an independent fee calculation and the Planning Director has discretion to adjust the fee.¹⁵⁵ Nonetheless, the Yolo County Planner indicated the in-lieu fee is significantly lower than the current market price of land in the county and should be updated so that developers pay an accurate price and the purpose of county's program can be effectively accomplished. Both the land trust and the development representative believe there is a reluctance to increase the fee because it could make development cost prohibitive.

The in-lieu fee is paid to the county's Planning Department and placed into an interest-bearing account held separately from other funds.¹⁵⁶ The Department maintains accounting of the amount paid, the parcel number associated with the fee, and the payor information.¹⁵⁷ The Land Trust director indicated that organizations can apply for grants funded by the in-lieu fees, which can be applied toward purchases of agricultural

¹⁴⁹ *Id.* at § 8-2.405(a).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at § 8-2.405(b).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at § 8-2.405(e).

¹⁵⁶ *Id.* at § 8-2.405(d).

¹⁵⁷ *Id.*

conservation easements, as well as any administrative, monitoring, stewardship, or legal costs associated with the conservation easements.¹⁵⁸

Other Considerations

Ratios and Acreage Thresholds. The Yolo Land Trust's Director expressed a desire for a more protective 2:1 ratio because, at a 1:1 ratio, farmland is still lost. Conversely, the development representative expressed a desire for a less stringent requirement, and suggested a 0.5:1 ratio would be more appropriate.

The size of a conservation easement is a main factor in determining whether the Yolo Land Trust will accept an easement. The director said in the early years of the land trust they began with small, 9- or 10-acre parcels and found the size of the projects did not further the purpose of agriculture conservation, even though they required the same amount of time, effort, and paperwork as the larger parcels. The land trust decided it was a better use of resources to dedicate efforts to conserving larger lot sizes at a minimum of forty acres. For this reason, both the land trust and development representatives echoed the infeasibility of the county requirement that 5 or more acres must be set aside in a conservation easement.

The Yolo Land Trust's Director indicated she believes the county will increase the acreage to allow fees-in-lieu for conversion of 20 acres or less. While she would prefer a larger 40-acre amount, the land trust would be willing to accept 20-acre conservation easements. The development representative echoed the sentiment that the acreage threshold should be set at 40 acres before triggering a mandatory set aside.

Distance Requirements. Both the land trust and the development representatives felt the two- to four- mile radius requirement was onerous. The mileage requirement adds an additional burden when the land trust locates an area that is desirable to conserve, yet is not within the radius of the proposed project. This potentially limits the land trust from protecting critical farmland. From the development perspective, the mileage requirement could potentially prohibit the development entirely. The Director of the Yolo Land Trust believes the county will increase the distance of the mileage requirement in the near future. This requirement may also make it harder to do a mitigation bank, because the lands you can tap into for credits are more limited.

Impacts on Voluntary Conservation. There is more landowner demand for conservation than money available to purchase easements, which suggests voluntary conservation is working along with regulatory mitigation in Yolo County. Further, the Planner believes that conservation of agriculture land through the regulations is still voluntary because the landowners stepping forward to place their land under protection do so willingly. The mandatory nature of the regulations falls on the developer, rather than the agricultural landowners. From the land trust and developer perspectives, those who

¹⁵⁸ *Id.* at § 8-2.405(h).

want to conserve their own land will do so for benefits other than those tied to the regulations (i.e. tax benefits or cash payments).

Affordable Housing. The development representative raised the importance of providing affordable housing to the communities. He stated any time more regulatory costs are added to development projects, the developer must either opt not to proceed with the project or to pass the cost on to the consumer. While affordable housing to low or very low income households is provided for in the Yolo County Zoning Code as an exception to the agriculture mitigation requirements,¹⁵⁹ the development representative reflected concern over creating a housing market where there is housing available for only the low and high ends of the market's spectrum. Further, any new houses that are built must be competitive with the existing housing market.

Monitoring and Enforcement. While the Yolo Land Trust has not had any difficulties with monitoring or enforcement, the director recognized that litigation fees can be devastating and quickly consume the value received for the easement. She cautioned communities using fees-in-lieu to not set the fee too low so as to inadequately fund the program's purpose. The market can quickly outpace a fee schedule, so it is important to plan for a mechanism to change the fee schedule at reasonable intervals.

Farmer Perspectives. One Central Valley farmer, and former president of the local chamber of commerce, highlighted the importance of counties and cities working together to protect agricultural buffer lands between municipalities. He said it is in the best interest of cities to avoid growing or sprawling into one another, because often the small town will be consumed by the larger, harming the town's identity and economy. Agricultural land protection is one tool local governments can use to ensure that open space buffer zones remain between municipalities.

Conclusions and Lessons

Yolo County is a model for developing a close relationship with a land trust, and allowing the expertise of the trust to guide choices about the best agricultural property to protect. While the mitigation program has not been frequently used, the community has reflected on what is working and what should be adjusted to make it functional and responsive to both protection of agriculture and developer needs. This ongoing stakeholder dialogue suggests that the distance requirement, minimum acreage, and in-lieu fee are areas where future modification is needed. These topics were recently addressed by a community Agriculture Advisory Process, for which there is a forthcoming report.

¹⁵⁹ *Id.* at § 8-2.404(c).

CONCLUDING OBSERVATIONS

This section provides a summary of the techniques included in this report, highlights common themes across jurisdictions, and provides concluding remarks and advice provided by the many stakeholders interviewed.

Summary of Approaches

The mitigation strategies included in this report fit into one of these categories: mandatory set asides, fees-in-lieu, voluntary protection programs, or a combination thereof. The following is a compilation of general observations regarding each of these strategies.

Mandatory Set Asides. Most communities featured in this report require ratio set asides or certain percentages of agricultural land to be conserved during development. All of these communities use zoning as the foundation of determining which lands require set asides. Bannock, Teton, and Boulder counties use conservation percentage requirements, versus Yolo County, Stanislaus County, and the City of Hughson, which use ratio set asides. Important considerations in implementing this mitigation strategy include: what set aside ratio requirements to use; whether set asides may be both on-site or off-site; whether prior conservation efforts count toward current mitigation; how best to identify lands of equal or greater agricultural value to be set aside; and what entity is best suited to locate, negotiate, and manage conserved lands and conservation easements. Additionally, communities must determine what to do with any set asides which land trusts do not wish to manage.

Importantly, of the localities highlighted in this report that have implemented mandatory set asides to conserve agricultural lands, many have yet to actually use the regulations. This is largely due to the impacts of the economic downturn and a general lack of development on agricultural lands. Therefore, some of the stakeholder perspectives offered here are theoretical because the regulations have yet to be practically or extensively applied. Nonetheless, it is worth highlighting that these communities successfully navigated the public opinion process and achieved stakeholder buy-in for regulations requiring developer mitigation.

Fees-in-Lieu. Multiple localities included in this report incorporated some type of fee component in their regulations. Jurisdictions such as Stanislaus and Yolo Counties implement a combination of both mandatory set asides and fees-in-lieu. Typically, regulations incorporate fees where development proposals are smaller and a set aside is impractical. For example, Yolo County regulations allow for in-lieu fees when a development proposal is less than 5 acres, and Stanislaus County allows for in-lieu fees when a development proposal is less than 20 acres.

Stakeholders generally had positive responses to fees-in-lieu. Land trust staff in particular championed the use of fees when parcels are small and acquiring a conservation easement would be expensive and impractical. Fees provide the land trust with greater

flexibility in targeting lands that are a high priority for conservation. Stakeholders in jurisdictions with regulations lacking a fee option, such as Bannock, Boulder, and Teton Counties, highlighted that offering a fee option would be a good thing. Important considerations in implementing fees include: how to calculate fees; where and what entity is to hold fees; determining when and for what types of development fees are an option; and determining what fees may be used for (acquisition of development rights, monitoring, administrative costs, etc.).

Voluntary and Non-Regulatory Farmland Protection Programs. A few of the studied communities have implemented voluntary agricultural land protection programs, or have a component of their agricultural mitigation plan that is voluntary. King County and Boulder County, for example, implement county-driven voluntary programs to acquire agricultural lands. These counties seek to actively raise money for agricultural protection initiatives, and use those funds to purchase the development rights on lands with a high priority for conservation. If appropriately funded, these programs can be effective in conserving identified prime agricultural lands. It also bears repeating that several studied communities have more farmers volunteering to conserve lands that the market can accommodate, resulting in waiting lists. Nonetheless, several interviewees noted that regulatory mitigation is an important complement to voluntary efforts because some landowners are uninterested in voluntary conservation.

In addition to voluntary land conservation, several studied communities also use complementary programs such as local food initiatives, land stewardship training, and estate planning to support agricultural operators.

Combining Mandatory and Voluntary Land Protection. Interviews indicate that imposing mandatory conservation has not harmed voluntary conservation within the studied communities. One planner highlighted that, under his county's regulations, the land trust contacts a landowner who has expressed interest in selling their development rights, and negotiates a deal. In this way, all land that is being conserved is done so voluntarily. This particular planner thus sees the mandatory set aside model as enhancing voluntary protection because it allows the land trust to conserve more land by providing a guaranteed funding source.

Themes Across Jurisdictions

Relationships with the Agricultural Community. Stakeholders repeatedly emphasized the importance of involving the agricultural community in the process of protecting agricultural lands. Surveys that inform local governments about key agricultural needs are important both when new programs are formed, as well as to periodically assess and adjust established programs, as King County and Yolo County have done. Many interviewees highlighted the importance of holding workshops and meetings to inform the community about conservation efforts, and to overcome misconceptions that hinder conservation goals. Some farmers expressed the significance of framing the discussion

around protecting the agricultural heritage of a community. One farmer suggested incorporating estate planning and other needed services for farmers and ranchers.

Importance of Identifying Lands for Conservation. Stakeholders reiterated the importance of local governments and land trusts to have a unified vision of which agricultural lands should be targeted for conservation. One steward suggested that stakeholders collaboratively develop a working list of specific agricultural lands or general areas within the county that should be a priority for conservation. Going through this process requires stakeholders to determine what is most important in protecting agriculture within the community, i.e. protecting lands that are actually in production, lands with prime soils, lands suited for growing produce versus grazing lands, etc. Making these determinations is an important preliminary step in preparing to conserve agricultural lands in an organized fashion.

Relationships with Land Trusts. Both planners and land trusts reiterated repeatedly that having a good working relationship is a key component in the success of an agricultural land conservation effort. None of the local governments and land trusts included in this report had entered into formal agreements; however, all cited the importance of collaboration and a unified vision for conservation efforts. (We have also included a Model Memorandum of Understanding in Appendix F). The regulations in these jurisdictions require only that, where a conservation easement must be acquired, it is held by a “qualified” entity. This may include small, local land trusts like many of the entities included in this report, or larger, national organizations such the Nature Conservancy. Multiple planning staff said they actively encourage developers needing to mitigate agricultural land development to use the resources and services of local land trusts. However, these same planners emphasized that the regulations give developers the freedom to compare organizations and entities to find the right fit.

There were common threads identified by stakeholders as the foundation of this “good working relationship” between local governments and land trusts. These consist of an active inclusion of the land trust in the conversation about agricultural land protection priorities in the region, and the land trusts’ involvement in the drafting of regulations and programs. Reluctant developers or landowners also can be referred to the land trust for more information, and many community members are more comfortable receiving this information from a non-governmental organization. Often, land trusts are active in local communities and may have farmers and ranchers on their staff or boards. Numerous individuals interviewed highlighted this as an important and unique aspect that gives land trusts additional credibility.

Another important aspect of this relationship is the willingness to continually work collaboratively in tackle challenges that arise. Land trust staff cited instances when a current or former regulation was problematic, and when both the county and the land trust collaborated to overcome these challenges. For example, a land trust in Yolo County is

actively working with the county planners to change the impracticable requirement that mitigation lands are located within a 2-mile radius of developed lands.

Finally, planners highlighted how land trusts act as an educator and a guide through the process, which is a reason why it is so important that they are actively included in all aspects of implementing a program. As one developer cautioned, making the process clear for the developer and other entities involved is key. Another developer emphasized the importance of making the regulations understandable, and not changing them too frequently. He noted that developers will adjust more easily and the regulations will be more effective if the steps of compliance are clear, and if there are resources available to assist the developer in navigating the process. Land trusts are one of these important resources.

Determining the Ratio for Set Asides. Most of the jurisdictions with mandatory set asides imposed a 1:1 ratio or less. The City of Hughson was the only jurisdiction that imposed a higher ratio of 2:1. However, planners and land trust staff emphasized the importance of requiring higher ratios to ensure that agricultural land is actually being conserved. One land trust staff suggested a sliding scale of set-aside ratios where a higher ratio is imposed on prime agricultural soils that are sought to be developed.

Addressing Small and Isolated Parcels. Land trust perspectives gathered for this report were generally critical of efforts to protect small or isolated parcels of land. Multiple land trust directors and staff highlighted the cost ineffectiveness of putting conservation easements on small parcels. Many of these individuals highlighted the usefulness of incorporating a fee option to avoid creating small parcels.

However, some stakeholders did recognize an emerging market in their region for small, isolated, agricultural parcels with the growing local food movement. For example, stakeholders in Boulder County noted that the first mandatory set aside regulations that were implemented resulted in multiple small, isolated parcels, which was problematic at first. But in recent years, those parcels have been purchased and used as produce washing facilities and small community markets. Although there may be future uses for these parcels, most stakeholders cautioned that too many of these small parcels would be expensive and challenging to market and monitor. This suggests that an entity other than a land trust may be more suitable to manage small parcels.

Fees. Most stakeholders were generally supportive of offering fee options. In particular, land trusts encouraged them for smaller parcels where conservation easements are expensive or impractical. Determining fee structures and managing fees-in-lieu effectively is an important component to the success of a fee option. The City of Hughson determines its fee structure largely on an ad hoc basis. There, the local land trust and the city council make the ultimate determination based on market value and estimated monitoring costs; however, the regulation sets a fee minimum of 35% of the price of the land. Other jurisdictions take a more structured calculation approach. Yolo County regulations for example provide an equation to assess fees. The equation can be adjusted as

often as quarterly to account for current market trends and inflation. However, as one stakeholder noted, the equation had not been recalculated since 2007, which he believed was problematic. Most stakeholders reiterated the importance of calculating and recalculating fees regularly to accurately reflect market prices.

Other individuals interviewed, with land trusts in particular, emphasized the importance of incorporating monitoring costs into fees, in addition to acquisition costs. If fees do not adequately account for monitoring costs, land trusts or local governments may not be able to effectively carry out their conservation efforts as a whole. Multiple land trust stakeholders highlighted the importance of clearly stating how the fees can be used, and some even included coverage of administrative functions of land trusts.

Stakeholders provided multiple models for holding and managing fees. In one jurisdiction, fees are paid directly to the planning department, held in an interest-bearing account, and made available to land trusts through grants. In another jurisdiction, fees are held by the land trust itself. Stakeholders from both models emphasized the importance of ensuring that land trusts maintain flexibility in how they use the fees.

Importance of Growth Boundaries and Working with Municipalities. There was a general theme in multiple jurisdictions on the usefulness of urban growth boundaries and including local municipalities in the development and implementation of agricultural land mitigation efforts. Protecting agricultural lands through conservation easements reduces urban sprawl and maintains open space between municipalities. Stakeholders emphasized the importance of counties working with local governments, through intergovernmental agreements or memorandums of agreement, to funnel development to municipalities and off of prime, unincorporated agricultural lands.

Conclusion

The goal of this report is to provide a range of examples from communities that have taken action to conserve agricultural lands. The examples highlighted in this report are inextricably linked to the circumstances unique to the economy, climate, population density, agricultural capacity, etc. of each individual community. Not all of the strategies or techniques provided in this report are applicable to, or feasible for, Missoula County. However, by taking into account the many perspectives and the advice provided by different stakeholders in communities that are undergoing this type of effort, Missoula County is better situated to move forward in tailoring subdivision regulations that adequately address the requirements of Mont. Code Ann. § 76-3-608(3).