Preferential Assessment of Agricultural Lands: Preservation or Discrimination?

by

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PREFERENTIAL ASSESSMENT OF AGRICULTURAL LANDS: PRESERVATION OR DISCRIMINATION?*

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As the population of urban centers grows and spreads into the quiet, productive rural areas, what once seemed to be a limitless expanse of agricultural land is now being displaced by sprawling suburbias. Not only does this pattern of land development result in the irreplaceable loss of agricultural acreage, but it inevitably leads to the less intense and possibly uneconomic use of the available acreage. Although a number of states have developed methods which attempt to retard this conversion of agricultural land, it has become evident that any effective solution must offer property tax relief to the urban fringe farmer. After several abortive attempts to enact remedial legislation, California is now experimenting with a system which offers both the necessary tax relief to the farmer and the assurance to the community that its productive land will remain in agricultural use. The California law, although still burdened with some deficiencies, may serve as a model for other states experiencing the urbanization of agricultural lands.

The premature development of unimproved lands—whether agricultural or otherwise vacant—inevitably results in the socio-economic problems associated with urban sprawl.[1] The lack of planning inherent in land development predicated on the fluctuations of the real estate market undermines the long-range needs of the community. For example, commercial, residential and recreational areas are not integrated to maximize land use or convenience to the land user. Sprawl increases the expense to the community of police, fire and utility serv-

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1 *See* G. LEFCOE, LAND DEVELOPMENT LAW 186-99 (1966); M. WALKER, URBAN BLIGHT AND SLUMS 17-35 (1938). *See generally* C. HAAR, LAND-USE PLANNING (1959).

ices. Transportation facilities necessary to connect the heterogeneous pattern result in maze-like freeway systems, pollution and time lost to the traveler. Duplication of educational facilities often lowers the quality of education received. The scattered and disconnected developments decrease the citizen's sense of "community"[2] and, thereby, decrease the ability of the citizens to work together for common goals. Finally, the long-range effect of this lack of planning and the concomitant migration to the suburbs is the "blight" of the central city.

The conversion of agricultural land to more intensive land use has been the pattern throughout the United States. However, nowhere has the problem been more acute than in California. Of the approximately 100 million acres of land in California, only 17 million were ever suitable for intensive agricultural production; if the present conversion rate continues, it is estimated that one fourth of this 17 million acres will have been withdrawn from agricultural production by 1975.[3] This potential loss is not only distressing because of its adverse effect on the economy of California, but also because specialty crops presently grown in the state, from its artichokes to its wine grapes, cannot be grown in the same quantities or with the same high quality elsewhere in the nation.[4]

In California, as in most other states, property tax assessments are based on the property's "highest and best use," rather than on its value at its current use.[5] While the most profitable use that can be made of land in rural areas distant from the urban centers is agricultural production, land suitable for agricultural use on the urban fringe can most often be more profitably devoted to commercial or residential development, and thus it is assessed as though put to this higher use. Although a number of factors cause the urbanization of agricultural land, increases in the assessed valuation of farm property as

[2] *Cf.* J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 228-29 (1961).

[3] Doerr & Sullivan, *Property Taxation and Land Use*, in 4 CALIFORNIA LEGISLATURE ASSEMBLY INTERIM COMMITTEE, REPORT ON REVENUE AND TAXATION 202, 207 (1964) (hereinafter Doerr & Sullivan).

[4] *Id.* at 208. That the conversion of agricultural land will continue to present a significant socio-economic problem assumes, of course, that the present sources and yields of agricultural products remain constant. Should new sources of foodstuffs, e.g., marine organisms, become practical, or should substantial per acre increases in yield be realized, the importance of the conversion of agricultural acreage would decrease proportionately.

[5] 30 OP. CAL. ATT'Y GEN. 246 (1957). *See also* A. F. Gilmore Co. v. County of Los Angeles, 186 Cal. App. 2d 471, 475, 9 Cal. Rptr. 67, 71 (1960); Wild Goose Country Club v. County of Butte, 60 Cal. App. 339, 341, 212 P. 711 (1922). *Cf.* People v. Ocean Shore R.R., 32 Cal. 2d 406, 425-26, 196 P.2d 570, 584 (1948).

the neighboring land is developed accelerates this process.[6] In developing urban fringe areas property taxes soon increase to the point where it is no longer profitable for the farmer to devote his land to an agricultural use. Moreover, the point at which taxes force the farmer off the land frequently comes before his property has reached its full potential value for commercial or residential development. Therefore, often the farmer is forced to sell at a fraction of the eventual value of the property, and the land is either prematurely developed, with the resulting lack of planning and inefficient land use, or lies idle as it ripens on the market.[8]

Zoning for exclusive agricultural use has been adopted in an attempt to deter the withdrawal of agricultural land, since the assessor is directed to consider the effect of publicly imposed restrictions on the use of the land and since the assessor can only assess property at its value for those uses permitted by law. However, if there is a reasonable probability that the agricultural zoning will be removed or substantially modified in the near future, the assessor may take into consideration not only those uses which are presently permitted, but also those to which the land could be devoted.[9] Since zoning is noted for its lack of permanence in the urban fringe areas, zoning restrictions are typically ignored by the assessor. Therefore, zoning offers neither the motivating tax relief nor the assurance of continued agricultural productivity.

Confronted with the inadequacy of zoning restrictions to deter the conversion, several states have enacted laws authorizing public acquisition of development rights in land presently devoted to agricultural uses.[10] This approach, however, requires an immediate outlay of

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[6] Doerr & Sullivan at 204-05.

[7] *Id.* at 205. For example, the average value of prunes per acre in Santa Clara County for the ten year period ending in 1964 was $468 a year, while in one area of the county the annual property tax on an acre of prune orchards had reached $380 by 1964.

[8] Doerr & Sullivan at 213. The pressure of increased property taxes has often been delayed because the assessor commonly assessed agricultural lands at a lower ratio than he did land devoted to other uses. *See* Land, *Unraveling the Rurban Fringe*, 19 HASTINGS L.J. 421, 427 (1968). However, this form of relief is no longer available in California, since all property must now be assessed at a uniform 25% of fair market value by the 1971-72 fiscal year. CAL. REV. & TAX CODE § 401 (West 1956) (1939 version), *as amended*, (West Supp 1967).

[9] 30 OP. CAL. ATT'Y GEN. 246 (1957). *Cf.* People *ex rel.* Dep't of Pub. Works v. Donovan, 57 Cal. 2d 346, 352, 369 P.2d 1, 4, 19 Cal. Rptr. 473, 476 (1962); People *ex rel.* Dep't of Pub. Works v. Dunn, 46 Cal. 2d 639, 642, 297 P.2d 964, 966 (1956).

[10] *See, e.g.*, CAL. GOV'T CODE §§ 6950-54, 50575-628 (West 1966).

public funds, and in the transitional areas this outlay is particularly burdensome since the value of development rights approximates the value of a fee interest.[11] As a result, these acquisition laws have rarely been exercised.

Any viable method of preventing the conversion of agricultural land must involve some form of property tax relief for the farmer. Recognizing this need, a number of states have enacted legislation providing such relief. These states have most often approached the problem by providing for the assessment of agricultural land solely on the basis of its current use. Some states, such as Connecticut[12] and Maryland,[13] simply direct their assessors to assess property actively devoted to agricultural use on the basis of that use only. Other states, such as Florida,[14] combine the direction to so assess with zoning restrictions, and give preferential assessment to only those lands which are both zoned and actively used for agricultural purposes. A third approach provides preferential treatment for agricultural land, but requires that the difference between the taxes paid under the preferential assessment and the taxes which would have been paid had the land been assessed at its highest and best use be repaid when the use of the land changes to the latter.[15] A refinement of this approach adopted by some states allows for only a limited recapture of back taxes upon the change of land use.[16] Hawaii, which has one of the most comprehensive statutes, provides for the establishment of land use districts and for the restriction of property by agreement to exclusive agricultural use for a minimum of ten years.[17]

However, these various statutory schemes fail to prevent the withdrawal of land from agricultural use. States with statutes like those of Connecticut and Maryland give the farmer the necessary property tax advantage, but allow him to change the use of his agricultural land with impunity. The combination of zoning restriction and preferential assessment also fails to provide adequate assurance of continued use, since zoning restrictions are always subject to alteration. The threat

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[11] *See* Land, *supra* note 6, at 431.

[12] CONN. GEN. STAT. §§ 12-63, 12-107 (a-e) (Supp. 1967).

[13] MD. ANN. CODE art. 81, § 19(b). (1965).

[14] FLA. STAT. ANN. § 193.201 (Supp. 1967).

[15] HAWAII REV. LAWS § 128-9.2 (Supp. 1965); N.J. STAT. ANN. 54:4-23.2 (Supp. 1967); ORE. REV. STAT. chs. 308.370, 308.390, 308.395 (1967).

[16] N.J. STAT. ANN. § 54:4-23.8 (Supp. 1967) (current and preceding two years); ORE. REV. STAT. ch. 308.395 (1967) (preceding five years).

[17] REV. LAWS HAWAII § 128-9.2 (Supp. 1965).

of limited recapture of back taxes is but little deterrence to the farmer who can reap a large capital gain by selling his land to a developer; the threat of unlimited recapture of back taxes may become so punitive as to motivate farmers to forego the benefits of the statute.[18]

California is now developing a system to deter the conversion of agricultural land which is relatively free of the defects experienced by the other states. Initially California provided that land both zoned and used exclusively for agricultural purposes was to be assessed solely on the basis of that use if there was no reasonable probability of the removal of the zoning restriction in the near future.[19] However, this law gave little solace to the farmer on the urban fringe, for in these areas the assessor could conclude that there was a reasonable probability that the zoning would be modified.[20]

In an attempt to overcome the weaknesses of this initial legislation by providing a more permanent restriction on land use than did zoning, the California legislature, in 1965, passed the California Land Conservation Act.[21] The Act authorizes the establishment on the local level or "agricultural preserves";[22] by "contract" or by "agreement" land within these preserves is restricted to agricultural and other compatible uses.[23] Between the individual landowner and the city or county the "contract" restricts the land to agricultural and other compatible uses for a minimum period of ten years.[24] In order to qualify for a contract the land must be located in a preserve of not less than 100 acres, must be devoted to agricultural use and must be prime agricultural land.[25] The state must approve the contract before it becomes ef-

[18] *See* Hagman, *Open Space Planning and Property Taxation*, 1964 WISC. L. REV. 628, 639 (1964). Tax deferral statutes are undesirable also because of the additional administrative burdens upon the assessor.

[19] CAL. REV. & TAX CODE § 402.5 (1967), *added*, 1957 CAL. STATS. ch. 2049, *repealed*, 1966 CAL. STATS. ch. 147 § 34.2.

[20] 30 OP. CAL. ATT'Y GEN. 246 (1957).

[21] CAL. GOV'T CODE §§ 51200-295 (West Supp. 1967). The legislation is also known as the "Williamson Act."

[22] CAL. GOV'T CODE § 51201(d) (West Supp. 1967).

[23] CAL. GOV'T CODE §§ 51240, 51255 (West Supp. 1967).

[24] CAL. GOV'T CODE § 51244 (West Supp. 1967).

[25] CAL. GOV'T CODE § 51242 (West Supp. 1967). "Prime agricultural land" is defined as (1) all land which qualifies for a rating as Class I or as Class II in the Soil Conservation Service land use capability classifications, (2) land which qualifies for rating 80 through 100 in the Storie Index Rating, (3) land which supports livestock used for the production of food and fiber, and which has an annual carrying capacity equivalent to at least one animal unit per acre as defined by the United States Department of Agriculture, (4) land planted with fruit or nut-bearing trees, vines, bushes or crops which have a nonbearing period of less than 5 years and during the

fective and may bring an action to enforce its provisions.[26] The contract is automatically renewed at the end of each agreed term for an additional term, unless either the landowner or the county gives written notice of non-renewal. When this notice is given, the contract will remain in effect for the remainder of the existing term. The Act provides for payments by the state to the county, and for payments by the county to the landowner, although these latter payments may be waived. The contract can be cancelled by the mutual agreement of the county and the landowner only after the State Board of Agriculture finds that the cancellation is not inconsistent with the purpose of the Act and is in the public interest.[27] Moreover, upon cancellation, the landowner must pay, as deferred taxes, 50 percent of the new equalized assessed valuation of the land[28] or approximately 1/8 of the land's fair market value. Accordingly, the Act makes it economically prohibitive to cancel a contract, instead forcing the landowner to give notice of non-renewal and to wait nine years before changing the use of his land.

In contrast to these detailed provisions for contracts, the Act summarily covers the "agreement" procedure.[29] An agreement restricting the use of land within the preserves is entered into only between the county and the landowner. The state is not a party to the agreement and does not have the power to rule on its execution or cancellation. The length, terms, conditions and restrictions of agreements are not governed by the Act, but are subject to negotiation between the county and the landowner. There is no minimum size required for preserves; it is not necessary that the restricted land be prime agricultural land; no payments are made either to the county or the landowner; there is no provision for penalties upon the cancellation of the agreement.[30]

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commercial bearing period will normally return on an annual basis from the production of unprocessed agricultural plant production not less than two hundred dollars per acre, or (5) land which has returned from the production of unprocessed agricultural plant products an annual gross value of not less than two hundred dollars per acre for 2 of the previous 5 years. CAL. GOV'T CODE § 51201(c) (West Supp. 1967).

[26] CAL. GOV'T CODE §§ 51250, 51252. (West Supp. 1967). For a detailed discussion of the mechanics of payments to the landowner and the intended effect of these sections, *see generally* Comment, *Assessment of Farmland under the California Land Conservation Act and the "Breathing Space" Amendment*, 55 CALIF. L. REV. 273 (1967).

[27] CAL. GOV'T CODE §§ 51281-82 (West Supp. 1967).

[28] CAL. GOV'T CODE § 51283 (West Supp. 1967).

[29] CAL. GOV'T CODE §§ 51255-56 (West Supp. 1967).

[30] Apparently these brief provisions were added in committee as an afterthought and in fear that landowners would find the contract procedure too restrictive and

Although the Act provided a more permanent land use restriction than does the zoning method, the Act still failed to give sufficient tax relief to the urban fringe farmer. Although the maximum economic use that could be made of property under contract was agricultural, the property may have had a more profitable use when the contract expired. In developing areas the market reflected the present worth of this potentially more profitable future use. Thus, if the assessor valued property restricted under the Act by considering sales of comparable land similarly restricted, the assessed valuation also reflected this "transitional value" over and above the property's value for agricultural use.[31] This method of valuation greatly reduced the benefit of the Act to the urban fringe farmer.[32]

This obstacle to the effective use of the Land Conservation Act was remedied with the passage of the "Breathing Space Amendment" to the California Constitution.[33] This amendment empowered the legislature to limit the factors which the assessor was permitted to take into consideration in assessing land restricted to agricultural use.[34] Further legislation prohibits the assessor from considering comparable sales data in assessing agricultural land subject to an "enforceable restriction," and requires that he "consider only factors relative to the uses contemplated by local government and legally available to the owner by the provisions of the enforceable restrictions."[35] An "enforceable restriction" is defined as a contract under the Land Conservation Act or as an agreement which provides for "restrictions, terms, and conditions which are substantially similar or more restrictive than those required by statute for a contract" under the Act.[36]

inflexible. *See* 47 OP. CAL. ATT'Y GEN. 171, 175 (1966); Comment, *supra* note 23, at 279 n.34.

31 The California Attorney General declared, in 1966, that the assessor is required by the California Constitution to include this "transitional value" in his assessed valuation. 47 OP. CAL. ATT'Y GEN. 171 (1966). Other states have also faced constitutional difficulties in establishing preferential assessments, although some of this legislation has been upheld; *see, e.g.*, Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963); *cf.* Switz v. Kingsley, 37 N.J. 566, 182 A.2d 841 (1962).

32 In an example used by the California Attorney General, land which would have a value of but $150 per acre if restricted solely to agricultural use but which would have a value of $1,000 per acre if not subject to the restriction, would be valued by the assessor at $490 per acre. 47 OP. CAL. ATT'Y GEN. 171, 177 (1966).

33 CAL. CONST. art. XXVIII.

34 *Id.*

35 CAL. REV. & TAX CODE § 423 (West Supp. 1967).

36 CAL. REV. & TAX CODE § 422 (West Supp. 1967). An agreement or a contract is not to be considered an "enforceable restriction" once the landowner gives notice of non-renewal or when less than 6 years remain until the expiration of the

The effect of this further legislation is to prohibit the assessor from considering the "transitional value" of property covered by the Land Conservation Act and to limit him to capitalizing anticipated agricultural income in determining his valuation.[37]

It may be argued that this California scheme does not give the urban fringe farmer significant assurance of tax relief since the standards for capitalization of agricultural income are so vague. However, capitalization of income is probably a more reliable method of valuation for property on the urban fringe than is valuation based on the sales prices of comparable property. Since the sale price of real property fluctuates widely due to uncertainty as to the rate of future development and because a sale for commercial or residential development may effectively glut the market for a number of years to come,[38] the use of sales data is highly inaccurate in the urban fringe areas. However, the California legislation does offer some assurance of the preservation of agricultural land by demanding land use controls more stringent than zoning restrictions in return for preferential tax assessment. The legislation does not have the stultifying effect of a long-term deferral of taxes; yet, because the state or local government is able to enforce the restrictions, the legislation provides for a greater assurance of continued agricultural use than does a method of limited recapture of back taxes. Finally, although there is a prohibitive penalty for cancellation of the contract, the California legislation does allow for long-range planning as to the use of the property.

Utilization of the Land Conservation Act was insignificant before the passage of the "Breathing Space Amendment". Since the passage of that amendment, however, there has been a rapid increase in restricted acreage and by March, 1968, nearly 2,000,000 acres of agricultural land had been brought under the restrictions of the Act. The agreement procedure has accounted for 98 percent of this restricted land. Although land use contracts have been virtually ignored,[39] the

contract of agreement. Property which is no longer subject to a Section 422 "enforceable restriction", but which is still restricted as to use under a contract or agreement, presumably will be valued pursuant to Section 402.1. This latter section directs the assessor to consider the effect of the use restriction on value, but authorizes him to use comparable sales data in reaching his valuation. CAL. REV. & TAX CODE § 402.1 (West Supp. 1967).

37 The assessor is not even permitted to look at the comparable sales data in determining his capitalization rate. CAL. ADM. CODE tit. 18, § 8(i).

38 Doerr & Sullivan, at 205-06.

39 The contract procedure of the Act has been avoided either because the farmers demanded the flexibility of the agreement procedure or because the counties wished to

agreements made by most counties incorporate almost verbatim the statutory contract provisions.

Since the Act promulgates a method of assessment rather than dealing with the resulting taxes, another uncertainty of the Act is the lack of clarity as to whether taxes will be rolled back or merely frozen at the rate extant when the agreement went into effect. Since the prime agricultural land is presently assessed on the "highest and best use" standard,[40] the policy of the Act would seem to require a roll back of taxes so as to encourage farmers to enter the restriction agreements.

The county tax base would seem to decrease little as a result of land coming under the jurisdiction of the Act since the restricted acreage in most counties constitutes but a small percentage of its total area. If the preserves are made up of contiguous parcels of land, however, the taxing districts within the preserves may suffer a serious decrease in available tax funds.[41] Although there are a number of solutions to this deficiency in the legislation, probably the most efficient from an administrative standpoint is the subsidization of the local districts to cover the taxes lost when the agreements went into effect. Although this subsidy could come from either the county or the state, it is preferable that it come from the state since an increase in the cost to the county may deter it from utilizing the Act.

Despite the advantages of the California legislation over methods adopted by other states, experience under the Act has served to reveal problems requiring further legislative refinement. Legal uncertainties of the present legislation may prevent increased use of the Act in the future. For example, of primary importance to the farmer is the certainty that his land will receive a favorable assessment in return for his long-term agreement to restrict its development. The Act now requires that agreements must be substantially similar to, or more restrictive than, contracts if the former are to result in preferential assessment. Since most counties incorporate the statutory contract pro-

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avoid state control inherent in the requirements that the state approve both the execution and the cancellation of the contract restrictions.

[40] It appears that the owners of prime agricultural land in Santa Clara County are already suffering such a heavy property tax burden that they are unwilling to preclude profitable sales of their property to developers without some assurance that their taxes will be rolled back.

[41] In Marin County, where the taxes have been rolled back to reflect the new assessed valuations, local taxing districts within the county's preserve have suffered a significant decrease in their property tax receipts.

visions into their agreements, the assessor should give land subject to these agreements the tax benefit allowed by the Act. However, with the continued development of urban fringe areas, California counties will experience political pressure to cancel these agreements; this political pressure is similar to that exerted to modify zoning restrictions. Further, the counties may be vulnerable to this political pressure, since state approval is not required for cancellation of the agreement. If agreements are cancelled with impunity due to this pressure, the assessor will likely find the agreements not to be substantially similar to the statutory contract provisions and, therefore, will ignore the agreements as he ignored the zoning restrictions.

Perhaps the most significant problem presented by the legislation is the state's apparent inability to preserve its best agricultural land by relying on voluntary submission to the Act in return for preferential tax treatment. Although no detailed figures are available, most property restricted under the California legislation is not the prime agricultural land that the Act was designed to protect. Further, in many counties the restricted land is contiguous. The development of these small agricultural enclaves, which are soon surrounded by commercial and residential developments, is undesirable for both the local government and the farmer. Due to the sprawling nature of this development, the local government faces increased costs in disbursing their limited services while experiencing a decreased tax base due to the preferential tax treatment of the restricted land. And as the agricultural land becomes surrounded by commercial and residential properties, the farmers must curtail practices incompatible with this type of development *e.g.*, crop dusting, smudging, and insecticide spraying.[42]

Napa County, the heart of California's wine producing industry, has recently taken a meaningful step toward both avoiding the problem of urban sprawl and preserving its prime agricultural land. The county is now in the process of zoning 25,000 contiguous acres of its agricultural land into an agricultural preserve, which will be restricted to exclusive agricultural use and will provide for minimum parcel sizes of 20 acres. Once the zoning has been established, the county will then offer land-use agreements to the individual landowners within the preserve. Although this method of combining comprehensive zoning with agreements under the Act appears to be a desirable solution to the problems, the county may be faced with substantial pressures, both from landowners within the preserve and from developers, for zoning

[42] *See* Doerr & Sullivan at 210-12.

modifications as population spills over into the Napa Valley from the nearby San Francisco Bay Area.

A solution to these two problems would be to apply the statutory contract provisions to the agreements, to require that the State Board of Agricultural approve all agreements, to provide that the Board approve the agreements only if the county has adopted comprehensive agricultural zoning, and to give the Board the right to approve all cancelations of agreements.

CONCLUSION

In all states experiencing accelerated urban development agricultural acreage is being consumed by more intensive land use forms. To stall this conversion so as to insure long-range community goals the urban fringe farmer must be given preferential property tax assessment. Although California has developed legisaltion providing for such preferential treatment, deficiencies which remain must be over come if the legislation is to be successful. It is apparent that comprehensive zoning on the county level is necessary to guarantee that the provisions of the Act will be effectuated.