# A Model State Land and Trust Act

by

John McClaughry

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# STATUTE

## A MODEL STATE LAND TRUST ACT

JOHN MCCLAUGHRY*

### *Introduction*

Over the past two decades the conversion of prime agricultural lands to development has increasingly become a matter for public concern.[1] From 1954 to 1974, the amount of land devoted to farming in the United States decreased by 119 million acres, an area nearly three times the size of New England.[2] There are two basic reasons for this decline: the demand for more intensive land development to meet the needs of a rising population and growing economy; and the declining attractiveness of farming, especially on the smaller, less mechanized, marginal farms.

* A.B., Miami (Ohio) 1958; M.S., Columbia 1960; M.A., U. of California (Berkeley) 1963. Fellow of the Institute of Politics, Harvard University, 1967-68; Member, Vermont House of Representatives 1969-73; President, Institute for Liberty and Community, Concord, Vermont.

1 *See generally*, Barnes, *Special Farmland Assessment*, in THE PEOPLE'S LAND 48-51 (P. Barnes ed. 1975); S. SIEGEL, THE LAW OF OPEN SPACE (1960); T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND (Economic Research Service, U.S. Dep't of Agriculture, Agricultural Economic Report No. 256, 1974); Address by Thomas F. Hady, Seminar on Taxation of Agricultural and Other Open Land, Michigan State University, April 1, 1971 (on file with *Harvard Journal on Legislation*); Bab, *Taxation and Land Use Planning*, 10 WILLAMETTE L.J. 439 (1974); Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California 1968-1969*, 24 NAT'L TAX J. 449 (1971); Cooke & Power, *Preferential Assessment of Agricultural Land*, 47 FLA. BAR A.J. 636 (1973); Hagman, *Open Space Planning and Property Taxation — Some Suggestions*, 1964 WIS. L. REV. 628 (1964); Halpin, *How Can We Save Open Space?*, PEOPLE & TAXES, July, 1974 at 7; Heller, *Theory of Property Taxation and Land Use Restriction*, 1974 WIS. L. REV. 751 (1974); Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECONOMICS 343 (1963); Stocker, *Taxing Farmland in the Urban Fringe*, 30 TAX POLICY 3 (December 1963); Wershow, *Ad Valorem Taxation and its Relationship to Agricultural Land Tax Problems in Florida*, 16 U. FLA. L. REV. 521 (1964); Woodruff, *How Changing Tax Laws Affect Land Development*, 20 URBAN LAND 1 (1961); Zimmerman, *Tax Planning for Land Use Control*, 5 URBAN LAWYER 639 (1973); Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158 (1970); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960); Note, *Taxation Affecting Agricultural Land Use*, 50 IOWA L. REV. 600 (1965). *See also* sources cited in note 28 *infra*.

2 U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 597 (95th ed. 1974). Some decline could be seen in all but three states (Alaska, New Mexico, and Oklahoma) between 1959 and 1969. New England's decline was most marked among general areas with 40 percent (60.2 million acres) of its 1959 farmland being converted by 1969.

This latter reason has a number of components. If entrepreneurial labor and unpaid assistance from family members are taken into full account, the return to the farm family on its investment usually is low. There are complicated government regulations to comply with; an uncertain market cycle; the vagaries of the weather; the usual need for incurring heavy indebtedness; and the difficulty of obtaining steady and capable farm labor. Finally, there is the burden of property taxation, especially difficult for a land intensive activity like farming.

Many of these factors behind the declining attractiveness of farming are beyond the effective reach of public policy initiatives. One major one that is not is property taxation. Thus, it is farm property taxation legislation that has been the chosen technique of those concerned about preventing the forced conversion of farmland to more intensive uses.[3] This article describes the various types of tax techniques that, in response to such concern, have been employed or proposed to alleviate the tax pressure on farm and other open space lands. It then presents a model state Land Trust statute designed to prevent tax-forced conversion of farmlands to more intensive uses through public leasing of farm development rights.

## I. Interests Favoring Farm Tax Legislation

Public concern with preserving farmland and other open spaces originated with respect to the "exurban fringe" around metropolitan areas, where the demand for intensive land development is strongest. Later, however, it also came to embrace more remote, rural areas with high potential for vacation home and resort development within reasonably easy reach of the larger population centers.

Those concerned about farm conversion in the exurban fringe usually have been of urban/suburban orientation. They perceive the nearby farm not so much as the mainstay of the local economy and producer of foodstuffs, but as a privately managed park. They

3 *See* Section II *infra.*

are concerned about its conversion to more intensive uses because such conversion would: (a) deprive the area of environmental amenities (e.g., green belt and open space); (b) create problems of urban density (e.g., traffic congestion); and (c) especially in the case of residential development, cause additional local tax burdens well in excess of new tax revenue as a result of a large influx of school age children and the necessity of extending water, sewer and highway services.[4]

Those concerned about the farm conversion in more remote rural areas share these apprehensions, but have several of their own as well. They do not want to lose the contribution of the farmer to the local farm-oriented economy, a loss far more important there than in a large metropolitan area. They do not want to become a tourist-oriented economy. They do not welcome the prospect of a change in the political complexion of the area caused by permanent settlement of large numbers of urban expatriates accustomed to higher levels of public services and more tolerant of accompanying governmental regulations. And, finally, they resent absentee landowners who all too often post their lands against hunting, fishing, and, in more recent years, snowmobiling.[5]

In addition to these two groups, new support for farm preservation efforts recently has come from a third: those who discern a need to preserve productive farmland to alleviate the world food shortage. With more and more Americans alarmed about world population growth and the prospect of famine not only in the "Third World," but even in the United States, retaining farmland is increasingly viewed by some as more than preservation of suburban amenities or a rural way of life; it is seen as an investment in national survival.[6] With the growing popularity of "gloom and doom" theories forecasting an "ecospasm" with major disruption

4 Short-run additional tax burdens might be offset in the longer run by increased revenues resulting from a broadened economic base, but only at the expense of an increase in crowding and urbanization which these suburban taxpayer-environmentalists seek to avoid.

5 *See, e.g.*, W. WHYTE, THE LAST LANDSCAPE 25-26 (1970). Whyte generally is credited with popularizing the "conservation easement" approach to open space preservation.

6 *See, e.g.*, Warren, *Agricultural Lands — California's Response to Worldwide Food Crisis*, CALIFORNIA TODAY, Oct. 1974, in 120 CONG. REC. E 6856 (daily ed. Nov. 26, 1974).

of transportation and commerce, many have expressed an active interest in having a reliable source of food very close to home.[7]

Over the past two decades at least 31 states have responded to the demands of these groups by enacting various statutes aimed at preserving farmlands, timberlands, and open spaces, including in some cases golf courses.[8] The Maryland preferential assessment law of 1956 led the way,[9] although developments in the subsequent five years included a governor's veto, a veto override, a repeal one year later, a reenactment the following year,[10] two successive holdings of unconstitutionality by the Maryland Court of Appeals in 1960 (with two separate rationales),[11] two subsequent constitutional amendments,[12] and a corrective reenactment.[13]

Reflecting the different concerns of the groups pushing for such legislation, the rationales given for state action in this area generally have fallen into two main categories: tax equity and the prevention of intensive development.[14] Those who stress the tax equity rationale, primarily farmers themselves, argue that the burden of property taxation, measured as a fraction of income, falls more heavily on farmers than on the remainder of the population. Nationally, according to the U.S. Department of Agriculture,

> real property taxes on U.S. farms in 1971 amounted to an estimated 7.6 percent of the personal income of the farm population, up from 5.7 percent in 1961. This compares with total property tax levied (real and personal) of 4.4 percent of personal income for the Nation as a whole in 1971 and 4.3 per-

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7 *See generally* H. BROWNE, HOW YOU CAN PROFIT FROM THE COMING DEVALUATION (1970); A. TOFFLER, THE ECOSPASM REPORT (1975); R. VACCA, THE COMING DARK AGE (1974).

8 *See* notes 24, 25 & 29 *infra.*

9 Act of Feb. 7, 1956, ch. 9, [1956] LAWS OF MD. 10 (vetoed 1955; repassed 1956).

10 Act of April 10, 1957, ch. 680, [1957] LAWS OF MD. 1100.

11 State Tax Comm. v. Gales, 222 Md. 543, 161 A.2d 676 (1960). (Art. 81, § 19(b) of the Maryland Code held unconstitutional as an attempt to set up a separate classification of land for tax purposes, thereby controverting Art. 15 of the Declaration of Rights which required uniformity of taxing of land within a taxing district).

12 Act of March 23, 1960, ch. 64, [1960] LAWS OF MD. 185; Act of March 23, 1960, ch. 65, [1960] LAWS OF MD. 186 (amending, respectively, Articles 15 and 43 of the Declaration of Rights of the Maryland Constitution).

13 Act of April 24, 1961, ch. 455, [1961] LAWS OF MD. 629, as amended MD. ANN. CODE art. 81, § 19(b) (1957).

14 These rationales are used not only as political arguments, but also to attempt to satisfy the constitutional requirements of a "public purpose." *See generally,* J. METZENBAUM, THE LAW OF ZONING 1627 (2d ed. 1955).

> cent in 1961. . . . These data suggest that the average farmer does pay a larger proportion of his income in property taxes than does the average nonfarmer.[15]

The national data, however, obscures the effect on strategically placed farmland, either in the exurban fringe or in desirable rural vacation areas. In New England, where land in both areas is affected, property taxes averaged 11.1% of net farm income in 1973, with a high of 21.4% in Massachusetts.[16] The percentage for New York state was 17.7, and Michigan 13.8.[17] Needless to say, the burden is very much higher on selected parcels in the path of development. By contrast, in states like Arkansas and Louisiana, where farmland is located away from the exurban fringe and vacation areas, the figures were 1.8 and 1.6 percent respectively.[18]

Included in the equity argument is the proposition that since farmers do not themselves demand expensive public services, not only should they not be taxed more heavily than their nonfarm neighbors, they should actually be taxed less. This feeling was well described by William H. Whyte in his book, *The Last Landscape:*

> The farmer says that he is being punished when he should be rewarded. The reason the taxes have to go up is those new people in the subdivisions. They are the ones who need the extra sewer lines and the schoolrooms and the fire engines. He does not. His property, indeed, is a boon to the community. By keeping it open, he provides scenery and breathing space — and he spares the community the burden of yet another subdivision. Why, then, sock him? It would pay the community to keep his taxes low just to have him stay around and keep the land open. Come to think of it, some farm bureaus have suggested, it would pay the community not to tax him at all.[19]

The equity argument thus stresses the proposition that farmland owners not only are being taxed more heavily than nonfarmers, but that even equal taxation would be unfair in light of the level of services consumed.

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15 HADY & SIBOLD, *supra* note 3, at 7-8.

16 STAM & COURTNEY, FARM REAL ESTATE TAXES: RECENT TRENDS AND DEVELOPMENTS 14-15 (Economic Research Service, U.S. Dep't of Agriculture RET-14, March 1975).

17 *Id.*

18 *Id.*

19 WHYTE, *supra* note 5, at 120.

To this contention, however, there are at least two rebuttals. First, if tax equity really is the concern, the focus of remedial action should be those who suffer tax inequities, a class which may not include all farmers, and which certainly includes numerous other taxpayers, such as pensioners.[20] Second, it can be argued that the burden of a particular form of taxation is not as relevant as the net balance of all governmental burdens, offset by all forms of governmental benefits, federal, state and local. Thus, farmers who are heavily burdened by the local property tax may also be receiving federal income tax breaks[21] and crop subsidies,[22] which, in the aggregate, may result in reasonably equitable treatment.

The second rationale for action at the state level to preserve farmlands, the need for orderly and efficient growth and the protection of the natural environment from intensive development, is often advanced by nonfarmers. In a rapidly urbanizing metropolitan area, open space land, including farmland, takes on a special value as an environmental amenity. In addition, its continuation as farmland prevents the burdens associated with new development — congestion, density, water and sewer extensions, road construction and maintenance, police and fire protection, and increased school construction and operating costs. This rationale thus looks at farmland along with other "open space" land not so much as land in farming but rather as land whose development should be prevented. Preventing development becomes the logical objective rather than preserving the business of farming.

It should be noted that the objectives of tax equity and the

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20 *See* Paglin & Fogarty, *Equity and the Property Tax: A New Conceptual Focus*, 25 NAT'L TAX J. 557 (1972).

21 *See, e.g.*, INT. REV. CODE OF 1954, §§ 175, 180, 182, 268, 278, 1231(b)(3), 1231 (b)(4), 1251, 1252. *See generally* Allington, *Farming as a Tax Shelter*, 14 SO. D.L. REV. 181 (1969). Allington states: "Most of the tax benefits of a farm investment stem from the special accounting methods which farmers are allowed to use in computing their taxable income, coupled in certain instances with favorable capital gains treatment." But he points out that the greater tax benefits accrues not to the farmer but to the high bracket investor with substanial nonfarm income sources who can better utilize the advantages of deferred tax liability and capital gains treatment. *Id. See also* Davenport, *Farm Losses Under the Tax Reform Act of 1969: Keepin' 'Em Happy Down on the Farm*, 12 B.C. IND. & COM. L. REV. 319 (1971); Hjorth, *Farm Losses and Related Provisions*, 25 TAX L. REV. 581 (1970).

22 *See* L. SOTH, AN EMBARRASSMENT OF PLENTY 147-50 (1965); HOUSE COMM. ON AGRICULTURE, 91ST CONG., 1ST SESS., GOVERNMENT SUBSIDY HISTORICAL REVIEW 63-68 (1970).

prevention of intensive development are not the same, and may lead in somewhat different directions.[23] For example, from a tax equity standpoint, a 200 acre farm well inside the suburbs may cry out for tax relief, but from the standpoint of minimizing the costs of development to the public, it might be preferable to let that farm be developed, while preventing conversion elsewhere where public services would be more expensive. On the other hand, preserving a remote hill country farm where there is no pressure for development would appeal to no one concerned about the shape of growth, but the tax equity concern still might argue for some remedy. Since the political coalition for open lands preservation is likely to be composed of two quite different groups (farmers and suburban taxpayer-environmentalists), it is especially important that those considering legislation to preserve farmlands and open space keep the differences between these objectives clearly in mind.

## II. Attempted Statutory Solutions

At least six types of public programs have been attempted in the United States and Canada to deal with the problems of preserving farmland and/or open space. First, there is the *preferential assessment* approach.[24] Under this approach, land which qualifies — generally "agricultural land" — is assessed for tax by the local jurisdiction at its value for agricultural use rather than at market value. Whenever the owner wishes to convert into a more intensive use, local zoning permitting, he may do so without incurring any penalty or recapture of benefits. Preferential assessment is much favored by landowners, but widely criticized as a haven for speculators.[25] For that reason it is in increasing disfavor. In addi-

23 *See generally* Hady, *Differential Assessment of Open Space and Farmland*, in Senate Comm. on Agriculture and Forestry, 93d Cong., 2d Sess., Agriculture, Rural Development and the Use of Land 85-91 (Comm. Print 1974).

24 Preferential assessment statutes include: Ark. Stat. Ann. § 84-483 (Supp. 1973); Colo. Rev. Stat. Ann. § 137-1-3 (Supp. 1967); Del. Code Ann. tit. 9, § 8329 (Supp. 1974); Fla. Stat. Ann. § 193.461 (Supp. 1975) (farmland); Ind. Ann. Stat. § 6-1-26-2 (Burns 1972); Iowa Code Ann. § 404.15 (Supp. 1974); Me. Rev. Stat. Ann. tit. 36, § 564 (1964) (forest land); N.M. Stat. Ann. § 72-2-14.1 (Supp. 1973); S.D. Comp. Laws Ann. § 10-6-31 (Supp. 1967); Wyo. Stat. Ann. § 39-82(c) (Supp. 1973).

25 A reduction in assessed valuation on land increases its net yield and thus

tion, the entire cost of such a program is borne by the local taxing authority through the decline in property tax revenues, absent provisions for state reimbursement.

A modification of this method is *deferred taxation.*[26] Preferential assessment for agricultural land is combined with some kind of recapture provision ("rollback"), a conversion penalty clause, or a separate conveyance tax when the use is subsequently changed as an incentive to preserve the undeveloped character of the land. A severe example is the Oregon law, which provides a change of use penalty depending on years of benefit of up to ten times the amount of tax benefit accrued to land in a farm use zone.[27] For unzoned, specially assessed land there is a recapture of the deferred taxation for up to ten previous years carried forward at six percent interest.[28] The deferred taxation approach strikes at the problem of the speculative haven by assessing an economic charge when the land ceases to qualify as agricultural. However, it does not prevent

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increases the present market value. This then reduces the ability of farmers to purchase such lands for agricultural purposes, since the market value for the land is raised by the preferential treatment. Who then would be interested in buying such lands — the bona fide farmer or the speculator who feels the land has future urban use?

Cooke & Power, *supra* note 3, at 640.

26 Deferred taxation statutes include: ALASKA STAT. § 29.53.035 (1962); CONN. GEN. STAT. ANN. §§ 12-107c to 12-107e (1958) (classification); *id.* 12-99 (forest land reclassification penalty); *id.* 12-504a (conveyance tax); *id.* 12-504e (Supp. 1975) (change of use of land tax); HAWAII REV. STAT. § 246-12d (Supp. 1974); ILL. ANN. STAT. ch. 120, §§ 501a-1 to 501a-3 (Smith-Hurd Supp. 1974); KY. REV. STAT. §§ 132.450, 132.454 (1970); ME. REV. STAT. ANN. §§ 590, 591 (Supp. 1973); MD. ANN. CODE art. 81, § 19(b) (1957); MD. ANN. NATURAL RESOURCES CODE § 5-305 (1974) (woodland); MASS. GEN. LAWS ANN. ch. 61, § 1 (Supp. 1975) (forest lands); *id.* ch. 61A, §§ 4, 12, 13; MINN. STAT. ANN. §§ 273.111, 273.112 (Supp. 1974); MONT. REV. STAT. ANN. §§ 84-437.1, 84-437.3, 84-437.4 (Supp. 1974); NEB. REV. STAT. §§ 77-1344, 77-1348 (Cum. Supp. 1974); N.H. REV. STAT. ANN. §§ 79-A:5, 79-A:7 (Supp. 1973); N.J. STAT. ANN. §§ 54:4-23.2, 54:4-23.8 (Supp. 1975); N.C. GEN. STAT. §§ 105.277.4-105.277.5 (Supp. 1974); ORE. REV. STAT. §§ 308.370, 308.395, 308.399 (1974); R.I. GEN. LAWS ANN. §§ 44-27-1, 44-5-39 (1970); UTAH CODE ANN. § 59-5-87, 59-5-91 (1953); VA. CODE ANN. §§ 58-769.9, 58-769.10 (Supp. 1972). Texas amended its constitution in 1966 to mandate tax deferral: TEXAS CONST. art. 8, § 1-d. For a sharp critique of the New Jersey law in practice see J. KOLESAR & J. SCHOLL, MISPLACED HOPES, MISSPENT MILLIONS: A REPORT ON FARMLAND ASSESSMENTS IN NEW JERSEY (1972).

27 ORE. REV. STAT. § 308.399 (1974).

28 ORE. REV. STAT. § 308.395(1) (1974). For critical evaluation of the Oregon law in practice, see Henke, *Preferential Property Tax Treatment for Farmland,* 53 ORE. L. REV. 117 (1974); Roberts, *The Taxation of Farm Land in Oregon,* 4 WILLAMETTE L.J. 431 (1967); Sullivan, *The Greening of the Taxpayer: The Relation of Farm A Zone Taxation in Oregon to Land Use,* 9 WILLAMETTE L.J. (1973).

conversion; an owner willing to incur the charge may convert his land at any time.

Under the third approach, *restrictive agreements*, the landowner enters into an agreement not to change the use of the land for a fixed period, commonly ten years.[29] In return, the land is specially assessed for taxation at some specified less-than-market value. Under the New Hampshire law, for example, a landowner may grant a no-development easement to the local government, with the agreement of the local governing body, for at least ten years.[30] The parcel will then be assessed at current use value.[31] Upon a "demonstration of extreme personal hardship," the landowner may obtain a release from the easement. But to obtain the release he must pay as "consideration" either 6 percent of full value assessment if the easement term has passed the halfway point, or 12 percent if it has not.[32] In addition, a "land use change tax" of 10 percent of assessed value is due upon actual conversion of the land to a non-open space use.[33]

29 Statutes based on the contract or restrictive agreement method of awarding preferential tax treatment include: CAL. GOV'T CODE § 51252 (enforceable restrictions), CAL. REV. & TAX CODE (West Supp. 1975) § 423 (West Supp. 1975) (valuation); FLA. STAT. ANN. § 193.501 (Supp. 1975) (parkland); HAWAII REV. STAT. § 246-12 (Supp. 1974); ME. REV. STAT. ANN. tit. 36, § 589 (Cum. Supp. 1973); MD. ANN. NATURAL RESOURCES CODE § 5-302 (1974) (woodland); N.H. REV. STAT. ANN. § 79-A:15 (Supp. 1973); N.Y. AGRIC. & MKTS. CODE § 306 (Supp. 1975); PA. STAT. ANN. tit. 16, § 11944 (Supp. 1974); VT. STAT. ANN. tit. 24, § 2741 (Supp. 1974). For a description of the New York Agricultural Districts program see H. CONKLIN, RECENT CHANGES IN GOVERNMENTAL MECHANISMS FOR MODIFYING RURAL LAND USE DECISIONS IN NEW YORK STATE (Cornell Agricultural Economics Staff Paper No. 73-22, November 1973).

30 N.H. REV. STAT. ANN. § 79-A:15-21 (Supp. 1973).

31 N.H. REV. STAT. ANN. § 79-A:2(XI) (Supp. 1973) defines "use value" in this context:

> [I]n the case of open space land [use value means] the valuation per acre which the land would command if it were required to remain henceforth in an open space qualifying use. This valuation will be determined by the assessor in accordance with the recommendations of the board for the class, type, grade and location of land under consideration and its income-producing capability.

32 *Id.* § 79-A:19. It should be pointed out that the idea of the easement in common law has historically been fraught with difficulties. For a description of the complexities and problems of an easement approach as utilized to preserve the Lake George, N.Y. area, see Eveleth, *New Techniques to Preserve Areas of Scenic Attraction in Established Rural-Residential Communities — The Lake George Approach*, 18 SYRACUSE L. REV. 37 (1966). For a scholarly treatment that will leave one wishing he had never broached the subject, see Reno, *The Enforcement of Equitable Servitudes in Land*, 28 VA. L. REV. 951, 1067 (1942).

33 N.H. REV. STAT. ANN. 79-A:7 (Supp. 1973).

The restrictive agreement approach differs from the deferred taxation model in that the former requires an exchange of benefits agreement between the landowner and the local government, thus allowing the government some discretion in admitting lands to the program. Under the latter program, any qualified land is automatically entitled to receive benefits without formal agreement with the local government. The two approaches are, however, quite similar in overall effect. In either case the farmer's participation is entirely voluntary and the cost of the program is borne entirely by the local taxing authority.

A more direct approach to preserving agricultural land is compulsory *restrictive zoning*, which simply forbids the conversion of farmland to any more intensive use.[34] A case for enacting this type of statute was made by Professor Heyman as early as 1965.[35] From the standpoint of the enforcing government this technique may appear to be a "free lunch," but in fact it will impose higher property tax costs on the owners of unrestricted property, although these costs tend to be hidden unless the proportion of restrictively zoned land becomes large. From the standpoint of the landowner, the resulting benefit of reduced taxation, coinciding with the reduced value as a result of restricted use potential, must be weighed against the destruction of much of the capital value of the land by governmental fiat.

The most significant drawback of the "agricultural use only" zone is that it raises serious questions of a taking of property under the 5th Amendment of the U.S. Constitution and various similar provisions in state constitutions.[36] In one famous New Jersey case,[37]

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34 Perhaps the nearest approach to a state-level open space zoning scheme is found in Hawaii. HAWAII REV. STAT. § 205-2 (Supp. 1974). Under this law the Land Use Commission classifies all land into one of four categories — conservation, agricultural, rural or urban. Land included in the "agricultural" districts is restricted to traditional agricultural uses. In their detailed description of the implications of the Hawaii act, Bosselman and Callies suggest that restrictive regulatory zoning systems can be planned so as to avoid successful attack as unconstitutional takings. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 5-6, 31 (1972). *See generally*, E. SOLBERG & R. PFISTER, RURAL ZONING IN THE UNITED STATES (Economic Research Service, U.S. Dep't of Agriculture Misc. Pub. No. 1232, 1972).

35 *See* Heyman, *Open Space and the Police Power*, in OPEN SPACE AND THE LAW 5-28 (F. Herring ed. 1965).

36 Almost every state has a constitutional provision specifically prohibiting the state from taking private property without just compensation. *See, e.g.*, ALA. CONST. § 235; ARIZ. CONST. art. 2, § 17; CAL. CONST. art. 1, § 14; MISS. CONST. art. 3, § 17;

a landowner found his land included in a "meadowlands zone," where only certain minor improvements and uses were allowed. He successfully challenged the ordinance as an unconstitutional taking. In striking down the ordinance, the New Jersey Supreme Court said:

> While the issue of regulation as against taking is always a matter of degree, there can be no question but that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water detention basin or open space. These are laudable public purposes. . . . But such factors cannot cure basic unconstitutionality.[38]

The spectre of unconstitutionality has thus been sufficient to prevent the widespread use of compulsory "agricultural use only" zoning despite indications in recent cases of a judicial trend toward allowing ever more confiscatory regulations without requiring compensation.[39] Whether or not a highly restrictive zoning scheme is constitutional, the practice of destroying the capital value of a farm owner, and hence much of his farm credit capacity, without compensation from the public seems a rather backhanded way to assist the farmer to continue farming, and an inequitable method of allocating the cost of controlling development.[40] Not surpris-

PA. CONST. art. 1, § 10. Even if such provision were not operative, every state would still be required to justly compensate for takings under the "due process" clause of the Fourteenth Amendment of the United States Constitution. Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

The "taking issue" is currently the subject of considerable legal effort, as various commentators seek an ironclad rationale for public confiscation of private property rights without compensation. Chief among these efforts is F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE (1973).

37 Morris County Land I. Co. v. Parsippany-Troy Hills Tp., 40 N.J. 539, 193 A.2d 232 (1963).

38 *Id.* at 555, 193 A.2d at 241. The case might be limited in value as a precedent for holding such statutes unconstitutional. The land there involved was marshland, and while the law permitted agricultural uses, as a practical matter the owner could receive virtually no income without (illegally) developing the area for other uses. Query how the case would have come out had the owner been able to successfully farm and to obtain some return from the land in its use-restricted state. The court indeed adds: "Both public uses are necessarily so all-encompassing as practically to prevent the exercise of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required." *Id.*

39 For a survey of recent cases and emerging legal theories, see D. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039.

40 For a critical discussion of the uncompensated police power land use control

ingly, farmers have been less than enthusiastic about such an approach.

The *outright acquisition* of land, often with subsequent lease-back to operating farmers, avoids the thorny problem of the taking issue by fair-value compensation to the previous owner. This, of course, has its defect as well, in that it requires large initial public capital outlays. Yet it has the great virtue of placing the public firmly in control of the future use of the land values that might accrue as a result of public investment decisions.

Abundant use of this acquisition approach has been made recently in Canada. The Prince Edward Island Land Development Corporation, for example, was created by the provincial legislature in 1969.[41] It was designed to buy, hold and reorganize farm units and sell or lease them on a long term basis to farmers needing additional land, with the primary objective of consolidating good agricultural lands so as to increase farmer and agricultural sector income.[42] The Canadian federal government supplied a start-up appropriation of $26 million to cover all capital costs and 75% of administrative costs for the first five years. In fiscal year 1974 the Corporation acquired 179 parcels totalling 14,687 acres at a cost of $1.374 million, and either sold or leased 208 parcels comprising 14,426 acres. In four years the Corporation has also put some 9,000 acres of farmland back into production.[43]

In western Canada, the provincial legislature established the Saskatchewan Land Bank Commission in 1972 to purchase farmland and lease it back at reasonable rates to young farmers.[44] In its first full fiscal year of operation (1972-73) the Commission purchased 168,481 acres in 381 transactions (averaging 458 acres

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approach, with special reference to the Vermont experience, see McClaughry, *The New Feudalism*, 5 ENVIRONMENTAL LAW (forthcoming 1975). *See also*, B. SIEGAN, LAND USE WITHOUT ZONING 203-24 (1972).

41 Land Development Corporation Act, P.E.I. ACTS c. 40 (1969) as amended P.E.I. ACTS c. 21 (1974). *See generally* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, STRUCTURAL REFORM MEASURES IN AGRICULTURE 60, 68-69 (1972).

42 PRINCE EDWARD ISLAND LAND DEVELOPMENT CORPORATION, ANN. REP. 6 (1973).

43 Prince Edward Island Land Development Corporation, Ann. Rep. Chart 3 (1974).

44 Land Bank Act, SASK. STAT. ch. 60 (1922); For commentary, *see* B. Young, *Saskatchewan Government Buys Up Land To Help Keep Farmers Down on the Farm*, Wall St. J., Feb. 5, 1975, at 32, col. 1.

each, for a total acquisition cost of $10.9 million. During the same year it finalized 425 leases of parcels averaging 404 acres each.[45]

As noted, a major problem with the acquisition of fee simple interests is the need for front end or start-up capital, which has perhaps deterred a similar approach in the United States. Another deterrent is the well-known American dislike for public ownership of land, which continues to amaze foreign observers.[46] This hoary tradition may, however, be crumbling, in part due to the realization by its defenders that forcing government to acquire land interests outright may well be preferable to having the value of private land zoned away in the name of environmental protection or "managed growth."

It must be admitted, however, that these two objections still are formidable political obstacles to adoption of an outright acquisition plan despite its acknowledged effectiveness. Some modification of this approach, which preserves as many of its attributes as possible, seems both necessary and desirable. Therefore, American state legislatures interested in farm preservation should consider what appears to be a sensible compromise, the *acquisition of rights* approach, in which the government acquires less than a fee simple interest in farmland or open space property.[47] This is the approach adopted in the model statute set forth below.

The acquisition of rights approach is something of a cross between a restrictive agreement and an acquisition of fee. It differs from the common version of the former[48] in that once the public body has acquired development rights, the owner of the residual fee cannot under any circumstances develop without somehow reacquiring the publicly held rights; under most restrictive agreement laws, the landowner can unilaterally break the

45 SASKATCHEWAN LAND BANK COMMISSION, ANN. REP. 12-13 (1973).

46 *See, e.g.*, R. BRYANT, LAND: PRIVATE PROPERTY, PUBLIC CONTROL 142-43 (1972).

47 *See generally* R. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND 87-92 (1967); C. LITTLE, CHALLENGE OF THE LAND 63-66 (1968); W. WHYTE, OPEN SPACE ACTION 17-21 (Outdoor Recreation Resources Review Comm. Study No. 15, 1962); W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (1959). Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL ESTATE L.J. 330 (1975); Weissberg, *Legal Alternatives to Police Power: Condemnation and Purchase, Development Rights, Gifts*, in OPEN SPACE AND THE LAW 41-51 (F. Herring ed. 1965).

48 *See* text accompanying notes 29-33 *supra*.

agreement and proceed to develop, if he is willing to pay some economic cost specified in the legislation or contractual agreements. An acquisition of rights approach has an additional advantage over restrictive agreements in that the transfer of development rights by deed or lease is a process well understood in the law. Disputes are governed by the concept of possession of interests in land, not by the less well-defined terms of a contract between two parties to behave in specified ways.

Acquisition of rights differs from acquisition of fee simple, of course, in that the residuum of the fee remains with the private landowner, while the public acquires only certain as yet unexercised rights. These rights have an economic value, and are themselves subject to property taxation.

The use of the separable development rights concept should have the long-range effect of creating acceptance for various creative uses of development rights transfer for achieving managed growth objectives. From the standpoint of the landowner concerned about "police power" programs for open space preservation at his expense, this approach has an added virtue of establishing that development rights have an economic value which may not properly be extinguished by police power regulations without compensation to the landowner.

It should be emphasized, however, that the alleviation of tax pressure does not guarantee that land will not ultimately be converted. Skyrocketing land prices in certain farm areas in recent years have sorely tested the resolution of even the most determined farmer to remain in farming.[49] If the objective is to absolutely prevent the conversion of farmland, relieving tax pressure will not be enough. The development rights, at least, will have to be permanently acquired. This, however, will require substantial front-end capital and, quite possibly, the exercise of eminent domain. Neither of these features is included in the proposed model statute.

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49 [Farmers] are mindful of the money they might reap by selling out to a developer, but most of them really do want to continue farming. They have a big capital investment in their operation, and as the smaller farmers in the marginal land give up farming, the big farmers get bigger. Better soil practices, watershed planning, and such are an economic necessity for them, and they will be as activist in conservation programs as the gentry.

W. WHYTE, *supra* note 5, at 26.

A key feature of the proposed statute, though, is an arrangement so that the landowner whose tax burden has been alleviated and the public will fairly share the economic benefits of any subsequent conversion of rights back to private control; it is not sound public policy to create a tax shelter for land speculators at the expense of other taxpayers. And since the program is designed to benefit the public generally, the state should at least share in the revenue loss incurred by local taxing jurisdictions where taxable property rights are conveyed to a state instrumentality.[50] This becomes increasingly important where the local taxing jurisdictions are small.

Perhaps the foremost example of public acquisition of less than fee interests in the United States is the program launched in 1974 in Suffolk County, New York.[51] Pursuant to state[52] and county[53] laws, the County itself is in the process of acquiring development rights to up to 9,000 acres of Long Island farmland, at an anticipated cost of some $45,000,000. When first proposing this program, County Executive John V. N. Klein stated:

> By an intelligent combination of the acquisition of fee title with lease-back to farming interests and the acquisition of development rights to property leaving the farmer in possession with the right to continue agriculture, a major portion of Eastern Suffolk County can be set aside in the immediate future, for all time, for agriculture.[54]

At least four state legislatures — Connecticut,[55] Maryland,[56]

50 Currently, two states subsidize local governments which lose tax ratables through open space preservation programs. See CAL. GOV'T CODE §§ 16140-54 (West Supp. 1975); N.Y. AGRIC. & MKTS. LAW § 305(1)(f) (McKinney 1972).

51 *See generally* J. KLEIN, FARMLANDS PRESERVATION PROGRAM, REPORT TO THE SUFFOLK COUNTY LEGISLATURE FROM THE COUNTY EXECUTIVE (1973); *see also* SUFFOLK COUNTY LEGISLATURE SEL. COMM. ON THE ACQUISITION OF FARMLANDS, REPORT, (Mar. & Nov. 1974).

52 N.Y. GEN. MUNIC. LAW § 247 (McKinney 1965).

53 Suffolk County, N.Y., Act of June 25, 1974, Local L. No. 19.

54 J. KLEIN, *supra* note 51, at *iii*.

55 Conn. H.B. 7598, (Jan. Sess. 1975), provides for creation of an Agricultural Land Preservation Commission which, aided by local planning bodies, would designate agricultural areas throughout the state. The Commission would then offer to buy development rights from landowners in these designated areas. Funds for acquisition would come from an Agricultural Land Preservation Fund launched by a $500 million bond issue, the bonds to be sold as required. The bonds would not be full faith and credit obligations of the state, but would instead be secured by revenues of a 1% real estate conveyance tax. Whether this tax, in a time of depressed

New Jersey,[57] and Vermont[58] — are considering measures to create a state program for either lease or purchase of development rights to eligible land, generally farmland.[59] An acquisition of rights bill also passed the California legislature in 1974, but was vetoed by the Governor.[60]

Interestingly, each of these programs would be funded by assignment of the proceeds of a property transfer tax, a prominent feature of the proposed model statute. Such a tax is relatively

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land values and reduced conveyancing, would yield sufficient revenue to meet the amortization requirements of the outstanding bonds is a question that will no doubt occupy many bond counsels. *See generally* GOVERNOR'S TASK FORCE FOR THE PRESERVATION OF AGRICULTURAL LAND, REPORT (1974).

56 Md. H.B. 18, (1975), provides for formation of agricultural districts by landowner initiative, with public investment in facilities and utilities and exercise of the power of condemnation strictly limited thereafter. Landowners in agricultural districts may sell easements to the state, but the state is not obliged to accept the offers; under proposed amendments, however, the state is required to purchase. Funding is provided from assignment of proceeds of a 1/2% property transfer tax to an Agricultural Land Preservation Fund administered by the Secretary of Agriculture.

57 *See generally* BLUEPRINT COMMISSION ON THE FUTURE OF NEW JERSEY AGRICULTURE, REPORT (1973), which advocated the purchase of agricultural easements and dedication of proceeds of a property transfer tax as a source of funds. To resolve constitutional uncertainties, two senators introduced S.C.R. 86 196th Leg. 1st Sess. (1974), to add a new ¶ 4 to art. 8, § 3 of the N.J. Constitution:

> The continued application and use of privately owned land for agricultural purposes is in the public interest. The legislature may provide by law for the acquisition by the state of development easements on lands in agricultural open space preserves to encourage and assure continued use of the lands for agricultural and open space purposes. The acquisition of such easements in privately owned property by the state shall be a public purpose and a public use. The net proceeds of any tax imposed by law to finance acquisition by the state of development easements in agricultural open space lands shall be appropriated exclusively for this purpose.

No action, however, had been taken as of April, 1975. A statute will probably be introduced if the constitutional amendment is adopted.

58 Vt. H. 126, 53d Bienn. Sess. (1975) would create a state land trust funded by an existing property transfer tax and by assignment of gasoline tax receipts attributable to off-highway uses, and conforms to the statute presented here in most respects.

59 For a similar approach at the federal level, and containing regulatory powers over privately owned land as well as acquisition of interests in land, see Gifford, *An Islands Trust: Leading Edges in Land Use Laws*, 11 HARV. J. LEGIS. 417 (1974). The Kennedy-Brooke bill described therein has been reintroduced as S. 67, 94th Cong., 1st Sess. (1975).

60 Cal. A.B. 921 Reg. Sess. (1973-74). In 1972, Cal. A.B. 2137, Reg. Sess. 1971-72, its predecessor, was defeated on the floor of the Assembly. The sponsor of these bills, then Assemblyman John F. Dunlap, does not plan to introduce a similar measure in the 1975 session. The bill would have created an Open Space and Resource Conservation Fund, funded by assignment of the proceeds of a real property transfer tax, to make grants for acquisition of fee or less than fee interests in open lands by state agencies and regional and local jurisdictions.

easy to administer. In addition, its receipts have the virtue of rising with a strong real estate market, just as tax pressure for conversion is also rising.[61]

## III. A Summary of the Model Statute

The Land Trust would be a state instrumentality governed by five trustees appointed by the Governor and confirmed by the Senate for five year terms. Its principal corporate purpose would be to accept land and interests in land for the benefit of the people of the state. It would not have the power to issue bonds or exercise eminent domain.

To develop standard methods of determining the value of lands and development rights, the Governor would name a five member Land Value Advisory Committee.[62] In addition, Rural Land Appraisal Commissions of three members each would be created in each of the present natural resource conservation districts.[63] These commissions would make appraisals of lands and interests in lands within their geographic areas independently, of local appraisers so as to avoid a fiscal conflict of interest situation.[64]

61 Vermont is the only state that presently has a land gains tax. VT. STAT. ANN. tit. 32, § 236 (1973). There are, however, some alternatives. *See* CAL. ASSEMBLY SEL. COMM. ON OPEN SPACE LANDS, FUNDING FOR ACQUISITION OF OPEN SPACE LANDS: THREE APPROACHES 28-37 (1972) (unearned increment and capital gains taxation). *See also* McClaughry, *Taxes for Land Acquisition*, in THE PEOPLE'S LAND (P. Barnes ed. 1975); Rogers, *Financing Park and Open Space Projects*, in OPEN SPACE AND THE LAW 75-93 (F. Herring ed. 1965).

62 This committee is modeled after the New Jersey Farmland Evaluation Advisory Committee. *See* N.J. STAT. ANN. § 54:4-23.20 (Cum. Supp. 1974).

63 Natural resource conservation districts have existed since 1935 in conjunction with the Soil Conservation Service of the U.S. Department of Agriculture. *See* Soil Conservation Act, 16 U.S.C. §§ 590(b)-(f) (1970). There are approximately 3,000 local districts in all 50 states, involving over two million cooperating landowners in watershed protection, erosion control, woodlot management, and wildlife habitat improvement projects. Most districts are governed by a landowner-elected board of supervisors. NATIONAL ASSOCIATION OF CONSERVATION DISTRICTS, AMERICA'S CONSERVATION DISTRICTS (1974).

64 The conflict of interest may arise because local appraisers would have no reason not to overvalue development rights if the Trust were committed to paying the full locally assessed taxes on values held by it. By having the development rights appraised by a body independent of the local taxing jurisdiction, this possibility is eliminated. It should be noted that there may be a problem where local governments within a rural land appraisal district have assessments varying widely in percentage of true fair market value; this problem will have to be considered on a state by state basis.

The Trust would offer two different opportunities — one open to any owner of suitable open space lands, the other available only to resident farmers who derive at least one-third of their income from farming 40 acres or more. Under the first option, any landowner could offer to dedicate and convey his lands or interests in land to the Trust. If the Trust accepted the offer, the Trust would become the owner, and the former owner would have no tax liability for the interests conveyed. The Trust would have full discretion as to which lands or interests it could acquire, and the conveyor would have no unilateral right to reacquire the rights conveyed. The Trust could, under limited circumstances, reconvey the land or interests. A conveyor of land could, by agreement with the Trust, retain privileges such as life tenure, recreational use, and continued agricultural use. Donation of land or interests in land to the Trust would qualify as a tax deduction to the donor under both Federal and state income tax laws, and the donation could be phased over a number of years for maximum advantage.[65]

Operating farmers would have an additional option. Instead of dedicating their land or development rights, they could also lease them to the Trust for a fixed period of years. The model bill requires that the Trust enter into this lease if the farmer and farmland qualify, but the farm owner would not be required to participate against his will. The terms of the lease agreement would specify that the Trust would pay each year to the farmer the local property taxes attributable to the rights leased by the Trust; thus, in effect, the farmer would pay taxes only on use value, while the Trust would pay taxes on the value of the development rights. If the Trust should default on a payment due the farmer-lessor, the lease agreement would be terminated without penalty, unless the farmer waived a partial default by the Trust and elected to continue with the lease.

If the farmer wished to recover the development rights leased to the Trust, he could do so at any time by paying a lease termination price of half the difference in value of the rights computed on the day of initial leasing and that of termination. In no case, however, would the payment be less than a rollback price equal

65 *See* INT. REV. CODE OF 1954, § 170(c)(1).

to the past five years' tax benefits carried forward at six percent interest. In effect, the farmer could reacquire all rights by sharing one half of the accrued capital gain with the Trust.[66]

Where the Trust leased rights to farmland, it would pay to the farmer the taxes on the value of the land or rights leased, as determined by an appraisal by the Rural Land Appraisal Commission and the tax rate of the local jurisdiction in which the land is located. The farmer then would make full payment of taxes to the local government at the local appraisal value. This approach, incidentally, would relieve local assessors and clerks of the problems of assessing and maintaining records of use values, development values, deferred taxes, etc., problems which can become burdensome where local tax officials are relatively untrained and inexperienced with these more sophisticated concepts.

With respect to land or rights in land other than farmlands, the Trust would pay taxes to the local government only on that portion of such lands or rights which, when valued at fair market value and added to the value of other state owned property in the jurisdiction, exceeded ten percent of the remainder of the assessment roll. Local taxpayers, then, would absorb a revenue loss until the ten percent threshold is reached.[67]

The Trust would be funded by the proceeds of a property transfer tax of one percent on the value of all property transferred in excess of $10,000.[68] This would relieve lower income home and lot buyers from much of the incidence of the tax. The Trust also would receive some income from lease termination payments from farmers wishing to reacquire leased rights.

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66 This is the function of the rollback provision in many state statutes. *See, e.g.*, CONN. GEN. STAT. ANN. § 12-504(a)-(h) (Cum. Supp. 1975); N.H. REV. STAT. ANN. § 79-A:7 (Cum. Supp. 1973). These laws provide for a separate conveyance or land use change tax, computed not with respect to tax benefits received, but at the rate of ten percent of the total sale or value of the property (declining one percent for each year the property qualified before conversion in Connecticut).

67 The ten percent figure is largely arbitrary, being that used in Vermont under the so-called "Groton formula" for reimbursing towns in which the state has acquired large holdings. *See* VT. STAT. ANN. tit. 32, § 365(a) (1973).

68 The current Vermont property transfer tax is 0.5 percent of all non-exempt transfers. VT. STAT. ANN. tit. 32, § 9602 (1970). The Vermont Tax Department has estimated that changing the tax to 1% of all transfers in excess of $10,000 would greatly increase revenues. The Department's estimate, however, was based on the assumption of a $10,000 homestead exemption, rather than a $10,000 value exemption; hence its figures are not strictly applicable.

If the Trust's revenues fell below that necessary to meet the lease payment obligations, the lease would be terminated and the farmer would recover all leased rights without encumbrance or penalty. This ensures that there would be no open-ended commitment of the funds of the Land Trust or the State, a difficult problem in other contract-type bills.

## AN ACT TO CREATE A STATE LAND TRUST

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## I. Short Title, Purpose, and Definitions

### § 101 *Short Title*

This act may be cited as the [State] Land Trust Act.

### § 102 *Statement of Legislative Intent*

The purposes of this act are:

(a) to permit owners of agricultural, forest, or open space land to dedicate interests therein to a Land Trust, thereby reducing their liability for property taxes and preventing forced conversion of such lands to more intensive uses;

(b) to permit owners of qualified operating farmlands to lease the development rights to such lands to the Land Trust, thereby reducing their liability for property taxes and preventing forced conversion of such lands to more intensive uses;

(c) to protect local governments from undue loss of property tax revenue;

(d) to provide technical and legal assistance for the formation of private, voluntary community land trusts and for the increased use of farmers' contracts;

**(e) to provide for reasonable use of trust lands for snowmobiling, hunting, fishing, hiking and crosscountry skiing; and**

**(f) to impose a tax on the transfer of real estate to fund the operation of the Land Trust.**

COMMENT: Subsections (d) and (e) are optional. Subsection (d) incorporates the purpose of state encouragement of land preservation efforts by voluntary groups and local governments by the relatively inexpensive device of making available to them the expertise that will be required in any case for the proper operation of the Trust.[69] Subsection (e) poses a policy question with regard to snowmobiling. In cold weather states where snowmobiling is popular, inclusion of snowmobiling as a legitimate use of Trust lands may attract valuable political support, which of course must be netted against opposition from wilderness preservation forces.

§ 103 *Definitions*

**(a) "Development rights" means the rights to engage in land development other than for the purposes of agriculture and forestry.**

**(b) "Farming" means the business of farming, i.e., the cultivation, operation or management of a farm for gain or profit, either as owner or tenant.**

COMMENT: This definition follows very closely the definition in § 1.175-3 of the Internal Revenue Code Regulations.

**(c) "Farmland" means real estate which:**

**(1) is actively and exclusively devoted to farming;**

**(2) comprises no less than 40 acres of open lands, including the residential area, and not to exceed 10 acres of woodlots;**

**(3) is operated as a farm enterprise by its owner, who shall be a resident of the state; and**

**(4) produced in farm-related income no less than one-third of the owner's adjusted gross income as defined in [cross ref-**

69 For a description of the local community land trust idea, *see* INTERNATIONAL INDEPENDENCE INSTITUTE, THE COMMUNITY LAND TRUST 1-24 (1972).

**erence] in the owner's taxable year immediately preceding the year in which classification under this Act is sought.**

COMMENT: Since special benefits under the act are available to farmland owners, the definition of "farmland" is very important. The acreage requirements may well be varied with respect to the type of farming carried out in a given state. The limitation on woodlot acreage that may be included is not intended to exclude from participation otherwise qualified farmland that may happen to include more than 100 acres of woodlots; it merely limits the amount of woodlots that may be included for valuation and lease purposes to 100 acres. The seemingly low requirement of one-third farm-related income recognizes that many smaller farms are, in effect, subsidized by outside wages earned by the farmer's family. The cross reference relates to the definition of adjusted gross income elsewhere in the state's tax statutes; for states without income taxation, a definition will have to be included in this section.

**(d) "Interests in Land" includes, but is not limited to:**

**(1) fee simple;**

**(2) fee simple subject to the right of occupancy and use, defined as full and complete title subject only to a right of occupancy and use of the subject real property or part thereof by the grantor for residential, agricultural or forestry purposes;**

**(3) fee simple and resale of rights and interests, defined as the acqusition of land in fee simple and the subsequent reconveyance of rights and interests in such property to the former owner or to others, designed to accomplish the purposes of this act;**

**(4) fee simple and leaseback, defined as the acquisition of real property in fee simple and the lease, for the life of a person or for a term of years, of rights and interests therein, subject to the provisions of this act and to such covenants, restrictions, conditions, or affirmative requirements fixed by the Land Trust to accomplish the purposes of this Act;**

**(5) less than fee simple, defined as the acquisition of any rights and interests in real property less than fee simple;**

(6) option to purchase, defined as the acquisition of an option to purchase land or rights and interests therein.[70]

(e) "Land" means real property in land, including areas covered by water, air space, subterranean rights, and any buildings, structures or other improvements thereon.

(f) "Owner" of farmland means the record holder of legal title, the perpetual leasehold interest or the equity of redemption in either, under a bona fide mortgage deed, free and clear of any contract, option, or other agreement, written or oral, recorded or unrecorded, requiring, conditionally or absolutely, transfer of the beneficial ownership so as to disqualify the lands for dedication under section 301 of this Act. "Owner" includes joint ownership or corporate ownership where all holders of beneficial interests, either as individuals or stockholders, are actively engaged in the business of farming in this state.

## II. Creation of Land Trust

### § 201 *Land Trust Created*

There is created a body corporate and politic to be known as the [State] Land Trust, which shall be an instrumentality of the state benefiting all the citizens of the state by carrying out the public purposes expressed in this Act.

COMMENT: This section may need refinement to conform to constitutional language and judicial decisions of each state specifying the boundaries of "public purpose" for which the revenue-raising and expenditure provisions of this act are undertaken.

### § 202 *Trustees*

(a) The Trust shall have five trustees, who shall be residents of the state. At least two of the trustees shall be active or retired farmers. No trustee shall hold any other office, either elective or appointive, under state or local government.

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70 *See* VT. STAT. ANN. tit. 10, § 6303(a)(1)-(7) (1973).

COMMENT: The requirement that two of the trustees be active or retired farmers is designed to assure farmers that the Trust is not merely an instrument of lawyers, bankers, and environmentalists designed to deprive them of their property. The proscription against holding other offices is intended to prevent conflict of interest situations which could arise, for example, when the Trust takes action affecting the tax base of a local government.

(b) The Governor shall appoint the trustees with the advice and consent of the Senate for terms of five years; except that the terms of the members first appointed shall be for one, two, three, four, and five years in order that no more than one vacancy will occur in any calendar year. The Governor shall make appointments to fill vacancies to serve for the remainder of the unexpired term. A trustee may be removed for cause at any time by a two-thirds vote of the Senate.

(c) The trustees shall elect a chairman and a clerk, and at their organizational meeting shall adopt by majority vote such rules as they deem necessary. The Trust shall keep a public record of its resolutions and transactions, and its financial records shall be audited annually by the [auditor of accounts].

(d) Trustees shall receive compensation for their services at the rate of $_____ per year, and shall be entitled to reimbursement from the Trust for expenses incurred in the performance of their duties.

(e) A trustee shall not participate in any actions of the Trust relating to land or interest in land in which such trustee, his immediate family, or close associates have an interest, direct or indirect, and in such cases he shall enter the reason for his nonparticipation in the records of the Trust.

§ 203 *Powers and Duties*

(a) The Trust may acquire, by purchase, gift or any other manner, and hold for the benefit of the people of the state, any rights or interests in land in the state. It shall record within thirty days of its execution any instrument conveying to or from it any interest in land, which recordation shall be a condition of the validity of such transfer.

(b) In accepting conveyance of, and in holding and conveying in-

**terests in land, the Trust shall comply with the provisions of sections 303 and 304 of this Act and any plan or bylaws lawfully adopted by the governmental bodies in which such lands or interests are situated.**

**(c) The Trust shall prepare model legal documents and explanatory materials, conformable to the laws of [State], for the guidance of landowners and local groups wishing to establish community land trusts, and local governments wishing to enter into farm tax stabilization contracts pursuant to [cross reference]; and may provide direct technical and legal assistance to such landowners, groups, and local governments.**

COMMENT: This subsection is optional. The cross reference to farm tax stabilization contracts refers to legislation permitting local governments to enter into stabilization agreements with farmers, a practice frequently used with respect to industrial plants.[71]

**(d) The Trust shall have the following additional powers:**

**(1) To sue and be sued in the Trust's name, but the trustees shall not be liable for acts performed in good faith;**
**(2) To adopt a seal and alter the same with pleasure;**
**(3) To adopt bylaws for the regulation of its affairs and the conduct of its business;**
**(4) To maintain an office or offices at such place or places within the state as the trustees may designate;**
**(5) To appoint a secretary and treasurer and such other officers, who need not be trustees, as it shall deem advisable, and to employ such other employees and agents as may be necessary or desirable;**
**(6) To apply for and accept any grant of money or other assistance for programs relating to the purposes of the Trust, from the federal government, from private individuals, organizations or foundations, or from any other source, and to subscribe to and comply with any rule, regulation, contract or agreement with respect to the application of such grant or assistance;**
**(7) To make, enter into and perform all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this Act;**

71 *See* VT. STAT. ANN. tit. 24, § 2741 (1967).

**(8) To cooperate with and assist any agency of the state or any of its political subdivisions, and any private agency or person in furtherance of the purposes of the Trust;**

**(9) To do all acts and things necessary or convenient to carry out the powers expressly granted in this section.**

§ 204 ***Power to Issue Bonded Debt Reserved***

**The Trust shall not have the power to issue bonded debt unless expressly authorized to do so by legislative enactment.**

COMMENT: This section and the section following have a dual purpose. As written, they forbid the issuance of bonded debt and the exercise of eminent domain. This eliminates two difficult questions for legislative debate. If it is subsequently desired to have the Trust actually acquire development rights for compensation, either by voluntary purchase or eminent domain, such future enactment would replace these two sections at this point in the statute.

§ 205 ***Power to Exercise Eminent Domain Reserved***

**The Trust shall not have the power to exercise eminent domain over land or interests in land unless expressly authorized to do so by legislative enactment.**

§ 206 ***Land Value Advisory Committee***

**(a) There is established a land value advisory committee consisting of three members serving for terms of four years. Two members shall be appointed by the Governor and shall serve at his pleasure. One additional member shall be appointed by the president of the state agricultural college. All appointed members shall be persons experienced in agriculture or real estate appraisal. Any vacancies shall be filled by the Governor and the president of the state agricultural college, respectively. The commissioner of taxes and the commissioner of agriculture, or their delegates, shall be members of the committee *ex officio*.**

**(b) The committee shall formulate guidelines for the determination of agricultural use value and development rights value of rural land. In formulating such guidelines, consideration shall be given to the agricultural productivity of the land; the present market value of the land for agricultural purposes and for development purposes; the topography, size, location, and climatic exposure of the land; current standards of farm management and efficiency; and any other factor which the committee finds relevant to the determination of agricultural use value or development rights value. The committee shall provide technical advice and counsel to rural land appraisal commissions and to the Trust on request.**

COMMENT: This blue ribbon committee is necessary to provide expert assistance on the often complicated question of assessing the value of interests less than fee of agricultural and open space land, a task which may well, at least initially, overwhelm local government appraisers, particularly where they are nonprofessionals. It is modelled after the New Jersey State Farmland Evaluation Advisory Committee.[72]

### § 207 *Rural Land Appraisal Districts*

**The [commissioner of agriculture] shall divide the state into rural land appraisal districts. Such districts shall be coterminous with existing boundaries of natural resource conservation districts insofar as practicable, and no rural land appraisal district shall contain more than three natural resource conservation districts.**

### § 208 *Appointment of Rural Land Appraisal Commissions*

**(a) The Governor shall appoint three persons to serve as members of a rural land appraisal commission in each rural land appraisal district. The members of the commission appointed by the Governor shall serve at the pleasure of the Governor, and may be removed by him at any time. The Governor may appoint a successor for any commission member appointed by him who dies, resigns or is removed. Insofar as practicable the members of each commission appointed by the Governor shall include the following: a representative of the department of agriculture; a person employed by a lending institution**

72 *See* N.J. STAT. ANN. § 54:4-23.20 (Cum. Supp. 1974).

engaged in making farm loans in the district; and a person who has served as a tax assessor for a local government within the district.

(b) The cooperating landowners in each natural resource conservation district within a rural land appraisal district shall elect, at the time of election for natural resource conservation district supervisors, one person from among no less than two persons nominated and placed on the ballot by the supervisors, to serve as a member of the rural land appraisal commission with respect to appraisals in that district.

(c) Each commission shall elect annually from among its membership a chairman and a clerk, who shall serve until their successors are elected. Members of the commission shall not receive compensation for their services but shall be entitled to reimbursement from the Trust for reasonable and necessary expenses incurred in the performance of their duties.

COMMENT: The provision for election of one member of the commission by the "cooperators" of a natural resource conservation district is an attempt to allow rural landowners themselves to have a voice in the composition of the local commission, in addition to gubernatorial appointments. Nationally, there are some 300 such conservation districts involving over two million landowners.[73]

### § 209 *Biennial Report*

Biennially the Trust shall make a report to the [legislature] concerning its operations for the previous biennial period, including such recommendations as it may choose to make concerning the future operation of the program.

## III. ACQUISITION, MANAGEMENT AND TAXATION OF INTERESTS IN LAND

### § 301 *Dedication of Interests in Land*

(a) Any interests in land may be conveyed to the Trust, and accepted by the Trust in the discretion of the trustees, under such terms

73 *See* note 63 *supra*.

and conditions as may be agreed upon. Before accepting any lands or interests in land under this section the trustees shall consider:

(1) Their value and the amount of the tax liability assumed by the Trust under section 305 of this Act;
(2) The value of the lands in preserving the landscape of the area, including views and perspectives;
(3) The extent to which the public may be expected to benefit directly from and enjoy such dedication;
(4) The location of the lands in relation to other lands or interests held by the Trust, the state or other governmental authority;
(5) The potential use of the land, inherently, and as affected by any state, regional or local land use plan, development plan, or zoning bylaw;
(6) The ecological, geological and biological uniqueness and value to the state;
(7) Whether ownership would enable the Trust to influence the development of the area for the public benefit; and
(8) The extent and nature of reservations, if any, proposed by the donor if an offer is made of an interest less than fee.

(b) Prior to acceptance of land or interests in land by the Trust, the details of the proposed transaction shall be submitted to each affected municipal and regional planning commission, which shall forward its comments and recommendations, if any, to the Trust within 30 days. At the request of any affected municipal or regional planning commission within said 30 day period, the Trust shall, before concluding any proposed transaction, announce and hold a public hearing in the vicinity. Prior to concluding any transaction, the Trust shall take into consideration all comments and recommendations received from planning commissions and other public bodies, and shall convey its specific responses to the respective commissions or bodies from which the comments or recommendations originated. Any affected commission or governmental body shall have standing to seek an injunction against a proposed transaction where the procedural provisions of this Act have allegedly been disregarded.

COMMENT: This subsection recognizes the importance of close liaison between the Trust and local taxing jurisdictions. Since acceptance by the Trust of interests in land will in many cases affect the local property tax base, it is important that the Trust

proceed in full public view, although the local jurisdiction is not accorded a right of veto over a proposed conveyance. The last sentence, relating to injunction, is included to ensure that the Trust comply with these detailed procedural requirements. In a Vermont case, where no statutory law exists concerning mandamus or injunction relating to procedural errors by a state agency, a mandamus action by a local planning commission against the state environmental board was dismissed, presumably on the grounds that the state board's refusal to comply with statutory procedure in promulgating a land use plan for submission to the legislature was a political question for legislative, not judicial, resolution.[74]

**(c) If the Trust accepts land in fee simple under this section, it shall permit reasonable use of the land for snowmobiling, hunting, fishing, hiking, and crosscountry skiing by the public. If the Trust accepts less than fee simple interests in land under this section, the terms and conditions of conveyance to the Trust shall include agreement by the conveyor to permit reasonable use of the land for snowmobiling, hunting, fishing, hiking and crosscountry skiing. The Trust may establish guidelines for such reasonable use in consultation with the [Departments of Fish and Game and Forests and Parks].**

COMMENT: This subsection strengthens the case that the act has a public purpose benefiting all the public, but as noted above, it poses a difficult policy question especially with respect to snowmobiling.

### § 302 *Special Leasing of Farmlands*

COMMENT: The following section requires the Trust to lease the development rights to qualified farmland for a period not to exceed 25 years. Lessors are allowed to break the lease by paying a prescribed lease termination price, but the Trust may not break a lease unless the revenues assigned to it (which are beyond the

74 Town of Kirby Planning Commission v. State Environmental Board, Caledonia County (Vermont) Court, Docket C 19-74 CAC, filed February 15, 1974. (Motion for summary judgment by defendant granted without indication of which of the numerous grounds offered was persuasive).

Trust's control) prove insufficient to cover all lease payment obligations. Nothing prevents the Trust from entering into a lease of as little as one year's duration; such a lease, however, would be a speculator's dream, since the lessor could, after enjoying the benefits for a year, choose not to renew the lease without becoming liable for the lease termination payment.

At the end of any lease, the statute as written makes it mandatory for the Trust to enter into another lease if the farmer and farmland continue to qualify. The 25 year term provision ensures that the legislature can act to relieve the Trust of this requirement if it appears that mandatory leasing will be undesirable. Since no lease is perpetually renewable, such revision of the program would raise no question of breach of contract or an unconstitutional taking of property (the property right to the lease benefits).

**(a) The Trust shall, upon application by an owner of farmland, lease the development rights to such farmland at the nominal rate of $1.00 per year for a period not to exceed 25 years. The lease agreement shall provide that:**

**(1) The owner may continue to reside upon the land and continue all agricultural uses practiced at the time of leasing;**

**(2) If the land has been actively and continuously farmed for a period of ten years or more, and no less than three years by the owner, the owner may discontinue agricultural operations without termination of the lease agreement provided he continues to maintain the open space character of the land in a condition equivalent to that associated with active farming;**

COMMENT: This paragraph is intended to qualify the retired farmer, who would otherwise not qualify due to the definitions of "farming" and "farmland," which require engaging in the business of farming and one-third of family income from farm operation.[75] The retired farmer could, of course, lease his productive acres to another farmer, or just keep the fields mowed to qualify.

**(3) If at any time the land fails to qualify as farmland, and the**

75 Model State Land Trust Act § 103(c) *supra.*

**owner fails to comply with the provisions of paragraph (2), the lease agreement shall be deemed terminated by the owner, and he shall pay to the Trust the lease termination price as provided in subsection (b);**

**(4) The owner shall permit reasonable recreational use of the land for snowmobiling, hunting, fishing, hiking, and cross-country skiing by the general public in accordance with guidelines established by the Trust;**

**(5) The Trust may not convey its lease interest to any party other than the owner;**

COMMENT: It is, of course, unlikely that a third party would want to acquire a lease interest to development rights from the Trust as a business proposition. This paragraph is included mainly to reassure the farmer-lessor that if at some future time he wishes to terminate the lease and reacquire the rights, he will be dealing with the Trust rather than with the federal government or the Nature Conservancy.

**(6) The owner may give, convey, grant, or devise his interest in the farmland subject to the lease to any party and the lease shall not thereby be terminated and no termination price shall be due under subsection (b) of this section, provided that the successor in interest resides upon the land, continues agricultural uses, and otherwise assumes all the obligations under the lease of the original owner;**

COMMENT: This paragraph principally provides for transfer of the lessor's interest at death. Note, however, that where a lessor qualifying under paragraph 2 of this subsection conveys the lease to an heir, the heir must recommence agricultural operations to qualify. The "retired farmer" clause is intended to benefit only the retired farmer himself, and not his heirs.

**(7) The lease may be terminated at any time by the owner in accordance with the provisions of subsection (b) of this section;**

COMMENT: This is the "escape clause" that allows the farmer-lessor to reacquire his leased development rights.

**(8) Upon proper certification, the Trust shall pay to the owner each year an amount equal to the general local property taxes that the owner would be liable for if the rights leased were taxed at the value determined by the appropriate rural land appraisal commission, and at the rate obtaining in the local taxing jurisdiction in which the rights are located; and**

COMMENT: Note that the amount of lease payment to the lessor may not exactly equal the tax liability of the lessor to the local taxing jurisdiction. The payment by the Trust to the lessor equals the amount the lessor would have to pay in local property taxes if his property were taxed at the value fixed by the rural land appraisal commission, which is independent of any taxing jurisdiction. This provision eliminates the problem of reliance on local assessment officials who would have a tendency to overvalue the leased rights on the theory that the Trust's commitment to pay the full taxes due on those rights would eliminate any adverse interest of the local property owner.

**(9) If the Trust fails to make the payment required by paragraph (8), the owner, at his option, may declare the lease terminated and recover all rights contained in the lease without payment of the lease termination price required by subsection (b); or he may accept a partial payment by the Trust, waiving any further claim against the Trust for the deficiency, and continuing the lease agreement in force.**

COMMENT: This paragraph deals with the problem of revenue to the Trust insufficient to permit full payment of all the Trust's lease obligations. If this should happen, the Trust can make partial payments to all lessors who will accept them; or the Trust can make full payment to selected lessors and none to others, causing the termination of the latter leases; or a combination of both policies. This provision is extremely important since it eliminates the problem posed by a state instrumentality contractually required to incur budget obligations into the unpredictable future, a problem that has been the bane of many similar proposals.

**(b) If the lease is terminated by the action of the owner under the**

**provisions of paragraph (3) or (7) of subsection (a), the owner shall pay to the Trust as the lease termination price one-half of any increase in the fair market value of the rights from the time the lease was entered into, to the time the lease was terminated, as determined by the appropriate rural land appraisal commission, provided, however, that in no case shall the lease termination price be less than the total payments made by the Trust under paragraph (8) of subsection (a) during the five years preceding the year in which the rights are reacquired, plus interest at the rate of six percent per annum calculated from each date that payments were made by the Trust. An owner dissatisfied with the appraisal may appeal to the county court as provided in [cross reference].**

COMMENT: This important provision allows the farmer-lessor to "buy out" of his lease at any time, preserving the free alienability of land so prized by rural landowners. As a penalty for buying out, the landowner whose tax burden has been alleviated must share with the public the economic benefits of subsequent conversion. Presumably the farmer would not exercise this option unless he had closed a deal for sale of the property fee simple, and the Trust would then be a party at the closing where all rights and considerations would be appropriately exchanged. As pointed out in the text,[76] if it is desired that the Trust be able absolutely to prevent conversion of qualified lands, actual acquisition of either the fee or development rights is the only procedure that can accomplish that objective without raising the problems associated with the taking of property without compensation.

**(c) The Trust shall have a lien against the real estate to secure the lease termination price in the same manner as taxes assessed against real estate are a lien under [cross reference], and the same may be collected and enforced by action at law in the manner provided for under sections [cross reference], or by sale of real estate as provided under sections [cross reference], or by foreclosure as provided under section [cross reference].**

COMMENT: These cross references refer to existing statutes concerning governmental action in case of nonpayment of property taxes.

76 *See* text accompanying note 48 *supra*.

§ 303 *Management of Interests by Trust*

In managing lands and interest in lands held by the Trust, the trustees shall establish and adhere to policies and practices which shall:

(a) preserve the open space, scenic prospects, and general appearance of the countryside;

(b) preserve and enhance the natural history and ecological balance of the area;

(c) avoid and abate air and water pollution and any other hazard to the health and welfare and safety of the public;

(d) protect historic sites;

(e) conform to all lawfully adopted local, regional, and state land use, development, and zoning plans;

(f) permit reasonable use for snowmobiling, hunting, fishing, hiking and crosscountry skiing; and

(g) otherwise protect the public interest and the welfare and safety of the people of the area and the state.

The Trust may enter into arrangements with any department of federal, state or local government or a responsible private organization for the actual management of specific lands and interests owned by the Trust.

§ 304 *Transfer of Interests by Trust*

(a) The Trust may not convey any interest less than fee held by it except to the owner of the remainder of the fee, without his written consent. With respect to interests dedicated to the Trust under § 301, the owner of the remainder of the fee may reacquire the outstanding interest in the fee only with the consent of the trustees and on such terms and at such a price as they may specify. In determining whether conveyance of any interest held by the Trust should be made, the trustees shall consider:

(1) the probable effects of conveyance on the continued management of the lands or interests in accordance with the policies and practices enumerated in § 303;

(2) the probable impact on the economy, government, and tax base of the town in which such lands or interests are located; and

(3) the net gain likely to accrue to the public interest (or to the Trust, acting in the public interest) from conveyance.

(b) The Trust shall give notice of any proposed conveyance of lands or interests held by it to the regional and local planning commissions wherein the land lies and to all affected local governments, and hold public hearings in the locality prior to effecting any such conveyance.

(c) If the trustees determine that lands or interests held by the Trust should be sold, such conveyance may include conditions, restrictions, or covenants specifying the nature and character and particular type of development that may occur thereon, consistent with state, regional and local plans and zoning bylaws.

COMMENT: Although in general the Trust would not reconvey interests held by it to a private owner, it is conceivable that changing settlement patterns and planning considerations might suggest development of a Trust-held parcel as preferable to the development of private land in the vicinity. The Trust under this section would thus have carefully safeguarded powers to transfer or exchange interests in land. The safeguards are necessary to discourage transfers principally devised to promote private interests.

### § 305 *Taxation of Interests Held in Trust*

(a) When development rights or any other interests in land are deeded to the Trust pursuant to § 301, the interest deeded shall be appraised by the rural land appraisal commission at fair market value and listed separately and apart from other property in the assessment rolls of the local taxing jurisdiction in the name of the Trust. The Trust shall pay property taxes to the local taxing jurisdiction on the value of such lands or interests which, when added to the value of other state-owned property in the local jurisdiction, exceeds ten percent of the total value of all other property listed in the local jurisdiction.

(b) In the case of lands or interests in lands leased to the Trust by an owner of farmland under § 302, the lessor shall remain liable for all local property taxes.

(c) All appraisals of interests in land held by the Trust shall be

made at the direction of the Trust by the rural land appraisal commission in the district in which the land is situated.

(d) On or before May 1 in each year, the Trust shall notify the rural land appraisal commission in each rural land appraisal district as to the properties or rights within the district for which a determination of value is requested. On receipt of notification from the Trust of the properties or rights for which a request has been submitted under this section, the rural land appraisal commission shall determine the appropriate value for each property or right for which a request has been made. In making determinations of land values, the commission shall follow the guidelines established by the land value advisory committee under § 206. Prior to completing a determination the commission shall grant a hearing to the owner, on reasonable notice. The Trust shall also be given notice of such hearings and shall be entitled to appear. The commission shall prepare a report containing its valuation of each property or interest. One copy of the report shall be mailed to the owner on or before August 1; one copy filed with the commissioner of taxes; and one copy transmitted to the Trust.

(e) Farmland, as defined in this Act, which is held in the same ownership shall be appraised as one unit, even if the same consists of two or more parcels which are not contiguous.

(f) Each determination of value made in accordance with this section shall remain in effect for a period of four taxable years, including the year in which the determination is made, and shall be altered or revised prior to expiration of such four-year period only when there is a substantial change in the quantity of land held by the owner.

(g) The Trust, a municipality, or an owner, if aggrieved or dissatisfied by a determination by a rural land appraisal commission, may appeal to the county court for the county in which the land is situated, or if the land lies in more than one county, the county court for any county in which any part of the same is situated. Appeal procedure shall be provided as in [cross reference].

COMMENT: This section prescribes the two separate methods of taxation employed with respect to Trust-held interests in land. When interests are deeded to the Trust under § 301, the Trust pays local property taxes only on the value of the interests which, when added to other state-held property, exceeds ten percent of the local jurisdiction's assessment rolls. This in effect is a local "deductible" similar to current Vermont law.[77] The local juris-

77 *See* note 67 *supra*.

diction must assume the tax loss until such time as the state and its instrumentalities have consumed one-eleventh (10% of the remainder is one-eleventh of the total) of the local tax base in one way or another. With regard to the special farmland leasing provisions of § 302, the farmer-lessor remains fully liable, but is of course, reimbursed by the Trust under the terms of his lease. Subsection (g) is cross referenced to the customary property tax appeals provisions elsewhere in the state's tax law.

### § 306 *Taxation of Residual Interests of Landowners*

**When interests less than fee simple are dedicated to the Trust, the basis of valuation of the remainder of the fee for tax assessment purposes shall be the fair market value of the fee, less the fair market value of the interests conveyed to the Trust as appraised pursuant to subsection (a) of § 305.**

COMMENT: This section provides for taxation of residual interests at residual value. While this is logically necessary and probably required by law in most states in any case, in some states there may be a reluctance of local taxing authorities to recognize the full diminution of value occasioned by dedication of interests less than fee. This section is designed to remove any uncertainty.

## IV. PROPERTY TRANSFER TAX

COMMENT: Since it is likely that this part would be codified under the state's tax laws, rather than with the Land Trust provisions, it is referred to throughout as a "chapter" and contains its own set of definitions.[78]

78 This chapter is modeled on the existing Vermont property transfer statute, including amendments proposed by the Tax Department in 1975 to resolve some problems of interpretation. See VT. STAT. ANN. tit. 32, §§ 9601-16 (1970 & Cum. Supp. 1974).

§ 401 *Definitions*

**The following definitions shall apply throughout this chapter unless the context requires otherwise:**

**(a) "Commissioner" means the commissioner of taxes.**

**(b) "Deed" includes any deed, instrument or other writing evidencing a transfer of title to property.**

**(c) "Person" means every natural person, association, trust, or corporation.**

**(d) "Property" means real property, including furnishings, accessories and improvements permanently attached and annexed thereto, but the term does not include personal property transferred in the same transaction with real property.**

COMMENT: The term "property" has posed some tricky problems of definition under the Vermont statute. For example, throw rugs included in the sale of a motel are clearly exempt from the tax as personal property, but a nailed-down wall to wall carpet is arguably real property. The language used here is adapted from a Vermont case.[79]

**(e) "Recording clerk" means any town clerk, city clerk, county clerk or other official whose duty it is to record deeds of property.**

**(f) "Title to property" includes:**

**(1) those interests in property which endure for a period of time the termination of which is not fixed or ascertained by a specific number of years, including without limitation, an estate in fee simple, life estate, perpetual leasehold, and perpetual easement; and**

**(2) those interests in property enduring for a fixed period of years but which, either by reason of the length of the term or the grant of a right to extend the term by renewal or otherwise, consist of a group of rights approximating those of an estate in fee simple.**

**(g) "Transfer" includes a grant, assignment, conveyance, will, trust, decree of court or any other means of transferring title to property or vesting title to property in any person. In case of a foreclosure or a**

79 Sherburne Corp. v. Town of Sherburne, 124 Vt. 481, 484, 207 A.2d 125, 127 (1965).

conveyance in lieu of a foreclosure where there are a number of liens on the same property, the transfer between the obligor and the primary obligee shall be the only transfer arising out of the foreclosure proceedings or conveyance in lieu of foreclosure subject to tax under this chapter, any subsequent transfers to the junior lienholders being merged into the transfer from the obligor to the primary obligee.

(h) "Value" means, in the case of any transfer of title to property which is not a gift and which is not made for a nominal consideration, the amount of the full actual consideration for such transfer, paid or to be paid, including the amount of any liens or encumbrances on the property existing before the transfer and not removed thereby; in the case of a gift, or a transfer for nominal consideration, "value" means the fair market value of the property transferred.

§ 402 *Tax on Transfer of Property; Use of Proceeds*

(a) A tax is hereby imposed upon the transfer by deed of title to property located in this state. The amount of the tax equals one percent of the value of the property transferred which is in excess of $10,000.00, or $1.00, whichever is greater.

(b) On or before January 31 of each year the commissioner shall pay to the [State] Land Trust an amount equal to the full amount collected by him in the preceding calendar year under this chapter.

COMMENT: The Vermont tax is one-half percent of the full value of the property transferred. Using one percent of all value in excess of $10,000 eases or eliminates the tax burden on lower-priced homes and lots. In particular, it also reduces the knotty problem of mobile homes for resale by a non-dealer owner, since the $10,000 exemption virtually eliminates any tax otherwise due on a second-hand mobile home.

§ 403 *Exemptions*

The following transfers are exempt from the tax imposed by this chapter:

(a) Transfers recorded prior to the effective date of this act;

(b) Transfers of property to the United States of America, the state of [State], or any of their instrumentalities, agencies or subdivisions;

(c) Transfers directly to the obligee to secure a debt or other obligation; and transfers directly to the obligor releasing property which is security for a debt or other obligation when such debt or other obligation has been fully satisfied;

(d) Transfers which, without additional compensation, confirm, correct, modify or supplement a transfer previously recorded;

(e) Transfers between husband and wife, or parent and child, or grandparent and grandchild, without actual consideration therefor; and transfers in trust or by decree of court to the extent of the benefit to the donor or one or more of the related persons above named; and transfers from such a trust conveying or releasing the property free of trust as between such persons and without actual consideration therefor;

(f) Transfers pursuant to a public sale for delinquent taxes;

(g) Transfers of partition;

(h) Transfers made pursuant to mergers or consolidations of corporations; bona fide transfers to shareholders of corporations in connection with the complete dissolution thereof, except where the commissioner finds that a major purpose of such dissolution is to evade the property transfer tax;

(i) Transfers made by a subsidiary corporation to its parent corporation for no consideration other than cancellation or surrender of the subsidiary's stock;

(j) Transfers made to a corporation at the time of its formation pursuant to which transfer no gain or loss is recognized under section 351 of the Internal Revenue Code of 1954 as in effect on [date];

(k) Transfers made by a partnership to a partner in connection with a complete dissolution of the partnership, except where the commissioner finds that a major purpose of such dissolution is to evade the property transfer tax;

(l) Transfers made to a partnership at the time of its formation, pursuant to which transfer no gain or loss is recognized under Section 721 of the Internal Revenue Code of 1954 as in effect on [date];

(m) Transfers made to, or made by, a nonprofit local development corporation as organized and defined in [cross reference]; and

(n) Transfers to community land trusts and other nonprofit organizations created to acquire real property and manage it in accordance with § 303 of the [State] Land Trust Act, as certified to the commissioner of taxes by the [State] Land Trust.

COMMENT: Exemption (c) is written for a title property state, where a mortgagee holds actual title until the mortgage is discharged. This exemption may need revision in a lien property state. Exemptions (j) and (l), relating to transfers without recognized gain or loss, incorporate by reference two sections of the U.S. Internal Revenue Code in effect on a specified date. There is some legal question as to whether a state law may incorporate future changes in Federal statutory language by reference. The draft here is written to require further legislative action to update the reference to the Federal Code (by advancing the date specified). Exemptions (m) and (n) relate to nonprofit local development corporations authorized by the laws of most states for the purposes of encouraging job-creating industries, and to nonprofit organizations organized to preserve open lands, such as a community land trust or nature conservancy group. With regard to the latter, the Trust would certify to the commissioner that the organization to which property was transferred qualified for the exemption.

§ 404 *Liability for Tax*

**The tax imposed by this chapter upon any transfer of title to property is the liability of the transferee of the title, unless fixed otherwise by agreement of the parties.**

§ 405 *Payment of Tax*

**The tax imposed by this chapter shall be paid to a recording clerk at the time of the delivery to that clerk for recording of a deed evidencing a transfer of title to property subject to the tax.**

§ 406 *Property Transfer Return*

**(a) A property transfer return complying with this section shall be filed with a recording clerk at the time of the payment to the clerk of an amount of property transfer tax under § 405 of this chapter, or at**

the time of the delivery to the clerk for recording of a deed evidencing a transfer of title to property which is not subject to the tax imposed by this chapter.

(b) The property transfer return required by this section shall be in such form as the commissioner, by regulation, shall prescribe, and shall be signed, under oath or affirmation, by each of the parties, or their legal representatives, to the transfer of title to property for which the return is filed. If the return is filed for a transfer claimed to be exempt from the tax imposed by this chapter, the return shall set forth the basis for such exemption. If the return is filed for a transfer subject to such tax, the return shall truly disclose the value of the property transferred, together with such other information as the commissioner may reasonably require for the proper administration of this chapter.

§ 407 *Acknowledgment of Return and Tax Payment*

Upon the receipt by the recording clerk of a property transfer return, complete and regular on its face, together with the tax payment, if any, called for by that return, and the fee required under section 406, the clerk shall forthwith mail or otherwise deliver to the transferee of title to property for which such return was filed a signed and written acknowledgment of the receipt of that return and payment. A copy of that acknowledgment, or any other form of acknowledgment approved by the commissioner, shall be affixed to the deed evidencing the transfer of property with respect to which the return was filed. The acknowledgment so affixed to a deed, however, shall not disclose the amount of tax paid with respect to any return or transfer.

§ 408 *Prohibition Against Certain Recordings*

No recording clerk shall record, or receive for recording, any deed to which has not been affixed an acknowledgment of return and tax payment under § 407 of this chapter. A clerk who violates this section shall be fined $50.00 for the first offense and $100.00 for each subsequent offense.

§ 409 *Penalty for False Statement*

Any person who willfully falsifies any statement contained in a property transfer return required under § 406 of this chapter shall be subject to a fine of not more than $1,000.00.

§ 410 *Remittance of Return and Tax; Inspection of Returns*

(a) Not later than thirty days after the receipt of any property transfer return or payment of tax under this chapter, a recording clerk shall file the return in the office of the local taxing jurisdiction and forward one copy of the return and the amount of tax paid with respect thereto to the commissioner.

(b) The copies of property transfer returns shall be open to public inspection.

§ 411 *Interest*

Any person who fails to pay any tax imposed by this chapter on or before the date when the tax is required to be paid shall pay interest on that tax at the rate of one-half of one percent for each month or fraction thereof of the tax remaining unpaid, to be calculated from the date the tax was required to be paid. All such interest shall be payable to and recoverable by the commissioner in the same manner as the tax imposed by this chapter. For a reasonable cause the commissioner may abate all or any part of such interest.

§ 412 *Penalties*

Whenever the commissioner determines that any tax assessed under this chapter was unpaid due to negligence or disregard of the provisions of this chapter or of any ruling or regulation of the commissioner issued pursuant to the provisions of this chapter, but without intent to defraud, a penalty of ten percent of the amount of such tax as determined by the commissioner shall be added to the assessment and interest shall be payable on the amount of the tax at the rate of one percent of such tax for each month or fraction of a month during which the tax remains unpaid. Whenever any tax assessed under this chapter was unpaid due to fraud with intent to evade the tax imposed by this chapter, a penalty of twenty-five percent of the amount of such tax as determined by the commissioner shall be added to said assessment, and interest shall be payable on the amount of the tax at the rate of one percent of such tax for each month or fraction of a month during which the tax remains unpaid. For reasonable cause the commissioner may waive or abate all or any part of such penalties and interest.

§ 413 *Taxes as Personal Debt to State*

(a) All taxes required to be paid under this chapter and all increases, interest and penalty thereon, which becomes due and payable to the commissioner, shall constitute a personal debt from the person liable to pay the same to the state of [State] to be recovered in an action of contract on this statute.

(b) Action may be brought by the attorney general at the instance of the commissioner in the name of the state to recover the amount of taxes, penalties and interest due from such person provided the action is brought within three years after the same are due. The action shall be returnable in the county where the person resides if a resident of the state; and if a nonresident, the action shall be returnable to the county of [the state capital]. The limitation of three years in this section shall not apply to a suit to collect taxes, penalties, interest and costs when the person filed a fraudulent return or failed to file a return when the same was due.

§ 414 *Levy for Nonpayment*

When all or any portion of a tax imposed by this chapter, or any penalty or interest due in connection with such a tax, is not paid, the commissioner may issue a warrant under his hand and official seal directed to the sheriff of any county of this state. The warrant shall command the sheriff to levy upon and sell the real and personal property of the taxpayer for the payment of the unpaid tax liability imposed by this chapter, together with allowable fees and costs. The levy and sale shall be effected in the manner, and shall be subject to the limitations, prescribed for the levy, distraint and sale of property for nonpayment of local property taxes under [cross reference]. The sheriff shall return the warrant to the commissioner and pay to him the money collected thereunder within the time specified in the warrant.

COMMENT: The cross reference is to existing state statutes for property tax delinquency actions.

§ 415 *Taxes as Property Lien*

If any person required to pay a tax under this chapter neglects or refuses to pay the same after demand, the amount, together with all

penalties and interest provided for in this chapter and together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of [State] upon all property and rights to property, whether real or personal, belonging to such person. Such lien shall arise at the time demand is made by the commissioner and shall continue until the liability for such sum with interest and costs is satisfied or becomes unenforceable. Notice of lien, and certificate of release of lien shall be recorded as provided in [cross reference].

COMMENT: The cross reference is to existing state statutes regarding imposition and release of liens on property.

§ 416 *Administrative Appeals*

Any person held liable to tax under this chapter may appeal such holding under the provisions of [cross reference].

COMMENT: The cross reference is to existing state property tax appeals procedures.

§ 417 *Grace Period for Unrecorded Deeds*

Where real property was in fact transferred prior to the effective date of this chapter, but deed was not recorded as of such effective date, the transferee may within 90 days following the effective date of this chapter record the deed without incurring liability for payment of tax under this chapter, provided, however, that in any case where the tax otherwise due would exceed $200.00, the commissioner may require evidence of bona fide prior transfer.

§ 418 *Regulations of Commissioner*

The commissioner may from time to time, issue, amend and withdraw regulations interpreting and implementing this chapter, in accordance with [cross reference to administrative procedures act].