

# **FARMLAND PRESERVATION PROGRAMS IN WEST VIRGINIA: A PRELIMINARY INQUIRY INTO THE MERITS OF PURCHASE DEVELOPMENT RIGHTS**

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**Abstract:** To prevent the loss of farmland in West Virginia, the Voluntary Farmland Protection Act (VFPA) was passed in 2000. This act gives counties and the State authority to develop and fund local farmland protection programs, which typically involve a voluntary sale by a landowner of the right to develop the farmland. Following the purchase, the purchaser (often a government or a land trust) would retire the property. Since the inception of the VFPA, 5,000 acres of farmland have been retired in West Virginia. The objective of the paper is to assess the merit of this legislation in terms of its contribution toward its objective of preserving open space. The analysis is carried out at three levels, including the state, county and operational level. The state level analysis is conducted to assess the overall risk of eroding farmland in West Virginia. Aggregate statewide data will be used to determine this risk, including data on population density and state economic growth rates. A similar assessment is conducted at the county level to determine if development rights are more common in high growth counties (i.e., a micro level assessment). Finally, an analysis is conducted at the operational level to determine the operational efficiency the programs carried out under this legislation. The focus will be on the risk of misappropriation. Issues related to transparency and accountability in the distribution of funds swill be analyzed (how are decisions made, and how is accountability achieved). It is concluded that there seem to be, at the minimum, significant inroads for critical examination of the VFPA.

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## **Introduction**

In recent years, activists opposing the consumption of farmland have worked to create policy that allows for protection of these open spaces. An increasingly popular way to achieve this is to rely on Purchase of Development Rights (PDR). These involve a voluntary sale by a landowner of the right to develop the farmland. Following the acquisition, the purchaser (either a government agency or a land trust) retires the property for purposes of preventing its development. While the existing use of development rights primarily is used for purposes of protecting farmland in regions that are experiencing rapid urban sprawl, similar programs are adopted in rural areas.

This paper draws attention to policy allowing for the purchase of development rights in West Virginia. In efforts to prevent the loss of farmland in West Virginia, the state's legislature passed legislation in 2000 giving counties and the State authority to develop and fund local farmland protection programs. The objective of this paper is to assess the merit of this legislation in terms of its contribution toward its objective of preserving open space.

The analysis is two-pronged. The first portion of the analysis is conducted for purposes of assessing the actual need for farmland protection in West Virginia, based upon the legislation's stated goals. This analysis is carried out both at the state and the county level. At the state level, the analysis is conducted for purposes of assessing the overall risk of eroding farmland in West Virginia. Aggregate statewide data is used to determine this risk, including data on population density and state economic growth rates. A similar assessment is conducted at the county level to determine if development rights are more common in high growth counties.

The second portion of the analysis is carried out at the operational level for purposes of offering insight to the operational efficiency of the programs carried out under this legislation. The focus will be on the risk of misappropriation. Issues related to transparency and accountability in the distribution of funds are analyzed.

The study is important for several reasons. Perhaps most important, it sheds light on the effectiveness of farmland protection policies in West Virginia as tool for managing growth and economic development. It is also important for purposes of understanding the extent to which these policies may infringe on the economic growth potential of West Virginia. In West Virginia (and in many states around the country), development rights are sold in perpetuity. If these become widespread, they may become an institutional obstacle to necessary economic growth. This would add to an already difficult business climate context. West Virginia was ranked as number 50 in terms of economic freedom, in a recent study (Black 2006).

The paper is organized into four sections. The first section offers a general overview of purchase of development rights (PDR). The second describes the existing farmland protection policies in the State of West Virginia, including the Voluntary Farmland Protection Act (WV Code §8-24-72 through §8-24-84 (2000)) and the Conservation and Preservation Easements Act (WV Code §20-12-2 (1995)). The third describes several research examining urban sprawl and sprawl in West Virginia. The final section suggests a theoretical framework that can be used for purposes of framing the findings of the research.

### **Purchase of Development Rights Programs**

Purchase of Development Rights Programs (hereon forward PDR) exists nationwide in communities of all shapes and sizes. In a typical PDR program, an entity, governmental or non-profit, purchases a landowner's development rights. According to Blaine et al (1998), the sale of development rights should be considered akin to the sale of mineral rights. In other words, the property owner can still control all aspects of the land, except for the previously purchased development rights. This purchase lasts as long as agreed upon; most PDR programs purchase development rights in perpetuity. Hence, even if the landowner sells his property to a third party, the development rights belong to the organization that purchased them.

PDR programs are used by entities in two ways: to conserve land (either to protect farming interests, or to protect habitat for endangered species), or to steer development toward other geographic areas. Conservationists have argued that PDR programs are good ways to encourage the preservation of land, because instead of using regulatory policy to mandate what can and cannot be done with land, the conserving agency pays the landowner for his or her *inaction*. Main et al (1999) argues that conservation via regulation does not sufficiently reward landowners, who will in turn foster anti-conservation sentiments. They advocate PDR programs, although these scholars note that there are significant resource limitations to their implementation.

PDR programs got their start as a way for farms to hold out against financially stronger economic interests. Blaine et al (2006) describe PDR programs as one of the tools available to preservationists. PDR programs are designed to protect farmers by allowing these landowners to continue their own economic activity on the land after the rights have been sold. As such, PDR programs serve as a type of subsidy. While subsidies typically are used to protect or promote economic growth, PDR programs do not affect the market of the good produced on the property. They merely serve as a second means of income for the property owner.

### **Farmland Protection in West Virginia**

#### *The Voluntary Farmland Protection Act (VFPA)*

The Voluntary Farmland Protection Act (VFPA) was passed by the West Virginia legislature in 2000 (WV Code §8-24-72 through §8-24-84 (2000)) and became effective on June 8, 2000. The act was one of the first steps taken in the state to protect farmland while not forcing farmers to make particular decisions (West Virginia Farmland Protection, 2006). The VFPA allowed for the creation of Farmland Preservation Boards (FPB) and Farmland Protection Programs (FPP) in each of the state's 55 counties, as well

as a state West Virginia Agricultural Land Protection Authority. It should be noted that the creation of these boards required county interest; in other words, counties disinterested in the VFPA are not required to act upon it. The act also limited the authority of these bodies; explained the farmland protection methodology and the ways in which property would be protected; explained where the funding for such protection would come from; explained the potential use of protected property; and allowed for the Commissioner of Agriculture to promulgate rules.

The Act's stated purpose is the protection of West Virginia's dwindling farmland. It states: "The legislature hereby finds and declares that agriculture is a unique 'life support' industry and that a need exists to assist those agricultural areas of the state which are experiencing the irreversible loss of agricultural land." According to West Virginia Farmland Protection Website (West Virginia Farmland Protection, 2007), which is the main information outlet about the West Virginia Farmland Protection act, West Virginia's 25 most productive agricultural counties lost more than 100,000 acres of farmland in less than 15 years (between 1982-1997). Meanwhile, over the course of 33 years (1964-1997), the state lost more than 1.8 million acres of farmland and more than 20,000 acres of orchard land (West Virginia Farmland Protection: Background, 2007). Further analysis is needed to determine the extent of this land that has been developed in a way that leads to a reduction in open space.

The West Virginia Farmland Protection (accessed March 16, 2007) also describes the funding mechanism underlying these programs. According to their Website, the VFPA allows each county to slightly increase real-estate transfer tax rates, allowing increases of \$1.10 per \$500 of value. One of the attractive elements in the use of the real-estate transfer tax is that it can hit multiple times during rampant development. For example, revenue would be raised during the sale of a farm to housing developers, and again during the sale of the newly built housing to purchasers. The money raised from this increased taxation would then be used to fund Purchase of Development Rights (also known as Transfer of Development Rights) programs at the county level.

According to the West Virginia Farmland Protection Website the VFPA (West Virginia Farmland Protection, 2007), the Act is justified based on seven benefits. These include:

1. Sustaining the state's farming community.
2. Providing a source of agricultural production within the state.
3. Controlling urban expansion.
4. Curbing urban blight.
5. Protecting agricultural land for open-space use.
6. Enhancing tourism.
7. Protecting worthwhile community values.

Within the Act itself, there is no further explanation, in the form of either definitions or benchmarks, of these seven reasons.

#### *The Conservation and Preservation Easements Act (CPEA)*

The Voluntary Farmland Protection Act (VFPA) was preceded by the Conservation and Preservation Easements Act (CPEA). Passed in 1996, the CPEA (WV Code §20-12-2

(1995)) facilitated the FVPA in 2000. The CPEA was designed accomplished two things (West Virginia Farmland Protection, 2007): it established the need to protect various types of locations through West Virginia, and it explained the way in which that protection might occur. The legislation laid dormant until 2000, when the VFPA was written, and passed, into law.

The VFPA's primary author is Lavonne Paden, who at the time served under the title of Farmland Protection Specialist at the Canaan Valley Institute (CVI), which, according to its official website describes itself as "...a nonprofit, non-advocacy organization that helps organizations identify, solve, and implement solutions to serious water issues impacting their daily lives ([www.canaanvi.org](http://www.canaanvi.org)).” Ms. Paden currently serves as the Executive Director of the Berkley County Farmland Protection Board (see, [www.wvfarmlandprotection.org](http://www.wvfarmlandprotection.org)). Other key figures in the development of the VFPA was Pat Bowen, the NRCS's Assistant State Conservationist for Field Operations, and Senator John Unger, one of two representatives from Berkley and Jefferson Counties in West Virginia's eastern panhandle (Bowen, 2007; Paden, 2007).

In a semi-structured interview, Ms. Paden explained that the CVI got involved in farmland protection because it believed that protected farmland would have a positive benefit on its own projects (Paden, 2007). In this interview, Ms. Paden also explained that farmland protection policies in Maryland and Pennsylvania served as an inspiration for a similar program in West Virginia. The major difference between these and the final policy that was adopted in WV was, according to Paden, that parts of the law had to be changed to account for West Virginia's topography. Both Pennsylvania and Maryland feature significant portions of flat farmland, while almost all of West Virginia's farmland exists on the sides of hills and mountains.

In 2002, the state took one final, and important, step in the evolution of development right purchasing. The VFPA was amended to allow counties to collect their own funding for farmland preservation via the previously discussed real-estate transfer tax (West Virginia Farmland Protection, 2007). This meant that, besides the federal monies that were available to counties with established boards, there could also be income generated locally that was immediately earmarked for development right purchasing.

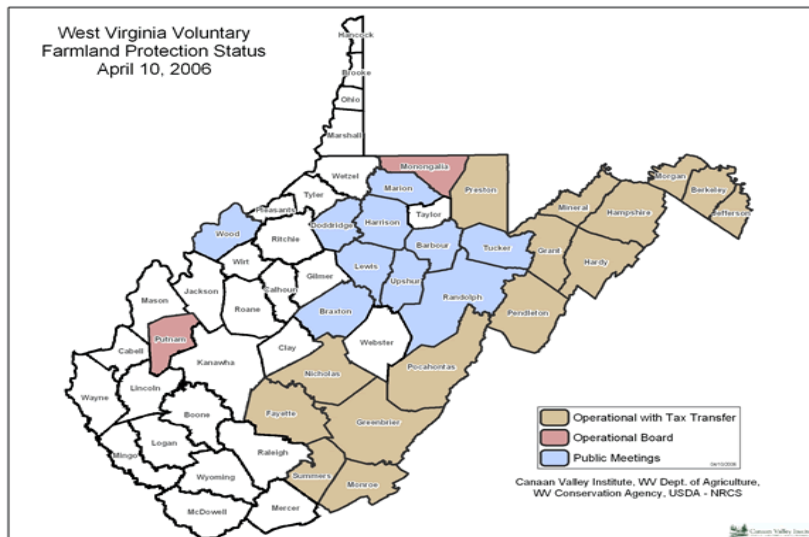
According to Paden, the VFPA moved through the state legislature with relatively limited friction. It encountered some resistance from the state's Department of Highways and from education supporters. The Department of Highways worried that properties whose development rights had been purchased could not be repossessed by the state through eminent domain. There was also some concern raised among education supporters, who worried that the established tax-base for farmland development would encroach on the tax-base for schooling.

An important factor in moving the legislation, according to Paden, was the prospect of having Federal Funds as the means of financing the program. Given, federal funding the West Virginia's government would be required to provide no initial financial outlay to get local boards started. The connection for the federal money was Pat Bowen who had at his disposal federal funds from the US Department of Agriculture and

whatever would be raised in individual counties through newly increased property transfer taxes (Bowen, 2007).

### ***Current State of the Act***

According to West Virginia Farmland Protection (West Virginia Farmland Protection, 2007), 16 of West Virginia's 55 counties currently have created the boards necessary to begin purchasing development rights, including Berkeley, Fayette, Grant, Greenbrier, Hampshire, Hardy, Jefferson, Lincoln, Mineral, Monroe, Morgan, Nicholas, Pendleton, Pocahontas, Preston and Summers. These counties represent an estimated (4) population of roughly 423,000, or a little more than 24 percent of the state's total population.



Two more counties, Monongalia and Putnam, have boards, but have not yet begun the process of collecting tax revenue for PDR purchases. Finally, there are ten counties beginning the process: Barbour, Braxton, Doddridge, Harrison, Lewis, Marion Randolph, Tucker, Upshur, and Wood. All but Lincoln County are shown on the map above; Lincoln added its program in early.

According to the NRCS, development rights for 6121 acres of farmland in West Virginia have been purchased from 44 different sellers. The development rights cost a total \$17,359,712. The federal government funded \$6,978,277 of that; West Virginia counties, via the real-estate transfer tax, funded the remaining \$10,381,435. The average cost per acre was \$2836. The counties that have protected the most farmland include, in order, Berkeley, Jefferson and Morgan, which possess 3581 acres of the total. Two of those three counties are represented by John Unger, one of the original authors of the legislation, while the third borders Unger's legislative territory. The cost of this acreage was \$12,254,922.

### **Research Approach**

The stated research objective of the paper is to assess the merit of this legislation in terms of its contribution toward its objective of preserving open space. As noted in the introduction, the analysis is two-pronged. It includes analysis of the actual need for

farmland protection based upon the legislation's stated goals, and an analysis of the operational efficiency of the programs carried out under this legislation.

Several data sources were used for purposes of the analysis, including 2000 US census data, and 2005 US census estimates of population change within West Virginia. In addition to these data sources, semi-formal interview were held with two of the above mentioned key persons involved in the preparation of the legislation – Mr. Pat Bowen and Ms. Lavonne Paden. The principal purpose of the interviews was to collect information about the prospective operational efficiency of the PDR programs in WV. Particular emphasis was placed on collecting information about the effectiveness of the allocation process of funds, in terms of rigor and the transparency and accountability associated with these allocations.

### *Needs-Based Analysis*

The purpose of this portion of the analysis is to assess the overall risk of eroding farmland in West Virginia at the county level as well as at the state as a whole. Through the VFPA, the threat of sprawl is both implicit and explicit. Thus, a natural starting point for this analysis is to determine the risk of sprawl for the state as a whole and at the county level.

There are numerous ways to measure sprawl. Smart Growth for America, an anti-sprawl advocacy group, identifies four different approaches (Galster, et al. 2000). The first, and simplest, is a measure developed by USA Today, for a series of articles the newspaper ran about sprawl in the United States (Nasser & Overberg, 2001). Published in 2001, USA Today took each of America's then 271 metropolitan areas and rank ordered them based upon the amount of the metropolitan area's population that was urbanized (defined as a population of greater than 1000 residents per square-mile). The 271 metropolitan areas were rank ordered again based upon the amount of change between 1990 and 1999. Those two numbers were combined and then rank ordered a final time, creating a list of the most sprawling metropolitan areas in America. Metropolitan areas are defined by the US Census Bureau as a place with, "a core urban are of 50,000 or more population...as well as any adjacent counties that have a high degree of social and economic integration with that urban core." (US Census, 2005)

A second measure of sprawl was developed by the Sierra Club (SC). The SC's measures were based on an account of several factors including "population shifts from city to suburb, growth of land area vs. growth of population, time wasted in traffic, and loss of open space." (Nasser & Overberg, 2001).

A third measure was developed by George Galster, an academician, as part of his examination of America's thirteen largest metropolitan areas (Ewing, et al, 2005). Galster compared these metropolitan areas on eight different levels, including density, continuity, concentration, clustering, centrality, nuclearity, mixed use and proximity.

A final measure has been developed by Smart Growth America (SGA). It measures 83 metropolitan areas (Karabegovic & McMahon, 2006) including every metropolitan with a population greater than 500,000. SGA computes sprawl based upon four factors: residential density, neighborhood diversity of jobs and housing, strength of downtowns/activities, and accessibility of street network.

Regardless of the definition used, West Virginia would score low on sprawl. An analysis of state and county data provide several strong indicators of the limited presence of sprawl in West Virginia. First, of the sixteen counties with currently operating VFPA boards, eight have no connection to any metropolitan area at all, including Grant, Greenbrier, Hardy, Monroe, Nicholas, Pendleton, Pocahontas, and Summers County. The other eight counties (Berkeley, Fayette, Hampshire, Jefferson, Lincoln, Mineral, Morgan, and Preston) have connections to either metropolitan or micropolitan areas; micropolitan areas are defined by the US Census Bureau as a place with a core urban area of 10,000 or more residents but less than 50,000 (US Census, 2005). Hence, eight of the counties that are currently protecting farmland *from* sprawl have no urban areas, or any connection to urban areas.

The other eight counties are geographically connected to urban areas, including Berkeley and Morgan (Hagerstown, MD, and Martinsburg, WV), Fayette (Oak Hill, WV), Hampshire (Winchester, VA), Jefferson (Washington, DC, and Arlington/Alexandria, VA), Lincoln (Charleston, WV), Mineral (Cumberland, MD), and Preston (Morgantown, WV).

Second, none of the West Virginia counties with populations dense enough to be considered urban areas currently have any sort of farmland protection program in place. The highest population density is found in Berkeley County, which has 236.5 persons per square mile, putting it more than 750 short of urban area status (US Census, 2000). This is worth remembering, especially when considering that all measures of urban sprawl start with examinations of metropolitan areas.

Finally, urban sprawl assumes a certain level of economic development. At an aggregate level, it seems reasonable enough to assume that places that are experiencing slow or stagnant economic growth rates are not subject to sprawl. Numerous studies suggest that West Virginia struggles to grow economically.

According a report issued by the Center for Economic Development in 2006, West Virginia received “F” grades, the lowest grades possible in multiple categories, including economic performance, business vitality and development capacity (Terry, 2007). WV score ranks low with on business climate measures. Forbes Magazine rated West Virginia amongst the three worst states in the nation in which to do business (Badenhausen, 2006). The state was joined by Louisiana and Mississippi, both a year removed from the devastating after-effects of Hurricane Katrina. According to Badenhausen (5), West Virginia suffers greatly because of its poor labor pool, its weak prospects for growth, and a low quality-of-life ranking. Several scholars are also pointing at the low level of economic freedom in West Virginia, when describing the business climate (20). West Virginia ranks 45 according to the Frazer Institute’s Economic Freedom Index (Karabegovic & McMahan, 2006). In another economic freedom study, West Virginia was ranked as number 50 (Black 2006).

Based on measures of sprawl, thus, the VFPA appears to be directed at solving a problem that does not exist, at least according to the legislation’s justification. That is, there seems to be only a minimal threat of urban sprawl, the actual threat of rampant development (or over-development) seems limited. If the threat is limited, then the legislation’s justification is weakened.



### *Operational Level Analysis*

In addition to these indicators, the interviews held with Pat Bowen and Lavonne Paden offered several insights regarding the operational efficiency of the programs. First, they indicated that one of the driving forces behind the adoption of the VFPA was available federal dollars. This money, available through Natural Resource Conservation Service (NRCS), was unavailable without county boards and the accompanying increase in taxation. Although the NRCS is allowed to match funds provided by counties, it cannot purchase development rights itself.

Second, the interviews explained the central role played by the CVI. The CVI, based in Thomas, West Virginia, is an organization interested in watershed protection. According to Paden (Paden, 2007), the CVI had several motivations for supporting the creation of farmland protection legislation, including the prospect of using it to achieve its own objective of watershed protection. Zoning was considered as a first solution, although Bowen & Paden (Bowen, 2007; Paden 2007) believed it would receive little support from state politicians who were thought to view zoning as inhibiting localized economic development. Development right purchasing was thought to be far more politically palatable, because individuals were free to sell, or not sell, their development rights.

Third, according to both Bowen and Paden, the VFPA offers no specific means for measuring the program's effectiveness and, as explained above, the legislation itself contains no benchmarks. This is highly problematic not only from an accountability and transparency perspective, but also for purposes of improving these programs. Without the necessary definitions and benchmarks, it is difficult to assess whether the 6121 acres of farmland that have been preserved in West Virginia ought to be protected and the trade-offs associated with the preserving it.

Fourth, outside of restrictions designed to prevent development right purchasing in places without county boards, there are no guidelines about where the money is supposed to be spent. Bowen (Bowen 2007) explained that he tries to spend his allotment of money in as many places as possible for purposes of making sure that federal money goes to every county with a board. Furthermore, there is no cap on spending. The merit of this distribution criterion may be questioned, given that the above broadly stated program objective. For example, development rights in places under the most threat will cost the most (as the land's value is at a premium); however, the result of those premium prices is that it becomes a very expensive proposition to save vast swathes of land. Meanwhile, in places where the land's value is the lowest specifically because of a lack of demand, saving acreage becomes far less expensive. This distribution of funds may be inconsistent the general program objective. That is, if the need to protect land is based upon the threat of sprawl, should these programs be targeting spending toward places where he can save the most threatened land, or places where he can save the *most* land? Obviously, there are no easy answers to such questions, but the legislation itself provides no arrows pointing in one or the other direction.

Finally, the definitions of what constitute farmland are made at the discretion of the local board (O'Donoghue, 2007). According to Bowen, there is no investigation of a landowner's intent when deciding whether or not to purchase his or her development

rights. In other words, the farmer who has every intention of staying put and never selling his or her land to anybody can still qualify to have the farm's development rights purchased. In addition, the definition of what constitute farmland is made at the discretion of the local board (O'Donoghue, 2007).

### **Moving Beyond the Policy Justification**

The above analysis raises several concerns with regards to farmland protection policies in West Virginia. First, the state and county wide analysis raises concerns about the broadly stated policy justification for farmland protection policies in West Virginia. Again, it is justified on the basis of the risk of urban sprawl. The analysis, however, indicate that there seems to be only a minimal threat of urban sprawl among the counties that are planning for or have already implemented farmland protection policies. As such, the legislation's justification is weakened. Given this, it is seems reasonable to conclude the adoption and expansion of these programs is driven by motivations that go beyond the principal justification for these programs.

One such possibility is that the policies are being adopted for purposes of protecting existing property owners from being "priced out," as a result of increases in property values and accompanying increases in tax burden. This concern has been raised in several states, Montana in particular (Robbins, 2006), where there has been a substantial growth in second homes. A similar argument may also be made in West Virginia, where a select number of counties are experiencing substantial property value increases as a result of this. Pocahontas, Morgan, Berkley and Greenbrier County are good examples of this.

Another possibility is that they are being adopted for based on rent-seeking motives. The broadly stated objectives of the VFPA make it difficult to assure accountability and transparency of these programs. The limited transparency increases the risk for of rent-seeking behavior in these programs. Such behavior may potential undermine the benefits provided by the programs. Some controversy has already been raised in this regard (See, Snyder, 2006).

Another aspect that needs to be addressed regards the trade-offs associated with these programs in terms of economic growth. Permanent retirement of land via the selling of development rights to government agencies would trigger concern from economists like Kirzner, who take a critical stance toward the ability of government actors to manage markets. Israel Kirzner has made a point of observing that government regulation is often created with only the best of intentions: to fix prices that are too low or too high or to allow or disallow competition. He argued (Kirzner, 1982) that the greatest effect of government regulation may, in fact, never be known, because what is impeded via the regulation is entrepreneurial discovery.

### **Concluding Remarks**

This paper has attempted to offer insight to the West Virginia Voluntary Farmland Protection Act, both by describing its creation, explaining its operation, and exploring potential criticism. The most important finding of the paper is that there seems to be only a minimal threat of urban sprawl among the counties that are planning for or have already implemented farmland protection policies. As such, the legislation's justification is

weakened. Given this, it seems reasonable to conclude the adoption and expansion of these programs in West Virginia are driven by motivations other than those that are stated in the policy (i.e., preservation of open space, due to urban sprawl). The VFPA appears to be directed at solving a problem that does not exist.

One possibility is that they are adopted for purposes of protecting existing property owners from being “priced out,” as a result of increases in property values and accompanying increases in tax burden. This concern has been raised in several states, Montana in particular (Robbins, 2006). Another possibility that ought to be explored is the role of rent-seeking behavior in these programs given the limited level of transparency that accompanies West Virginia’s programs and some of the controversy that have been associated with them (Snyder, 2006). To further the understanding of the merit of these programs in West Virginia, these and other possibilities needs to be addressed.

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