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An Agricultural Law Research Article

## **The Legal Aspects of Agricultural Districting**

by

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# The Legal Aspects of Agricultural Districting†

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After several years of studying American land planning law, Norman Williams concluded that there are three separate systems of land use controls.<sup>1</sup> In addition to the official system of zoning regulations and subdivision controls, the real property tax system and the planning of public works influence land use.<sup>2</sup> Professor Williams concluded that in open confrontation the official system rarely prevails, and that fiscal considerations frequently inhibit the rational development of even a well planned regulatory scheme.<sup>3</sup> He suggests that any reorganization of land use controls begin with coordination of all three of the present systems of land use regulation.<sup>4</sup>

Of the many programs designed to preserve open space and farmland,<sup>5</sup> the agricultural districting laws of New York<sup>6</sup> and Virginia<sup>7</sup>

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<sup>1</sup> 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 14.01 (1974). See also Williams, *The Future of Land Use Controls* in *FUTURE LAND USE* 25 (R. Burchell & D. Listokin eds. 1975); Williams, *The Three Systems of Land Use Control*, 25 *RUTGERS L. REV.* 80 (1970).

<sup>2</sup> 1 N. WILLIAMS, *supra* note 1.

<sup>3</sup> Williams, *The Three Systems of Land Use Control*, 25 *RUTGERS L. REV.* 80, 96 (1970).

<sup>4</sup> 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 163.16-19 (1974).

<sup>5</sup> For discussions of the various preservation techniques, see Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 *WIS. L. REV.* 370; Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 *S.D. L. REV.* 548 (1975); Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 *VILL. L. REV.* 559 (1964); Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 *MINN. L. REV.* 1009 (1974); Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 *WIS. L. REV.* 628; Henke, *Preferential Property Tax Treatment for Farmland*, 53 *ORE. L. REV.* 117 (1974); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmland*, 42 *MO. L. REV.* 369 (1977); Moore, *The Acquisition and Preservation of Open Lands*, 23 *WASH. & LEE L. REV.* 274 (1966); Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 *KAN. L. REV.* 215 (1977); Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 *DEPAUL L. REV.* 447 (1977); Richman & Kendig, *Transfer Development Rights—A Pragmatic View*, 9 *URB. LAW* 571 (1977); Roe, *Innovative Techniques to Preserve Rural Land Resources*, 5 *ENV'TL AFF.* 419 (1976); Rose, *Vermont Uses the Taxing Power to Control Land Use*, 2 *REAL EST. L.J.* 602 (1973); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 *REAL EST. L.J.* 635 (1974); Comment, *Control of Urban Sprawl or Securing Open Space: Regulation by*

focus primarily upon the "unofficial" systems of property taxation and location of public works.<sup>8</sup> Agricultural landowners in these states can voluntarily form special districts. District farmers are afforded partial property tax exemptions so long as land is retained in agricultural production. These tax benefits are recaptured in the event of conversion to nonagricultural uses.<sup>9</sup>

In addition, district landowners are insulated from governmental activities that tend to facilitate development. For example, land within districts cannot be condemned for urban-type improvements unless special procedures are followed. Nonagricultural development is also impeded by the prohibition of special assessment financing within districts. State agencies are directed to formulate policies to encourage the continuation of agricultural activities in districts, and local governments are forbidden to regulate farming practices within a district unless public health or safety can justify the intrusion.<sup>10</sup>

The hallmark of the districting concept is the emphasis on voluntary compliance and local initiative. The approach is essentially nonauthoritarian. For the most part, the acts seem conscientiously drawn to avoid constitutional challenge, though some barriers may be posed by state law. If the programs can survive such challenges, agricultural districting could provide a thoughtful, though moderate, alternative to legislatures concerned with farmland preservation.

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*Condemnation or by Ordinance?*, 50 CALIF. L. REV. 483 (1962); Comment, *Florida Greenbelts: Preservation of Public and Private Interests*, 27 U. FLA. L. REV. 142 (1974); Comment, *Preferential Assessment of Agricultural Property in South Dakota*, 22 S.D. L. REV. 632 (1977); Comment, *Preferential Property Tax Treatment of Farmland and Open Space Under Michigan Law*, 8 U. MICH. J.L. REF. 428 (1975); Comment, *Preservation of Florida's Agricultural Resources Through Land Use Planning*, 27 U. FLA. L. REV. 130 (1974); Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEG. 158 (1970); Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960). See also Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961).

<sup>8</sup> N.Y. AGRIC. & MKTS. LAW §§ 300-307 (McKinney 1972 & Supp. 1978-79).

<sup>7</sup> VA. CODE §§ 15.1-1506 to 1513 (Cum. Supp. 1979).

<sup>9</sup> The first farmland preservation plan to incorporate these factors, and apparently the precursor to the New York and Virginia laws, was the California Land Conservation Act, also referred to as the Williamson Act. See CAL. GOV'T CODE §§ 51200-51295 (West Cum. Supp. 1978). See generally Gustafson & Wallace, *Differential Assessment as Land Use Policy: The California Case*, 41 J. AM. INST. PLAN. 379 (1975). See also Comment, *Condemnation of Agricultural Property in California*, 11 U.C.D.L. REV. 555, 559-60 (1978).

<sup>8</sup> See notes 26-27, 37-39 & accompanying text *infra*.

<sup>10</sup> See notes 28-35 & accompanying text *infra*.

## THE STATUTES

In both New York and Virginia, the landowner generally takes the initiative in creating an agricultural district.<sup>11</sup> Any landowner who complies with the acreage requirements of the statutes<sup>12</sup> may submit an application to the appropriate governing body<sup>13</sup> for the creation of a district. This proposal is referred to the county planning board and to an agricultural districting advisory committee,<sup>14</sup> which in turn study the proposal and report their findings to the local governing body. The local governing body then holds a public hearing, and may adopt the proposal or any modified version of the proposal it deems appropriate.<sup>15</sup>

The statutes vary as to whether the decision of the local governing body is final. In Virginia, if the local governing body adopts a plan, it becomes effective as an ordinance.<sup>16</sup> In New York, on the other hand, the county legislative body must adopt the proposal and then refer it to the commissioner of environmental conservation.<sup>17</sup> If the commissioner certifies an area as eligible for districting,<sup>18</sup> the county

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<sup>11</sup> N.Y. AGRIC. & MKTS. LAW § 303 (McKinney 1972 & Supp. 1978-79); VA. CODE § 15.1-1511 (Cum. Supp. 1979).

<sup>12</sup> The New York statute provides that any owner or owners of land who submit an application for the creation of an agricultural district must own at least 500 acres of land or 10% of the land to be included in the proposed district, whichever is greater. N.Y. AGRIC. & MKTS. LAW § 303(1) (McKinney 1972). The Virginia act requires that an application consist of no less than 500 acres of land. In addition, the Virginia statute provides that no owner shall own more than 3500 acres of land proposed to be included within the boundaries of all districts in the state. VA. CODE § 15.1-1511(A) (Cum. Supp. 1979).

<sup>13</sup> In New York, the application is submitted to the "county legislative body." N.Y. AGRIC. & MKTS. LAW § 303 (McKinney 1972 & Supp. 1978-79). In Virginia, applications are first reviewed by the "local governing body." VA. CODE § 15.1-1511 (Cum. Supp. 1979). The local governing body is defined as the governing body of any county or city. *Id.* § 15.1-1508(G).

<sup>14</sup> In New York, the agricultural districting advisory committee consists of four active farmers and four agribusinessmen residing within the county and a member of the county legislative body, who serves as chairman of the committee. The members of the committee are appointed by the chairman of the county legislative body. N.Y. AGRIC. & MKTS. LAW § 302 (McKinney 1972). In Virginia, the advisory committee consists of four landowners who are actively engaged in farming, four freeholders of the locality and a member of the local governing body. The members are appointed by the local governing body. VA. CODE § 15.1-1510 (Cum. Supp. 1979).

<sup>15</sup> N.Y. AGRIC. & MKTS. LAW § 303(4) (McKinney Supp. 1978-79); VA. CODE § 15.1-1511(D) (Cum. Supp. 1979). The Virginia statute adds one other important limitation—no landowner can be included in a district without prior written approval.

<sup>16</sup> VA. CODE § 15.1-1511(D) (Cum. Supp. 1979).

<sup>17</sup> N.Y. AGRIC. & MKTS. LAW § 303(4) (McKinney Supp. 1978-79).

<sup>18</sup> The commissioner may not certify a plan as eligible for districting unless (a) the agricultural resources commission has determined that the area to be districted consists predominantly of viable agricultural land, and, that the plan of the proposed district is feasible, and will serve the public interest by assisting in maintaining a viable agricultural industry within

legislative body may hold a public hearing on the plan. The county legislative body retains the power to disapprove any district certified by the commissioner.<sup>19</sup>

The New York and Virginia statutes also provide for periodic review of any district created pursuant to the acts. In New York, the county legislative body reviews the district every eight years.<sup>20</sup> In Virginia, the local governing body shall review the district no less than four years, but no more than eight years after its creation.<sup>21</sup> The local governing body in both states may decide to continue, terminate or modify the district.<sup>22</sup>

Under the New York statute, the commissioner of environmental conservation also has the power to create agricultural districts.<sup>23</sup> In order to create an agricultural district, the commissioner must follow certain criteria set forth in the act. First, the land within a proposed district must be predominantly unique and irreplaceable agricultural land. Second, creation of the district must further state environmental plans, policies and objectives. Third, the proposed district must be consistent with state comprehensive plans. Finally, the director of the division of budget must approve the plan.<sup>24</sup> Any district created pursuant to this section of the New York statute must also be reviewed every eight years by the commissioner of environmental conservation.<sup>25</sup>

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the district and the state, and (b) the Secretary of State has determined that districting of the area would not be inconsistent with state comprehensive plans, policies and objectives. N.Y. AGRIC. & MKTS. LAW § 303(5) (McKinney Supp. 1978-79).

<sup>19</sup> N.Y. AGRIC. & MKTS. LAW § 303(6) (McKinney Supp. 1978-79).

<sup>20</sup> N.Y. AGRIC. & MKTS. LAW § 303(8) (McKinney Supp. 1978-79).

<sup>21</sup> VA. CODE § 15.1-1511(E) (Cum. Supp. 1979).

<sup>22</sup> In both jurisdictions, the local governing body must seek the recommendations of the local planning commission and the agricultural districting advisory committee before terminating or modifying the district.

In Virginia, if the local governing body does not terminate or modify a district, the district continues as originally constituted. *Id.*

In New York, the commissioner of environmental conservation has the power to terminate an agricultural district even if the local governing body decides to continue the district. N.Y. AGRIC. & MKTS. LAW § 303(8) (McKinney Supp. 1978-79).

<sup>23</sup> N.Y. AGRIC. & MKTS. LAW § 304 (McKinney 1972 & Supp. 1978-79).

<sup>24</sup> N.Y. AGRIC. & MKTS. LAW § 304(1) (McKinney Supp. 1978-79).

<sup>25</sup> *Id.* Each review shall include consultations with "local elected officials, planning bodies, agricultural and agribusiness interests, community leaders, and other interested groups, and shall also include a public hearing at a specified time and at a specified place either within the district or easily accessible to the proposed district, notice of such hearing to be published in a newspaper having general circulation within the district." After this review process, the commissioner of environmental conservation can modify a district so as to exclude land which is no longer predominantly unique and irreplaceable agricultural land or to include additional land provided: (1) the agricultural resources commission has recommended such modification; (2) the modification would further state environmental plans, policies and objectives;

Both the New York and Virginia statutes provide that land used in agricultural production within an agricultural district qualifies for an agricultural value assessment.<sup>26</sup> Generally, if land qualifies for use value assessment, the land must be assessed at the value it has for agricultural purposes only. The assessor cannot consider the development potential of the land in computing the land's assessed valuation. Consequently, a district landowner may be able to reduce his property tax liability.<sup>27</sup>

Restrictions upon the activities of local and state governments in agricultural districts provide additional incentives for agricultural districting. According to both statutes, local governments are prohibited from enacting laws within an agricultural district which might unreasonably restrict farm structures and practices in contravention of the purposes of the statute unless such regulations "bear a direct relationship to public health or safety."<sup>28</sup>

The statutes also restrict state and local governments from exercising their power of eminent domain in agricultural districts.<sup>29</sup> Any

(3) the secretary of state has determined that such modification would be consistent with state comprehensive plans; and (4) such modification has been approved by the director of the division of the budget.

<sup>26</sup> N.Y. AGRIC. & MKTS. LAW § 305(1) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(A) (Cum. Supp. 1979). To be eligible for the annual property tax exemption in New York, a district landowner must own ten or more acres of land which were used for agricultural purposes for the preceding two years and produced agricultural products with a gross average sale value of at least \$10,000. Both states provide for preferential assessment only upon annual application by the owner of district land. N.Y. AGRIC. & MKTS. LAW § 305(1) (McKinney Supp. 1978-79); VA. CODE § 58-769.8 (Cum. Supp. 1979).

The New York statute also permits landowners whose land is not within an agricultural district to qualify for an agricultural value assessment. The landowner must make a commitment to continue to use such land exclusively for agricultural production for the next eight years. Premature conversion to nonagricultural uses results in a penalty equal to twice the taxes levied on the property in the year following conversion. N.Y. AGRIC. & MKTS. LAW § 306 (McKinney Supp. 1978-79).

<sup>27</sup> See Conklin & Leshner, *Farm-Value Assessments as a Means of Promoting Efficient Farming in Urban Fringes*, 48 J. AM. SOC'Y FARM MANAGERS & RURAL APPRAISERS 42, 45 (1978):

In the fall of 1974, a set of assessed values that roughly doubled taxes on farmland became official throughout Orange County [New York] . . . Soon after the reappraisal, nearly all fulltime farms in Orange County were placed in agricultural districts, and almost all farmers with land that qualified asked for a use-value assessment. With use-value assessment, Orange County farmers were able to reduce their property taxes to approximately \$25 per acre, or roughly one-half what they otherwise would have been after reassessment. For the average Orange County farm this meant a savings of \$3000 per year in property taxes. And in some extreme cases, property taxes were reduced by an amount equal to the farmer's net income.

See also Adamson, *Preferential Land Assessment in Virginia*, 10 U. RICH. L. REV. 111 (1975).

<sup>28</sup> N.Y. AGRIC. & MKTS. LAW § 305(2) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(B) (Cum. Supp. 1979).

<sup>29</sup> N.Y. AGRIC. & MKTS. LAW § 305(4) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(D)

state agency, public corporation or local government body which intends to acquire land in an agricultural district must file a notice for public review.<sup>30</sup> The notice must contain a report justifying the proposed action, including an evaluation of alternatives which would not require action within an agricultural district. Various government bodies review the proposed action to determine its effect upon the preservation and enhancement of agricultural resources. In Virginia, if the local governing body determines that the proposed action will have an adverse effect, it may issue an order halting the proposed action.<sup>31</sup> In New York, the commissioner of environmental conservation is directed only to make his findings public.<sup>32</sup>

As an additional incentive to agricultural districting, the New York and Virginia statutes restrict the power of public service districts to impose benefit assessments or special ad valorem levies upon land within districts.<sup>33</sup> These provisions are primarily designed to limit special assessment financing for sewer, water, electricity or nonfarm drainage operations.<sup>34</sup> The acts also contain a mandate that state agencies modify their administrative regulations and procedures to encourage the maintenance of farming in agricultural districts.<sup>35</sup>

Landowners are generally free to discontinue their association within an agricultural district under either statute. The Virginia act allows the owner of any land within a district to file notice of termination with the local governing body to have his land withdrawn from the district. The county or city must then conduct a hearing to decide whether the landowner can show good cause for termination. If the local governing body denies the landowner's request, he has an immediate right of appeal to the circuit court.<sup>36</sup>

In addition, the Virginia statute provides for roll-back taxes upon

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(Cum. Supp. 1979).

<sup>30</sup> In New York, the state or local agency seeking to acquire land in an agricultural district must file the notice with the commissioner of environmental conservation. N.Y. AGRIC. & MKTS. LAW § 305(4) (McKinney Supp. 1978-79). In Virginia, the notice must be filed with the local governing body. VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>31</sup> VA. CODE § 15.1-1512(D) (Cum. Sup. 1979). Any public body aggrieved by this final order can appeal to the circuit court having jurisdiction where the majority of the land is located. *Id.*

<sup>32</sup> N.Y. AGRIC. & MKTS. LAW § 305(4)(d) (McKinney Supp. 1978-79).

<sup>33</sup> N.Y. AGRIC. & MKTS. LAW § 305(5) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(E) (Cum. Supp. 1979).

<sup>34</sup> *Id.*

<sup>35</sup> N.Y. AGRIC. & MKTS. LAW § 305(3) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(C) (Cum. Supp. 1979).

<sup>36</sup> VA. CODE § 15.1-1513(A) (Cum. Supp. 1979).

district land which is converted to nonagricultural use.<sup>37</sup> Any landowner who terminates his association with an agricultural district or otherwise converts his land to nonfarm use is liable for payment of the taxes deferred plus interest for up to five years preceding the change in use.<sup>38</sup> Unlike the Virginia act, the New York statute contains no specific provision relating to termination of an agricultural district. The New York act does provide, however, that a landowner who converts any land within a district to a use other than agricultural production is liable for the tax savings accruing under the program for the last five years.<sup>39</sup>

### DIFFERENTIAL TAXATION

Many commentators argue that property taxes do affect the use of land.<sup>40</sup> As noted above, Professor Williams considers the impact dramatic; he suggests that the local real property tax system is the most important of the land use control systems.<sup>41</sup> He particularly decries the disproportionate reliance upon property taxes to finance major public services. He argues that this financial pressure sends municipal governments in search of the "good ratables"<sup>42</sup> and

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<sup>37</sup> VA. CODE § 15.1-1513(B) (Cum. Supp. 1979).

<sup>38</sup> VA. CODE § 15.1-1513(B) (Cum. Supp. 1979) refers to VA. CODE § 58-769.10 (Cum. Supp. 1979) which states in part:

When real estate qualifies for assessment and taxation on the basis of use under an ordinance adopted pursuant to this article, and the use by which it qualified changes, to a nonqualifying use, it shall be subject to additional taxes, hereinafter referred to as roll-back taxes, in an amount equal to the amount, if any, by which the taxes paid or payable on the basis of the valuation, assessment and taxation under such ordinance were exceeded by the taxes that would have been paid or payable on the basis of the valuation, assessment or taxation of other real estate in the taxing locality in the year of the change and in each of the five years immediately preceding the year of the change, plus simple interest on such roll-back taxes at the same interest rate applicable to delinquent taxes in such locality, pursuant to § 58-847 or § 58-964.

<sup>39</sup> N.Y. AGRIC. & MKTS. LAW § 305(1)(e) (McKinney Supp. 1978-79).

<sup>40</sup> See, e.g., Bab, *Taxation and Land Use Planning*, 10 WILLAMETTE L.J. 439 (1974); Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975); Delogu, *The Taxing Power as a Land Use Control Device*, 45 DEN. L.J. 279 (1968); Farr, *The Property Tax as an Instrument for Economic and Social Change*, 9 URB. LAW. 447 (1977); Heller, *The Theory of Property Taxation and Land Use Restrictions*, 1974 WIS. L. REV. 751; Latcham & Findley, *Influence of Taxation and Assessment Policies on Open Space*, in OPEN SPACE AND THE LAW 53 (F. Herring ed. 1965); Zimmerman, *Tax Planning for Land Use Control*, 5 URB. LAW 639 (1973).

<sup>41</sup> Williams, *supra* note 3, at 82.

<sup>42</sup> A "good ratable" is defined as "a type of land use which brings in a lot of taxes, but does not require much in public services, that is, which shows a net profit to the town, taxwise." *Id.* at 83.



causes official land use controls to be distorted from their legitimate purposes.<sup>43</sup>

The real property tax system may also work at cross purposes with initiatives designed to preserve open space.<sup>44</sup> Spiraling property tax bills geared to rapidly rising market values may prompt conversion of open space land to more intense uses.<sup>45</sup> Preferential tax schemes based upon the agricultural use value of land are designed to induce farmers to remain in agriculture when assessments based on fair market values might force them to convert their land to more profitable uses.<sup>46</sup>

<sup>43</sup> *Id.* at 84. Williams explains:

Zoning decisions are frequently based primarily upon the search for the good rateable—thereby often encouraging development which, by any other criteria, may not belong in town, and, conversely, usually discouraging the type of housing which is needed most. Subdivision control is distorted into a system for passing all possible costs on to the developer, who then passes some or all of these on to his purchasers, thereby again driving up the cost of housing. Urban renewal is distorted into enlarging the downtown business area, thereby strengthening the local tax base, and often driving the poor out of town.

*Id.* at 84-85. *Accord*, Bab, *supra* note 40, at 441-43.

<sup>44</sup> Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 Wis. L. Rev. 628, 632-37; Zimmerman, *supra* note 40, at 652-55.

<sup>45</sup> See Stocker, *How Should We Tax Farmland on the Rural-Urban Fringe?* 54 NAT'L TAX A. Proc., 463, 464-65 (1961):

The problem is a variant of the familiar question that arises in any transition zone, over assessing and taxing property that is held in a use other than its most profitable use. When used in agriculture, the land produces an income and supports a value that is only a fraction of what a developer or foresighted investor would pay for it. Under laws that require assessment of property at full and true value, or some fraction thereof, the conscientious assessor must assess the land according to its value for nonfarm use. Thereupon the farmer, who often barely covers operating expenses from current income, and who probably realizes that the longer he holds onto his land, the better is his chance of maximizing his capital gain, complains that the higher tax will make it impossible for him to retain ownership and probably operation of his land. Thus it is concluded that, because of taxes, farmers are being forced out and land speculators are allowed to take over.

The principal arguments advanced for modification of the ad valorem principle as it applies to farmland in the rural urban fringe seem to be: (1) that taxation of this land at market value has undesirable effects on land ownership and use, specifically the destruction of part of our agricultural production capacity, and the loss of open spaces that are becoming increasingly valuable to an urbanizing society; and (2) that it is unfair.

See also Currier, *supra* note 40, at 33.

<sup>46</sup> Heller, *supra* note 40, at 773. Heller concludes:

To alleviate the threat of having this agricultural land converted into more housing sprawl, a tax break is given to the farmer by taxing him only on the capitalized income his property will yield in agriculture. It is hoped that this concession will constitute a bribe sufficient to cause him not to develop the land. The rationale in favor of limited use valuation is that those who would consume the benefits of farm fringe preservation (a less crowded natural environment)

Both the New York and Virginia statutes place heavy reliance on property tax relief as an incentive for creation of an agricultural district. In New York, district landowners can apply for annual exemptions from taxation on the value of land in excess of its value for agricultural use.<sup>47</sup> In Virginia, district landowners can qualify for use value assessment under certain provisions of the land use assessment law.<sup>48</sup> In order to discourage conversion to nonagricultural uses, both statutes utilize a roll-back tax to recapture the difference between the use value assessment and the fair market assessment for the five years prior to the change in use.<sup>49</sup>

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would be willing to pay to preserve the land if a market auction were held to determine its use. The agricultural preference tax is thus the equivalent to an auction bid for open space, but made through the governmental process.

*Id.* at 792. The literature on differential taxation legislation for farmland is ample. See generally COUNCIL ON ENVIRONMENTAL QUALITY, UNTAXING OPEN SPACE (1976); ECONOMIC RESEARCH SERVICE, U.S. DEPT. OF AGRICULTURE, REP. NO. 256, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND (1974); Coughlin, Berry & Plaut, *Differential Assessment of Real Property as an Incentive to Open Space Preservation and Farmland Retention*, 31 NAT'L. TAX. J. 165 (1978); Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D. L. REV. 548 (1975); Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369 (1977); Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 KAN. L. REV. 215 (1977); Comment, *Preferential Assessment of Agricultural Property in South Dakota*, 22 S.D. L. REV. 632 (1977); Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEG. 158 (1970); Note, *Taxation Affecting Agricultural Land Use*, 50 IOWA L. REV. 600 (1965).

<sup>47</sup> N.Y. AGRIC. & MKTS. LAW § 305(1) (McKinney Supp. 1978-79). The agricultural use value per acre is determined annually by the state board of equalization and assessment. N.Y. AGRIC. & MKTS. LAW § 305(1)(c) (McKinney Supp. 1978-79). The assessor is directed to utilize this certified average value per acre by multiplying it by the number of acres of land utilized for agricultural production and adjusting this result by application of the latest equalization rate established for the jurisdiction. The resulting amount is the agricultural value ceiling for farmlands. N.Y. AGRIC. & MKTS. LAW § 305(1)(d) (McKinney Supp. 1978-79). See STATE BOARD OF EQUALIZATION AND ASSESSMENT, REPORT ON FINAL AGRICULTURAL CEILING VALUES FOR 1979 (April 1979). See generally COUNCIL ON ENVIRONMENTAL QUALITY, UNTAXING OPEN SPACE 335-36 (1976); W. LESHER, LAND USE LEGISLATION IN THE NORTHEAST: NEW YORK 30-32 (Dep't of Agric. Econ., Cornell U., A.E. Res. 75-23, 1975).

<sup>48</sup> VA. CODE § 15.1-1512(A) (Cum. Supp. 1979). The provisions authorize local governments to assess agricultural, horticultural, forest and open space land on the basis of its actual use. VA. CODE § 58-769.4 to .16 (1974 & Cum. Supp. 1979). See generally Adamson, *Preferential Land Assessment in Virginia*, 10 U. RICH. L. REV. 111 (1975); Note, *Property Taxation in Virginia*, 11 U. RICH. L. REV. 589, 626-29 (1977).

In valuing real estate for agricultural use assessments, the local commissioner of revenue is directed to consider the recommendations of the state land evaluation advisory committee, which in turn is directed to utilize soil capability classification and income capitalization rates to determine "recommended ranges of suggested values." VA. CODE § 58-769.11 (Cum. Supp. 1979). Although the use values established by the state land evaluation advisory committee are advisory in nature, most localities have accepted the recommended values in applying the statute. Adamson, *supra*, at 117 n.32.

<sup>49</sup> N.Y. AGRIC. & MKTS. LAW § 305(1)(e) (McKinney Supp. 1978-79); VA. CODE § 15.1-

Such preferential taxation schemes often invite constitutional scrutiny under uniformity and equality directives in state law.<sup>50</sup> These provisions, mandating equal tax treatment within a particular taxing jurisdiction, are designed to insure against inequitable apportionment of the government tax burden.<sup>51</sup> The uniformity clauses are seldom identical.<sup>52</sup> In addition, state court interpretations of these provisions are many and varied.<sup>53</sup> As a consequence, thorough study of the constitutional genealogy<sup>54</sup> of uniformity requirements in each state is necessary to determine the difficulties that may confront an agricultural districting law.

Neither of the state constitutions in New York and Virginia would prohibit classification of property for use value assessment. The New York Constitution contains no uniformity clause.<sup>55</sup> In Virginia, a constitutional amendment allowing specifically for use value assessment was adopted in 1971.<sup>56</sup>

1513(B) (Cum. Supp. 1979).

<sup>50</sup> *Curry v. Planning & Zoning Comm'n*, 34 Conn. Supp. 52, —, 376 A.2d 79, 83 (1977). See also Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 Wis. L. Rev. 628, 640-41.

<sup>51</sup> *Idaho Tel. Co. v. Baird*, 91 Idaho 425, 429, 423 P.2d 337, 341 (1967); *American Nat'l Ins. Co. v. Board of Supervisors*, 303 So. 2d 457, 459 (Miss. 1974); *Switz v. Kingsley*, 37 N.J. 566, 574-79, 182 A.2d 841, 843-44 (1962). See generally Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, 38 Ky. L.J. 31, 51-53 (1949). Matthews adds this caveat:

Although the courts are surprisingly consistent in holding the broad purposes of constitutional uniformity to be the establishment of equality in burden, they make little or no mention of the theory of burden. That is, whether there shall be an equality of sacrifice or an equality of contribution in determining the ability to pay. Adam Smith's proposition that "the subjects of every state ought to contribute towards the support of government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state" presupposes possession of property as the primary source of revenue. This doctrine is more or less reflected in the uniformity provisions because possession of property was the best criterion of wealth at the time they were written. In more recent times attention has shifted to other means of measuring wealth, and with the change equality of burden may mean something entirely new. The point is not raised here for final solution, but to indicate that the consistent language of the courts is more deceptive than would appear on the surface.

*Id.* at 53.

<sup>52</sup> W. NEWHOUSE, *CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION* 643 (1959).

<sup>53</sup> The studies by Newhouse, *id.*, and Matthews, *supra* note 51, provide the most detailed analyses of judicial interpretation of state uniformity provisions.

<sup>54</sup> The phrase is borrowed from Henkin, *Constitutional Fathers—Constitutional Sons*, 60 MINN. L. REV. 1113, 1118 (1976).

<sup>55</sup> The New York courts have generally held that taxes in the state need only be uniform within classes. W. NEWHOUSE, *supra* note 52, at 600. *But see Hellerstein v. Assessor of Islip*, 37 N.Y.2d 1, 332 N.E.2d 279, 371 N.Y.S.2d 388 (1975).

<sup>56</sup> VA. CONST. art. X, § 2. See generally Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 204-05 (1972); *Nineteenth Annual Survey of Developments in Virginia*

In other jurisdictions, legislative authority to classify property for tax purposes may not be clear.<sup>57</sup> For example, the Indiana Constitution states that the legislature shall provide "for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal."<sup>58</sup> The state does have a preferential taxation scheme for farmland,<sup>59</sup> but this legislation has never been tested. At an early date, the state supreme court recognized that perfect equality in tax assessment is impossible.<sup>60</sup> The court later upheld a city ordinance providing that land used for agricultural purposes could be assessed at its use value.<sup>61</sup> These developments

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*Law: 1973-1974, 60 VA. L. REV. 1443, 1607-08 (1974).* Even prior to 1971, the equality and uniformity clause of the Virginia Constitution mandated only uniform tax treatment within each class of property. VA. CONST. art. X, § 1. Note, *Property Taxation in Virginia*, 11 U. RICH. L. REV. 589, 598-601 (1977).

<sup>57</sup> See generally W. NEWHOUSE, *supra* note 52, at 655-68; D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 309-27 (1977). See also Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369, 379-80 (1977) (questioning the constitutional validity of Missouri's differential assessment law).

<sup>58</sup> IND. CONST. art. 10, § 1.

<sup>59</sup> IND. CODE § 6-1.1-4-13 (1976).

<sup>60</sup> Board of Comm'rs v. Johnson, 173 Ind. 76, 92, 89 N.E. 590, 596 (1909).

<sup>61</sup> Blake v. Madison Circuit Court, 244 Ind. 612, 617, 193 N.E.2d 251, 254 (1963):

It is asserted that the ordinance is unconstitutional on its face. First, because it expressly provides that farmland, used for agricultural purposes, shall be assessed accordingly, as distinguished from urban property within the city. However, this court answered this contention to the contrary in the very recent case of *Welsh, etc. et al. v. Sells, etc. et al.* (1963), 244 Ind. 423, 192 N.E.2d 753. In that case we held that agricultural usage was a proper basis of classification for tax purposes.

On petition for rehearing, the petitioners asserted the *Welsh* case was not controlling authority because it involved an excise tax rather than an ad valorem property tax.

The court rejected this argument:

The opinion affirms the right of the annexing city as a taxing authority to consider the agricultural use of the land for tax purposes, and cites the case of *Welsh, etc. et al. v. Sells, supra*, as supporting this fact. It is true that the tax involved in that case was an excise tax, and the tax involved in the ordinance of annexation was a tax upon real estate. Nevertheless, the case cited was authority for the proposition which was under consideration.

The purpose for which land is used, whether it is outside a city or within its corporate limits, is a factor which should be considered in determining its taxable value. For this reason, we affirm our original position, that the ordinance of annexation was not invalid on its face.

*Id.* at 620, 195 N.E.2d at 354-55.

The preceding paragraph echoes the reasoning of the Florida Supreme Court when it upheld an agricultural use-value taxation law against challenges based on a uniformity clause substantially similar to the Indiana provision. See *Lanier v. Overstreet*, 175 So. 2d 521 (Fla. 1965). See also *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963). The *Overstreet* court concluded that the constitutional provision actually "contemplates" the authority to classify:

might suggest that the state legislature has wide discretion in drafting tax legislation. Yet the court recently suggested that the "rigid requirements of equality in taxing property" mandated by the uniformity clause are more stringent than the commands of equal protection in state and federal constitutions.<sup>62</sup> Thus, although the state court has sanctioned a limited classification system of property taxation,<sup>63</sup> the extent of the legislature's discretion in this matter remains ill-defined.<sup>64</sup>

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It is settled that the "uniformity" requirement of this provision is applicable to the rate of taxation only and not to legislative regulations to secure a "just valuation" of property. See *Rorick v. Reconstruction Finance Corp.* 144 Fla. 539, 198 So. 494; *Schleman v. Connecticut General Life Insurance Co.*, 151 Fla. 96, 9 So.2d 197. The organic requirements of Section 1 of Article IX do not forbid the classification of property in providing for the "just valuation" of taxable property; on the contrary, the organic mandate to the Legislature to "prescribe such regulations as shall secure a just valuation of all property" contemplates such classifications—subject, of course, to the fundamental organic requirements of due process and equal protection guaranteed by our state and federal constitutions.

*Lanier v. Overstreet*, 175 So. 2d 521, 523 (Fla. 1965). The court concluded that "just valuation" need not include that value attributable to potential development. *Id.* at 524-25. In fact, the court stated that "there is nothing in the legislative regulations respecting the 'just valuation' of taxable property to authorize the assessment of property in accordance with a potential use which might be made of the property at some future time." *Id.* at 523. Consequently, the court reasoned, the legislature was completely within constitutional boundaries when it defined "just valuation" of agricultural land to include its value for that use only. The 1968 Florida Constitution codified this interpretation. FLA. CONST. art. VII, § 4. The Florida experience has been extensively chronicled. See, e.g., *Wershow, Ad Valorem Taxation and Its Relationship to Agricultural Land Tax Problems in Florida*, 16 U. FLA. L. REV. 521 (1964); *Wershow, Ad Valorem Assessments in Florida—Whither Now?*, 18 U. FLA. L. REV. 9 (1965); *Wershow, Recent Developments in Ad Valorem Taxation*, 20 U. FLA. L. REV. 1 (1967); *Wershow, Ad Valorem Assessment in Florida—The Demand for a Viable Solution*, 25 U. FLA. L. REV. 49 (1972); Note, *The Florida Constitution and Legislative Classification for Tax Assessment Purposes*, 17 U. FLA. L. REV. 609 (1965).

<sup>62</sup> *Indiana Aeronautics Comm'n v. Ambassador, Inc.*, \_\_\_ Ind. \_\_\_, \_\_\_, 368 N.E.2d 1340, 1343-44 (1977).

<sup>63</sup> W. NEWHOUSE, *supra* note 52, at 303.

<sup>64</sup> See Note, *Uniform Property Taxation in Indiana—The Need for a Constitutional Amendment*, 38 IND. L.J. 72 (1962). But cf. *Indiana State Bd. of Tax Comm'rs v. Lyon & Greenleaf Co.*, \_\_\_ Ind. App. \_\_\_, \_\_\_, 359 N.E.2d 931, 934 (1977):

However, our own research discloses that our Supreme Court recognizes the necessity perceived by the Legislature to adopt different methods for assessment of different classes of property in order to achieve a just and uniform valuation. See, *Clark v. Vandalia R. Co.* (1909), 172 Ind. 409, 86 N.E. 851 (method of assessing railroad property permitted in order to secure a fair valuation of the whole property and an equitable distribution among the counties affected). See also *Smith v. Stephens* (1910), 173 Ind. 564, 91 N.E. 167 (assessment of banks); *Board, etc. v. Johnson* (1909), 173 Ind. 76, 89 N.E. 590 (classification of banks permitted where practical effect is to place the classes on the same footing in taxing result); *State, ex rel. v. Smith* (1902), 158 Ind. 543, 63 N.E. 25, 64 N.E. 18, 63 L.R.A. 116 (statute permitting mortgage deduction on real estate).

Several states have removed all doubts concerning the validity of preferential taxation schemes by amending their constitutions.<sup>65</sup> The following scenario is typical. A state court decision extols the virtues of uniform tax treatment and orders compliance with the constitutional mandate.<sup>66</sup> Compliance is unattainable, and classification results by administrative fiat.<sup>67</sup> Meanwhile, pressure builds for legislation to assign special burdens or benefits to certain groups, at least arguably for the general good.<sup>68</sup> To ensure implementation of these initiatives, constitutionally sanctioned exceptions to uniform assessments are adopted.<sup>69</sup> The courts, now free to adopt a policy of judicial restraint, limit their evaluative functions to dis-

However, the classification is only permissible to achieve uniformity and equality in result.

Moreover, the classification must not be arbitrary. Rather it must be based upon differences naturally inhering in the subject-matter of the legislation.

*State ex rel. v. Smith, supra* (1902), 158 Ind. 543, 580, 64 N.E. 18, 20.

<sup>65</sup> See, e.g., KAN. CONST. art. XI, § 12; MD. CONST. art. XLIII; NEB. CONST. art. VIII, § 1; NEV. CONST. art. X, § 1; N.J. CONST. art. VIII, § 1; OHIO CONST. art. II, § 36; S. D. CONST. art. VIII, § 15; TEX. CONST. art. VIII, § 1-d; WASH. CONST. art. VII, § 2; WIS. CONST. art. VIII, § 1.

<sup>66</sup> See, e.g., *Knowlton v. Board of Supervisors*, 9 Wis. 378 (1859), followed in *Boostrom v. Board of Review*, 42 Wis. 2d 149, 166 N.W.2d 184 (1969) and *Hensel v. Town of Wilson*, 55 Wis. 2d 101, 197 N.W.2d 794 (1972); *State Tax Comm'n v. Gales*, 222 Md. 543, 161 A.2d 676 (1960); *Switz v. Kingsley*, 69 N.J. Super. 27, 173 A.2d 449 (1961), *aff'd as modified*, 37 N.J. 566, 182 A.2d 841 (1962); *Park Inv. Co. v. Board of Tax Appeals*, 175 Ohio St. 410, 195 N.E.2d 908 (1964), *cert. denied*, 379 U.S. 818 (1964); *Boyne v. State ex rel. Dickerson*, 80 Nev. 160, 390 P.2d 225 (1964). See also *Simmons v. Ericson*, 54 S.D. 429, 223 N.W. 342 (1929).

<sup>67</sup> See *Switz v. Township of Middletown*, 23 N.J. 580, 600, 130 A.2d 15, 26 (1957) (Weintraub, J., concurring) ("There has been a century of wholesale disregard of these mandates."). Data as to the disparity between legal standards and assessment practices is provided in Plattner, *Assessment Practice and Administration of the Property Tax*, 13 ASSESSOR'S J. 17 (1978). See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE PROPERTY TAX IN A CHANGING ENVIRONMENT* 11-13 (1974).

<sup>68</sup> See Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 KAN. L. REV. 215, 226-28 (1977); Comment, *Property Taxes and Farmers in Ohio: The Park Investment Story*, 7 U. TOLEDO L. REV. 1125 *passim* (1976); Note, *The Uniformity Clause, Assessment Freeze Laws, and Urban Renewal: A Critical View*, 1965 WIS. L. REV. 885, 886-89.

<sup>69</sup> See, e.g., *Kelsey v. Colwell*, 30 Cal. App. 3d 590, 595, 106 Cal. Rptr. 420, 423 (1973):

Article XXVIII of the California Constitution . . . was adopted to uphold the [Williamson Act] by eliminating the tax controversy which came into existence after the plan became effective; the amendment reconciled assessments based on restricted agricultural and similar land uses with preexisting constitutional requirements that property be assessed at its full cash value.

See also the Wisconsin Constitution, which now provides in part:

The rule of taxation shall be uniform, but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. . . . Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property.

WIS. CONST. art. VIII, § 1.

cussions about the reasonableness of the sanctioned classifications.<sup>70</sup>

In some jurisdictions, the courts may play an active role in breaking down the barriers posed by uniformity requirements. The Illinois experience is illustrative. Prior to 1971, the Illinois Constitution directed that all property be assessed uniformly for property tax purposes.<sup>71</sup> The courts generally followed the mandate, but local assessing officials, particularly in Cook County, did not.<sup>72</sup> The present Illinois Constitution contains the following provisions:

#### Section 4. Real Property Taxation

(a) Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

(b) Subject to such limitations as the General Assembly may hereafter prescribe by law, counties with a population of more than 200,000 may classify or continue to classify real property for purposes of taxation. Any such classification shall be reasonable and assessments shall be uniform within each class. The level of assessment or rate of tax of the highest class in a county shall not exceed two and one-half times the level of assessment or rate of tax of the lowest class in that county. Real property used in farming in a county shall not be assessed at a higher level of assessment than single family residential real property in that county.<sup>73</sup>

Shortly after voter approval of the constitution in 1970, the legisla-

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<sup>70</sup> See, e.g., *Supervisor v. Alsop*, 232 Md. 188, 192 A.2d 484 (1963); *Great N. Ry. v. Whitfield*, 65 S.D. 173, 272 N.W. 787 (1937). See also *Snow v. City of Memphis*, 527 S.W.2d 55, 66 (Tenn.), *appeal dismissed*, 423 U.S. 1083 (1975):

The purpose and objective of the Question 3 amendment is to tax income-producing property at a higher rate than owner-occupied residences and farms. That such classification is constitutionally permissible is beyond question. The constitutional and statutory scheme that has resulted from the Question 3 amendment has brought about a state of uniformity and equality of assessment of real property in Tennessee that while not perfect can conservatively be described as vastly superior to its predecessor system in approaching the objective of equality and uniformity throughout the state within the classifications provided. Perfection in the taxation of real property is neither required nor attainable.

For a discussion of the New Jersey experience, see *City of East Orange v. Township of Livingston*, 102 N.J. Super. 512, 523-34, 246 A.2d 178, 188-90 (1968).

<sup>71</sup> ILL. CONST. art. IX, § 1 (1870). For an excellent discussion of this provision, see G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* 413-35 (1969).

<sup>72</sup> See generally W. NEWHOUSE, *supra* note 52, at 125-66; Young, *The Revenue Article of the Illinois Constitution of 1970—An Analysis and Appraisal*, 1972 U. ILL. L.F. 312, 325; Comment, *The Illinois Constitutional Requirement of Uniformity in Taxation*, 33 ILL. L. REV. 57, 68-77 (1938).

<sup>73</sup> ILL. CONST. art. IX, § 4.

ture established a preferential system of valuation for farmland.<sup>74</sup> This system, originally restricted to counties with a population of more than 200,000, was amended in 1973 to apply to all counties.<sup>75</sup>

This legislation was challenged in *Hoffmann v. Clark*.<sup>76</sup> The plaintiffs, landowners in DuPage County, had previously benefited from use-value assessment of their property for two years. Now they objected to the "roll-back" taxes which were assessed after they converted their land to nonagricultural uses. They alleged that the entire act was unconstitutional and void under section 4, article IX, of the new constitution.<sup>77</sup>

The court framed the issue broadly:<sup>78</sup> Does the new provision preclude the General Assembly from classifying real property for taxation purposes? The majority focused almost entirely upon committee reports and convention debates to answer this question.<sup>79</sup> The court noted that the Committee on Revenue and Finance designed section 1, article IX,<sup>80</sup> to free the legislature from restrictive interpretations of its exclusive power to raise revenue.<sup>81</sup> This power can be limited only by express provisions; if the legislature is not specifically prevented from classifying real property for tax purposes, the inherent power to do so remains unfettered.<sup>82</sup> The court did not consider the uniformity requirement in section 4(a) to constitute such a limitation:

We cannot gather from these debates any clear expression of an intent on the part of the convention to limit or preclude the

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<sup>74</sup> ILL. REV. STAT. ch. 120, § 501a-1 through -3 (Cum. Supp. 1979). Briefly, farmland owners can apply for valuation of their real estate on the basis of its agricultural use rather than its fair cash value. If the land is later put to nonagricultural uses, the owner must pay the difference between taxes actually paid for the preceding three years and the amount which taxes for those years would have been had the real estate been assessed at market value, plus five percent interest.

<sup>75</sup> *Id.*

<sup>76</sup> 69 Ill. 2d 402, 372 N.E.2d 74 (1977).

<sup>77</sup> *Id.* at 410, 372 N.E.2d at 77.

<sup>78</sup> *Id.* at 412, 372 N.E.2d at 78.

<sup>79</sup> The Illinois courts follow the rule that when the meaning of a constitutional provision is in doubt, the court can look to debates of the delegates to the constitutional convention to ascertain the meaning they intended to give to those provisions. See *Client Follow-Up Co. v. Hynes*, \_\_\_ Ill. 2d \_\_\_, \_\_\_, 390 N.E.2d 847, 853 (1979).

<sup>80</sup> ILL. CONST. art. IX, § 1, states: "The General Assembly has the exclusive power to raise revenue by law except as limited or otherwise provided in the Constitution. The power of taxation shall not be surrendered, suspended or contracted away."

<sup>81</sup> *Hoffmann v. Clark*, 69 Ill. 402, 422, 372 N.E.2d 74, 83-84 (1977). See generally Young, *The Revenue Article of the Illinois Constitution of 1970—An Analysis and Appraisal*, 1972 U. ILL. L.F. 312, 314.

<sup>82</sup> *Hoffman v. Clark*, 69 Ill. 2d 402, 423, 372 N.E.2d 74, 84 (1977). *Accord*, *Apache County v. Atchison, Topeka & Sante Fe Ry.*, 106 Ariz. 356, 359, 476 P.2d 657, 660 (1970).



General Assembly from classifying real property. Although the Karns amendment provided that "taxes upon real property shall be levied uniformly by valuation\*\*\*," it is evident that even the requirement of uniformity was not clearly viewed by the convention as specifically restricting the authority of the General Assembly. In fact, during the debate, *People ex rel. Miller v. Doe*, 24 [sic] Ill.2d 211, and *People ex rel. Toman v. Olympia Fields Country Club*, 374 Ill. 101, were called to the attention of the convention. Delegate Lyons informed the convention that these cases held that the requirement of uniformity of the 1870 Constitution did not preclude the General Assembly from classifying real property. Instead, he stated that the uniformity limitation meant only that taxes must be equal and uniform among the members of the same class.<sup>83</sup>

The court further suggested that the limitations contained in section 4(a) are aimed at counties with populations less than 200,000 and not the General Assembly.<sup>84</sup> The majority justified its rather strained analysis of the uniformity provisions by pointing out the need for legislative discretion in tackling future revenue problems.<sup>85</sup>

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<sup>83</sup> 69 Ill. 2d at 419, 372 N.E.2d at 82. Interestingly, the cases referred to during the debate offer dubious support for the proposition that prior Illinois uniformity provisions allowed for reasonable classification of property for tax purposes. Both decisions do contain statements implying that state constitutional provisions demand only uniformity as applied to a class of property. *Miller v. Doe*, 22 Ill. 2d 211, 219, 174 N.E.2d 830, 834 (1961) ("There is no argument over the fundamental principle that taxes must be equal and uniform among members of the same class."); *Toman v. Olympia Fields Country Club*, 374 Ill. 101, 103, 28 N.E.2d 109, 110 (1940) ("No prohibition against classification of property and taxpayers into different classes can be read into the constitution.").

But in *Miller*, the issue was whether a county board of review could classify property for the purpose of equalizing assessed valuations in order to achieve uniform assessments. And in *Olympia Fields*, the question was whether golf courses could be compared to other golf courses for valuation purposes and then assessed as improved, resulting in assessed valuation nearly twice the per acre value of adjoining farmland. In both cases, the court answered in the affirmative. Neither result is inconsistent with a rule of absolute uniformity and the above statements might be considered dicta. W. NEWHOUSE, *supra* note 52, at 139-41. Moreover, other Illinois decisions reflect a much more rigid interpretation of the uniformity mandates. See *Tuttle v. Bell*, 377 Ill. 510, 513, 37 N.E.2d 180, 181 (1941) ("The constitutional provision precludes the taxing officials from adopting a method of valuing property whereby there is a discrimination in favor of or against any class of property.") (decided under the old constitution); *M.F.M. Corp. v. Cullerton*, 16 Ill. App. 3d 681, 686, 306 N.E.2d 505, 508 (1973) ("And the law requires, if property within the taxing district is assessed on a debased proportion of the fair market value, all property shall be assessed on the same basis.") (decided after the new constitution went into effect).

<sup>84</sup> *Hoffmann v. Clark*, 69 Ill. 2d 402, 415-16, 372 N.E.2d 74, 80 (1977).

<sup>85</sup> *Id.* at 423-24, 372 N.E.2d at 84-85. The court also rejected plaintiff's contention that the roll-back provisions violate state and federal due process and equal protection guarantees. The court decided the legislature's attempt to discourage discontinuance of the preferred agricultural uses through the use of roll-back provisions similar to the ones provided in the agricultural districting laws is not unreasonable:

The dissent focused upon the structure of the revenue article. The minority agreed that section 1 confers broad powers on the legislature to raise revenue. But the dissent noted that sections 2 through 9 contain specific limitations on those powers.<sup>86</sup> Section 4(a) mandates uniformity; section 4(b) creates an exception to this general rule by authorizing the more populous counties to adopt classification schemes.<sup>87</sup> The dissent argued that section 4 represented a compromise at the convention between those delegates opposing all classification provisions and those who wanted all counties (or, at the very least, Cook County) to have the authority to classify property for real estate taxation purposes.<sup>88</sup> The dissent concluded that the line was drawn between these two groups to permit classification only in the larger counties, and that the legislature's attempt to mandate special treatment for agricultural land throughout the

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The general recognition of the need for some special effort for the preservation of farmland and open space demonstrates that there exists a rational basis for the creation by the legislature of a class of taxpayers from whom an additional tax is required when the land no longer qualifies for the special treatment given to it under the provisions of Section 20a-1.

*Id.* at 426-27, 372 N.E.2d at 86. The court also held that plaintiffs could not assert inadequate notice simply because they had no knowledge at the time they purchased the property that the prior owners had been granted agricultural valuation. The majority noted that preferential assessments are a matter of public record and can be ascertained easily. *Id.* at 428-29, 372 N.E.2d at 87. Finally, the court declined to classify the five percent interest charge on the roll-back taxes as an unconstitutional penalty. *Id.* at 429-30, 372 N.E.2d at 87.

<sup>86</sup> *Id.* at 431, 372 N.E.2d at 88.

<sup>87</sup> The dissent then analyzed the effect of section 4(b):

Since the exception permitting classification is expressly limited to counties with populations of more than 200,000, it is evident that any law establishing classification in counties with populations of less than 200,000 would not fall within the section 4(b) exception and would clearly violate the general rule of uniformity contained in section 4(a). This is the view expressed by this court in *Hamer v. Kirk* (1976), 65 Ill.2d 211, 219, where it was said in considering a related question: "The Constitution permits the classification of real property for purposes of taxation only in counties with a population of more than 200,000." The language of section 4(b) also plainly states that classification in counties which may classify is permissive and not mandatory. While the General Assembly may well have broad authority pursuant to section 4(b) to enact laws affecting the manner in which such counties may classify, the power to prescribe "limitations" cannot fairly be construed to include the power to enact laws mandating classification in counties which do not wish to do so.

*Id.* at 432, 372 N.E.2d at 88. The *Hamer* case referred to by the dissent is one of many decisions resulting from one man's quixotic attempts to compel government officials to assess property for taxing purposes in the manner prescribed by law. See *Hamer v. Jones*, 39 Ill. 2d 360, 235 N.E.2d 589 (1968); *Hamer v. Mahin*, 47 Ill. 2d 252, 265 N.E.2d 151 (1970); *Hamer v. Mahin*, 13 Ill. App. 3d 51, 299 N.E.2d 595 (1973); *Hamer v. Lehnhausen*, 60 Ill. 2d 400, 328 N.E.2d 11 (1975); *Hamer v. Kirk*, 65 Ill. 2d 211, 357 N.E.2d 506 (1976), *upon remand*, 57 Ill. App. 3d 343, 373 N.E.2d 64 (1978). In almost every instance, the courts found violations of the uniformity requirements but declined to provide any remedy.

<sup>88</sup> *Hoffmann v. Clark*, 69 Ill. 2d 402, 443-44, 372 N.E.2d 74, 94 (1977).

state overstepped permissible constitutional boundaries.<sup>89</sup>

The Illinois experience demonstrates that courts may avoid strict interpretations of the uniformity requirement if legislatures seek more flexibility in the property tax structure than the state constitution would appear to provide. Traditional doctrinal rigidity is considered inappropriate; legal standards are made to conform to legislative or administrative assessment practices.<sup>90</sup> One can certainly appreciate the need for judicial tolerance in matters of tax policy.<sup>91</sup> One commentator argues that uniformity provisions should be considered general objectives rather than specific limitations, and that courts might measure the effect of uniformity mandates under standards existing for federal and state equal protection clauses.<sup>92</sup> This approach may provide courts with a practical resolution of the conflict between strict uniformity mandates and de facto or de jure classification schemes.<sup>93</sup> But this analysis would probably

<sup>89</sup> *Id.* at 444, 372 N.E.2d at 95.

<sup>90</sup> Comment, *The Road to Uniformity in Real Estate Taxation: Valuation and Appeal*, 124 U. PA. L. REV. 1418, 1447 (1976).

<sup>91</sup> See Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27, 41-42 (1975); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 372-73 (1949).

<sup>92</sup> Matthews, *The Function of Constitutional Provisions Requiring Uniformity in Taxation*, (pts. 1, 4) 38 KY. L.J. 31, 61, 503, 520-26 (1949). Under equal protection standards, equality means practical equality. 1 T. COOLEY, *THE LAW OF TAXATION*, § 259 (4th ed. 1924). This concept has been eloquently summarized by Tussman & tenBroek, *supra* note 91, at 343-44:

In the years immediately following the adoption of the Fourteenth Amendment, with its apparent requirement of equality, the United States Supreme Court found it necessary to reaffirm the right of state legislatures to pass "special" legislation. . . .

The contrast here is between "general" legislation which applies without qualification to "all persons" and "special" legislation which applies to a limited class of persons. It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.

Here, then, is a paradox: The equal protection of the laws is a "pledge of the protection of equal laws." But laws may classify. And "the very idea of classification is that of inequality." In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.

The essence of that doctrine can be stated with deceptive simplicity. The Constitution does not require that things different in fact be treated in law as though they were the same. But it does require, in its concern for equality, that those who are similarly situated be similarly treated. The measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated.

be rejected in those jurisdictions which apparently deny legislative authority to classify property for tax purposes<sup>84</sup> and in those states where courts have previously interpreted uniformity provisions to prohibit such classification.<sup>85</sup> Clearly, where courts have been too strict, constitutional changes may be needed to assure judicial acceptance of the preferential taxation provisions in agricultural districting laws.<sup>86</sup>

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For a discussion of how this approach has been applied by the courts to controversies concerning property taxation, see *Snow v. City of Memphis*, 527 S.W.2d 55, 64-66 (Tenn. 1975). See generally *W. NEWHOUSE*, *supra* note 52, at 601-08.

<sup>84</sup> See *Matthews*, *supra* note 92, at 520-26. Professor Matthews explains:

If uniformity were recognized more directly as a goal of fairness toward which the taxing power is directed, more attention could be given to the possible methods available for achieving equality of burden. There would be more opportunity to consider the overall effect of the tax on the public in relation to other essential factors, particularly its place in the entire tax structure. It is doubtful whether true, practical, economic equality in taxation can ever be attained without full integration of the whole system of taxation. This rationalization would encourage such action rather than deter it.

*Id.* at 525.

<sup>85</sup> See, e.g., *ARK. CONST.* art. XVI, § 5. The Alabama experience is also noteworthy. Prior to 1972, the state constitution required that taxes be assessed in exact proportion to the value of property in the state and that such property be taxed at the same rate. *ALA. CONST.* art. XI, §§ 211, 217 (1901, amended 1972). In *Weissinger v. Boswell*, 330 F. Supp. 615 (M.D. Ala. 1971), taxpayers challenged the state ad valorem property tax scheme which allowed for variations in assessment ratios between counties. In evaluating their equal protection claim, the court noted that the constitutional provision had been strictly interpreted by Alabama courts. *Id.* at 620. Consequently, under traditional equal protection analysis, the federal court could not sanction property tax classifications because the state laws provided no rational basis for their existence. In fact, they prohibited such discriminations. *Id.* at 622-23. See generally *Yudof*, *The Property Tax in Texas Under State and Federal Law*, 51 *TEX. L. REV.* 885, 909-18 (1973). Alabama later amended its constitution to provide for a classified property tax system. *ALA. CONST.* art. XI, § 217. See *ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, THE PROPERTY TAX IN A CHANGING ENVIRONMENT* 38 (1974).

<sup>86</sup> See, e.g., *Idaho Tel. Co. v. Baird*, 91 Idaho 425, 423 P.2d 337 (1967). See also *Drey v. State Tax Comm'n*, 345 S.W.2d 228 (Mo. 1961) (noted in *Lapping, Bevins & Herbers*, *supra* note 57, at 380). See generally *W. NEWHOUSE*, *supra* note 52, at 655-65. Newhouse concludes that as "appealing as a project of redefinition might be, this writer is convinced that a 'new' formulation of a 'test' or even of the 'function' of these uniformity clauses would truly be to 'plow in the sea.'" *Id.* at 764.

<sup>87</sup> See *D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 346 (1971). Professor Hagman's advice to legislatures on drafting open space taxation schemes to avoid constitutional challenge is still sound. See *Hagman, Open Space Planning and Property Taxation—Some Suggestions*, 1964 *Wis. L. REV.* 628, 638-45. For example, Hagman suggests the risk that a state court may find a preferential scheme invalid for creating an unreasonable classification might be reduced if the statute provides that qualifying land must be burdened by a use restriction. *Id.* at 644. Pennsylvania adopted a system whereby landowners could voluntarily covenant that their land would remain in open space use for five years. In return, the county would covenant that property tax assessments would reflect the fair market value of the land as restricted. *PA. STAT. ANN.* tit. 16, §§ 11941-947 (Purdon Supp. 1978-79). A

While barriers posed by constitutional limitations on the taxing power may be overcome, the use of differential taxation as a land use control device leads to further difficulties. One problem is the potential shift in tax burden to property owners in the taxing jurisdiction who do not participate in the program.<sup>97</sup> The amount of this shift will depend upon the level of participation by owners of qualified property and the percentage of tax relief provided by the program.<sup>98</sup> Because of the local nature of most property tax systems, the financial burden of an agricultural districting program could be significant for local governments and nonparticipating landowners in rural areas where a large percentage of the original tax base is assessed differentially.<sup>99</sup>

The New York act contains a provision<sup>100</sup> which could alleviate this problem, but only with respect to state-initiated districts. The commissioner of environmental conservation can initiate an agricultural district covering unique and irreplaceable agricultural land.<sup>101</sup> A state-initiated district must cover at least 2,000 acres and it cannot contain any farmland already included in a voluntary district.<sup>102</sup> The statute provides for local input through public hearings during the formation process,<sup>103</sup> and a review of the continuing viability of

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Pennsylvania court decided this scheme was not a tax statute, and held the uniformity limitation inapplicable in *Bensalem Township School Dist. v. County Comm'rs*, 8 Pa. Commw. Ct. 411, 303 A.2d 258 (1973). Pennsylvanians nevertheless amended their constitution to expressly provide authority for special taxation provisions relating to agricultural lands. PA. CONST. art. 8, § 2(b)(i).

<sup>97</sup> See generally COUNCIL ON ENVIRONMENTAL QUALITY, *UNTAXING OPEN SPACE*, 80-99 (1976). This shift can undermine development plans:

At some point the magnitude of the tax shift will probably cause non-program landowners to develop their lands prematurely in order to fight increasing taxes. Under this influence, both current and prospective program participants would tend to re-examine the efficacy of receiving the tax advantage. Thus, where tax rate increases are greatest, the potential for this injurious effect may be anticipated and would conflict with governmental plans for orderly growth.

Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27, 78 (1975). See also Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 652-53; Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 189-90 (1961).

<sup>98</sup> Coughlin, Berry & Plaut, *Differential Assessment of Real Property as an Incentive to Open Space Preservation and Farmland Retention*, 31 NAT'L TAX J. 165, 176 (1978); Currier, *supra* note 97, at 82.

<sup>99</sup> Coughlin, Berry & Plaut, *supra* note 98, at 176-77; Currier, *supra* note 97, at 77-78. See also *Twenty-Second Annual Survey of Developments in Virginia Law, 1976-77*, 63 VA. L. REV. 1350, 1481 (1977).

<sup>100</sup> N.Y. AGRIC. & MKTS. LAW § 305(1)(f) (McKinney Supp. 1978-79).

<sup>101</sup> N.Y. AGRIC. & MKTS. LAW § 304(1) (McKinney 1972 & Supp. 1978-79). See also notes 23-25 & accompanying text *supra*.

<sup>102</sup> N.Y. AGRIC. & MKTS. LAW § 304(1) (McKinney Supp. 1978-79).

<sup>103</sup> N.Y. AGRIC. & MKTS. LAW § 304(2) (McKinney Supp. 1978-79) provides:

the district is mandated every eight years.<sup>104</sup> Once formed, the state initiated districts resemble the locally initiated agricultural districts in terms of available benefits. Additionally, taxing jurisdictions in the affected areas are reimbursed for one-half of the tax loss that results from requests for agricultural value assessments.<sup>105</sup>

This provision was included in the New York act at the request of agricultural groups who feared county governments may not be receptive to districting efforts.<sup>106</sup> In fact, one county declared a moratorium on creation of additional agricultural districts to prevent further erosion of the local tax base.<sup>107</sup> The mechanism for state-created districts provides some opportunity to break these stale-

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Prior to creating an agricultural district under this section the commissioner of environmental conservation shall work closely, consult and cooperate with local elected officials, planning bodies, agriculture and agribusiness interests, community leaders, and other interested groups. The commissioner shall give primary consideration to local needs and desires, including local zoning and planning regulations as well as regional and local comprehensive land use plans. The commissioner shall file a map of the proposed district in the office of the clerk of any municipality in which the proposed district is to be located, and shall provide a copy thereof to the chief executive officer of any such municipality and the presiding officer of the local governing body, and, upon request, to any other person. The commissioner shall publish a notice of the filing of such proposed map and the availability of copies thereof in a newspaper of general circulation within the area of the proposed district, which notice shall also state that a public hearing will be held to consider the proposed district at a specified time and at a specified place either within the proposed district or easily accessible to the proposed district on a date not less than thirty days after such publication. In addition, the commissioner shall give notice, in writing, of such public hearing to persons owning land within the proposed district. The commissioner shall conduct a public hearing pursuant to such notice, and, in addition, any person shall have the opportunity to present written comments on the proposed district within thirty days after the public hearing. After due consideration of such local needs and desires, including such testimony and comments, if any, the commissioner may affirm, modify or withdraw the proposed district. Provided, however, that if the commissioner modifies the proposal to include any land not included in the proposal as it read when the public hearing was held, the commissioner shall hold another public hearing, on the same type of published and written notice, and with the same opportunity for presentation of written comments after the hearing. Then the commissioner may affirm, modify or withdraw the proposed district, but he may not modify it to include land not included in the proposal upon which the second hearing was held.

<sup>104</sup> N.Y. AGRIC. & MKTS. LAW § 304(4) (McKinney Supp. 1978-79). See note 25 *supra*.

<sup>105</sup> N.Y. AGRIC. & MKTS. LAW § 305(1)(f) (McKinney Supp. 1978-79). Subparagraph (f) adds the proviso that any assistance payment to a taxing jurisdiction affected by a state-initiated district must be reduced by one-half the amount of any roll-back taxes triggered by conversion to nonagricultural uses. This provision implies that landowners within state-initiated districts are free to convert their land to a use other than agricultural production.

<sup>106</sup> Conklin & Bryant, *Agricultural Districts: A Compromise Approach to Agricultural Preservation*, 56 AM. J. AGRIC. ECON. 607, 610 (1974).

<sup>107</sup> W. LESHNER, *LAND USE LEGISLATION IN THE NORTHEAST: NEW YORK* 30 (Dept. of Agric. Econ., Cornell U., A.E. Res. 75-25, 1975).

mates,<sup>108</sup> but at a cost of reimbursing affected taxing jurisdictions for half of the lost revenue resulting from use-value assessments. The result, of course, is that the state absorbs part of the cost of the differential assessment program.<sup>109</sup> To date, however, no districts have been established under this provision.<sup>110</sup>

Another basic problem relates to the effectiveness of differential taxation as a land use control device. Almost all commentators conclude that preferential taxation, standing alone, is insufficient for keeping land in open uses.<sup>111</sup> Many propose that such schemes

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<sup>108</sup> An interesting question arises as to whether county governments involuntarily subjected to agricultural districts could contest the determination of "unique and irreplaceable" agricultural lands within their political boundaries. A challenge might be premised on constitutional provisions requiring separation of powers between the three branches of government. See generally Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 MINN. L. REV. 669, 677-84 (1976). For example, a county may contend that designation of an agricultural district within its boundaries by the commissioner of environmental conservation is an impermissible delegation of legislative authority. Until recently, the rule of nondelegability has not presented serious difficulties for legislation placing authority in state agencies for designation of "critical areas." See, e.g., *Toms River Affiliates v. Department of Environ. Protec.*, 140 N.J. Super. 135, 355 A.2d 679, cert. denied, 71 N.J. 345, 364 A.2d 1077 (1976); *J.M. Mills, Inc. v. Murphy*, 116 R.I. 54, 352 A.2d 661 (1976); *Creed v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974). See generally K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 2.04 (1976). See also Bruff, *supra* at 679 ("The delegation doctrine in state law has accordingly evolved, after a period of lip service and evasion, into a recognition that delegation may occur and a requirement that legislation contain standards to guide the exercise of delegated power.")

But in *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1978), the Florida Supreme Court invalidated those portions of the state's Environmental Land and Water Management Act which vest authority to designate "areas of critical state concern" in the Administration Commission of the Department of Administration. FLA. STAT. ANN. § 380.05 (1975). The court said the criteria for such designations were constitutionally defective because "they deposit in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in the greatest need of protection." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 919 (Fla. 1978). The court noted, however, that the legislature could satisfy its constitutional responsibilities by designating in advance the areas of critical state concern or by ratifying administratively developed recommendations. *Id.* at 926. Thus, even in those states which adhere to a strict construction of the rule of nondelegability, agricultural districting laws may elude constitutional invalidity by providing for legislative approval of administrative designations of "unique and irreplaceable agricultural lands."

<sup>109</sup> See Coughlin, Berry & Plaut, *supra* note 98, at 176-78.

<sup>110</sup> H. CONKLIN & N. KING, *LEGISLATION TO PERMIT AGRICULTURAL DISTRICTS IN NEW YORK AS AMENDED THROUGH 1978* 3 (Dept. of Agric. Econ., Cornell U., A.E. Ext. 78-34, 1978).

<sup>111</sup> COUNCIL ON ENVIRONMENTAL QUALITY, *UNTAXING OPEN SPACE* 77-79 (1976); Coughlin, Berry & Plaut, *Differential Assessment of Real Property as an Incentive to Open Space Preservation and Farmland Retention*, 31 NAT'L TAX J. 165, 170-175 (1978); Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27, 78-81 (1975); Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 631 n.10 (1964); Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117, 123-24 (1974); Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369, 383-86 (1977). See also Gustafson & Wallace, *Differential Assessment as Land Use Policy: The California Case*,

should be used only in conjunction with agricultural zoning or other land use controls utilizing the police power.<sup>112</sup> The New York and Virginia acts adopt a more moderate approach; the agricultural districting laws simply place restrictions on certain governmental activity within districts. These provisions are designed both to encourage participation in the program by increasing insulation against state and local government regulations, and to discourage urban-type development within the farm areas.<sup>113</sup> The difficulties with this approach will be analyzed in the following section.

### LIMITATIONS ON GOVERNMENT ACTIVITIES

Two of the limitations on governmental activities within agricultural districts relate to both the financing and planning of public improvements which tend to facilitate nonfarm development.<sup>114</sup> As noted previously,<sup>115</sup> the location of major public works is the final element in the Williams trilogy of land use controls.<sup>116</sup> This system, like the real property tax system, exerts powerful pressures on the official system of land use controls and tends to dominate planning decisions.<sup>117</sup> Suburban developments string out along water and sewer lines in much the same way as commercial developments follow highway interchanges.<sup>118</sup> In both instances, open space preservation plans can be frustrated. Obviously, control over the placement of these facilities could be a valuable planning tool for shaping growth in fringe areas.<sup>119</sup>

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41 J. AM. INST. PLAN. 379, 387 (1975) ("If one views growth management in the rural-urban fringe as the principle objective of the California Land Conservation Act, the arguments for its continued existence are not compelling.")

<sup>112</sup> See, e.g., COUNCIL ON ENVIRONMENTAL QUALITY, *supra* note 111, at 79; Gustafson & Wallace, *supra* note 111, at 387; Hagman, *supra* note 111, at 657; Henke, *supra* note 111, at 129-30.

<sup>113</sup> Bryant & Conklin, *New Farmland Preservation Programs in New York*, J. AM. INST. PLAN. 390, 392 (1975).

<sup>114</sup> See notes 28-32 & accompanying text *supra*.

<sup>115</sup> See notes 1-4 & accompanying text *supra*.

<sup>116</sup> 5 N. WILLIAMS, *supra* note 4, at § 161.03.

<sup>117</sup> *Id.*

<sup>118</sup> Williams, *supra* note 3, at 86-87. See generally URBAN SYSTEMS RESEARCH & ENGINEERING INC., THE GROWTH SHAPERS: THE LAND USE IMPACTS OF INFRASTRUCTURE INVESTMENTS (1976) (prepared for the Council on Environmental Quality).

<sup>119</sup> Comment, *Utility Extensions: An Untested Control on Wisconsin's Urban Sprawl*, 1977 WIS. L. REV. 1132, 1134. See also City & Regional Parks & Playgrounds Comm., Am. Soc. of Landscape Architects, *Preservation of Open Spaces*, 48 LANDSCAPE ARCHITECTURE 82, 88 (1958):

Throughout history the strongest force for urban growth and direction has been the provision of transportation facilities—harbors, canals, railroads, street



Appreciation of the potential effectiveness of this control, however, may lead courts to circumscribe its use for planning purposes. In *Robinson v. City of Boulder*,<sup>120</sup> for example, the Colorado Supreme Court invalidated Boulder's attempt to control fringe area development by refusing to extend water and sewer services to a subdivision outside city limits. The city argued that this decision was based upon growth objectives outlined in a comprehensive plan adopted by the city and the surrounding county.<sup>121</sup> The court hinted that the county might be able to turn down the proposed development,<sup>122</sup> but held that the city could refuse extension only for utility-related reasons.<sup>123</sup> Both the trial court and the supreme court agreed that "[g]rowth control and land use planning considerations do not suffice."<sup>124</sup> Thus, in the absence of statutory authority, local government discretion to achieve land use planning goals by withholding public services may be quite limited.<sup>125</sup>

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railways, etc. Where new highways or transit facilities are provided and where the stations or interchanges are located will largely determine the future shape of our metropolitan areas.

Similarly, the provision of water supply or electric power directly influences the direction and timing of urban development; and the availability of sewers, the nearness of schools and recreation areas, the degree of fire and police protection, all encourage settlement and urbanization.

The provision of these services and improvements is the oldest tool of planning—to guide development. The withholding of these services may be almost as important a tool for the preservation of open spaces.

See generally Note, *Public Utility Land Use Control on the Urban Fringe*, 63 IOWA L. REV. 889 (1978); Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974), reprinted in URBAN LAND INSTITUTE, 2 MANAGEMENT & CONTROL OF GROWTH 442 (1975).

<sup>120</sup> 190 Colo. 357, 547 P.2d 228 (1976).

<sup>121</sup> *Id.* at 361-62, 547 P.2d at 230-31.

<sup>122</sup> *Id.* at 362, 547 P.2d at 231.

<sup>123</sup> *Id.* at 362, 547 P.2d at 232.

<sup>124</sup> *Id.* at 359, 547 P.2d at 229. *Accord*, *Reid Dev. Corp. v. Parsippany-Troy Hills Township* 10 N.J. 229, 89 A.2d 667 (1952). *But cf.* *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972) (lack of resources preventing extension). See generally D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 428-48 (1977).

<sup>125</sup> Some commentators nevertheless remain optimistic about the potential for local government control of public utility extensions. One observer argues that common law rules relating to service obligations of private utility companies should not be interpreted to impose stringent limitations on government-owned utilities. Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974), reprinted in URBAN LAND INSTITUTE, 2 MANAGEMENT & CONTROL OF GROWTH 442 (1975). Another commentator finds a legal basis for public utility extension control in state statutes that require municipalities to reconcile utility extensions with land use plans. Comment, *Utility Extensions: An Untested Control on Wisconsin's Urban Sprawl*, 1977 WIS. L. REV. 1132. A third student note develops the argument that public utility extension control can be premised upon municipal planning enabling acts. Note, *Public Utility Land Use Control on the Urban Fringe*, 63 IOWA L. REV.

Local government zoning decisions can affect the siting of major public works. This authority stems from enabling acts<sup>126</sup> or constitutional home rule provisions<sup>127</sup> which provide the foundation for city and county zoning ordinances. But again, this authority may be limited, particularly in rural counties. In some jurisdictions, the power may simply lie dormant.<sup>128</sup> In other jurisdictions, county ordinances may be superseded by local governments vested with the power of eminent domain<sup>129</sup> or vetoed by state regulatory agencies vested with final authority on public utility siting decisions.<sup>130</sup>

In apparent recognition of these problems, the New York and Virginia legislatures placed express limitations on the exercise of eminent domain and on public funding of urban-type improvements within agricultural districts.<sup>131</sup> Any state agency, public service corporation<sup>132</sup> or local governing body intending to acquire land or ad-

889 (1978). Under the analyses set forth in the last two articles, public utility land use control is coextensive with, and limited by, extraterritorial regulatory authority.

<sup>126</sup> See, e.g., VA. CODE § 15.1-486(a) (Cum. Supp. 1979). See generally Cunningham, *Land-Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 368-80 (1965).

<sup>127</sup> See, e.g., CAL. CONST. art. XI, § 7.

<sup>128</sup> One commentator has noted that in Virginia, the exercise of the power of eminent domain by electric utilities must be consistent with applicable local zoning ordinances. Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257, 298 (1972). Professor Willrich also notes that where comprehensive plans have been adopted, local planning commissions have "the power to approve the general location . . . of a proposed public utility facility." *Id.* Yet few rural counties in Virginia have adopted either local zoning ordinances or comprehensive plans. *Id.* at 300.

<sup>129</sup> See, e.g., *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972) (county agricultural zoning ordinance superseded by city's purchase of farm for the establishment of a sanitary landfill system). See also *County of Westchester v. Village of Mamaroneck*, 22 App. Div. 2d 143, 148, 255 N.Y.S.2d 290, 294 (1964) ("In our opinion, broad principles of sovereignty require that a state or its agency or subdivision performing a governmental function be free of local control."). See generally D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 408-28 (1977).

<sup>130</sup> See, e.g., 58 OPS. CAL. ATTY. GEN. 729 (1975) (county has no authority to prohibit construction of nuclear power plant should the facility come within the jurisdiction of the state energy commission). See generally Comment, *California's Energy Commission: Illusions of a One-Stop Power Siting Agency*, 24 U.C.L.A. L. REV. 1313, 1342-52 (1977).

<sup>131</sup> N.Y. AGRIC. & MKTS. LAW § 305(4) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>132</sup> In Virginia, the term "public service corporation" includes gas, pipeline, electric light, heat, power and water supply companies, sewer companies and telephone and telegraph companies, but it does not include municipal corporations. VA. CODE § 56-1 (1974). The New York statute uses the term, "public benefit corporation," which is defined as "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which enure to the benefit of this or other states, or to the people thereof." N.Y. GEN. CONST. LAW § 66(4) (McKinney Supp. 1978-79). The New York courts have concluded that this term does not include municipal corporations and probably does not include special district corporations. See *Bender v. Jamaica Hospital*, 40 N.Y.2d 560, 356 N.E.2d 1228, 388 N.Y.S.2d 269 (1976); *Harrigan v. Town of Smithtown* 54 Misc. 2d 793, 283 N.Y.S.2d 424

vance funds for the construction of dwellings, commercial or industrial facilities, or water or sewer facilities to serve nonfarm structures within a district must submit to a review process designed to determine the effect of the proposed action upon the preservation of agricultural resources.<sup>133</sup> The public authority must file a report justifying the proposed action and detailing an evaluation of alternatives which would not require action within the district.<sup>134</sup> If it is determined that the proposed action would have an unreasonably adverse effect on agricultural resources, an order may be issued to stop the action for at least two months while public hearings continue.<sup>135</sup> A second, final order appears to be binding in Virginia,<sup>136</sup> while the findings of the commissioner of environmental conservation in New York are merely made available to "any public agency having the power of review of or approval of such action."<sup>137</sup> Thus, within agricultural districts, land cannot be condemned and public facility funding cannot begin until certain procedures are followed. In New York, such proposals are publicly aired before final decisions can be made.<sup>138</sup> In Virginia, the legislature has delegated to local governments the authority to make those final decisions.

Limitations on the exercise of the power of eminent domain within agricultural districts could prove significant as a tool for guiding growth in rural areas. The experience in Minnesota under that state's Environmental Rights Act<sup>139</sup> provides an interesting example. In *County of Freeborn v. Bryson*,<sup>140</sup> a farmer invoked certain provisions of the act<sup>141</sup> to enjoin the county from constructing

(1967); *Kennedy v. Fehlhaber Pile Co.*, 263 App. Div. 819, 31 N.Y.S.2d 376 (1941). Thus, the New York statute may not apply to many public utility companies in the state.

<sup>133</sup> N.Y. AGRIC. & MKTS. LAW § 305(4)(a) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>134</sup> N.Y. AGRIC. & MKTS. LAW § 305(4)(a) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>135</sup> N.Y. AGRIC. & MKTS. LAW § 305(4)(c) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(D) (Cum. Supp. 1979). In Virginia this determination is made by the local governing body, which is defined in the Act to include the governing body of any county or city. *Id.* § 15.1-1508(G). In New York, the decision is made by the commissioner of environmental conservation. N.Y. AGRIC. & MKTS. LAW § 305(4)(c) (McKinney Supp. 1978-79).

<sup>136</sup> VA. CODE § 15.1-1512(D) (Cum. Supp. 1979). The Virginia statute also mandates that in the event an agency, corporation or political subdivision is aggrieved by the final order of the local governing body, an appeal can be made to the circuit court where a majority of the land is located. *Id.*

<sup>137</sup> N.Y. AGRIC. & MKTS. LAW § 305(4)(d) (McKinney Supp. 1978-79).

<sup>138</sup> *Id.* § 305(4).

<sup>139</sup> MINN. STAT. §§ 116B.01-.13 (1976).

<sup>140</sup> 2 Env't'l L. Rep. 20324 (Minn. Dist. Ct. 1972), *rev'd and remanded*, 297 Minn. 218, 210 N.W.2d 290 (1973), *appeal after remand*, 309 Minn. 178, 243 N.W.2d 316 (1976).

<sup>141</sup> MINN. STAT. §§ 116B.02(5)-.03(1) (1976) authorize any person to maintain a civil suit to enjoin activities adversely affecting the environment. MINN. STAT. § 116B.04 (1976) allows

a highway across a natural wildlife marsh. The county originally proposed to route the highway along the property line separating land owned by the plaintiff and a neighboring farmer.<sup>142</sup> The plaintiff had developed the marsh on his property as a wildlife habitat.<sup>143</sup> The proposed route would require four and one-half acres of plaintiff's land, including about one acre of marsh area.<sup>144</sup>

The plaintiff alleged that construction along this route would have an adverse effect on the wetlands area.<sup>145</sup> The trial court dismissed the action, holding in effect that plaintiff had failed to prove that the proposed action would be environmentally destructive.<sup>146</sup> The state supreme court reversed.<sup>147</sup> Prior to the trial on remand, the county changed the proposed route fifty feet to avoid the plaintiff's property, although the highway would still divide the marshland.<sup>148</sup> The trial court decided to permit highway construction over this second route.<sup>149</sup> The plaintiff again asked the higher court to reverse and the court complied.<sup>150</sup>

In both decisions, the Minnesota court emphasized that the county's power of eminent domain was limited by the provisions of the Environmental Rights Act.<sup>151</sup> Specifically, the court held that in

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the defendant to such proceedings to rebut the plaintiff's prima facie case by showing that there is no "feasible and prudent alternative" course of action and that the conduct at issue is "consistent with and reasonably required for promotion of the public health, safety and welfare." See generally Bryden, *Environmental Rights in Theory and Practice*, 62 MINN. L. REV. 163, 175-76 (1978); Note, *The Minnesota Environmental Rights Act*, 56 MINN. L. REV. 575 (1972).

<sup>142</sup> County of Freeborn v. Bryson, 309 Minn. 178, 182, 243 N.W.2d 316, 318 (1976).

<sup>143</sup> County of Freeborn v. Bryson, 297 Minn. 218, 220, 210 N.W.2d 290, 293 (1973).

<sup>144</sup> County of Freeborn v. Bryson, 2 Env't'l L. Rep. 20324, 20325, 20328 (Minn. Dist. Ct. 1972), *rev'd and remanded*, 297 Minn. 218, 220-21, 210 N.W.2d 290, 293 (1973).

<sup>145</sup> County of Freeborn v. Bryson, 297 Minn. 218, 219, 210 N.W.2d 290, 292 (1973).

<sup>146</sup> *Id.* at 221, 210 N.W.2d at 293.

<sup>147</sup> *Id.* at 230, 210 N.W.2d at 298.

<sup>148</sup> County of Freeborn v. Bryson, 309 Minn. 178, 183, 243 N.W.2d 316, 319 (1976).

<sup>149</sup> *Id.* at 183, 243 N.W.2d at 319.

<sup>150</sup> *Id.* at 190, 243 N.W.2d at 322.

<sup>151</sup> *Id.* at 181, 243 N.W.2d at 318. See also County of Freeborn v. Bryson, 297 Minn. 218, 227, 210 N.W.2d 290, 296 (1973). Professor Bryden summarized the impact of the Environmental Rights Act as follows:

The greatest discernible effect of MERA suits has been in eminent domain cases. Prior to MERA judicial review of the propriety of condemnations in Minnesota—as in most other states—was very narrow. The traditional requirements that the taking be "necessary" for a "public purpose" are usually easy to satisfy. Courts rarely overrule administrative determinations of necessity, and a highway, for example, serves a public purpose even if the route will destroy valuable natural resources. The doctrine forbidding a condemnor to take land that is devoted to a "prior public use" does afford some protection to parks and the like, but it obviously does not protect natural resources on private lands. Moreover, courts often refuse to apply the doctrine when the condemnee is lower

the absence of unusual circumstances, a trial court must enjoin environmentally destructive conduct if a feasible and prudent alternative is shown.<sup>152</sup> Here, the court was convinced that both proposals by the county would adversely affect the marsh.<sup>153</sup> The plaintiff had proposed an alternate route circumventing the marsh entirely. The trial court rejected this alternative because the route would require an additional acre of farmland and would further disrupt farming operations on land adjacent to the plaintiff's property. In effect, the trial court weighed the merits of the two proposals and considered the county's revised route to be the more desirable.<sup>154</sup> The supreme court simply disagreed with this conclusion<sup>155</sup> and disapproved of the trial court's attempt to balance competing interests.<sup>156</sup> The supreme court considered the plaintiff's proposal to be a "feasible and prudent alternative" and ordered that a judgment be entered against the county.<sup>157</sup> The court at one point concluded, "The question of whether to build a highway or not, of course, is a matter largely within the county's prerogative, but the location of

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in the hierarchy of sovereigns than the condemnor. Thus, a county will be enjoined from building a road through a state park, but the state may build a road through a county park.

The broad language of the Rights Act has revamped eminent domain law so that now any taking may be challenged on the ground that it "materially adversely affects" natural resources. Unless the defendant can prove that there is no "prudent and feasible" alternative, the claimant should prevail.

Bryden, *supra* note 141, at 203-04 (footnotes omitted).

<sup>152</sup> County of Freeborn v. Bryson, 309 Minn. 178, 187, 243 N.W.2d 316, 321.

<sup>153</sup> *Id.* at 185-86, 243 N.W.2d at 320.

<sup>154</sup> *See id.* at 183-84, 187, 243 N.W.2d at 319, 321. The trial court's willingness to balance competing interests in the trial on remand may have been influenced by the judge's opinion that productive farmland, as well as marshland, might be subject to the provisions of the Environmental Rights Act. *See* County of Freeborn v. Bryson, 2 Env't L. Rep. 20324, 20330 (Minn. Dist. Ct. 1972), *rev'd and remanded*, 297 Minn. 218, 210 N.W.2d 290 (1973). The appellate court did not address this issue.

<sup>155</sup> We do not think the possibility of shortened crop rows on the Peterson farm is a factor of unusual or extraordinary significance. Construction of a highway will require the taking of a comparable amount of land whether the land taken is farm or marsh. In the route originally proposed by the county, approximately 1.4 acres of marsh would have been taken. If the highway is rerouted onto agricultural land, the additional farmland needed will probably not exceed an acre. While it is true that portions of the Peterson farm would be bisected, causing some inconvenience to Peterson in farming operations, there is nothing in the record to indicate that Peterson would be foreclosed from farming the land on either side of the highway any more than Bryson, whose farm also will be divided by the proposed road to the north of the marsh, in any event, whether the county's proposal or the feasible and prudent alternative is followed.

County of Freeborn v. Bryson, 309 Minn. 178, 187, 243 N.W.2d 316, 321 (1976).

<sup>156</sup> *Id.* at 183, 243 N.W.2d at 319.

<sup>157</sup> *Id.* at 190, 243 N.W.2d at 322.

that highway is now subject to the Environmental Rights Act."<sup>158</sup>

The limitations on condemnation procedures in the agricultural districting laws are not as strict as those contained in the Minnesota statute. In New York, for example, the review of condemnation proposals is designed only to provide a public forum on the effect of such proposals before a project can be approved.<sup>159</sup> In Virginia, however, a local governing body can prevent a state agency, city or county from condemning land within an agricultural district.<sup>160</sup> The local governing body must weigh two conflicting interests: (1) whether the proposed action will have an adverse effect upon the preservation of agricultural resources within the district, and (2) whether such action is necessary "to provide service to the public in the most economical and practicable manner."<sup>161</sup> Any party disappointed by the resulting balance can seek judicial review in circuit court.<sup>162</sup> These procedures could force condemnors to consider the impact of their actions on agricultural lands. Although these provisions may do little to stem the tide of imminent urbanization, they could have some effect in directing growth away from agricultural areas in the initial stages of the development process.<sup>163</sup>

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<sup>158</sup> *Id.* at 187, 243 N.W.2d at 321.

<sup>159</sup> See note 138 *supra*.

<sup>160</sup> VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>161</sup> *Id.* This standard resembles the balancing test used in some jurisdictions to resolve similar conflicts of an intergovernmental nature. See, e.g., *Town of Oronoco v. City of Rochester*, 293 Minn. 468, 197 N.W.2d 426 (1972) (governmental exemption from county zoning ordinance); *Orange County v. City of Apopka*, 299 So. 2d 652 (4th D.C.A. Fla. 1974) (same). See generally D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 415-18 (1977); Comment, *Balancing Interests to Determine Governmental Exemption from Zoning Laws*, 1973 U. ILL. L.F. 125.

Of course, the outcome in each controversy will depend upon the facts and circumstances of the case. *Columbus v. Teater*, 53 Ohio St. 2d 253, 261, 374 N.E.2d 154, 160 (1978). In *Teater*, the city of Columbus objected to a statute prohibiting any state department, agency or political subdivision from building a structure in a wild, scenic or recreational river area without prior approval from the director of the state's Department of Natural Resources. The city had appropriated funds for the construction of a water supply reservoir outside the city limits on Big Darby Creek. When the city learned that the Department intended to designate certain portions of Big Darby as a scenic river area, it sought declaratory relief arguing that its constitutional home rule authority to acquire a public utility could not be restricted by the legislature. The state supreme court disagreed, stating that a valid exercise of the police power by the General Assembly could override the interest of the city in constructing the reservoir located outside city limits. *Id.* The court held the judiciary in each case must "balance the rights of the state against those of the municipality and endeavor to protect the respective interests of each." *Id.* In this particular controversy, the court urged the judiciary to consider whether Columbus has reasonable alternative potential sources of water and whether Big Darby Creek is an area of statewide environmental significance. *Id.* at n.6. In any event, the court held that the statute in question was not unconstitutional on its face. See generally 47 CIN. L. REV. 495 (1978).

<sup>162</sup> VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>163</sup> For a healthy dose of skepticism on generalizations of this nature, see Bryden, *supra* note

The potential effectiveness of these provisions as they relate to public utilities is more difficult to predict. State legislation delegating to local authorities the power to review location of major public works may not preclude state regulatory agencies from preempting local decisions.<sup>164</sup> In California, for example, the Williamson Act requires any agency contemplating the construction of a public facility to notify local authorities of any proposal to locate a plant within established agricultural "preserves."<sup>165</sup> The California Attorney General has concluded, however, that approval by the state's Energy Commission would override any determinations by local authorities that plant construction should be prohibited on land which has been restricted to open space use under the provisions of the act.<sup>166</sup>

The limitations on advancing public funds for facility construction may also be ineffective as a land use control device. The agricultural districting laws affect only those projects that are financed at public expense; they do not prohibit a developer from paying for his own public facilities. Private wells and septic tanks can be used to facilitate residential development without acquiring prior approval from local authorities. Such individual actions can obviously frustrate a land use scheme based in part upon control over extensions of public utilities.<sup>167</sup>

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141, at 210-20. For example, Professor Bryden cautions against reading too much into the success of the *Bryson* litigation: "After all, even in *Bryson* only a few of the many thousands of acres of wetlands in the state were directly affected by the decree." *Id.* at 213. He questions the real impact of the decision and concludes that even with decisions like *Bryson*, the "direct, immediate effects of [the Minnesota Environmental Rights Act] litigation on the overall quality of Minnesota's environment have been insubstantial." *Id.*

<sup>164</sup> Under the Virginia act, for example, the limitations on condemnation procedures apparently do not apply to public service corporations subject to approval by the State Corporation Commission. VA. CODE § 15.1-1512(D) (Cum. Supp. 1979).

<sup>165</sup> CAL. GOV. CODE § 51291 (West Supp. 1979).

<sup>166</sup> 58 OPS. CAL. ATTY. GEN. 729, 749 (1975). *But cf.* Orange County Air Pollution Control Dist. v. Public Utility Comm'n, 4 Cal. 3d 945, 484 P.2d 1361, 95 Cal. Rptr. 17 (1971) ("As in the field of industrial health and sanitation . . . , the commission must share its jurisdiction over utilities regulation where that jurisdiction is made concurrent by another (especially a later) legislative enactment.").

<sup>167</sup> Note, *Public Utility Land Use Control on the Urban Fringe*, 63 IOWA L. REV. 889, 904 (1978). Another commentator adds:

The practical effectiveness of a utility extension control program is directly related to the availability of waste treatment alternatives. Private onsite treatment systems such as septic tanks and waste treatment mounds make development feasible without sewer connection. To the extent that these alternatives are possible, the efficacy of utility extension as a means of curtailing sprawl is diminished. Therefore, prohibiting the use of single-site waste treatment in new development is a necessary component of any utility extension control program.

Comment, *Utility Extensions: An Untested Control on Wisconsin's Urban Sprawl*, 1977 WIS.

Public utility projects can also be financed through special benefit assessments. Local government entities can undertake construction of a project as a local improvement and assess the cost against the owners of the property benefited by the facility.<sup>168</sup> Thus, special districts can be formed in rural areas to provide the services necessary to facilitate residential development.<sup>169</sup> The agricultural districting laws specifically limit the power of local governmental entities to impose benefit assessments for special tax levies upon land in farm districts.<sup>170</sup> These provisions are apparently designed to insulate district landowners from development pressures that may accompany public improvements financed through special benefit assessments.<sup>171</sup>

Similar motivations prompted residents in a suburban area of Los Angeles to form their own water district and thereby preclude annexation by two larger water districts located nearby. The California Appellate Court in *Wilson v. Hidden Valley Municipal Water District*<sup>172</sup> characterized this defensive incorporation as an attempt

L. REV. 1132, 1140 (footnote omitted). The author concludes that the prohibition of unsewered development is "legitimately within the scope of a municipality's subdivision review power and its power to protect area waters." *Id.* at 1157.

<sup>168</sup> See *Deerfield Estates, Inc. v. Township of E. Brunswick*, 60 N.J. 115, 286 A.2d 498 (1972). See generally S. SATO & A. VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW*, 598 *passim* (2d ed. 1977).

<sup>169</sup> Mitchell, *The Use of Special Districts in Financing and Facilitating Urban Growth*, 5 *URB. LAW* 185, 192 (1973).

<sup>170</sup> N.Y. AGRIC. & MKTS. LAW § 305(5) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(E) (Cum. Supp. 1979).

<sup>171</sup> Mitchell, *supra* note 169, at 216-17, discusses the ability of special districts to both facilitate and perhaps stimulate development:

There are indications that the use of special districts in the development of land has a stimulating as well as an enabling effect. Certainly, the availability of the district mechanism alone will not cause growth to occur. Certain developmental momentum is required to justify the risks inherent in development. Special district use is limited, therefore, to activating growth opportunities that already exist, but lie dormant. The stimulation offered by the use of special districts stems from the districts' ability to tap the international bond market as a source of credit—a source not otherwise available for assisting urban development.

The use of special assessment financing for local improvements has become more attractive to local governments faced with constitutional or statutory debt limitations. See Makielski, *The Special District Problem in Virginia*, 55 VA. L. REV. 1182, 1885-88 (1969). Private land developers are also increasingly relying upon special assessment taxation to finance local improvements. See Comment, *The Use of Special Assessment Districts and Independent Special Districts as Aids in Financing Private Land Development*, 53 CALIF. L. REV. 364, 365-67 (1965). See generally D. MANDELKER & D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 327, 353 (1977); O. OLDMAN & F. SCHOETTLE, *STATE AND LOCAL TAXES AND FINANCE* 412-42 (1974); Antieau, *The Special Assessments of Municipal Corporations*, 35 *MARQ. L. REV.* 315 (1952).

<sup>172</sup> 256 Cal. App. 2d 271, 63 Cal. Rptr. 889 (1967).



by the residents to preserve their agricultural way of life.<sup>173</sup> The court concluded that the residents of Hidden Valley shared a "widespread and rationally based fear that with the advent of Metropolitan Water District water within the Valley, subdivision and urbanization of the entire Valley would inevitably follow and the Valley's present limited agricultural way of life would be destroyed."<sup>174</sup> Two large ranchers in the area, however, wanted more water for irrigation purposes and sought exclusion from the district. The court denied relief:

Their argument is essentially that the District is an illegal one, fraudulent in nature and organized in abuse of the power delegated by the Legislature to form and maintain local water districts, since the District's sole *raison d'être* is to serve as an illegal regulator of land use or as an illegal zoning agency. These damning conclusions stem from the fact that the District does not provide and has not provided water for use within the district. We agree that a district of this type is normally formed and maintained for the purpose of bettering either the water supply or the water service, or both, within its boundaries and that this district has not done so and has no present plans for doing so. But in our view a water district may properly be formed and maintained for largely negative purposes as well as for positive purposes. This district was quite evidently formed and has been maintained to prevent the importation of Metropolitan Water District water into Hidden Valley and the subdivision and urbanization of that valley which the great majority of people within the Valley feel would then inevitably occur. We see nothing wrong in the use of a water district for this purpose. The people of Hidden Valley are using this local public entity to control and determine for themselves their own water future—in this case, for the present, negatively instead of positively. By the exercise of their right of political self-determination, they thereby, as an incident thereto, regulate the kind of land use that can prevail within the Valley.<sup>175</sup>

Ironically, the residents of Hidden Valley were allowed to utilize the special district concept to forestall construction of public works they feared would lead to increased urbanization.

The limitations on special assessment financing in the agricultural districting acts are likewise designed to inhibit the urbaniza-

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<sup>173</sup> *Id.* at 274, 63 Cal. Rptr. at 891. Donald Hagman has suggested that the scheme was designed to "exclude undesired immigrants." D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 247 (1971).

<sup>174</sup> 256 Cal. App. 2d at 288, 63 Cal. Rptr. at 899.

<sup>175</sup> *Id.* at 285, 63 Cal. Rptr. at 897-98.

tion process. By providing for comprehensive planning in the district formation process, however, the New York and Virginia statutes can allow for more rational land utilization policies than might result from special district incorporation. In addition, because individual landowners can elect to withdraw from locally initiated districts, problems like those which prompted the *Hidden Valley* litigation should not arise.<sup>176</sup> Thus, the districting acts may serve to relieve developmental pressure on farmland due to public improvements financed through special assessments, while simultaneously providing the necessary leeway for farmers who may demand increased public services to develop more intensive agricultural operations.<sup>177</sup>

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<sup>176</sup> In New York, for example, a district landowner seeking annexation to a municipal water district may elect to withdraw from the agricultural district and apply for an agricultural value assessment as an individual landowner. This alternative requires an eight-year commitment to continued agricultural use in return for preferential taxation, and is not subject to the limitation on the power of certain public service districts to impose benefit assessments for special ad valorem levies. N.Y. AGRIC. MKTS. LAW § 306 (McKinney Supp. 1978-79). Similarly, a Virginia farmland owner may elect to discontinue his association with an agricultural district and seek use value assessment pursuant to VA. CODE § 58-769.8 (Cum. Supp. 1979). Of course, this flexibility may also allow individual landowners to frustrate effective land use policy by withdrawing from districts and developing property for more intensive uses.

<sup>177</sup> Two decisions by the State Board of Equalization and Assessment in New York suggest that these provisions may be rather strictly construed. The New York provision states:

Within improvement districts or areas deemed benefited by town improvements for sewer, water, lighting, non-farm drainage, solid waste disposal or other land-fill operations, no benefit assessments or special ad valorem levies may be imposed on land used primarily for agricultural production within an agricultural district on the basis of frontage, acreage, or value, except a lot not exceeding one-half acre surrounding any dwelling or non-farm structure located on said land unless such benefit assessment or ad valorem levies were imposed prior to the formation of the agricultural district.

N.Y. AGRIC. & MKTS. LAW § 305(5) (McKinney Supp. 1978-79). The Virginia provision is substantially similar. See VA. CODE § 15.1-1512(E) (Cum. Supp. 1979).

The State Board of Equalization and Assessment was asked whether these provisions would impose limitations on the financing of a county-wide collection and disposal system for solid waste. The local costs for this system were to be raised by a general tax levy. The Board noted that the districting law limited only special ad valorem levies or special assessments imposed upon benefited real property. The former is a charge for a special district improvement or service imposed upon benefited property in the same manner as taxes for municipal purposes; the latter is defined as a charge imposed upon benefited property in proportion to the benefit received by such property to defray the cost of a special district improvement or service. N.Y. REAL PROP. TAX § 102(14), (15) (McKinney 1972). Because general tax levies are imposed without reference to benefits to particular property, the Board concluded that the districting law limitations would not apply to the county's waste disposal system. 5 Ops. N.Y. SBEA 90 (1975).

In another opinion, the Board concluded that the agricultural districting limitations would not apply to the benefit assessments imposed by a village for construction of a sewer system. This decision was based on the fact that the definition of "special district" provides only for

As an additional incentive for agricultural districting, both statutes limit local regulations within districts.<sup>178</sup> In New York, for example, the law provides:

No local government shall exercise any of its powers to enact local laws or ordinances within an agricultural district in a manner which would unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of the act unless such restrictions or regulations bear a direct relationship to the public health or safety.<sup>179</sup>

Because the purpose of both statutes is to conserve, protect and encourage the development of agricultural resources,<sup>180</sup> the provisions would seem to restrict the right of local governments to frus-

town or county improvement districts and does not include special districts formed by villages. N.Y. REAL PROP. TAX § 102(16) (McKinney 1972). See 2 OPS. N.Y. SBEA 113 (1973).

<sup>178</sup> N.Y. AGRIC. & MKTS. LAW § 305(2) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(B) (Cum. Supp. 1979).

<sup>179</sup> N.Y. AGRIC. & MKTS. LAW § 305(2) (McKinney Supp. 1978).

<sup>180</sup> The New York Act states as its declaration of legislative findings and intent:

It is the declared policy of the state to conserve and protect and to encourage the development and improvement of its agricultural lands for the production of food and other agricultural products. It is also the declared policy of the state to conserve and protect agricultural lands as valued natural and ecological resources which provide needed open spaces for clean air sheds, as well as for aesthetic purposes. The constitution of the state of New York directs the legislature to provide for the protection of agricultural lands. Agriculture in many parts of the state is under urban pressure from expanding metropolitan areas. This urban pressure takes the form of scattered development in wide belts around urban areas, and brings conflicting land uses into juxtaposition, creates high costs for public services, and stimulates land speculation. When this scattered development extends into good farm areas, ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements. Many of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes. Certain of these lands constitute unique and irreplaceable land resources of statewide importance. It is the purpose of this article to provide a means by which agricultural land may be protected and enhanced as a viable segment of the state's economy and as an economic and environmental resource of major importance.

N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 1972).

Similarly, the Virginia act provides:

It is State policy to conserve and protect and to encourage the development and improvement of its agricultural and forestal lands for the production of food and other agricultural and forestal products. It is also State policy to conserve and protect agricultural and forestal lands as valued natural and ecological resources which provide essential open spaces for clean air sheds, as well as for aesthetic purposes. It is the purpose of this chapter to provide a means by which agricultural and forestal land may be protected and enhanced as a viable segment of the State's economy and as an economic and environmental resource of major importance.

VA. CODE § 15.1-1507 (Cum. Supp. 1979).

trate these goals.<sup>181</sup> One commentator has concluded that these provisions insulate district landowners from the regulation of farm odors.<sup>182</sup> As a practical matter, however, the statutes prohibit only those regulations that "unreasonably" restrict farm practices, and even then only when the regulations bear no direct relationship to public health or safety. Thus, the limitation is really nothing more than a functional definition of the police power of local governments.<sup>183</sup> In other words, the provisions add little, if anything, to existing limitations on the exercise of governmental power in rural areas.<sup>184</sup>

Moreover, these limitations, as well as the other limitations on local governmental powers contained in the agricultural districting laws, could come into direct conflict with constitutional home rule provisions in some jurisdictions. For example, the Colorado Constitution dictates that home rule ordinances will supersede any conflicting state laws.<sup>185</sup> Thus, the limitation on local ordinances within agricultural districts would likely be preempted by home rule laws in that state. Similarly, the Illinois legislature is generally prohibited from limiting the right of home rule units to make special assessments.<sup>186</sup> Thus, legislative curtailment of the home rule power to create and tax special benefit districts within agricultural areas

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<sup>181</sup> As a general rule, local government ordinances must be in harmony with the public policy of a state as found in its constitution and statutes. See 5 McQUILLIN, MUNICIPAL CORPORATIONS §§ 15.20-.22 (3d rev. ed. 1969).

<sup>182</sup> Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369, 404-05 (1977).

<sup>183</sup> See 7 McQUILLIN, MUNICIPAL CORPORATIONS §§ 24.198-24.742 (3d rev. ed. 1968).

<sup>184</sup> See 6 McQUILLIN, MUNICIPAL CORPORATIONS §§ 24.34, 24.09, 24.46 (3d rev. ed. 1969). See also C. ANTEAU, COUNTY LAW ch. 35 (1966).

<sup>185</sup> COLO. CONST. art. XX, § 6. See also *Four-County Metropolitan Capital Improvement Dist. v. Board of County Comm'rs*, 149 Colo. 284, 369 P.2d 67 (1963). Accord, ANTEAU, MUNICIPAL CORPORATION LAW §§ 3.14-.15 (1979).

Similarly, the Illinois courts have held that a home rule government may preempt statutory provisions enacted prior to the effective date of the constitutional provisions granting home rule powers to counties and municipalities. See, e.g., *Witvoet v. Quinlan*, 41 Ill. App. 3d 724, 354 N.E.2d 524 (1976) (state farmers' protection statute superseded by Cook County ordinance prohibiting the placing, unpacking and sorting of goods and soliciting of trade on the public streets of Chicago).

<sup>186</sup> ILL. CONST. art. VII, § 6(l) provides:

The General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government or (2) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

may be ineffectual in that jurisdiction.<sup>187</sup> Clearly, legislatures considering limitations on the powers of local governmental units within agricultural districts should review the relevant constitutional provisions concerning home rule powers in their states.

The final incentive for agricultural district landowners is also unlikely to provide any additional substantive rights to participating farmers. Both the New York and Virginia statutes contain a general policy directive to all state agencies to encourage the maintenance of farming in agricultural districts.<sup>188</sup> The acts require state agencies to modify their administrative regulations and procedures to encourage commercial agriculture.<sup>189</sup> The statutes do not specify what procedures should be adopted; they merely dictate public policy. But, as one commentator has pointed out,<sup>190</sup> such declarations could prove significant when courts review agency actions affecting district landowners.

For example, courts at both state and federal levels have held that an agency may be obliged to consider legislative policies outside the scope of its own enabling legislation.<sup>191</sup> These obligations are most clearly imposed when the enabling legislation requires the agency to consider the public interest (or a similar standard) before acting.<sup>192</sup> Thus, a state highway commissioner or a public service commissioner may, in an appropriate situation, be required to consider the impact of proposed activities affecting landowners within agricultural districts.<sup>193</sup> If the proposal could have an adverse effect on

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<sup>187</sup> See generally Michael & Norton, *Home Rule in Illinois: A Functional Analysis*, 1978 U. ILL. L.F. 559, 595-96.

<sup>188</sup> N.Y. AGRIC. & MKTS. LAW § 305(3) (McKinney Supp. 1978-79); VA. CODE § 15.1-1512(C) (Cum. Supp. 1979).

<sup>189</sup> For example, the New York provision states:

It shall be the policy of all state agencies to encourage the maintenance of viable farming in agricultural districts and their administrative regulations and procedures shall be modified to this end insofar as is consistent with the promotion of public health and safety and with the provisions of any federal statutes, standards, criteria, rules, regulations, or policies, and any other requirements of federal agencies, including provisions applicable only to obtaining federal grants, loans, or other funding.

N.Y. AGRIC. & MKTS. LAW § 305(3) (McKinney Supp. 1978-79).

<sup>190</sup> Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 209-18 (1972).

<sup>191</sup> *Zabel v. Tabb*, 430 F.2d 199, 209 (5th Cir. 1970) ("Governmental agencies in executing a particular statutory responsibility ordinarily are required to take heed of, sometime effectuate and other times not thwart other valid statutory governmental policies."); *Blue Cross v. State Corp. Comm'n*, 211 Va. 180, 176 S.E.2d 439 (1970). These cases are discussed in Howard, *supra* note 190, at 210-11.

<sup>192</sup> Howard, *supra* note 190, at 211-12.

<sup>193</sup> Virginia specifically limits the power of eminent domain exercised by the state highway commissioner to be in accordance with the provisions of the agricultural districting law. VA. CODE § 33.1-89.1 (Cum. Supp. 1979).

commercial agriculture within a district, then perhaps alternatives should be considered. The agency could still conclude that the original proposal best serves the public interest. But the presence of a stated public policy in favor of maintaining viable farming in agricultural districts might serve to add another factor to the "judicially enforceable checklist of considerations that agencies must include in their decisionmaking processes."<sup>194</sup> However, such procedural safeguards are certainly not mandated by the agricultural districting laws, and courts may be unwilling in many circumstances to fashion remedies solely on the basis of the policies set forth in the districting acts.<sup>195</sup>

### CONCLUSION

In summary, the agricultural districting laws of New York and Virginia represent an attempt to preserve farmland by coordinating real property tax concessions with limitations on certain local governmental activities tending to facilitate development in fringe areas. The most important of these limitations are the restrictions on the exercise of eminent domain and funding of public works within districts and the prohibition of special benefit assessments on qualifying land. Together, these provisions serve to provide local governments with some influence over the location of major public works within districts, particularly in the Virginia Law.<sup>196</sup> Thus, to an extent, the districting laws pay respect to those authorities of land planning law who urge that examination of the property tax system and the planning of public facilities must precede any serious work on land use controls.<sup>197</sup>

Although the districting laws may be sound as far as they go, they

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<sup>194</sup> Howard, *supra* note 190, at 217.

<sup>195</sup> See Howard, *supra* note 190, at 216. Professor Howard points out that such procedural mechanisms could be guaranteed by adopting provisions similar to those in the National Environmental Policy Act of 1969, including the requirement of environmental impact statements and the stipulation that federal agencies proposing major action of significant impact on the environment must obtain comments from other agencies and must make those comments public.

<sup>196</sup> See notes 131-163, 170-177 & accompanying text *supra*.

<sup>197</sup> See references to Williams in notes 1-4, 41-43, 116-118 & accompanying text *supra*. Professor Williams would probably be particularly pleased with the New York act's insistence on comprehensive planning at both state and local levels, the mechanism for advance designation of large areas of "unique and irreplaceable agricultural lands" by a state agency, and the provisions for reimbursement of local funds by the state for half of the revenue lost due to the creation of state-initiated districts. See 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* §§ 163.16-.22 (1974). As noted previously, however, the last two elements of the New York program have yet to be utilized. See notes 100-110 & accompanying text *supra*.

simply do not go very far. For example, many commentators question the efficacy of differential taxation to keep open lands undeveloped.<sup>198</sup> In addition, as this brief study illustrates, the limitations on governmental activities within districts face significant obstacles in many jurisdictions. The attempt to delegate authority to local governments to exercise some control over the location or financing of public facilities within districts, for example, may be frustrated by actions of other governmental entities vested with authority or equal or greater dignity.<sup>199</sup> Finally, the agricultural districting laws put a high premium upon voluntary compliance and local initiative. In both states, landowners must generally take the first step to designate areas of nondevelopment, and yet under both statutes, individual landowners are generally free to leave the program if and when their desires change.<sup>200</sup>

This emphasis on voluntary compliance could engender criticism of the programs' potential for preserving agricultural land. Yet such criticism may be misguided. Legislatures contemplating agricultural districting initiatives might be better encouraged to consider the acts as merely the first stage in the development of a comprehensive program for the preservation of agricultural resources. These acts set in motion the machinery for coordinating the real property tax system and the planning of public facilities. They encourage state agencies to at least consider the impact of administrative regulations and procedures on commercial agricultural within districts.<sup>201</sup> And they encourage landowners and local government officials to participate in planning policy.<sup>202</sup> If, at a later stage, a

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<sup>198</sup> See authorities cited note 111 *supra*. See generally Keene, *Differential Assessment and the Preservation of Open Space*, 14 URB. L. ANN. 11, 39-51 (1977).

<sup>199</sup> See notes 164-66, 185-87 & accompanying text *supra*.

<sup>200</sup> See notes 11-15, 36-39 & accompanying text *supra*.

<sup>201</sup> See notes 188-95 & accompanying text *supra*.

<sup>202</sup> Participation in the New York program has been high. See Conklin & Leshner, *Farm Value Assessments as a Means of Promoting Efficient Farming in Urban Fringes*, 48 J. AM. SOC'Y FARM MANAGERS & RURAL APPRAISERS 42, 45 (1978):

About 4.7 million acres have been placed within the 336 agricultural districts formed in the six years since the law was passed, and district formation continues. Districts initially were formed principally in rural areas where farmers felt threatened by proposed government projects or encroaching recreationists. But within recent years a substantial amount of urban fringe acreage has been placed in agricultural districts. As of August, 1976, approximately 28.9% of all districted acreage was located in 16 of the state's 21 counties classified as Standard Metropolitan Statistical Areas outside of New York City, and 23.4% of all districted acreage was within 25 miles or less of an urban area of more than 50,000 population.

Thus, about one-half of the state's farmland is now in districts. *Id.* at 543 n.14. Of course,

consensus can be reached on the important policy questions that confront any open space preservation scheme, then perhaps more ambitious programs can be superimposed on existing legal structures.<sup>203</sup> Until that time, of course, the success of the agricultural districting concept would depend entirely upon the willingness of local governments, state agencies, individual landowners and possibly the courts to work toward a common goal.

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these figures provide little information on the actual impact of the agricultural districting program on farmland preservation.

<sup>203</sup> New York has already begun an evolution along these lines. See Peterson & McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447 (1977). See also Note, *Preserving Scenic Areas: The Adirondack Land Use Program*, 84 YALE L.J. 1705 (1975).