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PROPERTY TAX INCENTIVES FOR IMPLEMENTING SOIL CONSERVATION PROGRAMS UNDER CONSTITUTIONAL TAXING LIMITATIONS

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INTRODUCTION

The major environmental legislation of this past decade has failed to address sufficiently what may be this country's most pressing environmental problem—soil erosion. Erosion of topsoil has reached more than five billion tons per year.[1] The loss of topsoil seriously affects not just the productive capacity of the land but also the quality of the water into which much of this soil flows. Wind and water caused erosion is twenty-five to thirty-five percent worse than during the Dust Bowl days fifty years ago.[2] In addition, today's agricultural runoff contains many nutrients from fertilizers and pesticides. Thus, as well as threatening agricultural productivity, topsoil erosion is a major pollutant of our waterways.

Property tax incentives are a possible technique for promoting participation in soil conservation programs[3] if methods can be found to overcome

1. Rocky Mountain News, Nov. 22, 1981, at 43, col. 1; The Capital Times, Nov. 19, 1981, at 46, col. 1.

2. The Capital Times, Nov. 19, 1981, at 46, col. 1.

3. Other types of tax incentives that may be used to promote the implementation of soil conservation programs include reductions in federal and state income taxes and reductions in federal estate and state inheritance taxes. For a discussion of direct cost-sharing under the agricultural conservation program (ACP) of the U.S. Department of Agriculture and federal income tax incentives as alternative means or policy instruments for influencing farmer decisions to invest in soil conservation programs, see Boxley & Anderson, *An Evaluation of Subsidy Forms for Soil and Water Conservation*, JOINT ECONOMIC COMM., 93rd Cong., 1st Sess., THE ECONOMICS OF

the requirements in state constitutions that property taxation be "uniform and equal."[4] The constitutions of forty-three (possibly forty-five)[5] states contain provisions, described as "uniformity clauses," which limit the legislative power to give favorable tax treatment to certain lands for implementing conservation practices.[6] Some state constitutions allow classification of property or subjects for tax purposes, but provide for uniformity within the same class.[7]

All but two states have adopted enabling legislation permitting differential assessments granting property tax relief in one form or another to preserve agricultural, forest, recreational, and open space lands either by using constitutional authority to classify property or by amending the state constitutions to permit exceptions to the uniformity rule.[8] Of all the available methods for providing exceptions to the constitutional uniformity clauses, differential assessment or land preservation statutes probably will be the most commonly used for initiating property tax incentives to implement conservation programs.

This article describes how property tax incentives can be used to implement soil conservation programs on agricultural and open space lands under the differential assessment statutes and other exceptions to constitutional limitations on taxation powers. Because of their importance as a method of implementing conservation programs, differential or use-value assessments are emphasized. First, the article describes restrictions imposed on taxing powers by the constitutional uniformity clauses and methods for circumventing those limitations; various property tax incentives available for conservation programs; types of differential or use-value assessments providing property tax relief for farm, forest, and open space land preservation; eligibility of lands for differential assessments; methods available to landowners for participation in differential assessments; and determination of value under differential assessment. The article next details how each of the three

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FEDERAL SUBSIDY PROGRAMS 953 (Comm. Print 1973) [hereinafter cited as FEDERAL SUBSIDY PROGRAMS]. *See* A. DAUGHERTY, OPEN SPACE PRESERVATION: FEDERAL TAX POLICIES ENCOURAGING DONATION OF CONSERVATION EASEMENTS (1978) [*reprinted as* U.S. DEP'T OF COMMERCE, NAT'L TECH. INFO. SERV. PUB. NO. PB-284 960] for a discussion of federal income, capital gains, estate, and gift tax policies as incentives for encouraging donations of conservation easements to preserve open space and the economic effects these incentives have on grantors of easements. *See also* Daugherty, *Preserving Farmland Through Federal Income Tax Incentives*, 33 NAT'L TAX J. 111 (1980) for a discussion of federal income taxes as an incentive to participate in conservation programs.

4. See W. NEWHOUSE, CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION 3 (1959) for a discussion of the constitutional limitations on taxing powers.

5. Rhode Island and Vermont constitutions have "uniformity clauses" providing only for a fair distribution of governmental expenses. R.I. CONST. art. I, § 2; VT. CONST. ch. I, art. 9. *See* W. NEWHOUSE, *supra* note 4, at 10-11, 47-48, 591-94.

6. W. NEWHOUSE, *supra* note 4, at 3. *See id.* at 9-11 for a classification of the various types of uniformity clauses. Alaska, Connecticut, Hawaii, Iowa, and New York do not have uniformity clauses in their constitutions. *Id.* at 11, 48, 595-600. The Alaska Constitution provides, for example, that assessment standards are prescribed by law. ALASKA CONST. art. IX, § 3.

7. *See, e.g.*, ARIZ. CONST. art. IX, § 1; COLO. CONST. art. X, § 3; DEL. CONST. art. VIII, § 1; KY. CONST. § 171; MD. CONST. art. XV; MINN. CONST. art. X, § 1; N.C. CONST. art. V, § 2(3); OR. CONST. art. I, § 32; WASH. CONST. art. VII, § 1.

8. *See* B. DAVIES & J. BELDEN, SURVEY OF STATE PROGRAMS TO PRESERVE FARMLAND 4 (1979).

primary types of differential or use-value assessment statutes for farm, forest, and open space land preservation provides exceptions to the uniformity clauses for property tax incentives to implement soil conservation programs. The three types of differential assessments—and the state used as an example of each—are 1) preferential property tax assessment (Colorado); 2) preferential property tax assessment with deferred taxation (Maryland); and 3) preferential taxation with restrictive agreements (Wisconsin).[9] Other methods available for providing exceptions to the uniformity clauses to permit property tax incentives also will be described for each of the three states. Each of these states has statutes giving favorable tax treatment to certain types of property, such as pollution abatement equipment, alternative energy producing devices, and even country clubs. These statutes can be used as examples of finding a constitutional method for providing favorable tax treatment to promote participation in soil conservation programs.

I. CONSTITUTIONAL UNIFORMITY LIMITATIONS ON PROPERTY TAXATION

There were essentially nine types of basic constitutional "uniformity clauses" relating to property taxation in existence prior to many of the changes permitting differential assessments to preserve agricultural and forest lands.[10] Their distinguishing characteristics relate to the manner in which the words "uniform" and "equal" are used. The nine types of uniformity clauses are: (1) property shall be taxed according to its value;[11] (2) property shall be taxed in proportion to its value;[12] (3) the legislature may impose proportional and reasonable assessments, rates, and taxes upon all persons and estates within the state;[13] (4) there shall be a uniform rule of taxation;[14] (5) taxation of property shall be equal and uniform;[15] (6) the legislature shall provide by law for a uniform and equal rate of assessment and taxation;[16] (7) taxes shall be uniform upon the same class of subjects;[17]

9. *See* T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND 2-3 (1974) for a classification of the types of differential assessment.

10. W. NEWHOUSE, *supra* note 4, at 9-11. Even though many of the constitutions were amended to permit differential assessments of farm and forest lands, the basic uniformity provisions of the constitutions remain the same; the differential assessment amendments merely provided exceptions to the uniformity clauses.

11. ARK. CONST. art. XVI, §§ 5, 6; ME. CONST. art. IX, § 8; TENN. CONST. art. II, § 28.

12. ALA. CONST. art. XI, § 211; CAL. CONST. art. XIII, § 1; ILL. CONST. art. IX, § 1; NEB. CONST. art. VIII, §§ 1, 2.

13. MASS. CONST. pt. 2, ch. 1, § 1, art. IV; N.H. CONST. pt. 2 art. V.

14. MICH. CONST. art. X, § 3; N.J. CONST. art. VIII, § 1, ¶ 1(a) (1947, amended 1963); OHIO CONST. art. XII, § 2 (1851, amended 1929); WIS. CONST. art. VIII, § 1 (1848, amended 1961).

15. MISS. CONST. art. IV, § 112 (1890, amended 1960); TEX. CONST. art. VIII, § 1; W. VA. CONST. art. X, § 1; WYO. CONST. art. I, § 28, art. XV, § 11.

16. FLA. CONST. art. VII, § 2; IND. CONST. art. X, § 1; KAN. CONST. art. XI, § 1; NEV. CONST. art. X, § 1; S.C. CONST. art. X, § 1; UTAH CONST. art. XIII, § 3 (1896, amended 1930).

17. COLO. CONST. art. X, § 3; DEL. CONST. art. VIII, § 1; GA. CONST. art. VII, § 1, ¶ 3; IDAHO CONST. art. VII, § 5; LA. CONST. art. VII, § 18(A); MINN. CONST. art. X, § 1; MO. CONST. art. X, § 3; MONT. CONST. art. XII, § 11; N.M. CONST. art. VIII, § 1 (1912, amended 1914); OKLA. CONST. art. X, § 5; OR. CONST. art. I, § 32, art. IX, § 1; PA. CONST. art. IX, § 1; VA. CONST. art. XIII, § 168.

(8) taxes shall be uniform upon the same class of property;[18] and (9) there shall be a fair distribution of governmental expenses.[19] Five states, Alaska, Connecticut, Hawaii, Iowa, and New York, do not have uniformity clauses pertaining to property taxation.

Uniformity clauses involve two potential limitations on the exercise of legislative power to tax real property. These two limitations must be analyzed separately because they impose significantly different restrictions.[20] The first limitation involves the uniformity required in taxing the property itself, which concerns the degree to which state legislatures are free to pick and choose among classes of property for taxation. It is essentially a question of "universality," that is, whether all classes of property within a taxing authority's territory must be selected for taxation imposed by that authority or whether the constitution permits the legislature to exempt certain classes of property completely from taxation. A requirement of "universality of taxation" exists if all property must be selected for taxation and no property is exempt.[21]

The second limitation concerns the uniformity required for the effective rate of property taxation, which is a combination of the assessed value and the tax rate on that assessed value. Once the taxable property is ascertained, two questions arise as to the legislative power to deal with that property: (1) may the ratio of assessed valuation, that is, the percentage of actual value at which the property is entered on the tax rolls, be varied from class to class even though the rate of taxation imposed on all classes is uniform?; and (2) may different rates of taxation be imposed on the various classes of property even when the assessed valuation of the property is determined by a uniform ratio? If the answer to both questions is in the negative, then there is an "absolute uniformity as to effective rate;" and the uniformity requirement does not operate merely within the classes of taxable property, but requires that all classes be treated uniformly.[22] Mississippi is an example of an "absolute uniformity" state.[23] Prior to the constitutional amendments in Wisconsin permitting differential assessments for agricultural and forest lands preservation,[24] absolute uniformity was required as to the effective rate of property taxation because both the ratio of assessed valuation and the applied rate of taxation had to be uniform.[25] However, because classes of property may be exempted from taxation by the legislature there is no requirement of "universality of taxation" in Wisconsin.[26]

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18. ARIZ. CONST. art. IX, § 1; KY. CONST. § 171 (1891, amended 1915); MD. CONST. art. XV (1867, amended 1915); N.C. CONST. art. V, § 2(3) (1868, amended 1935); N.D. CONST. art. XI, § 176 (1889, amended 1919); S.D. CONST. art. VI, § 17, art. XI, § 2 (1889, amended 1913); WASH. CONST. art. VII, § 1 (1899, amended 1930).

19. R.I. CONST. art. I, § 2; VT. CONST. ch. I, art. IX.

20. Note, *The Uniformity Clause, Assessment Freeze Laws, and Urban Renewal: A Critical View*, 1965 WIS. L. REV. 885, 889-90 [hereinafter cited as *Uniformity Clause*].

21. W. NEWHOUSE, *supra* note 4, at 6-7; *Uniformity Clause, supra* note 20, at 890.

22. *Uniformity Clause, supra* note 20, at 890; *see* W. NEWHOUSE, *supra* note 4, at 7.

23. MISS. CONST. art. IV, § 112.

24. WIS. CONST. art. VIII, § 1 (1848, amended 1907).

25. W. NEWHOUSE, *supra* note 4, at 247-48; *Uniformity Clause, supra* note 20, at 890.

26. W. NEWHOUSE, *supra* note 4, at 247-48; *Uniformity Clause, supra* note 20, at 890. See WIS. STAT. § 70.11 (1977) for the property exempted from taxation by the legislature.

Several methods may be available, depending on the state, to overcome constitutional uniformity clauses, thereby permitting property tax incentives for promoting participation in soil conservation programs. The most direct method of removing any question of constitutional validity is simply to pass a constitutional amendment permitting a separate classification of property for tax treatment based upon the implementation of a soil conservation program. This specific classification approach to the strict uniformity rule is the one taken in the Wisconsin Constitution for merchants' stock-in-trade, manufacturers' material and finished products, and livestock.[27]

A second method that also removes any question of constitutional validity is to pass a constitutional amendment exempting agricultural, forest, and open space lands from the uniformity of taxation requirement.[28] Such an approach, giving explicit exceptions to the strict uniformity rule for agricultural, forest, and open space lands and permitting assessment on a use-value basis, has been taken by several states.[29] Once agricultural, forest, and open space lands are exempt from the uniformity clause, property tax incentives for promoting participation in soil conservation programs can be tied to differential or use-value assessments.[30] The most common method is to require the implementation of a soil conservation program as a prerequisite for taking advantage of use-value assessment.

The third method of overcoming uniformity clauses is to amend those clauses to allow legislatures to classify property permitting different ratios of assessed valuation or tax rates as applied to assessed value among classes of property, but requiring uniform treatment within each class.[31] This type of amendment gives legislatures flexibility to use various differential assessment devices without the necessity of amending the constitution specifically for farmland, forest land, or open space. A number of states permit a general classification of this type under their uniformity clause,[32] while others only permit agricultural land to be separately classified.[33]

Two other possible methods may be available for achieving property tax incentives to implement soil conservation programs. One is to consider conservation structures as improvements and in those states where improve-

27. WIS. CONST. art. VIII, § 1. Uniformity of treatment within each of these classifications is required.

28. *Uniformity Clause, supra* note 20, at 904.

29. *See, e.g.*, FLA. CONST. art. VIII, § 4(a); ME. CONST. art. IX, § 8; TEX. CONST. art. VIII, § 1-d-1; UTAH CONST. art. XIII, § 3; WIS. CONST. art. VIII, § 1.

30. See text accompanying notes 41-42, *infra* for the available types of property tax incentives.

31. *Uniformity Clause, supra* note 20, at 904. This would re-establish an earlier position taken by the Wisconsin Supreme Court when it held that the legislature had wide discretion to classify property for tax purposes and to prescribe a separate rule of taxation for each classification just as long as there was uniformity within each classification. Chicago & N.W. Ry. v. State, 128 Wis. 553, 108 N.W. 557 (1906).

32. *See, e.g.*, ARIZ. CONST. art. IX, § 1; COLO. CONST. art. X, § 3; DEL. CONST. art. VIII, § 1; KY. CONST. § 171; MINN. CONST. art. X, § 1; MO. CONST. art. X, § 3; N.C. CONST. art. V, § 2(3); PA. CONST. art. VIII, § 1; WASH. CONST. art. VII, § 1.

33. *See* TENN. CONST. art. II, § 2, for a good example. The same property tax incentives may be used with this type of constitutional amendment as with an amendment specifically exempting agricultural, forest, and open space lands from the uniformity clause. *See* text accompanying notes 41-42 *infra*.

ments may be assessed separately from real property, treat them as items that may be exempted from taxation. This device is helpful to counteract increases in assessed valuation caused by the implementation of conservation practices. The other method follows the example recently undertaken by some states either to exempt equipment purchased or constructed for pollution abatement purposes from property taxation or to provide state income tax credits for property taxes paid on such equipment.[34] Legislatures could expand those statutes to include certain soil conservation practices or structures.

II. PROPERTY TAX INCENTIVES FOR CONSERVATION PROGRAMS

Soil conservation programs on agricultural land are justified because sediment resulting from erosion of such land is the major nonpoint source of pollution. Runoff from agricultural land also increases levels of bacteria, nutrients, and pesticides in surface water. Rainfall patterns, natural erodibility of the soil, physical features of slopes, and other natural factors influence erosion, but land use practices are usually more important in determining soil loss than all other factors combined.[35]

Conservation programs are designed to conserve soil resources and prevent and control soil erosion. Such programs may involve the construction of structures, such as terraces, sediment traps, ponds, and diversions; the observance of cultivation practices, such as contour plowing, no-tillage planting, and strip-cropping; the planting of grass and trees; and the retirement of highly erosive areas from cultivation. Various structures and practices may be used singly or in combination with each other. The establishment of soil conservation programs to date is done primarily through farmers' voluntary initiative or under statutory requirements. Governments' promotion of soil conservation takes place mainly through educational efforts, technical assistance of the Soil Conservation Service (SCS), and cost-share funds under the Agricultural Conservation Program (ACP) which assist with installing structures and establishing practices.

Property tax incentives may be a new approach for promoting participation in soil conservation programs. Such incentives are not likely to be effective unless they are sufficient to reimburse the landowners for their additional net expenses in implementing soil conservation programs. On the other hand, if the incentives are sufficient for landowners to implement programs, the reduction in tax receipts may be too costly and burdensome for the local governments. Reduction of the tax base of the taxing jurisdiction, thereby reducing local government revenue in the area, and shifting the tax burden to other landowners are two side effects of property tax incentives for conservation programs.[36] The seriousness of these side effects will depend to

34. *See, e.g.*, COLO. REV. STAT. § 39-5-131 (Supp. 1980); WIS. STAT. § 70.11(21) (1977).

35. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY—THE NINTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 118, 119, 122 (1978). [hereinafter cited as THE NINTH ANNUAL REPORT].

36. T. HADY & A. SIBOLD, *supra* note 9, at 13; Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369, 386-87 (1977).

some extent upon the local government's reliance on property taxes as a source of revenue.[37] Studies conducted in some states adopting differential assessment statutes have not indicated substantial reductions in the tax base[38] or major shifts in the tax burden to other landowners.[39] New York and California provide state aid to local governments or school districts to partially reimburse the local jurisdictions for the revenue they lose when farmland or open space lands are differentially assessed and to finance the administrative costs of such programs.[40]

Several possible types of property tax incentives may be available for implementing soil conservation programs depending upon the exceptions permitted to the constitutional requirement of uniformity in property taxation and the type of enabling legislation allowing for differential or use-value assessments of farm, forest, and open space lands. Some state enabling legislation authorizing differential or use-value assessments for farm or forest lands requires the preparation and implementation of soil conservation management programs as a condition to reduced assessments.[41] Statutes in states authorizing differential assessment of farm and forest lands, but not requiring the implementation of soil conservation management programs, could be easily amended to require the implementation of such programs and the use of recommended conservation practices. A deferred taxation or "rollback" provision could be inserted in the statutes requiring landowners who later converted their lands to noneligible uses or failed to maintain conservation management programs, but who wanted to take advantage of differential assessment, to repay some or all the taxes which they were excused from paying for a number of years prior to conversion or while maintaining a conservation program. This method of promoting participation in conservation programs is the preferred method and would not be subject to challenge under constitutional uniformity restrictions. In addition, combining conservation programs and differential assessment would be the least costly alternative for local governments. Owners would not receive tax incentives for implementing conservation programs and at the same time maintaining land in farm, forest, or open space uses.

Another possible type of property tax incentive is to provide an adjust-

37. *See* Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27 (1975) which states that there is a great disparity among states as to how much property tax is relied upon as a revenue source, ranging in 1973 from 14.8% of total receipts in Alabama, to 59.1% of total receipts in New Hampshire. *Id.* at 44.

38. *See* T. HADY & A. SIBOLD, *supra* note 9, at 13-14; P. HOUSE, DIFFERENTIAL ASSESSMENT OF FARMLAND NEAR CITIES, EXPERIENCE IN MARYLAND THROUGH 1965, at 24 (1967); Carman & Polson, *Tax Shifts as a Result of Differential Assessment of Farmland: California*, 1968-69, 24 NAT'L TAX J. 449, 455-56 (1971).

39. *See* Fellows, *The Impact of Public Act 490 on Agriculture and Open Space in Connecticut*, in PROCEEDINGS OF THE SEMINAR ON TAXATION OF AGRICULTURAL AND OTHER OPEN LAND 48, 52-53 (1971); Garrison, *Problems and Impact of the New Jersey Farmland Assessment Act of 1964*, in PROCEEDINGS OF THE SEMINAR ON TAXATION OF AGRICULTURAL AND OTHER OPEN LAND 35, 46 (1971); Lapping, Bevins, & Herbers, *supra* note 36, at 387.

40. CAL. GOV'T CODE § 51283.1(e) (West Supp. 1980); N.Y. AGRIC. & MKTS. LAW § 305(1)(e) (McKinney Supp. 1981).

41. *See, e.g.*, MD. NAT. RES. CODE ANN. § 5-301 (1974); N.M. STAT. ANN. § 7-36-20 (1981); N.C. GEN. STAT. § 105-277.2(2) (1979); R.I. GEN. LAWS § 44-27-4 (1980); WASH. REV. CODE ANN. § 84.34.050 (Supp. 1980-1981).

ment in the assessed valuation or tax rates applied to the assessed value on lands where the owners have implemented soil conservation programs. Other possible types of property tax incentives include: (1) considering conservation structures to be improvements and exempting such improvements from property taxation; (2) providing that additional property taxes paid on land due to the implementation of soil conservation practices and erection of structures be credited against state income taxes; and (3) providing credits in a specified amount against property taxes levied by a local government while the owner is maintaining a soil conservation program. Each of these incentives is subject to constitutional challenge depending upon a particular state's exceptions to the uniformity clause and available enabling legislation.[42] Regardless of the incentive used, district conservationists employed by SCS at the county level under an agreement with the soil and water conservation districts could assist in determining compliance with conservation programs and certify eligibility for tax incentives to the local taxing body. ACP cost-share funds would be used in conjunction with property tax incentives.[43]

Any property tax incentives enacted by state legislatures should at least counteract an increase in assessed value of land due to the implementation of a soil conservation program if the land remains in agricultural or open space use.[44] Soil conservation programs are an improvement to land; therefore, land upon which conservation practices or structures are established is more valuable than land without such practices and structures and has a higher assessed value. Landowners implementing conservation practices or establishing structures may find themselves paying higher property taxes than landowners doing nothing. Without property tax incentives, landowners may not be inclined to implement soil conservation programs.

III. DIFFERENTIAL ASSESSMENTS FOR LAND PRESERVATION

Since Maryland enacted the first statute in 1957 providing for farmland property tax reduction,[45] all other states except Georgia[46] and Missis-

42. See text accompanying notes 27-34 *supra* for methods of circumventing the constitutional uniformity clause.

43. For a discussion of ACP cost-share funds see FEDERAL SUBSIDY PROGRAMS, *supra* note 3.

44. Landowners would be expected to pay any increase in property taxes if the installation of a conservation structure resulted in, for example, a residential subdivision with a small recreational lake.

45. 1957 Md. Laws ch. 680 (codified at MD. ANN. CODE art. 81, § 19(b) (1957 & Supp. 1981)); *see* MD. CONST. art. XV; MD. AGRIC. CODE ANN. §§ 2-501 to -515 (Supp. 1981); MD. NAT. RES. CODE ANN. §§ 5-301 to -308 (1974 & Supp. 1981). For a history of the Maryland farmland preservation statute see Ishee, *The Maryland Farmland Use-Value Assessment Law*, in PROCEEDINGS OF THE SEMINAR ON TAXATION OF AGRICULTURAL AND OTHER OPEN LAND 23, 23-29 (1971); Nielsen, *Preservation of Maryland Farmland: A Current Assessment*, 8 U. BALT. L. REV. 429, 431-38 (1979).

46. The Georgia Constitution requires that all taxation be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. GA. CONST. art. VII, § 1, ¶ 3; *see* GA. CODE ANN. § 91A-1002 (1980) which required all real property be taxed. The uniformity rule of taxation requires that all property of the same class not absolutely exempt be taxed alike. Hutchins v. Howard, 211 Ga. 830, 830-31, 89 S.E.2d 183, 186 (1955). Actual present "use" of the subject property may be considered one of the factors in determining fair mar-

sippi[47] have adopted legislation granting some kind of differential assessment treatment for agricultural or other types of undeveloped land.[48] Some states have had to amend their constitutions before they could adopt legislation permitting differential assessments.[49] Virtually all states adopting statutes for differential treatment of farmland employed the use-value assessment concept.[50] Most state statutes are similar in that each uses a state-level tax policy designed to reduce the burden of farmland property taxes and to slow or prevent the conversion of farmland to developed uses.[51]

The original Maryland statute providing for farmland property tax reduction was typical of those of several states and provided simply that "[l]ands which are actively devoted to farm or agricultural use shall be assessed on the basis of such use, and shall not be assessed as if subdivided . . . ."[52] These statutes have been termed "preferential" tax laws because of the preferential assessment provisions accorded agricultural land. Preferential tax statutes were criticized because they provided tax relief to land speculators and failed to alter the pattern or pace of agricultural land conversion.[53] These failures led to a second generation of agricultural land tax-

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ket value. Martin v. Liberty County Bd. of Tax Assessors, 152 Ga. App. 340, 342, 262 S.E.2d 609, 612 (1979). Lands in Georgia may be assessed based upon their value for agricultural purposes. Burkhart v. City of Fitzgerald, 137 Ga. 366, 367, 73 S.E. 583, 584 (1912).

47. Taxation shall be uniform and equal throughout Mississippi and property shall be taxed in proportion to its value. MISS. CONST. art. IV, § 112. The Mississippi legislature has exempted numerous real properties from *ad valorem* taxes. MISS. CODE ANN. §§ 27-31-1 to -117 (1972 & Supp. 1980).

48. B. DAVIES & J. BELDEN, *supra* note 8, at 4. *See also* J. KEENE, D. BERRY, R. COUGHLIN, J. FARNHAM, E. KELLY, T. PLAUT & A. STRONG, UNTAXING OPEN SPACE: EXECUTIVE SUMMARY 2, 4 (1976) [hereinafter cited as UNTAXING OPEN SPACE]. The Arkansas statute providing for differential tax assessment of farmland was declared unconstitutional. ARK. STAT. ANN. § 84-483 (1980); Arkansas Pub. Serv. Comm'n v. Pulaski County Bd. of Equalization, 266 Ark. 64, 582 S.W.2d 942 (1979). The court held that because farm, agricultural, and timber lands were taxed under the statute according to the use made of the property and not the market value, which is a requirement of the constitution, the statute is unconstitutional. *Id.* at 81-82, 582 S.W.2d at 949-50. *But see* ARK. CONST. art. XVI, § 5.

49. *See, e.g.*, ALA. CONST. art. XI, § 217 (1901, amended 1978); DEL. CONST. art. VIII, § 1 (1897, amended 1976); KAN. CONST. art. XI, §§ 1, 12 (1861, amended 1974, 1976); LA. CONST. art. VII, § 18; ME. CONST. art. IX, § 8 (1820, amended 1978); NEV. CONST. art. X, § 1 (1864, amended 1978); OHIO CONST. art. II, § 36, art. XII, § 2 (1851, amended 1974); S.C. CONST. art. X, § 1 (1895, amended 1977); TENN. CONST. art. II, § 28 (1870, amended 1972); TEX. CONST. art. VIII, §§ 1, 1-d-1 (1876, amended 1978); WIS. CONST. art. VIII, § 1 (1848, amended 1974). For a discussion of the constitutional considerations associated with adopting differential assessment statutes see Malone & Ayesh, *Comprehensive Land Use Control Through Differential Assessment and Supplemental Regulation*, 18 WASHBURN L.J. 432, 444-45 (1979).

50. *See* R. GLOUDEMANS, USE-VALUE FARMLAND ASSESSMENT: THEORY, PRACTICE AND IMPACT 15-19 (1974).

51. For a discussion of the state statutes see B. DAVIES & J. BELDEN, *supra* note 8, at 5-32; R. GLOUDEMANS, *supra* note 50, at 15-25; T. HADY & A. SIBOLD, *supra* note 9, at 17-65; Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821 (1978) [hereinafter cited as Currier, *Differential Taxation and Land Use*]; Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D. L. REV. 548 (1975); Lapping, Bevins, & Herbers, *supra* note 36, at 369; Malone & Ayesh, *supra* note 49, at 432; Myers, *Open Space Taxation and State Constitutions*, 33 VAND. L. REV. 837 (1980); Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 KAN. L. REV. 215 (1977); Comment, *Preferential Assessment of Agricultural Property in South Dakota*, 22 S.D. L. REV. 632 (1977).

52. 1957 Md. Laws ch. 680, (current version at MD. ANN. CODE art. 81, § 19(b) (1957 & Supp. 1981)).

53. *See* R. GLOUDEMANS, *supra* note 50, at 38-51; T. HADY & A. SIBOLD, *supra* note 9, at

ation statutes, termed "deferred" taxation statutes because all or part of the tax reduction would be repaid upon conversion of the land to nonagricultural use.[54] The benefits to speculators were reduced, but the pace of land use conversions was not greatly affected.[55] The failure of deferred taxation statutes to affect land use decisions significantly led to a third generation of laws combining use-value assessment with restrictive agreements to prevent nonagricultural uses of the properties granted tax relief.[56] Basically, the three types of differential assessments are preferential tax laws, deferred taxation, and restrictive agreements.[57]

A. *Types of Differential Assessments*

1. Preferential Property Tax Assessments

Under the preferential assessment or use-value approach, agricultural lands and other eligible open space lands specified by the enabling legislation are assessed for property taxation purposes on the basis of their value for agriculture or open space uses, as long as the land is used for those qualifying purposes.[58] Other potential "highest and best" uses for the land, such as urban purposes, are not to be considered in establishing the property tax appraisal.[59] The criterion in preferential assessment valuation is that land is valued at its current agricultural or open space use rather than at its market value or for potential alternative uses that may incorporate potential gains from converting the land to developed uses.[60] Landowners are not penalized if at any time in the future they convert their eligible land to a nonqualifying land use.[61] Sixteen states now have preferential property tax assessment statutes.[62]

10-13; Barlowe, Ahl, & Bachman, *Use-Value Assessment Legislation in the United States*, 49 LAND ECON. 206, 209-12 (1973).

54. Some states, including Maryland, changed their preferential tax laws to deferred tax laws after the preferential laws failed to achieve the results anticipated when enacted. MD. ANN. CODE art. 81, § 19(b) (1957 & Supp. 1981). Other states, including New Jersey and most of the states which later passed deferred tax laws, were well aware of the earlier experience with preferential assessment when they chose to enact deferred tax laws. *See* N.J. STAT. ANN. §§ 54:4-23.1, .2 (West Supp. 1980); Garrison, *supra* note 39, at 35-47.

55. *See* note 53 *supra*; Garrison, *supra* note 39, at 41-47.

56. See Collin, *The California Land Conservation Act: The Easement and Contract Approach to Open Land Planning*, in PROCEEDINGS OF THE SEMINAR ON TAXATION OF AGRICULTURAL AND OTHER OPEN LAND 55-66 (1971) for a summary of the arguments that resulted in the restrictive agreement provisions of the California statute.

57. T. HADY & A. SIBOLD, *supra* note 9, at 2; *see* B. DAVIES & J. BELDEN, *supra* note 8, at 4; Barlowe, Ahl, & Bachman, *supra* note 53, at 206. For a discussion of each type of differential assessment see T. HADY & A. SIBOLD, *supra* note 9, at 2-4: Currier, *Differential Taxation and Land Use, supra* note 51, at 826-31; Ellingson, *supra* note 51, at 555-70; Malone & Ayesh, *supra* note 49, at 446-51; Nelson, *supra* note 51, at 221-27.

58. T. HADY & A. SIBOLD, *supra* note 9, at 2; Barlowe, Ahl, & Bachman, *supra* note 53, at 206-07; Currier, *Differential Taxation and Land Use, supra* note 52, at 827; Nelson, *supra* note 51, at 221.; Malone & Ayesh, *supra* note 49, at 446.

59. Barlowe, Ahl, & Bachman, *supra* note 53, at 207; Nelson, *supra* note 51, at 221.

60. Barlowe, Ahl, & Bachman, *supra* note 53, at 207; Malone & Ayesh, *supra* note 49, at 446; Nelson, *supra* note 51, at 221.

61. T. HADY & A. SIBOLD, *supra* note 9, at 2; Currier, *Differential Taxation and Land Use, supra* note 51, at 827; Ellingson, *supra* note 51, at 555; Malone & Ayesh, *supra* note 49, at 446; Nelson, *supra* note 51, at 222.

62. ARIZ. REV. STAT. ANN. §§ 42-136, -227 (1980); ARK. STAT. ANN. §§ 84-479, -480, -483

Generally, a pure preferential assessment program is the most advantageous one to landowners. Since this type of program provides an abatement of taxes which would have been imposed on the difference between assessed value based on fair market value and the assessed value based on agricultural or open space use-value,[63] preferential assessment gives eligible landowners a pure tax break or preference.[64] In addition, the tax benefit is received without any promise from landowners to maintain their land in current qualifying uses.[65] This lack of penalty allows landowners to pay taxes upon use-value and realize a windfall gain when the land is urbanized or developed.[66] Another problem with the preferential assessment approach is the lack of participation by local governments. States merely dictate that lands will be assessed at use-value as long as they are used for designated purposes,[67] giving local governments no choice but to grant the assessment if the landowners meet the requirements of the statutes.

2. Preferential Property Tax Assessments With Deferred Taxation

Deferred taxation statutes add another feature to preferential assessments by imposing a sanction requiring owners of qualifying lands who convert the lands to nonqualifying uses to pay a part or all of the taxes for the years they were excused from paying prior to conversion.[68] Sometimes two

(1980); COLO. REV. STAT. § 39-1-103 (1973 & Supp. 1980); DEL. CODE ANN. tit. 9, §§ 8328-8344 (1975 & Supp. 1980); FLA. STAT. § 193.461 (1977); IDAHO CODE §§ 63-105CC, -202 (Supp. 1981); 1980 Idaho Sess. Laws ch. 240, § 1; IND. CODE ANN. § 6-1.1-4-13 (Burns 1978); IOWA CODE ANN. § 441.21 (West Supp. 1980); LA. REV. STAT. ANN. §§ 47:2301-:2309 (West Supp. 1981); MO. ANN. STAT. §§ 137.017-.026 (Vernon Supp. 1981); N.M. STAT. ANN. § 7-36-20 (1981); N.D. CENT. CODE §§ 40-51.2-06, -07, -16, 57-02-27 (Supp. 1979); OKLA. STAT. ANN. tit. 11, § 21-109 (West 1978); S.D. COMP. LAWS ANN. §§ 5-5-10.1 to -10.4 (Supp. 1980); W. VA. CODE §§ 11-3-1 to -8-5 (1974 & Supp. 1980); WYO. STAT. § 39-2-103 (1977); see B. DAVIES & J. BELDEN, *supra* note 8, at 4; UNTAXING OPEN SPACE, *supra* note 48, at 4 for a list of the states. For a brief summary of the statutes see B. DAVIES & J. BELDEN, *supra* note 8, at 5-10; T. HADY & A. SIBOLD, *supra* note 9, at 17-65; Malone & Ayesh, *supra* note 49, at 458-73.

63. UNTAXING OPEN SPACE, *supra* note 48, at 3.

64. Ellingson, *supra* note 51, at 557; Malone & Ayesh, *supra* note 49, at 447; Nelson, *supra* note 51, at 223. Preferential assessments satisfy one goal of states in adopting differential assessment statutes, which is to provide tax relief to farmers. Use-value assessment may not always reduce the assessed value of agricultural land because there may be little non-farm demand for agricultural land in some rural areas and farmland may already be assessed at its use-value in other areas. In the first case, market value may be identical to agricultural use-value, and in the second case, agricultural land may be underassessed relative to other types of property. See R. GLOUDEMANS, *supra* note 50, at 28-30 for a discussion of underassessment of farmland. For examples of use-value assessment resulting in increased farmland assessments in Connecticut, see Fellows, *supra* note 39, at 51-54.

65. T. HADY & A. SIBOLD, *supra* note 9, at 2; Currier, *supra* note 51, at 827; Ellingson, *supra* note 51, at 555; Lapping, Bevins, & Herbers, *supra* note 36, at 371; Malone & Ayesh, *supra* note 49, at 446-47.

66. Malone & Ayesh, *supra* note 49, at 447. Preferential assessments may not satisfy the second goal of differential assessment statutes to preserve agricultural and open space land because of the counterbalancing effects of land speculation. *See* Ellingson, *supra* note 51, at 557.

67. Malone & Ayesh, *supra* note 49, at 446; Ellingson, *supra* note 51, at 555.

68. T. HADY & A. SIBOLD, *supra* note 9, at 2; UNTAXING OPEN SPACE, *supra* note 48, at 3; Currier, *Differential Taxation and Land Use, supra* note 51, at 828; Ellingson, *supra* note 51, at 558; Lapping, Bevins, & Herbers, *supra* note 36, at 377; Malone & Ayesh, *supra* note 49, at 447-48; Nelson, *supra* note 51, at 223.

assessed values are determined annually for each qualifying parcel of land.[69] The value at which the land is assessed on the tax rolls corresponds to its use-value in its current qualifying use, as in preferential assessment.[70] A second value representing the assessed value that would have been assigned to the land in the absence of a deferred taxation statute, which means an assessment according to the land's current market value, is also recorded.[71] Taxes are paid on the basis of the land's use-value assessment as long as it is being used for qualifying purposes under the statute.[72] When the land is sold or converted to a nonqualifying use, the state or local government recaptures all or part of the difference between the use-value taxes paid and the taxes that would have been paid under a market value assessment.[73] Twenty-five states currently have deferred taxation statutes.[74]

Deferred or "rollback" tax payments when land is transferred from a qualifying to a nonqualifying use vary from state to state.[75] Such payments are ordinarily limited to a given percentage of the deferred taxes or to a rollback for a limited number of years.[76] The number of years' benefit that will be recaptured ranges from two[77] to ten[78] with an average of about five

69. *See, e.g.*, KY. REV. STAT. § 132.450(2)(g) (Supp. 1980); *see* Currier, *Differential Taxation and Land Use, supra* note 51, at 828.

70. Barlowe, Ahl, & Bachman, *supra* note 53, at 207; Ellingson, *supra* note 51, at 558; Malone & Ayesh, *supra* note 49, at 447.

71. T. HADY & A. SIBOLD, *supra* note 9, at 2; Barlowe, Ahl, & Bachman, *supra* note 53, at 207. The assessor in other programs need not make a yearly calculation of the fair market value of all enrolled land. Rather, the assessor determines the fair market value at the time of conversion to a nonqualifying use and a charge is levied based upon the current difference between the fair market value and the use-value. *See, e.g.*, OR. REV. STAT. § 308.397 (1977); *see* Currier, *Differential Taxation and Land Use, supra* note 51, at 829.

72. Barlowe, Ahl, & Bachman, *supra* note 53, at 207.

73. T. HADY & A. SIBOLD, *supra* note 9, at 2; Barlowe, Ahl, & Bachman, *supra* note 53, at 207; Ellingson, *supra* note 51, at 558; Malone & Ayesh, *supra* note 49, at 447-48.

74. ALA. CONST. art. XI, § 217 (1901, amended 1978); ALA. CODE § 40-8-1 (Supp. 1981); ALASKA STAT. § 29.53.035 (Supp. 1981); CONN. GEN. STAT. §§ 7-131c to -131k, 12-63, -107a to -107e (1972 & Supp. 1981); ILL. ANN. STAT. ch. 120, §§ 501, 501a to 501a-3, 501e to 501h-1, 621.02 (Smith-Hurd Supp. 1980); KAN. CONST. art. XI, § 12; KY. REV. STAT. §§ 132.010, .020, .450, .454 (1970 & Supp. 1980); ME. REV. STAT. ANN. tit. 36, §§ 1101-1118 (1964 & Supp. 1981); MD. ANN. CODE art. 81, §§ 19(b)-(f) (1980 & Supp. 1981); MASS. ANN. LAWS ch. 61A, §§ 1-24 (Michie/Law. Co-op Supp. 1981); MINN. STAT. ANN. §§ 273.111, .112, .12, .13(6) (West 1969 & Supp. 1981); MONT. REV. CODES ANN. §§ 15-6-133, -7-201 to -215 (1979); NEB. REV. STAT. §§ 77-1343 to -1348 (1976); NEV. REV. STAT. §§ 361A.010-.280 (1977); N.J. STAT. ANN. §§ 54:4-23.1 to .23 (West Supp. 1980); N.C. GEN. STAT. §§ 105-277.2 to .7 (1979 & Supp. 1981); OHIO REV. CODE ANN. §§ 5713.30-.99 (Page 1980); OR. REV. STAT. §§ 215.203, 308.345-.406 (1977); PA. STAT. ANN. tit. 72, §§ 5490.1-.13 (Purdon Supp. 1980); R.I. GEN. LAWS §§ 44-5-12, -39, 44-27-1 to -6 (1980 & Supp. 1981); S.C. CODE §§ 12-43-220 to -230 (1976 & Supp. 1980); TENN. CODE ANN. §§ 67-611, -650 to -658 (1976 & Supp. 1980); TEX. REV. CIV. STAT. ANN. arts. 7174A, 7174B (Vernon Supp. 1981); UTAH CODE ANN. §§ 59-5-86 to -105 (1953 & Supp. 1981); VA. CODE §§ 58-769.4 to -769.15:1 (1974 & Supp. 1981); WASH. REV. CODE ANN. §§ 84.34.010-.922 (Supp. 1981); *see* B. DAVIES & J. BELDEN, *supra* note 8, at 4; UNTAXING OPEN SPACE, *supra* note 48, at 4 for a listing of states. For a brief summary of the statutes see B. DAVIES & J. BELDEN, *supra* note 8, at 11-26; T. HADY & A. SIBOLD, *supra* note 9, at 17-65; Malone & Ayesh, *supra* note 49, at 458-73.

75. Currier, *Differential Taxation and Land Use, supra* note 51, at 828-29; *see* UNTAXING OPEN SPACE, *supra* note 48, at 4.

76. Barlowe, Ahl, & Bachman, *supra* note 53, at 207.

77. N.J. STAT. ANN. § 54:4-23.8 (West Supp. 1980).

78. OR. REV. STAT. § 308.404 (1977).

years.[79] A recent trend, particularly in states such as Connecticut[80] that have modified an existing preferential assessment statute, has been to base the "rollback" or penalty tax on the market value of the land in the year of conversion rather than on deferred taxes.[81] Some states require that interest be paid on the amount of rollback taxes,[82] while others do not.[83]

3. Preferential Taxation with Restrictive Agreements

The third type of differential assessment, used by eight states (Pennsylvania has both deferred taxation and restrictive agreements), are restrictive agreements.[84] This approach requires landowners, if they desire to receive tax concessions, to contract voluntarily with the appropriate governmental unit usually for a term of ten years[85] to keep their lands in a qualifying use.[86] Generally, either party must give several years' notice if they intend to change land use. After notice is given, the land either reverts to standard taxation or some type of charges are imposed.[87] Changing the use of the land prior to termination of the agreement or without giving proper notice of termination is a breach of the agreement and will lead to the imposition of either rollback taxes or a penalty.[88]

Usually, landowners are required to petition the state or local government to receive the tax relief. In evaluating petitions, the state or local government balances the general welfare interests in preserving the land in its present condition against the loss of revenue that will result from reduced taxes. In granting restrictive agreements, state or local governments may choose the area or land they want to preserve and contract with a limited number of landowners. Moreover, this contract participation allows state

79. Currier, *Differential Taxation and Land Use, supra* note 51, at 828-29; *see* UNTAXING OPEN SPACE, *supra* note 48, at 4.

80. CONN. GEN. STAT. § 12-504a (Supp. 1981).

81. T. HADY & A. SIBOLD, *supra* note 9, at 2.

82. Alaska, Hawaii, Illinois, Maine, Nebraska, Nevada, North Carolina, Oregon, Pennsylvania, Utah, and Washington require that interest be paid on the rollback taxes. *See* UNTAXING OPEN SPACE, *supra* note 48, at 4.

83. Kentucky, Maryland, Massachusetts, Minnesota, Montana, New Jersey, New York, Ohio, Rhode Island, South Carolina, Texas, and Utah do not require that interest be paid on the amount of the rollback. *See* UNTAXING OPEN SPACE, *supra* note 48, at 4-5; Barlowe, Ahl, & Bachman, *supra* note 53, at 209.

84. CAL. GOV'T CODE §§ 51200-51295 (West Supp. 1981); CAL. REV. & TAX. CODE §§ 421-430.5, 431-439.4 (West Supp. 1981); HAWAII REV. STAT. §§ 246-10, -12 to -12.2 (1976 & Supp. 1980); MICH. COMP. LAWS ANN. §§ 554.701-.719 (Supp. 1980); N.H. REV. STAT. ANN. §§ 79:1-:29, 79-A:1-:26 (1970 & Supp. 1979); N.Y. AGRIC. & MKTS. LAW §§ 300-307 (McKinney 1972 & Supp. 1981); PA. STAT. ANN. tit. 16, §§ 11941-11947 (Purdon Supp. 1980); VT. STAT. ANN. tit. 32, §§ 3751-3760 (Supp. 1981); WIS. STAT. §§ 71.09(11), 91.01-.79 (Supp. 1981). For a brief summary of the statutes see B. DAVIES & J. BELDEN, *supra* note 8, at 27-32; T. HADY & A. SIBOLD, *supra* note 9, at 17-65; Malone & Ayesh, *supra* note 49, at 458-73.

85. *See* UNTAXING OPEN SPACE, *supra* note 48, at 4.

86. Currier, *Differential Taxation and Land Use, supra* note 51, at 829. *See also* T. HADY & A. SIBOLD, *supra* note 9, at 3; UNTAXING OPEN SPACE, *supra* note 48, at 5; Malone & Ayesh, *supra* note 49, at 449. Basically, these agreements prohibit the development of agricultural, forest, or open space lands for a specified period of time.

87. T. HADY & A. SIBOLD, *supra* note 9, at 3.

88. *Id.*; Currier, *Differential Taxation and Land Use, supra* note 51, at 829; Malone & Ayesh, *supra* note 49, at 449.

and local governments to monitor the program to minimize abuses.[89]

Traditional market value assessment need not be abandoned under restrictive agreements. In appraising land at its "highest and best" use, tax assessors would consider the restrictions placed in the agreement on use of the land. Such restrictions would in effect preclude the assessor from considering the land's development potential because development is prohibited. As a result, assessment for tax purposes is based on the land's allowable use, such as farming, forestry, or open space. If the agreement is breached, annual rollback taxes would equal the difference between the highest and best use assessment with the restriction (farming, forestry, or open space) and the highest and best use assessment without it (urban development).[90] However, because of a possible breach, assessors still must determine the use-value assessment of the land for development purposes either annually or at the end of the agreement, to calculate rollback taxes.

B. *Eligibility for Differential Assessments*

The use-value assessment statutes of the various states vary considerably on land uses permitted under differential assessment, minimum parcel size for eligibility, and prior use and productivity requirements.[91] All differential taxation programs include land used for agricultural purposes among those land uses eligible for special tax treatment.[92] Qualifying agricultural uses are usually broadly defined in the legislation creating the differential taxation program.[93] Some state statutes leave the meaning of "agricultural use" largely to the local assessor's judgment,[94] while other states attempt to define it.[95]

Forest lands are eligible for differential assessment in several states[96]

89. Malone & Ayesh, *supra* note 51, at 449-50; Nelson, *supra* note 51, at 225-26.

90. Malone & Ayesh, *supra* note 51, at 450.

91. *See* T. HADY & A. SIBOLD, *supra* note 9, at 2-5; Barlowe, Ahl, & Bachman, *supra* note 53, at 207-09. For a complete description of the provisions of various laws, see B. DAVIES & J. BELDEN, *supra* note 8, at 5-32.

92. T. HADY & A. SIBOLD, *supra* note 9, at 4; Barlowe, Ahl, & Bachman, *supra* note 53, at 208; Currier, *Differential Taxation and Land Use, supra* note 51, at 824. Some states restrict the program strictly to agricultural use of the land. *See* UNTAXING OPEN SPACE, *supra* note 48, at 4.

93. Currier, *Differential Taxation and Land Use, supra* note 51, at 825. For example, differential taxation is available in Florida only on land used primarily for *bona fide* agricultural purposes. The phrase is defined to mean "good faith commercial agriculture use of the land." FLA. STAT. § 193.461(3)(b) (1977).

94. *E.g.*, MD. ANN. CODE art. 81, § 19(b)(1) (1975). In October 1960, the Maryland Department of Assessments and Taxation listed 29 criteria which local assessors could use to judge whether land was actively devoted to agricultural use. *See* Ishee, *supra* note 45, at 26-27.

95. *See, e.g.*, OR. REV. STAT. § 215.203(2)(a) (1977) which defines "farm use" as "the current employment of land including that portion of such lands under buildings supporting accepted farming practices for the purpose of obtaining a profit in money by raising, harvesting and selling crops or by the feeding, breeding, management and sale of, or the produce of, livestock, poultry, fur-bearing animals or honeybees or for dairying and the sale of dairy products or any other agricultural or horticultural use or animal husbandry or any combination thereof."

96. Several states have statutes specifically including forestry as an eligible use. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-136(A)(1)(e) (Supp. 1981); FLA. STAT. § 193.461(5) (1977); N.J. STAT. ANN. § 54:4-23.3 (West Supp. 1980); N.M. STAT. ANN. § 7-36-20(B) (1978); UTAH CODE ANN. § 59-5-88 (1953). Some states also have separate statutory provisions for taxing forest lands that provide greater benefits to landowners than the differential assessment statutes. *See, e.g.*, WIS. STAT. §§ 77.01-.14, .16 (1977 & Supp. 1981).

while other states provide some coverage for undeveloped land of scenic, environmental, ecological, or historical significance.[97] Still other states allow tax relief for open space land[98] and land in certain recreational uses.[99] The primary beneficiary of recreational use eligibility has been country clubs.[100]

Definitional problems become especially acute if the legislation attempts to distinguish between "*bona fide* farmers" and "speculators," as applied to the conferment of benefits. To make this distinction, several approaches have been devised.[101] One approach is to establish a minimum acreage requirement. Among those states that do specify a minimum, most require tracts of five or ten acres.[102] Another approach is to require that some proportion of the landowner's income derive from farming. One state mandates that at least ten percent of the landowner's income be from farming.[103] An alternative to the proportion of income requirement is to require that a minimum value of agricultural products be produced from the land over a time period or annually per acre.[104]

Differential assessment statutes generally require that eligible lands have prior histories of agricultural or open space use.[105] Delaware, New Jersey, and Utah, for example, require that the land have been used for agricultural purposes during the preceding two years;[106] Texas for five of the last seven preceding years;[107] and South Dakota for the five preceding years.[108] A variation of the agricultural use history provision limits eligibility by requiring that the land be owned by the owner or his family. Minnesota, for example, requires that the farm either be the owner's homestead or be owned by family members related to each other within the third degree of kindred.[109]

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97. *E.g.*, ARIZ. REV. STAT. ANN. § 42-136(A)(7) (Supp. 1981); ME. REV. STAT. ANN. tit. 36, §§ 1102(6), 1103, 1105, 1111 (1969); MICH. COMP. LAWS ANN. §§ 554.702(8), .706 (Supp. 1980); NEV. REV. STAT. §§ 361A.040, .050, .170-.250 (1977); N.H. REV. STAT. ANN. §§ 79-A:2(VII), :5 (Supp. 1979); R.I. GEN. LAWS §§ 44-5-12, 44-27-2(c), -5 (1980 & Supp. 1981); VA. CODE §§ 58-769.4, .5(d), .9 (1974); WASH. REV. CODE ANN. §§ 84.34.010, 020(1), .030 (Supp. 1981); *see* T. HADY & A. SIBOLD, *supra* note 9, at 4; UNTAXING OPEN SPACE, *supra* note 48, at 4.

98. *E.g.*, CONN. GEN. STAT. §§ 12-107b(c), -107e, -107f (1979); PA. STAT. ANN. tit. 16, §§ 11941(4), 11943 (Purdon Supp. 1980); *see* T. HADY & A. SIBOLD, *supra* note 9, at 4-5; UNTAXING OPEN SPACE, *supra* note 48, at 4.

99. *E.g.*, ARIZ. REV. STAT. ANN. § 42-136 (Supp. 1979); FLA. STAT. § 193-501 (Supp. 1981); *see* Currier, *Differential Taxation and Land Use, supra* note 51, at 825-26.

100. *E.g.*, MD. CODE ANN. art. 81, § 19(e) (1980); *see* T. HADY & A. SIBOLD, *supra* note 10, at 39. Currier, *Differential Taxation and Land Use, supra* note 52, at 826.

101. T. HADY & A. SIBOLD, *supra* note 9, at 4-5.

102. *See, e.g.*, DEL. CODE ANN. tit. 9, § 8329 (Supp. 1980).

103. ALASKA STAT. § 29.53.035(c) (Supp. 1981).

104. *E.g.*, MINN. STAT. ANN. § 273.111(6) (West Supp. 1981) (gross of $300 plus a $10 minimum value of production per tillable acre); MO. ANN. STAT. § 137.017(4) (Vernon Supp. 1981) ($2,500 annually over a five year period); N.J. STAT. ANN. § 54:4-23.5 (West Supp. 1980) (gross production averaging at least $500 per year during the two year period immediately preceding the application); WASH. REV. CODE ANN. § 84.34.020(2) (Supp. 1981) (minimum of $100 per acre for three of the five preceding calendar years).

105. *See* UNTAXING OPEN SPACE, *supra* note 49, at 4.

106. DEL. CODE ANN. tit. 9, § 8329 (Supp. 1980); N.J. STAT. ANN. § 54:4-23.5 (West Supp. 1981-1982); UTAH CODE ANN. § 59-5-87(1) (Supp. 1981).

107. TEX. REV. CIV. STAT. ANN. art. 7174A(1) (Vernon Supp. 1980-1981).

108. S.D. COMP. LAWS ANN. § 5-5-10.1(3) (Supp. 1980).

109. MINN. STAT. ANN. § 273.111(3) (West Supp. 1981).

C. *Participation in Differential Assessment Programs*

In several states, use-value assessment applies automatically to all qualifying lands whether or not the owner seeks use-value assessment.[110] In other states, such as California, Minnesota, and Rhode Island, owners must apply to have their lands classified for use-value assessment.[111] Applications must be submitted annually for use-value assessments in some states.[112] Generally, use-value assessment is automatic in preferential assessment states, but must be applied for by landowners in deferred taxation and restrictive agreement states.[113] Local governments, however, ordinarily do not have a choice in granting a differential assessment to landowners if they apply and the property meets the statutory definitions of agricultural, forestry, or open space use.[114]

D. *Valuation for Differential Assessments*

Systems for determining use-value of agricultural, forest, and open space lands under differential assessment vary considerably from state to state. Some states leave the method of determining use-value completely to the assessor's discretion.[115] Other states specifically list the criteria for assessment,[116] while in many states the responsibility for preparing assessment guidelines is delegated to state tax commissions.[117] The favored methods for determining use-value vary, falling into two main groups.[118] Sale prices of comparable lands in agricultural use are used in some states.[119] In the absence of comparable sales, some states use the capitalization of income method or a soil productivity rating system.[120]

E. *Circuit-Breaker to Determine Tax Relief*

A variation on the restrictive agreement approach is exemplified by Michigan and Wisconsin, which combine such agreements with "circuit-

110. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-227(B) (Supp. 1980); COLO. REV. STAT. § 39-1-103(5) (1973 & Supp. 1980); N.D. CENT. CODE §§ 40-51.2-06, 57-02-27; OKLA. STAT. ANN. tit. 11, § 21-109; WYO. STAT. § 39-2-103(b) (1977).

111. CAL. GOV'T CODE § 51241 (West Supp. 1981); MINN. STAT. ANN. § 273.111(8) (West Supp. 1981); R.I. GEN. LAWS §§ 44-27-3 to -5 (1980).

112. *See, e.g.*, CONN. GEN. STAT. §§ 12-107c(a), 107d(c), 107e(b) (Supp. 1981); DEL. CODE ANN. tit. 9, § 8336 (Supp. 1980); N.J. STAT. ANN. § 54:4-23.6(c) (West Supp. 1981-1982); WASH. REV. CODE ANN. § 84.34.030 (Supp. 1981).

113. *See* UNTAXING OPEN SPACE, *supra* note 48, at 4.

114. T. HADY & A. SIBOLD, *supra* note 9, at 3.

115. *See, e.g.*, IOWA CODE ANN. § 441.21. (West Supp. 1980).

116. *See, e.g.*, FLA. STAT. § 193.461(6)(a) (Supp. 1981); S.D. COMP. LAWS ANN. § 5-5-10.3 (1980).

117. *See, e.g.*, DEL. CODE ANN. tit. 9, §§ 8335(a), 8337 (1974); N.M. STAT. ANN. § 7-36-20(D) (1978).

118. Currier, *Differential Taxation and Land Use, supra* note 52, at 823.

119. *See, e.g.*, OR. REV. STAT. § 308.345(2) (1977).

120. *See, e.g.*, COLO. REV. STAT. § 39-1-103(5)(a) (Supp. 1980); MO. ANN. STAT. § 137.026 (Vernon Supp. 1981); *see* R. GLOUDEMANS, *supra* note 50, at 15-17. The capitalization of income method yields a use-value assessment when the annual income from the use of the land is divided by a capitalization rate that represents a reasonable return on the landowner's investment. Soil productivity rating systems involve valuation based on the quality of the land for agricultural purposes.

breaker" tax relief.[121] Under this variation, property taxes exceeding certain income percentages, the "threshold" income, are deducted from state income taxes or rebated directly to the taxpayers.[122] The Michigan law provides that an owner of eligible farmland may deduct from his state income tax liability the amount by which his property tax exceeds seven percent of household income.[123] On farms between five and forty acres, gross sales of agricultural products must total at least $200 per acre per year in order for the landowner to be eligible, and on farms greater than forty acres the land must be devoted primarily to agricultural use.[124] If the landowner wishes to participate, he must sign a ten-year agreement in which the land is restricted to agricultural use.[125]

IV. TAX INCENTIVES FOR CONSERVATION PROGRAMS UNDER PREFERENTIAL ASSESSMENT

Colorado, the state chosen as an example of preferential property tax assessment, enacted legislation in 1967 allowing agricultural lands to be assessed at their use-value.[126] Later statutes gave various types of favorable tax treatment to certain open space lands,[127] historic properties,[128] agricultural equipment[129] and supplies,[130] alternative energy source systems,[131] forests,[132] and land and facilities used to produce alcohol for motor fuel.[133] Taxes paid on certain types of pollution control property qualify for credit against state income taxes.[134]

121. MICH. COMP. LAWS ANN. § 554.710 (Supp. 1980); WIS. STAT. § 71.09(11) (Supp. 1981). "Circuit-breakers" on farm property taxes are based on the assumption that the gross (or net) farm receipts are a measure of the farm's ability to pay these taxes and that the gross (or net) tax rate of each farm is a yardstick in determining the eligibility for and the amount of property tax relief. Lockner & Kim, *Circuit-Breakers on Farm-Property-Tax Overload: A Case Study*, 26 NAT'L TAX J. 233, 235 (1973).

122. Lockner & Kim, *supra* note 121, at 235-36; Malone & Ayesh, *supra* note 49, at 451. Circuit-breakers are a feasible means of alleviating the impact of farm property taxes. Whenever an individual farm's property taxes with reference to its gross or net receipts exceed the ceiling gross or net tax rate determined by state policy makers, the excess amount is regarded as a "farm-property-tax overload" which is subject to tax relief. The farm-property-tax overload can be then alleviated by means of a rebate from the state government to the farmer or a credit subtracted from the farmer's state income tax liability otherwise payable. Lockner & Kim, *supra* note 121, at 233.

123. MICH. COMP. LAWS ANN. § 554.710(1) (Supp. 1980).

124. *Id.* §§ 554.702(6)(a), (b).

125. *Id.* § 554.704(1).

126. 1967 Colo. Sess. Laws ch. 424, § 4, *as amended by* 1971 Colo. Sess. Laws ch. 335, § 1, 1973 Colo. Sess. Laws ch. 408, § 1, 1975 Colo. Sess. Laws ch. 336, § 1, 1976 Colo. Sess. Laws ch. 154, § 3, 1977 Colo. Sess. Laws ch. 494, § 2 (codified at COLO. REV. STAT. §§ 39-1-103(5)(a), (6) (1973 & Supp. 1980)); *see* B. DAVIES & J. BELDEN, *supra* note 8, at 4-5; T. HADY & A. SIBOLD, *supra* note 9, at 2, 24; UNTAXING OPEN SPACE, *supra* note 48, at 4.

127. COLO. REV. STAT. § 39-1-103(7) (Supp. 1980).

128. *Id.* § 39-1-104(5).

129. *Id.* § 39-1-104(7).

130. *Id.* § 39-1-104(8).

131. *Id.* § 39-1-104(6).

132. *Id.* 39-3-103 (1973).

133. *Id.* §§ 39-1-104(13)(b), 14(b) (Supp. 1980).

134. *Id.* § 39-5-131.

A. *Uniformity of Property Taxation*

Colorado's constitutional uniformity clause provides that taxes shall be uniform upon each of the various classes of real and personal property located within the territorial limits of the tax levying authority.[135] In addition, the clause provides that taxes shall be levied and collected under general laws which shall prescribe regulations that secure a just valuation for taxing all real and personal property.[136]

The uniformity clause permits the legislature to define various classes of real and personal property and divide such property into separate and distinct classes for purposes of taxation[137] if the classification is reasonable and not palpably arbitrary.[138] A classification system conforms to the uniformity clause and equal protection provisions of the fourteenth amendment to the United States Constitution if it is based upon the nature and use of the property justifying the classification,[139] bears some reasonable relationship to a legitimate public purpose or policy,[140] rests upon some substantial differences having a reasonable relation to the property or persons dealt with,[141] and the same means and methods are applied impartially to all the constituents within each class so that the classification system operates equally upon all persons and corporations in like circumstances.[142] Different methods may be used to assess value for different classes of property and different

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135. COLO. CONST. art. X, § 3. This section requiring uniformity of all taxes is the only constitutional limitation upon the taxing power of the state. City & County of Denver v. Lewin, 106 Colo. 331, 339, 105 P.2d 854, 860 (1940). See W. NEWHOUSE, *supra* note 4, at 10, 350-59 for a discussion of the classification and uniformity provisions of the Colorado Constitution.

136. Board of County Comm'rs v. Rocky Mountain News Printing Co., 15 Colo. App. 189, 196, 61 P. 494, 497 (1900).

137. Each of the various classes of property may be taxed for a specific purpose. District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 430, 448 P.2d 788, 790 (1968).

138. American Mobilehome Ass'n v. Dolan, 191 Colo. 433, 438, 553 P.2d 758, 762 (1976); Western Elec. Co. v. Weed, 185 Colo. 340, 353-54, 524 P.2d 1369, 1376 (1974); District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 430, 448 P.2d 788, 790 (1968); Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912); Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899); People *ex rel.* Iron Silver Mining Co. v. Henderson, 12 Colo. 369, 375, 21 P. 144, 146-47 (1888). Except for the constitutional provision prohibiting the taxation of ditches, canals, and flumes separately from the land they irrigate if the same person owns both the structures and land, the legislature is "wholly unrestricted in dividing property into classes for purposes of taxation." Ames v. People *ex rel.* Temple, 26 Colo. at 103, 56 P. at 663. The court in People *ex rel.* Iron Silver Mining Co. v. Henderson stated:

> The uniformity required is a uniformity of taxes, not a uniformity of procedure, or of rules or regulations to govern the levy thereof. To demand absolute uniformity in the later regard would tend strongly to defeat the prior and supreme requirement. The constitution leaves this matter with the legislature, simply directing that the regulations shall be made by general law, and shall secure just valuations.

12 Colo. at 375, 21 P. at 147.

139. Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912); Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899).

140. American Mobilehome Ass'n v. Dolan, 191 Colo. 443, 438, 553 P.2d 758, 762 (1976); Western Elec. Co. v. Weed, 185 Colo. 340, 353-54, 524 P.2d 1369, 1376 (1974); District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 431, 448 P.2d 788, 791 (1968).

141. American Mobilehome Ass'n v. Dolan, 191 Colo. 433, 438, 553 P.2d 758, 762 (1976); District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 431, 488 P.2d 788, 791 (1968).

142. Western Elec. Co. v. Weed, 185 Colo. 340, 353-54, 524 P.2d 1369, 1376 (1974); Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899).

rates of taxation may be applied to different classes[143] provided that the assessment method prescribed for a particular class or rate applied imposes a uniform burden of taxation within the class,[144] is just and equitable, and does not exempt the class from bearing its fair proportion of the tax burden as compared with other classes of property.[145] Courts will not interfere with a classification system unless it is based on an unreasonable distinction or difference with reference to similar kinds of property[146] or is calculated to produce gross inequality and nonuniformity in the assessment of different property belonging to the same class.[147]

Publicly-owned property as well as property used exclusively for religious, educational, and charitable purposes is specifically exempt from taxation under the constitution.[148] The constitution further provides that the legislature may not exempt any other property from taxation.[149] This provision, however, does not prevent the legislature from exempting increases in value to the property due to, for example, planting trees.[150]

B. *Valuation for Tax Assessment*

The actual value of all real[151] and personal[152] property, other than agricultural lands exclusive of building improvements on it[153] and land used for open space-residential purposes,[154] is determined by the assessor of the county where the property is located. The assessor takes several factors into

143. American Mobilehome Ass'n v. Dolan, 191 Colo. 433, 438, 553 P.2d 758, 761 (1976); Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912).

144. Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912). The uniformity which is required is that all persons who are members of any class, or all property logically belonging in a given classification, shall receive treatment equal to that accorded all other persons or properties in the same class. District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 430, 448 P.2d 788, 790 (1968).

145. Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912).

146. Citizens' Comm. for Fair Property Taxation v. Warner, 127 Colo. 121, 130, 254 P.2d 1005, 1010 (1953); People *ex rel.* Iron Silver Mining Co. v. Henderson, 12 Colo. 369, 375, 21 P. 144, 146-47 (1888).

147. City & County of Denver v. Lewin, 106 Colo. 331, 336, 105 P.2d 854, 858 (1940); Foster v. Hart Consol. Mining Co., 52 Colo. 459, 468, 122 P.2d 48, 51 (1912). The court in Ames v. People *ex rel.* Temple, 26 Colo. 83, 105, 56 P. 656, 663 (1899), stated: "In the method of laying a tax, either as to the assessment or the apportionment, the general assembly is not restricted by the constitution, and, unless the legislature is palpably unjust, oppressive or inadequate, courts will not substitute their judgement for that of the legislature."

148. COLO. CONST. art. X, §§ 4, 5. See Crockett, *The Problem of Tax Exempt Property in Colorado*, 19 ROCKY MTN. L. REV. 22 (1946) for a discussion of tax-exempt property.

149. COLO. CONST. art. X, § 6; *see* Carlisle v. Pullman Palace Car Co., 8 Colo. 320, 324, 7 P. 164, 166 (1885), which held that the constitution and laws passed pursuant to it subject to taxation all real and personal property within the state that is not expressly exempted by law.

150. *See* COLO. REV. STAT. § 39-3-103 (1973). *See also id.* § 39-1-104(5) (Supp. 1980) which provides that the inclusion on the state register of historic properties adds no value to the assessed value of the property.

151. Real property includes all interests in land and improvements. *Id.* § 39-1-102(14) (1973).

152. Personal property means everything which is the subject of ownership and which is not included within the term "real property." *Id.* § 39-1-102(11).

153. *See id.* §§ 39-1-103(5)(a), (6) (1973 & Supp. 1980). See *id.* § 39-1-103(6) (1973 & Supp. 1980) for a definition of agricultural lands.

154. *See id.* § 39-1-103(7) (Supp. 1980). Land used for open space-residential purposes means land up to 35 acres in size that the owner uses partly for residential and related purposes and partly for open space. *Id.* § 39-1-102(7.5).

consideration,[155] including the property's location and desirability, functional use,[156] current replacement cost less depreciation, comparison with other properties of known or recognized value, market value in the ordinary course of trade, earning or productive capacity, and, if practicable, the appraisal value for loan purposes on comparable properties.[157] The value of unimproved land,[158] except for portions used for open space, is determined by taking into account the same factors as for other nonagricultural property in addition to considering the amount of time necessary to realize potential future values.[159]

The actual value of agricultural land, exclusive of building improvements,[160] is determined by considering the earning or productive capacity of the land during a reasonable period of time, capitalized at a rate of eleven-and-one-half percent.[161] Determination of the actual value of land used for open space-residential purposes is dependent upon the parcel's size and the use made of the parcel.[162] The actual value of small parcels used for residential and related purposes is determined by the same method as that used to determine the actual value of nonagricultural land,[163] while the actual value of larger parcels used for open space purposes is a certain percentage, depending upon its size, of the actual value determined in the same manner as used for small parcels.[164] Increases in the value of private lands because of the planting of trees are not to be taken into account when determining the actual value of the land for thirty years from the date of planting.[165]

Valuation for assessment of all taxable property, except for agricultural equipment and supplies, land, facilities used to produce alcohol for motor fuel, and historical property, is thirty percent of the actual value as determined by the assessor.[166] The assessment must be applied uniformly to the actual value of the various classes and subclasses of real property located within the territorial limits of the tax-levying authority.[167] For each year

155. *Id.* § 39-1-103(5)(a).

156. Assessors must take applicable land use laws or regulations which limit the use of the land into consideration when determining functional use. *Id.* § 39-1-103(5)(b) (Supp. 1980).

157. *Id.* § 39-1-103(5)(a).

158. Unimproved land is land with no buildings or structures suitable for residential, commercial, or industrial use and that the owner does not use for commercial or industrial purposes. *Id.*

159. *Id.*

160. Agricultural building improvements are not valued and appraised as agricultural land, but as other real property. *See id.*.

161. *Id.* To qualify land for assessment as agricultural land, the owner must have used the land for the previous two years, and be currently using it, primarily for profit by raising and selling crops or livestock or their products or for horticultural use. *Id.* § 39-1-103(6)(a)(I) (Supp. 1980). In addition, the land must continue to have been in actual agricultural use. *Id.* § 39-1-103(6)(a)(II) (1973).

162. *See id.* § 39-1-103(7) (Supp. 1980).

163. *Id.* § 39-1-103(7)(a).

164. COLO. REV. STAT. § 39-1-103(7)(b) (Supp. 1980). The percentage is 50 for parcels 4 acres or less and 25 for parcels between 4 and 30 acres.

165. *Id.* § 39-3-103 (1973).

166. *Id.* § 39-1-104(1).

167. *Id.* Valuation for assessment need not equal full valuation; however, it must be equal and uniform. People *ex rel.* Colorado Tax Comm'n v. Pitcher, 56 Colo. 343, 350, 138 P. 509, 512 (1914).

after 1980, the valuation for assessment of all agricultural equipment is five percent of actual value.[168] For each year after 1977, the assessed value of agricultural supplies is five percent of actual value.[169] Assessed value of property used to produce alcohol utilized in motor fuel for the taxable years 1980 through 1984 is two percent of actual value in the first year of assessment, nine percent in the second year, sixteen percent in the third year, twenty-three percent in the fourth year, and thirty percent thereafter.[170]

Certain factors are prohibited by statute from increasing the assessed value of property. Any increase in the valuation of structures, buildings, or improvements in or on which an alternative energy device is installed, which is attributable to that device, will not be included in determining the assessed value of the structures, buildings, or improvements.[171] Also, a property's assessed value may not be increased when the property is added to the state register of historic properties.[172]

Improvements[173] are generally appraised and valued by the assessor separately from the land.[174] The exception to that rule is improvements other than buildings on land, such as water rights and fences, which are used solely and exclusively for agricultural purposes. These types of improvements are appraised and valued with the land as a unit.[175] A constitutional provision provides that ditches, canals, and flumes owned and used by individuals or corporations for irrigating land are not to be taxed separately so long as they are owned and used exclusively for such purposes.[176]

C. *Implementation of Tax Incentives for Conservation Programs*

The Colorado uniformity clause, which allows general classification of property by the legislature,[177] may permit a variety of property tax incentives for implementing soil conservation programs. Such programs may be used in conjunction with preferential or use-value assessments for agricultural or open space lands by requiring the establishment of conservation practices as a prerequisite to the favorable tax treatment. Possibilities also exist under the constitution for adjusting the assessed valuation or tax rates applied to the assessed value in order to implement soil conservation programs, exempting from property taxation improvements due to conservation

168. COLO. REV. STAT. § 39-1-104(7)(a) (Supp. 1980).
169. *Id.* § 39-1-104(8).
170. *Id.* §§ 39-1-104(13)(b), (14)(b).
171. *Id.* § 39-1-104(6)(d).
172. *Id.* § 39-1-104(5).
173. Improvements include all structures, buildings, fixtures, fences erected upon the land and water rights fixed to the land. *Id.* § 39-1-102(7) (1973).
174. *Id.* § 39-5-105(1) (Supp. 1980).
175. *Id.*
176. COLO. CONST. art. X, § 3. This provision prevents double taxation by forbidding valuation of ditches, canals, and flumes as "improvements" separately from the water they carry since the value of a water right and the structures carrying the water are already reflected in the assessment of the land they irrigate. Empire Land & Canal Co. v. County Treasurer, 1 Colo. App. 205, 212, 28 P. 482, 484 (1891), *rev'd*, 21 Colo. 244, 40 P. 449 (1895).
177. *See* COLO. CONST. art. X, § 3. Colorado, unlike some other states, does not have an exemption specifically for farmland or open space land, but such lands may be exempt from the uniformity of taxation by the general classification provisions.

programs, and crediting additional property taxes caused by implementing soil conservation programs against state income taxes.

1. Differential Taxation of Lands

Colorado's statute authorizing preferential assessment for agricultural lands[178] and certain open space-residential lands[179] could be easily amended to require the implementation of recommended soil conservation programs as a condition to eligibility for use-value assessment. Owners failing to maintain recommended soil conservation programs would lose eligibility to have their lands valued for agricultural or open space-residential uses. Instead of use-value assessments being automatic, the soil conservation districts, with the assistance of the SCS district conservationists, could certify on an annual basis the eligibility of agricultural or open space-residential lands for preferential assessments based on the maintenance of recommended soil conservation programs.[180] Such an amendment to the preferential assessment statute would not conflict with the uniformity clause of the constitution because the amendment does not create a new class of property, but rather adds a further restriction for eligibility into the agricultural or open space classes. Even if a new class of property is created, the Colorado Supreme Court has held that the legislature is wholly unrestricted in dividing property into classes for purposes of taxation so long as the classification is based upon the nature and use of the property justifying it.[181]

The implementation of conservation programs as a prerequisite to preferential assessment has the effect of forcing such programs on those otherwise legitimately involved in an agricultural or open space enterprise. Force can be justified because one of the purposes of preferential assessment statutes is to maintain land in productive agricultural use.[182] Another purpose is to control the nonpoint source pollution problems associated with soil erosion from agricultural lands.[183] Conservation programs are essential for maintaining land in good agricultural use. Statutes relating to the possible enforcement of conservation programs upon landowners are not new in Colorado. Soil conservation districts may adopt and enforce land use regulations,[184] and subdividers are required to consider conservation programs as a prerequisite for subdivision plat approval.[185] Soil conservation district boards review such plats and make recommendations regarding soil suitability, floodwater problems, and watershed protection.[186] Landowners may be faced with undue financial hardship if they are required to erect structures

178. *See* COLO. REV. STAT. § 39-1-103(6)(a)(I) (Supp. 1980).

179. *Id.* § 39-1-103(7).

180. The powers and duties of the soil conservation district may have to be expanded. *See id.* § 35-70-108 (1973).

181. Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912); Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899).

182. *See* Currier, *Differential Taxation and Land Use, supra* note 51, at 830; Ellingson, *supra* note 51, at 553-54; Malone & Ayesh, *supra* note 49, at 432-35, 443-44.

183. *See* THE NINTH ANNUAL REPORT, *supra* note 35, at 118-19, 122.

184. COLO. REV. STAT. § 35-70-109 (1973).

185. *See id.* § 30-28-133 (1973 & Supp. 1980).

186. *Id.* § 30-28-136(1)(f) (1973).

to comply with the conservation requirements for preferential assessment. Such hardships may be alleviated by inserting a provision in the statute which provides that compliance with certain programs is not required unless ACP cost-share funds are available to assist the landowner.

2. Adjustments in Assessed Valuation or Tax Rates

Adjustments in the assessed valuation of land or in the tax rate applied to the assessed value may provide incentives for implementing soil conservation programs. Assessed valuation or tax rates may be set at different levels for lands upon which qualifying programs have been implemented. In enacting legislation setting the level of adjustment, a state has to determine how much promoting soil conservation is worth financially and whether it is in the best public interest to lower taxes on land with a conservation program. Adjustments would have the effect of lowering taxes for activities which increase land values. A way around this problem would be to have the adjustment in assessed valuation or tax rate apply only to the increase in land values due to the conservation programs.

Two examples exist under Colorado statutes that may be used as models for a tax incentive involving an adjustment in assessed valuation or tax rates to promote conservation. The valuation for assessment on certain real and personal property used exclusively to produce alcohol for use in motor fuels, where the alcohol is derived from agricultural commodities, forest products, hydrocarbon or carbon-containing by-products, or waste products, is a certain percentage of actual value depending upon the number of years the facility has existed.[187] The assessed valuation of agricultural supplies and equipment is a very small percentage of actual value.[188]

Agricultural land is assessed at thirty percent of its actual value.[189] Colorado statutes could be amended to provide that the assessed value of agricultural land upon which soil conservation programs are established could be lower than thirty percent of actual value. Such an amendment would require the creation of two classes of agricultural land—one class for land upon which soil conservation practices have been implemented and the other class for land upon which such practices have not been implemented. The valuation for assessment or tax rate of assessed value for each class could differ. Agricultural land could move from one class to another depending upon the implementation of a soil conservation program.

Dividing agricultural and open space lands into two classes with the implementation of a soil conservation program as the criteria for the division conforms to the constitutional uniformity clause on property taxation, just as creating a separate class of property by giving preferential tax treatment for land and facilities used to produce alcohol for use in motor fuel does.[190] The legislature is free to classify property for taxation so long as the discrimina-

187. *Id.* §§ 39-1-104(13)(b), (14)(b) (Supp. 1980). *See* text accompanying note 170 *supra*.

188. COLO. REV. STAT. §§ 39-1-104(7), (8) (Supp. 1980). *See* text accompanying notes 168-69 *supra*.

189. COLO. REV. STAT. § 39-1-104(1) (1973).

190. *See id.* §§ 39-1-104(13)(b), (14)(b) (Supp. 1979).

tion is based on the nature and use of the property justifying the discrimination, the classification is reasonable, and the classification bears some reasonable relationship to a legitimate state interest or policy.[191] A state interest can justify soil conservation programs in the same manner as it justifies the classification of alcohol-producing facilities. Different rates of taxation and different assessment methods may be used for different types of property,[192] as long as the same rates and methods are uniformly applied to all property within the same class.[193]

3. Exemptions of Improvements from Taxation

Considering soil conservation programs, particularly structures, as improvements to the land and exempting these improvements from taxation involves two closely related issues—the definition of improvements and the authority to exempt improvements from taxation. Unlike some other state constitutions, the Colorado Constitution specifically exempts certain types of property from taxation[194] and forbids the legislature from exempting any type of property not listed.[195]

Ditches, canals, and flumes illustrate the close relationship between assessing improvements separately from land and exempting improvements from taxation. Such improvements or structures, if owned and used by individuals or corporations for irrigating land owned by the same individuals, corporations, or individual members of the corporations, are not to be taxed separately from the land under the state constitution as long as they are owned and used exclusively for such purposes.[196] Even though the constitution forbids the legislature from exempting any types of property from taxation other than those listed (ditches, canals, and flumes do not fall under any categories of exempt property), the legislature totally exempted ditches, canals, and flumes owned and used by any persons for irrigating their land.[197] Courts have interpreted the constitutional provision and statute not as a true exemption of ditches, canals, and flumes from property taxation, but rather as preventing double taxation by forbidding their valuation as "improvements" separately from the land. The reasoning is that the value of water rights and the structures carrying the water are already reflected in the

191. American Mobilehome Ass'n v. Dolan, 191 Colo. 433, 438, 553 P.2d 758, 762 (1976); Western Elec. Co. v. Weed, 185 Colo. 340, 353-54, 524 P.2d 1369, 1376 (1974); District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 430, 448 P.2d 788, 790 (1968); Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912); Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899).

192. American Mobilehome Ass'n v. Dolan, 191 Colo. 433, 436-37, 553 P.2d 758, 761 (1976).

193. District 50 Metropolitan Recreation Dist. v. Burnside, 167 Colo. 425, 430, 448 P.2d 788, 790 (1968); Foster v. Hart Consol. Mining Co., 52 Colo. 459, 471, 122 P. 48, 52 (1912); Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899); Board of County Comm'rs v. Rocky Mountain News Printing Co., 15 Colo. App. 189, 196, 61 P. 494, 497 (1900).

194. COLO. CONST. art. X, §§ 4-6.

195. *Id.* § 6; *see* Logan Irrigation Dist. v. Holt, 110 Colo. 253, 260, 133 P.2d 530, 533 (1943), which held that statutes exempting property from taxation, other than property specified in the constitution, were an unauthorized exercise of legislative power and unconstitutional.

196. COLO. CONST. art. X, § 3.

197. COLO. REV. STAT. § 39-3-101(1)(c) (1973).

assessment of the land they irrigate.[198]

Property tax incentives cannot be established by designating soil conservation structures as "improvements" to be assessed with the land as a unit or as "improvements" to be exempt from taxation. Improvements assessed with the land as a unit only prevent double taxation and therefore really do not offer a tax incentive, and conservation structures are not exempt property under the constitution. Therefore, a method must be found of classifying soil conservation structures that has the effect of designating them as "improvements" assessed separately from the land and exempting them from property taxation.

Colorado has some statutes that have the effect of exempting improvements from taxation. These statutes can be used as models for soil conservation structures. One example is that any increase in the value of private lands arising from planting trees is not taken into account in determining the actual value of the land until thirty years after the date of planting.[199] In another example, the state legislature gives a temporary financial incentive for the purchase of alternative energy devices[200] by providing that the installation of such devices will not cause an increase in the valuation for assessment for property tax purposes from 1980 to 1989.[201] Any increase in the valuation of structures, buildings, or improvements in or on which an alternative energy device is installed shall not be included in determining the actual value of the structures, buildings, or improvements.[202] A third example provides that the inclusion of property on the state register of historic properties does not increase the valuation for assessment of the property.[203]

New legislation could be adopted in Colorado to provide tax incentives for soil conservation structures by exempting from the assessed valuation any increase in value caused by the structures. The same justification could be made for soil conservation structures as was made for forestry and alternative energy devices.[204] Technically, a new classification may have to be created to accommodate property with soil conservation structures. This would not be contrary to the uniformity clause because the state supreme court

198. Logan Irrigation Dist. v. Holt, 110 Colo. 253, 263, 133 P.2d 530, 534 (1943); Shaw v. Bond, 64 Colo. 366, 370-71, 171 P. 1142, 1144 (1913); Empire Land & Canal Co. v. County Treasurer, 1 Colo. App. 205, 211-12, 28 P. 482, 484 (1891), *rev'd*, 21 Colo. 244, 40 P. 449 (1895).

199. COLO. REV. STAT. § 39-3-103 (1973).

200. An alternative energy device is a system, mechanism, or device using solar energy or geothermal, renewable biomass, or wind resources, including any passive structural design element that is an integral part of the system, mechanism, or device. The term does not include any system, mechanism, or device for the direct combustion of wood. *Id.* § 39-1-104(6)(b) (Supp. 1980).

201. *Id.* § 39-1-104(6)(c). The legislature found that alternative energy sources reduce the consumption of irreplaceable fossil fuels; reduce the need for capital, land, water, and other resources used in conventional energy systems; reduce air and water pollution from conventional energy systems; offer the potential for increased jobs and new business opportunities; and reduce oil and gas imports. *Id.* §§ 39-1-104(6)(a)(I)(A)-(E) (Supp. 1980).

202. *Id.* § 39-1-104(6)(d).

203. *Id.* § 39-1-104(5).

204. The purpose of the legislation concerned with alternative energy devices was to promote public health, safety, and welfare by providing a temporary financial incentive for the purchase of such devices through reducing the financial barriers which might inhibit rapid development and utilization of alternative systems. *Id.* § 39-1-104(6)(a)(II).

held that except for the constitutional provision prohibiting the taxation of ditches, canals, and flumes separately from the land they irrigate, the legislature is wholly unrestricted in dividing property into classes for purposes of taxation.[205] In addition, there is no constitutional requirement that taxes be levied under a plan which secures full valuation. Therefore, a valuation, however low, which is equal and uniform, is a just valuation and meets the constitutional requirement.[206]

4. Property Tax Credits Against Income Taxes

Colorado could follow the example it established for pollution control property[207] and provide that property taxes paid on certain types of soil conservation practices and structures be credited against the landowners' or lessees' state income taxes. After an owner or lessee applies for the tax credit, the Colorado Department of Health certifies the property's eligibility as "pollution control property" and its qualification for tax credits.[208] When the property taxes levied upon pollution control property have been paid, and upon request of the owner, the assessor endorses the receipt of that portion of the taxes the owner is entitled to credit against income taxes.[209] Taxpayers are entitled to a state income tax credit equal to thirty percent of the amount of general property taxes.[210] If the tax credit exceeds the tax due, the taxpayer may carry it over and apply it against the taxes due in each of the five succeeding years.[211] The amount of the income tax credit could be either the additional property taxes paid on the land due to increased assessed value because of the implementation of a conservation program, or a certain percentage of general property taxes similar to those the state uses for pollution control property. Constitutional problems associated with credits against income taxes for the erection of conservation structures are no greater than for the installation of pollution control property.

V. TAX INCENTIVES FOR CONSERVATION PROGRAMS UNDER DEFERRED TAXATION

Maryland, the state chosen as an example of a state having preferential property tax assessment with deferred taxation, was the first state to enact a

205. Ames v. People *ex rel.* Temple, 26 Colo. 83, 103, 56 P. 656, 663 (1899).

206. People *ex rel.* Colorado Tax Comm'n v. Pitcher, 56 Colo. 343, 350, 138 P. 509, 512 (1914).

207. *See* COLO. REV. STAT. § 39-5-131(7) (Supp. 1980). Pollution control property includes all owned or leased property acquired or first used after January 1, 1970, that is installed, constructed, or used for the primary purpose of eliminating, reducing, or preventing the release of pollutants into the air or water. Such property includes any treatment works, control devices, disposal systems, machinery, equipment, structures, land, or other property installed, constructed, or used for the primary purpose of reducing, controlling, or disposing of air and water pollutants. *Id.* § 39-1-102(12.1)(a)(I), (II) (Supp. 1980).

208. *Id.* §§ 39-5-131(1)-(3) (Supp. 1980). The department may certify all or part of the property as eligible pollution control property for tax credits. *Id.* § 39-5-131(3) (Supp. 1980). *See id.* §§ 39-5-131(1)-(5) (Supp. 1980) for certifying procedures.

209. *Id.* § 39-5-131 (7). The credit also applies to that portion of any lease payment providing revenue for a payment in lieu of taxes. *Id.*

210. *Id.* § 39-22-508(1).

211. *Id.* § 39-22-508(3).

differential assessment statute for agricultural land.[212] After the Farm Assessment Act,[213] enacted in 1956 as a pure preferential assessment statute, was declared unconstitutional as being in violation of the uniformity clause on property taxation,[214] both the constitution[215] and statute[216] were amended. The amended statute provides for a deferred or "rollback" tax to discourage conversion of agricultural land enjoying preferential assessment to other uses.[217] Taxes currently being levied against agricultural lands,[218] woodlands,[219] country club lands,[220] and planned development lands[221] are based upon their use-value subject to a deferred tax if the lands are converted to a nonqualifying use. In addition, before owners of woodlands[222] and country club lands[223] can take advantage of use-value assessments the owners must sign agreements restricting the use of such lands for a number of years. Maryland also created the Agricultural Land Preservation Program in 1974 to preserve the character of agricultural lands and woodlands.[224] Tax credits can be given for lands preserved under this program if approved by local resolution or ordinance.[225]

A. *Uniformity of Property Taxation*

Since a 1960 constitutional amendment,[226] Maryland's constitutional uniformity clause has permitted separate assessment for land and improvements on land and the classification and subclassification of both land and improvements. All taxes levied, however, must be uniform within each class or subclass of land or improvements.[227] Another 1960 constitutional amend-

212. 1956 Md. Laws ch. 9, § 1, *as amended by* 1957 Md. Laws ch. 680, § 1; 1960 Md. Laws ch. 52, § 1; 1961 Md. Laws ch. 455, § 1; 1969 Md. Laws ch. 433, § 1; 1972 Md. Laws ch. 75, § 1; 1973 Md. Laws ch. 714, § 1; 1974 Md. Laws ch. 176, § 5, ch. 705, § 1; 1975 Md. Laws ch. 39, § 1, ch. 731, § 2; 1977 Md. Laws ch. 900, § 1; 1978 Md. Laws ch. 84, § 1, ch. 902, § 1; 1980 Md. Laws chs. 394, 410, 463 (codified in MD. ANN. CODE art. 81, § 19(b) (1980)).

213. 1956 Md. Laws ch. 9, § 1, *as amended by* 1957 Md. Laws ch. 680, § 1 (current version at MD. ANN. CODE art. 81, § 17 (1980)).

214. State Tax Comm'n v. M.A. Wakefield, Jr., Inc., 222 Md. 543, 161 A.2d 676 (1960); *see* MD. CONST. art. XV.

215. 1960 Md. Laws ch. 64, § 1 (amending MD. CONST. art. XV). *See also* 1960 Md. Laws ch. 65, § 1 (amending MD. CONST. art. XLIII).

216. 1960 Md. Laws ch. 52, § 1 (amending MD. ANN. CODE art. 81, § 19(b)). *See* 1961 Md. Laws ch. 455, § 1.

217. MD. ANN. CODE art. 81, § 19(b)(2)(B)(i) (1980). For a discussion of the farmland preservation statute in Maryland, see B. DAVIES & J. BELDEN, *supra* note 8, at 13; T. HADY & A. SIBOLD, *supra* note 9, at 37-40; Ishee, *supra* note 45, at 23-34; Nielsen, *supra* note 45, at 429-60.

218. MD. ANN. CODE art. 81, § 19(b) (1980). *See also* MD. AGRIC. CODE ANN. §§ 2-501 to -508 (Supp. 1980).

219. MD. ANN. CODE art. 81, § 19(d) (1980). *See also* MD. NAT. RES. CODE ANN. §§ 5-301 to -310 (1974 & Supp. 1980).

220. MD. ANN. CODE art. 81, § 19(e) (1980).

221. *Id.* § 19(f).

222. MD. NAT. RES. CODE ANN. § 5-302 (Supp. 1980).

223. MD. ANN. CODE art. 81, § 19(e)(5) (1980).

224. MD. AGRIC. CODE ANN. §§ 2-501 to -508. For a discussion of the program, see Nielsen, *supra* note 45, at 438-47.

225. MD. ANN. CODE art. 81, § 12E-1(c) (1980).

226. 1960 Md. Laws ch. 64, § 1 (amending MD. CONST. art. XV).

227. MD. CONST. art. XV; *see* MD. ANN. CODE art. 81, §§ 14(a)(2)(i), 19(a)(1) (1980). *See also* Weaver v. Prince Georgia's County, 281 Md. 349, 355, 379 A.2d 399, 402 (1977); State Dep't of Assessments & Taxation v. Greyhound Computer Corp., 271 Md. 575, 590, 320 A.2d

ment permits the separate classification and assessment of land actively devoted to farm or agricultural use, and further provides that such land is to be assessed on the basis of farm or agricultural use and not assessed as if subdivided.[228]

Maryland's legislature can always classify and subclassify improvements on land and personal property if the classification and subclassification is not arbitrary or unreasonable.[229] The classification itself must be based upon natural reasons inherent in the subject matter and real differences existing between the classes.[230] Improvements on land and personal property may be classified for the purpose of both assessed value and tax rates since the actual tax is the product of these two figures.[231] The appropriate test is "the reasonableness of the classification rather than the method by which a difference in the amount of taxes is effected—whether by a difference in percentage of assessment or by a difference in the rate of taxation applicable to the respective classes."[232] A county may be divided into taxing districts by the legislature and each county or taxing district may have its own rate of taxation without violating the uniformity clause.[233]

B. *Valuation for Tax Assessment*

1. Agricultural Lands

Lands actively devoted to farm or agricultural use must be assessed on the basis of such use and not as if they were subdivided.[234] Such lands are valued at their full cash value[235] less an allowance for inflation of fifty percent of the current value.[236] Owners of agricultural lands need not make an application to have their farmland assessed in accordance with its use-value.[237] The State Department of Assessments and Taxation has established criteria for determining whether lands appearing to be actively devoted to farm or agricultural use are in fact *bona fide* farms and qualify for assessment as agricultural land.[238] Statutes require the department to consider at least the following criteria: (a) zoning classification of the land;[239]

40, 48 (1974); Marco Associates v. Comptroller of the Treasury, 265 Md. 669, 673-74, 291 A.2d 489, 492 (1972).

228. 1960 Md. Laws ch. 65, § 1 (codified in MD. CONST. art. 43).

229. State Tax Comm'n v. M.A. Wakefield, Jr., Inc., 222 Md. 543, 549-50, 161 A.2d 676, 679 (1960). *See* W. NEWHOUSE, *supra* note 4, at 557; Lewis, *The Tax Articles of the Maryland Declaration of Rights*, 13 MD. L. REV. 83, 94-109 (1953).

230. Oursler v. Tawes, 178 Md. 471, 483, 13 A.2d 763, 768 (1940).

231. National Can Corp. v. State Tax Comm'n, 220 Md. 418, 428-29, 153 A.2d 287, 293 (1959).

232. *Id.* at 429, 153 A.2d at 293.

233. Rogan v. County Comm'rs, 194 Md. 299, 309, 71 A.2d 47, 51 (1950).

234. MD. CONST. art. XLIII; MD. ANN. CODE art. 81, § 19(b)(1) (1980).

235. Full cash value means current or market value, which is the value a willing purchaser will pay a willing seller in an open market, eliminating exceptional and extraordinary conditions giving the property a temporary abnormal value. MD. ANN. CODE art. 81, § 14(b)(1)(ii)(1) (1980); Rogan v. County Comm'rs, 194 Md. 299, 311, 71 A.2d 47, 52 (1949).

236. MD. ANN. CODE art. 81, § 14(b)(2) (1980).

237. *Id.* § 19(b)(1).

238. *Id.* § 19(b)(1). See Ishee, *supra* note 45, at 26-27 for the department's list of 29 criteria for assessors to use in establishing whether land is actively devoted to farm use.

239. *Id.* § 19(b)(1)(i).

(b) present and past uses of the land, including land under the soil bank program of the Agricultural Stabilization Act;[240] and (c) productivity of the land, including timberlands and lands used for reforestation.[241] Lands not eligible for assessment as farmland include land zoned for industrial, commercial, or multifamily residential use as of July 1, 1972, if zoned at the request of the present or previous owner;[242] land rezoned after July 1, 1972, to a more intensive use if the landowner requested the rezoning;[243] and land subdivided into lots or parcels after July 1, 1972.[244] However, except for the dwelling house and one acre surrounding it, which must be assessed at fair market value, any parcel of twenty acres or more that the owner conveys to another party is not automatically ineligible for assessment as farmland as a result of that subdivision.[245]

A landowner whose land is assessed on the basis of agricultural use may not develop the land for any nonagricultural use, other than for the residential use of the owner or the owner's immediate family, without first paying a development tax equal to ten percent of the difference between the most recent agricultural use assessment and the current nonagricultural use assessment.[246] The local government collects the development tax as a lien in the same manner as it does for real property taxes.[247] Two-thirds of the development tax collected by the local government is paid to the state for deposit in the Maryland Agricultural Preservation Fund.[248] The local government retains one-third of the tax (two-thirds in Montgomery County if it continues to impose a transfer tax) to be used for its own agricultural land preservation program, including bond annuity funds or matching funds.[249]

2. Woodlands

Owners of five or more contiguous acres of woodland may contract with the State Department of Natural Resources (DNR) for a minimum period of ten years to place the parcel under a forest conservation and management program.[250] When placed under such a program woodlands are valued at

240. *Id.* § 19(b)(1)(ii).
241. *Id.* § 19(b)(1)(iii).
242. *Id.* § 19(b)(2)(A)(i).
243. *Id.* § 19(b)(2)(A)(ii). The court has held that land zoned industrial, commercial, or multifamily residential at the instance of its owner, even though being farmed, will not continue to be used for farming and is not entitled to assessment based upon such use. Supervisor of Assessments v. Ely, 272 Md. 77, 84, 321 A.2d 166, 170 (1974).
244. MD. ANN. CODE art. 81, § 19(b)(2)(A)(iii) (1980).
245. *Id.*
246. *Id.* § 19(b)(2)(B)(i). Land is reassessed when its use is changed from agricultural to nonagricultural as determined by the State Department of Assessments and Taxation regulations or when the owner or other person having a property interest in the land commences or engages in the construction of improvements for nonagricultural use, other than for residential use of the owner or his immediate family, or records a plat. *Id.* § 19(b)(2)(B)(ii). When a farm owner conveys lands assessed for agricultural use to a new owner who does not maintain the agricultural use, the original owner is liable for the development tax. 57 Op. Md. Att'y Gen. 696 (1972).
247. MD. ANN. CODE art. 81, § 19(b)(2)(B)(v) (1980).
248. *Id.* § 19(b)(2)(B)(iii). See MD. AGRIC. CODE ANN. § 2-505 (Supp. 1980) for permitted expenditure of moneys from this fund.
249. MD. ANN. CODE art. 81, § 19(b)(2)(B)(iv) (1980).
250. MD. NAT. RES. CODE ANN. § 5-302 (1974 & Supp. 1980).

their full cash value less an allowance for inflation of fifty percent of the current value.[251] The assessed valuation during the contract period may not be increased.[252] Woodlands sold or removed in part or totally from the forest conservation and management contract are subject to a deferred or "rollback" tax.[253] Deferred taxes are based on the difference between the valuation for assessment at the time of the removal or sale and the valuation for assessment at the time of the contract,[254] computed in approximately equal annual steps covering the number of years elapsing between the two valuations.[255] The amount of taxes owed is computed by the annual increase in assessed value based on the tax rates applicable for the particular year.[256]

3. Country Clubs

Country clubs[257] actively devoted to use as country clubs may enter into an agreement with the State Department of Assessments and Taxation[258] for a minimum term of ten years[259] permitting the land to be assessed on the basis of club use and not as if subdivided or used for any other purpose.[260] Country club lands are valued at their full cash value less an allowance for inflation of fifty percent of the current value.[261] Deferred or "rollback" taxes are due if part or all of the country club property is conveyed to a new owner[262] or the property ceases to be used or no longer qualifies as a country club prior to the expiration of the agreement or its extension.[263] The amount of deferred taxes due is determined for each year by applying the appropriate tax rate against the difference between the assessed value at the beginning of the agreement and the assessed value at the time the land ceases to be used for country club purposes, and adding the

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251. MD. ANN. CODE art. 81, § 14(b)(2) (1980).

252. MD. NAT. RES. CODE ANN. § 5-303 (1974). See MD. ANN. CODE art. 81, § 19(d) (1980) for statutory authority to provide preferential assessment for woodlands.

253. MD. NAT. RES. CODE ANN. § 5-306 (Supp. 1980). Deferred or "rollback" taxes are not due if the seller assigns and transfers the contract to the buyer and the buyer assumes its obligations, or the woodlands are taken by eminent domain or other involuntary proceedings. *Id.* §§ 5-305(a), -308.

254. *See id.* § 5-302-304. The original valuation takes into consideration that the assessed value is only 50 percent of the current value. *See* MD. ANN. CODE art. 81, § 14(b)(2) (1980).

255. MD. NAT. RES. CODE ANN. § 5-306 (Supp. 1980).

256. *Id.*

257. To qualify for use-value assessment, a country club must have at least 50 acres on which is maintained a regular or championship golf course of nine holes or more and a clubhouse. The country club must have a dues-paying membership of at least 100 persons who pay dues averaging at least $50 annually per member, with the use of the club restricted primarily to members, their families and guests. In addition, the club may not practice discrimination in granting membership or guest privileges. MD. ANN. CODE art. 81, § 19(e)(4)(i) (1980).

258. *Id.* § 19(e)(1).

259. *Id.* § 19(e)(5).

260. *Id.* § 19(e)(2).

261. *Id.* § 14(b)(2).

262. An agreement may be assigned and transferred to the buyer of all or part of the land, and if the buyer assumes the obligations under the agreement, deferred taxes are not due. *Id.* § 19(e)(9).

263. *Id.* § 19(e)(7). If the owner conveys only part of the property and the remaining property still qualifies as a country club deferred taxes are only due on the property actually conveyed. *Id.* § 19(e)(8).

taxes for each year[264] with a limit of ten years.[265]

4. Planned Development Lands

Planned development lands are eligible for special assessment as active agricultural land.[266] As with agricultural lands, planned development lands are valued at their full cash value less an allowance for inflation of fifty percent of the current value.[267] Whenever planned development lands have a full cash value in excess of their special assessment as active agricultural land, they are assessed on the basis of their full cash value and both the full cash value and agricultural value are recorded.[268]

Owners of land must apply to the county supervisor of assessments for a determination of whether their lands meet the criteria for planned development.[269] Planned development lands to be designated as such must consist of at least 500 acres or more in a contiguous tract[270] and be primarily undeveloped at the time they are placed in the planned development zoning classification.[271] The land must be situated in an area designated for planned development on a current master plan or general or regional plan adopted by the governmental authority having planning or zoning jurisdiction, or be designated for development as a new town, city, or satellite city.[272] In addition, the land must be located in a zoning classification that permits development only in compliance with the master plan or general or regional plan, requires a land use plan and a comprehensive site development or subdivision plan, and requires the landowner to provide public works and improvements that the local government normally provides under other zoning classifications.[273]

Taxes are not due on the full cash value assessment unless there is a change in land use.[274] Special assessments for that portion of land subdivided by recording a plat or improved by construction of permanent buildings are terminated and that portion is thereafter assessed at full cash value.[275] If the lands subject to special assessments are rezoned, at the request of the owner, to a classification that does not meet the requirements of planned development lands, the special assessment terminates for that portion of the land rezoned and a deferred tax is due. The tax equals the difference between the tax based on the special assessment and the tax based on full cash value for each year of special assessment, not to exceed ten percent

264. *Id.* § 19(e)(2),(3),(7).
265. *Id.* § 19(e)(7)(A).
266. *Id.* § 19(f)(1),(3). This special assessment applies whether or not such land would qualify for agricultural use assessment.
267. *Id.* § 14(b)(2).
268. *Id.* § 19(f)(4).
269. *Id.* § 19(f)(3).
270. *Id.* § 19(f)(2)(C).
271. *Id.* § 19(f)(2)(D).
272. *Id.* § 19(f)(2)(A).
273. *Id.* § 19(f)(2)(B).
274. *Id.* § 19(f)(4).
275. *Id.* § 19(f)(5). The remaining portion of the land continues to be entitled to special assessment even though its area is less than 500 acres if it continues to meet the criteria.

of the full cash value assessment in effect at the time of rezoning.[276]

5. Agricultural Land and Woodland Easements

County governing bodies and the city council of Baltimore City may by resolution or ordinance provide credits up to seventy-five percent against taxes imposed upon any real property if the owner permanently conveys or assigns an easement or interest in the land to the Maryland Agricultural Land Preservation Foundation[277] to preserve the land's character as agricultural land or woodland.[278] Valuation and assessment of the agricultural land or woodland before granting a tax credit is similar to any other real property in the taxing subdivision.[279]

Easements may not be acquired by the Foundation in agricultural lands or woodlands unless a county agricultural preservation district has been created and such lands are located within that district.[280] To be located within an agricultural preservation district, land must meet productivity, acreage, and locational criteria that the Foundation determines are necessary for continuation of farming the land.[281] The Foundation, in acquiring easements, attempts to preserve the minimum number of acres in a given district that will reasonably promote the continued availability of agricultural supplies and markets for agricultural goods.[282]

C. *Implementation of Tax Incentives for Programs*

Maryland's constitutional uniformity clause, which allows classification of land and permits farmland devoted to such use to be assessed on the basis of farm use and not as if subdivided,[283] permits the legislature to enact a variety of property tax incentives for implementing soil conservation programs. Such incentives can be used in conjunction with the preferential or use-value assessment for agricultural, wood, country club, and planned development lands or credits against property taxes granted for selling agricultural land and woodland easements to the state and local governments. Assessed valuation or tax rates on assessed valuation may be adjusted for implementing conservation programs. In addition, the constitutional uniformity clause permits the separate assessment and classification of improvements on the land;[284] thus, it may be possible to exempt conservation

276. *Id.* § 19(f)6.

277. The Foundation is within the Department of Agriculture and is governed and administered by an 11 member board of trustees. MD. AGRIC. CODE ANN. §§ 2-502, -503(a) (Supp. 1980).

278. MD. ANN. CODE art. 81, § 12E-1(c) (1980). *See id.* § 12E-1(a). See Nielsen, *supra* note 45, at 438-47, for a discussion of the Maryland Agricultural Land Preservation Program.

279. MD. ANN. CODE art. 81, § 12E-1(b) (1980).

280. See MD. AGRIC. CODE ANN. § 2-509(b) (Supp. 1980) for procedures to establish county agricultural preservation districts. Such districts are governed by a county agricultural preservation advisory board. *See id.* § 2-504.1 for the creation, composition, and duties of the advisory board.

281. *Id.* § 2-509(c)(1).

282. *Id.* § 2-509(c)(2). See CODE OF MARYLAND REGULATIONS § 15.17.01 for procedures to acquire easements.

283. MD. CONST. arts. XV, XLIII.

284. *Id.* art. 15.

structures from taxation.

1. Differential Taxation of Lands

Statutes permitting preferential or use-value assessments for certain agricultural, wood, country club, and planned development lands[285] could be easily amended to require the implementation of recommended soil conservation programs as a prerequisite for classifying land into categories eligible for use-value assessment. Such amendments to the preferential assessment statutes will not conflict with the constitutional uniformity clause because the suggested amendments do not create new classes of land, but rather add further eligibility restrictions for the agricultural land, woodland, country club land, and planned development land classes.

Maryland requires the payment of deferred or "rollback" taxes when the lands cease to be used for the purposes that made them eligible for preferential assessments.[286] In addition, land has to be kept in woodland and country club use for a specified number of years under restrictive agreements.[287] Deferred taxation provisions could be amended to require the payment of a certain amount of rollback taxes for failure to maintain a recommended soil conservation program on the land just as if the land use was changed to a nonqualifying use. Failure to maintain conservation programs on woodlands or country club lands would be a breach of the restrictive agreements and would require the payment of deferred taxes. Soil conservation districts, with the assistance of the SCS district conservationists, can certify the eligibility of lands for preferential assessment and maintenance of a soil conservation program.

Under certain circumstances, owners of agricultural lands and woodlands may convey easements to the federal, state, or local government that preserves natural, agricultural, and woodland characteristics of such lands. Owners conveying such easements are given credits against their property taxes if local governments adopt resolutions or ordinances authorizing such credits.[288] Convenants may be inserted in the easement instrument requiring the implementation of soil conservation programs.

2. Adjustments in Assessed Valuation or Tax Rates

Assessed valuation on property or tax rates on the assessed value may be adjusted for owners implementing soil conservation programs. A precedent exists in the Maryland statutes to reduce the valuation for assessment on certain real property. Agricultural lands, woodlands, country club lands, and planned development lands are valued at their full cash value less an allowance for inflation of fifty percent of current value.[289] The statute could

285. MD. ANN. CODE art. 81, §§ 19(b), (d)-(f) (1980); *see* MD. NAT. RES. CODE ANN. §§ 5-301 to -308 (1974 & Supp. 1980).

286. *See* MD. ANN. CODE art. 81, § 19(b)(2)(B)(i), (e)(7), (f)(6) (1980); MD. NAT. RES. CODE ANN. § 5-306 (Supp. 1980).

287. MD. NAT. RES. CODE ANN. § 5-302 (Supp. 1980); MD. ANN. CODE art. 81, §§ 19(e)(1), (5) (1980).

288. MD. ANN. CODE art. 81, § 12E-1(c) (1980).

289. *Id.* § 14(b)(2); *see id.* § 19(b),(d)-(f).

be easily amended to adjust that percentage figure based on the implementation of soil conservation programs.

An adjustment in assessed value or tax rates to encourage soil conservation programs requires subclassification of real property with the implementation of such programs as the criteria for the classification system. Such classification or subclassification of land is permitted by the constitutional uniformity clause on property taxation, provided the taxes levied are uniform within each class or subclass.[290] The primary requirement under the constitution is that the classification be reasonable and not arbitrary and be based on natural reasons inherent in the property and real differences existing between the classes.[291] The application of soil conservation practices on some land and not on other land would serve as a sufficient distinction between the two parcels of land to justify two separate classes.

3. Exemptions of Improvements from Taxation

Maryland's constitutional uniformity clause on property taxation provides that improvements on the land are to be assessed separately from the land and can be classified and subclassified so long as the assessments on the improvements are uniform within each class or subclass.[292] Soil conservation structures may be considered as improvements on the land. They are sufficiently different from other improvements to justify putting them into a separate class or subclass. Such improvements may be assessed at a lower value or taxed at a lower rate than other improvements if the taxes levied are equal and uniform upon all structures within the same class or subclass.[293] In addition, each county or taxing district may establish its own rate of taxation without violating the constitutional uniformity clause.[294]

Another possibility exists whereby Maryland could amend its statutes and exempt improvements consisting of soil conservation structures from taxation. The legislature has the power to fully exempt property from taxation without violating the uniformity clause where the exemption is reasonable and for a public purpose even though there is no express constitutional authorization.[295] An exemption is valid if it is justified by public policy, it is within reasonable limits and not arbitrary, and it applies to an entire class of property.[296] A recent case held that exemptions of a reasonably defined class of property in furtherance of a public good and rationally related to a legitimate state purpose do not offend the uniformity clause.[297] Currently,

290. MD. CONST. art. XV.

291. State Tax Comm'n v. M.A. Wakefield, Jr., Inc., 222 Md. 543, 549-50, 161 A.2d 676, 679 (1960); Oursler v. Tawes, 178 Md. 471, 483, 13 A.2d 763, 768 (1940).

292. MD. CONST. art. XV.

293. State Dep't of Assessments & Taxation v. Greyhound Computer Corp., 271 Md. 575, 590, 320 A.2d 40, 48 (1974).

294. Rogan v. County Comm'rs, 194 Md. 299, 309, 71 A.2d 47, 51 (1950).

295. Williams v. Mayor of Baltimore, 289 U.S. 36, 40-42 (1933); Aero Motors, Inc. v. Motor Vehicle Administration, 274 Md. 567, 593, 337 A.2d 685, 701 (1975); State Tax Comm'n v. M.A. Wakefield, Jr., Inc., 222 Md. 543, 548, 161 A.2d 676, 678 (1960).

296. Mayor of Baltimore v. Minister of the Starr Methodist Protestant Church, 106 Md. 281, 286, 67 A. 261, 264 (1907).

297. Ballard v. Supervisor of Assessments, 269 Md. 397, 406, 306 A.2d 506, 511 (1973).

Maryland exempts various governmental, religious, cemetery, charitable, educational, natural preserve, and housing authority property from taxation.[298]

4. Credits of a Specified Amount Against Property Taxes

Local governments adopting ordinances or resolutions may give credits in amounts up to seventy-five percent against property taxes imposed by political subdivisions on certain woodlands and agricultural lands where the owners have conveyed easements to the federal, state, or local governments that preserve the character of such lands.[299] Maryland could expand this program and enact legislation giving credits against property taxes for implementing soil conservation practices. The amount of the credit could be based on the type of practice implemented or on the cost of implementing the practice amortized over a number of years. As Maryland has a precedent for deferred or "rollback" taxes, such a provision could also be inserted for owners failing to maintain conservation practices.

VI. TAX INCENTIVES FOR CONSERVATION PROGRAMS UNDER RESTRICTIVE AGREEMENTS

Wisconsin, the state chosen as an example of a state that uses preferential property tax assessment with a restrictive agreement, adopted the Farmland Preservation Act in 1977[300] that provides property tax credits against state income taxes. A farmer may apply for a farmland preservation agreement under this act if the land is located in an area zoned for exclusive agricultural use or is located in a county that has a certified agricultural preservation plan.[301] Woodlands and forest croplands are also given preferential tax treatment if the landowners agree to keep them in woodland or forest use for a certain number of years.[302] In addition, certain pollution abatement equipment is exempt from property taxation in Wisconsin.[303]

A. *Uniformity of Property Taxation*

The Wisconsin Constitution requires a uniform rule of taxation.[304] Each type of real property must be taxed the same under the uniformity clause unless the clause has been amended to provide otherwise.[305] Several

298. MD. ANN. CODE art. 81, 9(b)-(e), (e-1), (f), (g)(2), (h), (i), (L)-(L-3), (n)-(p) (1980).

299. *Id.* § 12E-1(c).

300. 1977 Wis. Laws ch. 29, § 982m, ch. 169, §§ 1-21, ch. 418, §§ 579c, 579g, 579L, 579p, 579t-579v, 579x-580e, 580L, 580p-580x, ch. 447, § 119 (codified in WIS. STAT. §§ 20.115(6)(a), 71.09(11), 91.01-.79 (1977)).

301. WIS. STAT. §§ 91.11(1)(a), (b) (1977).

302. *Id.* §§ 77.01-.14, .16 (1977 & Supp. 1981).

303. WIS. STAT. § 70.11(21) (1977).

304. WIS. CONST. art. VIII, § 1; W. NEWHOUSE, *supra* note 4, at 10.

305. *See* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1962), which held that there can be but one constitutional class of property for taxation purposes under the uniformity clause. The court summarized the requirements of the constitutional uniformity provision as follows: (a) all property within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis; (b) all property not included in that class must be absolutely exempt from property taxation;

amendments have been made to the constitution permitting the legislature to classify the various types of real property on the basis of use for the purpose of determining value.[306] A 1927 amendment required the legislature to establish a classification system for forest and mineral lands.[307] An amendment in 1961 provided that the taxation of merchants' stock-in-trade, manufacturers' materials and finished products, and livestock need not be uniform with the taxation of real property and other personal property, but the taxation of all objects within the same class must be uniform.[308] The latest amendment provides: "Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property."[309]

B. *Valuation for Tax Assessment*

Real property in Wisconsin, which includes the land and all buildings and improvements on it and attached fixtures, rights, and privileges,[310] is valued at the full value which would ordinarily be obtained at a private sale.[311] In determining the value for each parcel, the assessor must consider the advantage or disadvantage of the parcel's location; soil quality; quantity of standing timber; and the value of water privileges, mines, minerals, quarries, and other deposits.[312] Assessors must value land separately from improvements and classify each parcel as residential, mercantile, manufacturing, agricultural, swamp or wasteland, productive forest land, or nonproductive forest land.[313]

1. Agricultural Lands

The purpose of the Wisconsin Farmland Preservation Act[314] is to assist local governments desiring to preserve farmland through local planning and zoning and to provide property tax relief in the form of credits against state income taxes for farmers who participate in the local program by signing

(c) privilege taxes are not direct taxes on property and are not subject to the uniformity rule; (d) while there may not be a classification of property for different rules or rates of taxation, the legislature may classify property as either taxable or wholly exempt, and the test of such classification is reasonableness; and (e) there may be variations in the mechanics of property assessment or tax imposition as long as the resulting taxation is borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property. *Id.* at 424, 108 N.W. at 641-42; *see* Chicago & N.W. Ry. v. State, 128 Wis. 553, 603-04, 108 N.W. 557, 567 (1906).

306. *See, e.g.*, WIS. STAT. §§ 20.115(6)(a), 70.32(2), (3), .525, .995, 71.09(11), 77.01-.14, .16, 91.01-.79 (1977); *see* Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 426, 147 N.W.2d 633, 642 (1967), which stated the viability of the uniformity clause is attested to by the series of constitutional amendments that have been necessary to avoid its proscription.

307. Wis. J. Res. 62 (1925); Wis. J. Res. 13 (1927) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1927)).

308. Wis. J. Res. 78 (1959); Wis. J. Res. 13 (1961) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1961)).

309. Wis. J. Res. 39 (1971); Wis. J. Res. 29 (1973) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1973)).

310. WIS. STAT. § 70.03 (1977).

311. *Id.* § 70.32(1).

312. *Id.*

313. *Id.* §§ 70.32(2)(a)-(c).

314. *Id.* §§ 20.115(6)(a), 71.09(11), 91.01-.79.

agreements restricting the use of their lands to agriculture.[315] The act provides for an initial five-year program and a permanent program.

a. *Initial Program*

Under the initial program, qualified farmland owners can voluntarily sign an agreement or contract with the state for a period of five years or less that provides for the farmland to remain in agricultural use. In return, the owners are eligible for state income tax credits under a "circuit-breaker formula" if their property taxes are "excessive" under criteria set by the act.[316] Initial farmland preservation agreements may not be made after September 30, 1982, and they all expire on that date.[317]

Farmers are eligible for an initial agreement only if their land has been in "agricultural use"[318] for at least twelve consecutive months during the preceding thirty-six months,[319] consists of thirty-five acres or more of contiguous land in one parcel, and produced farm products valued at $6,000 or more in the preceding year or $18,000 over the past three years.[320] In addition, the lands must be covered by a farm conservation plan prepared or in the process of being prepared by the soil and water conservation district.[321] However, land to be covered by an initial farmland preservation agreement need not be located in a county with a certified agricultural use under a certified zoning ordinance.[322]

Applications for farmland preservation agreements must be approved by the local governing body having jurisdiction over the land.[323] Applications approved by the local governing body are submitted to the Wisconsin Department of Agriculture, Trade and Consumer Protection for signature.[324] This signed initial farmland preservation agreement stays with the

315. The act complies with an opinion of the attorney general. *See* 66 Op. Wis. Att'y Gen. 337, 341 (1977) which states: "Although the uniformity clause now permits the taxation of agricultural land on a different basis, there is serious doubt as to whether it allows for nonuniformity of treatment within the classification for agricultural land. In other words, even though agricultural land does not have to be taxed on a uniform basis with nonagricultural land, nevertheless, all agricultural land must be taxed alike. As a class, all agricultural land could be exempt."

316. WIS. STAT. §§ 91.13, .31 (1977).

317. *Id.* §§ 91.31, .35(2).

318. "Agricultural use" means beekeeping; commercial feedlots; dairying; egg production; floriculture; fish or fur farming; forest and game management; grazing; livestock raising; orchards; plant greenhouses and nurseries; poultry raising; raising of grain, grass, mint, seed crops, vegetables, fruits, nuts, and berries; and sod farming. *Id.* § 91.01(1).

319. *Id.* § 91.01(5).

320. *Id.* §§ 71.09(11)(a)(3), 91.01(6) (1977 & Supp. 1981). The value of farm products means the gross receipts, excluding rent, from the land's agricultural use less the cost or other basis of livestock or other items which are purchased for resale and which are sold or disposed of during the year. *Id.* § 71.09(11)(a)(3m) (1977).

321. *Id.* § 91.35(1) (1977).

322. *Id.* § 91.31.

323. *Id.* § 91.13(4). Generally, the county board has jurisdiction; however, if the land is located in a city, village, or town that has adopted an exclusive agricultural zoning ordinance certified by the State Agricultural Lands Preservation Board, the city council, village board, or town board has jurisdiction. *Id.* § 91.01(8). *See id.* § 91.13 for the approval procedure.

324. *Id.* § 91.13(5). The department signs an agreement with the farmer unless it determines that the land is not eligible farmland for an agreement. *Id.* § 91.13(6); *see id.* § 91.01(6) (1977), which states that land is ineligible if it is not devoted primarily to agricultural use, it did

land even if it is sold to a different owner.[325]

Owners who sign an initial farmland preservation agreement are eligible to receive tax credits against their state income taxes for "excessive" property taxes as calculated under a "circuit-breaker" formula.[326] The circuit-breaker formula relieves farmland owners from paying excessive property taxes under a "threshold" concept; "excessive" property taxes are that amount of the property tax bill exceeding a certain threshold percentage of household income.[327] Threshold percentages vary with the household income so that greater threshold percentages are assigned to larger household incomes. Excessive property taxes, up to a maximum of $6,000, are computed by subtracting a certain threshold percent of the household income from the accrued property taxes.[328] Farmland owners who sign initial agreements are eligible for state income tax credits equal to fifty percent of the potential credit calculated for farmland owners under a permanent program.[329] Higher levels of tax credit are available to farmers who, in addition to signing the agreement, live in areas with farmland preservation plans or exclusive agricultural zones,[330] up to a maximum potential tax credit of $4,200.[331]

A lien attaches to the property for the full amount of all tax credits received, plus interest from the date of the credits, if the landowner cancels an agreement prior to the termination date.[332] When the initial agreement expires and the owner does not apply for a renewal[333] or does not sign a new permanent land preservation agreement,[334] a lien attaches to the property, without interest, for the tax credit received for the last two years the land was eligible for such credit. This is provided that the land is not subject to a certified exclusive agricultural use zoning ordinance and either the county in which the land is located has not adopted a certified agricultural preservation plan or, if such a plan is adopted, the farmland would not be eligible for

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not produce the required value of agricultural product, or the acreage did not meet the 35-acre minimum.

325. *Id.* § 91.17(1).

326. *Id.* § 91.13(8)(e). To be eligible for the tax credit, a landowner must have been a resident of Wisconsin for the entire year, owned the farmland at the close of the year for which the credit is claimed, and not claimed income tax credit for a homestead. *Id.* §§ 71.09(11)(a)(1), (a)(1)(b). In case the tax credit formula is changed so that the credit is reduced, the owner is guaranteed, at a minimum, the credit under the formula at the time he signs the agreement. *Id.* § 71.09(11)(b)(2) (1977) (Supp. 1981).

327. *See* WIS. STAT. § 71.09(11)(b) (1977). A household includes the landowner, spouse, and all minor dependents. *Id.* § 71.09(11)(a)(4). Household income includes the net farm income and all nonfarm income, such as nonfarm wages, salaries, and tips, in excess of $7,500. *Id.* § 71.09(11)(a)(5), (6)(a).

328. *Id.* § 71.09(11)(b)(1) (1977 & Supp. 1981). Percentages vary from 5% of the second $5,000 of income to 35% of household income in excess of $30,000. *See also* WIS. STAT. § 71.09(11)(a)(7) (1977 & Supp. 1981).

329. WIS. STAT. § 71.09(11)(b)(3)(f) (1977 & Supp. 1981); *see id.* § 71.09(11)(b)(2).

330. WIS. STAT. § 71.09(11)(b)(3)(d), (e) (1977).

331. *Id.* § 71.09(11)(b)(2) (1977 & Supp. 1981).

332. WIS. STAT. § 91.37(1) (1977); *see id.* §§ 91.19(9)-(12).

333. *See id.* § 91.39 for renewal procedure. Agreements may be renewed for a single one-year period only if an agricultural preservation plan is adopted by the county in which the farmland is located and the farmland is eligible for a permanent land preservation agreement.

334. *See id.* §§ 91.11-.23 for permanent land preservation agreements.

an agreement under the terms of the agreement.[335] If, however, the owner is eligible to renew the initial agreement or sign a new permanent agreement, but declines, and the land is eligible for a permanent agreement because of an agricultural preservation plan, but is not located in an exclusive agricultural zone, the lien or rollback applies to all tax credits received plus interest compounded from the initial expiration date.[336]

b. *Permanent Program*

Owners are eligible for permanent farmland preservation agreements after the initial program expires in 1982 only if the local government adopts either a certified agricultural preservation plan or an exclusive agricultural zoning ordinance.[337] To be eligible, land in urban counties[338] must be located within an area zoned for exclusive agricultural use under an ordinance certified by the State Agricultural Lands Preservation Board,[339] and the town in which the land is located must have approved the ordinance.[340] Rural county land[341] is eligible for permanent program agreements if the county has adopted an agricultural preservation plan certified by the state board[342] or an exclusive agricultural zoning ordinance certified by the state board[343] and the land is located within one of those areas.[344] If any city, town, or village has adopted its own certified exclusive agricultural zoning ordinance or a town has approved a similar county zoning ordinance, eligible land must be within the area zoned for agricultural use.[345]

Landowners apply for permanent farmland preservation agreements in the same manner in which they apply for initial agreements,[346] with the additional requirement that the application for a permanent agreement must contain the soil classification of lands sought to be covered.[347] The provisions of initial and permanent agreements are the same, except that under a permanent agreement an approved farm conservation plan must be in effect.[348] Deviation from the conservation plan is permitted if SCS or district personnel are unavailable to lay out the suggested practices on the land or if the practices are not economical for the owner to adopt.[349] Landowners are ineligible for tax credits if they have been notified of a violation

335. *Id.* § 91.37(2); *see id.* §§ 91.19(9)-(12).
336. *Id.* § 91.37(3).
337. *Id.* § 91.11(1).
338. An urban county is one with a population density of 100 or more persons per square mile. *Id.* § 91.11(3) (1977 & Supp. 1981).
339. WIS. STAT. § 91.78 (1977).
340. *Id.* § 91.11(3) (1977 & Supp. 1981).
341. A rural county has a population density less than 100 persons per square mile. *Id.* § 91.11(2).
342. WIS. STAT. § 91.61 (1977).
343. *Id.* § 91.78.
344. *Id.* § 91.11(2) (1977 & Supp. 1981). Towns in which the land is located need not approve the ordinance.
345. *Id.* § 91.11(4).
346. *See* WIS. STAT. § 91.13 (1977).
347. *Id.* § 91.13(1).
348. *Id.* § 91.13(8)(d). An initial agreement only requires that a soil and water conservation district plan be in effect or under development. *Id.* § 91.35(1).
349. *Id.* § 91.13(8)(d).

of the plan.[350]

Lands under permanent farmland preservation agreements located within an area of the county and subject to either exclusive agricultural zoning or an agricultural preservation plan are eligible for tax credits of seventy percent of the potential credits, calculated under a "circuit-breaker" formula in the same manner as initial agreements.[351] A seventy percent tax credit is available on farmland located in an urbanizing area if the farmland is identified as such in the preservation plan and the owner signs a special transition area agreement.[352] If a county has both exclusive agricultural zoning and a preservation plan, land located with an area covered by both is eligible for 100% of the potential tax credit calculated under the "circuit-breaker" formula.[353]

The same procedures and criteria apply to the relinquishment of farmland preservation agreements under both the initial and permanent programs.[354] A lien is recorded against the property for all tax credits received during the past ten years the landowner was eligible for such credits if either the permanent farmland preservation agreement expired or the land was rezoned out of the exclusive agricultural district.[355] Interest is assessed from the time the agreement expired or the land was removed from the exclusive agricultural zone.[356] When a farmland preservation agreement is relinquished before its expiration date with state and county approval or a transition area agreement expires, a lien is recorded against the land for all tax credits received during the last ten years that the land was eligible for such credit. Interest is assessed from the time the credit was received until the lien is paid.[357]

2. Woodlands

Owners of ten or more acres of land who intend to practice forestry on it may apply to the Wisconsin Department of Natural Resources (DNR) to have their lands placed under the woodland tax law for a fifteen-year period.[358] The DNR examines the land and approves the application if the woodland is suitable for growing timber and other forest products, the land is not more useful for other purposes, and the owner agrees to follow the DNR-approved woodland management plan.[359]

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350. *Id.* § 71.09(11)(o).

351. *Id.* § 71.09(11)(b)(3)(e) (1977 & Supp. 1981). *See also id.* § 71.09(11)(b)(3)(bm), (cm) (Supp. 1981).

352. WIS. STAT. § 71.09(11)(b)(3)(c) (1977 & Supp. 1981).

353. WIS. STAT. §§ 71.09(11)(b)(3)(a), (b) (1977 & Supp. 1981).

354. *See* WIS. STAT. §§ 91.19(1)-(6) (1977).

355. *Id.* § 91.19(8); *see id.* § 91.77(2).

356. *Id.* § 91.19(8). No interest accumulates if the owner later signs a new farmland preservation agreement or transition area agreement or if the land has been included in an exclusive agricultural zone. *Id.*

357. *Id.* § 91.19(7).

358. *Id.* § 77.16(4). Lands that are ineligible for woodland taxation include those consisting of an entire quarter-quarter section, fractional lots, or government lots as determined by the federal survey plat; within recorded subdivision plats; within incorporated limits of cities or villages; and which have improvements on them. *Id.*

359. *Id.* § 77.16(3). Copies of the order approving the application are forwarded to the

Once the DNR approves the application, the assessor reduces the total assessed valuation on the land by an amount equal to the assessed value of the acreage covered by the contract. Landowners pay the town a special property tax of forty cents per acre per year on all lands entered in the program or renewed after December 31, 1976, until 1982.[360] In 1982, and at ten-year intervals thereafter, the Wisconsin Department of Revenue will recalculate the rate by multiplying twenty cents per acre by a ratio, using as the denominator of the ratio the equalized value of the combined residential, mercantile, manufacturing, agricultural, swamp or wasteland, productive forest land, and nonproductive forest land classes within the state in 1972, and as the numerator, the equalized value for these combined land classes in 1982 and every tenth year thereafter, rounded to the nearest cent.[361] Owners must pay the town a penalty based on the average full value per acre of the productive forest land classes during the previous year in the county where the land is located as determined by the Department of Revenue once the DNR or the owner removes the land from the program. The penalty is equal to one percent of that figure for each acre for each year the land was in the program.[362] Owners are not liable for any penalty if the contract is not renewed at the end of its period.[363]

3. Forest Croplands

Soon after Wisconsin amended its constitution to allow forest lands to be taxed differently from other lands and timber to be taxed separately from the land,[364] the legislature enacted the Forest Crop Law.[365] The law provides that the owner of an entire quarter section, fractional lot, or governmental lot as determined by the federal government may petition the DNR requesting that such lands be approved as forest croplands.[366] The DNR will grant the request if after a public hearing[367] and investigation it finds that the facts give "reasonable assurance" that the landowner will develop a stand of merchantable timber within a reasonable time and that the owner presently holds the land permanently for growing timber under sound forestry practices, rather than for agricultural, mineral, shoreland development

owner of the land, the supervisor of property assessments of the district where the land is located, the town clerk and assessor, and the county register of deeds for recording.

360. *Id.* § 77.16(6). The special tax was 20¢ per acre per year for lands entered in the program prior to 1977.

361. *Id. See id.* § 77.04(2) for the method of calculation.

362. *Id.* § 77.16(11).

363. *Id.* § 77.16(12).

364. Wis. J. Res. 62 (1925); Wis. J. Res. 13 (1927) (codified in WIS. CONST. art. VIII, § 1 (1927)).

365. 1927 Wis. Laws ch. 454 (codified in WIS. STAT. §§ 77.01-.14 (1977 & Supp. 1981)). The purpose of the act was to protect forests from destructive or premature cutting and provide towns in which forest lands are located with just tax revenue. WIS. STAT. § 77.01 (1977). See Waite, *Land Use Controls and Recreation in Northern Wisconsin*, 42 MARQ. L. REV. 271, 272-75 (1959) for a discussion of the Forest Crop Law.

366. WIS. STAT. § 77.02(1) (1977). The petitioner must state that he believes the lands described in the petition would be more useful for growing timber and other forest crops than for any other purpose, that he intends to practice forestry on the lands, and that all persons holding encumbrances on the lands have joined in the petition.

367. See *id.* § 77.02(2) for public hearing requirements.

of navigable water, recreational, residential, or other purposes.[368] The DNR's order accepting the petition and designating the lands as "forest croplands" becomes a contract running with the land between the state and owner for a period of twenty-five to fifty years.[369]

Owners of land designated as forest croplands pay an "acreage share" to the town each year rather than the ordinary property tax.[370] The Department of Revenue computes the acreage share every ten years for all lands designated as forest croplands after December 31, 1971, by multiplying twenty cents per acre by a specific ratio and rounding it off to the nearest cent.[371] The DNR pays the town twenty cents for each acre in the town under the forest cropland program.[372] The town, in turn, pays the county twenty percent of all funds it receives from any source due to the forest croplands within its boundary.[373] Owners are not liable for any other taxes on their cropland, except for buildings located on it which are assessed and taxed as personal property.[374]

A severance tax equal to ten percent of the value of the wood products removed based on stumpage value is paid by the owner for any timber cut on the forest croplands prior to the expiration of the contract.[375] If the state and owner do not renew the forest cropland contract by mutual consent upon its expiration, the owner must pay a ten percent severance tax just as if the wood had been cut.[376] The DNR will remove the land from forest cropland status if the tax records show prolonged delinquency or the owner fails to comply with the program's requirements.[377] An owner must pay a rollback tax plus interest, less any severance tax and acreage share previously paid, if either the owner withdraws or the DNR removes the land from the forest cropland program.[378]

C. *Implementation of Tax Incentives for Conservation Programs*

Amendments to Wisconsin's constitutional uniformity clause allowing for the classification of forest lands,[379] merchants' stock-in-trade, manufacturers' materials and finished products, livestock,[380] and agricultural

368. *Id.* § 77.02(3).

369. *Id.* § 77.03. The landowner must designate the duration when filing the petition.

370. See Waite, *supra* note 365, at 272 for a discussion of the Forest Crop Law's distinction between land, which is considered capital, and timber, which is the crop or income.

371. WIS. STAT. § 77.04(2) (1977).

372. *Id.* § 77.05(1).

373. *Id.* § 77.04(3).

374. *Id.* § 77.04(1). Forest cropland owners, however, are liable for special assessments for specific improvements. 18 Op. Wis. Att'y Gen. 108, 109 (1929).

375. WIS. STAT. § 77.06(5) (1977). *See id.* §§ 77.06(2) for procedure to determine stumpage value.

376. *Id.* § 77.03.

377. *Id.* § 77.10(1)(a).

378. *Id.* § 77.10(2)(a).

379. Wis. J. Res. 62 (1925); Wis. J. Res. 13 (1927) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1927)).

380. Wis. J. Res. 78 (1959); Wis. J. Res. 13 (1961) (codified in WIS. CONST. art. VIII, § 1, (1848, amended 1961)).

lands[381] for differential taxation permit the legislature to enact a variety of property tax incentives for implementing soil conservation programs. Such programs may be implemented in conjunction with differential assessments permitted for agricultural lands, forest lands, and woodlands or property tax credits can be provided against state income taxes under a farmland preservation agreement. A possibility exists for adjusting assessed valuation or tax rates applied to assessed values under the constitutional amendments for implementing soil conservation programs. Also, under certain circumstances, soil conservation structures may be exempt from taxation in Wisconsin.

1. Differential Taxation of Lands

Legislation has been enacted in Wisconsin permitting differential assessment for agricultural land,[382] forest land,[383] and woodlands.[384] In each case, the landowner must adhere to certain management practices[385] and sign an agreement[386] to be eligible for differential assessments.

Wisconsin is one state that requires participation in a soil conservation program as a prerequisite for differential assessment under farmland preservation agreements. A farm conservation plan must be either prepared or in the process of being prepared before approval of an initial program agreement.[387] A farm conservation plan must also be in effect before approval of a permanent program agreement.[388] Approximately 2,000 farmers throughout the state have signed farmland preservation agreements since 1977 and farm conservation plans were prepared for about one-half of the farms. Conservation plans were already in existence on the remaining farms. The failure of SCS to assign additional technicians to prepare conservation plans has forced the soil and water conservation districts to hire additional personnel to perform the work.[389]

Soil and water conservation district supervisors are charged with the responsibility of preparing and enforcing farm conservation plans.[390] Owners of land under a permanent farmland preservation agreement who fail to comply with the farm conservation plan are given one year to comply.[391] Compliance can be enforced by an injunction or civil penalty for actual damages up to double the value of the land at the time the agreement application was approved.[392] Also, if owners fail to renew a permanent agreement at its expiration date or relinquish it, with state approval, prior to

381. Wis. J. Res. 39 (1971); Wis. J. Res. 29 (1973) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1973)).
382. WIS. STAT. §§ 20.115(6)(a), 71.09(11), 91.01-.79 (1977).
383. *Id.* § 77.01-.14.
384. *Id.* § 77.16.
385. *Id.* §§ 77.02(1), (3), .16(2), (4), (7), 91.13(8)(d), .35(1).
386. *Id.* §§ 77.02(3), .03, .16(4), 91.13(1)-(5), .31.
387. *Id.* § 77.35(1).
388. *Id.* § 77.13(8)(d).
389. Telephone Interview with James A. Johnson, Director, Farmland Preservation Program, Wisconsin Department of Agriculture, Trade and Consumer Protection, Madison, Wisconsin, January 28, 1981.
390. WIS. STAT. § 77.13(8)(d) (1977).
391. *Id.* § 91.21(3).
392. *Id.* § 91.21(1).

expiration, deferred or "rollback" taxes for all credits received for up to ten years are assessed against the owners.[393] Officials in the Department of Agriculture, Trade and Consumer Protection feel that the farmland preservation program has been an effective incentive for promoting participation in soil conservation programs and that the soil and water conservation districts have successfully enforced compliance with the farm conservation plan requirement.[394]

Wisconsin has two programs giving differential tax treatment to forest lands, depending primarily upon the size of the land parcels involved and length of the contract period between the landowner and state. Both programs have provisions promoting soil conservation. Prior to approving an application designating a parcel as forest croplands under the Forest Crop Law,[395] the DNR must be satisfied that the land will be used for growing timber under sound forestry practices.[396] The DNR may cancel the contract prior to expiration if the owner uses the land for anything other than forestry purposes or fails to practice sound forestry on the land.[397] An owner must pay a rollback tax, plus interest, less any severance tax and acreage share previously paid, if the DNR removes the land from the forest cropland program.[398]

The DNR will not approve an application placing a parcel of land under the woodland tax law unless the owner agrees to follow the department's approved management plan for the land.[399] If the DNR finds that the owner no longer uses the land for forestry purposes or follows the approved management plan, it may remove the land from the woodland tax law classification.[400] Upon declassification, owners must pay a penalty to the town based on the average full value per acre of productive forest land during the previous year in the county where the land is located. The amount is equal to one percent of that figure for each acre for each year the land was in the program.[401]

2. Adjustments in Assessed Valuation or Tax Rates

Adjustments in assessed valuation or tax rates as a method of promoting soil and water conservation are not very promising in Wisconsin under the constitutional uniformity clause. Such adjustments would have to operate in conjunction with already existing statutes permitting differential assessments for agricultural lands, forest lands, and woodlands. Owners who sign farmland preservation agreements are eligible to receive tax credits against their

393. *Id.* §§ 91.19(1), (2), (7), (8).

394. Telephone Interview with James A. Johnson, Director, Farmland Reservation Program, Wisconsin Department of Agriculture, Trade and Consumer Protection, Madison, Wisconsin, January 28, 1981.

395. WIS. STAT. §§ 77.01-.14 (1977).

396. *Id.* § 77.02(3).

397. *Id.* § 77.10(1)(a).

398. *Id.* § 77.10(2)(a).

399. *Id.* § 77.16(3). The signed management plan becomes part of the contract. *Id.* § 77.16(4).

400. *Id.* § 77.16(7). *See id.* §§ 77.16(8), (9) for the removal procedures.

401. *Id.* § 77.16(11).

state income taxes for "excessive" property taxes as calculated under a "circuit-breaker" formula. The percentage of the potential tax credit that a landowner can claim is dependent upon whether the preservation agreement is an initial, transitional, or permanent one and whether the subject farmland is located in an area zoned for exclusive agricultural use or under a county agricultural preservation plan.[402] These statutes could be amended to have the percentage also dependent upon the implementation of certain soil conservation practices. Owners of woodlands or forest lands given preferential tax treatment pay twenty cents per acre of land times a specific ratio based on land values every ten years.[403] This twenty cents could be adjusted for the implementation of certain soil conservation practices.

The only other method of providing adjustments in assessed valuation or tax rates for implementing soil conservation programs would be to amend the constitution to provide that the taxation of lands upon which conservation practices have been implemented need not be uniform with the taxation of each other or with the taxation of other lands. Existing amendments provide that the taxation of merchants' stock-in-trade, manufacturers' materials and finished products, and livestock need not be uniform with the taxation of real property and other personal property.[404] Property can be classified for the purpose of applying different rates. Graduated rates are a reasonable scheme of classification.[405]

3. Exemptions of Improvements from Taxation

Improvements in Wisconsin are valued separately from the land for tax purposes.[406] The legislature could exempt improvements, such as soil conservation structures, from property taxation under the constitutional uniformity clause as it now exempts all property purchased or constructed as waste treatment facilities utilized for the treatment of industrial wastes or air contaminants.[407]

Certain rules must be followed in exempting soil and water conservation structures from taxation. If improvements are to be exempt from taxation, the exemption must be a full exemption and all improvements within the same property class must be exempt,[408] otherwise the exemption is unconstitutional. The Wisconsin Attorney General said a proposed statute exempting improvements to wild lands by settlers from property taxation for five years following purchase of the land would be unconstitutional because it would allow non-uniform taxes. Land having the same value would be

402. *See id.* § 71.09(11)(b) (1977 & Supp. 1981).

403. WIS. STAT. §§ 77.04(2), .16(6) (1977).

404. Wis. J. Res. 78 (1959); Wis. J. Res. 13 (1961) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1961)).

405. *See* State *ex rel.* Bolens v. Frear, 148 Wis. 456, 134 N.W. 673 (1912); Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906).

406. WIS. STAT. § 70.32(2) (1977).

407. *Id.* § 70.11(21).

408. *See* Ehrlich v. City of Racine, 26 Wis. 2d 352, 354-55, 132 N.W.2d 489, 490-91 (1965); Chicago & N.W. Ry. v. State, 128 Wis. 553, 603, 108 N.W. 557, 567 (1906); Hale v. City of Kenosha, 29 Wis. 599, 604 (1872); Knowlton v. Board of Supervisors, 9 Wis. 410, 424 (1859). There can not be a partial exemption.

taxed differently depending on how long ago the owner purchased the land and when improvements were made on it.[409] A later opinion stresses another problem. Proposed legislation exempting the first $3,750 of assessed value of real property occupied by the owner as a homestead would be unconstitutional because a homestead is not an item of property. Instead, it is merely part of the taxable value of the entire property. The uniformity clause would be violated because property occupied by an owner as a homestead would be valued lower than if the property were not occupied as a homestead.[410]

Recent supreme court decisions also illustrate that limitations are likely to be placed on exempting conservation structures from taxation. The Urban Redevelopment Law,[411] which authorizes cities to freeze the assessment on property held by redevelopment corporations for up to thirty years regardless of any improvements the owners made during that period, was declared unconstitutional as providing a special tax privilege to some landowners.[412] A later case held that the Improvements Tax Relief statute[413] providing tax credits to certain owners of residential properties for making improvements violated the uniformity clause because the credits were available to only two classes of property owners.[414]

4. Credits of a Specified Amount Against Property Taxes

Wisconsin is unable to provide credits of specified amounts against property taxes for implementing soil conservation programs without amending the constitutional uniformity clause to provide that the taxation of lands upon which conservation programs have been implemented need not be uniform with the taxation of each other or with the taxation of other lands. A similar amendment provides for the nonuniform taxation of forest and mineral lands.[415] Once the constitution is amended, the legislature can adopt a statute permitting the deduction of a specified amount from property taxes for implementing soil conservation programs. Failure to maintain such programs could be grounds for imposing rollback taxes.

5. Property Tax Credits Against Income Taxes

Since the constitution was amended in 1974 to allow tax treatment of agricultural and undeveloped lands to differ from the tax treatment of other real property, credits against income taxes can be used as an incentive for

409. 10 Op. Wis. Att'y Gen. 261 (1921).

410. 52 Op. Wis. Att'y Gen. 143, 144-45, 156-57 (1963).

411. 1943 Wis. Laws ch. 333, *as amended* (codified in WIS. STAT. 66.405-.425 (1977)). The unconstitutional section, WIS. STAT. § 66.409 (1943), was repealed by 1969 Wis. Laws ch. 15, § 3.

412. Gottlieb v. City of Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

413. WIS. STAT. §§ 79.24, .25 (1977).

414. State *ex rel.* LaFollette v. Torphy, 85 Wis. 2d 94, 98, 111-12, 270 N.W.2d 187, 188, 194 (1978).

415. Wis. J. Res. 62 (1925); Wis. J. Res. 13 (1927) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1927)).

implementing soil conservation programs.[416] Such tax credits, because they relate to income taxes, are not dependent upon whether the constitutional amendment allows for nonuniformity of treatment within the classification for agricultural land.[417] The legislature could enact a statute providing that a certain portion of the property taxes paid on lands where the owners have implemented soil conservation practices be deducted from the owners' state income taxes. As with the Farmland Preservation Act,[418] the amount of deduction would relate to the amount of household income. Rollback or deferred taxes could also be imposed for failure to maintain the conservation program.

VII. SUMMARY AND CONCLUSIONS

Property tax incentives available to promote implementation of soil conservation programs are dependent upon a state's enabling legislation and exceptions to its constitutional uniformity clause. Uniformity clauses restrict legislative power to provide property tax incentives for implementing soil conservation programs. Several possible methods are available to overcome uniformity clause restrictions and allow property tax incentives. Among the methods are to amend the constitution to permit classification of property upon which soil conservation programs have been implemented, for separate tax treatment; to exempt agricultural, forest, and open space lands from the uniformity clause limitations; and to permit general classification of property so different ratios of assessed valuation or tax rates can be applied to the various classes. Another method is to consider conservation practices as improvements and exempt such improvements from taxation.

Constitutions in virtually all states now permit a general classification of real property for tax purposes or provide exemptions of agricultural, forest, and open space lands from the uniformity clause limitations. In conformity with the liberalization of uniformity restrictions, all states except Georgia and Mississippi have adopted one of three types of statutes providing for differential assessment of certain lands and such statutes may provide the foundation for property tax incentives. Under one type of statute, preferential assessment, agricultural and other open space lands specified by the legislation are assessed for property tax purposes on the basis of their value for agriculture and open space purposes as long as the lands are used for those purposes, and not on the basis of the lands' highest and best use. A second type of statute, preferential assessment with deferred or "rollback" taxation, adds a feature to differential assessment by imposing a sanction requiring owners of qualifying lands converting them to nonqualifying uses to repay part or all the taxes for a specified number of years they were excused from paying prior to conversion. The third type of statute involves the use of restrictive agreements whereby landowners voluntarily contract with governmental agencies to keep their lands in a qualifying use for a number of years.

416. Wis. J. Res. 39 (1971); Wis. J. Res. 29 (1973) (codified in WIS. CONST. art. VIII, § 1 (1848, amended 1973)).

417. *See* 66 Op. Wis. Att'y Gen. 337, 340-42 (1977).

418. WIS. STAT. §§ 20.115(6)(a), 71.09(11), 91.01-.79 (1977).

Changing land use prior to termination of the agreement is a breach and leads to the imposition of rollback taxes or a penalty.

Several possible types of property tax incentives may be available for implementing soil conservation programs. One type of incentive is associated with differential assessment of agricultural, forest, and open space lands and requires the implementation of soil conservation programs as a prerequisite to taking advantage of use-value assessment.[1] Another possible type of property tax incentive is to provide an adjustment in the assessed valuation or tax rates applied to the assessed value on lands where owners have implemented soil conservation programs. Other possible types of property tax incentives include considering conservation structures improvements and exempting such improvements from taxation, providing property tax credits against state income taxes, and providing credits in a specified amount against property taxes.

The preferred type of property tax incentive for participation in soil conservation programs is the one requiring implementation of such programs as a condition for eligibility for use-value assessments under the various differential assessment taxation statutes. All except two states now have differential assessment statutes and some, such as Wisconsin, already require participation in a soil conservation program as a prerequisite for eligibility. Differential assessment statutes in those states not requiring the implementation of soil conservation programs as a prerequisite for eligibility could be easily amended to incorporate such a requirement. Statutes also could easily be amended to provide for deferred or rollback taxation in instances where landowners fail to maintain conservation programs. States such as Maryland and Wisconsin already require the payment of deferred taxes for failure to maintain eligible lands in uses qualifying for differential assessment. Soil and water conservation district supervisors, with the help of SCS district conservationists, could assist with the compliance and enforcement requirements.

Several advantages exist with the property tax incentive method that requires implementation of a soil conservation program as a prerequisite for differential assessment. Differential assessment statutes are already in existence and have been held constitutional under the uniformity clauses. A simple amendment to the statutes requiring the implementation of a soil conservation program as a prerequisite for use-value assessment and the payment of deferred taxes for failure to maintain such a program would not create new classes of property and, therefore, would not conflict with the uniformity clause restrictions. Local governments would not lose as much potential property tax revenue under this method of promoting participation in soil conservation programs as with some other methods because extra tax incentives are not given for participating in conservation programs. SCS and soil and water conservation district technical assistance and ACP cost-share funds can be easily used in conjunction with the prerequisite for differential assessment method. States could even make the implementation of soil conservation programs dependent upon the availability of technical assistance and cost-share funds to avoid hardships. Another advantage of

the differential assessment method is that many states include open space, forest, planned development, and country club lands in addition to agricultural lands under their use-value assessment program, thereby permitting a broad coverage of land subject to conservation programs. The concept of forcing soil conservation programs upon landowners as a prerequisite for differential assessment differs little from forcing conservation practices upon subdividers as a prerequisite for subdivision plat approval.

Adjustments in the assessed valuation of land or in the tax rate applied to the assessed value may be a possible property tax incentive for implementing soil conservation programs. Statutes permitting tax adjustments for conservation purposes could be enacted only in states where the constitutional uniformity clause allows subclassification of real property. The next issue to be addressed is whether subclassification of land in order to implement soil conservation programs is reasonable and bears some reasonable relationship to a legitimate state interest or policy. Also, a real difference must exist between the classes of property. Even though states have not subclassified land on the basis of implementation of soil conservation programs, states have subclassified land on the basis of other uses made of the land. For example, Colorado permits a separate classification for property used to produce alcohol for motor fuels and Wisconsin permits separate classifications for merchants' stock-in-trade, manufacturers' materials and finished products, and livestock. Statutes permitting classification of land for other uses may be used as models for classification for conservation programs. In some cases, however, the state constitutions may have to be amended to permit specifically subclassifications of land for conservation purposes. States could decrease the impact of tax revenue loss due to an adjustment in assessed value or tax rates by providing that the adjusted assessed value or tax rate on the assessed value applies only to the land's increased value caused by the new conservation program.

Another possible method of providing property tax incentives is to consider conservation structures as improvements and assess such improvements at a lower value or tax them at a lower rate than other property or exempt them altogether from taxation. The issues involved with this method of providing a tax incentive for conservation programs include the definition of improvements and the authority to assess them separately from the land, classify them, and exempt them from taxation. The constitutional uniformity clause and statutes must permit improvements to be assessed separately from land and improvements to be classified and exempt from taxation. Exemption of improvements may be easier in a state like Maryland whose constitution provides that improvements on the land are to be assessed separately from the land and that such improvements can be classified and subclassified. In addition, the Maryland Constitution gives the legislature power to exempt property fully from taxation without violating the uniformity clause, where such exemption is reasonable and for a public purpose. Colorado's constitution, on the other hand, is more restrictive in that it specifically exempts certain types of property and forbids the legislature from exempting others not listed. Several examples exist as models to provide

some type of tax exemption for conservation structures. Planting trees, installing alternative energy devices, and placing property on the historic register do not increase the assessed value of the property in Colorado, and property purchased or constructed as waste treatment facilities in Wisconsin is exempt from taxation. If this type of property tax incentive is used, states should at least strive to exempt any increase in value to land because of the construction of conservation structures.

Still another type of property tax incentive for conservation programs is to provide that the property taxes paid on soil conservation practices or structures be credited against state income taxes. Colorado has such a statute for pollution control property and Wisconsin's differential assessment for farmland preservation is based on credits against state income taxes. The advantage of this method is that state income taxes are not subject to the constitutional uniformity clause restrictions on property taxation. The last type of property tax incentive is to provide credits of a specified amount against property taxes for implementing soil conservation programs. A disadvantage of this method of property tax incentive is that the constitutional uniformity clause must provide that the taxation of lands upon which conservation programs have been implemented need not be uniform with the taxation of other lands.