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Abstract

Michael Morea's article reviews different New York State statutes and different methods that can be implemented to preserve farmland and still allow development. The author concludes that New York State is trying to carry out its Constitutional policy of preserving farmland, but that the statutes are largely separated and it is difficult for the municipality to create a effective policy. Some of the statutes that the author discovered provide tax breaks and financial incentives for the creation of easements restricting the land to agricultural use and the creation of comprehensive zoning plans with agricultural areas and the adoption of cluster development to allow development but to preserve the maximum amount of open land.

Resource

NEW YORK STATE STATUTES THAT PROVIDE FOR THE PROTECTION OF AGRICULTURAL LANDS

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Environmental Regulation of Real Estate, Spring 1997

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I. Introduction

The preservation of agricultural lands is of great importance to New York State. Agriculture is the second leading industry in the Hudson Valley, second only to tourism.[1] State-wide, farming is responsible for approximately $3 billion of gross cash income each year.[2] It is estimated that the gross revenues from farming related activities approaches $10 billion annually.[3] Thus, as well as providing income for farmers, farming activities help sustain the entire industry of farming related business.[4]

In addition to the direct fiscal benefits of agriculture, the industry promotes other important objectives. One commentator has noted that "[f]arming contributes to the fiscal stability of many New York regions in subtler ways as well."[5] Agriculture supports other industries such as tourism, "which is dependent upon agriculture for its own success in maintaining attractive open spaces and rural flavor."[6] Agriculture supports tourism by providing open spaces and lands which contribute to the tourist appeal of rural areas.[7] Additionally, farms provide more in property taxes than they require in governmental services.[8]

In realization of the importance of agriculture to the state, the New York State Constitution declares that "[t]he policy of the State shall be to conserve and protect its natural resources and scenic beauty and encourage the development and improvement of its agricultural lands for the production of food and other agricultural products."[9] In order to carry out this policy,

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[1] Preserving Agriculture, Cozata Solloway and Sean F. Nolon, Pace University Land Use Law Center, 2 (1996). [Hereinafter Preserving Agriculture].
[2] American Farmland Trust, Agricultural and Farmland Protection for New York, 2 (August 1993). [Hereinafter NY Farmland Protection].
[3] John R. Nolon, The Stable Door is Open: New York's Statutes to Protect Farm Land, in LAND USE LAW REPORTER, Series 2, No. 3, 2 (Jayne E. Daly, ed. May 1994).
[4] NY Farmland Protection, supra note 2 at 3.
[5] Nolon, supra note 3 at 2.
[6] Preserving Agriculture, supra note 1 at 2.
[7] Holly L. Thomas, Dutchess County Planning Department Tech Memo, The Economic Benefits of Land Conservation, 3-4 (February 1991).
[8] Id. at 1-2.
[9] N.Y. CONST. art. 14, § 4.

the legislature has implemented numerous laws designed to promote the preservation of agricultural lands. These laws are scattered throughout the New York State statutes.

Despite the numerous statutory provisions available to local legislatures, farmland in New York is being lost at a dramatic rate. The Hudson Valley is losing farmland at a rate of 18,600 acres per year.[10] Additionally, since 1950, the number of farms in New York has decreased by 70%, while the acreage of farm use has decreased by 47.5%.[11]

This paper will analyze the various tools and methods available to local legislatures to preserve farmland and determine whether the State Legislature has competently carried out the constitutional policy of New York to encourage the development of agricultural lands for the production of food.[12] The author hopes to answer the question of whether the means to accomplish the policy set forth in the New York Constitution of preserving agricultural lands are available to local legislatures or whether more is needed.

Part II of this paper will discuss the methods of agricultural land preservation that are commonly used, as well as those protections afforded farmland that are not applicable to local government. Part III will discuss briefly the Agriculture and Markets Law. Part IV will deal with the various land use techniques that can be used by municipalities to protect farmland. Part V will discuss those statutory provisions designed to protect farmland that affect state agency action. The State Environmental Quality Review Act (SEQRA) will be discussed in Part VI.

II. Background

There are numerous legal techniques designed to promote and preserve agricultural land, or which can be used to do so. Many of these methods are implemented, while many remain unused. This section will discuss the major techniques currently being used to preserve agricultural lands, as well as those statutes not applicable to local government.

A. Conservation Easements and Transfer of Development Rights

Apart from the agricultural districts program (discussed in section III), the most common techniques used to preserve agricultural lands are conservation easements and transfer of development rights.[13] Conservation easements "are legally recorded, voluntary agreements that limit land to specific uses."[14] In the case of agricultural preservation, the land is limited

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[10] Presentation by Steven Rosenberg, Land Preservation Director, Scenic Hudson, Inc., to Pace University School of Law Environmental Regulation of Real Estate class, March 1996.

[11] The Institute for Development, Planning & Land-Use Studies of the State University of New York at New Paltz, THE REGION'S INTEREST, Will Farming Disappear for the Region? (Peter Fairweather, ed.) (May 1995).

[12] Since there are numerous articles that have dealt with various methods for preserving agriculture, this paper will only briefly present those methods dealt with elsewhere.

[13] For a complete discussion of conservation easements and transfer of development rights see Preserving Agriculture, supra note 1; Pace Land Use Law Center, Local Leaders Guide, Transfer of Development Rights, Series III: Innovative Tools and Techniques, Issue No. 8.

[14] NY Farmland Protection, supra note 2 at 30.

to farming activities. Conservation easements can vary in duration. They can be either permanent or for a set number of years.[15] Under the New York statute, unless the easement has a termination date, it will last in perpetuity.[16] Thus, such an easement will run with the land for as long as the duration in the easement specifies.[17]

When an easement is created to protect farmland, "[t]he easement limits practices which would damage the agricultural use of land, such as subdivisions or non farm development."[18] Thus, the conservation easement will help to protect farmland from being converted into a non-farming use. The benefit of conservation easements is that while they limit development rights, they do not otherwise affect the owners' property rights.[19]

When landowners, donate, sell, or otherwise transfer a conservation easement, they "confer the economic value associated with developing their land."[20] The result of this is that property taxes may be reduced and the landowner may be able to take a charitable deduction for tax purposes.[21] This provides incentives for farmers to continue to use their land for agricultural activities.

Although conservation easements provide incentives to farmers, such easements do have certain limitations. One limitation of conservation easements is that they are used irregularly by individual local governments and non-profit organizations. New York statutes provide for a programatic approach toward the purchase of agricultural conservation easements, referred to as transfer of development rights (TDR).[22] TDR is defined as "the process by which development rights are transferred from one lot, parcel, or area of land in a sending district to another lot, parcel, or area of land in one or more receiving districts."[23] The statutes state that "[t]he purpose of providing for transfer of development rights shall be to protect the natural, scenic or agricultural qualities of open lands...."[24] Thus, the Legislature has given local municipalities the power to systematically preserve agricultural lands through a program of conservation easements.

Although TDRs can provide an organized program to preserve farmland, such programs are complex and seldom used.[25] "They require municipalities to engage in a sophisticated analysis of the impacts of the program in both sending and receiving districts.[26] Additional

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[15] Id.
[16] N.Y. ENVTL. CONSERV. LAW § 49-0307.
[17] Preserving Agriculture, supra note 1 at 8.
[18] Id.
[19] NY Farmland Protection, supra note 2. at 31.
[20] Id.
[21] Id.; Internal Revenue Code § 170(h).
[22] N.Y. TOWN LAW § 261-a; N.Y. VILLAGE LAW § 7-701; N.Y. GEN. CITY LAW § 20-f. The authority for municipalities to purchase agricultural lands comes from N.Y. GEN. MUN. LAW § 247.
[23] N.Y. TOWN LAW § 261-a(1)(d).; N.Y. VILLAGE LAW § 7-701(1)(d); N.Y. GEN CITY LAW § 20-f(1)(d).
[24] N.Y. TOWN LAW § 261-a(2).; N.Y. VILLAGE LAW § 7-701(2); N.Y. GEN. CITY LAW § 20-f(2).
[25] Pace Land Use Law Center, Local Leaders Guide, Transfer of Development Rights, Series III: Innovative Tools and Techniques, Issue No. 8.
[26] Id.

problems arise in determining the value of the development rights.[27] TDR programs are expensive and generally require permanent funding to be successful.[28]

B. Environmental Conservation Laws

In addition to TDRs, New York has numerous environmental statutes that are applicable to farmland preservation. These statutes are found in the Environmental Conservation Law. While these statutes are not designed to aid local legislatures in preserving agricultural lands, they independently serve to protect farmland.

One such statute is the Water Resources Law.[29] The statute is designed to protect the water resources of New York State.[30] The legislature has found that having an "adequate and suitable" water supply for agricultural activity "is essential to the health, safety, and welfare of the people and economic growth and prosperity of the state."[31] One of the statutorily declared policies of the law is that "[c]omphrehensive planning be undertaken for the protection, conservation, equitable and wise use and development of water resources of the state to the end that such water resources be not wasted and shall be adequate to meet the present and future needs ...[of] agricultural [activities]."[32]

The Department of Environmental Conservation (DEC) is directed to "exercise its powers and perform its duties in any matter affecting ... the use of water for industrial and agricultural operations...."[33] In addition to the powers of the DEC, the Water Resources Law permits counties, towns, villages, or cities to submit proposals for surveys of water resources.[34] If the DEC determines that the proposal should be undertaken, it is to appoint a regional planning board to conduct the survey.[35] At lest one member of the board "shall be representative of the agricultural and farming interests within the region of the proposal...."[36] Thus, the interests of farmers are to be protected.

Besides protecting the interests of farmers while conducting surveys, the water resources law exempts agricultural practices from certain limitations. The statute provides for the designation of wild, scenic, and recreational rivers.[37] In scenic river areas, only certain limited activities are permitted, and agricultural practices are among them.[38] Thus, farmers

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[27] Id.
[28] NY Farmland Protection, supra note 2 at 34.
[29] N.Y. ENVTL. CONSERV. LAW. § 15-0101 et seq.
[30] Id. at § 15-0105.
[31] Id. at § 15-0103(3).
[32] Id. at § 15-0105(3).
[33] Id. at § 15-0109.
[34] Id. at § 15-1101(1).
[35] Id. at § 15-1105(1).
[36] Id. at § 15-1105(2)(b).
[37] Id. at § 15-2701.
[38] Id. at § 15-2709(2)(b).

> In scenic river areas, the continuation of present agricultural practices, the propagation of crops, forest management pursuant to forest management standards duly promulgated by regulations, limited dispersed

will be allowed to continue their present practices even if their farm is located in a designated scenic river area.

Similar to the Water Resources Law, the Freshwater Wetlands Law is designed to preserve agricultural lands, among other objectives. The statute states that it is the policy of the state to "preserve protect and conserve freshwater wetlands ... and to regulate use and development of such wetlands to secure the natural benefits of freshwater wetlands, consistent with the general welfare and beneficial economic, social and agricultural development of the state."[39] This policy is to carried out by the mapping of freshwater wetlands,[40] and requiring permits for activities that occur within, or within 100 feet of a wetland.[41]

The Legislature has attempted to promote farmland preservation by specifically exempting farming activities from the permitting requirement.[42] The statute states that

> The activities of farmers and other landowners in grazing and watering livestock, making reasonable use of water resources, harvesting natural products of wetlands, selectively cutting timber, graining land or wetlands for growing agricultural products and otherwise engaging in the use of wetlands or other land for growing agricultural products shall be excluded from regulated activities and shall not require a permit.[43]

In this way, the Legislature spares farmers some of the burdens that otherwise might have been imposed upon them through the freshwater wetlands regulations.

The final conservation law related to farmland preservation deals with the state's land acquisition program. "In order to help provide a basis for a strategy for the preservation of land resources in the state and the preparation of the state land acquisition plan," the Legislature has directed the DEC to inventory the state's land resources.[44] This inventory is to include "agricultural areas, including agricultural districts...."[45] Therefore, through the land acquisition program, the State can ensure that farmland is preserved and protected.

C. Financial Incentives

The Legislature has also provided financial incentives to farmers to ease the burden of developmental pressures. For example, The Environmental Protection Fund appropriated

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> or cluster residential developments and stream improvement structures for fishery management purposes shall be permitted.

Id.

[39] Id. at § 24-0103.
[40] Id. at § 24-0301.
[41] Id. at § 24-0701(2).
[42] Id. at § 24-0701(4).
[43] Id.
[44] Id. at § 49-0207(1).
[45] Id. at § 49-0207(1)(d).

$4 million for farmland protection in 1996.[46] In 1991, the New York State Legislature created the Farmland Protection Trust Fund.[47] Money from this fund is to be allocated to municipalities that have established a program for the protection of local farmland.[48] The fund was designed "to be used for future federal and state appropriations for the purpose of farmland protection."[49]

Tax relief is also available to owners of farmland in the form of the agricultural assessment,[50] and deductions for donations of conservation easements.[51] A tax credit and property tax-credit program were established in 1996.[52] Also, the Legislature has exempted from sales tax the sale of tangible personal property used in the "production for sale of tangible personal property by farming."[53]

D. Limitation of Tort Liability

To protect farms, and farming practices, New York has shielded farming activities from private nuisance suits.[54] For this protection to apply, the farming activities (1) must have existed before the surrounding activities; (2) not have increased substantially; and (3) not have been determined to present a danger to life or health.[55]

Additionally, the Legislature has limited the tort liability of farmers who permit public use of their lands for certain recreational purposes enumerated in the statute.[56] Owners of farmland also owe no duty to keep their land safe for entry or use by persons who do not have permission or privilege to enter the land.[57] The freedom from nuisance statute and the protection from certain tort liability allow farmers to continue their farming activities by limiting their potential legal exposure.

III. Agricultural & Markets Law

The major provision in New York designed to preserve agricultural land is the Agricultural & Markets Law, Article 25-AA. This statutory provision is important because it creates the "agricultural districts program, provides a right-to farm law, allows agricultural assessment

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[46] New York State Bar Association, Environmental Law Section, Agricultural Environmental Law Task Force, Land Use and Environmental Laws Applicable to Agriculture 47, Vol. 16, No. 4 (Fall 1996).
[47] N.Y. STATE FINANCE LAW § 87.
[48] NY Farmland Protection, supra note 2 at 24.
[49] Id.
[50] See discussion supra sec. III.
[51] See discussion infra sec. II.A.
[52] Farmland Preservation Act of 1996.
[53] N.Y. TAX LAW § 1115.
[54] N.Y. PUB. HEALTH LAW § 1300-c. This provision is in addition to the right-to-farm provision in the Agriculture & Markets Law discussed in section III of this paper.
[55] Id.
[56] N.Y. GEN. OBLIG. LAW § 9-103(1).
[57] Id. at § 9-103(1)(c).

of land within a district, and creates County Agricultural and Farmland Protection Boards (AFPBs)."[58]

The most significant feature of the Agricultural & Markets Law is the creation of agricultural districts. The advantage of owning farmland located within an agricultural district is that a landowner can take advantage of farmland protection techniques that would otherwise require agricultural zoning.[59] Such protections include right-to-farm laws,[60] and the agricultural tax assessment.[61] Additional protections come from other statutory provisions which require coordination with the agricultural districts programs.[62]

The Agricultural and Markets Law also provides property tax relief to farmers which provides a substantial savings to farmers.[63] As an economic matter, "[t]he higher the land values in an area, the more substantial the competition for non-farm use."[64] It is this dynamic that causes the sale of existing farmland and prevents the purchase of new farmland.[65] This problem arises because "land's economic value for farm production tends to be lower than its value for non-farm construction...."[66] To combat this situation, the New York State Legislature has provided tax relief to farmland.[67]

The Agriculture and Markets Law provides for an agricultural assessment for land used for agricultural purposes within an agricultural district.[68] The agricultural assessment is also available to land not within an agricultural district, that is committed to agricultural use for a minimum of eight years.[69] The agricultural assessment taxes the farmland at its value as agricultural land rather than on its developmental value.[70] Thus, the economic pressures on owners of farmland is somewhat relieved.

The Agricultural and Markets Law also establishes a statutory right-to-farm. The act provides that an agricultural practice on land within an agricultural district "shall not constitute a private nuisance...."[71] This protection also extends to land located outside of a

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[58] Preserving Agriculture, supra note 1 at 28-29. For a complete discussion of the Agricultural and Markets Law see, Preserving Agriculture, supra note 1, and NY Farmland Protection, supra note 2. The agricultural protection boards provide financial and technical assistance to counties so that that counties can create farmland protection plans.
[59] Preserving Agriculture, supra note 1 at 28.
[60] N.Y. AGRI. & MKTS. LAW § 308
[61] Id. at §§ 304-a - 306.
[62] See e.g., N.Y. GEN. MUN. LAW § 970-c (discussed infra § V.A.); N.Y. VILLAGE LAW § 7-739, N.Y. TOWN LAW § 238-a (discussed infra § V.B.); and N.Y. GEN. MUN. LAW § 239-m (discussed infra § V.C.), and N.Y. ENVTL. CONSER. LAW § 8-0101 et seq.
[63] NY Farmland Protection, supra note 2 at 36.
[64] Id.
[65] Id.
[66] Id.
[67] N.Y. AGRI. & MKTS. LAW §§ 304-a - 306.
[68] Id. at § 305.
[69] Id. at § 306.
[70] NY Farmland Protection, supra note 2 at 37.
[71] N.Y. AGRI. & MKTS. LAW § 308(2).

district, if the land is subject to an agricultural assessment.[72] However, this protection only applies if the agricultural activity is deemed a sound agricultural practice by the state commissioner.[73]

To summarize, the Agricultural and Markets Law establishes a comprehensive scheme to preserve farmland. This is accomplished by property tax relief, farmland protection techniques, and establishing a right to farm. However, except for the tax relief and right-to-farm, these protections are not available to farmland outside the districts. These techniques do not immunize farmland from developmental pressures, nor discourage the sale of farmland for non-farm uses. Additional measures, to further protect such lands may be taken by local governments using their authority to regulate land use.

IV. Agricultural Zoning Techniques

A. Comprehensive Plan

Municipalities can use their zoning powers to protect agricultural lands. Any zoning actions taken by a municipality must be "in accordance with a comprehensive plan"[74] or "in accord[ance] with a well considered plan."[75] A "comprehensive plan" is statutorily defined as the "material, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the [locality]."[76]

The comprehensive plan is the key to zoning. As one court has stated "the comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use."[77] Interestingly, however, the statutes do not mandate the creation of a comprehensive plan. Nevertheless, the statutes do provide for agricultural considerations in the development of comprehensive plans.[78] The statutes provide that "[t]he [municipality's] comprehensive plan may include ... [c]onsideration of agricultural uses...."[79] Thus, agricultural uses can be incorporated into a municipal land use plan.

This permits a municipality to zone for agricultural uses through the comprehensive plan. By planning for agricultural uses, a municipality can avoid some of the problems that occur when agricultural land is zoned for large lot residential use, as often as it is. In this situation, farmers must seek variances or special use permits to expand their agricultural activities or to establish new agricultural practices.[80] If, however, the land is zoned to

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[72] Id.
[73] Id.
[74] N.Y. VILLAGE LAW § 7-704; N.Y. TOWN LAW § 263.
[75] N.Y. GEN. CITY LAW § 20(25).
[76] N.Y. TOWN LAW § 272-a(2)(a); N.Y. GEN. CITY LAW § 28-a(3)(a); N.Y. VILLAGE LAW § 7-722(2)(a).
[77] Udell v. Haas, 21 N.Y.2d 463, 288 N.Y.S.2d 888 (1968).
[78] N.Y. TOWN LAW § 272-a(3)(d); N.Y. GEN. CITY LAW § 28-a(4)(d); N.Y. VILLAGE LAW § 7-722(3)(d).
[79] N.Y. TOWN LAW § 272-a(3)(d); N.Y. GEN. CITY LAW § 28-a(4)(d); N.Y. VILLAGE LAW § 7-722(3)(d).
[80] Pace Land Use Center, Local Leaders Guide, Agricultural Zoning, Series III: Innovative Tools and Techniques, Issue No. 9.

accommodate agricultural uses, farmers do not have to seek permits or variances to conduct farming activities.[81]

Besides easing the burden on farmers, zoning that includes agricultural practices serves to "protect and promote the continuation of farming in areas with prime soils and where farming is a viable component of the local economy."[82] One way that zoning can accomplish this is to limit the subdivision of large lots into smaller ones, thus preserving large tracts of land to be used for farming.[83] Zoning for agricultural uses is advantageous in "that it preserves large tracts of farmland to maintain the agricultural community and services that are necessary to keep farming viable in that region.[84]

Municipalities may protect the integrity of intermunicipal agricultural areas by coordinating their planning and zoning activities. Municipal corporations are authorized "to enter into agreements to undertake comprehensive planning and land use regulation with each other or one another."[85] This grant of authority is designed to "promote intergovernmental cooperation that could result in increased coordination and effectiveness of comprehensive planning and land use regulation ... as well as the enhanced protection of community resources, especially where such resources span municipal boundaries."[86] Under this authority, adjoining municipalities can join together in a cooperative effort to ensure that their zoning regulations and ordinances serve to protect agricultural resources that they share.

Local land use regulation can be used to preserve farmland in numerous ways. First, an area can be zoned for, or zoned to encourage, agricultural uses. The typical permitted uses in an agricultural zone would include "all forms of agriculture, forestry, nurseries, and fisheries, among others."[87] Additionally, accessory uses such as "garages, machine sheds, barns and other farm buildings, beekeeping, and composting" would be permitted as-of-right.[88]

Municipalities can also use a buffer district to "act as a transition between an exclusive agricultural zone and one that allows for more intensive development."[89] Buffer districts are particularly useful if the municipality has exclusive agricultural zoning.[90] The buffer zone would serve to minimize the tension between agricultural and developmental uses.[91]

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[81] Id.
[82] Id.
[83] Id.
[84] Preserving Agriculture, supra note 1 at 37.
[85] N.Y. GEN. MUN. LAW § 119-u(1).
[86] Id.
[87] Pace Land Use Center, Local Leaders Guide, Agricultural Zoning, Series III: Innovative Tools and Techniques, Issue No. 9.
[88] Id.
[89] NY Farmland Protection, supra note 2 at 46.
[90] Id.
[91] Id.

Another way that zoning can be used to protect farmland is through large-lot zoning. Generally minimum lot sizes of five to ten acres will be designated for such purposes.[92] Such minimum lot size designations have been upheld by the courts of New York.[93] Large-lot zoning, unless it requires very large lot sizes, does not preserve farmland from developmental pressures.[94]

B. Subdivision Approval/Cluster Development

Another method that local legislatures can use to preserve agricultural lands is subdivision[95] approval and cluster development.[96] While subdivision authority is not granted specifically for the preservation of agricultural land, it can be used to accomplish such an objective. Specifically, subdivision regulations are designed to "insure that new development is cost effective, properly designed and has a favorable, rather than negative impact on the neighborhood."[97] The stated purpose of subdivision regulations are "[f]or the purpose of providing for the future growth and development of the town and affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health and welfare of its population...."[98]

Subdivision regulations are used by municipalities to carry out the locality's comprehensive plan.[99] In municipalities that have identified areas for agricultural uses, subdivision approval can be used to further these objectives of the comprehensive plan. Therefore, while subdivision authority does not generally address agricultural preservation, local legislatures can fashion such regulations to accomplish agricultural preservation.

Local legislatures must fashion such regulations so that they serve the public health, safety, and welfare.[100] Further, any condition imposed upon a particular subdivision must bear a reasonable relationship to the impact the subdivision will have on the community.[101] When reviewing subdivision applications, a court will not overturn a planning board's determination, so long as that determination is rational and supported by substantial evidence.[102]

As part of its subdivision authority, a municipality can provide for "cluster development." Cluster development is defined as:

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[92] Id. at 48.
[93] Kurzius v. Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (1980) (upholding a locality's five acre, minimum zoning requirement).
[94] NY Farmland Protection, supra note at 48.
[95] Local Legislatures are authorized to subdivide land in N.Y. VILLAGE LAW §§ 7-728- 7-730; N.Y. TOWN LAW §§ 276-278; and N.Y. GEN. CITY LAW §§ 32-34.
[96] Authorized by N.Y. VILLAGE LAW § 7-738; N.Y. TOWN LAW § 278; and N.Y. GEN. CITY LAW § 37.
[97] Pace Land Use Center, Local Leaders Guide, Subdivision Bulletin, Series I: Basic Tools & Techniques, Issue 6.
[98] N.Y. TOWN LAW § 276.
[99] Pace Land Use Center, Local Leaders Guide, Subdivision Bulletin, Series I: Basic Tools & Techniques, Issue 6.
[100] Koncelick v. Planning Board of Town of East Hampton, 188 A.D.2d 469, 590 N.Y.S.2d 900 (2d Dept. 1992).
[101] Brous v. Planning Board of Village of Southhampton, 191 A.D.2d 553, 594 N.Y.S.2d 816 (2d Dept. 1993).
[102] M & M Partnership v. Sweenor, 210 A.D.2d 575, 619 N.Y.S.2d 802 (3d Dept. 1994).

> a subdivision ... in which the applicable zoning ordinance or local law is modified to provide an alternative permitted method for the layout, configuration and design of lots, buildings and structures, roads, utility lines and other infrastructure, parks, and landscaping in order to preserve the natural and scenic qualities of open lands.[103]

Cluster zoning, also known as open space zoning "is designed to protect open land while allowing new development."[104] The goal is to locate the permitted density of a whole lot on a particular part of a lot while leaving the rest of it undeveloped.[105] Thus, clustered subdivisions can preserve land suitable for farming and agricultural uses by shifting development from prime agricultural soils to less productive areas of the site. Clustering can be used as well to shift development on non-agricultural land that is adjacent to usable agricultural lands so that it does not abut farm uses.

An additional means of protecting for farmland is available to villages and towns. In a village or town containing an agricultural district, an application for subdivision approval may be required to include an agricultural data assessment.[106] The agricultural data assessment applies where the property involved in the application is located "within an agricultural district containing a farm operation or on property with boundaries within five hundred feet of a farm operation located in an agricultural district.[107] The local authority reviewing the application is to consider the agricultural data assessment as part of the application to determine the possible impacts of the proposed project on farm operations.[108]

C. Site Plan Approval

Along with the methods previously discussed in this section, municipalities can use site plan review and approval to promote the preservation of agricultural resources. Site plan review is not specifically designed for agricultural land protection, but local legislatures have the authority to design it to be used in such a fashion. Villages, cities, and towns are statutorily authorized to review and approve site plans, in order to supplement their authority to adopt and carry out their comprehensive plans.[109] This authority is used to regulate the development of individual parcels of land.

A "site plan" is a drawing, prepared according to local specifications, showing the "arrangement, layout and design of the proposed use of a single parcel of land."[110] The purpose of site plan regulations is to ensure that the development of individual parcels of

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[103] N.Y. TOWN LAW § 278, N.Y. VILLAGE LAW § 7-738; and N.Y. GEN. CITY LAW § 37.
[104] NY Farmland Protection, supra note 2 at 46.
[105] Id.
[106] N.Y. VILLAGE LAW § 7-739(2); N.Y. TOWN LAW § 283-a(2). For a complete discussion of this provision see infra V.B.
[107] N.Y. VILLAGE LAW § 7-739(2); N.Y. TOWN LAW § 283-a(2).
[108] Id.
[109] N.Y. VILLAGE LAW § 7-725-a, N.Y. TOWN LAW § 274-a; N.Y. GEN. CITY LAW § 27-a. These provisions are not applicable to cities containing a population of more than one million people. N.Y. GENERAL CITY LAW § 27-a(13).
[110] N.Y. VILLAGE LAW § 7-725-a(1), N.Y. TOWN LAW § 274-a(1); N.Y. GEN. CITY LAW § 27-a(1).

land does not have an adverse impact on adjacent properties or the surrounding neighborhood.[111]

Local site plan regulations must specify the land uses requiring site plan approval.[112] The site plan is required to show specific elements, such as "those related to parking, means of access, screening, signs, landscaping, architectural features, location and dimensions of building, adjacent land uses and physical features meant to protect adjacent land uses."[113] The local legislature can also include "any additional elements specified by the legislature."[114] It is this last provision that would allow a municipality to use site plan review and approval as a tool to preserve agricultural resources. Site plan regulations could require the applicant to note agricultural uses on lands adjacent to the site and to demonstrate how the proposed development can be located to minimize any negative impact on those agricultural uses.

Site plan approval, similar to subdivision approval, is also subject to submission of an agricultural data assessment.[115] The agricultural data assessment applies where the property involved in the application is located "within an agricultural district containing a farm operation or on property with boundaries within five hundred feet of a farm operation located in an agricultural district."[116] The local authority reviewing the application is to consider the agricultural data assessment as part of the application to determine the possible impacts of the proposed project on farm operations.[117]

D. Special Use Permits[118]

Another zoning tool that can be used by municipalities to preserve agricultural lands is the special use permit, also referred to as conditional zoning. A special use permit is defined as:

> an authorization of a particular land use which is permitted in a zoning ordinance or local law, subject to requirements imposed by such zoning ordinance or local law to assure that the proposed use is in harmony with such zoning ordinance or local law and will not adversely affect the neighborhood if such requirements are met.[119]

To obtain a special use permit, the applicant for such a permit must demonstrate that the proposed use adequately meets the requirements and standards of the law.[120] However,

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[111] Pace Land Use Center, Local Leaders Guide, Site Plan Bulletin, Series I, Basic Tools and Techniques, Issue Number 7.
[112] N.Y. VILLAGE LAW § 7-725-a(2)(a), N.Y. TOWN LAW § 274-a(2)(a); N.Y. GEN. CITY LAW § 27-a(2)(a).
[113] Id.
[114] Id.
[115] N.Y. VILLAGE LAW § 7-739(2); N.Y. TOWN LAW § 283-a(2).
[116] Id.
[117] Id.
[118] For a complete discussion of "special use permits" see Pace Land Use Center, Local Leaders Guide, Special Use Permits Bulletin, Series I, Basic Tools and Techniques, Issue Number 8
[119] N.Y. VILLAGE LAW § 7-725-b(1); N.Y. TOWN LAW § 274-b(1); N.Y. GEN. CITY LAW § 27-b(1).
[120] Pace University School of Law, Land Use Law, Professor John Nolon, Supplement II: Explanatory Text (Fall 1996)

once a special use permit is granted, the permit runs with the title to the land.[121] Therefore, a special use permit is not personal to the owner, and subsequent owners of the property can put the land to the use approved in the special use permit.

The use of special use permits "achieve[s] a degree of flexibility by adding special uses to the types of land uses otherwise permitted in zoning districts."[122] Special use permits are useful because "[b]y allowing special uses, yet subjecting them to conditions, the legislature achieves needed diversity of uses while insuring compatibility with surrounding properties."[123] Thus, special use permits can be used in agriculturally zoned districts, to permit non-farm uses in the discretion of the appropriate authority.[124] In this way the municipality can ensure that non-farm uses on neighboring properties do not interfere with the farming activities of agriculturally zoned land. This would give the municipality the flexibility to permit non-farm uses in an agriculturally zoned area, while protecting the farming interests in that area.

Also, similar to site plan and subdivision approval, special use permitting is subject to submission of an agricultural data assessment.[125] The local authority reviewing the application is to consider the agricultural data assessment as part of the application to determine the possible impacts of the proposed project on farm operations.[126]

E. Agricultural Member of Planning Board

To further protect the interests of farmers, New York State statutes expressly permit the appointment of an agricultural member to the local planning board.[127] The statute provides that the applicable authority (mayor or local legislature) may appoint an agricultural member to the planning board if an agricultural district exists in the municipality.[128] The agricultural member must be a person who "derives ten thousand dollars or more annual gross income from agricultural pursuits in [the municipality]."[129] Such an inclusion serves to protect the land interests of farmers, by having one of their own help make land use decisions in the municipality.

V. Additional Mandates

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[121] Dexter v. Town Board of Town Gates, 36 N.Y.2d 102 (1975).
[122] Pace Land Use Center, Local Leaders Guide, Special Use Permits Bulletin, Series I, Basic Tools and Techniques, Issue Number 8.
[123] Id.
[124] NY Farmland Protection, supra note 2 at 43-44. The local legislature has the authority to grant the permitting authority to the planning board or another administrative body. N.Y. VILLAGE LAW § 7-725-b(2); N.Y. TOWN LAW § 274-b(2); N.Y. GEN. CITY LAW § 27-b(2).
[125] N.Y. VILLAGE LAW § 7-739(2); N.Y. TOWN LAW § 283-a(2).
[126] Id.
[127] N.Y. VILLAGE LAW § 7-718(11), N.Y. TOWN LAW 271(11).
[128] Id.
[129] Id.

Besides providing affirmative zoning strategies to municipalities, the New York State Legislature imposes mandates on local and some state agencies, to carry out the objectives of Art. XIV, § 4.

A. Municipal Redevelopment

One such statutory provision is the municipal redevelopment law.[130] This provision is designed to promote the development of "blighted areas".[131] The municipal redevelopment law authorizes municipalities to "employ the power of eminent domain, to advance or expend public funds ... and to provide a means by which blighted areas may be redeveloped or rehabilitated"[132] The statute declares that the redevelopment of blighted areas "is necessary to facilitate commercial and industrial development, to maintain and expand the supply of low and moderate-income housing and to maintain and expand employment opportunities for jobless, underemployed and low income persons."[133]

In order to carry out this policy, municipalities are to perform studies to "determine if a redevelopment project within a specified area is feasible...."[134] Based on the results of these studies, the municipality is authorized to "select one or more project areas for redevelopment ... and provide for the preparation of preliminary plans for such redevelopment projects."[135] The statute defines a "project area" as "an area of a community which is blighted, the redevelopment of which is necessary to effectuate the purposes of this article."[136]

Despite the strong policy favoring redevelopment the legislature has specifically excluded lands used for agricultural production from the definition of "project area."[137] Thus, municipalities are not authorized to redevelop agricultural lands under the municipal redevelopment law. That the New York State Legislature would put such a priority on agricultural preservation exhibits a commitment to follow the policy set forth in Article XIV, § 4 of the State Constitution.

B. Coordination with Agricultural Districts Programs

Another mandate directed at local governments applies if an agricultural district is located in the town or village. Municipalities containing agricultural districts are required to:

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[130] N.Y. GEN. MUN. LAW §§ 970a-970q.
[131] Id. at § 970-b. "Blighted areas" are defined as: "an area within a municipality in which one or more of the following conditions exist: (i) a predominance of buildings and structures which are deteriorated or unfit or unsafe to use or occupancy; or (ii) a predominance of economically unproductive lands, buildings or structures, the redevelopment of which is needed to prevent further deterioration which would jeopardize the economic well being of the people." Id. at § 970-c(a).
[132] Id. at § 970-b.
[133] Id.
[134] Id. at § 970-d.
[135] Id. at § 970-e. This section also sets forth the requirements that are to be included in the preliminary plans.
[136] Id. at §970-c(g).
[137] Id.

> exercise their powers to enact local laws, ordinances, rules or regulations that apply to farm operations in an agricultural district in a manner which does not unreasonably restrict or regulate farm structures or farming practices in contravention of the purposes of ... agriculture and markets law, unless such restrictions or regulations bear a direct relationship to the maintenance of public health or safety.[138]

As part of this required coordination, applications for special use permits, subdivision approval, use variances, or site plan approval must include an agricultural data statement.[139] The statement shall include:

> the name and address of the applicant; a description of the proposed project and its location; the name and address of any owner of land within the agricultural district, which land contains farm operations and is located within five hundred feet of the boundary of the property upon which the project is proposed; and a tax map or other map showing the site of the proposed project relative to the location of farm operations identified in the agricultural data statement.[140]

Upon receipt of the agricultural data statement, the local authority responsible for reviewing the applicable application, is required to "mail written notice of such application to the owners of land as identified by the applicant...."[141]

The coordination requirement obligates local governments to coordinate their actions with the agricultural districts program. Furthermore, the required notice to the owners of the farmland gives those owners an opportunity to challenge or object to approval of the project or to suggest ways it can be changed to minimize the negative impact on their operations.

C. Referral of Final Zoning Actions

Another mandate imposed on municipalities, relating to agricultural preservation, pertains to final zoning actions. The board of supervisors or any county, by itself, or in collaboration with the governing bodies of the cities, towns, and villages has been authorized to establish a regional, county, or metropolitan planning board.[142]

Certain actions proposed by cities, towns, and villages are required to be referred to the county, metropolitan, or regional planning agency.[143] One such action requiring referrals is any proposed action, dealing with "the boundary of a farm operation located in an

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[138] N.Y. VILLAGE LAW § 7-739(1); N.Y. TOWN LAW § 283-a(1).
[139] N.Y. VILLAGE LAW § 7-739(2); N.Y. TOWN LAW § 283-a(2). As discussed previously, this requirement applies when the project would occur on property containing a farm operation within an agricultural district, or on property within 500 feet of a farm operation within an agricultural district. Id.
[140] N.Y. VILLAGE LAW § 7-739(4); N.Y. TOWN LAW § 283-a(4).
[141] N.Y. VILLAGE LAW § 7-739(3); N.Y. TOWN LAW § 283-a(3).
[142] N.Y. GEN. MUN. LAW § 239-b(1). Counties are authorized to establish a county planning board, but they are not mandated to do so. Op. Atty. Gen. (Inf.) July 16, 1974.
[143] N.Y. GEN. MUN. LAW § 239-m.

agricultural district...."[144] The statute excludes area variances from this referral requirement.[145]

This referral requirement is designed to "aid in coordinating such zoning actions and planning among municipalities by bringing pertinent inter-community and county-wide considerations to the attention of the aforesaid municipal agencies having jurisdiction."[146] The county planning agency is to review the plan based upon the considerations set forth in the statute,[147] and any other considerations it deems appropriate.[148] The agency "shall recommend approval, modification, or disapproval, of the proposed action, or report that the proposed action has no significant county-wide or inter-community impact."[149] If the agency recommends modification or disapproval, the referring agency can continue with the project as proposed only by a majority vote plus one.[150] Furthermore, if the municipality acts contrary to the recommendation, it must set forth its reasons for doing so.[151]

VI. SEQRA

The New York State legislature enacted the State Environmental Quality Review Act (SEQRA) in order to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of ecological systems, natural, human, and community resources important to the state."[152]

To further this purpose, SEQRA requires that most land use actions taken by local agencies are subject to an environmental review of their potential negative impact on the environment. SEQRA applies to any actions taken by a state or local agency which "(i) are directly undertaken by an agency; or (ii) involve funding by an agency; or (iii) require one or more new or modified approvals from an agency."[153] In other words, most local land use

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[144] Id. at § 239-m(3)(vi).
[145] Id.
[146] Id. at § 239-l.
[147] Such considerations include:

> compatibility of various land uses with one another; traffic generating characteristics of various land uses in relation to the effect of such traffic on other land uses and to the adequacy of existing and proposes thoroughfare facilities; impact of proposed land uses on exiting and proposed county or state institutional or other uses; protection of community character as regards predominant land uses, population density, and relation between residential and nonresidential areas; community appearance; drainage; community facilities; official development policies, municipal and county, as may be expressed through comprehensive plans, capital programs, or regulatory measures; and such other matters as may relate to the public convince, to governmental efficiency, and to the achieving and maintaining of a satisfactory community environment.

Id. at § 239-l.

[148] Id. at § 239-m(4)(a).
[149] Id.
[150] Id. at § 239-m(5).
[151] Id. at § 239-m(6).
[152] N.Y. ENVTL. CONSERV. LAW § 8-0101.
[153] N.Y.C.R.R. § 617.2(b).

actions such as the approval of rezoning requests, subdivision, special permits, and site plan applications, the award of area and use variances, unless specifically excluded, are subject to this environmental review.

In enacting SEQRA, the Legislature kept in mind the policy of Art. XIV of the State Constitution. Regulations promulgated under SEQRA are to be coordinated with the agricultural districts program.[154] SEQRA states that:

> The commissioner, in consultation with the commissioner of agriculture and markets, shall amend the regulations promulgated pursuant to the provisions of this section as necessary and appropriate to assure the adequate consideration of impacts of public acquisitions, or the advancement of public monies for non-farm development on lands used in agricultural production and unique and irreplaceable agricultural lands within agricultural districts in accordance with ... the agriculture and markets law.[155]

By virtue of this provision, the Commissioner's SEQRA regulations address the preservation of agricultural lands.

Besides this coordination requirement, SEQRA mandates that local agencies determine whether a proposed action may have a significant adverse impact on the environment.[156] If the proposed action may have an adverse impact on the environment, the agency must prepare and "environmental impact statement" (EIS).[157] SEQRA sets forth procedures and requirements to be followed by the appropriate agency to follow in performing the environmental review. Failure to comply with the requirements of SEQRA will make the local action invalid.[158]

In order to comply with SEQRA requirements "an agency must comply with both the letter and the spirit of SEQRA before it will be found to have discharged its responsibility thereunder."[159] The requirements are designed to "insure[] that agency decision-makers--enlightened by public comment where appropriate--will identify and focus attention on any environmental impact of [a] proposed action."[160]

SEQRA requires that adverse environmental effects are minimized or avoided to the "maximum extent practicable."[161] If the agency adopts a proposal that will adversely affect the environment, the agency must "make explicit findings that (1) the requirements of SEQRA have been met, and (2) adverse environmental effects revealed in the EIS process will

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[154] N.Y. ENVTL. CONSERV. LAW at § 8-0113(4).
[155] Id.
[156] 6 N.Y.C.R.R. § 617.7(a).
[157] Id.
[158] Chinese Staff and Workers Association v. City of New York, 68 N.Y.2d 359, 502 N.E.2d 176 (1976).
[159] Matter of Schenectady Chem. v. Flacke, 83 A.D.2d 460, 463, 446 N.Y.S.2d 418 (19--).
[160] Matter of Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400,. 414-415; 494 N.E.2d 429 (1986).
[161] N.Y. ENVTL. CONSERV. LAW § 8-0109(8).

be minimized to the maximum extent possible."[162] Failure to comply to with these requirements will make the action invalid.[163]

The SEQRA regulations contain three types of actions; (i) Type I; (ii) Type II; and (iii) Unlisted.[164] Type II actions, which include a variety of farm management practices and specified farm construction activities, are not subject to environmental impact review.[165] Type I actions, have been determined to require an EIS.[166] There is a presumption that the actions classified as Type I actions, will have a significant environmental impact.[167] Unlisted actions are those that are not classified as either Type I or Type II actions.[168]

The SEQRA regulations explicitly deal with proposed actions occurring within an agricultural district. The regulations list as Type I actions "any Unlisted action that includes a nonagricultural use occurring wholly or partially within an agricultural district ... and exceeds 25 percent of any threshold established in this section."[169] Also, "a substantial change in the use, or intensity of use, of land including agricultural ... or in its capacity to support existing uses" is deemed indicative of an a significant adverse impact on the environment.[170]

SEQRA also implicitly protects farmland. Under the SEQRA regulations any "project or action that involves the physical alteration of 10 [or more] acres" is a Type I action, and thus presumed to have an environmental impact.[171] Thus, proposed development of farmland for non-farm uses may require an EIS. Also classified as Type I actions are any "changes in the allowable uses within a zoning district, affecting 25 or more acres of the district."[172] This provisions would subject many zoning changes that affect farmland to EIS requirements. Additionally, administrative actions such as site plan review and subdivision approval will be subject to SEQRA review if they fall within the thresholds established in the regulations.

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[162] Sun Beach Real Estate Dev. Corp. v. Anderson, 469 N.Y.S.2d 964, 968 (A.D. 2d Dept. 1983).
[163] Chinese Staff and Workers Association v. City of New York, 68 N.Y.2d 359, 502 N.E.2d 176 (1976).
[164] 6 N.Y.C.R.R § 617.2(ai)-(ak).
[165] Id. at § 617.5(a). Some examples of Type II actions include:
(1) maintenance or repair involving no substantial changes in an existing structure of facility;
(2) replacement, rehabilitation or reconstruction of existing structures or facilities;
(3) agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming; or
(4) repaving of existing roadways.
Id. at § 617.5(b).
[166] Id. at § 617.4(a). Examples of Type I actions are:
(1) the adoption of a municipality's land use plan, and the initial adoption of a municipality's comprehensive zoning regulations;
(2) changes in zoning regulations affecting 25 acres or more; or
(3) the construction of residential or non-residential structures exceeding stipulated thresholds.
Id. at § 671.4(b).
[167] Id.
[168] Id. at § 617.2(ak).
[169] Id. at 617.4(b)(8).
[170] Id. at § 617.7(c)(1)(vii).
[171] Id. at § 617.4(6)(i).
[172] Id. at § 617.4(2).

Further protection of farming activities by SEQRA occurs in the designation of Type II actions. The regulations provide that Type II actions include "agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming." This provision allows the municipality to act more quickly in reviewing proposed farming activities and involves fewer costs for farmers who propose them.

VII. Conclusion

As can be discerned from the above summary of laws designed to preserve farmland, the State Legislature has provided ample support to carry out the Constitutional policy of preserving farmland. The statues provide for conservation easements and transfer of development rights,[173] create agricultural districts,[174] permit municipalities to zone in the interests of farmland,[175] and direct State and local agencies to act in ways that preserve farmland.[176] New York also has statutes requiring environmental review of actions affecting farmland,[177] and the state has numerous environmental statutes incorporating farmland protection.[178] Furthermore, there are laws protecting farmers from lawsuits and other laws designed to aid farmers financially.[179]

The problem with these laws is that they are scattered throughout the statutes, with no discernible connection among them. This shotgun approach has resulted "[b]ecause land use laws are drafted by separate legislative committees, at different points in time, to accomplish separate purposes, [thus] they fail to connect with one another; to become integrated with the objectives they seek to accomplish and to establish efficient procedures regulating the use of land."[180] The result is a series of piecemeal regulations, "whose actual use has been relatively limited."[181]

The most comprehensive scheme designed to preserve agriculture comes from the use of agricultural districts. However, this need not be the case. Municipalities have the tools at their disposal to provide the protections necessary to preserve farmland. This can be accomplished through the land use regulations discussed in section IV. The problem is that these provisions are scattered throughout the statutes as well. It is very difficult for a local legislature to wade through all the provisions and cobble together a comprehensive agricultural protection regime. Hopefully, this paper will serve as a reference point for individuals interested in creating a municipal land use plan designed to protect farmland.

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[173] See discussion supra section II.
[174] See discussion supra section III.
[175] See discussion supra section IV.
[176] See discussion supra section V.
[177] See discussion supra section VI.
[178] See discussion supra section II.
[179] See discussion supra section II.
[180] Nolon, supra note 3 at 7.
[181] Id. at 1.

I. The problem with agricultural preservation in New York is not that the Legislature has failed to provide municipalities with the power to preserve farmland. The problem is not that the Legislature has failed to create the tools necessary to preserve farmland. The problem is that, as drafted, these provisions do not create a clear program enabling municipalities to realize the constitutional objective of preserving farmland. Having provided such an impressive list of techniques to preserve agricultural land, it only remains for the Legislature to design an effective method of calling them to the attention of local officials and encouraging local agencies to utilize them in a comprehensive and effective manner.