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UNRAVELING THE RURBAN FRINGE: A PROPOSAL FOR THE IMPLEMENTATION OF PROPOSITION THREE

By ALAN E. LAND*

The depletion of California's natural resources and open spaces is an immediate and serious problem. This article will examine the role of the property tax as a factor contributing to this depletion, and will discuss attempts by California's legislature to deal with this problem, attempts which culminated in the adoption of a constitutional amendment to permit special assessment of restricted open lands on the basis of use value. Alternative means of implementing this tax scheme suggested by the experience of other states will be considered. Finally, a proposal for the implementation of proposition 3 (Cal. Const. art. XXVIII) will be offered.

The level alluvial valleys and plains are the location of the finest agricultural soil in the state. This alluvial soil has been washed into place over periods of geologic time which would place the era of civilized man in the last few seconds on a 24-hour geologic clock. This land is now a fixed and increasingly scarce resource. As population increases there is increased demand for prime land. These level valleys and plains are the most desirable land for low cost assembly line subdivisions, new freeways, and airports. With every daily increase of 1,500 people in California, 375 acres of open land come under the blade of the bulldozer, to be used for subdivision, roads, industry, and public and private facilities. This amounts to 140,000 acres annually. At this rate we can expect 3 million acres of open land to disappear by 1980. The population pressures will be intensified by the addition of 8 million Californians in the next 10 years. These new residents will probably move to suburbs.

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2 S. Wood & A. Heller, California Going, Going . . . 9 (1962). On a national scale one commentator estimates that 3,000 acres are converted to urban uses daily. Whyte, Urban Sprawl, in THE EXPLODING METROPOLIS 115 (1958).

3 UNIV. OF CALIF. EXTENSION, OPEN SPACE IN CALIFORNIA: ISSUES AND OPTIONS (1967). Population estimates are contradictory and often inconsistent. Id. at 2 anticipates 8 million new Californians in the decade 1965-1975. S. Wood, supra note 2, writing in 1962, anticipated 16 million additional people by 1980. Earl Warren recently predicted an increase of 20 million in the next 20 years. Address by Earl Warren, Special Convocation at University of California, Berkeley, April 28, 1967. Despite these inconsistencies the overall...
California's physical land resources total 100 million acres. Of this, 36.8 million has been described as "in farms" and 7.4 million as "irrigated," and 17.56 million acres constitute Class I-V soils. From 1942 to 1955 the average rate of withdrawal of land suitable for agricultural use had been 60,000 acres per year; however, in recent years the rate has been approaching 150,000 acres per year. At this rate by 1975 one-fourth of all land suitable for agricultural use will be converted to nonagricultural use. An extensive recent study of California's open spaces has recently been made public by the State Office of Planning. This study indicated that in southern California 70 square miles per year are being converted to urban use. In the San Francisco Bay Area the conversion rate is 21 square miles per year. As a comparison it is noted that the entire city and county of San Francisco covers 44 square miles. Land other than deserts or mountains is under considerable urban pressure in Riverside and Ventura Counties, and slightly less intense pressure in Santa Barbara, San Bernardino and San Diego Counties.

The impact of statistical estimates is that California's population is growing rapidly and will continue to do so.

4 Whyte, supra note 2, at ix.

5 The Soil Conservation Service of the Department of Agriculture classifies land according to land capability. There are two general divisions: (1) land suitable for cultivation and other uses (classes I-IV), and (2) land limited in use generally—not suited for cultivation (classes V-VIII). Individual classes are distinguished by various limitations and hazards. The variables considered include: (1) effective depth, (2) texture of topsoil, (3) permeability of subsurface, (4) type of base material, (5) slope, (6) erosion, (7) salinity, and (8) wetness.

6 H. Snyder, The City As Seen from the Farm, March 13, 1963 (paper presented at a conference at Davis, California). Compare Snyder, A New Program for Agricultural Land Use Stabilization: The California Land Conservation Act of 1965, 42 LAND ECON. 29 (1966). In the latter article the author reports that 13 million acres are under "intensive cultivation" and 7.5 million acres are "irrigated," while 19.5 million acres were in classes I-IV. Id. These figures are probably all correct; however, they demonstrate how statistics may be molded to produce a given effect at a given time. Two general conclusions may be drawn from them. First, California's land resources are being depleted. Second, acreage with top soil capability ratings is equally subject to this depletion.

7 These estimates appear slightly high. S. Wood, supra note 2 estimates 140,000 acres per year in 1962. But see CAL. STATE OFFICE OF PLANNING, URBAN-METROPOLITAN OPEN SPACE STUDY (1965) (prepared by Eckbo, Dean, Austin & Williams, San Francisco, Cal.) [hereinafter cited as the Eckbo Report]. This study was prepared as part of the state master plan, and made public on May 17, 1967. Oakland Tribune, May 17, 1967, § 1, at 2, col. 4. In dealing with the urbanized areas of southern and northern California, the Eckbo Report, supra, estimates a loss of 70 square miles (44,000 acres) per year in southern California and 21 square miles (13,440 acres) per year in northern California. These figures result in a combined total of 56,240 acres per year in the most rapidly growing areas of California.

8 Eckbo Report.

9 Id. at 59.

10 Id. at 63-75.
It is often argued that this prodigious conversion of agricultural land to urban use poses a threat to the economy of California and the entire United States.\(^{11}\) This argument is usually documented by pointing to the heavy reliance of the nation on certain specialty crops produced in California.\(^{12}\) The general proposition that land conversion presents an immediate threat to agricultural supply has been challenged on the basis that despite continual decreases in farm acreage, improvements in mechanization and development of new farm areas will lead to increased production.\(^{13}\) However, this rationale is inapplicable where the conversion is of agricultural land uniquely suited to the growth of specialized crops.

In addition to the quantitative loss of open spaces, considerable attention is focused on the qualitative aspects of its replacement—suburban sprawl. New development is often characterized by low density, single family subdivisions in a monotonous, sprawling and scattered pattern over the flat valleys. Such is variously called sprawl,\(^{14}\) scatteration,\(^{15}\) and slurbs.\(^{16}\) This process is probably best illustrated by the development of Santa Clara County. In the Santa Clara Valley, the fertile valley floor which contained 70 percent of

\(^{11}\) See Hearings Before Assembly Interim Comm. on Revenue and Taxation on Problems of Agricultural Land, Jan. 30, 1964, app. D (statement by William Staiger, Ass’t Executive Secretary, Agricultural Council of California).

\(^{12}\) For example, California produced the total crop for the country for eight products and over 90% of the total crop for nine other products. The state ranked first in production nationally for a total of 40 crops: (1) 100% of almonds, artichokes, garlic, persian melons, and raisins; (2) over 95% of dates, figs, nectarines, olives, and walnuts; (3) over 90% of avocados, lemons, plums, and prunes. Unique agricultural soils are found in the Napa Valley and the coastal valleys near Santa Cruz. CAL. ASSEMBLY INTERHVM, ON REVENUE, TAXATION OF PROPERTY IN CALIFORNIA, A MAJOR TAX STUDY, pt. 5, at 208 (1964) [hereinafter cited as MAJOR TAX STUDY].


\(^{14}\) “[E]ven within the limits of most big cities there is . . . a surprising amount of empty land. But it is scattered; a vacant lot here, a dump there—no one parcel big enough to be of much use. And it is with this same kind of sprawl that we are ruining the whole metropolitan area of the future.” Whyte, supra note 2, at 116.

\(^{15}\) “Development patterns are characterized by sprawl, scatteration, San Francisco Bay filling, highway strip commercial sprawl, the spatial merging of cities and urbanization of some of the finest agricultural soils and specialty crop areas of the nation.” Eckbo Report, supra note 8, at 62.

\(^{16}\) “The character and quality of urban sprawl is readily recognized: neon-bright strip cities along main traveled roads; housing tracts in profusion; clogged roads and billboard alleys; a chaotic mixture of supermarkets, used car lots, and pizza parlors; the asphalt plain of parking spaces; instead of parks, grey looking fields forlornly waiting to be subdivided. These are the qualities of most of our new urban areas—of our slurs—our sloppy, sleazy, slovenly, slipshod semi cities.” S. Wood, supra note 2, at 10.
the Class I farmland in the entire Bay Area,\(^{17}\) 200,000 acres of agricultural land were converted to suburban use between 1947 and 1962. If this development had been contiguous rather than scattered, only 26 acres would have been converted.\(^{18}\)

Not only is sprawl bad aesthetics, it is also bad economics. It has resulted in increased service costs to outlying areas. The initial cost of running sewers, water mains and storm drains out to "Happy Acres" has been supplanted by the increased costs of road maintenance to accommodate the rising tide of commuters.\(^{19}\) The cost of farm operation will increase as the farmer is forced to abandon normal farm practices (spraying, crop dusting, and smudge pots) which might constitute a nuisance to urban neighbors. Population increases will also result in increased losses because of vandalism, dog attacks on livestock, and theft. The developer himself is hurt by sprawl. If open spaces are not preserved there is little assurance that Happy Acres will retain the amenities promised at the time of sale. This may not affect the hit-and-run builder, but will be important to the established local builder who has a vested interest in the permanent character of the community. The conversion of agricultural land is accelerating. The effects of conversion are aesthetically and economically undesirable, and the process is usually irreversible.\(^{20}\) Some authorities contend that the property tax exacerbates the conversion of open spaces.\(^{21}\) This contention requires further analysis.

**Role of the Property Tax**

**The Traditional Model**

The traditional model of property taxation provides that for assessment purposes all property shall be valued uniformly on the basis of its highest and best use measured by the price it will bring in an open market where there is a willing seller and a willing buyer neither of whom is compelled to enter the transaction.\(^{22}\) Application

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\(^{17}\) Whyte, *supra* note 2.


\(^{19}\) An additional problem is the duplication of facilities and services resulting from inter-jurisdictional competition (i.e. separate sewer lines from two jurisdictions may parallel each other in the same roadbed).


\(^{22}\) See Council of State Governments, *Farmland Assessment Practices in the United States* (1966) [hereinafter cited as *Council of State Governments*]. This study was prepared on the basis of questionnaires sent to state tax commissions. The questionnaires were prepared with the assistance of the
of this model to land subject to pressure from urban expansion in the rural-urban (rurban) fringe areas has resulted in assessments based on the value of this land for subdivision purposes.

Use of the traditional model in such rurban areas has been criticized on the basis of fairness. Is it fair to tax the owner of farmland that has become valuable as a potential site for a residential subdivision on the basis of this higher market value? Critics of the traditional model point out that such taxation cannot be justified on the basis of either the farmer's ability to pay the tax from his farm income or the benefits he receives from the encroachment of development. A partial answer to this argument may be that the farmer certainly has ability to pay his taxes if he sells his farm at its market value and moves to new land further from urban development or gives up farm-

International Association of Assessing Officers.

In California, CAL. CONST. art. XIII, § 1 provides that all property shall be assessed in proportion to its value. Art. XIII, § 2 provides that cultivated and uncultivated land, of the same quality and similarly situated, shall be assessed at the same value. The constitution variously uses the terms: "full cash value" (art. XI, § 14), "true value in money" (art. XIII, § 9), and "actual value" (art. XIII, § 14). These terms are collectively defined in CAL. REV. & TAX. CODE § 110 as the amount at which "property would be taken in payment of a just debt from a solvent debtor." The definition of value actually used by assessors is that suggested in De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955): "the price that property would bring [if it were offered for sale] on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other." Cf. Sacramento R.R. v. Heilbron, 156 Cal. 408, 104 P. 979, 980-81 (1909). California assessors often in effect make law by use of administrative procedures which are neither authorized by statute nor constitutionally compelled. Two examples come readily to mind. Assessors value land at its "highest and best use." CAL. STATE BOARD OF EQUALIZATION, ASSESSOR'S HANDBOOK 34-39 (1966). This standard is not mentioned in the constitution or statutory laws of California. Comment, Assessment of Farm-land under the California Land Conservation Act and the "Breathing Space" Amendment, 55 CALIF. L. REV. 273, 285 (1967). This practice was upheld in Wild Goose Country Club v. Butte County, 60 Cal. App. 339, 212 P. 711 (1922). Secondly, assessors uniformly assess land at a fraction of its full cash value in apparent contradiction of the constitutional requirement of full cash value (CAL. CONST. art. XI, § 12) and the statutory full cash value standard. CAL. REV. & TAX. CODE § 401.

This practice was sustained over a taxpayer's objection in Michels v. Watson, 229 Cal. App. 2d 404, 40 Cal. Rptr. 464 (1964). In 1966 the legislature amended CAL. REV. & TAX. CODE § 401 to provide for uniform fractional assessment at 25% of full cash value after the 1971-1972 fiscal year. The constitutionality of this statute has been upheld by the California Supreme Court in County of Sacramento v. Hickman, 66 A.C. 875, 468 P.2d 988, 59 Cal. Rptr. 141 (1967).

23 Stocker, How Should We Tax Farmland in the Rural Urban Fringe?, in NATIONAL TAX ASS'N, PROCEEDINGS OF THE 54TH ANNUAL CONFERENCE 463, 465 (1961). The criticism of the property tax as not justified by benefits received or ability to pay has been extended by some economists to an attack on the entire property tax. J. Heilbrun, REAL ESTATE TAXES AND URBAN HOUSING (1966).
ing. This "answer" may not hit a responsive note with the farmer who wishes to keep his farm in the family or does not wish to move for noneconomic reasons.

Another problem with the application of the traditional model to rurban fringe land is the difficulty of obtaining an accurate assessment of value. Use of comparable sales as a measure of value assumes a market where land is homogeneous, unlimited in supply, and all buyers and sellers are fully informed. This is far from an accurate description of the dynamic and highly imperfect market in rurban areas. Comparable sales may also be inaccurate because demand is sporadic. If a particular tract of farmland is sold for development in one year, it may be several years before a farmer holding comparable land could receive a similar price.24

The "highest and best use" component of the traditional model is based on the assumption that the best use of a particular piece of property is that which is economically most profitable. This leads the assessor in determining values to overlook elements of social value in open space or agricultural lands which may tend to be less profitable economically.25 Thus, in effect, the tax forces property to be used at its most profitable use.

Another basis for criticizing application of the traditional model to rurban land is the use of the willing-seller/willing-buyer concept. If a farm is valued by use of highest and best use and comparable sales, and if taxes increase more rapidly than farm income, is the farmer truly a willing seller? If in fact high taxes compel farmers to sell their land, the sale would not seem to qualify under the willing-seller/willing-buyer test.

Assessment of rurban land is further complicated by the speed with which the market changes. Typically assessors do not value all county property during a single year.26 This results in a phenom-

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24 F. Stocker, Some Problems in Assessing Farmland in the Rural Urban Fringe 4, Sept. 12, 1961 (paper presented at the Conference of the Washington State Association of Assessors, Spokane, Wash.): "Except in the most rapidly growing metropolitan areas, conversion of one large tract to residential use, instead of proving that adjacent land can now be sold at a comparable price for similar use, may exhaust the demand for residential sites for some years. Ordinarily there are only a few choice locations for residential, commercial, or industrial development. When these tracts are taken up, the nature of the market for the remaining properties differs sufficiently that sale prices of the tracts sold may have little relevance to the value of those that remain."


26 In the San Francisco Bay Area, an individual parcel of property is assessed on the average every 4 or 5 years. The period varies depending on the County: Alameda—6 years, Contra Costa—4-5 years, Marin—5 years, Napa—5 years, San Mateo—4 years, San Francisco—4 years, Santa Clara—1 year, Solano—2-5 years, Sonoma—6-7 years. MAJOR TAX STUDY 109.
on known as "assessment lag." The length of lag will depend on whether the assessor uses the "hot spot" or the "cyclical" method of reappraisal. The "hot spot" method will more accurately reflect rapid increases in market values than the "cyclical" method. To the extent the assessment lag operates in areas of rapidly increasing market values, properties will be relatively underassessed.

The traditional model, although the theoretical basis for assessment in California, is not always followed in actual practice. The requirement of uniformity does not mean that all property in California is assessed at the same proportion of market value. Different land uses may also be assessed at differing percentages of market value. Agricultural land is often assessed at a lower percentage of market value than is residential or commercial land. This relative underassessment of agricultural lands may be the result of both assessment lag and pressure from farmers on the locally elected assessor to keep their taxes down.

The Farmers' Plea for Relief

The farmers' property taxes undoubtedly have been increasing. Statewide farm property taxes have increased from $71.1 million in 1949 to $175.5 million in 1962, an increase of 147 percent. During the same period, net farm income declined slightly from $543 million in 1949 to $532 million in 1962. Between 1959 and 1960 farm real estate taxes rose 16 percent. One commentator has estimated that farm property taxes have been rising without interruption for 20 years at a rate averaging more than 5 percent per year.

27 The assessment lag is the period involved in which the assessor must recognize that a market trend is occurring. See generally Comment, supra note 25, at 864-65.

28 Under the "hot spot" method the assessor reassesses the area showing greatest economic activity first each year. Id.

29 Under the "cyclical" method the county is divided into sections with each section being reassessed in a given year until the entire county has been reassessed. Id.

30 Latcham & Findley, The Influence of Taxation and Assessment Policies on Open Space, in OPEN SPACE AND THE LAW 56 (1965). In 1963 the statewide average of assessed value to market value was 23.1% while County ratios varied from 19.1% to 27.1%. Id.

31 Residential property 21.1%; multi-residential 26.3%; commercial 26.1%; industrial 23.4%; timber 29.35%; bare land 20.4%; and agricultural 19.3%. Id.


33 DOERR & SULLIVAN, supra note 21, at 205.


35 Snyder, supra note 18, at 32.

36 Stocker, Taxing Farmland in the Urban Fringe, TAX POLICY 3 (December 1963).
This increase in taxes is related to the rising market values of farmland. Urban expansion increases prices both directly (subdividers' purchases of farmland) and indirectly as farmers who have sold their lands to speculators in other areas are willing to pay inflated prices to continue farming. The farmers themselves are partially responsible for increased market values, since well-to-do farmers pay high prices to expand their farm size and maximize efficiency. Arguably, if increased market values are not reflected in increased taxes, farmers are underassessed relative to other taxpayers; and if increased market values are accurately reflected by increasing taxes, farmers are in no worse a position than other taxpayers.

Some farmers argue that property taxes have a greater adverse effect on the farmer than on other taxpayers. This argument is based in part on the fact that the farmer is forced by the very nature of his business to invest more heavily in land than other taxpayers. A second reason given by proponents of this view is that the farmer is unable to pass increased cost on to consumers. This is assertedly true because supply, demand, and income factors coupled with the inherent competition between commodities, limit the price consumers will or can pay for farm products. This assertion is highly questionable given the increasing cost of living index and the increased cost of consumer goods. Also, it should be noted that farmers asking relief from high taxes often argue that destruction of prime land will result in increased food prices.

A second argument supporting the proposition that the property tax falls more heavily on farmers, is that the less intensively a piece of property is used, the greater will be the difference between its value at its present use and its highest and best use. Most taxpayers (i.e. residential, commercial, and industrial) make more intensive use of quantitatively less land than does the farmer, thus their tax more closely approaches use value.

The traditional model of property taxation works imperfectly in the rurban fringe. In more remote rural areas agricultural land is assessed at a market value which may be quite similar to use value. However, in more urbanized areas the diverse pressures from suburban sprawl result in a dynamic and imperfect market. In this market comparable sales may not accurately reflect current market value. The difference between highest and best use and actual use is at a

87 In California refugees from Orange County have been bidding up prices of farmland in the Sacramento valley 500 miles north. Time, April 29, 1966, at 96.
88 Hearings, supra note 11.
89 63% of total U.S. farm investment is in land. Id.
90 MAJOR TAX STUDY, supra note 12, at 206-09.
As taxes increase more rapidly than farm income the farmer may be forced to sell his property. In this environment the farmers began to turn to the legislature for relief.

Legislative Action in California

Greenbelt Zoning

The first attempt by farmers to defend their agricultural lands from urban encroachment originated with the farmers and county planners in Santa Clara County. They had seen new development spring up amidst farmland, followed by a neighboring town's strip annexing down country roads to take the subdivision into its tax base. The planners and farmers in Santa Clara with the approval of the County Board of Supervisors set up exclusive agricultural zoning. In 1955, they went to the State legislature to seek protection from municipal annexation of lands in these agricultural zones. As a result the legislature passed the Greenbelt Law of 1955\(^1\) to prevent annexation of lands “zoned and restricted for agricultural purposes exclusively,” without the consent of the owners. Initially the provision was limited to Santa Clara County, but another provision was added in 1965 to include any county adopting agricultural zoning.\(^2\) This Greenbelt Law authorized any county to establish land use zones devoted exclusively to agricultural use; however, it gave no guidance to the assessor.

Greenbelt Assessment Section 402.5

Two years after the passage of the Greenbelt Law the legislature passed section 402.5 of the California Revenue and Taxation Code.\(^3\) This section directed the assessor to assess land which is zoned and used exclusively for agricultural purposes at its use value, providing that “there is no reasonable probability of the removal or modification of the zoning restriction within the near future.” The proviso in effect nullified the provision since assessors usually found a

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\(^{1}\) Cal. Stats. 1955, ch. 1712, § 1, at 3147 (Cal. Gov't Code § 35009). This section was limited to counties which had adopted a master plan including provisions for agricultural zoning on or before December 31, 1954, and thus was limited to Santa Clara County.

\(^{2}\) Cal. Stats. 1965, ch. 1869, § 1, at 4321 (Cal. Gov't Code § 35009.1).

\(^{3}\) Cal. Rev. & Tax. Code § 402.5, Cal. Stats. 1955, ch. 2049, § 1, at 3630 (repealed 1966). This section would be an ideal solution from the farmer's point of view if only they did not have to show that removal or modification of the restrictions was unlikely. Property would be assessed at its “use value” until the farmers and subdividers decided to change the zoning. This would confer a tax benefit with no assurance that property would remain in agricultural use. One commentator has objected that local government is too close to the profits from land development. Address by Samuel Wood, California Open Space Conference, Davis, Calif., April 14, 1967.
reasonable probability that the zoning would be modified when warranted by sufficiently enticing capital gains. Thus, greenbelt zoning combined with tax reduction failed to accomplish the preservation of open spaces since there was no assurance that the assessor would in fact lower assessments on land zoned exclusively for agriculture.

Development Rights—Enter the Conservationists

At this point the conservationists became concerned over the loss of open space to unaesthetic suburban sprawl. They noted that zoning was dependent on the will of local politicians subject to influence by developers as well as farmers. They concluded that zoning was too weak a reed on which to rest their hopes for open space conservation. In 1959, the California legislature passed an Open Space Act enabling “any city or county” to acquire “through the expenditure of public funds,” the fee or any lesser interest or right in real property in order to preserve, “through limitation of their future use, open spaces and areas for public use and enjoyment.” The statute defines open spaces in broad terms, thus allowing planners to achieve many of the goals of open space conservation. However, the enabling legislation is limited in many important respects. The purchase of scenic or conservation easements is limited to voluntary

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44 Assembly Interim Committee on Agriculture, Preserving Agricultural Land in Areas of Urban Growth: A Look at the Record 4 (Geyer & Hanauer ed. 1964) [hereinafter cited as Geyer]. Cal. Rev. & Tax. Code § 402.5, Cal. Stats. 1955, ch. 2049, § 1, at 3630 (repealed 1966) was largely ignored by assessors as a result of an opinion of the California Attorney General stating that the section merely restated existing law and that the assessor was still required to use his own judgment with regard to value. 30 Ops. Cal. Att’y Gen. 246 (1959).

45 Cal. Gov’t Code §§ 6950-54.

46 Cal. Gov’t Code § 6954. This section defines “open space” as any space or area characterized by (1) great natural scenic beauty or (2) whose existing openness, natural condition or present state of use, if retained, would enhance the present or potential value of surrounding urban development or would maintain or enhance the conservation of natural or scenic resources.

47 Some of the conservationist goals of open space preservation might include: (1) control of the shape or timing of urban growth, such as use of greenbelts to shape communities and prevent the merging of subdivisions; (2) reservation of nature and natural settings; (3) reservation of land for recreation; (4) conservation of wildlife habitats, water supply, forests, and agricultural land; (5) minimization of water runoff, soil erosion, and flood damage; and (6) reservation of land for future urban development. Krasnowicki & Paul, The Preservation of Open Space in Metropolitan Areas, 110 U. Pa. L. Rev. 179 (1961). “The broad language of [Cal. Gov’t Code] § 5954 permits less than fee purchase to promote such purposes as watershed protection, conservation of farm lands, control of urban form, recreation, easing air pollution, control of highway interchanges, reservation of land for future public use and so on.” Weissburg, Legal Alternatives to Police Power: Condemnation, Purchase, Development Rights, Gifts, in Open Space and the Law 43 (1965).
sales; there is no provision for eminent domain. The authorization flows only to cities and counties, not to regional bodies. In addition, there are practical limits. In rurban areas where population pressures are most intense, and the need for open space preservation is greatest, the cost of development rights may closely approximate the cost of the fee interest.48

Acquisition of development rights in California has not proceeded at a rapid pace for two reasons. First, the counties and cities lacked the finances necessary to purchase less than fee interests on a scale sufficiently large to preserve the needed open spaces. Second, the statute gives no assurance that tax reduction would follow a sale of development rights. It would seem that the assessor should be required to value the property at its highest and best use as undeveloped property, but such a result is by no means certain.49

Proposed Constitutional Amendment—Proposition Four

By 1962 the farmers had realized that greenbelt zoning would not produce the desired tax advantages.60 They sought to compel the assessor to give them tax relief through a proposed constitutional amendment.61 The amendment included the following provisions: (1) preferential treatment for property "used exclusively for agricultural purposes," (2) a requirement that land be in such use 2 successive years prior to application for relief, (3) a local option provision requiring approval by the local board of supervisors, (4) the assessor should consider no factors other than those relating to use, (5) the assessor determines if property qualified under the exclusive agricultural use requirement, (6) property remains subject to the amendment until there is a new application or an actual change in use, (7) if property is converted to nonagricultural use, the owner would be required to pay the difference between the taxes paid under the preferential scheme, and the taxes which would have been paid under the traditional model for the prior 7 years.52

The arguments against proposition 4 were as follows: (1) it in-

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48 Eckbo Report 40. The report recommends that if the less than fee rights cost 75% of the full fee it may be desirable as a matter of public policy to acquire the full fee. Id.
49 The assessor might claim that since no sales of less than fee property interests have been recorded, the most accurate interim measure of value is fee sales of comparable properties. He may also argue that the government might release its interest in the development rights in the future or that the legislature may change the nature of the rights.
50 Exclusive agricultural zones have been adopted in only 20-25 counties, and few of these counties restrict rezoning.
51 Assembly Constitutional Amendment No. 4, which appeared on the November 1962 California general election ballot as proposition 4, was a proposal to add § 2.8 to the Cal. Const. art. XIII (1962).
volves tax favoritism and shifting of farmers' taxes to other taxpayers, (2) it is too vague and uncertain (i.e. "agricultural purposes" is not defined), (3) it exempts oil interests from taxation, (4) it encourages speculation, and (5) it will produce more leapfrogging subdivisions.53 The amendment carried 37 counties but was defeated by a vote of 2,147,761 yes to 2,384,064 no.54 Prior to the defeat of proposition 4 the Assembly Committee on Revenue and Taxation asked local assessors to estimate the probable loss of revenue if proposition 4 were to pass. This gave the assessors an opportunity to do some statistical lobbying. The result was an estimated loss of almost $500 million in a year when the total property tax revenue from farms in the state constituted less than $170 million.55

Land Conservation Act of 1965

Despite the failure of the constitutional amendment in 1962, the legislature decided to give the farmers tax relief. In 1965 it passed the Land Conservation Act56 which was designed to protect prime agricultural lands.57 The act was unsuccessfully attacked as an unconstitutional departure from full cash value and uniformity.58 The Land Conservation Act provided a means for the farmers to gain tax relief in return for a temporary surrender of their development rights. Owners of prime agricultural land could voluntarily enter into contracts with local governments and the state to keep their land in agricultural use for 10 years.59 The city or county was empowered

53 See CALIFORNIA SECRETARY OF STATE, PROPOSED AMENDMENTS TO THE CONSTITUTION (1962). Compare CALIFORNIA SECRETARY OF STATE, PROPOSED AMENDMENTS TO THE CONSTITUTION (1966). The arguments against proposition 3 make all the same points: e.g., tax shifting, vagueness, speculation, oil interests, with the added statement that a "less ominous" tax scheme was defeated in 1962. 54 MAJOR TAX STUDY, supra note 12, at 220.

55 The Los Angeles Assessor estimates a loss of $185 million, when the total farm assessed value in the county was $169 million. The Orange County Assessor estimated a loss of $177.1 million when the total assessed value of farm property was only $105 million. MAJOR TAX STUDY 222.


57 CAL. GOV'T CODE § 51201(c) defines prime agricultural land to include: (1) all land within classes I or II of the Soil Conservation Service Land Use Capability classifications, or (2) land which returned an annual gross value of not less than $100 per acre for the previous 5 years from production of unprocessed agricultural plant products. The second clause was added to cover intensively farmed "high value" crops which are not located on prime class soils, e.g., strawberries, spinach, rice, fruits, nuts, and vine crops.

58 The constitutionality of the statute was affirmed by the California Attorney General, 47 Ops. CAL. ATT'y GEN. 171 (1966). Constitutionality of the statute has never been considered by the courts; however, the passage of proposition 3 in 1966 would seem to render the question moot. For a discussion of the constitutional objections which might arise, see Comment, supra note 22, at 281.

59 CAL. GOV'T CODE §§ 51243-44. Contracts are renewable automatically
to establish agricultural preserves containing not less than 100 acres. Agricultural preserves were to be devoted to agricultural and "compatible uses." The statute authorized the payment of compensation to landowners whose lands were subject to contract restrictions if the assessed value of their property was increased.

Contracts may expire in three ways: by nonrenewal, by revocation, and by cancellation. If a farmer decided not to renew his contract, he would not be able to sell the land for 9 years. During that period his assessed value would gradually increase along with the market value, and his compensation payments from the county would be reduced 10 percent per year. A contract may be revoked by consent of all parties. The state's consent to the revocation must be in the public interest. If a contract is cancelled, the taxpayer must pay 50 percent of the new assessed value of the property as soon as reassessment occurs. The Land Conservation Act provisions conditioning tax relief on a 10-year relinquishment of development rights by the farmer seems a desirable and workable program assuming the assessor would reduce assessed values.

The Land Conservation Act does not limit the farmer to the use of contracts. It also provides for agreements which may be negotiated between the counties and farmers subject to no given time every year for another 10 years, and run with the land binding successive owners. Cal. Gov't Code § 51252 provides that contracts are enforceable by state suit for an injunction or specific performance.

60 Cal. Gov't Code § 51201(d)-(e). The term "compatible uses" is not defined by the statute, and the legislature delegates the power to define the term to the local governments administering the preserves.

61 Cal. Gov't Code § 51261. Compensation paid to owners is the result of a complex waiver arrangement whereby the owner waives compensation up to the value of the land at the time of the contract. Any increase above that assessed value results in compensation at a rate of $5 per $100 of assessed value. This rate was set at a level above the base tax rate of all counties, so that any increase in assessed values would cost the county more than it would return in revenue. Proponents of the act argue it stabilizes the market in farmland, and gives the farmers tax relief. Snyder, supra note 18. However, this stabilization feature may produce some problems. Will the same result (i.e. the county loses revenue if it raises the assessed value) follow if the actual value of the land as farmland increases? What if the land is not currently valued at its highest and best use? For example, land currently valued as pasture land is situated on class I or II soil, and is thus more valuable under cultivation.

62 Cal. Gov't Code § 51283. The cancellation provisions appear to be limited to cases where due to changed circumstances it is no longer desirable to maintain the preserve. Cal. Gov't Code § 51280. Any other cancellation would seem to be foreclosed by the provision for state enforcement of the contract by injunction or specific performance. Cal. Gov't Code § 51252.

63 Cal. Rev. & Tax. Code § 402.6, Cal. Stats. 1965, ch. 2012, § 2, at 4543 (repealed 1968). The assessor is required to value all property in agricultural preserves at its restricted value, when there is no reasonable probability of removal or modification of the restriction within the near future.
period and not limited to owners of prime agricultural land.\(^{64}\) If these agreements were to be held “enforceable use restrictions,” and the assessor was required to lower assessments on property subject to agreement restrictions, this would provide a loophole for speculators who desire a 5-year tax break while property is “ripening” from farmland to marketable subdivision land.

**Knox-Petris Bill—A.B. 80**

In 1966, Assembly Bill 80\(^{65}\) created a rebuttable presumption that enforceable use restrictions (such as zoning, and “any recorded contractual provisions”) will not be modified in the predictable future, “and they will substantially equate the value of the land to the value attributable to the legally permissible use or uses.”\(^{66}\) The assessor is directed to ignore sales of lands not similarly restricted in assessing lands subject to use restriction where the presumption is not rebutted. The effect of A.B. 80 is to force the assessor to prove that the use restriction will be removed or is highly likely to be removed before he can use market value as the basis for assessment.\(^{67}\) Agreements under the Land Conservation Act may fall within the presumption and thus the loophole left open by that act was not closed by A.B. 80.

**Proposition 3—Adding Article 28 to the California Constitution**

Before the impact of the Land Conservation Act could be felt, and immediately after A.B. 80 became effective, the conservationists and the farmers joined in backing another proposed constitutional amendment.\(^{68}\) The arguments against this amendment were identical to those offered against Proposition 4 in 1962. However, this time the

\(^{64}\) Cal. Gov't Code §§ 5155-56. Agreements are to be recorded in the same manner as contracts.

\(^{65}\) Cal. Stats. 1966, ch. 147, § 34.1 (1st Ex. Sess.).

\(^{66}\) Cal. Rev. & Tax. Code § 402.1. Grounds for rebutting the presumption include: (1) past history of like use restrictions; and (2) similarity of sales prices of restricted and unrestricted land. An additional presumption is created by Cal. Rev. & Tax. Code § 1630, providing that a written statement by the local governing body of its present intention to refrain from removing or modifying the restriction creates a presumption of nonremoval. Such a statement may be presented to the county board of equalization as evidence that a restriction exists and that it should be considered in assessing the property.

\(^{67}\) Cal. Rev. & Tax. Code § 402.1. The possibility that a restriction may expire at a time certain, shall not be conclusive evidence of the future removal or modification of the restriction unless there is no opportunity or likelihood of the continuance or renewal of the restriction. At the same time section 402.1 was added, the legislature specifically repealed Cal. Rev. & Tax. Code §§ 402.5-6. Cal. Stats. 1966, ch. 147, § 34.2 (1st Ex. Sess.).

\(^{68}\) Senate Constitutional Amendment No. 4, which appeared on the November 1966 general election ballot as proposition 3 was a proposal to add art. XXVIII to the Cal. Const.
arguments in favor were phrased in terms of conservationist language, "save California's open spaces, protect recreation, scenic beauty, natural resources, and crops or trees." In these terms proposition 3 was approved in the general election November 8, 1966, and a new article 28 was added to the California Constitution. Section 1 of article 28 states that it is in the best interest of the state to preserve open space lands, and that assessment practices must be designed to accomplish this end. Section 2 authorizes the legislature to: (1) define "open space lands," (2) specify enforceable use restrictions for recreation, enjoyment of scenic beauty, use of natural resources, or production of food or fibre, (3) provide criteria to determine when land is subject to such specified use restrictions, and (4) define the measure of value consistent with such use restrictions. Once the legislature has acted the assessor must consider no factors other than those specified by the legislature.

Article 28 offers the prospect of tax reduction to a wide variety of property owners. It will serve as a focus for the attempts of farmers to get tax relief, and the conservationists' efforts to save open spaces. It will also serve as a battleground for lobbyists competing for special favors. It is possible to view the implementation of proposition 3 as a funnel into which are poured all the ingredients of a comprehensive open space plan (i.e. greenbelt zoning, section 402.1, the Land Conservation Act) and out of which may come a rational plan for conservation of open space lands without tax favoritism to speculators or other private interests.

Alternative Means of Implementation

One method of implementing article 28 would be through the use

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69 In 1962, the arguments offered for proposition 4 strongly emphasized agricultural objectives: e.g., "keep food costs down, help California's number one industry—agriculture—serve California more effectively." In 1966 a more vague and comprehensive authority was given to the legislature in the name of conservation. The arguments for proposition 3 use the words "crops and trees" rather than the constitutional words "food and fibre." The argument for proposition 3 also states that the amendment specifically requires the legislature to protect against speculation, yet such a requirement is not found in the wording of the amendment. Both proposition 4 (1962) and proposition 3 (1966) passed the legislature by substantial majorities. In 1962 the vote in the Assembly was 73-5. In 1966 the Senate voted 58-7 in favor of the amendment. See California Secretary of State, Proposed Amendments to the Constitution (1962).

70 A.C.R. 26 (1987) (Knox). This resolution allocated $35,000 for a new Joint Legislative Committee on Open Space Land to study implementation of proposition 3. The resolution has passed the Assembly, but was amended in the Senate and must go to a joint conference committee before final passage. The committee will hold hearings and report to the legislature. This resolution superseded the less satisfactory proposals embodied in A.B. 346, S.B. 213, and A.B. 1724 (1967).
of a general directive ordering the assessor to presume that the application of land use control is permanent. While the directive may be useful in states which have as yet not amended their constitutions, it would be too unrealistic to be useful in California.

A second method of implementation of the constitutional amendment would involve preferential assessment combined with modification of existing use restrictions. A primary duty of the legislature must be to establish some priorities within the vast group of land uses under the open space category.

**Open Space Categories**

The recently released Eckbo Report has categorized open spaces in California with all relevant data on computer tapes in the following categories: (1) open space for managed resource production, (2) open space for preservation of natural and human resources, (3) open space for health, welfare and well being, (4) open space

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72 Reliance on the presumption as a mandate would raise other problems. How much evidence will be necessary to rebut it? Under the California Evidence Code presumptions must be classified as either Thayer type (i.e. affecting the burden of producing evidence (sections 603-04) or Morgan type (i.e. affecting the burden of proof (sections 605-06)) presumptions. See Comment, *The California Evidence Code: Presumptions*, 53 CALIF. L. REV. 1439 (1965). If the presumption is a Thayer presumption, the introduction of any evidence rebuts it. If the presumption is of the Morgan type, it must be overcome by at least a preponderance of evidence. Since Morgan type presumptions are based on public policy and the last paragraph of CAL. REV. & TAX. CODE § 402.1 seems to rest on public policy, it would seem safe to classify this presumption as one affecting the burden of proof. However, a further problem must be overcome. A Morgan type presumption must be based on a "rational connection" between the fact to be proved and the ultimate fact presumed. Tot v. United States, 319 U.S. 463 (1943). It is arguable that there is no rational connection between the present intention of the local board of supervisors and the presumed permanency of the restriction.

73 Eckbo Report 32-35. *See also* UNIV. OF CALIF. EXTENSION, supra note 3, at 5-6. Managed resource production includes: (1) lands for forestry; (2) lands for agricultural use: highly fertile lands (classes I & II?), lands for specialty crops (artichokes, grapes), and floriculture; (3) lands for mineral production: unusual or short supply minerals, local consumption minerals (sand, gravel); (4) lands for animal products: meat, wool, hides; (5) lands for water supply: ground recharge areas, watershed areas, reservoir sites, energy production; (6) water areas for commercial and recreational fish and marine life production: spawning areas, tidal areas.

74 Eckbo Report 32: (1) Water, tideland and marsh land areas for fish and wildlife habitats; (2) forests and woods for wildlife refuges; (3) geological features of note: cliffs, headlands, landslide areas, earthquake faults and zones, beaches and dunes; (4) historic and cultural sites: missions, Indian settlements, old trails and roads.

75 Id.: (1) land to protect the quality of ground water; (2) open land for disposal (sewage, garbage); (3) open areas to improve airshed quality (anti-smog); (4) areas for recreation: neighborhood parks, community parks,
for public safety, and open space for corridors, and open space for urban expansion. Difficult choices must be made in arriving at a clearly articulated set of legislative priorities in preservation of open spaces. Is it more important to conserve prime agricultural land, our future water supply, or to prevent building on hazardous soil as in Portuguese Bend or below dams which straddle faults as in Baldwin Hills?

Forms of Use Restriction

Once the legislature has clearly defined the goals of open space conservation and established priorities, it must determine what restrictions to place on the use of open lands. Some states go further and require that land restricted to a particular use must actually be put to that use. However, it would seem that if the use restrictions were enforceable it should not matter if the land is actually used for the restricted purpose as long as it remains open.

A wide variety of use restrictions are available ranging from strong control to weak or nonexistent control. The strongest forms

Id.: (1) Flood control reservoirs, flood plains, drainage channels and areas below dams; (2) unstable soil areas: slide areas, erosion areas, fault areas, areas too steep for intensive development; (3) airport flight path zones; (4) fire zones.

Id.: (1) Power transmission lines ways; (2) canals, conduit and aqueduct ways, transportation and transit ways.

Id. Areas for commerce, industry, housing and public service facilities.

It may well be argued that top priority should be given to preventing suburban development on hazardous soils. It seems clear that the loss of homes resulting from the slipping of large areas of soil into the sea at Portuguese Bend near the Los Angeles suburb of Palos Verdes could easily have been avoided in light of the known subsurface conditions. Thus, stratified clay sloping toward a cliff would not be suitable for subdivision development. A similar situation which involved loss of life as well as property was the Baldwin Hills flood. Again, soil conditions were ignored and a dam was constructed across a fault line. The gradual slippage created fractures in the lower cement portions of the dam and it eventually failed. These are serious problems, and would seem to require more direct regulation than is possible under any form of tax inducement to open space conservation such as is envisioned under article 28. The proper function of priorities would be to set one interest group against the other and thus foster complete and thorough discussion from all points of view.


E.g., statewide zoning by a state agency, local zoning backed by state condemnation if removed or modified, local zoning by the local government, private contracts, subdivision regulation, official mapping.
of use restriction would be provided by the Wisconsin practice of threatening state condemnation if the required zoning is changed, or the Hawaiian system of statewide zoning districts. The use of private contractual agreements enforceable by state suit for injunction or specific performance provides a weaker and more flexible type of use restriction. Different types of use restrictions may be devised to control different types of open space lands.

Definition of Open Space

In California the new article 28 will constitutionally require assessment on the basis of use value rather than market value for all lands designated as “open space lands.” This provision goes well beyond the preferential assessment statutes in other states which use the concept of agricultural use. The experience of other states with the definition of “agricultural purposes,” “actively devoted to farm or agricultural use,” or “bona fide farmer” will only be of partial help in defining “open space lands.”

Enumeration

Some state legislatures have attempted a partial enumeration of the types of activities included within the category of land devoted to agricultural use. Since the definition of agricultural use would on

82 Address by Professor Jake Beuscher, California Open Space Conference, Davis, April 14, 1967.
83 Hawaii has zoned all property into six use groups: (1) single family and two family residences; (2) three or more family residences, apartments, hotels and resorts; (3) commercial; (4) industrial; (5) agricultural, and (6) conservation. HAWAII REV. LAWS § 98H-2 (Supp. 1963).
84 States which have adopted some form of preferential assessment include: Arkansas, Connecticut, Florida, Hawaii, Indiana, Iowa, Maryland, Minnesota, Nevada, New Jersey, Oregon and Wisconsin. Such legislation has been proposed in other states: Illinois, Massachusetts, Michigan, Virginia, and Washington. For a helpful table of statutory citations see Hagman, supra note 71, at 658-59. See also Geyer; COUNCIL OF STATE GOVERNMENTS.
85 FLA. STAT. § 193.11 (1965).
86 MD. ANN. CODE art. 81, § 19(b) (1965).
87 Id.
88 Florida: “For the purposes of this section, ‘agricultural lands’ shall include horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bee and all forms of farm products and farm production.” FLA. STAT. § 193.201 (4) (1965). P. HOUSE, STATE ACTION RELATING TO ASSESSMENT OF FARMLAND ON THE RURAL URBAN FRINGE (U.S. Dep’t of Agriculture ERS-13, 1961). New Jersey: The New Jersey Constitution gives preferential treatment to lands devoted to agricultural or horticultural use. N.J. CONST. art. VIII § 1, para. 1(b). “Agricultural use” includes: forages and sod crops; grains and feed crops; dairy animals and dairy products; poultry and poultry products; livestock, including beef cattle, sheep, swine, horses, ponies, mules or goats, including the breeding and grazing of any or all of such animals; bees and apiary products; fur animals; trees and forest products. REAL PROPERTY ASSESSMENT
its face appear to be broader than the terms "food and fibre" used in article 28 it would be incumbent on the legislature to attempt at least to enumerate the types of activities not included in the definition of "food and fibre," and "natural resources." Consideration should be given to the fact that the argument for proposition 3 did not use the terms food and fibre but instead substituted the more clearly defined terms "crops and trees." Consideration should also be given to the arguments against both propositions. Troublesome problem areas would include: (1) the 1 to 5 acre suburban home with fruit trees and perhaps a few horses and chickens—does it produce food and fibre? (2) oil and mineral resources underlying open space lands—are they natural resources? (3) a grain warehouse, a hop dryer, a milking plant, greenhouses—are they "compatible uses" within the meaning of the Land Conservation Act? If so would they also be included under the language "food and fibre"? (4) privately owned recreational facilities (such as the over 30 camps and picnic areas owned by Pacific Gas and Electric Company from the Pit River near Mount Shasta to the Mokelumne River below Lake Tahoe)—are they within the natural resources, or recreation catagories? What other P.G.&E. facilities are included with natural resources?

**Objective Criteria**

Some states have attempted to limit the category of land devoted to agricultural use by reference to objective tests. For example: (1) prior use of the land, (2) minimum acreage, and (3) char-

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89 California Sec. of State, Proposed Constitutional Amendments 6 (1966).

90 The inclusion of property owned by oil interests in the definition of open spaces does not constitute tax favoritism if the land is permanently restricted in use to prevent extraction of minerals. If the land were in fact used for extraction of oil and this use was classified as conservation of natural resources (which is doubtful given the conservationist flavor of the amendment) it would be assessed at its use value for oil extraction and probably assessed on a capitalization of income basis.

91 Fla. Stat. § 193.11(3) (1965). Land must have been used for agricultural purposes prior to the effective date of the statute. However, Fla. Stat. § 193.201(1) (1965) provides that land used exclusively for agricultural purposes for 5 prior years may be zoned as such. N.J. Const. art. VIII § 1, para. 1(b) land must have been devoted to agricultural or horticultural purposes for at least 2 successive years. Assembly Constitutional Amendment 4, supra note 51, would have required use exclusively for agricultural purposes for 2 successive years prior to the lien date on which preferential treatment is sought.

92 N.J. Regs., supra note 88, at 6 (at least 5 acres). See N.J. Regs. 16:12-
acteristics of present land use. It might be desirable for the legislature to attempt to arrive at some objective criteria for determining when a particular parcel of land qualifies as open space land. The use of enumeration and objective criteria should result in a definition of open spaces which is superior to previous definitions in clarity and precision.

10.160(a). The minimum acreage provision would seem appropriate to limit the ability of suburban "hobby" farmers and estate owners to receive windfall reduction of taxes. This offers one approach to the problem of open space areas within urban areas produced by scatteration. However, if the future development of the land is restricted by enforceable use controls it would seem unnecessary.

N.J. REG., supra note 88, at 10. N.J. Reg. 16:12-10.360. Devoted to agricultural or horticultural use means land: (1) on which crops are grown for market, (2) crops are grown as a part of a regular crop rotation program, (3) for on-farm use (not including land on which products are grown for on-farm personal consumption), (4) on which are maintained, pastured or ranged farm animals whose products or the animals themselves are produced for market, (5) which qualifies under the Soil Bank Program, and (6) which is devoted to woodland appurtenant to land in agricultural or horticultural use, and reasonably required for the purposes of maintaining the land in such use.

In Maryland, an extensive list of objective criteria to evaluate when land is actively devoted to agricultural use has been devised by the State Department of Assessment and Taxation. See P. HOUSE, PREFERENTIAL ASSESSMENT OF FARMLAND IN THE RURAL-URBAN FRINGE OF MARYLAND 9 (U.S. Dep't of Agriculture ERS-8, June, 1961). Such criteria include: (1) zoning applicable to the land, (2) applications for and grants of zoning reclassification in the area, (3) general character of the neighborhood, (4) use of adjacent properties, (5) proximity to metropolitan areas and services, (6) subdivision plans for property or adjacent property, (7) present and past use of the land, (8) business activity of the owner on and off the property, (9) principal domicile of the owner and family, (10) date of acquisition, (11) purchase price, (12) whether farming operation is conducted by the owner or by another for the owner, (13) if another, the provisions of the arrangement—term, area let, consideration and termination provisions, (14) farming experience of the owner, (15) participation in governmental or private programs or activities, (16) productivity of the land, (17) acreage of crop land, (18) acreage of other land—wooded, idle, (19) number of livestock or poultry (by type), (20) acreage of each crop planted, (21) amount of fertilizer and lime used, (22) amount of last harvest of each crop, (23) gross sales last year from crops, livestock and livestock products, (24) amount of feed purchased, (25) months of hired labor, (26) uses other than farming operation of land, (27) inventory of buildings, (28) inventory of machinery. This extensive list of criteria without any indication of the weight to be given to any single factor was apparently too much for the Maryland courts. In Supervisor of Assessment v. Alsop, 232 Md. 188, 192 A.2d 484 (1965), the court held that the controlling factors must be whether the land is actively devoted to farm or agricultural use.

This would require more than a simple listing of criteria. It would require some method of determining the weight to be given to different criteria.

CAL. GOV'T CODE § 6954.
Who Determines Qualification?

A legislative decision should be made as to which administrative body or official will determine when a parcel of land qualifies within the meaning of article 28. In some states that decision is left ultimately to the assessor, in others the decision is made by the planning department, or the municipal government. As a practical matter the ultimate decision must always rest with the assessor subject to appeal to the courts. The important question is who will establish the guidelines to be followed by the assessor. It is submitted that the best answer to this question is that the legislature should make use of recommendations from the State Office of Planning, and the State Board of Equalization to arrive at fairly precise statutory standards.

Measure of Use Value

After the legislature has defined the limits of the term "open space land," attached priorities to competing land conservation goals, and established criteria for determination of when property qualifies for use restriction, it must then define the measure of value consistent with such use restrictions. In other states this problem involved the determination of the value of land exclusively devoted to farming. The "value" of land under a restricted use may or may not correspond to the market value of the property. In areas subject to urban pressure, use value will be considerably lower than market value.

One approach to the use value would require the assessor to value property at the price it would bring if sold in a purely agricultural market. Since such a market is not found in urban areas, this approach involves creation of a hypothetical market. Within this hypothetical market there might also be problems of highest and best use, i.e. property devoted to pastures for grazing breeding cattle might also be prime agricultural land. This approach would apply the traditional tax model to a hypothetical market and would give great discretion to the assessor. However, article 28 provides that the assessor shall consider no factors other than those specified by the legislature.

A better approach to determination of the value of restricted

[96 MD. ANN. CODE art. 81 § 19(b) (1960); N.J. STAT. ANN. § 54:4-23 (Supp. 1966).
98 FLA. STAT. § 193.201(3) (1965).
99 The problem in California will be more complex, since the definition of open spaces includes property which is nonincome producing.
100 W. WALKER & W. GARDNER, ASSESSING FARMLAND UNDER MARYLAND'S USE VALUE ASSESSMENT LAW 7 (1964). See also W. WALKER, IMPROVING FARMLAND TAX ASSESSMENTS IN MARYLAND UNDER NON FARM USE PRESSURES (1965).]
open space lands would involve use of three factors: (1) sales of similarly restricted property which is "comparable," (2) capitalization of income, and (3) use of soil capability measures to determine productive capacity.

**Deferral—Recapture Provisions**

Valuation at lower use value will be very attractive for all property owners who are able to qualify. However, many owners may not wish to give up their right to develop their property permanently. To the extent use restrictions are less than permanent, problems will arise on cancellation of preferential assessment and subsequent development of open space lands. The sanction used to deter cancellation may differ if cancellation is procured by the local government in the public interest, or on the other hand by the private owner for speculative profit.

If the legislature should decide that cancellations by private owners should be discouraged rather than prohibited by use restriction, it may consider use of a tax recapture or deferral provision. The justification for this deferral system may be that it seems equitable to require a quid pro quo. In exchange for preferential assessment, the owner of farmland ought to be required to repay the community the abated taxes. Another justification might be that deferral will discourage speculative conversion while allowing the community to obtain revenue for the services necessitated by suburbanization.

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101 This formula is most appropriate for valuation of income producing lands devoted to food and fibre production or natural resources and recreation, rather than nonincome producing recreation, scenic beauty and natural resources.

102 The tests for comparability used in condemnation cases (e.g. recency of sale and size of property) could be used in the determination of comparability under proposition 3.

103 Capitalization of farm income might be based on a level of income commensurate with average good farm management. There would be difficulties in determining the income to be capitalized under this approach where the farm is run below or above the arbitrary standard selected for average good management. However, this standard would seem better than the use of actual income which would put a premium on bad management. However, the courts may require that the assessor use actual income to avoid the uncertainty of an arbitrary standard. De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955). Additional problems will be encountered in attempting to determine the proper rate of capitalization to be used.

104 U.S. Soil Conservation maps may be used, but physical soil characteristics are not sufficient. Value must also include location of land in relation to climate, rainfall, and differences in slope and drainage.

105 Comment, 55 Calif. L. Rev. 273, 277 n.22 (1967).

106 Assembly Constitutional Amendment 4, supra note 51, contained a provision for a 7 year recapture of the difference between preferential taxes and taxes at the market rate.

107 Stocker, supra note 23, at 469.
zation when and if conversion occurs.\textsuperscript{108}

One objection to a deferral system is that it may be expensive to administer since the assessor would be required to maintain double records reflecting both use value and market value.\textsuperscript{109} This criticism is directed against the type of deferral which recaptures the difference between the market value taxes normally due and the amount deferred under preferential (use value) assessment.\textsuperscript{110} Some states have avoided this problem by providing for deferral of a percentage of the market value.\textsuperscript{111}

Use of various deferral combinations and options might be made to stimulate owners' interest in participation in voluntary plans such as provided by the Land Conservation Act, or to differentiate between open space uses according to legislatively established priorities. Variation in percentage deferrals might be combined with various recapture periods.\textsuperscript{112} Deferral and recapture of taxes provide a highly useful and flexible means to regulate private decisions. The recapture provisions could be strengthened in direct proportion to the weakening of use restrictions. Deferral variations might also be used to implement differing priorities where use restriction is weak.

\textbf{Recommended Legislation}

Article 28 gives the legislature authority to greatly advance the goals of open space conservation. It also gives the legislature power to grant tax reductions to numerous private landowning classes. The legislature must first define the goals to be accomplished by article

\textsuperscript{108} P. House, A Review of Legislative Proposals Relating to the Taxation of Farmland in the Rural-Urban Fringe 3, May 22, 1961 (a paper presented before the Agricultural Advisory Committee of Fairfax County, Virginia).

\textsuperscript{109} This argument is overdrawn. If assessors do not use market value as a basis in determining use value, they may simply determine market value at the time of conversion and project backwards over the requisite number of years. This approach would present problems in terms of retroactive equalization of past assessments but these problems are not insurmountable.

\textsuperscript{110} Oregon, Hawaii, Nevada, and New Jersey. Nevada's preferential assessment statute was declared unconstitutional in Boyne v. State, 390 P.2d 225 (1964) on the ground that it violated the state's uniformity requirement.\textsuperscript{111} S.\textsuperscript{112} SIEGEL, THE LAW OF OPEN SPACE 46 (1960). See also House, supra note 88, at 10-11. A percentage deferral scheme was submitted to the Massachusetts legislature but was not enacted. Mass. H.R. Bill No. 850 (1961). The Massachusetts bill would have rebated 90% of property taxes for the first 3 years, 70% for the next 7, and 50% after 10 years. An alternative to the use of deferral to discourage conversion would be use of a supplementary capital gains or transfer tax which would eliminate the favorable income tax treatment given land sales by the federal income tax laws. Comment, 55 CALIF. L. REV. 856, 888 (1967).

\textsuperscript{112} California, Assembly Constitutional Amendment 4, supra note 51 (7 years); Oregon, ORE. REV. STAT. § 308.395(1) (1963) (5 years); Hawaii, HAW. REV. LAWS § 128-9.2(c), (d) (Supp. 1963) (5 years); New Jersey, N.J. STAT. ANN. § 54:4-23.8 (Supp. 1966) (2 years).
28, and then establish priorities between different types of open space lands.\textsuperscript{113}

The legislature is authorized to establish enforceable use restrictions. If the land involved is given a high priority rating as open space, strong use regulations might include locally adopted zoning with the threat that any modification of such zoning would result in automatic condemnation by the state. A less extreme method would involve a 20-year contract between the owner, county, and state to maintain land in a particular use. If the contract is breached during the first 10 years, the county could bring an action for specific performance or injunction against development; if this suit failed the state could be given an option to condemn. If the breach occurred after 10 years, the owner would be subject to a 10-year deferral recapture at X percent of market value. A more expensive and permanent form of use restriction would be the purchase or condemnation of development rights by the state.

The constitution now gives the legislature the power to clearly define the meaning of such vague terms as “natural resources,” “food and fibre,” “recreation,” and “scenic beauty.” The legislature would be remiss in its duty both to the people of the state who voted for proposition 3, and the assessors throughout the state if it failed to establish clear guidelines governing when property would be included within the meaning of “open space lands.” Such a definition should be undertaken on two levels. First, a descriptive list of land uses included and excluded within the meaning of “natural resources,” and “food and fibre.”\textsuperscript{114} In addition, objective factors such as productivity, and acreage devoted to crops, and farming experience of the owner, might be considered in close cases to determine if particular land is within the meaning of the statute.

Once the legislature has clearly established what land qualifies as “open space lands,” it must still aid the assessor in arriving at a valuation consistent with the use restriction. In the case of agricultural land, value may be temporarily based on soil productivity and

\textsuperscript{113} Top priorities might be given to lands for: water supply, prime agricultural lands, and lands for public safety. Middle priorities might be given to lands for: animal products, wildlife habitats, historic and cultural sites, and scenic areas. Lower priorities might be given to lands for: airsheds, corridors to shape development, and open space for future development. A primary conflict must be reconciled between planning for future expansion to prevent leapfrogging, and preserving prime agricultural land. The answer may be to divert urban development into clusters on the valley floors and more extensive development of low foothills surrounding prime agricultural valleys.

\textsuperscript{114} Such enumeration could be either a specific attempt to limit by definitions purporting to be comprehensive, or phrased in terms of “including but not limited to . . . .”
capitalization of income, until there are sufficient sales of restricted lands. Other nonincome producing open space uses will be more difficult to value until there have been sufficient sales of restricted land to allow use of comparable sales as a measure of valuation.

A flexible means of providing incentives commensurate with the established priorities would be a sliding scale of percentage deferrals. The variables in such a scale may include both the amount of taxes deferred and the recapture period. Thus, the highest priority land uses would receive the highest deferral percentage and the shortest recapture period. These variables would then shift progressively as one moves down the scale of land use priorities. Land held for future development should be subject to a high percentage deferral to keep it off the market, but should also be subject to a substantial recapture upon development.