Agricultural Mitigation

Description:

This method assures one-for-one replacement of a converted resource at another site, or else payment in lieu of replacement. There is an analogy to wetland mitigation programs which require a developer who converts wetlands to create additional wetlands of similar value in another area as a substitute for what was lost. Mitigation fees are justified by the burden imposed on the public as a result of the loss of the environmental resource.

The procedure has analogies to both transfer of development rights (TDR) and to impact/linkage fees. A TDR transaction involves a quid pro quo in which a targeted agricultural (or other resource-based) parcel is guaranteed immediate preservation in return for assigning a current or future right to develop on some other parcel in a designated "receiving" area. In the case of an agricultural mitigation program, a similar quid pro quo occurs, but the roles played by "preservation" and "development" in the transaction are interchanged. The right to develop now is granted for a given agricultural parcel in return for a current or future legal right to a guarantee of permanent preservation from development on some other equivalent agricultural parcel in a designated "preservation" area.

Impact fees are common around the U.S. and provide for collection of uniform fees on new development to pay for the public infrastructure costs that can be directly traced to each project. Linkage fees are fees assessed on new commercial development as compensation for specific public costs like the provision of affordable housing for new employees that are not traditionally covered by public service fees for specific public utility services (water, sewer, garbage collection, roads). The linked public costs for affordable housing generated by new commercial projects are not normally reimbursed through traditional government revenue sources.

Mitigation fees are distinguished from impact fees or linkage fees charged to new development because the former are resource-based rather than service- or facility-based.

Operation:

A critical public resource is identified which merits long-term protection through long-range community planning. A public value is attached to the resource in the form of a per unit price. In the TDR case, the developer receives a deed of transfer for the protected development rights, but often these must first be purchased by an intermediary public TDR bank to remove the risk involved to the developer. Similarly, in the case of a mitigation transaction, a mitigation fee

to a public mitigation bank is often substituted for a direct purchase by the developer of development rights on a replacement agricultural parcel.

Mitigation fees collected from the conversion of farmland are often banked by a designated public agency and then used for fee simple purchase of replacement resource land, or for purchase of development rights. Fees may also be used in other ways to help support the vitality of the agricultural sector. For example, in Santa Maria, Ca., $30,000 of in-lieu ag mitigation fees were used to build housing for farm workers. In Carlsbad, Ca. the use of mitigation fees was allowed for beaches and the coastal and lagoon environment as well as agricultural land.

Where Applied:

Such mitigation programs for agricultural conversion by private developers are common in California, but rare in most of the U.S. They have been adopted in Monterey and Yolo County and the cities of Gilroy, Tracy, Brentwood and Davis, California and in King County, Washington which has a "no net loss" program. Mitigation for loss of resources like wetlands and habitat are required by law under the Clean Water Act and the Endangered Species Act of both private and public developers.

In addition to agricultural preservation, mitigation fees have also been used for replacing affordable housing, hotels, mobile home parks, wetlands, endangered species habitat, and lofts. The most extensive state program is the California Environmental Quality Act which requires a developer to mitigate any adverse environmental impacts of a development. Vermont's Impact Fees Statute allows use of offsite mitigation in lieu of impact fees for loss of agricultural land. However, in Vermont, opposition to mitigation fees led to their only being available as a last resort. There are also farmland mitigation programs in Illinois, Massachusetts and Pennsylvania.

The Davis County program had between 1995 and September 2001 approved 15 ag mitigation projects, including 4 easements and had collected $1.5 million in in-lieu fees. In-lieu fees charged in Davis must equal or exceed the value of a previous farmland conservation transaction plus the estimated administrative costs for acquiring the mitigation property. The City of Brentwood imposes a flat $5,000 an acre fee for conversion of ag land. Acquisition of land in Vermont applied a mitigation fee per acre that failed to reflect the actual cost of acquisition of replacement land.

Advantages:

- Offers an alternative to costly purchase of development rights programs because payment for permanent preservation of lands is shifted to the private sector

- Provides more flexibility for developers than TDR programs in choosing development sites: conversion of agricultural sites at specific locations desirable for development is not prohibited even if within a "preservation area", as long as replacement land is protected elsewhere.
- Provides predictability for developers by knowing in advance that land in a specific prime market location can be developed, if mitigated elsewhere
- Speeds up the development process by reducing the time and controversy in applying for development permits

Disadvantages:

- Unless combined with planning and zoning that restrict where development can occur, may contribute to scattered development in farmland areas that cause an "impermanence syndrome."
- Replacement agricultural land mitigated may lack the same quality or productivity of the farmland converted
- Replacement agricultural land purchased may not have been subject to threat, meaning that in practice there is no net preservation gain
- It has been argued that loss of agricultural land is unmitigatable, because there is still a net loss
- It is not clear that the net preservation of farmland under mitigation will exceed that under strongly enforced exclusive agricultural zoning; there is a tradeoff in what is lost versus what is preserved
- Conversion of some parcels of agricultural land, allowed under a mitigation program, may contribute disproportionately to significantly inducing secondary development; their rezoning and conversion may not have been allowed under a traditional zoning/comprehensive planning regime.
- Introducing a mitigation program depends on strong public support acceptance of permanent agricultural preservation as a legitimate public purpose
- Since mitigation is implementing public benefits, it may be argued by some landowners that it should not be subsidized by individual landowners but by the taxing public as a whole, as in the case with PDR
- Mitigation fees which are disproportionate raise the possibility of legal challenges. They cannot deny landowners all economically viable use of their land. Currently, key legal decisions on the issue in California remain unpublished, so the legal status is unclear.