



# PENN STATE LAW REVIEW

## Clean & Green: Tidying Up the Farm Tax Subsidy

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### I. INTRODUCTION

Agriculture is one of our most important industries, and it is under constant threat. Agricultural operations have been experiencing reduced profits, increased costs associated with working capital, and the expense of complying with ever-increasing environmental regulations. Combined with the developmental pressures accompanying population increases and urban sprawl, the economic conditions for agriculture have made it far less desirable for many farmers to continue operations. As a result, the federal and state governments have enacted several different programs to “save” agriculture.

One such program addresses the property tax burden borne by agricultural operations. Due to increased property demand from urban sprawl, the value of farmlands in many places has dramatically increased. One result of the appreciation in agricultural land value is that the associated property taxes have risen. For many operators, this cost may contribute significantly to unprofitability of the business. One of the primary methods to offset this burden is through providing some form of differential assessment, which lowers the property tax obligation for eligible landowners. Pennsylvania accomplishes this with a program commonly referred to as Clean and Green.<sup>1</sup> Clean and Green provides for lower assessments by valuing eligible agricultural and other lands at their use value, rather than at their fair market value. The purpose stated in the Pennsylvania Code includes:

The benefit to an owner of enrolled land is an assurance that the enrolled land will not be assessed at the same value for tax assessment purposes as land that is not enrolled land. In almost all

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1. Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. §§ 5490.1-5490.13 (West 1990 & Supp. 2009).

cases, an owner of enrolled land will see a reduction in his property assessment compared to land assessed or valued at its fair market value.<sup>2</sup>

This Comment addresses problems with the Clean and Green statute. Underlying one such problem is that the Act permits enrollment of lands that are not actively used for agricultural purposes.<sup>3</sup> This allowance increases the likelihood of abuses of the program when more types of lands are made eligible by the statute, which threatens the underlying purpose: promotion of agricultural operations. By permitting more disparate land uses to enroll in the program, the Act increases the burden borne by owners of ineligible lands. This would eventually result in municipalities raising millage rates to recover revenue lost due to more properties withdrawing from market value assessment.<sup>4</sup> Additionally, expansive enrollment increases the tax differential that is required to be borne by owners of non-eligible lands. With property taxes increasing, there exists the potential for backlash against the entire program.

Part II of this Comment will provide an overview of the Pennsylvania approach to farmland preservation. It will then explain the statutory provisions of Clean and Green. The enactment of Clean and Green will be described to explain the underlying purposes of the program, and provide a historic link to current concerns over the statute. Lastly, current criticisms of the program will be introduced.

Part III will compare Clean and Green to differential assessment programs employed by several other states. Through comparison of the programs, suggestions will be made to improve Pennsylvania's approach to relieving the property tax burden to agricultural operators. Part IV provides a conclusion.

## II. BACKGROUND

### A. *The Current State of Agriculture*

A study conducted by the USDA in 2003 revealed that a significant percentage of our nation's farmland was converted to other uses.<sup>5</sup> Land

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2. 7 PA. CODE § 137b.1 (2001).

3. 72 PA. STAT. ANN. §§ 5490.2-5490. Land designated as agricultural reserves or farmland reserves that are defined in § 5490.2 are permitted to enroll in the program. *Id.*

4. Millage refers to the mill rate. BLACK'S LAW DICTIONARY 1083 (9th ed. 2009). The mill rate is set by the taxing authority, and one mill equals \$1 per \$1000 on the property's assessed value. *Id.* at 1084.

5. See NAT'L RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., NATIONAL RESOURCES INVENTORY 2003 ANNUAL NRI: LAND USE 1-2 (2007), available at

used for cropland declined by 12% between 1983 and 2003, and land devoted to grazing uses declined 5% during the same period.<sup>6</sup> Indicative of development demands, property values for agricultural lands have been rising steadily since 1987.<sup>7</sup>

Although a pure market based approach to land use might result in an adequate number and placement of agricultural operations, it is likely that the transition time would result in severe food shortages during the period of market reaction to agricultural product pricing.<sup>8</sup> The practice of farmland preservation is a means of actively influencing land use decisions.<sup>9</sup> These decisions can be economically motivated by diverting the costs associated with encroaching development, which might otherwise push agricultural operations to new locations in a pure market system.<sup>10</sup>

### B. *Pennsylvania's Approach to Protecting Agriculture*

Pennsylvania has an interest in protecting its agricultural industry. In a 2008 report, the Pennsylvania Department of Agriculture stated that agriculture is the leading economic enterprise in the state, with sales contributing \$5.8 billion annually to the economy.<sup>11</sup> Accordingly, Pennsylvania has responded to the growing threats to the agricultural industry in several ways. A brief overview of Pennsylvania's statutory protections illustrates the state's overall approach to farmland preservation, in which Clean and Green is a component.

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<http://www.nrcs.usda.gov/technical/NRI/2003/Landuse-mrb.pdf>. The National Resources Inventory is a statistical survey of natural resource conditions and trends on non-federal land in the United States. *Id.*

6. *Id.* at 2-3.

7. Charles Barnard, *Farm Real Estate Values*, in U.S. DEP'T OF AGRIC., ECON. RESEARCH SERV., ECONOMIC INFORMATION BULLETIN 16, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 9, 9 (Keith Wiebe, Noel Gollhon ed., 2006), available at [http://www.ers.usda.gov/publications/arei/eib16/eib16\\_1-2.pdf](http://www.ers.usda.gov/publications/arei/eib16/eib16_1-2.pdf). Land values had risen rapidly during the 1970s until 1982, when land depreciated in value until 1987. Between 1987 and 2004, average land values for farmland rose 127%. *Id.*

8. LAWRENCE W. LIBBY, FARMLAND PROTECTION POLICY: AN ECONOMIC PERSPECTIVE 2 (1997), <http://www.farmlandinfo.org/documents/29764/wp97-1.pdf> (last visited March 21, 2011).

9. *See id.* at 7-8.

10. *See id.* The process involves bargaining and negotiating by citizens in the preservation of agricultural land uses which often produce rent values lower than the highest and best use from market demands. *Id.*

11. COMMW. OF PA. DEP'T OF AGRIC., BUREAU OF FARMLAND PRES., 2008 FARMLAND PRES. ANNUAL REPORT, at 1 (2009).

## 1. Right to Farm Law

Pennsylvania enacted its Right to Farm law in 1982.<sup>12</sup> Generally, this law provides agricultural operations protection from nuisance suits.<sup>13</sup> Local municipalities are prohibited from including agricultural operations in nuisance ordinances, so long as that “operation does not have a direct adverse effect on the public health and safety.”<sup>14</sup> The statute also expressly states that “[i]t is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.”<sup>15</sup>

## 2. ACRE

Act 38 of 2005, more commonly known as the Agriculture, Communities and Rural Environments law (ACRE), strengthens protections against local regulations on agriculture.<sup>16</sup> In comparison to the Right to Farm law, which prohibits municipal regulations defining agriculture as a nuisance, ACRE prohibits municipalities from adopting or enforcing almost any ordinance regulating agriculture that is more restrictive than one that the state has passed.<sup>17</sup> The statute also authorizes the attorney general to bring suit challenging an allegedly unauthorized local ordinance.<sup>18</sup>

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12. Prot. of Agric. Operations from Nuisance Suits and Ordinances, 3 PA. STAT. ANN. §§ 951-957 (West 2008). For a thorough analysis of this law, see generally Jennifer L. Beidel, *Pennsylvania's Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN. ST. L. REV. 163 (2005).

13. 3 PA. STAT. ANN. § 954.

14. *Id.* § 953(a).

15. *Id.* § 951.

16. Agric., Cmties. and Rural Env'ts, 3 PA. CONS. STAT. §§ 311-318 (2006).

17. See *id.* Section 313 states, “A local government unit shall not adopt nor enforce an unauthorized local ordinance.” *Id.* § 313. “Local government unit” is defined in § 312 as “[a] political subdivision of the Commonwealth.” *Id.* § 312. “Unauthorized local ordinance” is defined in § 312 as being one that “[p]rohibits or limits a normal agricultural operation,” unless the municipality has authority and has not been preempted by the state, or one that “[r]estricts or limits the ownership structure of a normal agricultural operation.” *Id.* This last clause indicates that a municipality cannot exclude different forms of farm ownership, such as an incorporated business. Normal agricultural operation is defined by reference to the Right to Farm Law. *Id.*; 3 PA. STAT. ANN. § 952.

18. 3 PA. CONS. STAT. §§ 314-315. This mechanism relieves the agricultural operator of the burden of litigation if the attorney general decides to challenge the ordinance. *Id.*

### 3. Agricultural Area Security Law

In 1981, Pennsylvania adopted the Agricultural Area Security Law, which provides for the creation of agricultural security areas (ASA).<sup>19</sup> An ASA can be created when owners of at least 250 eligible acres of land submit a proposal to the local governing body.<sup>20</sup> Lands within an ASA are provided with protection from certain local regulations, preferential treatment from administrative agencies, and insulation from the exercise of eminent domain.<sup>21</sup> This law also provides authority for the purchase of agricultural conservation easements.<sup>22</sup> Agricultural conservation easements grant an interest in property that “represents the right to prevent the development or improvement of a parcel for any purpose other than agricultural production.”<sup>23</sup> This authority was first exercised in 1989, and as of 2008, there were over 400,000 acres of land “preserved” by agricultural conservation easements.<sup>24</sup>

### 4. Clean and Green

The Clean and Green program can also be viewed as a tool for farmland preservation. While the Right to Farm Law and ACRE protect agriculture from nuisance suits as well as burdensome local regulations, and the Agricultural Area Security Law provides a method for perpetually restricting the use of land, Clean and Green provides economic incentives by reducing the operating costs of farmers.

In Pennsylvania, property taxes are collected at the county level.<sup>25</sup> Property taxes are “a primary provider of local tax revenues for, among other things, public schools, police and fire departments, and sanitation

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19. Agric. Area Sec. Law, 3 PA. STAT. ANN. §§ 901-915 (West 2008).

20. *Id.* § 905. The determination of whether the creation of an agricultural security area is needed is determined by the landowners, not the governing body. *See In re Agric. Sec. Area in E. Lampeter Twp.*, 974 A.2d 1213, 1215 (Pa. Commw. Ct. 2009).

21. 3 PA. STAT. ANN. §§ 911-913. Section 913 states that approval for most proposed condemnations shall occur only if it is determined that condemnation will not “unreasonably adverse[ly] affect [the] preservation and enhancement of agriculture or municipal resources within the [ASA]... or there is no reasonable and prudent alternative.” *Id.* § 913.

22. *Id.* § 914.1.

23. *Id.* § 903.

24. COMMW. OF PA. DEP’T OF AGRIC., *supra* note 11, at 3.

25. *See* General County Assessment Law, 72 PA. STAT. ANN. §§ 5020-1 to 5020-602 (West 1995); First Class County Assessment Law, 72 PA. STAT. ANN. §§ 5341.1-5341.21 (West 1995); Second Class County Assessment Law, PA. STAT. ANN. §§ 5452.1-5452.20 (West 1995); Second Class A and Third Class County Assessment Law, 72 PA. STAT. ANN. §§ 5342-5350k (West 2008); Fourth to Eighth Class County Assessment Law, PA. STAT. ANN. §§ 5453.101-5453.107 (West 1995 & Supp. 2009).

services.”<sup>26</sup> Property taxes are paid according to the assessed value on real property.<sup>27</sup> The assessed value is normally determined by appraising the property at its market value.<sup>28</sup> When development spreads outward from urban areas into agricultural areas, property values tend to rise with the increased demand for land.<sup>29</sup> When agricultural lands are reassessed after demand in the area has increased, the assessed value will likely also increase, resulting in higher property taxes. Clean and Green addresses this increased cost by providing an alternative assessed value; instead of the fair market value, the assessment is based on the use value of the property under its current use. This can often result in significant savings to the taxpayers on lands enrolled in the Clean and Green program. Unlike conservation easements, which provide a legal method to prevent development of affected lands, Clean and Green creates financial incentives for the landowner to keep the land in its current state. As a tool for farmland preservation, it is a carrot rather than a stick. It provides farmers who wish to continue farming the opportunity to reduce operating costs through a reduced property tax burden.

### C. *Overview of Clean and Green*

The program known as Clean and Green was enacted by the Pennsylvania Farmland and Forest Land Assessment Act of 1974.<sup>30</sup> The Act provides the framework for the administration of the program. The Pennsylvania Department of Agriculture was given the responsibility to establish use values for the program and to provide the county assessors

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26. *Clifton v. Allegheny County*, 969 A.2d 1197, 1202 (Pa. 2009) (citing John Joseph Wallis, *A History of the Property Tax in America*, in PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 127 (Wallace E. Oates ed. 2001)).

27. *See id.* Assessed value is defined as “[t]he value that a taxing authority gives to property and to which the tax rate is applied.” BLACK’S LAW DICTIONARY 1690 (9th ed. 2009).

28. *See Clifton*, 969 A.2d at 1202. Market value has been defined by the Pennsylvania Supreme Court as “the price which a purchaser, willing but not obliged to buy, would pay an owner, willing but not obliged to sell, taking into consideration all uses to which the property is adapted and might in reason be applied.” *In re Lehigh & Wilkes-Barre Coal Co.’s Assessment*, 148 A. 301, 303 (Pa. 1929). The court held that a separate method of valuation, the base year market value method, was unconstitutional as applied when the taxing locality did not reassess property for several years. *See generally Clifton*, 969 A.2d at 1197.

29. *See Ronald W. Spahr & Mark A. Sunderman, Property Tax Inequities on Ranch and Farm Properties*, 74 LAND ECON. 374, 374 (1998).

30. Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. §§ 5490.1-5490.13 (West 1990 & Supp. 2009).

with necessary forms and regulations.<sup>31</sup> The individual county assessors are responsible for administering the program at the county level.<sup>32</sup>

The statute declares that there are three categories of land that are eligible for enrollment in Clean and Green to receive preferential assessment: agricultural use, agricultural reserve, and forest reserve.<sup>33</sup> Land is devoted to agricultural use when it “is used for the purpose of producing an agricultural commodity” or is eligible for a federal soil conservation program.<sup>34</sup> Agricultural reserve land must be “noncommercial open space and open to the public.”<sup>35</sup> Forest reserve lands are “stocked by forest trees of any size and capable of producing timber or other wood products.”<sup>36</sup> Lands that are classified as eligible in one of these categories are further classified according to their productivity.<sup>37</sup>

In addition to the requirement that lands be devoted to one of the three eligible uses, there are size requirements for enrollment.<sup>38</sup> Lands devoted to agricultural use must have been used in that manner for at least three years, and they must consist of at least ten acres or have “an anticipated yearly gross income of at least two thousand dollars.”<sup>39</sup> Both agricultural and forest reserve lands must be at least ten acres in size, and there is no provision for prior revenue to permit enrollment.<sup>40</sup> The acreage requirements include the farmstead land, which consists of the area under a residence, and the curtilage.<sup>41</sup> The owner may, for the purposes of enrollment, combine the acreage of several contiguous parcels, but he or she must be the owner of all lands included in the

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31. *Id.* §§ 5490.4a, 5490.11; 7 PA. CODE § 137b.3 (2001). The Department of Agriculture is to establish annually county-specific use values for the eligible classes of land. 72 PA. STAT. ANN. § 5490.4a.

32. 72 PA. STAT. ANN. §§ 5490.4b-5490.

33. *Id.* § 5490.3.

34. *Id.* § 5490.2. The term also applies to lands that are rented to another person who conducts the agricultural operation. *Id.*

35. *Id.* Lands devoted as agricultural reserve must be open to the public without charge and without discrimination. *Id.*

36. *Id.*

37. *Id.* § 5490.3. This section indicates that lands can be categorized by the USDA-NRCS Agricultural Land Capability Classification system or by other methods to calculate the capability of the land for its particular use. *See also* PA. DEP'T OF AGRIC., BUREAU OF FARMLAND PRES., 2009 CLEAN AND GREEN USE VALUES (2009) (identifies assessment values by county and soil category).

38. 72 PA. STAT. ANN. § 5490.3.

39. *Id.*

40. *Id.*

41. *Id.* § 5490.2. The statute defines curtilage as “[t]he land surrounding a residential structure and farm building used for a yard, driveway, on-lot sewage system or access to any building on the tract.” *Id.*

application.<sup>42</sup> The landowner may enroll land that is devoted to more than one of the eligible classifications, so long as the combined total satisfies the acreage requirement.<sup>43</sup> A landowner seeking enrollment must include all contiguous lands described in the applicable deed.<sup>44</sup>

Assuming the lands included in a landowner's application satisfy the requirements of the program, the county assessor will notify the landowner of acceptance.<sup>45</sup> Once enrolled, the property will be assessed according to its use value rather than its market value.<sup>46</sup> The basic concept behind this is that the market value of agricultural land might be the price a prospective buyer would be willing to pay in anticipation of land development. This assessment essentially ignores the appreciation in property values due to demand for land uses other than that under which the property is enrolled in the program.

In exchange for the preferential assessment, enrolled landowners agree to maintain the land in its current use.<sup>47</sup> The landowner is required to submit notice to the assessor for any proposed changes in land use or

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42. *Id.* § 5490.3; 7 PA. CODE § 137b.17 (2001); *see also* Feick v. Berks County Bd. of Assessment Appeals, 720 A.2d 504 (Pa. Commw. Ct. 1998) (holding that a landowner was no longer eligible for the program when he sold one of two parcels, and his remaining parcel was not independently eligible for enrollment). The statute indicates that "contiguous tracts" include "all portions of one operational unit as described in the deed or deeds, whether or not the portions are divided by streams, public roads or bridges and whether or not the portions are described as multiple tax parcels, tracts, purports or other property identifiers." 72 PA. STAT. ANN. § 5490.2. Contiguous means "touching at a point or along a boundary." BLACK'S LAW DICTIONARY 362 (9th ed. 2009).

43. 72 PA. STAT. ANN. § 5490.3.

44. *Id.* The landowner must also include in the application the boundaries of all contiguous and ineligible lands described on the deed, although this land will not be preferentially assessed. 7 PA. CODE § 137b.24 (2001).

45. 72 PA. STAT. ANN. § 5490.4-5490.5.

46. *Id.* §§ 5490.3, 5490.4a-5490.4b. Use values for assessment may be based upon annual figures provided by the Pennsylvania Department of Agriculture or by the individual county assessors, so long as they are uniform in their application throughout the county. *Id.* §§ 5490.3, 5490.4b. In determining use values, the Department of Agriculture uses the income approach for asset valuation. *Id.* § 5490.4a. This method of valuation is based on the capitalization of the income that the property is expected to generate. BLACK'S LAW DICTIONARY 832 (9th ed. 2009). In performing this computation, the Department of Agriculture is to consult with the College of Agricultural Sciences at The Pennsylvania State University, the Pennsylvania Agricultural Statistics Service, United States Department of Agriculture (USDA) Environmental Research Service, USDA Natural Resources Conservation Service, and other sources the Department deems appropriate. 72 PA. STAT. ANN. § 5490.4a. In determining forest reserve use values, the Department is to consult with the Bureau of Forestry of the Department of Conservation and Natural Resources. *Id.* The market value is typically determined by a method of real property appraising where the property to be assessed is compared to the prices of similar, recently sold properties. BLACK'S LAW DICTIONARY 1057 (9th ed. 2009); APPRAISAL INST., APPRAISING RESIDENTIAL PROPERTIES 82-83 (4th ed. 2007).

47. *See* 72 PA. STAT. ANN. § 5490.4.



ownership.<sup>48</sup> If the assessor determines that the proposed changes would not satisfy the requirements of Clean and Green, the ineligible lands will lose their preferential assessments.<sup>49</sup> Additionally, rollback taxes will be assessed as a penalty.<sup>50</sup> The rollback penalty is determined by finding the difference between the taxes that were paid under preferential assessment and the taxes that would have been paid according to typical market value assessment.<sup>51</sup> The rollback penalty can be imposed for the prior years of enrollment in Clean and Green, up to a maximum of seven years.<sup>52</sup>

The statute differentiates between various types of property dispositions that result in a change in ownership of enrolled lands. If the entirety of lands enrolled under a single application is transferred to a new owner, the lands will continue to be preferentially assessed unless there is a change to an ineligible use.<sup>53</sup> If less than all the lands from a single application are transferred, they are classified as either a split-off or separation under the program.<sup>54</sup> A separation is a division of the enrolled lands into two or more tracts of land that individually still meet the requirements for enrollment.<sup>55</sup> Preferential assessment will continue in the occurrence of a separation.<sup>56</sup> A split-off is a division into two or more tracts of land, where at least one tract no longer meets the requirements of eligibility.<sup>57</sup> The tract that is no longer independently eligible will no longer receive preferential assessment, while the preferential assessment for those tracts that do independently meet the requirements will remain.<sup>58</sup>

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48. *Id.* § 5490.4. Upon application, the landowner agrees to submit notice of at least thirty days to the assessor regarding these changes. *Id.*

49. *Id.* § 5490.3.

50. *Id.* § 5490.5a.

51. *Id.* §§ 5490.3, 5490.5a.

52. *Id.* § 5490.5a. Interest is applied to the rollback at the rate of 6% annually. *Id.*

53. *Id.* § 5490.6. The statute also indicates that the landowner changing the use will be liable for the rollback taxes. *Id.*

54. *Id.*

55. *Id.* § 5490.2.

56. *Id.* § 5490.6.

57. *Id.* § 5490.2.

58. *Id.* § 5490.6. The imposition of rollback taxes varies in the case of a split-off depending on the circumstances of the transfer. *Id.* There will be no rollback due if the land split-off is less than two acres; the land split-off is used for one of the three Clean and Green eligible land classes or for a residence occupied by the person to which the land was conveyed, and the total tract or tracts split-off do not exceed ten acres or 10% of the total originating tract, whichever is less. *Id.* If the municipality requires a minimum lot size of two to three acres, then the split-off is permitted to be the lesser of the minimum lot size and three acres. *Id.*

D. *The Enactment of Clean and Green*

Prior to the adoption of the statute, the legislature amended the Pennsylvania Constitution in 1973 to include an exception from the requirement of uniform taxes for “private forest reserves, agriculture reserves, and land actively devoted to agriculture use.”<sup>59</sup> The Pennsylvania Farmland and Forest Land Assessment Act of 1974 was signed into law on December 19, 1974.<sup>60</sup> However, this was not the first attempt by the Pennsylvania legislature to alleviate the property tax burden on agricultural operators. Act 515 of 1966 permits the individual county commissioners to covenant with landowners for preservation of certain eligible lands in exchange for reduced property taxes.<sup>61</sup> The property would be given an assessment based upon the fair market value of the property with the restrictive covenant, which would be similar to the use value.<sup>62</sup> This program is not mandatory; individual counties can choose whether to implement it.<sup>63</sup>

The Pennsylvania House of Representatives introduced a bill in 1971 that was an early version of what would become Act 319 of 1974.<sup>64</sup> This bill was not passed, as it required an amendment to the state constitution. The state constitution requires that “[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax.”<sup>65</sup> Property taxes generally conform to this mandate by assessing all properties according to their fair market values. Because Act 319 assesses selected properties non-uniformly, without the amendment, the Act may have been found unconstitutional.

E. *Public Criticism of Clean and Green*

As property taxes have skyrocketed throughout the state, taxpayers are looking for reasons why. Unsurprisingly, more attention has been given to the effect Clean and Green has on property tax bases.<sup>66</sup> A

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59. PA. CONST. art. VIII, § 2; John C. Becker, *Preferential Assessment of Agricultural and Forest Land Under Act 319 of 1974: Entering the Second Decade*, 90 DICK. L. REV. 333, 335 (1986). Pennsylvania’s Constitution was amended by a voter ballot question in 1973, proposed by 1971 Pa. Laws 776 and 1973 Pa. Laws 451. *See id.*

60. *Id.*

61. Act 515 of 1966, 16 PA. STAT. ANN. §§ 11941-11947 (West 2001).

62. *Id.* § 11943.

63. *Id.*

64. STAFF ANALYSIS OF THE PENNSYLVANIA FARMLAND AND FOREST LAND ASSESSMENT ACT OF 1974, JOINT STATE GOVERNMENT COMMISSION OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 20 (Apr. 1997).

65. PA. CONST. art. VIII, § 1.

66. *See* Judy Kroeger, ‘Clean and Green’ Hurts Districts’ Budgets, DAILY COURIER (Connellsville), July 29, 2004, available at [http://www.pittsburghlive.com/x/daily\\_courier/news/s\\_205658.html](http://www.pittsburghlive.com/x/daily_courier/news/s_205658.html). The author compares the differences in tax revenue for

necessary effect of reducing the taxes paid by some property owners is that those property owners not receiving a tax break will pay the difference. This consequence was identified during the drafting of the bill, and the drafters realized that in order for the program to be fair, the taxpayers paying a disproportionately higher tax than those taxpayers receiving preferential assessment should receive something in return.<sup>67</sup>

Additionally, there has been criticism that the eligibility requirements are too broad, permitting the enrollment of lands used for country clubs, condominiums, and golf courses.<sup>68</sup> In response, attempts have been made to increase the minimum required parcel size for agricultural and forest reserve to 30 acres.<sup>69</sup> Some have called for a three year review process, during which the assessor would have to confirm that the enrolled lands still meet the requirements of the program.<sup>70</sup> A downside to the renewal process is that it would force legitimate farmers to complete more paperwork, and it would make it more difficult to receive the benefits of the program.<sup>71</sup>

### III. ANALYSIS

#### A. *Pennsylvania's Approach Compared to Other States*

Pennsylvania is not the only state with a differential assessment program for agriculture. All states but Michigan have enacted some

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several counties with lands enrolled in Clean and Green, and what the tax revenues would be if those lands were not preferentially assessed. *Id.*

67. See 1974 LEGIS. J. 2369. Senator Franklin Kury from Northumberland County stated:

What we have in this particular proposal is the proposition that a certain group of landowners should receive preferential tax treatment, and the justification for giving that for the other taxpayers is that in exchange for giving certain people a tax break, they will give the rest of the taxpayers something. . . . Otherwise, if there is no quid pro quo, it is unfair, it is unjust to give a tax break to one particular group.

*Id.*

68. David M. Brown, *Pa Senator Gets Mean on Clean and Green*, TRIBUNE-REVIEW (Pittsburgh), Mar. 2, 2007, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_495730.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_495730.html).

69. S.B. 708, Gen. Assem., Regular Session 2007-2008, (Pa. 2007). The Senate Bill additionally sought to statutorily prohibit enrollment of lands used for golf courses or country clubs as agricultural or forest reserve lands. *Id.*

70. See Brian Bowling, *Pa. Farm Aid Program Ripe For Change?*, TRIBUNE-REVIEW (Pittsburgh), May 6, 2007, available at [http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s\\_506281.html](http://www.pittsburghlive.com/x/pittsburghtrib/news/cityregion/s_506281.html).

71. See *id.* The Pennsylvania Farm Bureau commented that forgetting to mail a letter of renewal might result in automatic disenrollment. *Id.*

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form of a differential assessment.<sup>72</sup> Michigan provides property tax relief through a circuit breaker program.<sup>73</sup>

This Comment will compare Pennsylvania's Clean and Green to the differential assessment programs of selected other states. New York, Ohio, North Carolina, and Virginia have been chosen for their proximity to Pennsylvania, and because they have employed similar programs to Pennsylvania for farmland preservation.

*B. Factors for Comparison*

Selected features of Pennsylvania's Clean and Green for comparison include the type of tax reduction, eligibility criteria for receiving preferential assessment, potential for rollback taxes, and whether the program is discretionary on the part of the government. Eligibility requirements include minimum lot size for the applicant landowner's property and the current use of the land.

*C. Differential Assessment Programs in Other States*

1. North Carolina

North Carolina's differential assessment program is more restrictive than that of Pennsylvania. North Carolina requires that eligible lands be actively used for agricultural, horticultural, or forestry production.<sup>74</sup> Although portions of enrolled parcels are permitted to be classified as "wasteland" or "woodland," the predominant use of the parcel must be related to active agricultural, horticultural, or forestry production.<sup>75</sup> North Carolina does not permit landowners to enroll lands that have characteristics of agricultural lands but are not currently in production, such as Pennsylvania's categories of agricultural reserve or forest reserve.<sup>76</sup> In order to classify property as either active agricultural or horticultural use, the property owner must demonstrate that there was an

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72. AM. FARMLAND TRUST, DIFFERENTIAL ASSESSMENT AND CIRCUIT BREAKER TAX PROGRAMS (2006).

73. *Id.* This program allows farmers to offset their property tax through state income tax credits. *Id.* New York and Wisconsin also have enacted circuit breaker programs. *Id.*

74. N.C. GEN. STAT. § 105-277.2 (2009). Horticultural land is defined as land devoted to the production of fruits, vegetables, nursery, or floral products. *Id.*

75. *Id.*

76. *Id.* § 105-277.3.

average gross income related to agricultural or horticultural production over the preceding three years.<sup>77</sup>

North Carolina's minimum parcel size requirements vary from those of Pennsylvania. While Pennsylvania's minimum size for the enrollment of lands is ten acres regardless of classification, North Carolina's requirements differ depending on the active use. Lands enrolled as agricultural use must be at least ten acres.<sup>78</sup> Lands enrolled as horticultural use need only be 5 acres, and lands enrolled as forestry use must be at least 20 acres.<sup>79</sup>

Unlike Pennsylvania, North Carolina imposes restrictions depending on the classification of the applicant landowner. North Carolina permits enrollment of lands owned by an individual or an eligible business entity.<sup>80</sup> A requirement to be an eligible business entity is that the principal business of the entity must be the farming of agricultural land, horticultural land, or forestry.<sup>81</sup> This provision makes it more difficult for speculative developers to enroll the lands prior to development, unless the developers' principle business is in agriculture.<sup>82</sup>

The penalty imposed for converting enrolled land to an ineligible use is not as severe in North Carolina as in Pennsylvania. The North Carolina statute declares that the difference over the preceding three years between the property taxes under a market value assessment and the use value assessment will be applied as a lien against the property.<sup>83</sup> In the event that the property is disqualified from eligibility for the program, the deferred taxes for up to a maximum of three years will be imposed as a rollback tax.<sup>84</sup> This does not provide as great of a disincentive for converting the land from a "protected" eligible use to an ineligible use as Pennsylvania's seven year rollback tax.<sup>85</sup>

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77. *Id.* The statute does not prescribe an income figure requirement for lands eligible as forestry use, but states that they must be "in actual production." *Id.*

78. *Id.* The statute further provides that for agricultural operations producing aquatic species, the minimum size is only five acres, or if the operation produces at least 20,000 pounds of aquatic species for commercial sale, there is no minimum property size. *Id.*

79. *Id.*

80. *Id.* § 105-277.2. A "business entity" is defined as a corporation, general partnership, limited partnership, or limited liability company. *Id.*

81. *Id.*

82. *See generally* W.R. Co. v. N.C. Prop. Tax Comm'n, 269 S.E.2d 636 (N.C. Ct. App. 1980) (holding that a corporation that received 99% of its income from the sale of land, but did not mention agricultural, horticultural, or forestry production in its corporate charter, was not an eligible business entity).

83. N.C. GEN. STAT. § 105-277.4.

84. *Id.* § 105-277.3.

85. Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. § 5490.5a (West Supp. 2009).

North Carolina's application process is similar to that of Pennsylvania, as the assessor does not have discretion to determine eligibility of applicant lands.<sup>86</sup> If the applicant is able to demonstrate that his or her lands meet the minimum statutory and regulatory requirements, the assessor is directed to appraise the property at its use value and tax accordingly.<sup>87</sup>

## 2. New York

New York provides property tax relief for agricultural operators by use value assessment.<sup>88</sup> New York sets agricultural assessment values annually, which are based on soil productivity.<sup>89</sup> New York has also more closely integrated the use value assessment with other farmland preservation programs, which offer similar protections to Pennsylvania's Agricultural Area Security Law.<sup>90</sup>

Although New York's preferential assessment program is included in the Agricultural Districts Law, eligibility is not premised on the applicant's land being included within an agricultural district.<sup>91</sup> Owners of land seeking preferential assessment are required to apply annually with the tax assessor.<sup>92</sup>

An important distinction between the Pennsylvania approach and the New York approach appears in the eligibility requirements. Whereas Pennsylvania permits certain lands not actively used in agricultural

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86. N.C. GEN. STAT. § 105-277.4; 72 PA. STAT. ANN. § 5490.4.

87. N.C. GEN. STAT. § 105-277.4.

88. N.Y. AGRIC. & MKTS. LAW § 300 (McKinney 2004). The income approach is generally defined as "[a] method of appraising real property based on capitalization of the income that the property is expected to generate." BLACK'S LAW DICTIONARY 832 (9th ed. 2009).

89. N.Y. AGRIC. & MKTS. LAW § 304-a. New York's state board of real property services is responsible for determining and publishing the land use categories and use values annually. *Id.*

90. Compare *id.* §§ 300-310 with Agric. Area Sec. Law, 3 PA. STAT. ANN. §§ 911-913 (West 2008). New York's tax reduction program is included within the Agricultural Districts law, which provides protections similar to Pennsylvania's Agricultural Area Security Law. N.Y. AGRIC. & MKTS. LAW §§ 300-310. The act declares the legislative intent as the identification and attempt to solve the following problem:

[M]any of the agricultural lands in New York state are in jeopardy of being lost for any agricultural purposes. When nonagricultural development extends into farm areas, competition for limited land resources results. Ordinances inhibiting farming tend to follow, farm taxes rise, and hopes for speculative gains discourage investments in farm improvements, often leading to the idling or conversion of potentially productive agricultural land.

*Id.* § 300.

91. N.Y. AGRIC. & MKTS. LAW § 300. Lands outside an agricultural district may be enrolled as if they were in an agricultural district. *Id.*

92. *Id.* §§ 305, 306.

production, New York is more restrictive.<sup>93</sup> The New York law requires that enrolled lands have been “used as a single operation in the preceding two years for the production of the sale of crops, livestock or livestock products of an average gross sales value of ten thousand dollars or more.”<sup>94</sup> It is also required that applicant lands be at least seven acres.<sup>95</sup> The statute permits the inclusion of “farm woodland,” which is land used for the purpose of woodland production up to 50 acres in size.<sup>96</sup> Lands that would otherwise be classified as “farm woodland” but are larger than 50 acres are governed by a separate statute.<sup>97</sup>

Rollback penalties are imposed depending upon the method of inclusion within a preferential assessment program and upon the circumstances leading to disenrollment. If land is enrolled as agricultural production land within an agricultural district, the rollback penalty will be imposed for up to the prior five years in which the owner received a preferential assessment.<sup>98</sup> If the enrolled land is not located within an agricultural district, the rollback penalty will also be imposed for the prior five years in which a tax savings resulted from preferential assessment, and the rollback will be imposed if the conversion occurs within the eight years subsequent to the land last receiving preferential assessment.<sup>99</sup> The rollback penalty for enrolled forest land in excess of 50 acres that is converted to a non-eligible use will be up to five times the amount that would have been levied upon the land without the preferential tax treatment.<sup>100</sup>

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93. Compare *id.* § 301 with Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. § 5490.3 (West 2008). New York’s statute generally limits eligibility to lands that are actively used for agricultural production, and providing for limited specific exceptions, while Pennsylvania’s statute permits enrollment of lands in agricultural reserve that are not in production. See N.Y. AGRIC. & MKTS. LAW § 301; 72 PA. STAT. ANN. § 5490.3.

94. N.Y. AGRIC. & MKTS. LAW § 301. The statute makes an exception for the income requirement in the case of agricultural operations in their first or second year of operation. *Id.*

95. *Id.*

96. *Id.* This type of production includes, but is not limited to, logs, lumber, posts and firewood. *Id.*

97. N.Y. REAL PROP. TAX LAW § 480-a (McKinney Supp. 2010). The statute further specifies that land enrolled under this provision must be “committed to continued forest crop production for an initial period of ten years” and stipulates requirements for adhering to a forest management program for continued inclusion within the program. *Id.*

98. N.Y. AGRIC. & MKTS. LAW § 305. In addition to the amount saved through preferential assessment, the rollback penalty will include 6% interest. *Id.*

99. *Id.* § 306. The rollback penalty will be imposed with 6% interest if the land is converted to a non-eligible use within the eight years following the last time an agricultural assessment was received. *Id.*

100. N.Y. REAL PROP. TAX LAW § 480-a. The statute specifies that the rollback for failure to comply with the commitment to forest production will be in the amount of two

New York also provides a method for the local taxing body to recover tax revenue lost due to preferential assessment.<sup>101</sup> For properties enrolled under the agricultural assessment program and located within an agricultural district, the state will pay the taxing jurisdiction half of the tax loss resulting from the preferential assessment.<sup>102</sup> This policy spreads some of the cost of the tax subsidy throughout the state, relieving local property owners of some of the burden which would be borne by higher tax rates to offset the loss from agricultural assessment.

### 3. Ohio

Similar to New York, Ohio generally restricts preferential use value assessment to lands in active agricultural production.<sup>103</sup> The Ohio statutes differentiate between forest land and “land devoted to agricultural use,” providing separate tax treatment.<sup>104</sup>

To be eligible for preferential treatment as “forest land,” the parcels must be approved by the Ohio Division of Forestry.<sup>105</sup> The Division of Forestry regulations stipulate that for certification, land must be at least ten acres in size, devoted to commercial production of timber, and the owner must comply with a forest management plan.<sup>106</sup> If land is certified as “forest land” and the owner successfully completes the application, the property taxes are reduced to 50 percent of the normal local tax rate.<sup>107</sup> If lands enrolled in the forest lands assessment program are no longer in compliance with the statutory or administrative guidelines, the preferential assessment will be revoked, but no rollback penalty will be imposed.<sup>108</sup>

In addition to the forest land assessment program, Ohio also has an agricultural use value assessment program.<sup>109</sup> To be eligible, land must have been “devoted exclusively to agricultural use” for the three years

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and one-half the otherwise exempted taxes, or if only part of the parcel is no longer eligible, then five times the amount of taxes exempted for only that portion in noncompliance. *Id.*

101. N.Y. AGRIC. & MKTS. LAW § 305.

102. *Id.*

103. *See generally* OHIO REV. CODE ANN. § 5713.22-5713.38 (West 2007).

104. *See generally id.*

105. *Id.* § 5713.22.

106. OHIO ADMIN. CODE 1501:3-10-02 (2009).

107. OHIO REV. CODE ANN. § 5713.23.

108. *Id.* § 5713.26. This statute provides that the chief of the division of forestry can notify the county auditor of a rule violation, prompting a return to market value assessment. *Id.* Owners can also voluntarily remove enrolled lands. *Id.* § 5713.25; *see also* OHIO DEP'T OF NAT. RES., OHIO'S FOREST PROPERTY TAX LAWS, <http://www.ohiodnr.gov/tabid/5287/Default.aspx> (last visited Jan. 7, 2010).

109. OHIO REV. CODE ANN. § 5713.30-5713.37.



prior to the application for enrollment.<sup>110</sup> The land must be at least ten acres in size, or the agricultural use must have produced an average of \$2500 over the prior three years if the land is less than ten acres.<sup>111</sup> The land owner must apply annually to continue the preferential assessment.<sup>112</sup> If enrolled, lands are assessed at their current use value.<sup>113</sup> Enrolled lands that are converted to an ineligible use will be subject to a rollback penalty equal to the tax saving over the prior three years.<sup>114</sup>

#### 4. Virginia

Virginia provides tax relief for agricultural operators through the Special Assessment for Land Preservation.<sup>115</sup> Virginia's program permits enrollment of four categories of land.<sup>116</sup> Lands enrolled as agricultural use, horticultural use, or forest use must be devoted to "bona fide production" for that purpose.<sup>117</sup> Lands eligible as open space use may be used for many non-agricultural purposes.<sup>118</sup>

The Virginia program is outwardly more permissive than the Pennsylvania program, as it specifically permits enrollment of public or private golf courses as open space.<sup>119</sup> Lands "assisting in the shaping of the character, direction, and timing of community development" may also be preferentially assessed if those lands are in accordance to a local

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110. *See id.* § 5713.30-5713.31. The lands are generally required to be in active production of an agricultural product. *Id.* § 5713.30. Lands eligible for enrollment as forest lands under the forest land assessment program might also be eligible for assessment under this program. *Id.* Some exceptions are made to the requirement that the land be in active production, such as when land has been lying idle for more than one but less than three years, and the landowner shows good cause. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* Eligible agricultural lands are further classified by their soil productivity to develop the annual use value assessment. *See generally* Ohio Dep't of Taxation, *2009 Current Agricultural Use Value of Land Tables* (2009), available at [http://tax.ohio.gov/divisions/real\\_property/documents/CAUV\\_2009\\_Explanation\\_of\\_the\\_CAUV\\_Calculation.pdf](http://tax.ohio.gov/divisions/real_property/documents/CAUV_2009_Explanation_of_the_CAUV_Calculation.pdf).

114. OHIO REV. CODE ANN. § 5713.34.

115. VA. CODE ANN. §§ 58.1-3229 to 58.1-3244 (2009).

116. *Id.* § 58.1-3230.

117. *Id.* § 58.1-3230. The statute directs the Director of the Department of Conservation and Recreation, the State Forester, and the Commissioner of Agriculture and Consumer Services to further provide for standards of these categories. *Id.* § 58.1-3240. These agencies have provided further technical guidance on issues such as soil productivity and crop development. 4 VA. ADMIN. CODE § 10-20-10 to -40 (2009); 2 VA. ADMIN. CODE § 5-20-10 to -40 (2009); 4 VA. ADMIN. CODE § 5-20-10 TO -40 (2009).

118. VA. CODE ANN. § 58.1-3230. This statute includes lands used for parks, public or private golf courses, conservation purposes, or historic or scenic purposes in the category of open space. *Id.*

119. *Id.*

land-use plan.<sup>120</sup> The program is restrained by the requirement that the land for which preferential assessment is sought under the open space category must either be located within an agricultural district, or subject to either a perpetual easement or recorded commitment to keep the land in its current use.<sup>121</sup>

The minimum land size for enrollment as agricultural, horticultural, or open space use is 5 acres, and 20 acres for forest use.<sup>122</sup> The local taxing body is permitted to require a greater minimum land size for enrollment of open space land.<sup>123</sup>

Unlike Pennsylvania's Clean and Green, Virginia's agricultural assessment program requires the adoption of local ordinances before certain portions of the program are available to landowners.<sup>124</sup> Furthermore, the local governments are not required to effectuate the program in its entirety.<sup>125</sup> However, lands used in agricultural and forestal production within an agricultural district will be eligible for the use value assessment whether or not the local taxing body has enacted a local ordinance creating agricultural assessment.<sup>126</sup> By requiring use value assessment only for those lands in active production, and within agricultural districts, Virginia's program permits local taxing jurisdictions to more carefully design the assessment plan to best protect important land assets. Additionally, by only requiring part of the program, local governments can calculate the ability of their residents to subsidize those lands not in active production and located within an agricultural district.

Localities may also choose to adopt a sliding scale for the agricultural assessment and taxation, whereby the assessment lowers the longer the property is enrolled in the program.<sup>127</sup> In exchange for receiving the decreasing assessment under the sliding scale, the property

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120. *Id.*

121. *Id.* § 58.1-3233. Virginia authorizes the creation of agricultural, forestal, and agricultural and forestal districts, which are similar to Pennsylvania's Agricultural Security Areas. *Compare* Agric. and Forestal Dist. Act, V.A. CODE ANN. §§ 15.2-4300 to -4314 (2009) with Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. § 5490.3 (West Supp. 2009). The recorded commitment must be greater than four years but less than ten years. V.A. CODE ANN. § 58.1-3233.

122. V.A. CODE ANN. § 58.1-3233. The statute provides exceptions to the minimum lot size requirement for specialty crops identified by local ordinances. *Id.* There are exemptions for certain open space uses that permit lands less than the general requirement for five acres, but not less than one quarter of an acre. *Id.*

123. *Id.*

124. *Id.* § 58.1-3231. "[A local government] which has adopted a land-use plan may adopt an ordinance to provide for the use value assessment and taxation. . . ." *Id.*

125. *See id.*

126. *Id.*

127. *Id.*

owner must commit to the locality to keep the use of the property within an eligible class for a stipulated period of years.<sup>128</sup> By proving this sliding scale, localities which are unable to purchase conservation easements on lands within their jurisdiction may be able to secure shorter term restrictions on land use by offering decreasing assessments.

Rollback penalties will be imposed on owners who change the use of enrolled property, or who request and receive a change in zoning to a more intensive use.<sup>129</sup> For enrolled lands that are not within a locality that has enacted a sliding scale ordinance, the rollback penalty will be imposed for the five previous years in which the land was preferentially assessed.<sup>130</sup> Lands subject to a sliding scale assessment will have rollback penalties imposed for all years in which the land was preferentially assessed under the most current agreement between the landowner and the locality.<sup>131</sup>

Virginia's statute also addresses split-offs, stating that parcels split from enrolled land are subject to rollback for the land that was split, but the split will not result in a rollback penalty to the remaining land if it still complies with the requirements.<sup>132</sup> Localities may elect not to impose a rollback penalty for lands split-off from enrolled property, so long as the lands split-off are held in the name of an immediate family member for the first 60 months following the subdivision.<sup>133</sup> This permits owners of enrolled lands greater flexibility in granting lands to family members than in Pennsylvania, but does not provide a mechanism for the controlled sale of land without rollback similar to that of Clean and Green.<sup>134</sup>

### C. *Suggestions for Improving Clean and Green*

#### 1. *Narrowly Tailor the Statute*

The statute should address the goals of preserving agricultural land and open space separately. The differential assessment programs in New York, Ohio, and North Carolina are all limited in eligibility to lands in

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128. *Id.* § 58.1-3234. The agreement must be in writing for a period less than twenty years. *Id.*

129. *Id.* § 58.1-3237.

130. *Id.*

131. *Id.*

132. *Id.* § 58.1-3241.

133. *Id.* § 58.1-3231. Immediate family member is defined by local ordinance. *Id.*

134. *Compare id. with* Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. § 5490.6 (West Supp. 2009). Pennsylvania permits the owner of enrolled lands to split-off annually the lesser of ten acres or 10% of the entire enrolled lands, into parcels not greater than two acres. 72 PA. STAT. ANN. § 5490.6.

active agricultural production, and do not apply to nonproduction open space land.<sup>135</sup> By limiting enrollment to only active agricultural lands, the program can be designed to better assist agricultural operators with less potential from abuse by developers. Although Virginia's program does permit the enrollment of open space land, the local governments are not mandated to institute that portion of the statute.<sup>136</sup> Pennsylvania could follow the Virginia approach, which permits local governments to determine the best way to subsidize open space lands, while still providing a uniform program for active agricultural lands.<sup>137</sup>

The dynamics underlying use value taxation support the concept of addressing the preservation of active agricultural and open space lands separately. The stated purpose of Clean and Green is to encourage landowners to keep their land in use for agricultural or forestal production, or reserve.<sup>138</sup> Because use value assessment for enrolled lands operates as an exception to the state constitutional requirement for uniformity of taxation, its application should be limited.<sup>139</sup> The Pennsylvania Supreme Court has stated:

Each person . . . must bear his share of the public burdens. . . . The large property owner and the small holder pay upon the same ratio [which results in] what is known in organic and statute law as uniformity. . . . While every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden measured by the value of his property to that of his neighbor.<sup>140</sup>

Although the court was addressing a separate issue of assessment, this statement can be analogized to the application of Clean and Green.<sup>141</sup> Those owners of large properties may include farmers and other agricultural operators, as well as wealthy owners of large parcels that are not in use for agricultural production.<sup>142</sup>

In exchange for bearing a greater share of the public burden, the owners of land ineligible for preferential assessment receive the possibility that enrolled lands will remain in agricultural or forestal

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135. See N.Y. AGRIC. & MKTS. LAW § 301 (McKinney Supp. 2010); OHIO REV. CODE ANN. § 5713.23, 5713.30-5713.31 (West 2007); N.C. GEN. STAT. § 105-277.3 (2009).

136. See VA. CODE ANN. § 58.1-3230 to -3231.

137. See *id.*

138. 7 PA. CODE § 137b.1 (2001).

139. See PA. CONST. art. VIII, § 2.

140. *Clifton v. Allegheny County*, 969 A.2d 1197, 1214 (Pa. 2009).

141. *Id.* (considering a challenge on base year market value assessment).

142. See Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. § 5490.3 (West Supp. 2009). The statute permits the enrollment of agricultural reserve land. *Id.*

use.<sup>143</sup> It is less likely that the owners of ineligible land will find the disproportionate burden “cheerfully borne” when they see the beneficiary of preferential assessment to be a wealthy, non-agricultural operator.<sup>144</sup>

While sharing some common benefits, the practice of preserving lands in active agricultural production and the practice of preserving lands for open space should be viewed separately. Apart from the open space benefits, preserving lands in agricultural production ensures an adequate food supply for the future.<sup>145</sup> Many farms are located near urban areas that are developing outward. Relocation of the farms might lead to overdevelopment, and lands available for relocation may not have soil of comparable fertility.<sup>146</sup> The additional benefits of preserving lands in agricultural use, and not simply in an undeveloped state, will likely require less “bargaining” by the landowner ineligible for preferential assessment in return for bearing a greater share of the public tax burden.<sup>147</sup> If the preservation of farmland and the preservation of open space were addressed by separate statutory provisions, the programs might be better tailored for these different goals.

## 2. Require a Greater Commitment for Enrollment

There is some concern that the imposition of rollback taxes alone does not provide a great enough disincentive for development.<sup>148</sup> If the rollback alone does not provide sufficient incentive to maintain the land in its current use, then perhaps additional penalties or commitments should be imposed.

Virginia’s differential assessment program provides two mechanisms that produce a stronger commitment to maintaining the property in its current use.<sup>149</sup> First, localities are permitted to create a sliding scale for preferential assessment, providing reduced taxes for

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143. *See generally id.* The program both provides incentive to maintain current land use through lower taxes, and financially discourages conversion of the land use through the imposition of rollback taxes. *Id.*

144. *See Clifton*, 969 A.2d at 1214 (“While every tax is a burden, it is more cheerfully borne when the citizen feels that he is only required to bear his proportionate share of that burden.”).

145. *See AM. FARMLAND TRUST, WHY SAVE FARMLAND?* 1-2 (2003).

146. *See id.*

147. *See LIBBY*, *supra* note 8, at 7-8. The granting of preferential assessment involves bargaining and negotiating by citizens. *Id.*

148. James M. McElfish, Jr., *Taxation Effects on Land Development and Conservation*, 22 TEMP. ENVTL. L. & TECH. J. 139, 149 (2004) (referencing MICHAEL JACOBSON, ASSESSMENT OF PENNSYLVANIA’S FOREST PROPERTY TAX (2002)).

149. VA. CODE ANN. § 58.1-3233 (2009) (restricting the availability of preferential assessment for open space lands); *id.* § 58.1-3237 (imposing greater rollback for lands enrolled under a sliding scale system).

properties that are enrolled for greater periods of time.<sup>150</sup> The creation of a sliding scale assessment requires owners to commit to maintaining the use, or suffer a greater rollback penalty equal to the number of years committed to under the agreement.<sup>151</sup> By employing this mechanism, Pennsylvania could provide a potentially greater benefit to Pennsylvania agricultural operators, while simultaneously creating a greater disincentive for abuse of the program.

Virginia's second mechanism addresses the concern that the enrollment of lands not in active production are subject to abuse from developers.<sup>152</sup> If the locality decides to permit enrollment of open space land, the land must either be located within an agricultural district or be subject to either a perpetual agreement or written commitment to maintain the open space use.<sup>153</sup> This added commitment provides the ineligible property owners with a much greater benefit in exchange for higher property taxes. Pennsylvania should employ this type of mechanism for enrolled agricultural reserve or forest reserve lands to provide ineligible taxpayers with a greater benefit for bearing the cost of higher taxes.

### 3. Spreading the Cost of Farmland Preservation

Currently, the costs of Clean and Green are borne solely by non-enrolled landowners within the applicable county. The disproportionate amount paid by ineligible landowners would be greater in counties where enrolled lands comprise a greater percentage of the overall lands subject to property taxes.

The approaches of Virginia and New York offer two different mechanisms to alleviate this disproportionate burden. Virginia's approach permits the local taxing authority to partially tailor the preferential assessment to the needs or desires of the community.<sup>154</sup> The locality is only required to enroll lands that are located within agricultural districts, and are actively used for the production of agricultural or forestal production, into the preferential assessment program.<sup>155</sup> If this approach were mirrored in Pennsylvania, only those lands actively used and within an Agricultural Security Area established pursuant to the Agricultural Area Security Law would be automatically

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150. *Id.* § 58.1-3233.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* § 58.1-3231. The statute permits, but does not require, any county, city or town to adopt an authorizing ordinance. *Id.*

155. *Id.*

eligible.<sup>156</sup> However, it might be preferable to restrict automatic eligibility to lands in active production, as many farms may lack adequate area to be eligible to form an Agricultural Security Area.<sup>157</sup> Localities desiring to offer incentives to owners of land that was not actively used for agricultural production could do so by authorizing additional provisions by local ordinance. This would permit counties to tailor their land preservation plans according to a bargained-for agreement by ineligible landowners to carry a disproportionate amount of the public burden.

New York's approach is more direct than that of Virginia. For all preferentially assessed parcels located within an agricultural district, the state will pay the appropriate taxing locality one half of the revenue lost due to the preferential assessment.<sup>158</sup> Stated otherwise, the state will relieve the local owners of ineligible property of the subsidy to enrolled landowners, spreading the cost statewide. This approach merits consideration because the benefits of preserving agricultural production are enjoyed not only by those close to the actual agricultural operations, but by all those consuming the production. By spreading the cost of the preservation of that production, the application of preferential assessment can be made more uniform.

#### IV. CONCLUSION

Clean and Green is an integral part of Pennsylvania's approach to preserving its agricultural industry.<sup>159</sup> Although the program has proven to be successful in reducing the operating costs of many agricultural operations, those costs have been borne unequally throughout the state.<sup>160</sup> Additionally, the benefits of the program apply to lands that are not in agricultural production, which increases the cost to owners of ineligible land who have to make up for the revenue lost to local government's tax rolls.<sup>161</sup> This Comment has analogized Pennsylvania's differential assessment program to those of selected nearby states to propose changes to the Pennsylvania statute. By enacting these changes, Clean and Green may be improved to provide an even greater benefit to agricultural operators, while spreading the cost of the program more evenly among those taxpayers who are not enrolled.

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156. See Agric. Area Sec. Law, 3 PA. STAT. ANN. §§ 901-915 (West 2008).

157. See *id.* § 905. At least 250 acres of eligible land are required for the creation of an Agricultural Security Area. *Id.*

158. N.Y. AGRIC. & MKTS. LAW § 305 (McKinney Supp. 2010).

159. See *supra* Part II.B.1-4.

160. COMMONWEALTH OF PA. DEP'T OF AGRIC., *supra* note 11, at 1.

161. See Pa. Farmland and Forest Land Assessment Act of 1974, 72 PA. STAT. ANN. § 5490.3 (West Supp. 2009).

Specifically, first, the goals of the program should be identified and separately addressed. Clean and Green currently mandates local assessors to tax eligible agricultural and open space lands at a different rate than those ineligible.<sup>162</sup> The preferential assessment of agricultural lands and open space lands should be separately addressed. By addressing these goals separately, the state can protect agricultural operations uniformly, while permitting local governments to tailor open space programs according to local needs. Virginia's program is similar to this suggestion, and permits local governments to provide more or less financial incentive to open space landowners than is currently provided by Pennsylvania's program.<sup>163</sup>

Second, by requiring a greater commitment in return for a lower assessment, the local governments could better ensure that Clean and Green is not abused by developers holding the land for speculation. The other states have addressed this concern by permitting fewer landowners to enroll, or by providing commitment periods during which the landowner can potentially save enrolled landowners more in property taxes, while penalizing those landowners converting their lands to ineligible lands more. Virginia's sliding scale mechanism may be an attractive method of increasing commitment to the program. It simultaneously imposes a stricter penalty on abusers of the program, while rewarding landowners who maintain enrolled land use which was agreed upon during enrollment.<sup>164</sup>

Lastly, Pennsylvania could help spread the cost of the program throughout the state. By partially subsidizing Clean and Green, Pennsylvania could distribute the costs borne unequally by certain counties to the entire state. New York's approach could serve as a model, where the state reimburses local governments for half of the tax revenue lost for certain enrolled land.<sup>165</sup> Sharing the costs of the program across the entire state would be equitable, because Pennsylvania has declared the preservation of agriculture to be a state interest.<sup>166</sup>

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162. *See id.* §§ 5490.4b-5490.5.

163. *See* VA. CODE ANN. § 58.1-3231 (2009).

164. *See id.*

165. *See* N.Y. AGRIC. & MKTS. LAW § 305 (McKinney Supp. 2010).

166. *See* Prot. of Agric. Operations from Nuisance Suits and Ordinances, 3 PA. STAT. ANN. § 951 (West 2008) ("It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.").