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## Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State

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# Comment

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## I. Introduction

Agriculture produces about \$3 billion gross cash income for New York State every year.<sup>1</sup> It is the number two industry in the Hudson Valley, second only to tourism, which is itself dependent upon agriculture for its success because agriculture maintains attractive open spaces and rural flavor.<sup>2</sup> Farming is not only important economically, but socially as well. It enhances the quality of life of all New Yorkers by maintaining

1. See AMERICAN FARMLAND TRUST, AGRICULTURAL AND FARMLAND PROTECTION FOR NEW YORK 2 (1993) [hereinafter NY FARMLAND PROTECTION].

2. Interview with Steve Rosenberg, Land Preservation Director, Scenic Hudson, Inc., (Mar., 1996) [hereinafter Rosenberg].

green space and preserving our agricultural heritage. "New York is a farm state."<sup>3</sup> And we are losing our farms rapidly.<sup>4</sup>

Production per acre has drastically increased since 1950.<sup>5</sup> The trend is toward fewer farms that are larger than in the past, but total acreage is decreased because farms do not need as much land to produce the products demanded.<sup>6</sup> The question then arises—why is it so important to protect farmland?

As stated above, agriculture is an important industry in New York State. Some of the products produced include corn for silage, dairy products, hay, apples, cherries, pears, grapes, cauliflower, celery, strawberries, sweet corn, green beans and peas.<sup>7</sup> Farming not only provides income for farmers, but also maintains an entire support industry of farm-related businesses.<sup>8</sup> A study in Cayuga County found that eighteen percent of non-agricultural business was directly linked to the agriculture industry.<sup>9</sup> Such businesses include equipment sales, farm centers such as Agway stores, veterinary services and products, and seed and fertilizer dealers.

Not only do farms contribute to the economics of the locality and the state, but they are also less demanding on community services than residential or other commercial uses. A 1990 study by Scenic Hudson, Inc. in Red Hook, Amenia, and Fishkill found that for every dollar contributed in land taxes, residences required \$1.11 to \$1.23 in community services, while open land required only \$0.17 to \$0.74 for each dollar contributed.<sup>10</sup> Farms, in effect, subsidize local government by providing more

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3. NY FARMLAND PROTECTION, *supra* note 1, at 2.

4. The Hudson Valley is losing productive farmland at the rate of 18,600 acres per year. Rosenberg, *supra* note 2. In the years 1982 to 1991, New York's crop and pasture land dropped by 707,000 acres to 5.9 million acres, the loss of about 10,000 farms. See NY FARMLAND PROTECTION, *supra* note 1, at 5.

5. See The Institute for Development, Planning & Land-Use Studies of the State University of New York at New Paltz, *Will Farming Disappear from the Region?*, THE REGION'S INTEREST (Institute for Development, etc.) May 1995, at 1 [hereinafter *Will Farming Disappear?*].

6. See *id.*

7. See NY FARMLAND PROTECTION, *supra* note 1, at 2-3.

8. See *id.* at 3.

9. See *id.* at 3 (citing N.Y. State Department of Agriculture and Markets, Division of Rural Affairs, in cooperation with the Cayuga County Planning Department, THE IMPORTANCE OF AGRICULTURE TO CAYUGA COUNTY (1985).

10. See HOLLY L. THOMAS, DUTCHESS COUNTY PLANNING DEPARTMENT TECH. MEMO, THE ECONOMIC BENEFITS OF LAND CONSERVATION 1-2 (1991).

in property taxes than they require in services such as schools or police.<sup>11</sup> An American Farmland Trust study in New York and New England found that an average \$0.65 out of every farm property tax dollar can be used to offset the deficit created by residential uses.<sup>12</sup> Although commercial and industrial uses also pay more in taxes than they demand in services, those uses encourage residential growth while farms do not.<sup>13</sup> Therefore, protecting farmland and open space is a way for local governments to control their costs.<sup>14</sup> Another reason for a local government to be economically interested in preserving agriculture is that communities that have land protection programs receive higher bond ratings.<sup>15</sup> Agriculture leaves open space in critical areas such as flood plains, which saves public funds from being expended on costly drainage projects as well.<sup>16</sup>

Agriculture promotes other important interests as well. Conserving open space promotes tourism by maintaining the rural character and attractiveness of the area.<sup>17</sup> Farms also provide critical natural resource protection when farmers leave untouched wetlands and steep slopes on their property which are not conducive to agricultural use.<sup>18</sup> Adjacent property values are increased by the open space and quality of life provided by farmlands as well.<sup>19</sup>

The character of an agricultural area is enhanced by green fields, clean air, and space for communities of people to enjoy

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11. See *id.* at 1.

12. See NY FARMLAND PROTECTION, *supra* note 1, at 6. For further statistics, see CORNELL COOPERATIVE EXTENSION OF DUTCHESS COUNTY AND AMERICAN FARMLAND TRUST, COST OF COMMUNITY SERVICES STUDY: TOWNS OF BEEKMAN AND NORTHEAST, DUTCHESS COUNTY, NEW YORK (1989).

13. See THOMAS, *supra* note 10, at 2.

14. See *id.* at 1.

15. See *id.* at 2.

16. See *id.* at 3.

17. See THOMAS, *supra* note 10, at 3-4.

18. See *id.* at 3. A study in a Champaign, Illinois watershed indicated that converting 100 acres of agricultural land to urban use would increase levels of nitrate and soluble phosphorous from non-point sources by 140% and 180% respectively, even with 100 foot buffer areas. *Research Notes: Farmland Conversion Steps Up Non-Point Pollution*, DEVELOPMENTS, July 1993, at 9.

19. See THOMAS, *supra* note 10, at 3 (citing a study in Boulder, Colorado where property values decreased by \$4.20 for every foot of distance from public open space).

life.<sup>20</sup> Farming is a heritage and way of life for many. That heritage should be preserved for today, and to sustain the open space and productivity of the land for future generations. As population grows, there will be increased demand for agricultural products, and the best farmlands must be set aside for the future. Without planning to set these lands aside, the last crop produced on much of the nations prime farmland will be asphalt.

New York's farms have decreased 70% since 1950 to 37,000 farms, with acreage of farm use decreasing 47.5% to 8,500,000 in 1987.<sup>21</sup> There are many problems contributing to the loss of farmlands in New York State. One problem is that New York farmers pay the highest per acre tax of any agricultural state.<sup>22</sup> In ten counties, property taxes are twice the net farm income, and farmers cannot make ends meet.<sup>23</sup> The "impermanence syndrome" is another problem.<sup>24</sup> This term refers to the pressures on farmers in areas influenced by urban and suburban sprawl.<sup>25</sup> As demand for their land increases with development pressure, taxes rise, and low profitability plus the urban influence causes farmers to begin to sell out to subdividers.<sup>26</sup> As less farms remain, the farmers have less political and social support, and more farms succumb to the approaching city dwellers.<sup>27</sup>

Although New York State has much legislation related to agricultural preservation,<sup>28</sup> another problem is that many of

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20. See NY FARMLAND PROTECTION, *supra* note 1, at 6.

21. See *Will Farming Disappear?*, *supra* note 5, at 1.

22. See Dave Tetor, *We are Number One! We are Number One!*, LAND & LIVING, Dec. 1995-Jan. 1996, at 7. New York State, in one report acknowledges that "tax levies on farm property are 'high' compared to other states," and it cites specific problems presented by these taxes. ADVISORY COUNCIL ON AGRICULTURE, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS, *Farm Property Taxes in N.Y. State* 18 (1996) [hereinafter *Farm Property Taxes*].

23. See Tetor, *supra* note 22, at 7.

24. HENRY H. STEBBINS, SCENIC HUDSON, INC., PRESERVING WORKING FARM LANDSCAPES IN THE HUDSON VALLEY: A FEASIBILITY STUDY 2 (1995).

25. See *id.* Another author describes the "inherent incongruity of trying to farm in an area whose residential population is increasing." John R. Nolon, *The Stable Door is Open: New York's Statutes to Protect Farm Land*, in LAND USE LAW REPORTER, May 1994, at 5 [hereinafter *The Stable Door*].

26. See STEBBINS, *supra* note 24, at 2.

27. See *id.*

28. See *infra* Part III.

those tools are not utilized. For example, few counties or municipalities have purchase of development rights programs (PDR).<sup>29</sup> And, there are no approved county wide plans.<sup>30</sup>

The approach to solving the problem of farmland loss must be an integrated effort.<sup>31</sup> Pace Law School Professor John Nolon, in one article, wrote that New York needs a "unifying policy" addressing the "root cause" of the loss of agricultural lands to development pressures.<sup>32</sup> We cannot separate the land use techniques from tax, marketing, and education efforts.<sup>33</sup> There must be a commitment to each component of a successful project.

This paper offers various techniques that can be used to help preserve farmland. The authors stress that it is important to preserve farms as productive operations with responsible farming methods, and not just as undeveloped land. There is value in preserving open space for habitat and quality of life. However, the purpose of the techniques presented in this Comment is to preserve farms for the values they add to the economy, the environment, the sustainability of resources, and the quality of life in New York as productive farms.

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29. See *infra* Part II.A.2 for an example of Suffolk County's PDR program.

30. Several counties have planning grants in place already, however. Telephone conversation with Kim Blot, New York State Advisory Council on Agriculture. See also ADVISORY COUNCIL ON AGRICULTURE, NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS 1994-95 ANN. REP. (1995). The following counties have received planning grants under Article 25-AAA: Cayuga, Dutchess, Erie, Essex, Orange, Suffolk, Tompkins, Washington. See *id.*

31. See John R. Nolon, *Fusing Economic and Environmental Policy—The Need for Framework Laws in the United States and Argentina*, 13 PACE ENVTL. L. REV. 569 (1996) [hereinafter *Environmental Policy*] (discussing how framework laws can encourage and foster sustainable development); see also Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson and National Land Use Legislation*, Commemorative Edition PACE L. REV. 25 (1995) (discussing the proposed National Land Use Policy Act, its proponents, failure, and a suggestion to continue to work toward a similar framework).

32. See *The Stable Door*, *supra* note 25, at 7.

33. Nor can we separate the agricultural preservation techniques discussed here from other land use techniques. Compact development techniques must be used in the areas where development is allowed and encouraged to complement the tools explained in this comment. The township of East Hempfield in Lancaster County, Pennsylvania, recognized this in their Comprehensive Plan where they discussed cluster developments as a tool to "halt the strip development pattern" which causes traffic congestion, conflicts increases between agriculture and neighboring residential uses, and blocks scenic views of farms. EAST HEMPFIELD TOWNSHIP COMPREHENSIVE PLAN, FUTURE LAND USE PLAN 180.

## II. Techniques to Preserve Agriculture

### A. *Easements, Covenants and Purchase of Development Rights*

A conservation easement, generally, is a voluntary restriction placed on a landowner's property to protect some natural resource.<sup>34</sup> An agricultural conservation easement is "a voluntary, legally recorded agreement between the landowner and . . . [a] qualified conservation organization that restricts land to agriculture and open-space uses."<sup>35</sup> The easement limits practices, such as subdivisions and development, that would damage the agricultural use of land.<sup>36</sup> The easement is conveyed by a recordable deed of a conservation easement and is therefore a restriction that runs with the land,<sup>37</sup> and can be in perpetuity or for a specified period of time.<sup>38</sup> The landowner still holds title to the land and can convey that interest, but use of that land is restricted to the terms of the agreement<sup>39</sup> that can vary for each individual parcel.<sup>40</sup> The entity that holds the easement will also place a clause in the agreement giving the entity certain inspec-

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34. See N.Y. ENVTL. CONSERV. LAW § 49-0203(1) (McKinney Supp. 1997).

35. AMERICAN FARMLAND TRUST, A GUIDE TO AGRICULTURAL CONSERVATION EASEMENTS 3 (1995) [hereinafter GUIDE].

36. See *id.*

37. See *id.* at 1. A conservation easement must be recorded in the local land records just as any other deed. See *id.* Holders of any encumbrances on the property, such as a mortgage or mineral rights, must agree to release or subordinate their claim in order to ensure that the easement will be enforceable. See *id.*

38. See Tom Daniels, Farmland Protection with the Purchase of Development Rights: The Case of Lancaster County 6 (available from Tom Daniels, Director, Agricultural Preserve Board, Lancaster, Pennsylvania).

39. See *id.* In explaining the separation of development rights from the whole, the "bundle of rights" illustration is often helpful. See *id.* at 5-6. Property rights have been analogized to a bundle of rights possessed by the owner. See *Dolan v. Tigard*, 114 S. Ct. 2309, 2320 (1994). As an example, the right of an owner to exclude others from her property is characterized as one of the most "essential sticks in the bundle." *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). When a property owner sells a conservation easement over her property, she has agreed to transfer some of the sticks in her bundle to the holder of the easement. With an easement that is designed to preserve agricultural uses, the land owner retains the rights that are most important to continuing the uses while the easement holder retains the rights that preserve uses.

40. Steve Rosenberg of Scenic Hudson explained that the agreements are flexible, and that different factors affect what uses will be allowed on the premises. See Rosenberg, *supra* note 2. For instance, one landowner donated the easement but required that he be able to put an additional residence on the property. See *id.*

tion rights, but this does not grant a public right of access unless specifically agreed upon.<sup>41</sup>

Non-profit conservation organizations, such as American Farmland Trust, Scenic Hudson, Inc., and the Franklin Land Trust administer conservation easement programs,<sup>42</sup> and there is enabling legislation in some states for state programs.<sup>43</sup> These government programs are purchase of development rights programs. The landowner may donate the conservation easement or the preservation entity may purchase the development rights.<sup>44</sup> The value paid to the landowner will be the difference between the value of the land without the restriction and the value of the land with the restrictions imposed.<sup>45</sup> As discussed below, there are also beneficial tax consequences to the landowner from a release of development rights.<sup>46</sup>

### 1. *Conservation Easements in New York*

In New York State, as in other states, "a conservation easement<sup>47</sup> is a voluntary agreement between a private land owner and a public body or eligible not-for-profit corporation to restrict the use of real property."<sup>48</sup> These easements can be used to preserve scenic vistas, historic areas, agriculture, forest land, and

41. See GUIDE, *supra* note 35, at 3.

42. See Kevin Kasowski, *Growth Management and Green Spaces: Rural America at a Crossroads*, DEVELOPMENTS (National Growth Management Leadership Project) July 1993, at 3. This article reported 900 land trusts in existence in 1993, primarily in the northeast, and land trusts are being formed at a rapid rate. See Rosenberg, *supra* note 2.

43. Between 1986 and 1990, 14 states financed state acquisition or easement programs with \$6 billion in bond issues, and another 14 states produced \$1 billion in real estate transfer or cigarette taxes for such programs. See Kasowski, *supra* note 42, at 3-4.

44. *Id.*

45. See GUIDE, *supra* note 35, at 3.

46. See *supra* Part II.A.8.

47. See N.Y. ENVTL. CONSERV. LAW § 49-0303 (McKinney 1984).

Conservation easement is an easement, covenant, restriction or other interest in real property, created under and subject to the provisions of this title which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining [its conservation attributes or characteristics].

*Id.*; See also N.Y. GEN. MUN. LAW § 247 (McKinney 1986).

48. John C. Partigan, *New York's Conservation Easement Statute: The Property Interest and Its Real Property and Federal Income Tax Consequences*, 49 ALBANY L. REV. 430 (1985).

other environmental resources.<sup>49</sup> Conservation easements can be used to preserve land by restricting the use of that land to agricultural uses or uses that are not inconsistent with agriculture. The restrictions imposed depend on the agreement between the private parties. Easements can be individually tailored to address the specific concerns of the involved parties. New York's statute changes the common law rule that easements must be appurtenant<sup>50</sup> in order to last in perpetuity.<sup>51</sup> Under that statute, an easement lasts for perpetuity unless it is extinguished.<sup>52</sup> The easement must be a written agreement, signed by all parties, and filed both with the county clerk's office and with the Department of Environmental Conservation.<sup>53</sup>

Most conservation easements that have a perpetual duration may be extinguished under certain circumstances.<sup>54</sup> Termination is permitted under section 49-0307 of New York's Environmental Conservation Law in two situations: (1) when a provision of the instrument provides for destruction; and (2) when it is determined that the easement is of "no actual and substantial benefit" because of changed conditions.<sup>55</sup>

## 2. *Suffolk County's Purchase of Development Rights Program*

Suffolk County has the largest population in New York State (excluding the City of New York) and it is also the largest agricultural producer generating \$108,000,000 in sales each

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49. See N.Y. ENVTL. CONSERV. LAW § 49-0301, commentary, at 90 (McKinney 1984) [hereinafter Commentary].

50. Appurtenant means benefiting the contiguous property owner who is the holder of the easement. See BLACK'S LAW DICTIONARY 94 (6th ed. 1990).

A thing is "appurtenant" to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from across the land of another.

*Id.*

51. See Commentary, *supra* note 49 (citing N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney 1995)).

52. See N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney 1995).

53. See *id.* § 49-0305.

54. See *id.* § 49-0307(1).

55. See Board of Educ., East Irondequoit Cent. School Dist. v. Doe, 88 A.D. 2d 108, 113, 452 N.Y.S.2d 964, 967 (4th Dep't, 1982).

year.<sup>56</sup> In 1974, the County instituted the first PDR program to protect agricultural land from development pressures and used County and Town funds exclusively.<sup>57</sup> Today the program is still in operation and has succeeded in many ways: farming provides many jobs in the county on a seasonal and year round basis; farmland acts as a buffer against suburban sprawl; farming and farmland maintains the rural character of the area; farming and farmland provide a tourism industry for the whole county; and farming makes fresh fruit, vegetables and plants available to residents and tourists.<sup>58</sup>

In 1970, the Nassau-Suffolk Regional Planning Board recommended the preservation of more than 30,000 acres of farmland in Suffolk County.<sup>59</sup> A fourteen-member Agricultural Advisory Committee was created in 1972 to assist the County Planning Commission.<sup>60</sup> A subsequent report that examined ways to implement the Regional Planning Board's recommendations highlighted the impact that development had on the cost of providing educational services.<sup>61</sup> The County Legislature recommended spending \$45,000,000 to \$55,000,000 to acquire the development rights of prime agricultural land.<sup>62</sup> In 1980, when rising land prices made it apparent that it would not be able to purchase as much as it had hoped, the County Executive, Peter F. Cohalan, asked towns to assist in the preservation effort by enacting zoning and clustering provisions.<sup>63</sup> Many towns agreed and put farmland into zones requiring mandatory clustering that would preserve at least half of the farmland on the parcel being developed.<sup>64</sup>

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56. See PATRICK G. HALPRIN, SUFFOLK COUNTY PLANNING COMMISSION, FARM-  
LAND PRESERVATION PROGRAM: HISTORY AND CURRENT PERSPECTIVE 1 (1990).

57. See *id.*

58. See *id.*

59. See *id.* at 5 (citing NASSAU-SUFFOLK REGIONAL PLANNING BOARD COMPRE-  
HENSIVE DEVELOPMENT PLAN SUMMARY (1970)).

60. See *id.* at 5.

61. See *id.* at 6.

62. See *id.* at 6.

63. See *id.* at 10.

64. See HALPRIN, *supra* note 56, at 10.

Proposals to enter the program are received by the Farmland Select Committee.<sup>65</sup> The Committee evaluates the parcel on a number of criteria: suitability, present land use, contiguity of farms, development pressure, and price of the parcel.<sup>66</sup> High priority is given to parcels contiguous with other protected farmlands.<sup>67</sup> This helps to avoid the impermanence syndrome<sup>68</sup> by creating areas that are exclusively agricultural. The Committee also considers the price set by the landowner.<sup>69</sup> This promotes lower purchase prices for parcels and, while this helps keep costs down, it may keep some landowners from entering the program.

The program was unable to reach the goal of protecting 12,000 to 15,000 acres with the funds originally set aside.<sup>70</sup> The sharp rise in land costs during the 1980's made this goal impossible to achieve with that amount of money.<sup>71</sup> The county and town governments have worked to get more funds and are hopeful about continuing to purchase development rights.<sup>72</sup> Local officials expect to receive money to acquire more land from the State.<sup>73</sup>

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65. The Committee is made up of 19 members: 1 appointed from each of the 10 towns, and 9 appointed by the County Executive. Four of the members must be farmers. *See id.* at 11.

66. *See HALPRIN, supra* note 56, at 7.

67. *See id.* at 6-7.

68. *See supra* notes 24-26 and accompanying text.

69. The impact of bargaining over the price of the parcel is discussed in more detail. *See infra* Part II.C.2.e.ii. That section explains that because applicants try to offer lower prices than other landowners, the final sale value is generally below the market value. *See id.*

70. *See HALPRIN, supra* note 56, at 17.

71. *Id.*

72. *See id.* at 17, 19.

73. *See id.* In the 1995 Environmental Protection Fund and the 1996 Environmental Quality Bond Act, the state recognized the importance of open space preservation by making \$150,000,000 available to local governments. Telephone Conversation with Nick Garlick, Assistant Counsel to Governor Pataki, January 8, 1996. Specifically, the 1996 Bond Act provides for the following:

[t]he commissioner of agriculture and markets is authorized to provide state assistance payments to county agricultural and farmland protection boards, or to municipalities provided the proposed project is endorsed for funding by the agricultural and farmland protection board for the county in which the municipality is located, for implementation of projects identified in agricultural protection plans pursuant to the program as set forth in article twenty-five-AAA of the agriculture and markets law.

N.Y. ENVTL. CONSERV. LAW § 56-0307(5) (McKinney Supp. 1997).

### 3. *Lancaster County, Pennsylvania's Purchase of Development Rights Program*

Lancaster County was ranked fifth nationally in 1993 for farmland preservation,<sup>74</sup> and added another twenty-eight farms to its PDR program in 1995.<sup>75</sup> Pennsylvania's enabling statutes for PDR are part of its Agricultural Area Security Law<sup>76</sup> and provide for: the details of a conservation easement program,<sup>77</sup> a purchase fund to provide monies to carry out the program,<sup>78</sup> and an authorization for the state to borrow monies to finance the program.<sup>79</sup>

A professional in the land preservation field stated that a mix of initiatives, public and private, are needed to protect farms.<sup>80</sup> Lancaster County, Pennsylvania has implemented its farmland preservation plan to include these elements through agricultural zoning, agricultural districts, and purchase of de-

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74. See Ed Klimuska, *County Ranks 5th in U.S. for Saving Farms*, LANCASTER NEW ERA, Nov. 12, 1993, at A1. The rankings, and preservation of acreage, were as follows:

1. Montgomery, Md.	34,786 acres
2. Marin, Ca.	23,224 acres
3. Carroll, Md.	20,790 acres
4. Caroline, Md.	18,000 acres
5. Lancaster, Pa.	16,400 acres

Ranked sixth through tenth were counties in Maryland. See *id.*

75. See Daina Savage, *Preservationists Toast Another Big Year for Saving County Farms*, INTELLIGENCER JOURNAL, Feb. 9, 1996 at B1 [hereinafter *Preservationists Toast*].

76. See *infra* Part II.B.2.

77. See 3 PA. CONS. STAT. ANN. § 914.1 (West 1995). This section is entitled "Purchase of agricultural conservation easement," and describes the state program under the direction of the State Agricultural Land Preservation Board. *Id.*

78. See 3 PA. CONS. STAT. ANN. § 914.2. A state cigarette tax that began in July 1993 helped to fund the effort with about \$20 million per year. See Daniels, *supra* note 38, at 11.

79. See 3 PA. CONS. STAT. ANN. § 914.3 (West 1996). This provision is a \$100 million bond authorization act which was approved by nearly 70% of Pennsylvania's voters. See STEBBINS, *supra* note 24, at 13.

The counties are authorized to incur debt under the "Local Government Unit Debt Act." 53 PA. CONS. STAT. ANN. § 6780-1, et seq. (West 1996). At a recent celebration recognizing 20,000 acres preserved in Lancaster County, the County Commissioner, Terry Kauffman, pledged \$5 million for the program with a new bond issue over the next four years. See Daina Savage, *Farm Preservation Effort Gets an Extra \$500,000 From County*, INTELLIGENCER JOURNAL, March 23, 1996, at B1.

80. See Rosenberg, *supra* note 2.

velopment rights programs.<sup>81</sup> The PDR program itself is a model example of a combined public/private partnership, where the Agricultural Reserve Board obtains easements through state and county monies, while the non-profit Lancaster Farmland Trust is privately funded.<sup>82</sup>

The Agricultural Preserve Board of Lancaster received its first donation of a perpetual conservation easement in 1982.<sup>83</sup> Easements under the state program may be purchased from voluntary landowners in perpetuity or for twenty-five years.<sup>84</sup> Mostly twenty-five year term easements were purchased by the Preserve Board of Lancaster until it received state funding in 1989 from the Pennsylvania Bureau of Farmland Protection.<sup>85</sup> The Lancaster program also offers a Right of First Refusal Agreement under which the Preserve Board may purchase the property if it is being sold to other than a member of the immediate family or if non-agricultural development is planned.<sup>86</sup> The county operates a purchase and resale program as well.<sup>87</sup> In the years 1989 to 1994, Lancaster received \$14.4 million in state funds to purchase easements.<sup>88</sup> That state funding came only after approval of the county program by the State Agricultural Land Preservation Board<sup>89</sup> under section 914.1(b) of Pennsylvania's Consolidated Statutes Annotated.<sup>90</sup> The funds given are based on a matching grant formula.<sup>91</sup>

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81. See *infra* Parts II.B.2., II.C.2.b.

82. See Klimuska, *supra* note 74, at A1.

83. See Daniels, *supra* note 38, at 6.

84. See 7 PA. CODE § 138e.1 (1997).

85. See Daniels, *supra* note 38, at 6-7.

86. See Lancaster County Agricultural Preserve Board, *Agricultural Land Preservation, Conservation Easement Program: Program Guidelines* 30 (December 1996) [hereinafter *Program Guidelines*]. The price may either be equal to any bona fide offer, plus one dollar, or the appraised fair market value, and the land must be in a Security Area to be eligible. See *id.*

87. See *id.* at 32. As a last resort measure, the county is authorized to purchase farms on the open market, and place a perpetual easement on the land before resale to the highest bidder. See *id.*

88. See Daniels, *supra* note 38, at 7.

89. See *id.* at 7.

90. A county must first be certified in order to participate in the state purchase of conservation easements program. See 7 PA. CODE § 138e.2. The requirements which the county program must meet for certification are explained in the administrative code. See 7 PA. CODE §§ 138e.11-.20.

91. See Daniels, *supra* note 38, at 7.

The eligibility requirements for the county program include a minimum of ten acres, location within an Agricultural Security Area, that the farm operation has exercised stewardship of the land, and that the farm consists of at least fifty percent soils in Classes I-IV as defined by the USDA.<sup>92</sup> The landowner must apply to the program by the annual deadline of September 1.<sup>93</sup> A ranking system is used to allot the limited funds to the numerous applications.<sup>94</sup> The Agricultural Preserve Board has two policies which guide its acquisition of lands. First, the Preserve Board attempts to preserve farms that are close to each other.<sup>95</sup> Two-thirds of the farms encumbered are contiguous or in close proximity to one another.<sup>96</sup> This policy serves to create profitability and stability for farms and support business because development pressures on all are reduced.<sup>97</sup> Second, the Board targets farms which are relatively close to development.<sup>98</sup> This serves to create "Urban Growth Boundaries," in effect, without zoning to limit sprawl and encourage more efficient compact development.<sup>99</sup> Urban services are not extended past these planned boundaries.<sup>100</sup>

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92. See *Program Guidelines*, *supra* note 86, at 9-10. The minimum requirements are dictated by the state under title 7 of the Pennsylvania Administrative Code section 138e.16.

93. See *Program Guidelines*, *supra* note 86, at 11. The application process, appraisal process and other facets of the program are described in the Program Guidelines. See *id.*

94. See *id.* at 13. The elements of the ranking system are fully explained in the Program Guidelines. The criteria to be used under the 1989 guidelines were likelihood of conversion to non-farm use (47.5% of total formula), quality of the farmland (47.5% of total formula), and stewardship, historic and scenic factors, and application frequency (5% of total). Lancaster County Agricultural Preserve Board, *Agricultural Land Preservation, Conservation Easement Program: Program Guidelines*, Appendix (July 1989). Beginning January 1, 1998, a new ranking system explained in the December 1996 guidelines will be used which allots a number of points in three general categories of development potential, farmland potential, and clustering potential, which are then divided into subcategories. See *Program Guidelines*, *supra* note 86, at 38-43. The State Administrative Code dictates guidelines for the county to follow in developing the ranking system. See 7 PA. CODE § 138e.15.

95. See Daniels, *supra* note 38, at 9.

96. See *id.*

97. See *id.*

98. See *id.* at 9-10. See also *infra* Part II.C.2.a.

99. See Daniels, *supra* note 38, at 9-10.

100. See *id.* at 10. These guidelines are instituted with guidance from the State Administrative Code guidelines. 7 PA. CODE ch. 138e.

The Lancaster County program has a total of approximately \$3 million per year which will preserve about 1,500 acres each year.<sup>101</sup> The Preserve Board pays an average of \$2,000 per acre for a conservation easement and preserved eighteen farms (1,307 acres) under perpetual easement in 1995.<sup>102</sup> In addition, the work of the Lancaster Farmland Trust preserved ten farms and helped the Board with seven.<sup>103</sup> Because of donations of easements to the Trust, its cost per acre of land preserved was about \$130.<sup>104</sup> Options under the sale of a conservation easement in the Preserve Board's program include: a bargain sale with tax benefits,<sup>105</sup> the holding of proceeds in a tax escrow account with deferred payments over a five year period, and a payment method of either a lump sum or installment payments.<sup>106</sup>

#### 4. *Massachusetts' Agricultural Preservation Restriction Program*

The Massachusetts Agricultural Preservation Restriction (APR) Program<sup>107</sup> was established in 1977 as a method to preserve Massachusetts' farmland resource that generates a \$500 million agricultural industry.<sup>108</sup> The law defines an agricultural preservation restriction as "a right, whether or not stated in the form of a restriction, easement, covenant or condition in any deed, will, or other instrument executed by or on behalf of the owner of the land appropriate to retaining land or water areas predominately in their agricultural farming or forest use,"<sup>109</sup> and then goes on to enumerate the basic restrictions.<sup>110</sup> The state Agricultural Lands Preservation Committee (ALPC)

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101. See Daniels, *supra* note 38, at 11.

102. See *Preservationists Toast*, *supra* note 75, at B-1.

103. See *id.*

104. See *id.*

105. See *Program Guidelines*, *supra* note 86, at 8. See *infra* Part II.A.8 for a discussion of tax consequences of conservation easements.

106. See *Program Guidelines*, *supra* note 86, at 9.

107. See MASS. GEN. LAWS ch. 184, §§ 31-33 (1995); MASS. GEN. LAWS ch. 132A, §§ 3, 11A-11D (1994); MASS. REGS. CODE tit. 330, § 22.00 (1996).

108. See Massachusetts Department of Food and Agriculture, Lancaster Regional Field Office, *Agricultural Preservation Restriction Program*, Memo [hereinafter APR Memo].

109. MASS. GEN. LAWS ch. 184, § 31 (1994).

110. See *id.*

administers the program.<sup>111</sup> State bonds may be issued to fund the program.<sup>112</sup>

The Massachusetts APR program works with municipalities to fund the efforts, and almost one-half of the APRs are co-held by towns.<sup>113</sup> The program also works with private land trusts that promote the program and carry out the pre-acquisition of APRs.<sup>114</sup> For example, the non-profit Franklin Land Trust has helped to bring 4100 acres into the program within the past eight years.<sup>115</sup> The APR program encourages cooperative projects with other states as well.<sup>116</sup>

As is typical of other state programs, the APR program offers landowners the difference between the fair market value and the agricultural value of the property.<sup>117</sup> A release of the property back to the landowner at the fair market value at time of repurchase is provided for under chapter 184, section 32 of Massachusetts General Laws.<sup>118</sup> Because there are no official administrative regulations under the APR program, it works

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111. See MASS. GEN. LAWS ch. 132A, § 11A (1994). The Commissioner of Food and Agriculture is the chairman, and the committee also includes the Secretary of Environmental Affairs, the Secretary of Communities and Development, the Director of the Office of State Planning, the Chairman of the Board of Food and Agriculture (or designees from these officers), and four members appointed by the Governor, including two Massachusetts farmers. See MASS. GEN. LAWS ch. 132A, § 11B (1994).

112. See MASS. GEN. LAWS ch. 184, § 32(9) (1991). There has been \$80 million in funding to the APR program through 10 year bond issues from December 1977 to March 1995. Agricultural Preservation Restriction Program, Questions & Answers, Publication #14606-4-500-10-15-86 C.R., 1, 3 (Mar. 1995) [hereinafter Questions & Answers].

113. See generally APR Memo, *supra* note 108, at 2. The local Conservation Commissions assist with program implementation in the municipality by educating citizens, helping with applications, doing local inventories and soil studies, and assessing a municipality's financial contribution to the project. See Questions & Answers, *supra* note 112, at 4.

114. See generally APR Memo, *supra* note 108, at 2.

115. Telephone conversation with Mark Zenick, Franklin Land Trust, Mar. 5, 1996 [hereinafter Zenick]. Mr. Zenick also explained that the group will purchase the development rights from the farmers and sell them to the state. See *id.*

In this way, the Franklin Land Trust can pay the farmers in installments, which is better for the farmers than a lump sum in relation to tax consequences. See *id.*

116. See APR Memo, *supra* note 108, at 2.

117. See *id.* at 6.

118. For a release to occur, it must be approved by the holders of the restriction and a two-thirds vote of both houses of the Legislature. See Questions & Answers, *supra* note 112, at 1.

flexibly to carry out the policies of preserving farms in Massachusetts.<sup>119</sup>

### 5. *Private Land Trusts*

Various private land trusts exist to protect lands for specific interests.<sup>120</sup> The Vermont Farmland Trust is a private non-profit organization that has preserved 96,000 acres in Vermont since 1977.<sup>121</sup> The Trust works in conjunction with the Vermont Housing and Conservation Board and has been very successful.<sup>122</sup> The Trust attributes that achievement to the strong land ethic of Vermont farmers and the fact that the public has become more familiar with conservation easements over the period the trust has been in existence.<sup>123</sup>

Scenic Hudson is a private conservation and environmental protection organization in New York's Hudson Valley.<sup>124</sup> Part of the organization is the Scenic Hudson Land Trust which has protected 6,650 acres of riverfront land.<sup>125</sup> This group seeks to protect the land for the open space, scenic vistas, and recreation along the Hudson River.<sup>126</sup>

### 6. *Problems with Purchase of Development Rights*

One problem with PDR programs is that there is never enough funding to support all of the goals of the program.<sup>127</sup> More than 150 farms are on a waiting list in Lancaster County,

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119. Interview with Richard K. Hubbard, Assistant Commissioner, Department of Food and Agriculture, Commonwealth of Massachusetts (Apr. 1997). The Massachusetts Department of Food and Agriculture has broad latitude to implement the APR program through individual agreements with landowners. See, e.g., *Bennett v. Commissioner of Food and Agric.*, 576 N.E.2d 1365 (Mass. 1991) (ruling that restriction created by APR was enforceable on common law principles).

120. While various groups have differing interests in protecting open lands, the focus of this paper is the preservation of working farms.

121. Letter from Layla Ray, Receptionist, Vermont Land Trust, to Cozata Soloway (Feb. 22, 1996) (on file with the *Pace Law Review*).

122. *Id.*

123. See STEBBINS, *supra* note 24, at 23.

124. See SCENIC HUDSON, INC., 1994-1995 ANNUAL REPORT 3.

125. See *id.*

126. See Rosenberg, *supra* note 2.

127. See *supra* Part II.A.2. As illustrated by Suffolk County's experience, preservation becomes a priority once the land is under pressure from development. See *supra* note 27 and accompanying text. Once land is under pressure from development, the cost of that land becomes prohibitive.

Pennsylvania to have their development rights purchased, and that program is well-funded.<sup>128</sup> One source estimates that between private land trust efforts and state programs, only 0.3% of privately-owned rural lands have been saved.<sup>129</sup> Not only is funding limited, but the conservation easement programs are voluntary, so that landowners who do not want to restrict their property are not obligated to do so.<sup>130</sup>

Conservation easements often result in fragmented, instead of contiguous, preservation of lands.<sup>131</sup> Therefore, the effort may do little to hold off the pressures felt by farmers as development can surround them and discourage agricultural investment.<sup>132</sup> The area also may be "too small and too disconnected to function in the long-term as an ecosystem" for plant and animal life.<sup>133</sup>

Some groups believe that PDR programs are negative because they decrease a landowner's equity for credit and later sale.<sup>134</sup> The sale value is, of course, given to the farmer at the time she conveys the easement. A concern is that a farmer "is very much dependent on retaining the potential value of his or her land" to borrow money for improvements and machinery.<sup>135</sup> But some explain that by being accepted into a conservation easement program the farmer is able to realize equity from her land without having to sell the farm.<sup>136</sup> The proceeds can be invested for future equity, used to purchase more land, or otherwise invested in the farm.<sup>137</sup> Plus, if the farmer has neighboring land which is not under easement, the value of that land will increase, providing equity.<sup>138</sup>

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128. See *Preservationists Toast*, *supra* note 75, at B-1.

129. See Kasowski, *supra* note 42, at 4.

130. See *supra* text accompanying note 34.

131. See Coughlin, *Farming on the Fringe*, DEVELOPMENTS 11, 12 (July 1993)[hereinafter *Farming on the Fringe*].

132. See *id.*

133. See Kasowski, *supra* note 42, at 4.

134. See Agriculture Advisory Committee of the Hudson River Valley Greenway, *The Agricultural Landscape: A Policy Recommendation for the Hudson River Valley Greenway* 13 (Apr. 1990) [hereinafter *Agricultural Landscape*].

135. *Id.*

136. See APR Memo, *supra* note 108, at 10.

137. See *id.*

138. See Rosenberg, *supra* note 2.

Other groups think that the disadvantages of PDR are just the opposite; that the government paying for conservation easements is like paying the farmer twice because it is the infrastructure improvements that give the land its value.<sup>139</sup> One planner says that PDR has been "a price support for rural land values."<sup>140</sup> Many suggest that a combination of regulatory and land acquisition programs is necessary.<sup>141</sup>

### 7. *Solutions to PDR's Problems*

Different groups employ a variety of methods to solve the problems of a PDR program. As stated above, some groups offer agricultural zoning methods to solve some of the problems with PDR.<sup>142</sup> Groups such as the Lancaster Agricultural Preserve Board are working out a system to concentrate on purchasing easements in patterns to prevent sprawl and fragmentation.<sup>143</sup> The Nature Conservancy uses its funds, and funds it receives from the state and federal governments, to purchase large blocks of land, or "mega-preserves."<sup>144</sup>

Lease of Development Rights (LDR) programs are another option. With LDR, a farmer would give up the development rights on her land for a given time period in exchange for yearly lease payments.<sup>145</sup> The benefits of this approach are that it helps spread the cost of the easement to make it more manageable for the conservation entity,<sup>146</sup> and it allows farmers to keep the value of their development rights for a future date so that the farm equity is not lost.<sup>147</sup> The problem with LDR is that it only preserves the farm until the term of the lease expires. The LDR technique is used in Perinton, New York (ten miles southeast of Rochester) and was created under section 247 of New

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139. See *Farming on the Fringe*, *supra* note 131, at 12.

140. *Id.* at 12-13 (quoting Sam Hamill, Board President of New Jersey Future, a non-profit statewide planning advocate, and founding member of the N.J. Agricultural Development Committee).

141. See, e.g. Kasowski, *supra* note 42, at 5; *Farming on the Fringe*, *supra* note 131, at 13.

142. See *infra* Part II.C.2.

143. See *supra* text accompanying notes 95-100.

144. See Kasowski, *supra* note 42, at 4.

145. See *Agricultural Landscape*, *supra* note 134, at 13.

146. See *id.*

147. See *id.*

York's General Municipal Law.<sup>148</sup> The town offers property tax abatement in return for a commitment to protect the land for a specified period.<sup>149</sup> Under the minimum five year program, 25% tax reduction is offered for open space lands, and 60% tax reduction is offered for actively farmed land.<sup>150</sup> The fifteen year commitment provides an 80% tax reduction on open land, and a 90% tax abatement for actively farmed land.<sup>151</sup> Perinton holds 4,400 acres in this program with 60% being active farms, and over 60% of those farms held on commitments of ten years or more.<sup>152</sup>

### 8. *Financial and Tax Consequences of Conservation Easements*

Positive economic effects arise from the donation or sale of conservation easements on agricultural property. The funds received by the landowner are placed back into the local economy as an investment in the efficiency of the farm and through retail activity.<sup>153</sup> The farmland values stabilize as easements are obtained, benefitting both new farmers who are starting up, and those farmers who lease land on which to farm.<sup>154</sup> Additionally, all of the financial benefits discussed above in the introduction apply, such as income from tourism, when the high quality of life is maintained.<sup>155</sup> The value of land around the conservation area will also appreciate.<sup>156</sup>

Donation of a perpetual conservation easement results in income tax savings by a charitable deduction based on the value of the easement, provided it meets the conditions of the Internal Revenue Code.<sup>157</sup> The amount of the deduction may be limited

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148. See STEBBINS, *supra* note 24, at 11. The town of Perinton also has a Transfer of Development Rights Program in which 60 acres of open space have been preserved. See *id.* at 12. See *infra* Parts II.A.1 & 2 for mention of the N.Y. GEN. MUN. LAW § 247 (McKinney 1995).

149. See STEBBINS, *supra* note 24, at 11.

150. See *id.*

151. See *id.*

152. See *id.* at 12.

153. See APR Memo, *supra* note 108, at 1.

154. See *id.* at 2.

155. See *supra* Part I.

156. See Rosenberg, *supra* note 2.

157. See Lancaster Farmland Trust, *Farmland Preservation Guide*, at 8-9 [hereinafter *Farmland Preservation Guide*]. The relevant Internal Revenue Code

by a percentage of the taxpayer's contribution base.<sup>158</sup> By allowing the charitable deduction, the Federal Government's taxation policies impact agricultural preservation.

A conservation easement placed on property can help farmers to keep their land in the family because of its effects on estate and property taxes.<sup>159</sup> The easement decreases the value of the property, and thus decreases the value of the estate for tax purposes.<sup>160</sup> Some farm operations will be exempt from estate tax after the easement if it causes their estate value to be below the minimum required for the tax.<sup>161</sup> Decreasing the amount of estate taxes that must be paid may allow the family to keep the farm rather than having to sell part of it off to pay the taxes.<sup>162</sup>

A conservation easement will conceptually, and in many actual cases, lower a property tax assessment as well. For example, in Massachusetts, the law provides for a lower assessment on the land under an easement as long as it is actively devoted to farming, and only if the landowner applies annually for the farmland assessment.<sup>163</sup> Similarly, Vermont law provides for a decreased assessment "only upon the value of those remaining rights or interests to which he retains title" when the conservation easement is held by the state government, the town, or a

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section is I.R.C. § 170(h) (1997). For a discussion of the Federal income tax considerations, as well as other tax effects of conservation easements in New York, see John C. Partigan, *New York's Conservation Easement Statute: The Property Interest and its Real Property and Federal Income Tax Consequences*, 49 ALBANY L. REV. 430 (1985) (there have been some statutory changes since the date of Partigan's article).

158. See I.R.C. § 170 (West 1997). For a brief discussion of the tax implications of a donation of a conservation easement, see *Farmland Preservation Guide*, *supra* note 157, at 7-9.

159. See American Farmland Trust, *A Guide to Agricultural Conservation Easements* (Aug. 1995).

160. See *id.*

161. See *id.* In 1993 the minimum amount for a taxable estate was \$600,000 for individuals and \$1.2 million for married couples. See *id.*

162. See *id.*

163. See MASS. GEN. LAWS ch. 132A, § 11D (1995). That section refers to Massachusetts General Laws chapter 61A, the assessment statute, under which the farmland receives a lower assessment, but the dwellings and their lots, and the farm buildings are taxed as other real estate. See Questions & Answers, *supra* note 112, at 2.

qualifying non-profit organization if the transfer was certified by the Department of Property Valuation and Review.<sup>164</sup>

In New York State, an agricultural assessment is provided for if the property is in an agricultural district<sup>165</sup> or, if it is not in a district, if it is committed to agricultural use for at least an eight year period and is applied for every year.<sup>166</sup> Land under conservation easement is treated for tax purposes as if it were in an agricultural district,<sup>167</sup> and should clearly receive a lower valuation.<sup>168</sup> Some assessors are slow to reassess the property,<sup>169</sup> however, and even a reassessment may not result in lower taxes, depending on the situation.<sup>170</sup>

### B. Agricultural Districts

Agricultural districts allow an individual landowner, or group of landowners, to voluntarily take advantage of farmland protection techniques established by the state that otherwise might be imposed upon them through agricultural zoning.<sup>171</sup>

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164. Deb Brighton & Davis J. Cable, *Taxation of Land Subject to Conservation Easements in Vermont: A Lister's Guide* 2 (Nov.-Dec. 1992) (quoting 10 VT. STAT. ANN. tit. 10, § 6306 (1995)) (This source explains the appraisals and property tax valuations of conservation easements and TDR).

Another study by the Vermont Land Trust looks at the effect of conservation easements on not only the single property owner, but on others in the town. Deb Brighton & Judy Cooper, The Vermont Land Trust, *The Effect of Land Conservation on Property Tax Bills in Six Vermont Towns* (Feb., 1994). The conclusion showed mild tax increases—from \$0.77 to \$0.04—on the average residence, with a projected \$0.16 to \$2.70 increase on the average house in the future. See *id.* The report pointed to the other benefits to be considered as well. See *id.*

165. See N.Y. AGRIC. & MKTS. LAW §§ 304-a, 305 (McKinney Supp. 1995). See also *infra* Part II.B.1.

166. See N.Y. AGRIC. & MKTS. LAW § 306(1) (McKinney Supp. 1995).

167. See *id.*

168. See *supra* text accompanying note 162.

169. See Rosenberg, *supra* note 2.

170. In some cases the highest and best use may be found to be the same as the use allowed under the easement. See *Adirondack Mountain Reserve v. Board of Assessors of Town of North Hudson*, 9 A.D.2d 600, 471 N.Y.S.2d 703 (3d Dep't 1984) (holding that the Reserve, which granted an easement to allow hikers' use of the Reserve property, was not entitled to a reduced assessment because: (1) the highest and best use of the property was for recreation; and (2) the Reserve benefited).

If a landowner conveys an easement on only a portion of her property, the value of her adjacent land may even increase and offset any tax advantage. See Rosenberg, *supra* note 2.

171. See PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS, §19.01[3], ch. 91, at 19-5 (1995).

Landowners receive protections in exchange for an agreement not to use their land in a manner contrary to the state's agricultural preservation objectives.<sup>172</sup> Some protections include special tax treatment, relief from burdensome regulations, and right-to-farm laws.<sup>173</sup> Most programs impose financial penalties on landowners who break the terms of an agreement.<sup>174</sup>

1. *Agricultural Districts Law in New York State*<sup>175</sup>

The Agricultural Districts Law in New York State, first adopted in 1968, was recently amended in 1995.<sup>176</sup> Article 25-AA of New York's Agriculture and Markets Law contains the bulk of the State's farmland and farming protection laws.<sup>177</sup> Most importantly, it establishes the agricultural districts program, provides a right-to-farm law, allows agricultural assessment of land within a district, and creates County Agricultural and Farmland Protection Boards (AFPB).<sup>178</sup>

The AFBPs have the power to establish, modify, continue or terminate any agricultural district.<sup>179</sup> They are also charged with reviewing the notice of intent filings<sup>180</sup> and making recommendations about how to reduce the impact of proposed public actions and public acquisitions within an agricultural dis-

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Agriculture may be made the object of zoning laws in several ways. In most jurisdictions, agriculture structures and activities are subject to the same zoning rules and regulations that govern other types of structures and activities. In these jurisdictions, there is no separate body of distinct "agricultural zoning" law with which to be concerned even though agriculture is involved. Such zoning, as it relates to agriculture, might accurately be referred to simply as the "zoning of agriculture." Agricultural zoning problems in these jurisdictions will have to be analyzed in the same way as any other zoning problem. In this sense, "agricultural zoning" is only a subset of the larger law of zoning.

*Id.* See also *id.* at 19-18.

172. See *id.*

173. See *id.*

174. See *id.*

175. See N.Y. AGRIC. & MKTS. LAW, art. 25-AA (McKinney 1995).

176. See *id.* § 302 (McKinney 1995).

177. See *id.* generally art. 25-AA (McKinney 1995).

178. See *id.*

179. See *id.*

180. Under New York's Agriculture and Markets Law section 305(4)(a), State agencies that want to acquire land from an active farm in a district must file a Notice of Intent to analyze the possible effects and minimize the impact upon the district. See N.Y. AGRIC. & MKTS. LAW § 305(4) (McKinney 1995).

trict.<sup>181</sup> As part of the Farmland Protection Act of 1992 the AFPBs are authorized to develop and approve county agricultural and farmland protection plans.<sup>182</sup> The grants to develop farm land protection plans will aid counties in promoting and coordinating the establishment of Agricultural Districts.

Districts may be created in two ways: (1) by the commissioner to protect unique and irreplaceable agricultural lands;<sup>183</sup> (2) on the initiative of farm owners.<sup>184</sup> An owner or owners of farmland that desire to create a district may submit a proposal to the Board, the county planning board, and the county legislative body.<sup>185</sup> The petitioner must own at least 500 acres, or at least ten percent of the land within the proposed district.<sup>186</sup> The land in the proposed district must be predominantly "viable agricultural land."<sup>187</sup> The AFPBs are required to consider the following factors in deciding whether a district should be formed:

(i) the viability of active farming within the proposed district and adjacent areas;

(ii) the presence of viable farm lands that are not in active farming;

(iii) the nature and extent of land uses other than active farming;

(iv) county developmental patterns and needs.<sup>188</sup>

After the plan is adopted by the AFPB, it must be approved by the Commissioner of Agriculture and Markets.<sup>189</sup> Once created, the district must be reviewed every eight, twelve or twenty years by the county legislature to determine if the purpose of

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181. *See id.*

182. Currently, eight counties are developing protection plans with assistance of planning grants. *See supra* note 30.

183. *See* N.Y. AGRIC. & MKTS. LAW § 304.

184. *See id.* § 303.

185. *See id.* § 303(1).

186. *See id.*

187. *Id.* § 303(5). Historically, the requirement that land within the district be predominately viable agricultural land has been interpreted to mean 51%. 1996 NEW YORK STATE ADVISORY COUNCIL ON AGRICULTURE, LISTENING REPORT 8 [hereinafter LISTENING SESSION]. Farmers are concerned that because the Department of Agriculture and Markets encourages districts to be formed with a higher proportion of viable farmland, this will be taken too far. *See id.*

188. *See* N.Y. AGRIC. & MKTS. LAW § 303(3). *See also* NY FARMLAND PROTECTION, *supra* note 1, at 12.

189. *See* N.Y. AGRIC. & MKTS. LAW § 303.

the district is being met.<sup>190</sup> In making this determination, the following factors must be considered:

- (i) the extent to which the number of farms and farm acres furthers the purposes for which the district was originally created;
- (ii) the extent to which the district has achieved its original objectives;
- (iii) the degree to which the district is consistent with community economic and land use conditions; and
- (iv) the district's effect on local government policies concerning community development, environmental protection and preservation of the agricultural economy.<sup>191</sup>

Article 25-AA of New York's Agriculture and Markets Law also contains other provisions that attempt to minimize adverse impacts.<sup>192</sup> The Commissioner is directed to develop and maintain data and information about the districts to assist in the administration and to evaluate the environmental and economic effects.<sup>193</sup> Land that is "used in agricultural production" is eligible for an agricultural assessment.<sup>194</sup> Under an agricultural assessment, value which represents an excess above the assessed value of the land for agricultural uses is not subject to real property taxation.<sup>195</sup> This excess value, above the value as farm land, is considered to be the value of residential or commercial development. Eligibility of a parcel is decided by: (1) location within an agricultural district; or (2) at least an eight year commitment to agricultural production.<sup>196</sup> If the land is

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190. *See id.* § 303(8). Most districts are designated for review every eight years. *See id.* § 304(4) (McKinney Supp. 1991). Because the review can be so time consuming and onerous contiguous districts are linked together to reduce the procedures. *Id.*

191. N.Y. AGRIC. & Mkts. LAW § 303(7)(b) (McKinney Supp. 1995).

192. *See generally id.* art. 25-AA.

193. *See* N.Y. AGRIC. & Mkts. LAW § 304-b (McKinney Supp. 1995). Landowners are required to supply their county with the following information: total acres, number of acres in cropland, number of acres by land classification, principal products, approximate annual gross sales. *See id.* The counties must make this information available to the commissioner of agriculture and markets, who then must submit a report to the legislature and the governor. *See id.*

194. *See id.* § 301(4) (McKinney Supp. 1995). "Land used in agricultural production" is defined as not less than ten acres of land with gross sales of \$50,000 or more of agricultural products. *Id.*

195. *See id.* § 305(1)(b).

196. *See id.* § 304-a. Requirement (2) allows land that is subject to a conservation easement to receive an agricultural assessment. *See id.* § 304-a(2).

converted into a non-agricultural use, it is subject to conversion payments.<sup>197</sup> Additionally, the districts law protects land in the districts from local and state actions that unreasonably restrict or regulate farm structures or farming practices.<sup>198</sup>

Coordination of local planning and land use decisionmaking was added in 1993 to recognize the impact of these functions upon the policy of the district.<sup>199</sup> When a municipal action has an impact on that policy, an agricultural data statement must be submitted to the local reviewing board to review the possible impacts on agricultural operations.<sup>200</sup> Right-to-farm laws also protect farmers from residential neighbors who are offended by the farm activities.<sup>201</sup> Farming techniques that are considered to be "sound agricultural practice[s]"<sup>202</sup> are prohibited from being considered a nuisance.<sup>203</sup> Recent amendments in 1995 allow for the recovery of fees and expenses to the prevailing party in a nuisance action based on agricultural practices.<sup>204</sup>

Article 25-AA of New York's Agriculture and Markets Law also created the Advisory Council on Agriculture that is appointed by the governor with the senate's input, to make comments and recommendations on: the agricultural districts program, the establishment of agricultural assessment values, and state government plans, policies and programs affecting

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197. See N.Y. AGRIC. & MKTS. LAW § 305(1)(d)(i) (McKinney Supp. 1995).

[These] payments equal five times the taxes saved in the last year in which the land benefited an agricultural assessment, plus interest of six percent compounded annually for each year in which [the] agricultural assessment was granted, not exceeding five years.

*Id.*

198. See *id.* § 305(2) (limitation of local regulation); see *id.* § 305(3) (policy of state agencies); see *id.* § 305(4) (limitation on public actions affecting agricultural districts); see *id.* § 305(5) (limitation on imposition of benefit assessment or special ad valorem levies).

199. See N.Y. AGRIC. & MKTS. LAW § 305-a (McKinney Supp. 1995).

200. See *id.* Farmers complained that the data statements were not being used in the necessary situations. See LISTENING SESSION, *supra* note 187, at 12. They felt that the boards were not properly considering the impact of planning and development on land within the districts. *Id.*

201. See N.Y. AGRIC. & MKTS. LAW § 308 (McKinney Supp. 1995). See *infra* Part II.B.3.

202. The commissioner will decide if a practice is "sound" on a case-by-case basis. See N.Y. AGRIC. & MKTS. LAW § 308(1) (McKinney Supp. 1995).

203. See *id.* § 308(2); N.Y. PUB. HEALTH LAW § 1300-c (McKinney Supp. 1995).

204. See N.Y. AGRIC. & MKTS. LAW § 308-a (McKinney Supp. 1996).

farming and agriculture in the state.<sup>205</sup> Among the duties listed above, the council must recommend programs to reduce the farmers' tax burden.<sup>206</sup> The council must include at least five commercial farmers among the eleven members.<sup>207</sup>

## 2. Lancaster County's Agricultural Security Areas

Lancaster County, Pennsylvania began its agricultural districts program in 1980 with the creation of the Agricultural Preserve Board.<sup>208</sup> The Agricultural Preserve Board then recommended a district that required approval from the county commissioners and township supervisors.<sup>209</sup> The district would not require landowner approval, but landowners could individually withdraw from the district.<sup>210</sup> In 1988, Pennsylvania adopted the Agricultural Area Security Law,<sup>211</sup> and Agricultural Security Areas replaced Agricultural Preserves. Instead of the Agricultural Preserve Board instigating the creation of Security Areas, landowners initiate the process and the township supervisor approves or denies the application.<sup>212</sup> The purpose of the Agricultural Area Security Law is to protect and improve the use of agricultural lands for the production of agricultural products, as well as to preserve open space.<sup>213</sup> The law is designed to encourage land owners to make long-term commitments to agriculture,<sup>214</sup> to prevent non-farm land uses in the Agricultural Security Areas,<sup>215</sup> and to compensate farmers for their relinquishment of development rights.<sup>216</sup> Agricultural Security Areas accomplish these goals by offering landowners three benefits, as stated by the Director of Lancaster's Agricultural Preserve Board:

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205. See N.Y. AGRIC. & MKTS. LAW §309 (McKinney 1995).

206. See *id.*

207. See *id.*

208. See Daniels, *supra* note 38, at 3.

209. See *id.* at 3-4

210. See *id.*

211. See 3 PA. CONS. STAT. ANN. §§ 901-15 (West 1995).

212. See Daniels, *supra* note 38, at 4-5.

213. See 3 PA. CONS. STAT. ANN. § 902 (West 1995).

214. See *id.* § 902(1).

215. See *id.* § 902(2).

216. See *id.* § 902(4). See *supra* Part II.A.3 for a discussion of the conservation easement program in Lancaster.

- 1) A strengthened right-to-farm. Township supervisors are discouraged from enacting nuisance ordinances which would restrict normal farming practices within the Security Area [under 3 P.S. §911(b)];
- 2) Greater protection against eminent domain. Government bodies seeking to condemn land in a Security Area must receive approval from the state Agricultural Lands Condemnation Acceptance Board [under 3 P.S. § 913(a)]; and
- 3) Landowners in a Security Area have the option to apply to sell an easement to the Agricultural Preserve Board [under 3 P.S. §914.1].<sup>217</sup>

Under section 905 of the Pennsylvania Constitutional Statute Annotated, an owner or owners of at least 250 acres of productive, viable agricultural land, contiguous or not, may apply to create a Security Area.<sup>218</sup> As of June 1994, there were thirty Security Areas in the county accounting for 119,000 acres.<sup>219</sup>

When a petition to create a Security Area or add to an existing one is received, an Agricultural Security Area Advisory Committee is formed by the local government consisting of a chairman, who is a member of the local government, three active farmers, and one other citizen.<sup>220</sup> The Advisory Committee acts as the expert body in evaluating and recommending action on the petition by the local government and planning commission.<sup>221</sup> The approval process calls for review by the planning commission,<sup>222</sup> notice<sup>223</sup> and a hearing,<sup>224</sup> and a decision by the local governing body.<sup>225</sup> Review of a Security Area is performed every seven years.<sup>226</sup> The Director of Lancaster's Agricultural Preserve Board stated that the Security Areas have helped to stabilize the farmland base because "[a]lthough a security area does not impose any restrictions on a farmland owner, it does

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217. Daniels, *supra* note 38, at 4. See also *supra* Part II.A.3.

218. 3 PA. CONS. STAT. ANN. § 905 (West 1995).

219. See Daniels, *supra* note 38, at 4.

220. See 3 PA. CONS. STAT. ANN. § 904 (West 1995).

221. See *id.*

222. See *id.* § 905(d).

223. See *id.* § 905(b).

224. See *id.* § 906.

225. See *id.* § 908. An appeal is also available. See *id.* § 910.

226. See 3 PA. CONS. STAT. ANN. § 909 (West 1995). In New York State, review is normally required every 8 years. See N.Y. AGRIC. & Mkts. LAW § 303(4) (McKinney 1996 & Supp. 1997).

provide some important protection from nuisance suits and condemnation actions by government agencies."<sup>227</sup>

### 3. *Right to farm*

Right-to-Farm laws exist in most states and provide varying degrees of protection for farmers against nuisance suits. For example, Pennsylvania's law is intended to limit "the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances."<sup>228</sup> The Pennsylvania law prohibits municipalities from including within their nuisance statutes any normal agricultural operation that "does not have a direct adverse effect on the public health and safety."<sup>229</sup> New York's right-to-farm law, like those of other states, protects farmers against nuisance suits if the farm operates under "sound agricultural practices."<sup>230</sup> Even though farmers may be legally protected from nuisance suits, social pressures will arise if the community is not educated about what to expect from the farms.<sup>231</sup>

## C. *Zoning Techniques*

### 1. *Minimum Lot Size*

Many communities have used their zoning power to preserve farming by increasing the acreage required for a buildable lot.<sup>232</sup> By increasing the minimum lot size, farmland is likely to

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227. Daniels, *supra* note 38, at 5.

228. 3 PA. CONS. STAT. ANN. § 951 (West 1995). Both the model agricultural zoning ordinance from Lancaster County and East Hempfield's zoning ordinance refer to the Right-to-Farm Law and warn adjacent landowners of the inconveniences of living next to a farm operation. EAST HEMPFIELD TOWNSHIP, PA., ZONING ORDINANCE § 201.7 (1994).

229. 3 PA. CONS. STAT. ANN. § 953(a) (West 1995). Section (b) of that provision protects the farmer in the direct commercial marketing of her crops on her own property, even against municipal ordinances, public nuisance, or zoning ordinances. *See id.* § 953(b). *See infra* Part II.C.2.e.ii for a discussion of accessory uses and direct marketing of agricultural products.

230. N.Y. AGRIC. & MKTS. LAW § 308(2) (McKinney Supp. 1995).

231. *See generally Environmental Policy*, *supra* note 31; *see also supra* Part II.B.3.

232. *See Farming on the Fringe*, *supra* note 131, at 13. Some examples of communities that have established different lot sizes are: Anne Arundel County, Maryland (20-acres minimum lot sizes); McHenry County, Illinois (160-acres lot sizes); and, Alameda and Maedera Counties in California (320-acres lot sizes). *See id.*

remain as farmland since it can not be subdivided into smaller buildable lots.<sup>233</sup> As a result the value of land in the downzoned areas is reduced to the value of the farmland, instead of the potential development value.<sup>234</sup>

The advantage of rezoning an agricultural area is that it preserves large tracts of farmland to maintain the agricultural community and the services that are necessary to keep farming viable in that region.<sup>235</sup> The lower value relieves the landowner of the pressure to sell the farm for development. Stability is promoted by zoning agricultural regions because it promotes re-investment in the farmland.<sup>236</sup> Farmers can be confident that their investment will not be jeopardized by incoming suburbanites and that community support for agriculture will remain.

However, many landowners are strongly opposed to any sort of downzoning for a number of reasons. One problem with imposing large minimum lot sizes is that, without other safeguards, most landowners violently object to downzoning.<sup>237</sup> Landowners have an understandable and sympathetic argument against any restriction imposed upon the use of land. Another problem is that once the land value decreases, the landowner's ability to borrow money for farm operations may be greatly reduced.<sup>238</sup> Unless these concerns are addressed, land-

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233. If the lot sizes are not large enough, residential development will not be discouraged and the intent to protect farmland will be compromised. *See id.*

234. *See id.* In Marin County soaring farmland prices have eased and speculators holding land for development have sold it back to ranchers. *See id.*

235. *See* Sam Seronick, *The Accretion of Cement onto Prime Iowa Farmland: A Proposal for a Comprehensive State Zoning Plan*, 76 IOWA L. REV. 583 (1991) (noting that once farmland is surrounded by residential and industrial development, the region will not be conducive to agricultural uses, resulting in industrial or residential zoning by default); *see also* ROHAN, *supra* note 171, § 19.01[2], at 19-5.

236. *See Farming on the Fringe*, *supra* note 131, at 13-14. In a four year period, farmland increased by 10,000-15,000 acres in West Marin County. *See id.* at 14. In return, a more stable land base has encouraged dairy farmers to make new investments. *See id.*

237. Although downzoning is a legitimate use of the municipalities' police power, equity issues must be addressed to gain the support of the community and avoid creating a lightening rod of controversy that will detract from the program's ability to succeed. *See e.g.* *Stone v. City of Wilton*, 331 N.W.2d 398 (Iowa 1983).

238. *See infra* Part II.D. on taxation. The impact of the downzoning will vary with the level of development pressure on the restricted area. If the affected area is subject to intense development pressures, the value of the land will be higher and any downzoning will cause a drastic reduction in equity and hence borrowing

owners will fight any restriction on their use of the land. This opposition can create substantial political pressure and cause the zoning to be changed by the legislature.<sup>239</sup> Therefore, unless landowners endorse minimum lot size as a tool to preserve agriculture, any efforts to downzone must address the equity issues that arise when value, albeit through legitimate means,<sup>240</sup> is reduced.

## 2. Agricultural Zoning

Agricultural zoning does not exist as a distinct body of law, but rather arises from a specific situation as a result of political, economic and social factors that exist within a legal framework.<sup>241</sup> Agricultural zoning designates zones in a municipality primarily for agricultural uses, while allowing other compatible and accessory uses.<sup>242</sup> An agricultural zone is simply another type of zone in the Euclidean model,<sup>243</sup> and "there is no separate body of 'agricultural zoning' law with which to be concerned."<sup>244</sup> In order to challenge an agricultural zoning, the challenger must overcome the presumption of validity and show that there is no relation to the public health, safety or welfare.<sup>245</sup> As to a

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power. Conversely, in areas where development pressure is low, relative land values are not high and any downzoning is not likely to cause a substantial decrease in equity, thus leaving the farmers borrowing power unaffected.

239. While most legislatures are required to downzone only in accordance with the comprehensive plan, most courts do not strictly construe this requirement. *Kozesnik v. Montgomery Twp.*, 131 A.2d 1 (N.J. 1957) (holding that this requirement did not require a physical plan outside the zoning ordinance). This grant of freedom allows a creative legislative body to amend the zoning ordinance while not running afoul of the consistency requirement.

240. Courts have upheld zoning plans that restrict development of large minimum lot sizes. See *ROHAN*, *supra* note 171, § 19.01[3][b], at 19-11 n.24 (citing *Gisler v. County of Madera*, 38 Cal. App. 3d 303 (1974) (18 acres); *Wilson v. County of McHenry*, 92 Ill. App. 3d 997 (1981) (160 acres)).

241. See generally *id.* § 19.01-07, at 19-8.

242. See generally *id.* § 19.01(2), at 19-7, 8.

243. See generally *id.* § 19.04(3), at 19-8, 9.

244. *Id.* § 19.01(2), at 19-5.

245. See *id.* § 19.02(3), at 19-28. See also *Racich v. County of Boone*, 625 N.E.2d 1095 (Ill. App. Ct. 1993) (upheld agricultural zoning in relation to an 87 acre property because the surrounding uses were agriculture, the purchasers knew it was in an agricultural zone and paid a price consistent with farm use, and the court held that the refusal to rezone did not destroy the economic value of the property). But see *Twigg v. County of Will*, 627 N.E.2d 742 (Ill. App. Ct. 1994) (denial of a rezoning in an agricultural district was struck down as applied to a 35 acre parcel based on eight factors).

Fifth Amendment takings challenge, agricultural zoning is historically considered valid and not a taking.<sup>246</sup> However, a denial of all economically beneficial use—for example, zoning theoretically infertile land for agriculture purposes—could be a taking requiring compensation.<sup>247</sup>

Agricultural zoning overcomes some of the problems with other land use techniques. For example, PDR and other conservation easement programs are voluntary and are supported by limited funding,<sup>248</sup> and thus, such programs “cannot secure all of the State’s farmland” but allow “the potential of conflicting land use patterns around protected farms.”<sup>249</sup> Agricultural zoning could be an answer to the problem associated with land under intense development pressure<sup>250</sup> because it provides for preservation of a large contiguous area, sheltering the farms from suburban pressures.<sup>251</sup> Reversing the fragmentation problem also alleviates the “impermanence syndrome” felt by farmers whose operations are unproductive, in areas where support services are lacking and development pressures are high.<sup>252</sup> For example, a more stable land base in West Marin, created by minimum lot size zoning, encouraged farmers to invest in technology to make the operations more economically profitable.<sup>253</sup>

Some critics of PDR and TDR prefer agricultural zoning because they say that it is the public infrastructure that gives the farmland added development, so that purchasing development rights makes the taxpayers pay twice.<sup>254</sup> At any rate, Robert

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246. See ROHAN, *supra* note 171, § 19.02(3)(d), at 19-37.

247. See *id.* § 19.02(3), at 19-37 n.43 (citing *Lucas v. South Carolina Coastal Comm’n*, 112 S. Ct. 2886, 2893 (1992); *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264 (1981)).

248. See *supra* Parts II.A.1-6.

249. STEBBINS, *supra* note 24, at 18. See *supra* Part II.A.6 for a discussion of some problems with PDR.

250. See STEBBINS, *supra* note 24, at 18.

251. Stanley D. Schiff, *Real World Experience with TDRs—An Update*, Piedmont Environmental Council, Warrentown, Va. 2. In Lancaster County, Pennsylvania, agricultural zoning covers 242,000 acres. See generally Daniels, *supra* note 38.

252. See *Agricultural Landscape*, *supra* note 134, at 12. See also *supra* text accompanying note 24.

253. See *Farming on the Fringe*, *supra* note 131, at 13-14.

254. See *id.* at 12.

Coughlin, an expert in preservation of agricultural lands, states that "agricultural zoning is the method most commonly used in the United States for preventing the conversion of agricultural land to non-agricultural uses."<sup>255</sup>

a. *Oregon's Approach to Agricultural Protection*

During the 1950's, the Willemette Valley experienced such a considerable increase in the number of residents that many natives became alarmed at the rapid loss of prime agricultural land.<sup>256</sup> In response to this crisis the legislature enacted senate bill 100 which gave local governments primary responsibility for land use planning.<sup>257</sup> Under this plan, localities are required to adopt comprehensive plans that are consistent with state goals.<sup>258</sup> The Land Conservation and Development Commission, a state agency, has the responsibility of developing the statewide policies.<sup>259</sup> One of its nineteen policies is dedicated to agricultural land.<sup>260</sup>

Through this program seventeen million acres of agricultural land have been protected in Exclusive Farm Use (EFU) zones.<sup>261</sup> These zones, although labeled exclusive, allow for other uses that are not considered agricultural, such as golf courses, churches, and other uses.<sup>262</sup> The greatest impact of the

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255. *Id.* at 13. From the context of the article, Coughlin is presumably referring not only to agricultural zoning for exclusive agricultural use, but also minimum lot sizes.

256. See Henry R. Richmond, *From Sea to Shining Sea: Manifest Destiny and the National Land Use Dilemma*, 13 PACE L. REV. 327, 338 (1993).

257. See *id.*

258. See *id.*

259. See *id.*

260. See *id.* at 340.

261. Agricultural lands may be grass seed fields, orchards, grazing lands, or crop fields. See *Farming on the Fringe*, *supra* note 131, at 14.

The UGBs and EFUs are created by cooperation between cities and counties. See Richmond, *supra* note 256, at 341. The UGB includes land that is already in urban use and land that is necessary for the estimated urban growth. Through this arrangement, local governments have retained their planning and zoning authority. See *id.*

262. See *Farming on the Fringe*, *supra* note 131, at 14. This is an important component of any agricultural zone. The zone should not be exclusive and highly restrictive, but allow for accessory uses, limited development of non-agricultural houses, and signage laws that allow farmers to take advantage of their resource and attract consumers and tourists if they desire. See *infra* Part II.C.2.e.ii. for a discussion of accessory uses and marketing efforts.

zones is their restriction on subdivisions, shopping centers, and other large-scale developments.<sup>263</sup> These types of developments must be located in Urban Growth Boundaries (UGBs), which surround each incorporated community.<sup>264</sup> To date the program has been successful in preserving farm land, especially in the prized region of the Willemette valley, where urban pressures are the highest in the state and the soils are touted as the best in the state.<sup>265</sup>

b. *Lancaster County's Agricultural Zoning*

The farmland preservation program of Lancaster County, Pennsylvania, combines agricultural zoning, agricultural districts, and the purchase or gift of conservation easements.<sup>266</sup> Lancaster County is different from other areas working to preserve agriculture. Even with strong development pressures, farming in Lancaster County is recognized as "the single most important component of the local economy,"<sup>267</sup> and therefore the public may be more willing to take some extra steps in the effort at preservation. Lancaster is also more interested in preserving working farms as opposed to simply preserving open space.<sup>268</sup>

The comprehensive plan for Lancaster County in 1975 identified 278,000 acres for preservation.<sup>269</sup> The municipalities followed by adopting agricultural zoning ordinances in 33 out of 41 townships by 1988 encompassing 242,000 acres, with the guidance of a model agricultural zoning ordinance published by the county in 1978.<sup>270</sup> By 1994, 39 townships had preserved 320,000 acres with this method.<sup>271</sup>

The purposes enumerated in the model zoning ordinance include the protection and promotion of farming in areas with

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263. See *Farming on the Fringe*, *supra* note 131, at 14.

264. See *id.*

265. See Richmond, *supra* note 256, at 341.

266. See Daniels, *supra* note 38, at 2.

267. See *id.* at 1. Daniels recognizes that while the Lancaster program is successful to date, that is largely due to public support and interest and profitability in farming. See *id.* at 15. If economic pressures become too strong due to changed federal policies and interest rates, he fears that there may be a loss of farmlands. See *id.*

268. See *id.* at 14.

269. See *id.* at 2-3.

270. See *id.* at 3.

271. See *id.*

suitable soils and where farming currently exists,<sup>272</sup> "to permit, with limited exceptions, only agricultural land uses and activities,"<sup>273</sup> to separate agriculture from incompatible uses,<sup>274</sup> and to conform with the comprehensive plan.<sup>275</sup> Most of the municipalities follow the model zoning ordinance and allow one building lot of one to two acres per twenty-five acres in the agricultural zone.<sup>276</sup> That lot is subdividable from the parent tract<sup>277</sup> under the limitations of section 403.2(b) of the model zoning ordinance.<sup>278</sup> That provision permits a parent tract of fifty or more acres to be subdivided into one farm parcel or one non-farm lot for every fifty acres of area within the parent tract.<sup>279</sup>

The agricultural zone emphasizes "all forms of agriculture, horticulture, and animal husbandry,"<sup>280</sup> but allows compatible uses<sup>281</sup> such as farm dwellings and elementary schools, and accessory uses<sup>282</sup> such as garages and signs.<sup>283</sup> There are also a

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272. See LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE, § 401(a) (1978). The soils are rated and the ordinance emphasizes protection of Class I and II prime soils, and Class III soils of statewide importance. See *id.*

273. *Id.* § 401(b).

274. See *id.* § 401(c).

275. See *id.* § 401(d).

276. See Daniels, *supra* note 38, at 3.

277. A parent tract is defined as "[e]ach tract of land located within an A-Agricultural District on the effective date of this ordinance, and held in single and separate ownership." LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE 1 (1978).

278. See LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE, § 403.2(b) (1978).

279. See *id.*

280. *Id.* § 402.1(a). When comparing Lancaster's model zoning ordinance to the zoning ordinance of Montgomery County, Maryland, one can see Lancaster's emphasis on farms and lack of emphasis on support service. See *supra* Part II.C.2.c. In contrast, Montgomery County has four different zones of agricultural zoning, all emphasizing rural character but also including support services and residences in a more prevalent manner. See MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 5-9-c-9.1, 9.21-9-23; LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE § 492.2 This difference highlights the concept that the character of the area dictates the structure of its agricultural zoning.

281. LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE § 402.1.

282. See *id.* § 402.1(g).

283. See *id.* § 402.1(g)(iii). See *supra* Part II.C.2.e.ii for the importance of signs.

number of special exception uses permitted,<sup>284</sup> and some incompatible uses are specifically prohibited.<sup>285</sup> A reference to the Pennsylvania Right-to-Farm Law is included in the model zoning ordinance.<sup>286</sup> Although zoning may be changed through a petition process, there have been few rezonings in Lancaster County.<sup>287</sup>

### c. *Montgomery County's Agricultural Zoning*

In 1969, Montgomery County, Maryland developed a comprehensive planning program to allow continued residential growth and to preserve farming as an industry and as a land use.<sup>288</sup> The County Planning Board developed a plan that encouraged growth along "corridors" and farmland preservation within "wedges."<sup>289</sup> The Board enumerated policies as part of a growth plan to help guide the program.<sup>290</sup> Included in those policies were the preservation of agricultural land, encouragement of development around transportation infrastructure and an adequate public facilities program.<sup>291</sup>

The Montgomery County Zoning Ordinance divides the agricultural area into four zones: the Rural zone; the Rural Cluster zone; the Density Transfer Zone; and Rural Service Zone.<sup>292</sup> The purpose of these zones is to allow uses that preserve the rural areas for agriculture and to provide the farms with serv-

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284. See LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE § 402.2.

285. See *id.* § 402.3. Such prohibited uses are landfills, quarries, golf courses, sewage treatment plants, airports and country clubs. See *id.*

286. See *id.* § 407.

287. See Daniels, *supra* note 38, at 3.

288. See Douglas Porter, *Managing Growth in Urban America. Case Study: Montgomery County, Maryland 2*, Draft, Aug. 19, 1996 [hereinafter Porter] [materials on file with authors]. Montgomery County has 70 years of experience in planning and growth management. See *id.* at 1.

289. See *id.* at 2.

290. See *id.* at 3.

291. See *id.* The adequate facilities program requires a review of facility capacities available to serve prospective development as a condition of project approval. See *id.* The purpose of the program is to determine where infrastructure may support more development and where more services must be provided. See *id.* at 3-4.

292. See MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-9.5 (Rural Cluster Zone); *Id.* § 59-C-9.6 (Rural Density Transfer); *Id.* § 59-C-9.8 (Rural Service Zone).

ices and uses that complement agricultural practices.<sup>293</sup> Along with agricultural uses, these zones allow bed-and-breakfast lodging, ambulance/rescue squad facilities, day care facilities, churches, signs for produce, recreational facilities, and limited commercial facilities necessary for agricultural use.<sup>294</sup> Overall, the four zones create a flexible system of land use across the entire Agricultural Zone that accommodates residential, limited industrial and consistent commercial development along with agricultural uses. But when examined individually, each separate zone restricts uses to achieve its purpose.

For example, the Rural Density Transfer Zone (RDTZ) is the primary zone for agricultural preservation. The purpose of the RDTZ is to "promote agriculture as the primary land use in sections of the county designated for agricultural preservation in the general plan and the functional master plan for preservation of agricultural and rural open space."<sup>295</sup> The RDTZ uses a TDR-type program to promote the preservation of contiguous parcels and allows the development rights from these properties to be transferred.<sup>296</sup> Because the primary purpose of the RDTZ promotes agriculture, all agricultural operations are permitted all the time and cannot be restricted by other uses permitted in the zone.<sup>297</sup> While the RDTZ may be strictly agricultural, limiting other uses severely, the other three zones provide flexibility.

As part of the Agriculture Preservation Plan, mentioned above, the County adopted a "plan for preservation of agriculture and rural open space" that created a twenty-five acre minimum lot size for one-third of the county.<sup>298</sup> A TDR<sup>299</sup> program was established to partially compensate the landowners in the

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293. *See id.* § 59-C-9.21 - 24.

294. *See id.* § 59-C-9.24.

The purpose of this zone is to allow limited types of service and commercial uses in rural areas of the County. Such uses must support traditional low density rural land uses, while protecting and maintaining an overall rural character. Further, it is intended that this zone be located in areas that are not suitable for primarily residential development.

*See id.*

295. *Id.* § 59-C-9.23.

296. *See infra* text accompanying notes 308-12.

297. *See* MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-9.23.

298. *See* Porter, *supra* note 288, at 4.

299. *See infra* Part II.C.2.e.i., discussing TDR.

restricted area.<sup>300</sup> Rural opposition to the program was stymied after a judge held that the county could have legally downzoned without using TDRs.<sup>301</sup> Predictably, residents in the more developed regions objected to being "up-zoned."<sup>302</sup> Eventually, the major differences were worked out so that now Montgomery County has the most successful agriculture preservation program in the nation.<sup>303</sup>

#### d. *Problems with Agricultural Zoning*

The idea of agricultural zoning is not generally supported by New York's farmers because it has some harsh effects. One group states, "Farms saved by agricultural zoning pressures preserve the land but the farmer is lost."<sup>304</sup> They explain that such zoning limits a farmer's rights by mandating agricultural use and removing the equity/credit value from the land.<sup>305</sup> This will mean that the farmer has less equity to borrow against to sustain her farming operation, and less value when she sells her farm for retirement. As with any downzoning, there is always landowner opposition, both by the owners of these parcels, and by the adjacent parcels which are upzoned in effect because development is directed toward their area.<sup>306</sup> Another problem with agricultural zoning is that it is not permanent because rezonings can occur by a vote of the local legislature.<sup>307</sup>

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300. See MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-9.23. See also *West Montgomery County Citizens Ass'n v. Maryland Nat'l Capital Parkland Planning Comm'n*, 522 A.2d 1328, 1330 (Md. 1987).

The owners of property down-zoned to the RDT zone are granted one TDR for each five acres, less one TDR for each existing dwelling unit. Other amendments to the zoning text provide that if the owners execute a covenant not to develop their land at its base density, the TDRs can be transferred to any property within a properly designated receiving zone, and under certain circumstances can be used to increase by one dwelling unit per TDR the density of development of the receiving property.

*Id.*

301. See *Montgomery County v. Horman*, 418 A.2d 1249, 1253 (Md. Ct. Spec. App. 1980).

302. See Porter, *supra* note 288, at 4.

303. See Klimuska, *supra* note 74, at A1.

304. *Agricultural Landscape*, *supra* note 134, at 10.

305. See *id.* at 9.

306. See Dana H. Heiberg, *The Reality of TDR*, URBAN LAND, Sept. 1991, at 34.

307. See Daniels, *supra* note 38, at 10.

e. *Some Solutions*

Some buffers to the harshness of agricultural zoning include the addition of a TDR program to the area,<sup>308</sup> and allowance of accessory uses to promote economic feasibility for farmers.<sup>309</sup> Agricultural zones also can allow limited subdivision for non-farm lots to give the landowner some flexibility.<sup>310</sup> The other land use options discussed above, such as PDR, eliminate some of the problems with agricultural zoning, but entail problems of their own including costliness.<sup>311</sup>

Community backing is crucial to the success of agricultural zoning.<sup>312</sup> All constituents must be sufficiently informed to reach a consensus that farming is important and must be protected in the area.

i. *Transfer of Development Rights*

Transfer of Development Rights<sup>313</sup> is one way to compensate landowners for the lost development value when their land is downzoned.<sup>314</sup> Under a TDR, a landowner's property rights can be severed into the value of the land under the present use and the value of the land if developed to the limits of the designated zoning.<sup>315</sup> Landowners in the sending zones can sell their

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308. See *infra* Part II.C.2.e.i for a discussion of TDR programs.

309. See *infra* Part II.C.2.e.ii for a discussion of accessory uses and related marketing techniques.

310. See, e.g., LANCASTER COUNTY, PA., MODEL AGRICULTURAL ZONING ORDINANCE, § 403 (1978).

311. See *supra* Parts II.A.1-7.

312. See Daniels, *supra* note 38, at 14. See *supra* Part II.C.2.b for a discussion of the wide support for agricultural zoning in Lancaster County, Pa.

313. "Transfer of development rights . . . severs the development value from the property and allows the owner to realize that value through more extensive development of other property." Joseph D. Stinson, *Transferring Development Rights: Purpose, Problems, and Prospects in New York*, 17 PACE L. REV. 319, 320 (1996).

314. While it may be constitutionally permissible to downzone without compensation pursuant to *Norbeck Village Joint Venture v. Montgomery County Council*, 254 A.2d 700 (Md. 1969) and *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1333 (Fla. Dist. Ct. App. 1983), good policy requires that landowners be compensated for lost value. The political reality is that the majority of the landowners must support downzoning even when the downzoning is legitimate. Without the support of the landowners, any zoning designation may be overturned by an effectively lobbied legislature.

315. See Stinson, *supra* note 313, at 322-33.

potential development rights to someone who wishes to build in a designated receiving zone.<sup>316</sup>

The area where development is restricted is often designated as the sending district.<sup>317</sup> The foregone development rights on the parcels in the sending zone can be sold to a private developer and used to build new construction in a designated receiving district.<sup>318</sup> These zones should be designated in a manner consistent with the comprehensive plan and the communities collective vision.<sup>319</sup> There have been a variety of TDR programs proposed, but they are all based on the same premise—development rights on one restricted parcel can be transferred to another lot where development is encouraged.<sup>320</sup>

Under New York's TDR statutes,<sup>321</sup> municipalities have the power to designate sending and receiving zones in accordance with the comprehensive plan.<sup>322</sup> The sending zone may be

316. See ROHAN, *supra* note 171, at 19-16 - 17.

317. See, e.g., N.Y. TOWN LAW § 261-a (1)(c).

318. See, e.g., N.Y. TOWN LAW § 261-a (1)(b); see also Rohan, *supra* note 171, at 19-16 - 17.

The receiving districts are the areas to which development rights are transferred, and great care must be taken with their designation for two reasons. First, there should be a market for development rights in the receiving district (this is a basic premise of the whole TDR system). Second, the transfer will necessarily result in an increase in the density or intensity of development in the receiving area, which means that municipal services must be available to support it; consequently, there must be an awareness of the potential impact of such development.

*Transfer of Development Rights*, LEGAL MEMORANDUM, ST. OF N.Y., DEP'T OF ST., at 4 (Jan. 1995) [hereinafter *Transfer of Development Rights*].

319. Land use regulations, such as these, must accord with the comprehensive plan. See N.Y. GEN. CITY LAW § 28-A(12)(A) (McKinney 1989 & Supp. 1996); N.Y. TOWN LAW §272-A (McKinney Supp. 1987); N.Y. VILLAGE LAW § 7-222(11) (McKinney Supp. 1996).

320. See ROHAN, *supra* note 171, at 19-16.

The four most commonly described methods for TDR plans are generally identified as: (1) the New York Plan, which allows transfer of unused development rights only to adjacent parcels; (2) the Chicago plan, which allows transfer of unused rights within a designated district; (3) the Puerto Rico and New Jersey plans, which allow transfer of rights from nonurban areas to urban areas; and (4) the "uniform" plan, which allows the assignment of rights to all lands in the jurisdiction.

*Id.*

321. See N.Y. TOWN LAW § 261-a (McKinney Supp. 1995); N.Y. VILLAGE LAW § 7-703 (McKinney Supp. 1995); N.Y. GEN. CITY LAW § 20-f (McKinney Supp. 1995).

322. See N.Y. TOWN LAW § 261-a(2)(A).

formed with the intent of protecting agricultural lands.<sup>323</sup> The town board must find that the receiving zone has adequate facilities and that the added development will not cause significant environmental damage.<sup>324</sup> A generic environmental impact statement shall be prepared before any sending or receiving zone is designated.<sup>325</sup> When development rights are transferred from a parcel, the burden shall be documented in the form of a conservation easement.<sup>326</sup> The easement "shall be enforceable by the town or any other person or entity granted . . . rights."<sup>327</sup> Within one year of a transfer, the assessed value "shall be adjusted to reflect the transfer."<sup>328</sup>

A TDR is similar to PDR programs in that both involve restricting development rights on a parcel of land.<sup>329</sup> However, the two can be distinguished in a number of important ways. First, a TDR program can be used in conjunction with an agricultural zone to preserve land in contiguous areas.<sup>330</sup> The agricultural zone creates contiguous parcels of farmland that help to maintain profitability of farming and preserve farming in that area.<sup>331</sup> A TDR program compensates those landowners within the agricultural zone.<sup>332</sup> A PDR may create pockets of preserved land that are often not coordinated with a community plan or vision.<sup>333</sup> A properly run TDR program incorporates the community vision of preserving open space, while at the same time directs necessary economic growth to appropriate areas.<sup>334</sup>

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323. *See id.* Sending zones can also be used to protect natural, scenic, recreational, forest, or open land or sites of special historical, cultural, aesthetic or economic values. *See id.*

324. *See id.*

325. *See id.*

326. *See* N.Y. TOWN LAW § 261-a(2)(c).

327. *Id.*

328. N.Y. TOWN LAW § 261-a(2)(d).

329. *See supra* Part II.A.

330. TDR designates a sending zone where development is restricted to achieve a public purpose. *See* N.Y. TOWN LAW § 261-a(2)(A).

331. *See supra* Part II.C.2. for a discussion of the advantages to zoning regions for agricultural use. The RDTZ is an example. *See* Part II.C.2.c.

332. *See generally* Stinson, *supra* note 313.

333. Suffolk County, New York, attempts to remedy this by making contiguity of parcels the most important criteria used in selecting parcels. *See* HALPRIN, *supra* note 56.

334. *See Transfer of Development Rights*, *supra* note 318, at 4.

Second, TDR programs do not require assessment of land value to calculate the amount of compensation. For example, under a TDR, development rights are allocated by a community-calculated formula<sup>335</sup> to owners of property within an agricultural zone.<sup>336</sup> Avoiding the assessment process eliminates substantial complications that arise as a result of differences between landowners and buyers as to land value assessments.<sup>337</sup>

Third, governments are not required to fund the purchase of development rights from landowners in restricted growth areas. Private individuals purchase the TDRs to collect TDR units that can be placed in another area. The purchase of a TDR does not require development in a receiving zone; a landowner in a sending zone may decide to donate her TDR to the town. In this way, a TDR program can be used like a PDR program where development rights, in the form of TDR units, can be bought with no intention of being used.

Fourth, the sale of a TDR often brings the landowner more money than the sale of a PDR. This is anomalous since TDRs are usually sold for below market value of the development rights.<sup>338</sup> In Maryland, landowners have found that TDRs often bring more money than PDRs.<sup>339</sup> Since there are so many applicants for the PDR programs, landowners are willing to sell their land at a discounted price.<sup>340</sup>

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335. For example, a designated number of TDRs per acre.

336. See Schiff, *supra* note 251, at 2. In Montgomery County, Maryland, the base density for a sending area is the "maximum number of dwelling units permitted by the zoning classification of a property in a receiving area computed over the gross area of the property without the use of TDR or the MPDU density increase." MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-A-2.1.

337. See Schiff, *supra* note 251, at 2. In Montgomery County, landowners prefer the TDR program over the PDR program because the transfer of development rights is not based on appraisal but on acres. See *id.* In Maryland, landowners feel that the appraisal process often undervalues their land. See *id.*

338. TDRs are calculated on the acreage that is sold, not the value of a parcel of land. DANIEL R. MANDELKER, ET AL., PLANNING AND CONTROL OF LAND DEVELOPMENT 829. For this reason some parcels may actually have more value in terms of development potential than the TDRs that are designated. See *id.*

339. See Schiff, *supra* note 251, at 4.

340. See *id.* Under the Maryland PDR program, the offers to sell easements to the state "are ranked on the basis of the amounts by which the offer prices are below the appraised values." *Id.* This procedure, which results in competition among owners, tends to keep prices down. See *id.*

Fifth, TDR promotes a more complete vision of preservation and growth simultaneously, while a PDR only contemplates preservation.<sup>341</sup> With TDR, the community must decide which areas will be preserved and which areas will experience the growth necessary for the economic health of the community.<sup>342</sup> Therefore, TDR is a tool used by the community to shape a vision for its future.<sup>343</sup>

In theory, TDRs solve many problems that are created by downzoning an area for exclusive agricultural use. TDR provides compensation for lost value, maintains profitable farming, preserves farmland, and promotes more efficient development around existing services and infrastructures saving public funds.<sup>344</sup> Nevertheless, in practice TDR has only had limited success in some jurisdictions.<sup>345</sup> This can be explained by the novelty and complexity of TDR, and developers' and land speculators' desires for certainty in their investments and their hesitancy to put their faith in a system with which they are not familiar.<sup>346</sup> Another cause for lagging success is that developers generally have a backlog of properties.<sup>347</sup> This prevents them from utilizing a TDR program when initiated.<sup>348</sup>

The success of a TDR program is contingent on many factors.<sup>349</sup> Paramount among those factors is support by the com-

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The same is true in Suffolk County, where price of the parcel is one of the criteria used for selection of parcels in the PDR program. See Suffolk County Planning Comm'n, *Farmland Preservation Program: History and Current Perspective*, at 7. The cheaper the price, the more likely the parcel will be approved for purchase. See *id.*

341. See *supra* Part II.A.6.

342. See *Transfer of Development Rights*, *supra* note 318, at 4.

343. See *id.*

344. See generally Stinson, *supra* note 313.

345. See generally Pete J. Pizor, *Making TDR Work, A Study of Program Implementation*, APA Journal, Spring 1986, at 203 (commenting on the frustration with Pinelands TDR program due to major delays that are caused when local municipalities and the Pinelands Commission disagree); Heiberg, *supra* note 306, at 34 (the complexity of TDR programs is likely limit its viability as a growth management tool).

346. See Stinson, *supra* note 313, at 331; see also Heiberg, *supra* note 306, at 35.

347. Presentation by Charles Siemon, Planning for Sustainable Growth, Lincoln Land Center Conference, Albany, N.Y., March 14, 1996.

348. See *id.*

349. See Schiff, *supra* note 251, at 4.

munity.<sup>350</sup> Without support, developers will be hesitant to buy TDRs and therefore, the demand will not materialize.<sup>351</sup> Recalcitrant sectors of the community will try to break the program by making transactions more difficult.<sup>352</sup> For example, residents in receiving zones will resist development if they have not agreed to the community vision. This dissent can have political repercussions that may hinder a TDR program. Any TDR program should be accompanied by a public education campaign to familiarize participants with the TDR mechanisms and a facilitator to assist the first transfers with the new system.<sup>353</sup>

ii. *Accessory Uses and Related Marketing Efforts to Promote Economic Efficiency*

Accessory uses are another important tool that may be added to uses in agricultural areas, whether under an agricultural district plan, with minimum lot sizes, or as a buffer to the harshness of agricultural zoning. Municipalities could incorporate certain accessory uses into agricultural areas that provide extra income to the farmer, but that are compatible with the

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In evaluation of a TDR program there are several criteria that can be used: is it contributing significantly to the protection of farmland; is it giving landowners an opportunity to obtain compensation; is it making farmland available for purchase at prices commensurate with its value for agriculture; is it promoting economically efficient patterns of growth; is the private market working for buyers and sellers; and most importantly, is it proving politically acceptable within the community.

*Id.*

350. The community should include developers, farmers, residents and government officials, among others.

351. See Stinson, *supra* note 313, at 131; see also Pizor, *supra* note 345, at 209.

The linchpin in TDR is whether the increased densities provided by the development rights are in demand. Where a market exists for the rights, and where the interests of all the actors—landowners, facilitator, developers—have been at least recognized and addressed, a TDR program can harness private market operations to attain a public purpose.

Pizor, *supra* note 345, at 209.

352. Court challenges have implicitly upheld the validity of TDR programs. See Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271 (1977). Nevertheless, opponents can be very effective at thwarting a TDR program by organizing political forces to slow the transfer, by holding out, and by applying social pressures in community interactions. See *id.*

353. See Pizor, *supra* note 345, at 210.

surrounding area and not disruptive to neighboring farms.<sup>354</sup> Such uses include small apartments, small shops for antiques or items made by the farmer, seasonal hayrides, or a bed and breakfast operation. One advocate states that some of these uses, such as affordable rental housing, provide "important supplemental income but [are] virtually unnoticeable to neighbors."<sup>355</sup> East Hempfield, Pennsylvania allows "[a]ccessory uses customarily incidental to" the permitted uses in their Agricultural Zone which include, but are not limited to, roadside stands, family day-care facilities, and beekeeping.<sup>356</sup> Special exception uses in that township's Agricultural Zone include home occupations, riding stables, bed and breakfasts, kennels, and farm markets.<sup>357</sup> However, farmstands and other accessory uses are sometimes prohibited in an area,<sup>358</sup> or signage may be prohibited which precludes effective marketing of the use.<sup>359</sup>

Marketing is very important to the survival of farms. Wholesale markets may not provide the income needed by a farmer to stay afloat in an area where taxes are high and costs are increasing.<sup>360</sup> Thus, some promotions and direct marketing are necessary.<sup>361</sup> Direct marketing includes roadside stands, farmer's markets, pick-your-own operations,<sup>362</sup> and direct sales to restaurants and institutional buyers.<sup>363</sup> One source suggests increasing government funding of such programs.<sup>364</sup> Another suggestion is to promote products from New York State with a

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354. See, e.g. EAST HEMPFIELD, PA., ZONING ORDINANCE § 201.3; MONTGOMERY COUNTY, MD., ZONING ORDINANCE § 59-C-9.24. See *supra* note 309 and accompanying text.

355. Joel S. Russell, *Reader Exchange: Retaining Agriculture and Development*, LANDLINES (Mar. 1993).

356. EAST HEMPFIELD TOWNSHIP, PA., ZONING ORDINANCE § 201.2(6).

357. See EAST HEMPFIELD TOWNSHIP, PA., ZONING ORDINANCE § 201.3. For uses allowed in the agricultural zones of Montgomery County, Maryland, see *supra* Part II.C.2.c.

358. See *Agricultural Landscape*, *supra* note 134, at 11.

359. See Rosenberg, *supra* note 2.

360. See *Agricultural Landscape*, *supra* note 134, at 11.

361. See *id.*

362. See *id.* Roadside stands, farmer's markets, and pick-your-own operations are all possible accessory uses. See *id.*

363. See *id.*

364. See *id.* The Agriculture Advisory Committee of the Hudson River Valley Greenway suggests that New York State government should provide more financial help with these programs. See *Agricultural Landscape*, *supra* note 134, at 12.

"produced in New York" logo and or similar programs, including national and international marketing.<sup>365</sup> A Massachusetts land trust, conversely, focuses on promotion of local agricultural products in local markets.<sup>366</sup> For instance, they encourage local schools and other institutions to buy local milk.<sup>367</sup>

#### D. *Taxation Issues*

Since taxes are such a crucial issue to the agricultural industry, any farmland preservation program must consider the issue as well. The farmer's trade is uniquely tied to the land.<sup>368</sup> Property taxes are burdensome, especially in New York where farmers pay the highest per acre tax of any agricultural state, according to some sources,<sup>369</sup> or at least taxes that are "high" compared to other states.<sup>370</sup> In ten counties, property taxes are twice the net farm income, and farmers cannot make ends meet.<sup>371</sup>

New York's property tax generally factors in the speculative use of the property.<sup>372</sup> The agricultural assessment provided for if the property is committed to agricultural production as defined in section 301 of New York's Agriculture and Markets Law<sup>373</sup> allows the landowner to be taxed on the use-value of their property for agricultural purposes.<sup>374</sup> The Office of Real Property Services stated that the agricultural assessment saves farmers about \$47 million per year in New York.<sup>375</sup> Plus, ex-

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365. See LISTENING SESSION, *supra* note 187, at 12-13.

366. See Zenick, *supra* note 115.

367. See *id.*

368. See *Farm Property Taxes*, *supra* note 22, at 2.

369. See Tetor, *supra* note 22, at 7.

370. See *Farm Property Taxes*, *supra* note 22, at 18.

371. See Tetor, *supra* note 22. One study showed that until the early 1970s, property taxes on farms were 10-15% of net cash income, whereas they are around 20-25% today. See *Farm Property Taxes*, *supra* note 22, at 14.

372. See *The Stable Door*, *supra* note 25, at 4.

373. See N.Y. AGRIC. & MKTS LAW §§ 301(4), 304-a, 305, 306 (McKinney 1991).

374. See *id.* § 305(2). See also, *id.* §§ 304-a, 306. The Agricultural Districts Law was created in 1971. See *Farm Property Taxes*, *supra* note 22, at 2.

Land rented by a farmer from another landowner can be used to satisfy the requirements of section 306 of the New York Agriculture and Markets Law, namely \$50,000 yearly gross sales and 10 acres, and the land does not have to be contiguous. See *Sidnam v. Town of Lewisboro*, 129 Misc. 2d 622, 493 N.Y.S.2d 725 (Sup. Ct. Westchester Co. 1985).

375. See *Farm Property Taxes*, *supra* note 22, at 47.

emptions are allowed on certain farm buildings,<sup>376</sup> and restrictions are placed on special assessments.<sup>377</sup> However, as noted above, the property tax for farmers in New York is still substantially higher than for farmers in competitor states.<sup>378</sup>

Farmers' complaints about property taxes are often related to the tax rate rather than the property assessment, one expert stated.<sup>379</sup> Plus, in some areas of the state, an agricultural assessment will not provide a farmer with much comparative tax relief because the difference between the speculation value and the agricultural value is minimal.<sup>380</sup> In a 1996 report by the New York State Advisory Council on Agriculture, the state recognized the need for tax relief and reform for farmers.<sup>381</sup> They made three final recommendations: 1) the State should look at alternatives to property taxes to fund education; 2) State and local governments should improve administration of the property tax system; and 3) the State should enact a "Farmland Protection Tax Credit Program", or "circuit breaker" program.<sup>382</sup>

A circuit breaker program is in place in Michigan and Wisconsin.<sup>383</sup> A circuit breaker program "requires that farmland owners pay taxes on the full value of their property and then makes them eligible to receive an income tax credit from the state for the amount in which the property taxes paid exceeds a certain percentage of household income."<sup>384</sup> The Michigan program requires the landowner to keep the land in agriculture for at least ten years under a development rights agreement with the state, and allows an income tax credit of the amount farmland property taxes exceed seven percent of household in-

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376. See N.Y. REAL PROP. TAX LAW §§ 483, 483-a, 483-b (McKinney 1984 & Supp. 1997).

377. See N.Y. AGRIC. & MRKTS. LAW § 305(5) (McKinney 1991).

378. See *Farm Property Taxes*, *supra* note 22, at iii.

379. Telephone interview with Jeremiah Cosgrove, *American Farmland Trust* (April 4, 1996).

380. See *id.*

381. See *Farm Property Taxes*, *supra* note 22, at iii. The Council recognized four policy rationales: that taxes are unfair to farmers because the system does not consider the demand for services or ability to pay, New York farmers have a competitive disadvantage, high taxes distort land use decisions and negatively affect the possible benefits to the community of farming, tax relief will stimulate the rural economy with reinvestment. See *id.*

382. See *id.* at vi.

383. See *id.* at 39-40.

384. KERRI L. BENSON, FARM BUREAU OF NEW YORK, TAXED GROUND 26 (1995).

come.<sup>385</sup> In 1994, about one half of Michigan's farmers were enrolled in the program, at a cost of \$80 million, offset by an increase in sales tax.<sup>386</sup> The Wisconsin program is similar to, but more complex than, Michigan's.<sup>387</sup> Two circuit breaker proposals were before the New York Legislature in 1996: Assembly Bill 2411, and Senate Bill 1284/Assembly Bill 1885.<sup>388</sup> Assembly Bill 2411 was very similar to Michigan's statute, with seven percent of household income as a circuit breaker level.<sup>389</sup> These bills would establish a formula to determine the circuit breaker rate and apply it to the total farm agricultural assessment value, with the calculation done annually.<sup>390</sup>

With the enactment of the Farmer's Protection and Farm Preservation Act of 1996,<sup>391</sup> beginning in January of 1997 New York State gave its qualified farmers some extra tax relief.<sup>392</sup> A farmer who derives at least two-thirds of her income from farming<sup>393</sup> may credit the amount of school district property taxes paid on her qualified agricultural property against her state income taxes for the year.<sup>394</sup> There is an acreage limitation in that only taxes paid on the base acreage designated by the statute plus fifty percent of the remaining acreage qualify.<sup>395</sup> The acreage limitation increases from 100 acres in 1997 to 175 acres in 1998, and 250 acres after 1998.<sup>396</sup> There is also a limitation determined by a fixed formula if the taxpaying farmer has a net

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385. See *Farm Property Taxes*, *supra* note 22, at 39 (citing 1974 MICH. PUB. ACTS 116).

386. See *id.* at 40.

387. See *id.*

388. See *id.* at 41-42.

389. See *id.*

390. See *id.* at 42-43.

391. See Ch. 309 §§ 207-16, [1996] N.Y. Laws 1075.139.

392. Under the Farmer's Protection and Farm Preservation Act of 1996, measures to restore historic barns are also promoted by providing a tax credit of 25% of the qualified rehabilitation expenditures spent on the barn. See N.Y. TAX LAW §§ 210(12)(l), 606(a)(12) (McKinney Supp. 1997). Local laws may also be adopted to allow an exemption on real property taxes on the historic barns for up to 10 years, with the exemption decreasing over the years. See *id.* § 483-b.

393. See N.Y. TAX LAW §§ 210(22)(a), 606(n)(2) (McKinney Supp. 1997).

394. See *id.* §§ 210(22)(a), 606(n).

395. See *id.* §§ 210(22)(e)(1), 606(n)(5).

396. See *id.* §§ 210(22)(f), 606(n)(6).

income of over \$100,000.<sup>397</sup> If the taxpayer voluntarily converts the land to non-agricultural use, she may not take the tax credit that year, and may lose the previous tax advantages as well if the conversion takes place within two years after the year of the original credit under this section.<sup>398</sup>

The Farmer's Protection and Farm Preservation Act of 1996 decreases the farmer's tax burdens without taking money from the school districts.<sup>399</sup> The plan is expected to cost the state treasury \$38 million in 1997 and up to \$62 million annually by the year 2000.<sup>400</sup> But, the farming industry brought \$3 billion in gross receipts to New York in 1995 and that money turns over five to seven times in the local economy through related industries.<sup>401</sup> The state expenditure on the plan is about one-tenth of one percent of the state budget.<sup>402</sup> Small farmers will get the most benefit from the new statute because a higher percentage of their school property taxes will be credited against their income tax due to the acreage limitations.<sup>403</sup>

## E. Federal Programs to Protect Farmland

### 1. 1996 Farm Bill

Until recently, Congress has made only token efforts to address the loss of agricultural farmland.<sup>404</sup> Today, the Federal

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397. See N.Y. TAX LAW §§ 210(22)(f), 606(n)(6). The statute also provides limitations on the amount of the credit, although it does allow for a carryover to the next tax year. See *id.* § 210(22)(g).

398. See *id.* §§ 210(22)(h), 606(n)(7).

399. See Elizabeth Doran, *School-Property Tax Breaks Plant Seeds of Equity For State's Farmers: Program Will Pay School Taxes for Overburdened Farmers*, SYRACUSE HERALD AM., Oct. 13, 1996, at E16, available in 1996 WL 7189123.

400. See *id.*

401. See *id.* (quoting New York Farm Bureau spokesman, Mark Emery). See also NY FARMLAND PROTECTION, *supra* note 1, at 2.

402. See Doran, *supra* note 399, at E16.

403. See *id.* at E16; see also *Protecting Farms: The Tax Relief Will Help Small Farmers Most—And Won't Add To Their Neighbors' Burden Either*, THE POST-STANDARD (Syracuse, N.Y.), Aug. 30, 1996, at A14, available in 1996 WL 7181467.

404. See *Agricultural Lands Protection, Commission for Environmental Cooperation*, April 14, 1996 [<http://cec.org/english/database/law/us/19/19-05.htm>]. The Farmland Protection Act of 1981 required the USDA to evaluate the actions of other federal agencies to decide if those actions promoted the conversion of agricultural lands. See 7 U.S.C. §§ 4201-09 (1995); 7 C.F.R. pt. 658 (1996). See also Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?*, 1986 ILL. L. REV. 563. "The Farm Future Act of 1990 provides for federally guaranteed loans and interest rate assistance for private loans

Agricultural Improvement and Reform Act of 1996<sup>405</sup> (FAIR), signed by President Clinton on April 4, 1996, contains minor, but encouraging efforts to preserve agricultural land.<sup>406</sup> While most of the media coverage surrounding the Act has focused on federal subsidies and other support programs, Title III of FAIR represents Congress' attempt to improve land conservation efforts.<sup>407</sup> Specifically, Title III includes the "Farmland Protection Program" which, through the Commodity Credit Corporation, provides \$35 million over three years to purchase conservation easements to protect farmland.<sup>408</sup> The program seeks to complement state programs by authorizing the Secretary of Agriculture to purchase easements by matching state funding.<sup>409</sup>

The history behind how the conservation measure was adopted helps to explain the final version of FAIR. Initially, Congress intended to pass two bills, one reforming the subsidy program and another addressing conservation issues.<sup>410</sup> The subsidy program needed to be passed before the planting season to have the support of the farmers.<sup>411</sup> Partisan politics in the Senate prevented passage of the subsidy reform without provisions on conservation.<sup>412</sup> As a result, the Senate rushed to develop acceptable conservation measures to accompany the subsidy reform.<sup>413</sup>

The Farmland Protection Program, as it exists in the final version of FAIR, was modeled after House Bill 2429.<sup>414</sup> This Senate adaptation is similar in purpose to H.R. 2429,<sup>415</sup> but

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to state-operated land preservation funds." *Id.* (citation omitted). Although New York created a trust fund under this program, it has yet to be used. N.Y. STATE. FIN. LAW § 87 (McKinney Supp. 1997).

405. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104 - 127 (1996).

406. *See generally id.*

407. *See generally id.*

408. *See* Pub. L. No. 104-127, § 388(c).

409. *See id.*

410. *See* Telephone Interview with Representative Pat Robert's staff, House of Representatives (Apr. 17, 1996).

411. *See id.*

412. *See id.*

413. *See id.*

414. *See id.*

415. *See id.*

markedly different in structure.<sup>416</sup> While H.R. 2429 explicitly designated how grant money is to be spent, the Farmland Protection Program lacks any direction as to what qualifies a state for receipt of funds.<sup>417</sup> While H.R. 2429 did not ensure the money will be available, the final version specifically allotted \$35 million.<sup>418</sup> As a result, the Act leaves the method of disbursing the funds to administrative rulemaking but ensures that funds will be available over the next three years.<sup>419</sup>

## 2. *Coastal Zone Management Act*

Congress enacted the Coastal Zone Management Act<sup>420</sup> (CZMA) to help preserve natural and man made resources of coastal areas while promoting economic development of those areas.<sup>421</sup> The program does not mandate that states develop their own plan, but provides policies to guide those states that decide to create a plan.<sup>422</sup> States that develop Coastal Management plans consistent with the policies enumerated by the Department of State may receive funding to complete portions of their plans.<sup>423</sup> Once a state adopts a plan, compliance is mandatory.<sup>424</sup>

New York State adopted a Coastal Program that lists forty-four coastal policies which promote the conservation of natural resources "and the preservation and revitalization of appropriate water dependent and water-related uses in the coastal area."<sup>425</sup> Policy 26 addresses the preservation of farmland and

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416. See Telephone Interview, *supra* note 410.

417. See *id.*

418. See *id.*

419. See *id.*

420. Coastal Zone Management Act of 1972, Pub. L. No. 92-583 (1972).

421. 16 U.S.C. § 303(2) (1997). "[T]o achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and aesthetic values as well as the needs for compatible economic development . . . ." *Id.*

422. See *id.* § 312(a); see also N.Y.S. DEPT. OF STATE NEW YORK STATE COASTAL MANAGEMENT PROGRAM: STATE CONSISTENCY PROCESS.

423. See 16 U.S.C. §§ 306, 308.

424. See *id.* § 306(d).

425. *Agricultural Landscape*, *supra* note 134; See also *State Coastal Policies, State of New York Coastal Management Program and Final Environmental Impact Statement*, § 6, Aug., 1982 [hereinafter *State Coastal Policies*].

applies to any agricultural land<sup>426</sup> that may be impacted by any State and Federal actions.<sup>427</sup> "Coastal Policy 26 requires a concern for the loss of any important agricultural land, but places particular emphasis on preventing a loss which would have significant effect on an agricultural area's ability to continue to exist, to prosper and even to expand."<sup>428</sup> Land along the Hudson river is within the jurisdiction of the State's Coastal Program.<sup>429</sup>

The State Coastal Management Program (SCMP) directs the state agencies to act consistently with the enumerated policies.<sup>430</sup> New York State's Waterfront Revitalization of Coastal Areas and Inland Waterways (LWRP)<sup>431</sup> encourages, but does not require, local governments to develop revitalization plans consistent with the enumerated policies.<sup>432</sup> Therefore, because LWRP is voluntary, local governments are not required to consider Policy 26 when making decisions. Only State agencies are compelled to follow Policy 26 under the direction of the SCMP.

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426. See generally *Agricultural Landscape*, *supra* note 134. The policy applies to: (1) all land within an agricultural district or subject to an eight year commitment which has been farmed within at least two of the last five years; (2) any land farmed within at least two of the last five years in soil groups 1-4 as classified by the Land Classification System, established by the NYS Department of Agriculture and Markets; (3) and land farmed within at least two of the last five years which is influenced by climate conditions which support the growth of high value crops; and (4) agricultural land not meeting the above criteria but adjacent to any such land and forming part of an on-going agricultural enterprise shall be considered important agricultural land. See *State Coastal Policies*, *supra* note 425.

427. See *State Coastal Policies*, *supra* note 425, Policy 26.

To conserve and protect agricultural lands in the State's coastal area, an action shall not result in a loss, nor impair the productivity, or important agricultural lands, as identified on the coastal area map, if that loss or impairment would adversely affect the viability of agriculture in an agricultural district or if there is no agricultural district, in the area surrounding such lands.

*Id.*

428. *Agricultural Landscape*, *supra* note 134, at 5.

429. See N.Y. EXEC. LAW § 914 (McKinney Supp. 1995).

430. See N.Y. EXEC. LAW § 42-9191(1) (McKinney 1987).

431. See *id.*

432. See *id.* § 915.

### III. New York State's Framework for Agricultural Protection

#### A. *An Overview*<sup>433</sup>

Under New York's Constitution preservation of Agricultural land is an important State policy.<sup>434</sup> To carry out this policy, the legislature has enacted legislation to address taxation issues,<sup>435</sup> establish a farm land protection trust fund,<sup>436</sup> bar nuisance actions against farmers,<sup>437</sup> create agricultural districts,<sup>438</sup> sever and sell development rights,<sup>439</sup> allow municipalities to acquire open spaces,<sup>440</sup> create conservation easements<sup>441</sup> and transfer development rights,<sup>442</sup> and reduce the conflict between agency regulations and farm programs.<sup>443</sup> Most recently, in 1992, the legislature passed the Agricultural Protection Act of 1992<sup>444</sup> to sustain the state's farm economy and to increase the involvement of local governments in farmland protection.<sup>445</sup> In addition to this provision, there is pending legislation to further advance farmland preservation.<sup>446</sup>

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433. The authors provide a limited overview of New York's existing framework. Other publications have obviated the need for a comprehensive description of New York's preservation law. See, e.g., NY FARMLAND PROTECTION, *supra* note 1.

434. N.Y. CONST. art. XIV, § 4.

The policy of the state shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products.

*Id.*

435. See *supra* Part II.D for a discussion on taxation issues.

436. See N.Y. STATE FIN. LAW § 87 (McKinney Supp. 1997).

437. See N.Y. AGRIC. & MKTS. LAW § 308 (McKinney Supp. 1997).

438. See N.Y. AGRIC. & MKTS. LAW art. 25-AA (McKinney Supp. 1995).

439. See N.Y. GEN. MUN. LAW § 247 (McKinney Supp. 1986).

440. See *id.* (authorizes localities to acquire open spaces; agricultural lands are considered in "open space" and can be acquired under this section to satisfy the purpose of the law).

441. See N.Y. ENVTL. CONSERV. LAW § 49-0203 (McKinney Supp. 1997).

442. See N.Y. TOWN LAW § 261-a (McKinney Supp. 1997), N.Y. VILLAGE LAW § 7-703 (McKinney Supp. 1995).

443. See N.Y. AGRIC. & MKTS. LAW § 305(4) (McKinney Supp. 1997).

444. See N.Y. AGRIC. & MKTS. LAW art. 25-AAA (McKinney Supp. 1995).

445. See NY FARMLAND PROTECTION, *supra* note 1, at 23.

446. See, e.g., 1996 N.Y. Laws 1284 ("An act to amend the tax law and real property tax law, in relation to creating an agricultural property tax circuit breaker program."); 1996 N.Y. Laws 3738 (provides for the exemption of farm land, forest land, and open space land from certain taxation); 1996 N.Y. Laws 532 (provides for the enactment of the farmland preservation bond act of 1995); 1996 N.Y. Laws 8876 ("An act to amend the agriculture and markets law, in relation to duties

### B. *The Agricultural Protection Act of 1992*

The districts law is complemented by the Agricultural Protection Act of 1992<sup>447</sup> which was enacted to "explore ways to sustain the state's farm economy and to promote local initiatives for agricultural and farmland protection."<sup>448</sup> The Act directs the commissioner to provide financial and technical assistance to accomplish the stated intent.<sup>449</sup> Counties are given the authority to develop plans, in association with local soil and conservation districts, that: (1) identify the location of lands to be protected; (2) analyze agricultural land based on certain factors; and (3) describe the activities and strategies that can be used to promote continued agricultural use.<sup>450</sup> The state will provide grants to fund these county planning activities.<sup>451</sup> Under the Town, Village, and General City Law comprehensive plan statutes,<sup>452</sup> local governments are required to recognize these county agricultural and farmland protection plans in their comprehensive plans.<sup>453</sup>

### C. *An example: Orange County*

In response to the 1992 Agricultural Protection Act, Orange County utilized the new law to treat agricultural lands as irre-

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of the commissioner of agriculture and markets with respect to review of existing and proposed rules and regulations affecting agriculture."); 1996 N.Y. Laws 6019 ("An act to amend the tax law, in relation to estate taxes on certain real property devoted to farming or closely held businesses."); 1996 N.Y. Laws 3668 ("An act to amend the agriculture and markets law, in relation to improving the agricultural districts program."); 1996 N.Y. Laws 1905 (sales and use tax exemption for certain farm costs).

447. See N.Y. AGRIC. & Mkts. LAW art. 25-AAA (McKinney Supp. 1997). See also <http://www.senate.state.ny.usl>.

448. NY FARMLAND PROTECTION, *supra* note 1, at 23; N.Y. AGRIC. & Mkts. LAW art. 25-AAA, § 321. "[I]t is therefore declared the policy of the state to promote local initiatives for agricultural and farmland protection." *Id.*

449. See N.Y. AGRIC. & Mkts. LAW, art. 25-AAA § 323.

450. See *id.* § 324(1).

451. See *id.* § 325.

452. See N.Y. TOWN LAW § 272-a (McKinney 1987 & Supp. 1997); N.Y. VILLAGE LAW § 7-722 (McKinney 1996 & Supp. 1997); N.Y. GEN. CITY LAW § 28-a(10) (McKinney Supp. 1997).

453. See N.Y. TOWN LAW § 272-a(9); N.Y. VILLAGE LAW §§ 7-722(9), § 7-739(1) (McKinney 1996). Also, local governments are required to exercise their powers so that they do not restrict farm practices or structures to interfere with the purposes of article 25AA, unless such restrictions "bear a direct relationship to the maintenance of public health or safety." N.Y. VILLAGE LAW § 7-739(1) (McKinney 1996).

placeable resources.<sup>454</sup> Orange County's Agricultural and Farmland Protection Board (AFPB) received a grant to develop a plan on November 1, 1994.<sup>455</sup> The AFBP held a public hearing on November 28, 1995 and 200 county citizens attended; no one opposed the plan.<sup>456</sup>

In its report, Orange County recommends that some actions should be implemented by the County government, some by the State government, and others by the Federal government.<sup>457</sup> Orange County realized that, without planning, the factors that control development of land are: (1) location in the county; (2) suitability for septic; and (3) willingness of owner to sell. These factors illustrate that without public intervention, preservation of farmland is not a factor in deciding which parcels of land get developed.<sup>458</sup> After approval by the County legislature, the plan will be submitted for approval to the Commissioner of the Department of Agriculture and Markets.<sup>459</sup>

Recommendations of the plan include that "the County Planning Department [should] structure a detailed plan to fully evaluate the potential for a County Land Preservation Program" and the county should support the Town of Warwick's efforts to develop a TDR<sup>460</sup> program.<sup>461</sup>

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454. THE AGRICULTURAL AND FARMLAND PROTECTION BOARD, ORANGE COUNTY AGRICULTURAL AND FARMLAND PROTECTION PLAN DRAFT I (1995)[hereinafter ORANGE COUNTY PLAN].

455. *See id.* at 1.

456. *See id.*

457. *See id.* at 2.

458. *See id.* The Board also made some other findings, including:

(1) Land that is good for septic is good for crops. *See id.* at 3. This scatters farmland into a patchwork that creates burdens of providing services to farms over larger area and conflicts between farm uses and intolerant residents. *See id.*

(2) "Coordinated efforts at all levels of government should be concentrated on preventing sprawl development. It is more economical to service settlements which are concentrated in areas with existing infrastructures." *Id.*

459. *See* N.Y. AGRIC. & MKTS. LAW art. 25-AAA.

460. The Board points out some of the challenges to the success of a TDR program: (1) Lack of correspondence between the taxing jurisdictions; (2) Future water supply and sewer capacity. *See* ORANGE COUNTY PLAN, *supra* note 454, at 4. Because Orange County soils cannot deal with a high amount of septic, the availability of sewer is an important consideration in receiving areas. *See id.*

461. *See id.* at 3. The proposal discusses the problems between uncontrolled development and preservation of farmland. *See id.* The factors controlling land

#### D. *The Farmland Protection Trust Fund*

The Farmland Protection Trust Fund<sup>462</sup> was amended in 1991 to act as a state trust fund as defined in the federal Farms For the Future Act of 1990.<sup>463</sup> The money in the trust is to "be allocated to . . . municipalities which have in place a local farmland protection program, for the purpose of protection or preservation of farmland for agricultural purposes."<sup>464</sup> As of July 1993, no money had been placed in the fund.<sup>465</sup>

#### E. *N.Y. Districts Revisited*

By far, the most substantial farmland protection legislation in New York State is Article 25-AA, the Agricultural Districts Law.<sup>466</sup> The Districts Law uses a broad range of techniques including use-value assessment,<sup>467</sup> right-to-farm legislation,<sup>468</sup> and limitations on local regulations and public actions,<sup>469</sup> to name a few. Local planning and land use decision making is to "recognize the policy and goals of the agricultural districts law and to avoid unreasonable restrictions or regulations on farm operations within agricultural district."<sup>470</sup> This provision requires an agricultural data statement to be filed with the planning board when they are reviewing an application for a special use permit, a site plan approval, use variance or subdivision approval.<sup>471</sup> This has the effect of making the impacts upon the agricultural community apparent to the planning board.

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development include locations in the county, suitability for septic, and willingness of owner to sell. *See id.*

462. N.Y. STATE FIN. LAW § 87 (McKinney Supp. 1997).

463. *See id.* § 87(2).

464. *Id.* § 87(4).

465. *See* NY FARMLAND PROTECTION, *supra* note 1, at 24.

466. *See* N.Y. AGRIC. & Mkts. LAW art. 25AA. *See infra* Part II.B.1. for a discussion of New York State's district program.

467. *See* N.Y. AGRIC. & Mkts. LAW § 301.

468. *See id.* § 308.

469. *See id.* § 305(2) & (3).

470. NY FARMLAND PROTECTION, *supra* note 1, at 18 (citing N.Y. AGRIC. & Mkts. LAW § 305-a). Municipalities in New York State are also required to have comprehensive plans that are consistent with articles 25-AA and 25-AAA of New York's Agricultural and Markets Law. *See* N.Y. VILLAGE LAW § 7-722(9), N.Y. TOWN LAW § 272-a(9), N.Y. GEN. CITY LAW § 28-a(10) (McKinney Supp. 1997). Local governments are directed to coordinate the exercise of their powers with the purposes of article 25-AA. *See* N.Y. VILLAGE LAW § 7-739.

471. *See* N.Y. AGRIC. & Mkts. LAW § 305-a(2) (McKinney Supp. 1997).

### F. *School Property Tax Relief*

The property tax system in New York State which has been a burden to farmers may finally be lessened by the enactment of the Farmer's Protection and Farm Preservation Act of 1996.<sup>472</sup> This Act allows eligible farmers to receive a credit against state income tax for school district property taxes paid on some of their farmland.<sup>473</sup> Since the Act was not effective until January 1997, the results are uncertain. New York Governor George Pataki stated, "This is one of the happiest moments for me to sign this bill. It's going to have an impact for the children and the grandchildren who want to keep the farm in the family."<sup>474</sup> John Lincoln of the New York Farm Bureau stated that the law "will be a big help in maintaining farmland as agriculture."<sup>475</sup> While the purpose of this program is laudable, only time will tell if these measures help preserve farming.

### G. *Intermunicipal Agreements*

In New York, local governments have "home rule" over zoning and land use decisions within their jurisdictions.<sup>476</sup> Historically, cities, villages and towns rarely looked past their borders to assess the impact of their land use decisions on the region or the needs of the region in determining their land uses.<sup>477</sup> In recent years, communities have begun collaborating to address problems that can only be solved through regional solutions.<sup>478</sup>

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472. Ch. 309, §§ 207-16, [1996] N.Y. Laws 1075.139. See *supra* Part II.D.

473. See N.Y. TAX LAW §§ 210(22), 606(n) (McKinney Supp. 1996).

474. Tasneem A. Grace, *Pataki Signs Tax Cut For Farmers: The Program Will Cost The State Up To \$62 Million A Year By The Year 2000*, THE POST-STANDARD (Syracuse, N.Y.), Aug. 23, 1996, at A1.

475. Doran, *supra* note 399, at E16.

476. See GEN. CITY LAW § 20(24); TOWN LAW § 261; VILLAGE LAW § 7-700 (McKinney 1996).

477. See John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, at 364 n.54 (1993) [hereinafter *Comprehensive Land Use Planning*].

478. PATRICIA SALKIN, INTERMUNICIPAL COOPERATION IN LAND USE PLANNING, GOVERNMENT LAW CTR. OF ALBANY LAW SCH., 1994.

In the late 1970s, five towns decided that rather than each individually appointing a zoning board of appeals, they would appoint a joint cooperative board. This arrangement was accomplished through an intermunicipal agreement which called for the legislative body of each participating municipality to appoint a representative to the cooperative zoning board of appeals.

*Id.*

The state legislature, in an effort to promote such cooperation, adopted a law authorizing cooperation between localities.<sup>479</sup> Article 5-g of New York's General Municipal Law allows cooperation between two or more municipalities in regards to land use planning and zoning activities.<sup>480</sup> Intermunicipal cooperation, whether in planning or in execution of a program, is almost mandatory for any farmland preservation effort because agricultural communities are rarely contained in one political jurisdiction. Therefore, measures to preserve farming must transcend political boundaries if they are to be effective.

Recognizing the importance of this concept, the state legislature enacted the Hudson Valley Greenway Conservancy to preserve the qualities of the Hudson Valley communities that collectively make this region a unique and special place.<sup>481</sup> The design and implementation of the Greenway legislation respects the authority of local governments by promoting cross-community planning through the voluntary creation of compacts.<sup>482</sup> The Greenway Council has authority to guide and support cooperative agreements between municipalities but may not force any community into an agreement against its will.<sup>483</sup>

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479. See N.Y. GEN. MUN. LAW § 119-m, *et. seq.* (McKinney 1996). See also Albert J. Pirro, Jr. *The Unconstitutionality of Consolidated Planning Boards: Interlocal Planning under New York Law*, 16 PACE L. REV. 477 (1996), and Philip Weinberg, *Consolidated Planning Boards: Valid and Valuable—A Reply to Albert Pirro*, 17 PACE L. REV. 379 (1997).

480. See N.Y. GEN. MUN. LAW § 119-o (McKinney 1986 & Supp. 1997).

481. See N.Y. ENVTL. CONSERV. LAW § 44-0101 (McKinney Supp. 1997).

The Hudson river valley region possesses scenic beauty, natural and cultural resources of state and national significance. . . . It is the intention of the legislature that these efforts be continued and strengthened under the cooperative program of the Hudson river valley greenway in order to continue and advance the state's commitment to the preservation, enhancement and development of the world-renowned scenic, natural, historic, cultural and recreational resources of the Hudson river valley while continuing to emphasize economic development activities and *remaining consistent with the tradition of municipal home rule*.

*Id.* (emphasis added).

482. Conversation with David Sampson, Executive Director, Hudson River Greenway Conservancy (April 17, 1996).

483. See *id.*

#### IV. Conclusion—How can the existing law preserve farmland in New York State?

All of the statutory techniques discussed in this paper are available to preserve farming in New York State.<sup>484</sup> For example, municipalities have the authority to create agricultural districts, reassess their agricultural lands, pass nuisance ordinances, create PDR or TDR programs, purchase agricultural land outright, zone for agricultural uses, or use intermunicipal cooperation to expand on any number of these.<sup>485</sup> Orange County's plan, discussed above, is an example of how one county uses these statutory tools to protect farmland within its jurisdiction.<sup>486</sup> Aside from the powers granted to municipal entities, land owners have the ability to create agricultural districts, enter into conservation easement agreements, participate in PDR and TDR programs where they are available, and become eligible for credits on state income tax.<sup>487</sup>

Whether these techniques will be used effectively depends on the particular community, its problems, and its vision. New Yorkers will need to be educated on the importance of farming and the use of preservation techniques before local governments will effectively use these tools. Once they are, a clear vision for agricultural preservation can be formed based on the level of support for farming throughout the community, the rate of farmland loss, the amount of development pressure, funding, and other considerations unique to the community. For example, voters in Lancaster County, Pennsylvania strongly supported farmland preservation programs.<sup>488</sup> This support enabled the county to employ several techniques including the controversial agricultural zoning.<sup>489</sup>

Ideally, since agricultural lands are intermunicipal in nature, regional solutions to the preservation of those lands should exist. New Yorkers are reluctant, however, to give up

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484. New York State has statutory authority allowing PDR, TDR, agricultural districts, agricultural assessment, conservation easements, right-to-farm laws, and municipal zoning. *See supra* Part III.

485. *See supra* Part III.

486. *See supra* Part III.C.

487. *See supra* Part III.

488. *See supra* text accompanying notes 269-71.

489. *See supra* Parts II.A.3, II.B.2, II.C.2.b.

local authority to regional planning entities.<sup>490</sup> This reluctance is demonstrated by the lack of large scale agricultural preservation across municipal boundaries. Aside from the establishment of agricultural districts in New York State, most counties have not made significant preservation efforts.<sup>491</sup> Likewise, municipalities, acting individually, have not been successful in preserving agricultural land in a meaningful way.

The tradition of home rule<sup>492</sup> is fiercely protected by New York's local governments; localities are reluctant to relinquish power to county, state and intermunicipal entities.<sup>493</sup> If regional cooperation is to be achieved, the momentum for it must come from another source. For example, private initiatives, based on agricultural communities, have been effective in other states to help communities develop their vision and, most importantly, to implement that vision.<sup>494</sup>

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490. See *Comprehensive Land Use Planning*, *supra* note 477, at 364 n.54.

491. One obvious exception is Suffolk County, which has used PDR to preserve extensive tracts of agricultural land. See *supra* Parts II.A.2. Additionally, the recent efforts of Cayuga, Washington, Erie, Tompkins, Essex, Suffolk, Orange, Oneida, Wayne, Monroe, Dutchess, Ulster, Saratoga, and Onondaga hopefully evidence that communities are working together to preserve farming.

The passage of the Farmer's Protection and Farm Preservation Act of 1996 does show recognition of the problem by the state government. John Lincoln, President of the New York Farm Bureau said that the law "reflects the attitude that agriculture, and farmers, are important." Doran, *supra* note 399, at E16.

492. See *supra* text accompanying notes 490-91.

493. See *Comprehensive Land Use Planning*, *supra* note 477, at 364 n.54.

494. One of these regional initiatives is Bluegrass Tomorrow, which coordinates seven counties surrounding Lexington, Kentucky. See Charles Siemon, *Bluegrass Tomorrow: A Planned Regional Vision for the 21st Century*, (and lecture) in PLANNING FOR SUSTAINABLE GROWTH: REGIONAL ALTERNATIVES FOR NEW YORK STATE, Resource Manual (1996). The mission of Bluegrass Tomorrow is to preserve the bluegrass horse farms which are renowned for their world class thoroughbreds. See *id.* at 2. The Bluegrass Tomorrow initiative developed when residents realized that farmland was being rapidly lost to residential development, and that the continued sprawl of the suburbs would destroy the region's unique resource. See *id.* at 4. A 21,000-person public opinion survey conducted by Bluegrass Tomorrow:

identified a strong regional consensus that the critical issues facing the central Bluegrass region is how to provide for a wide range of economic and housing opportunities and at the same time sustain and enhance the region's highly desirable and distinctive quality of life and environmental character; a character which has been the basis of the region's economic strength, is shaped and defined by the world famous Bluegrass landscape, and without which the region would be a relatively ordinary place.

*Id.* at 6.

New York has important agricultural regions throughout the state, and preservation efforts should be organized based on these regions. Grassroots efforts should be organized regionally with statewide oversight and assistance. An example of such a program prompted by the State government is the Hudson River Valley Greenway.<sup>495</sup> Such efforts must discover the unique visions of each region and work with the local governments to employ the expansive tools and techniques available in New York. One broad, statewide program will not work, especially given New York's tradition of home rule. Regions must work to achieve their own individual solutions by selecting the techniques that are most suitable and acceptable to their communities.

Individual communities in New York, after assessing their goals for preservation, the resources available, and their constituent support, should focus on techniques appropriate to their circumstances.<sup>496</sup> Communities that lack strong support for preservation of farmland may want to rely on less burdensome techniques such as the incorporation of land into designated agricultural districts,<sup>497</sup> promotion of voluntary conservation easements,<sup>498</sup> and encouraging accessory uses associated with farming.<sup>499</sup> Techniques such as PDR programs<sup>500</sup> are likely to be successful in communities where constituents support government preservation efforts. A municipality that has strong public support for long term preservation and where there is intense development pressure on its agricultural lands should consider agricultural zoning.<sup>501</sup> With these techniques, in combination with state and federal efforts to promote farm-

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495. See N.Y. ENVTL. CONSERV. LAW § 44-0101, *et. seq.* (McKinney Supp. 1997). See *supra* Part III.G.

496. For example, easement techniques, districts, and tax benefits are likely to be accepted more readily than agricultural zoning. See *supra* Part II.C.2.d.

497. See *supra* Parts II.B.1. and III.

498. See *supra* Part II.A.1.

499. See *supra* Part II.C.2.e.ii.

500. See *supra* Part II.A.

501. See *supra* Part II.C.2.

ing, individual governments can make effective strides to preserve our agricultural heritage.

*Sean F. Nolon  
Cozata Solloway\**

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