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Exploring the Role of Taxation In The Land Use Planning Process

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Exploring the Role of Taxation In The Land Use Planning Process

BARRY A. CURRIER*

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INTRODUCTION

There has been a sudden and dramatic shift in the attitude of many local and some state governments in the last several years. Promotional campaigns to attract people and business have given way to studies designed to justify the feelings of local citizens that new development and growth harm rather than benefit their community. Significant investments of energy and money are being made in programs to direct, control, or block growth.¹

We are perhaps too close to the events to fully understand this phenomenon. No doubt sometimes the well-to-do are just trying to preserve and keep safe their "islands" from the rest of us. The "new mood" may reflect the need in our fast-paced society to preserve the natural and cultural characteristics that allow a satisfactory and acceptable way of life.² But the dominant reason for this attitudinal turnabout is that state and local governments, and those who elect them, have come to believe that growth costs more and creates more problems than it is worth.³ How much of this belief is based on myth and how much on

¹ The literature concerning growth control or growth management is rapidly expanding. See, e.g., E. FINKLER & D. PETERSON, *NONGROWTH PLANNING STRATEGIES, THE DEVELOPING POWER OF TOWNS, CITIES AND REGIONS* (1974); TASK FORCE ON LAND USE AND URBAN GROWTH, ROCKEFELLER BROS. FUND, *THE USE OF LAND: A CITIZENS GUIDE TO URBAN GROWTH* (1973) [hereinafter cited as *CITIZENS GUIDE*]; DAEDALUS, *THE NO-GROWTH SOCIETY* (M. Olson & H. Landsberg eds. 1974); Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA. ST. L. REV. 234 (1973); Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA LAW. 1 (1974); Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis-St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009 (1974); Cahn, *Where Do We Grow from Here?*, ARCHITECTURAL FORUM, Dec. 1973 at 22; Cameron, *Growth Is a Fighting Word in Colorado's Mountain Wonderland*, FORTUNE, Oct. 1973, at 148; Harris, *Californians Are Saying "No" to Growth in a Spreading Revolt That Makes Strange Allies*, CAL. JOURNAL, July 1973, at 224; Morgan, *Running Out of Space*, HARPERS, Sept. 1973, at 59.

² *CITIZENS GUIDE*, at 34-36; D. Peterson, *Growth Control: An Emerging National Phenomenon* at 1, Aug. 1973 (paper presented at the Third Pacific Regional Science Conference, Honolulu, Hawaii); Reilly, *New Directions in Federal Land Use Legislation*, URBAN LAW ANNUAL 29, 56 (1973); Seelig & Seelig, *Dissecting the Opposition to Growth*, PLANNING, June 3, 1973, at 15.

³ In *Keeping Oregon Green*, THE CENTER MAGAZINE, Jan./Feb. 1974, at 78, Governor Tom McCall of Oregon reported the "value" of one hundred new employees to a community as determined by a chamber of commerce study. The gains to the community were \$590,000 more personal income per year, \$270,000 more bank deposits, 107 more cars registered, 174 more workers employed, four new retail establishments, and \$360,000 more retail sales. Weighed against these factors, however, were 51 additional school children, 296 more people, the need for three new residential subdivisions, increased requirements on the social services, police and fire departments of the town, and an additional long-term debt of six million dollars. Governor McCall concluded: "It would be a long time, and perhaps never, before the community could pay the cost of attracting one hundred new employees." See Cahn, *supra* note 1; *CITIZENS GUIDE* at 155-59; Harris, *supra* note 1, at 225; Stanford Environmental Law Society, *Do New Residential Developments Pay Their Own Way? A*

fact is now an unanswered question. However, the romance with growth does appear to be over for the present.

The disenchantment with growth is not going to disappear by itself. If effort is directed at conceiving new ways to discourage development, if governments continue to give in to the anti-growth mentality, the situation will undoubtedly worsen for a considerable period of time. No matter how many no-growth or slow-growth schemes are legitimized by courts,⁴ clearly such schemes are not solutions to the problems presented by our increasing population and the continuing migration to urban areas.⁵ The commitment of our resources to coping with the problems of growth is a much more positive and hopeful endeavor.

Arguably, planners and others who manage a community's land resources are unable to accommodate growth satisfactorily because they have not taken into consideration all of the factors that influence the land use process.⁶ One factor that is often overlooked is the role taxa-

Case Study in Half Moon Bay, California, in STANFORD ENVIRONMENTAL LAW SOCIETY, SAN JOSE: SPRAWLING CITY, Appendix A (1971). *But see* R.L. MACE & W.J. WICKER, DO SINGLE-FAMILY HOMES PAY THEIR OWN WAY (ULI Res. Mono. no. 15) (1968).

⁴ Ordinances explicitly designed to control a community's growth rate have received a mixed reception in the courts. The New York Court of Appeals sustained the town of Ramapo's ordinance which was designed to slow and limit growth through determining the timing of permitted development. *Golden v. Town of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972). Much of the commentary on the Ramapo plan is listed in Deutsch, *supra* note 1, at 7 n.33. More recently, a federal district court invalidated the plan of Petaluma, California, to deal with its growth problem by limiting the number of housing units that could be started each year. The court found that Petaluma's scheme violated the right to travel. *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975). A performance standard ordinance related to schools adopted by the City of San Jose, California, has recently been sustained by the California Supreme Court. *Builders Ass'n of Santa Clara-Santa Cruz Counties v. City of San Jose*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974). An analogous ordinance of the City of Livermore, which was struck down at trial and by a California court of appeal, *Associated Home Builders of Greater East Bay v. City of Livermore*, 116 Cal. Rptr. 326 (Cal. App. 1974), is on appeal to the California Supreme Court. For a thorough analysis of the ordinances and the political and legal issues involved in them, see Deutsch, *supra* note 1.

⁵ Judge Coffin, in a well-reasoned opinion sustaining a six-acre minimum lot zone as a temporary measure to allow for more substantial planning efforts, recognized this proposition: "Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channelled by the happenstance of what town gets its veto in first." *Steel Hill Development, Inc. v. Town of Sanborton*, 469 F.2d 956, 962 (1st Cir. 1972). Other courts in exclusionary zoning cases have found that communities may not avoid, and indeed may be obligated to plan for, growth. *See, e.g., Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965); *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). *See generally* Bingham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971).

⁶ For insights into some of the many planning approaches to problems of growth, *see, e.g.,* F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1972);

tion policy and practice play in determining the pattern of the landscape.⁷ Perhaps this is because local governments have been charged with the responsibility for land use planning but have very little power or discretion in the area of taxation.⁸ Furthermore, no coordination or exchange of goals or information is required between a community's planners and those involved in the budgeting and assessing process.⁹ Thus, experimentation and debate in land use planning have focused on zoning and other regulatory powers over which local governments do have control.

Economists have demonstrated, however, that taxes do affect the timing, intensity, and nature of land use.¹⁰ Despite restrictions on private property rights, for the most part our system of government leaves to the property owner the decision as to how and when land will be used. If a community's tax policy and practice lead an owner to conclude that it would be unwise or unprofitable to develop his land in accordance with the community plan, he will not choose to so develop it. Land use plans are not self-implementing—the cooperation of land owners subject to the plan is essential. If a local government's tax structure discourages this cooperation, the goals of the plan may never be achieved.

This article focuses on the part the major taxes used by state and local government—those on property, sales and income—play in the shaping of our environment. This is not to say that tax-base sharing,¹¹

FINKLER & PETERSON, *supra* note 1; Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives*, 49 DENVER L.J. 1 (1972).

⁷ Several writers have recognized and have started to explore the relationship between taxes and land use. See, e.g., W. ATTOE, T. HELLER & J. MORGAN, *TAXATION AND LAND USE* (1974); Bab, *Taxation and Land Use Planning*, 10 WILLIAMETTE L.J. 439 (1974) [hereinafter cited as Bab]; Delogu, *The Taxing Power as a Land Use Control Device*, 45 DENVER L.J. 279 (1968); [hereinafter cited as Delogu]; Gaffney, *Tax Reform to Release Land*, in *MODERNIZING URBAN LAND POLICY* 115 (M. Clawson ed. 1973) [hereinafter cited as Gaffney, *Tax Reform*]; Pickford & Shannon, *Harnessing Property Taxes and Land-Use Planning*, *PLANNING*, Dec. 1972, at 305; Zimmerman, *Tax Planning for Land Use Control*, 5 URB. LAW. 639 (1974) [hereinafter cited as Zimmerman]. See also, D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 345-67 (1971); D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* 749-819 (1973); G. LEFEOE, *LAND DEVELOPMENT LAW* 1125-58 (2d ed. 1974).

⁸ See text accompanying notes 36-54 *infra*.

⁹ See Delogu, *supra* note 7, at 280. The movement toward more state and federal involvement in the land use planning process is unlikely to alter this situation. Proposed and adopted state planning legislation makes little reference to taxation and does not call for cooperation and exchange of information among the relevant parties.

¹⁰ For a discussion of how taxes have been used to promote planning objectives in other countries, see Lefcoe, *Tax and Urban Design Policy*, *REAL ESTATE L.J.* (forthcoming).

¹¹ See Lyall, *Tax-Base-Sharing: A Fiscal Aid Towards More Rational Land Use Planning*, 41 J. OF THE AM. INST. OF PLANNERS 90 (1975). Tax base-sharing allows participating local governments to share in property tax revenues derived from increases in the assessed valuation of certain real property of all the governmental units in the

construction taxes,¹² tax-increment financing,¹³ and numerous other inventive and specialized tax programs are not important or significant. It may be, however, that some of these taxes would not be needed if the basic taxes on which local governments rely could be coordinated with the land use objectives of a community.¹⁴ So little has been done or said with respect to the impact of these most important taxes on land use planning, that it seems appropriate to begin there and leave other taxes for another time.

Part I of this paper compares taxation with regulation as a means of achieving land use goals. Part II briefly describes the legal framework in which taxation must operate. Part III presents a detailed review of much of the empirical work that relates to the relationship between taxes and land use. Finally, Part IV points out the need for additional work in this area, and offers some ideas based on existing studies about how taxation may be used to influence land use.

I. TAXATION AND THE POLICE POWER AS MEANS OF ACHIEVING LAND USE GOALS

A. *The Legitimacy of Using Taxes as Planning Tools*

It is appropriate at the outset to examine the legitimacy of utilizing taxation to achieve land use goals. One objection that might be leveled against the use of taxes to control land use is that the taxing power exists solely to provide government with a mechanism for financing its activities. Using the power for other purposes, then, constitutes a misuse, if not an abuse, of the power.¹⁵ However, tax laws have policy

program. It is designed to shift local governments' attitude from one of competition for the good tax ratables to a spirit of cooperation that will promote sound land use planning on a metropolitan or regional basis. Schemes of this sort have been sustained in Minnesota and New Jersey. See *Village of Burnsville v. Onischuk*, — Minn. —, 222 N.W.2d 523 (1974), *appeal denied*, 420 U.S. 916 (1975); *Meadowlands Reg. Redev. Agency v. State*, 64 N.J. 35, 304 A.2d 545 (1973).

¹² The construction tax is imposed under the taxing power on all new residential construction in a municipality. The money generated by this tax is earmarked for capital improvement programs. See *Associated Home Builders of Greater East Bay, Inc. v. City of Newark*, 18 Cal. App. 3d 107, 95 Cal. Rptr. 648 (1971). A complete review of the California experience with this type of tax is contained in Ducker, *The Use of Construction Taxes by California Cities*, January 1973 (unpublished seminar paper prepared for Professor Donald Hagman's Land Planning Seminar, UCLA, a copy of which is on file with the author). See also Hammer, Siler, George Associates, *An Economic Analysis of the Development Impact Tax in Oregon*, January, 1974 (a report prepared for the National Association of Home Builders, a copy of which is on file with the author).

¹³ See Hegg, *Tax-Increment Financing of Urban Renewal-Redevelopment Incentive Without Federal Assistance*, 2 REAL ESTATE L.J. 575 (1973).

¹⁴ See Zimmerman, *supra* note 7, at 644.

¹⁵ See *id.* at 641-43 and sources cited therein. *But cf.* *United States v. Kahriger*, 345 U.S. 22 (1953). The converse of the situation may also be true. That is, the police power

objectives beyond merely raising revenue.¹⁶ Even if that were the only legitimate goal of a tax system, choices would still have to be made among a variety of taxes, each of which has the capacity to raise the needed funds. Selecting a tax or group of taxes from among the available taxing alternatives necessitates deciding what to tax (wealth, land, buildings, income, consumption, sales, business licenses, etc.) and at what rates. This choice will unavoidably have policy impacts.

The use of taxes to achieve or complement growth management is also subject to attack for its potential arbitrariness. A tax plan that favors or promotes a particular land use indirectly taxes all other land uses more heavily. This potential inequity leads most states to prescribe that taxes, and particularly the property tax, be levied at a uniform rate, and that all properties of the same class be taxed alike.¹⁷ Because the administration of a tax can create inequities even if the tax itself does not, the manner in which real estate is assessed is subject to considerable regulation, including administrative appeal systems in many states.¹⁸

Thus, two forms of unfairness might result if taxes were used to affect land use goals. On the one hand it might be argued that it is discriminatory to assess, for instance, farm land ripe for development, on its value in farm use, while nearby non-farm land is assessed at its fair market value (increased significantly by the development potential). Alternatively, it could be argued that if the tax law favors farmers, the

may not justify an ordinance that is primarily designed to raise revenue, rather than to effectuate legitimate regulatory purposes. A number of ordinances requiring the payment of a fee analogous to the construction tax discussed in note 11 *supra*, have been struck down as unauthorized taxes and not valid regulations (or fees incident thereto) because the primary purpose of the fee was to raise revenue. *See, e.g., Daniels v. Borough of Point Pleasant*, 23 N.J. 357, 129 A.2d 265 (1957); *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961).

¹⁶ *See, e.g., W. ATTOE, T. HELLER & J. MORGAN, TAXATION AND LAND USE 2* (1974); Gaffney, *Tax Reform*, *supra* note 7; Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352, 353-59 (1970). Professor Surrey argues against the use of tax incentives in the federal tax system as a means of achieving policy objectives in Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Expenditures*, 83 HARV. L. REV. 705 (1970).

¹⁷ *See, e.g., CAL. CONST. art. 13, § 1; KY. CONST. § 171.* Some courts have struck down preferential tax treatment for agricultural land use, *see* the discussion at notes 208-61 *infra*, on the grounds that it violates the uniformity provisions of the state constitution. *Boyne v. State*, 80 Nev. 160, 390 P.2d 225 (1964). Maryland's initial effort to differentially assess farmland through legislation was struck down in *State Tax Comm'n v. Wakefield*, 222 Md. 543, 161 A.2d 676 (1960). However, similar legislation was validated by the Maryland Court of Appeals after a constitutional amendment authorizing such a program had been adopted. *Supervisor v. Alsop*, 232 Md. 188, 192 A.2d 484 (1963). Other courts have determined that these tax relief programs for farm and open space uses do not run afoul of uniformity requirements. *Bensalem Township School Dist. v. County Comm'rs*, 8 Pa. Cmwlth. 411, 303 A.2d 258 (1973); *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963)

¹⁸ *See, e.g., CAL. CONST. art. 13, §§ 16-18.*

favoritism might be compounded by assessors underassessing farms even more than intended under an assessment program designed to give farmers a tax break to preserve land in agricultural uses.

In response to the argument that land use goals should not influence the design of tax systems, it can be said that although the tax system may seem neutral, it actually discriminates against some in its overall impact.¹⁹ Using the same example, farmers might contend that it would be unfair to tax their land at other than its value in farm use because speculators and subdividers have boosted the going rate for neighboring lands based on a belief that such property is within the path of development. Not only does the farmer wish to continue farming, but the insufficient demand for all the land in their area and the large sunk costs in his farming operations would preclude him from realizing the full gain on his land. Yet, he is taxed as if he could easily liquidate his holdings profitably. Also, agricultural users contend that they consume less in the way of public services (fire, police, and schools) than subdivided lands. Therefore, farmers submit that they should be treated differently because they are in fact distinguishable from other land users. Uniformity requirements, it may be argued, have no application when two land uses are essentially different.

Next, consider the effect the official sanctioning of a tax break for farmers might have on assessors. Will assessors be encouraged to increase the tax break by informal practices? Indeed, the opposite may result. Underassessment may have been taking place before the passage of a differential assessment law because of the sympathy assessors felt for hard-pressed farmers.²⁰ Legitimitizing this attitude by legislative tax relief programs, (whether for farmers, home owners, the elderly, or any group which attracts "off the record" sympathy) may actually

¹⁹ Since no one has the same amount and mix of resources as anyone else and the same demands for those resources, it would seem that no tax can be precisely neutral. If the lack of tax neutrality does influence land use decisions, then whether desirable or not and whether intended or not, a tax system will in fact partially determine land development patterns. It would seem to make sense to have this effect be a positive one. Cf. Heller, *The Theory of Property Taxation and Land Use Restrictions*, 1974 Wisc. L. Rev. 751, 754-55. But see Bab, *supra* note 7, at 443-50.

²⁰ Although he says that the assessed values may be climbing toward market values, Professor Hagman reports:

In the past [vacant rural-urban or fringe land] may have enjoyed an illegal preference because of a practice of undervaluing, strong taxpayer resistance accompanied by assessors' sympathy, a recognition of basic policy beliefs that vacant fringe land should be valued lower, and an inability of assessors to make accurate assessments.

Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 Wisc. L. Rev. 628, 636-37.

reduce arbitrariness in the administration of tax laws.²¹ In any event, the answer to improper assessment practices is to clean up those practices.

However arbitrary the current assessment practice may be, there is no evidence that zoning and other land use or environment controls are any less capricious. The corruptibility of the zoning process is often reported.²² Perhaps tax programs could be designed with fewer opportunities for abuse of discretion; it must certainly be the case that few tax systems could be imagined with as many opportunities for abuse as we have suffered in the administration of zoning ordinances.

The central function of taxation will continue to be the raising of the money necessary to run government. A corollary function of taxation might be as a land use planning device. The use of taxes for this purpose is compelling because whatever taxes are imposed will have land use impacts. This is especially true so long as the tax system is not more arbitrary than the current processes through which the development of land is controlled.

B. The Distinct Impacts of Tax and Police Power Measures

Assuming that a state or community has recognized the unavoidable effect taxes will have on land use, and has decided to employ taxes as tools in its growth management efforts, the question that arises is when and how tax measures can be useful. This can be partially answered by examining the general characteristics of taxes and police power regulations.

Assuming that optimal allocation of scarce land resources is a desirable goal, taxation may be preferred to zoning and other land use regulations when it will more efficiently distribute land among various

²¹ A recent study found that innercity housing property is grossly overassessed compared to stable or upwardly transitional neighborhoods in the same metropolitan areas. The administration of the property tax in the cities studied was determined to contribute to urban blight and poor-quality housing. G. PETERSON, A. SOLOMAN, H. MADJID & W. APGAR, *PROPERTY TAXES, HOUSING AND THE CITIES* 52-57 (1973) [hereinafter cited as *PROPERTY TAXES, HOUSING*]. If owners of property in blighted or transitional areas seem like good candidates for the assessor's sympathy, the difference between the favorable assessments on the rural-urban fringe and the harsh assessments in the innercity may be explained in part by the traditionally slow adjustment of assessment levels. This works to the benefit of the person on the fringe of development whose property is rising in value, but works to the detriment of the innercity landowner who needs a reduced assessment.

²² See, e.g., NATIONAL COMMISSION ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 226-27 (1969); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Control*, 40 U. CHI. L. REV. 681, 701-02 (1973) [hereinafter cited as Ellickson] and the newspaper accounts and other commentary cited in the accompanying notes. Ellickson refers to the uncovered abuses as only the tip of the iceberg. *Id.* at 702 n.74. See generally R. BABCOCK, *THE ZONING GAME* (1966).

uses.²³ Basic economic analysis tells us that market transactions will lead to optimal land usage in a world of perfect information where there are no impediments to bargaining among the participants in the market.²⁴ Any government interference in such a situation would only impair the resource allocation process. But land markets do not even approximate this economic model. Transactions and decisions made in any land use market will regularly have spillover effects on others in the same market and may influence other land markets.²⁵ There is no reason in such a situation for the government to avoid interference. The problem is deciding when and how to intervene. If the goal is optimally allocating land resources, a government should intervene whenever its activity will promote and not hinder the flow of land to its best use. That form of intervention should be selected which is the most promotive of optimal land use.²⁶ For our purposes, the most efficient course of action will be that which minimizes the sum of nuisance, prevention, and administrative costs.²⁷

Police power measures, especially zoning, are characteristically all-or-nothing propositions. That is, they either prohibit certain uses altogether, or direct how property must be used, if at all. From an efficiency standpoint the danger is that the regulation may be too restrictive or not restrictive enough. If either extreme occurs, the sum of nuisance, prevention, and administrative costs will not be minimized. For example, an overly severe zoning measure may do a good job at eliminating

²³ This is not to say that social objectives, the distribution of wealth in our society and basic equity concerns, are not appropriate factors to consider in the process of deciding how land resources should be utilized. See notes 272-74 *infra* and text accompanying. Economists often avoid consideration of the equitable effects of a particular program, see Ellickson, *supra* note 22, at 690-91, and propose instead that wealth redistribution or the correction of injustices that may arise from a particular policy choice be accomplished by direct cash transfers. Without arguing whether the only important objective is the optimal allocation of resources, it certainly should be a primary concern of any policy-maker.

²⁴ Ellickson, *supra* note 22, at 683. The attempt here to compare taxes and police power regulations as land use control devices has been substantially influenced by Professor Ellickson's development of criteria for the evaluation of land use control systems and their application to zoning. See *id.* at 683-711.

²⁵ Also referred to as "externalities," spillovers are impacts from an activity on non-participants in the activity which may be either beneficial or harmful to the party affected.

²⁶ Ellickson describes a number of courses of action from which a government can choose ranging from doing nothing except providing a way for a private citizen to enforce a freely negotiated contract against a defaulting party to collective directives to landowners, ordering them to affirmatively act in a way they otherwise would not. Ellickson, *supra* note 22, at 686-87.

²⁷ Nuisance costs are those which depreciate the usefulness and value of land resulting from the nature of the use to which the nuisance-maker has put his or her land. Prevention costs are those expenditures made or opportunity costs borne by affected landowners or the nuisance-maker to reduce the nuisance costs. Administrative costs include those incurred to acquire information, negotiate transactions or agreements and the costs of policing. *Id.* at 688-89.

nuisance-like commercial uses from a residential neighborhood. However, in doing so it may force affected residents to suffer long trips to shop, a cost of prevention that probably exceeds the suffering that would result if some commercial land uses were located in the residential neighborhood. Similarly, nuisance costs to neighboring landowners may be greater than prevention costs if the regulation does not go far enough in proscribing what activities will not be allowed. The efficiency of a regulation, then, is a function of its precision.²⁸ In a few clear-cut cases, governments can have some confidence that a regulation will promote efficient land usage.²⁹ Otherwise, it would seem desirable to give the market some flexibility to respond to the governmental intervention and correct errors in judgment that might have been made.

Taxation does allow some amount of market response to government interference in the land development process. To some extent, each landowner can choose whether and at what level to incur a tax. An owner's decision presumably reflects his or her attitude about whether or not the land use is worth the cost of the tax. If the tax represents all or part of the societal costs that result from a particular land use, then the landowner is in effect put to the choice between the nuisance costs he imposes and the costs of prevention. The rational decision that we must assume will be reached should promote the optimal allocation of our land resources. Under this analysis the level of the tax would be critical, and must be periodically adjusted based upon an analysis of how the market is responding to the tax at its existing level, and the changing social and environmental context. One implicit assumption here is that some quantity of a particular land use may be desirable in an area, but not all that activity that would take place if land users got a free ride, that is, if they had no responsibility for spillovers from their land use. It is probably efficient to have some basic commercial uses in residential areas. A properly calibrated tax would permit the right amount of such use and discourage all others. Regulations would either exclude these uses altogether or permit too many to operate.

²⁸ The very simple examples given to illustrate the consequences as far as efficiency is concerned of an ill-conceived regulation ignore administrative costs. These should be higher from both design and enforcement perspectives the more specific and detailed a regulation is. Attempts to save administrative expenses may, therefore, cause intolerable inaccuracies in a regulation.

²⁹ Under Ellickson's scheme, regulation would sometimes be appropriate where an activity causes insubstantial injury to a great many surrounding landowners which when added up may exceed the value of the activity to the nuisance-maker. Relying on nuisance remedies the foundation of Ellickson's "privatized" land use control system) in such a situation would result in an intolerable administrative burden. Also, he suggests that mandatory standards may be the best way to control subdivision design. Ellickson, *supra* note 22, at 761-62, 772-79.

The use of taxation might also increase involvement of state and regional governments in land use planning. Since the power to tax is in the state and has been exercised primarily at that level,³⁰ it is perhaps a more logical and politically acceptable place for the state to increase its role. On the other hand, resistance can be expected from local governments when the state tries to interpose itself in the planning process which has long been primarily delegated to local government.³¹ In addition, since the interjurisdictional differences in tax practice and rates is one area where taxation certainly impacts on land use in a significant way,³² paying increased attention to taxation may lead to neutralization of undesirable tax differential effects on population movement, locational decisions, and the pattern of urban expansion.

Moreover, taxes raise revenue, a benefit regulations do not offer. Monies generated can be used to defray the social costs the taxed activities generate or to improve locales where planners would like to see more development.³³ Funds raised from taxes imposed to further a land use aim would also reduce the need to employ those taxes which now significantly interfere with achievement of land use objectives.

Finally, taxes may be perceived differently by developers than are regulations. A tax may not be viewed as so great an impediment to a project by the landowner or developer that he will challenge the tax. If the prohibited use is the most profitable land use, however, effort and funds are likely to be expended to seek a change in the regulations. Avoiding the regulation becomes a do-or-die issue. Such will not normally be the case when a tax applies to a proposed development. Seldom would the tax be isolated out of all the costs associated with a project as the one that needs to be reduced or eliminated if the project is to be viable. Further, because the tax would have general application, it is not likely the owner or developer will see the measure as a special hardship.

Increased reliance on taxation in land use planning does not imply the total abandonment of current land use control techniques. Such a suggestion is infeasible politically and would be unwise as well. In some instances regulation makes more sense than taxation as a way of achieving a particular land use. For example, zoning would seem to be preferable to taxation for the maintenance of flood plains. How would a tax

³⁰ See text accompanying notes 36-39 *infra*.

³¹ See generally CITIZENS GUIDE at 61-71; THE QUIET REVOLUTION IN LAND USE CONTROL, *supra* note 6.

³² See text accompanying notes 124-32 *infra*.

³³ See Zimmerman, *supra* note 7, at 643.

be constructed to achieve this objective? A tax rate which would be fair to the owner, given the low intensity use the community expects on the property, does nothing to assure development consistent with the character of the land. Since the acceptable uses of flood plain land can be determined without too much difficulty, and since flood plains can be identified with some precision, it makes sense to use regulation rather than taxation to achieve the desired land use.³⁴ It is in those situations where the optimal use of land is not so apparent that taxation may be preferable to traditional forms of regulation.

II. THE LEGAL FRAMEWORK OF THE TAXING POWER

Courts striking down exclusionary land use practices often say that the police power cannot be used as a way of avoiding the financial burdens that are thought to accompany an increased population.³⁵ Without countenancing these exclusionary objectives, it might be said on behalf of these municipalities that they are putting to use the only weapon at their disposal to combat the fiscal crunch in which they find themselves. From its inception the zoning power has been delegated by the states to their local governments, and courts have allowed a great deal of maneuvering within the powers granted. Such is not the case with the power to tax. Which taxes can be imposed, and sometimes the maximum tax rates, are tightly controlled at the state level.³⁶ Constitutional provisions regarding equal protection of the laws and tax uniformity further constrain any municipality that might seek to cope with its money crisis through the taxing power. Perhaps the contrast between the amount of discretion local governments have in the taxing and zoning areas can be partially explained by the deeply-imbedded distrust of the power to tax Americans seem to have.³⁷ Whatever the

³⁴ For a good presentation of the practical and legal problems surrounding floodplains, see Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEXAS L. REV. 201 (1974).

³⁵ See, e.g., *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713 (1975); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970).

³⁶ For more detailed analysis of the legal questions involved in the distribution of the taxing power between state and local governments than is presented here see E. McQUILLIN, 16 MUNICIPAL CORPORATIONS § 44 (3d ed. 1972) [hereinafter cited as McQUILLIN]; Antieau, *Municipal Power to Tax—Its Constitutional Limitations*, 8 VAND. L. REV. 698 (1955) [hereinafter cited as Antieau].

³⁷ The classic statement in this regard was made by Daniel Webster arguing against state taxation of the Bank of the United States in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819):

An unlimited power to tax involves, necessarily, a power to destroy, because there is a limit beyond which no institution and no property can bear taxation.

Id. at 327. See Zimmerman, *supra* note 7, at 641-43.

reason, creative taxation for land use objectives is inhibited if a town must impose every tax it is authorized to levy at the maximum rate legally permitted or politically feasible in order to meet its continuing financial obligations.

Although the ability to raise revenue is essential to local governments, in general the taxing power is considered an attribute of sovereignty which inheres in the state legislature and not in local governments.³⁸ Municipal governments have no power to tax unless the power is delegated to them. The extent of any delegation by the state is likely to be narrowly construed by the courts, who are unwilling to make inferences concerning what portion of the taxing power the legislature has intended to pass on to local governments.³⁹ Cities are dependent, then, on clear grants of taxing authority from their state government.

States have picked and chosen from among the various taxes those they will keep for themselves and those that will be shared with or given completely to local governments. This is illustrated nicely by the way the three taxes with which this article is concerned, those on property, sales, and income, have been treated. The power to impose a tax on real property has typically been passed on to local governments and constitutes their main source of revenue.⁴⁰ The state has, of course, continued to enforce uniformity requirements through assessment laws and has retained the power to prescribe what property is exempt from property taxation.⁴¹ This transfer of the real property tax to local governments may be contrasted with the firm control the state government has maintained over the income tax. Only nine states in 1972 authorized local governments to impose an income tax.⁴² There is even doubt

³⁸ See McQUILLIN at §§ 44.03, 44.05; Antieau, *supra* note 36, at 698-99. Cf. *United States v. New Orleans*, 98 U.S. 381 (1878). There is some question about where the locus on the taxing power is when a municipality has home rule powers. See McQUILLIN at § 44.06a; Antieau, *supra* note 36, at 698-700; Note, *The Validity of San Francisco's Commuter Tax*, 20 *HAST. L.J.* 813, 814-16 (1969).

³⁹ See McQUILLIN at § 44.05; Antieau, *supra* note 36, at 700-03.

⁴⁰ See notes 72-79 *infra* and text accompanying. This delegation is indicated by the fact that the property tax raised over 36.7 billion dollars revenue at the local level and only about 1.1 billion at the state level in the United States in 1971. *STATISTICAL ABSTRACT OF THE UNITED STATES 1973*, at 413, table no. 660 [hereinafter cited as 1973 *STAT. ABSTRACT*]. In California the decision to relinquish the property tax to local governments was made pursuant to a plan drawn up in 1905 and adopted in 1910 to correct tax inequities that existed as a consequence of the property tax being a basic revenue source for both state and local governments. Januta, *The Municipal Revenue Crisis: California Problems and Possibilities*, 56 *CALIF. L. REV.* 1525, 1529 (1968).

⁴¹ See McQUILLIN at §§ 44.63-65.

⁴² *ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL FINANCES: SIGNIFICANT FEATURES AND SUGGESTED LEGISLATION 308-09* (1972 ed.) [hereinafter cited as *ACIR 1972*].

whether cities with home rule powers can levy an income tax.⁴³ The treatment of the general retail sales tax represents a middle ground. It is imposed at the state level by almost every state,⁴⁴ and is the best source of revenue in many of them.⁴⁵ However, many states have been willing to share this revenue source with their local governments,⁴⁶ allowing local sales taxes to piggyback on top of the state tax.⁴⁷

In addition to the state legislature's ability to prescribe what taxes can be levied, the development of a tax policy by a municipality is handcuffed by either constitutional or statutory limitations on the maximum tax rate that a local government can adopt.⁴⁸ There is little doubt that such provisions are valid, including those a legislature may enact when the state constitution does not speak to the matter.⁴⁹ Restrictions on the allowable property tax rate are not infrequent.⁵⁰ They may establish an overall limit on the total tax levied against property by all taxing jurisdictions, limit the rate certain governmental units may charge, or control the increase in rates by restricting the increase to a percentage of the increase in the previous year.⁵¹ Those states that permit local income and sales taxes usually set the upper limit on the amount of each tax that can be collected. The local sales tax rates hover in the area of one to two percent.⁵² Colorado, however, allows a local rate of up to four percent,⁵³ which should permit municipalities some flexibility in

⁴³ Compare *City & County of Denver v. Sweet*, 138 Col. 41, 329 P.2d 441 (1959) with *Dooley v. City of Detroit*, 370 Mich. 194, 121 N.W.2d 724 (1963). See Januta, *supra* note 40, at 1540-56; Comment, *The Municipal Income Tax and State Preemption in California*, 11 SANTA CLARA LAW. 343 (1971).

⁴⁴ Only Alaska, Delaware, Montana, New Hampshire, and Oregon do not levy a sales tax. Due, *Development of Retail Sales Taxes in the 1960's and 1970's*, in O. OLDMAN & F. SCHOETTLE, *STATE AND LOCAL TAXES AND FINANCE* 458 (1974) [hereinafter cited as OLDMAN & SCHOETTLE].

⁴⁵ OLDMAN & SCHOETTLE at 444.

⁴⁶ Due reports that 23 states permit local sales taxes and that over 50 percent of cities over 100,000 have a local sales tax. OLDMAN & SCHOETTLE at 463. In Alaska, which does not levy a state sales tax, there is widespread use of municipal sales taxes. *Id.* at 458.

⁴⁷ See, e.g., CAL. REV. & TAX. CODE §§ 7200 *et seq.* (1970). See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *FEDERAL-STATE-LOCAL FINANCES: SIGNIFICANT FEATURES OF FISCAL FEDERALISM* at 84-89, table 59 (1973-74 ed.) [hereinafter cited as ACIR 1973-74].

⁴⁸ In the absence of a tax rate ceiling a municipality may tax to the extent it is politically practical. The reasonableness of a tax is primarily a legislative matter with which the courts will seldom interfere. See McQUILLIN at § 44.25.

⁴⁹ *Id.* at § 44.26.

⁵⁰ See, e.g., CAL. GOV'T. CODE §§ 43068, 43072 (West Supp. 1975); MICH. CONST. art. 9, § 6.

⁵¹ Howards, *Property-Tax-Rate Limits: A View of Local Government*, in *PROPERTY TAXATION USA* 165, 169 (R. Lindholm ed. 1967).

⁵² See, e.g., CAL. REV. & TAX. CODE § 7202 (West Supp. 1975). See ACIR 1973-74 at 84-89, table 59.

⁵³ COLO. REV. STATS. ANN. § 29-2-108 (Cum. Supp. 1973).

designing a tax program. Local income tax rates are also generally set in the one percent range.⁵⁴

Finally, local tax programs are circumscribed by constitutional provisions regarding equal protection of the law and tax uniformity.⁵⁵ Broadly put, classifications made by communities for purposes of taxation must be based on reasonable distinctions which bear some relationship to the purposes of the tax legislation.⁵⁶ Further, the same method of assessment and the same tax rate are to be applied to properties similarly classified. Exact equality is not demanded, but courts will protect taxpayers from intentional and arbitrary discrimination and from irrational assessment practices.⁵⁷ Unquestionably, the courts should stand ready to strike down harsh and unfair tax policies. However, as in many other areas of the law, it is difficult to understand where the line between the capricious and the rational will be drawn.

Lack of clarity in the standard against which a tax policy or practice will be judged can deter attempts at tax reforms that might aid in solving land use problems. This is especially true with respect to the property tax where uniformity and equal protection guarantees play their most significant role. Nevertheless, these provisions do not appear to hamper a more aggressive use of the property tax to promote land use planning objectives to the extent one might suppose.

In *San Antonio School District v. Rodriguez*,⁵⁸ the Supreme Court indicated in the context of a challenge to local property tax financing of schools that state and local governments are allowed broad discretion in formulating their tax policies,⁵⁹ and quoted the following passage from *Madden v. Kentucky*:⁶⁰

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of

⁵⁴ See, e.g., MICH. COMP. LAWS ANN. §§ 141.503, 141.611 (1967). Michigan cities over one million population are empowered to levy up to a two percent tax under this law. For a listing of rates across the country see ACIR 1973-74 at 291-94, table 150.

⁵⁵ For an interesting application of this principle see *Andrews v. Lathrop*, ——— Vt. ———, 315 A.2d 860 (1974), upholding the Vermont land gains tax which seeks to deter speculation in land by imposing a tax on the transfer of land which is steeper the more profit made and the shorter the holding period.

⁵⁶ See generally 71 AM. JUR. 2d, *State and Local Taxation* §§ 150-90 (1973); Antieau, *supra* note 36, at 738-45.

⁵⁷ See, e.g., *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526-28 (1958); *District of Columbia v. Green*, 310 A.2d 848, 854-57 (D.C. Cir. 1973).

⁵⁸ 411 U.S. 1 (1973).

⁵⁹ *Id.* at 40-41. See also *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

⁶⁰ 309 U.S. 83 (1940). This case upheld a higher tax rate on out-of-state bank deposits than was charged against in-state bank deposits.

the large area of discretion which is needed by a legislature in formulating sound tax policies . . . It has . . . been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of the legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes⁶¹

This language is almost an invitation to state governments who would like to have their tax programs play a more positive role in the land use planning process. With proper enabling legislation the same amount of flexibility and discretion can be given to local governments.

The several cases that have upheld statutes allowing preferential tax treatment of farm and open space land without a specific constitutional provision authorizing such a tax break further support the notion that the courts will tolerate tax policies designed to promote land use goals.⁶² Among other reasons, special tax treatment of agricultural and open space land is justified because “[c]lassification of property according to use is valid and constitutional.”⁶³ If the courts are willing to allow fairly wide latitude in classifying property for tax purposes according to use, state and local governments will have acquired a potentially valuable tool. The agricultural/open space versus all other land uses is probably the strongest case for separating out a land use and assessing at its value in that use as opposed to its “highest and best use.” The policy objectives are clear-cut, and judges are not too uncomfortable dealing with the question of when land qualifies for the special tax treatment the law allows. Whether finer distinctions would be tolerated is uncertain. Consider, for example, how a court would react to a statute which classifies agricultural land on the fringe of urban expansion separately for tax purposes from all other land, including other agricultural land and neighboring fringe land not in agricultural use. In such a piece of legislation arbitrary? The arguments for and against the validity and wisdom of such a measure should be fairly apparent, but who can say with any confidence how a court in the future would respond to such a piece of legislation?

⁶¹ *Id.* at 87-88.

⁶² *See, e.g.*, *Tyson v. Lanier*, 156 So. 2d 833 (Fla. 1963); *Elwell v. County of Hennepin*, — Minn. —, 221 N.W.2d 538 (1974); *Bensalem Township School Dist. v. County Comm’rs* 8 Pa. Cmwlth. 411, 303 A.2d 258 (1973). A discussion of a number of the constitutional problems that are involved in assessing these tax programs is presented in *Hagman*, *supra* note 20, at 640-45.

⁶³ *Elwell v. County of Hennepin*, — Minn. —, 221 N.W.2d 538, 546 (1974).

Lastly, the upholding of the concept of tax base-sharing by the highest courts of Minnesota⁶⁴ and New Jersey⁶⁵ implies that the courts will be receptive to innovative tax schemes designed to alleviate some of the land use and fiscal problems faced by metropolitan areas. The Minnesota case concerned the constitutionality of the Metropolitan Fiscal Disparities Act⁶⁶ passed in 1971 to cope with land use and fiscal problems faced by some cities in the Twin Cities area as a result of population growth and suburban expansion. This legislation provided for the pooling of 40 percent of the increase in the tax base of all commercial and industrial property in the affected seven county (encompassing some 250 municipalities) area. The money collected is distributed to the various governmental units under a formula designed to reflect the needs of the local units for revenue and their own capacity to provide the needed funds. As the court reports:

The effect of the system is to reallocate the area-wide tax base thus pooled to all municipalities in direct relation to need and inverse relation to fiscal capacity. Need is measured by population, and fiscal capacity is measured by the market value of property per capita. Consequently, the units of government with large population and low fiscal capacity are favored in reallocation over those with small population and high fiscal capacity.⁶⁷

The tax base-sharing notion was determined to be consistent with Minnesota's uniformity provision.⁶⁸ The challengers had argued that state case law held that those who pay a tax must receive a tangible and specific benefit from the expenditures of the funds generated in order for the tax to satisfy the uniformity requirement. The court found the challengers' argument had merit,⁶⁹ but found that a strict and literal interpretation of the concept of special benefit no longer served the constitutional requirement of uniformity.⁷⁰ Given the mobility and high degree of political, social, and economic interdependence in the metropol-

⁶⁴ *Village of Burnsville v. Onischuk*, — Minn. —, 222 N.W.2d 523 (1974), *appeal denied*, 420 U.S. 916 (1975).

⁶⁵ *Meadowlands Reg. Redev. Agency v. State*, 63 N.J. 35, 304 A.2d 545 (1973). See *Meadowlands Reg. Redev. Agency v. State*, 112 N.J. Super. 89, 270 A.2d 418 (1970), which is the trial court decision in this case. Its reasoning on the issues of whether the statute in question was an unconstitutional delegation of taxing power by the state or an unconstitutional allotment of local property tax revenues was approved by the New Jersey Supreme Court without discussion. *Meadowlands Reg. Redev. Agency v. State*, 63 N.J. 35, 40, 304 A.2d 545, 547 (1973).

⁶⁶ MINN. STAT. ANN. §§ 473.01 *et seq.* (Supp. 1975).

⁶⁷ *Village of Burnsville v. Onischuk*, — Minn. at —, 222 N.W.2d at 525-26.

⁶⁸ MINN. CONST. art. 9, § 1 provides, "[t]axes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes"

⁶⁹ *Village of Burnsville v. Onischuk*, 222 N.W.2d 523, 530.

⁷⁰ *Id.*

itan area, the court was willing to sanction the theory of the Fiscal Disparities Act that the residents of one municipality do benefit from amenities and improvements in other towns in the area to a degree sufficient to satisfy the constitutional demand of uniformity.⁷¹

The continuing willingness of courts to defer to state and local judgments on tax matters and the attitudes expressed in the cases discussed here allow the conclusion that the use of taxation to promote land use objectives will receive favorable reception by the courts. The tax power resides in the state and is tightly held at that level through limited delegation of the type of taxes local governments can impose and through limits on tax rates. Effective utilization of taxes in the land use planning process, therefore, depends on state legislation and initiative.

III. WHAT IS ALREADY KNOWN: ECONOMIC REPORTS ON PROPERTY, SALES, AND INCOME TAXES

A. *The Property Tax*

Since the property tax is probably the most significant tax affecting land use, it is appropriate to begin this report of economic studies on taxes and land use with this form of taxation. Its importance is magnified because the levy is on the land and improvements, making the impact on the price of land and land use a direct one.

In 1973 the property tax produced approximately 45 billion dollars in revenues.⁷² The property tax represents approximately 40 percent⁷³ of the total tax revenues raised by state and local governments, and approximately 23 percent⁷⁴ of state and local revenues from all sources.

Examining available data yields some interesting insights. There is great disparity among the states as to how much the property tax is relied upon as a revenue source, ranging from 14.8 percent of total receipts in Alabama, to 59.1 percent of total receipts in New Hampshire.⁷⁵ The burden imposed by the property tax differs significantly across the country. The average property tax payment on middle income homes,

⁷¹ *Id.* at 532.

⁷² PROPERTY TAXES, HOUSING at 1. In comparison with other taxes used by state and local governments, the property tax generates 17 percent more total dollars than sales and gross receipts taxes, which accounted for 34 percent of total state and local tax revenues, and generated 150 percent more dollars than did state and local personal and corporate income taxes, which accounted for 16 percent of total tax revenues for state and local governments. These percentages are based on calculations made from data in 1973 STAT. ABSTRACT, at 419, table 668.

⁷³ Based on calculations made from 1973 STAT. ABSTRACT at 419, table 668, by dividing total data in state and local taxes by property tax revenues.

⁷⁴ *Id.* at 411, figure 28.

⁷⁵ ACIR 1973-74 at 30, table 18. The average is 39.9 percent. *Id.*

according to 1969 figures, showed that Louisiana homeowners only pay \$70.00 per year, while the rate in New Jersey is \$626.00 per year.⁷⁶ As a percentage of income, the property tax can be as high as the 10.8 percent which Boston residents were found to be paying in 1970.⁷⁷

A staggering fact which emerges from close reading of available information is the sheer number of governmental units which employ property taxes. Out of the total 78,000⁷⁸ units of state and local government in existence in 1971, some 66,000⁷⁹ have property taxing power. Thus, careful attention to the land use impact of the property tax is called for if for no other reason than the pervasiveness of the tax. A third feature which stands out about the property tax is the heavy share of the burden carried by land devoted to residential uses. Residential uses may contribute as much as 50 percent of total property tax revenues.⁸⁰

1. Basic Effects of the Property Tax

The property tax, like other taxes, acts as a cost to those who must bear it, and accordingly can become a disincentive associated with engaging in the use of taxed property.⁸¹ Property taxes can become costs to land users in two ways. Where there is an identity between the property and the user of property, property taxes become costs through tax capitalization.⁸² Where the owner of taxed property is not the user of the property (*e.g.*, a renter), the property tax becomes a cost by tax shifting where the expense of the tax is passed on to the land user by the owner who is liable for it. In either case the presence of these costs

⁷⁶ ACIR 1972 at 234, table 102. This table also calculates the effective tax rate per \$100 of value. This New Jersey rate was \$2.99 and Louisiana's rate was \$.43. *See also* ACIR 1973-74 at 174-75, tables 103 & 104, which present data concerning the average effective property tax rates on FHA insured homes for the period from 1958-71.

⁷⁷ ACIR 1972 at 62-73, table 39. This table shows the great interjurisdictional differences in the property tax. The intrajurisdictional uniformity of property taxes as a percentage of income across income classes is being seriously challenged. *See* PROPERTY TAXES, HOUSING, *supra* note 22.

⁷⁸ 1973 STAT. ABSTRACT at 412, table 659.

⁷⁹ *Id.*

⁸⁰ NATIONAL COMMISSION ON URBAN PROBLEMS, IMPACT OF THE PROPERTY TAX: ECONOMIC IMPLICATIONS FOR URBAN PROBLEMS, printed for the Jt. Econ. Comm. Cong. of the United States, 90th Cong., 2d Sess. 13 (1968).

⁸¹ Economists generally believe that an increase in the price of a good activity will lead to a decrease in the quantity which consumers will demand of such a good or activity. This generalization is subject to the qualification that the decrease in demand is in part a function of how indispensable the good or activity is. *See generally* P. SAMUELSON, ECONOMICS part 4 (8th ed. 1970).

⁸² Basically tax capitalization means the tax will cause a decrease in the value of the land equal to the amount of the tax. That is, property values are inversely related to property taxes, so that the imposition of a property tax or increase in such a tax will reduce property value.

will be taken into account by land users in formulating their land use decisions.

Tax capitalization and tax shifting can be offset by benefit capitalization or additional tax shifting. Both of these reduce the impact of the property tax on the primary land user. Benefit capitalization focuses on the impact of the value of the goods and services which are financed by tax revenues. Generally, property values are directly related to the provision of benefits financed by tax revenues.⁸³ Additional tax shifting to others than the actual user of the property can occur when the land user employs the taxed property as an input of production for goods which will be sold to others. The tax or increase in the tax may be passed on to customers as a cost of production.

2. Investigations of Property Tax Capitalization

Studies of property tax capitalization concentrate on owner-occupied residential land uses and agricultural land uses. The lack of studies on tax capitalization in the business and industrial context may be due in part to testing problems which arise when there are infrequent property sales to use as a basis for making value comparisons.⁸⁴ It may also be because of some uncertainties about whether capitalization will occur in a given instance.⁸⁵ Owner-occupied homes are a good situation in which to study tax capitalization because there is little problem in identifying the tax-bearer. When renters and customers become candidates for sharing all or part of a tax through tax shifting, the capitalization process becomes harder to study.⁸⁶

(a) Tax capitalization on agricultural land

The earliest studies of property tax capitalization in the United States concerned agricultural properties. In all, three basic studies have

⁸³ Both benefits such as police and fire protection which are tied directly to property and benefits such as educational facilities which may be less directly related to property can affect property values.

⁸⁴ The impact of a property tax on land value is frequently tested by comparing the sales prices of various parcels with some value for the parcel that would have been expected in the absence of a tax. Sales values become crucial to such methods of analysis, and infrequent sales make testing more difficult and the results open to more serious question.

⁸⁵ See, e.g., D. NETZER, *THE ECONOMICS OF THE PROPERTY TAX* 35 (1966) [hereinafter cited as NETZER]; Seligman, *Introduction to The Shifting and Incidence of Taxation*, in *READINGS IN THE ECONOMICS OF TAXATION* 202 (R. Musgrave & C. Shoup eds. 1959).

⁸⁶ This difficulty might be overcome by a model which studies either actual operating expenses or relatively homogeneous communities in close proximity with differing tax rates. However, the latter approach has been attempted and severely criticized. See note 113 *infra*.

been made of tax capitalization in agricultural properties.⁶⁷ Each of these suffers from methodological defects, but they appear to support the existence of tax capitalization.

Jens Jensen in 1931⁶⁸ compared property taxes, land rents, and land values for a five year period in thirteen states. Jensen's guarded conclusion was that property taxation contributed to a decline in the values of farm properties.⁶⁹ A second study conducted approximately thirty years later by Daicoff⁷⁰ examined the relationships between property taxes and land values within a single state over a six year time period. Daicoff's analysis failed to find an inverse relationship between taxes and land values,⁷¹ and Netzer concluded that this should be seen as a contradiction of the underlying capitalization theory.⁷² However, more recent work has demonstrated that this is neither necessary nor logically the case. An important study conducted by F. O. Woodard and R. W. Brady⁷³ in 1965 looked at the relationships between property taxes and sales values of farms in two states during a two-year period.⁷⁴ These

⁶⁷ A fourth study was attempted but the data was insufficient to allow a conclusion to be reached. Wicks, Little & Beck, *A Note on Capitalization of Property Tax Changes*, 21 NAT'L TAX J. 263 (1968).

⁶⁸ J. JENSEN, PROPERTY TAXATION IN THE UNITED STATES 69-75 (1931).

⁶⁹ Jensen compared the property values, rents, and taxes for agricultural lands in fifteen counties in thirteen states for the years 1919 to 1924. He found that rents decreased, taxes increased, and property values fell. While either the decrease in rents or the increase in taxes would explain the decline in property values, the pre-tax percentage of rent to property value had increased while the after-tax percentage of rent to property value had remained constant. This indicated to Jensen that property value fell at a faster rate than did rent, which he interpreted as a sign that at least part of the decrease in property value was attributable to an increase in property taxes. *Id.* Because Jensen's results are presented so guardedly, they do not deserve criticism. Two major weaknesses of the study, however, are that it does not measure the rate of change of rent decline as an element of property value change, which leaves untested the foundations for expectational factors, and that it does not account for benefit capitalization, if any.

⁷⁰ Daicoff, *Capitalization of the Property Tax* (doctoral thesis, Univ. of Michigan, 1961) cited in NETZER at 34-35.

⁷¹ It is unclear from Netzer's report whether benefit capitalization was tested for. This might explain why Daicoff did not find tax capitalization present.

⁷² NETZER at 35.

⁷³ Woodard & Brady, *Inductive Evidence of Tax Capitalization*, 18 NAT'L TAX J. 193 (1965).

⁷⁴ Woodard & Brady tested the relationships between the sales prices, property tax payments and values for 238 farms of varying size in Ohio and Indiana sold between January 1, 1962 and July 1, 1963. The hypothesis that property value as measured by sales price should be equal to the present capitalized value of future tax payments was proven to be correct by the authors' study. Woodard & Brady realized that the best statistical evidence of tax capitalization would come from studying a sufficiently large sample of properties in which a sale, tax change and resale would take place within a short period of time. *Id.* at 195. Since such a sample is unlikely ever to be found, the authors devised a way of testing for tax capitalization with data from single sales. They used the Federal Land Bank's appraisal values which look solely to the income producing capacity of the farm (without regard to the property tax) to give an independent valuation of the prop-

authors, with Jensen, concluded that capitalization had been demonstrated. They further found that the extent to which taxes were capitalized varied with the sales value of the land in question, with inexpensive properties showing undercapitalization of the tax and high valued properties showing overcapitalization. Woodard and Brady surmised that this variation in capitalization was due to a larger than average degree of competition among buyers to purchase inexpensive land and a lower than average degree of competition among buyers to purchase the most expensive properties.⁹⁵

Considered together these studies indicate that property taxes do exert a price deflating effect on agricultural properties. While the magnitude of this impact has not been ascertained, Woodard and Brady's conclusions suggest that the strength of the impact varies directly with the value of the property taxes.

(b) Tax capitalization on residential lands

A number of studies have focused on owner-occupied residential dwellings to determine whether capitalization of the property tax exists. A 1965 study in Montana⁹⁶ compared actual to expected sale values for properties in Montana after a tax rate increase. This analysis not only found strong evidence of an inverse relationship between property taxes and property values, but also found that the difference between actual and expected values increased as the size of the tax increase grew. A similar study, conducted by R. S. Smith,⁹⁷ also compared actual to expected price differences for residential properties after the imposition of a tax. This study is significant because the property tax increase in residential properties occurred as a result of a reassessment program which, in effect, shifted tax liability from business and commercial uses to residential uses of land. This enabled Smith to test for property tax capitalization unaccompanied by changes in the benefits property owners received from the expenditure of tax revenues.⁹⁸ Smith's analysis verified the presence of tax capitalization.

Heinberg and Oates in a 1970 study compared property tax variations among a sample of communities in the Boston area with property

erties in the data base to permit accurate comparisons between two or more properties to be made.

⁹⁵ *Id.* at 200.

⁹⁶ See Wicks, Little & Beck, *supra* note 87.

⁹⁷ Smith, *Property Tax Capitalization in San Francisco*, 23 NAT'L TAX J. 177 (1970).

⁹⁸ Smith used an expected price-actual price methodology similar to that employed by Wicks, *supra* note 85, to study the effects of a reassessment program in San Francisco. The result of the higher residential property taxes was lower taxes on business property rather than increased expenditures benefiting property owners. Smith, *supra* note 95, at 179. This gives assurance that the results are not biased by the exclusion of benefit capitalization effects.

value variations, and concluded that tax capitalization was present and reflected in property value variations among jurisdictions.⁹⁹

The Montana study, and Smith's study of the San Francisco situation, in addition to exploring the presence and direction of tax capitalization effects, attempted to explore the magnitude of such effects, and got fairly similar results.¹⁰⁰ In Montana, for the properties studied, each dollar in tax revenue exacted from a property owned led to a nineteen dollar decrease in the present value of the property.¹⁰¹ The authors felt that this ratio was high, but Smith's results are comparable. Smith concluded that for the properties studied each tax dollar exacted accounted for a fourteen to twenty dollar reduction in property values.¹⁰²

Two additional studies, which focused both on property tax capitalization and benefit capitalization, also document the presence of tax capitalization. An earlier study by Oates¹⁰³ compared property values in a number of New Jersey communities with varying property tax rates,¹⁰⁴ and concluded that a significant inverse relationship between property values and property tax rates was demonstrated. The most recent work in this area, by Sabella in 1974,¹⁰⁵ examined the relation-

⁹⁹ Heinberg & Oates, *The Incidence of Differential Property Taxes on Rental Housing: A Comment and Some Further Evidence*, 23 NAT'L TAX J. 92 (1970). Property values, property tax payments, local expenditures as represented by per pupil educational expenditures and several other variables for residential properties in 23 communities in the Boston area were examined. The authors made the assumption that to the extent residential properties could be classified as equally desirable, differences in property values would reflect such local public fiscal variables as differences in taxation of property and differences in local spending. Their results indicated that as tax differences among communities increased, so did sales values of properties. This analysis is basically sound. Although the attempt to equate residences in different communities is questionable, Heinberg & Oates attempted to account for variations in the quality of housing between communities by including a variable which represented the average age and number of rooms per dwelling, but there is simply no way to know whether less tangible factors, such as prestige values, were taken into account.

¹⁰⁰ The range of variation in Smith's results was approximately 30 percent, Smith, *supra* note 97, at 185, which would seem acceptable in light of Woodard & Brady's conclusion regarding differences in the intensity of capitalization among price levels of properties studied. See text accompanying note 95 *supra*.

¹⁰¹ Wicks, Little & Beck, *supra* note 87, at 265.

¹⁰² Smith, *supra* note 97, at 190.

¹⁰³ Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and the Tiebout Hypothesis*, 77 J. OF POL. ECON. 957 (1969).

¹⁰⁴ Oates studied a sample of 53 residential communities in northeastern New Jersey in 1959-60 to compare the effects of both property taxes and public expenditures on property values. Oates attempted to account for such intangible features as physical charm, beauty and attractiveness of the neighborhood by adding as a variable the median family income for each community. Further, as a measure of tax rates Oates used a term he called the effective tax rate, which was defined as the nominal tax rate times the average assessment-to-sales price ratio, which should have removed variations in assessment practices between communities.

¹⁰⁵ Sabella, *The Effect of Property Taxes and Local Public Expenditures on Sales Prices of Residential Dwellings*, THE APPRAISAL JOURNAL, Jan. 1974, at 114.

ships between property taxes and values for homes sold twice within a four year period in Hennepin County, Minnesota. Sabella also concluded that capitalization was documented.¹⁰⁶

These five studies strongly indicate that owner-occupied residential property values will be depressed by the imposition of or increase in a property tax. Although some attempt has been made to show the strength of this relationship, this aspect of property tax capitalization needs to be further studied.

(c) Tax capitalization in the business and commercial land use context

There is a paucity of studies focusing directly on the impact of property taxes on the property values of business uses of land.¹⁰⁷ Nothing in the agriculture or residential studies, however, suggests that tax capitalization does not occur in a similar manner on business properties, depressing land value for those portions of the property tax which cannot be shifted. One further comment can be made. Woodard and Brady concluded that the effect of competition for property may impact on the degree of tax capitalization that occurs.¹⁰⁸ To the extent that competition for business property is only of low or moderate intensity, tax capitalization may be fairly complete for that portion of the property tax which the land user bears.

3. Tax Shifting

When tax shifting occurs between the owner of taxed property and the user of the property, as may occur, for example, in the context of rental housing, the tax makes the use of the land more expensive to the user, and makes continued use of the property less desirable than it would be before the tax shifting took place. At the same time, the tax shifting will offset the tax capitalization process because it will reduce the size of the tax cost which would otherwise be capitalized into the value of the taxed land. When property tax shifting occurs between an owner or user (such as a firm) and another party (such as a consumer), it should mitigate or cancel the unwanted impacts of the property tax, for an owner will have less tax to capitalize and a user who has had taxes shifted to him will be able to recoup his increased rental cost.

¹⁰⁶ There were 1,308 dwellings in the study, which sold twice between 1962-66. Sabella compared sales values, property tax payments, and local public expenditures as measured by school expenditures per pupil. He compared property tax changes over time and local expenditures over time with changes in property values, and concluded that both tax and benefit capitalization were demonstrated.

¹⁰⁷ Wicks, Little & Beck, *supra* note 87, attempted to study capitalization on commercial properties but did not have sufficient data to conduct an analysis.

¹⁰⁸ Woodard & Brady, *supra* note 93, at 201.

(a) Tax shifting in the agricultural land use context

Whether or not tax shifting takes place in the agricultural land use context has not been documented. On a theoretical level, classical tax incidence theory would seem to indicate little, if any, shifting of property taxes on agricultural land. If the property tax cannot be shifted, and if farmers are in a financial situation that makes it difficult for them to come up with the cash to pay rising property taxes, the conversion of agricultural lands to other uses might be quickened.

Classical tax incidence theory holds that in many situations taxes on the land component of property will be borne by the land owner, while taxes on the improvements on the property will be borne by the user of the property.¹⁰⁹ The tax on the land is keyed to value which is affected by many factors beyond the farmer's control. Property taxes on improvements, however, may be shiftable because the farmer can destroy or discontinue their use to avoid taxation. Thus, for improvements on land, owners may choose to reduce their output (by decreasing the use of a taxed item of production) and thus shift the tax cost to consumers by allowing the price of the item whose production was cut to increase to ration the restricted supply. Since agriculture relies primarily on land as the basis for production, not improvements, shifting in this context may not occur. Those who advocate preferential tax treatment for agricultural lands would seem by their request for special tax treatment to be assuming that shifting of taxes does not occur.

(b) Residential land uses

There seems to be general belief that the shifting of property taxes occurs in the residential context between land owners and land users (renters), who are said to be the final consumers of the taxed good.¹¹⁰ However, very little empirical work exists to verify this. Orr¹¹¹ attempted to test for residential property tax shifting by comparing property tax differentials with rental variation for similar housing among a sample of communities in the Boston area. He concluded that tax differentials were unrelated to rent differentials and that shifting was not

¹⁰⁹ See generally sources cited at note 85 *supra*. This is due to the belief that owners can be forced to bear the tax on the land itself because they cannot reduce or avoid the tax by curtailing or changing the use of the land.

¹¹⁰ While other persons, such as the owners of building maintenance services, can be affected by decreases in property upkeep supplied by the owners of property which becomes subject to a tax or a tax increase, the primary effect is tax shifting to the users of taxed property, who pay a constant amount for a smaller package of housing and maintenance after the imposition of a tax.

¹¹¹ Orr, *The Incidence of Differential Property Taxes on Urban Housing*, 21 NAT'L TAX J. 253 (1968).

demonstrated.¹¹² Orr's study, however, has received such severe criticism that one must be suspicious of its results.¹¹³

The question of whether the part of the property tax that relates to the land rather than the improvements is ever shifted in the residential context is a most difficult one. Orr's focus was on improvements. Absent studies on the point, theory would indicate that taxes on the value of the land are borne by the property owner. Some current theorists go even further and suggest that both taxes on the value of land and improvements will be borne by property owners.¹¹⁴ Given the pervasiveness of lay assumptions, however, that landlords will always increase rents to cover changes in property taxation, this area needs fur-

¹¹² Orr attempted to ascertain whether taxes on improvements were shifted by studying the relationships between interjurisdictional tax differentials and rents. Orr assumed that there was no way to determine whether components of the several property taxes studied that were identical were shifted because there was no available indication of what rents would have been in their absence. Rather, he hoped to learn whether shifting occurred by assuming that if the tax differentials could account for rent differentials (if any), then shifting occurred for the components of the tax rates studied that were identical also.

Orr examined 31 communities in the Boston area for 1959. Tax rates on single family homes ranged from 2.1 percent to 6.6 percent. Orr used the median gross rent per room in each taxing jurisdiction as the indicator of rent differentials, computed from the median gross rent per unit and the median number of rooms in both rental and owner occupied units.

Orr attempted to account for community differences by incorporating differences in land value, differences in distance from the downtown business area, differences in the age and percentage of dilapidation of the housing stock in each community, and differences in public spending per pupil on education in order to isolate property tax effects.

Orr found that variables other than property taxes accounted for the bulk of rent differentials, when they existed, and that tax differentials were not a significant aid in predicting rent differences. Not surprisingly, the strongest factor in rent differentials was distance from the central business district. Orr surmised, from these results, that taxes are not shifted. *Id.*

¹¹³ Orr's work was first criticized by Heinberg & Oates, *supra* note 99, who argued that Orr had incorrectly chosen his variables because he had not confined his data to multiple dwelling units. Instead he had used data on single family residences, which Heinberg & Oates felt were atypical of rentals. As a consequence, tax payments were understated, and their effects on rents biased. Another criticism, Coen & Powell, *Theory and Measurement of the Incidence of Differential Property Taxes on Rental Housing*, 25 NAT'L TAX J. 211 (1972), questions the underlying assumption of Orr's analysis. Coen & Powell argue that tax differentials may not be accompanied by like rent differentials while shifting still occurs. As an example, they suggest the following. Suppose that there are two neighboring tax jurisdictions, *A* and *B*, with equal property taxes and rents. Jurisdiction *A* raises property taxes, and landlords within *A* attempt to raise rents to shift the tax. As renters in *A* migrate to *B* to avoid the shifted tax, rents will be bid up in *B* until the rents in *B* equal the rents in *A* and the incentive to migrate disappears. An observer, such as Orr, would then conclude that taxes are not shifted since rents do not differ, and would miss both the tax shifting in *A* and the windfall to the landlords in *B*. A third criticism of Orr's work, again by Heinberg & Oates, *The Incidence of Differential Property Taxation on Rental Housing*, 25 NAT'L TAX J. 221 (1972), suggests that the relationships between the timing of tax changes and rent changes need to be studied to remedy the Coen-Powell criticism and to account for rent changes produced by long run trends such as inflation and growth in demand.

¹¹⁴ See, e.g., Gaffney, *The Property Tax is a Progressive Tax*, in PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 408-27 (1971).

ther research before any definitive conclusion about residential property tax shifting can be made.

(c) Business and commercial land uses

Here again there are no relevant empirical studies to buttress or refute what theoreticians have asserted regarding shifting. Shifting may take place between users of taxed business or commercial property. Shifting by property owners will act as an offset to tax capitalization, and shifts to users will result in increased costs of operation. Further, shifting may occur from users of taxed property, whether owners or renters, and the consuming public. The empirical studies that do exist on tax shifting by business and industries focus on income or profit taxes, not property taxes. Most of these indicate that nearly complete shifting of such taxes occurs.¹¹⁵ In the absence of some reason to believe that property taxes are treated by business and commercial land users like other taxes, little can be said about the extent of tax shifting, if any, in the commercial and industrial land use context.

4. Benefit Capitalization as an Offset to the Property Tax

So far we have examined the way in which the property tax can reduce land value and make a particular parcel (or use of the parcel) less desirable than it would be if the tax was lower or non-existent. Here we will consider what effects the spending of the revenue raised by the tax can have on land value of land owners. The value of the tax-financed services may be reflected in an increase in property values through capitalization of the benefits provided. In the case of land users who have had their rental expense increased by tax shifting, this offset will be manifested by the presence of goods or services which would not have been present in the absence of a tax.

Benefit capitalization has been studied only in the residential context. Generally, it appears that the level of provision of public services is positively related to property values.

Two good empirical studies have tested for benefit capitalizations in the residential setting. The first, conducted by Oates in 1961,¹¹⁶ compared variations in property tax rates with one form of local expenditure, per pupil expenditure for education, among a sample of jurisdictions in New Jersey. After demonstrating that the taxes were capitalized, Oates concluded that local expenditures are positively

¹¹⁵ See Mieszkowski, *Tax Incidence Theory: The Effects of Taxes on the Distribution of Income*, 7 J. OF ECON. LIT. 1103 (1969).

¹¹⁶ See Oates, *supra* note 103.

related to property values. Sabella's recent study¹¹⁷ examined the relationships between property taxes, local spending as represented per pupil school expenditure, and property values for a sample of residences which sold twice during a four year period in Minnesota. He also concluded that benefit capitalization will act as an offset to the value-depressing effect of a property tax.

Both Oates and Sabella reach a further conclusion of some interest. Beyond showing the presence of benefit capitalization, they indicate benefit capitalization may fully offset or more than offset the depressive effects of tax capitalization. Sabella's data, for example, was structured into ten different time subsets for the four year period studied. In eight of these periods, the net effect of tax and benefit capitalization resulted in an increase in property values.¹¹⁸ A growing body of literature concerning the determinants of industrial location has pointed to the importance of public expenditure policies, which implies the notion of benefit capitalization. One study noted: "If a community has better schools, highways, utilities and fire and police protection, industry will be willing, even glad to pay higher taxes. Industry wants fair taxes, not simply low ones."¹¹⁹

5. The Net Effect of the Property Tax

The preceding sections have reviewed empirical studies undertaken by economists to determine the influence that the property tax will have on land value. It is fair to conclude from them that the tax will effect the value of a parcel subject to the tax. Further, within a taxing area the net impact will depend no less on the benefits financed by the property tax than on the burdens imposed by it. If the strength of tax capitalization is greater than the strength of benefit capitalization, then property values will decline.¹²⁰ If, on the other hand, benefit

¹¹⁷ See Sabella, *supra* note 105.

¹¹⁸ *Id.* at 119.

¹¹⁹ Murphy & Baldwin, *Business Moves to the Industrial Park*, 37 HARV. BUS. REV. 79 (May/June 1959). This conclusion is supported by an ACIR study of the relationship of taxes and industrial locational decisions: "The basis for industry's growing concern over public expenditure policies is no longer simply a matter of the larger tax bills it pays as State and local expenditures grow. . . . It stems rather from the increasing importance industry attaches to the provision of typical State and local social or people-related services, particularly education, because the services can affect industry's ability to attract and maintain highly qualified employees." ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL TAXATION AND INDUSTRIAL LOCATION 72 (1967) [hereinafter cited as ACIR 1967].

¹²⁰ This can occur if taxes are increased while benefits are not. If taxes are increased to finance higher costs of providing existing services, the decline in value should occur unless the market simultaneously recognizes the higher cost of providing these services.

capitalization is greater than tax capitalization, property values will rise. This may occur as a result of a reassessment program which lowers some owners' tax bills, or when levels of service provision leads to economies of scale, but Oates'¹²¹ and Sabella's¹²² findings indicate that this will often occur when the owner of property is perceived as the beneficiary of tax-financed services which exceed in value the amount of the tax. One factor that will obviously bear upon the amount of benefit capitalization is how specifically the service paid for by the tax benefits the owner *qua* owner.¹²³ Control over the budget is one way a local government has of influencing land values in its jurisdiction.

It is difficult to translate the property tax's influence on land values into land use impacts. Lower value might encourage land consumption for residential use by permitting demanders of land to get more of it for the same amount of money, and by slightly reducing buying costs (such as a downpayment). Higher land value, on the other hand, may promote leapfrogging and sprawl development by forcing those with limited resources to seek housing farther from the urban center where they can get "more house for the money". The answer to this apparent contradiction, of course, is that the property tax cannot be the vehicle for resolving all the land use problems a community might face. The studies reported here, however, do imply that the property tax does have some impact on land development patterns. This suggests the need for further emirical investigation addressing the broad land use effects of the property tax as a first step in harnessing taxation for land use planning purposes.

The importance of property tax and benefit capitalization in the land use process is heightened because of interjurisdictional differences in tax bills and benefit levels. This is especially so when the jurisdictions are part of the same metropolitan area and may be viewed as interchangeable on many grounds by land consumers. The assumption here is that those making land use decisions consider a wider geographical area than a single taxing jurisdiction, and that within that wider geographical area tax and benefit variations will be large enough to not leave those making land use decisions indifferent.

This view was first postulated for residential land uses by Tiebout.¹²⁴ Two subsequent studies seem to support Tiebout's conclusion

¹²¹ See Oates, *supra* note 103.

¹²² See Sabella, *supra* note 105.

¹²³ See text accompanying notes 70-71 *supra*.

¹²⁴ Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416 (1956).

that interjurisdictional differences affect location. The first study, by W. J. Beeman,¹²⁵ examined the relationships between property taxation, a number of other variables (including density, land surface characteristics, and distance from downtown metropolitan centers), and growth in property values for taxing jurisdictions in the Syracuse, New York, area from 1955 to 1965. Beeman concluded that property taxation did play a role in the location of residential land use.¹²⁶ Oates' study¹²⁷ compared property tax and service variations with property value variations in 53 communities in northeastern New Jersey. Oates concluded that tax and benefit capitalization were documented and that this demonstrated the validity of the locational incentive theory because "people do appear willing to pay more to live in a community which provides a high-quality program of public services . . . with lower tax rates."¹²⁸

Interjurisdictional variations may also exert some influence on the location of agricultural uses, inducing them to locate in primarily low-tax rural rather than high-tax urban areas. This may be because of greater demand for non-property related services in urban rather than rural areas and because of the lack of benefits agricultural and open space uses derive from non-property related services.¹²⁹

Commercial and industrial land uses also appear to be affected by interjurisdictional property tax and expenditure variations. The strength of these effects is not generally understood, however, because studies which have examined taxes as locational incentives have focused on all taxes faced by firms in a given area, not just the property tax.¹³⁰

¹²⁵ W. J. BEEMAN, *THE PROPERTY TAX AND THE SPATIAL PATTERN OF GROWTH WITHIN URBAN AREAS*, (ULI Res. Mono. no. 16) (1969).

¹²⁶ Beeman hypothesized that growth in total property values within a tax-imposing jurisdiction would be a function of that jurisdiction's property taxation practices and of its desirability in other ways, such as population density and proximity to downtown Syracuse.

While Beeman concluded that property taxation did play a role in property value changes, he found that population density, land surface characteristics, and location with respect to central city were more important determinants.

¹²⁷ Oates, *supra* note 103.

¹²⁸ *Id.* at 968.

¹²⁹ One commentator has noted:

There are important differences between rural and urban areas in the nature and complexity of local government. In general, per capita local government expenditure is greater in urban than in rural areas due to the greater diversity of services provided in urban areas and the greater costs of administration, public assistance, fire and police protection and subsidized public transportation in urban areas.

G. Gustafson, *The California Land Conservation Act of 1965: An Economic Analysis of a New Tool of Land Use Policy* 26 (unpublished doctoral dissertation, Univ. of Calif. at Berkeley, 1973) [hereinafter cited as Gustafson].

¹³⁰ See notes 188-210 *infra* and text accompanying.

However, a theory has been developed by J. D. Strasma that locational decision-making is a multi-step process in which property tax variations do influence location.¹³¹ Strasma's thesis is that business and industrial land uses will begin a location search by selecting regions, which are usually multi-state geographical areas. The second step in such a location process is for the selection of some smaller area to be chosen, usually on the basis of access to labor, materials, and so on. Finally, within the area under consideration, a site must be selected. It is in this final process that interjurisdictional property tax variations become important. The Advisory Committee on Intergovernmental Relations concurs:

Within a State and more particularly within a metropolitan area significant local property tax rate variations can and do become swing factors in plant location decisions—the industrial tax haven being the most conspicuous example. In sharp contrast to States, local governments are primarily dependent on one source of revenue—the local property tax. . . . Thus, the job and tax base stakes can become quite high and interlocal competition can become quite keen.¹³²

6. The Role of Property Taxation in the Problems of Blight and Spread

Fully appreciating the impacts of property taxation on land use requires considering two problems which the tax is frequently alleged to cause—blight, and scattered or sprawl development. It has been argued for some time that property taxation leads to blight.¹³³ Henry George argued that blight is caused by the taxation of structures as well as land which encourages owners to forego maintenance and rehabilitation of structures as a means of avoiding some portion of their property tax bills.¹³⁴ If the tax does not directly cause the blight, it might be argued that assessment practices systematically lead to the over-assessment of properties in need of rehabilitation, which drains resources that might be used for maintenance and discourages investors or owner-occupants from making needed repairs and improvements.¹³⁵

However, assessment practices do not seem to play a part in the blighting of an area. Ordinary maintenance does not add to tax bills. Further, most improvements to structures do not lead to reassessment. Peterson's study found that few improvements of moderate scale

¹³¹ J.D. STRASMA, *STATE AND LOCAL TAXATION OF INDUSTRY* (1959).

¹³² ACIR 1967 at 70. See also Due, *Studies of State-Local Tax Influences on Location of Industry*, 14 NAT'L TAX J. 163 (1961).

¹³³ See Zimmerman, *supra* note 7, at 648-50.

¹³⁴ H. GEORGE, *PROGRESS AND POVERTY* (1911).

¹³⁵ Cf. Note, *Reducing Property Taxes: An Evaluation of Collective Action*, 51 LAND ECONOMICS 94 (1975).

(\$10,000 or less) led to reassessment and a larger tax bill.¹³⁶ Further, reassessment when it does occur typically does not increase the valuation of a property by the full cost of the rehabilitation work.¹³⁷ Reassessments of more substantial improvements may not even be a significant factor in the creation of blight:

As to more sizable outlays, the expense is desirable or not desirable, justifiable or not justifiable on non-tax grounds. If he (a property owner) fails to make major improvements, it is because the return would not justify the investment, on the assumption that these gentlemen are concerned above all about profits. That is, even though the absolute size of his tax bill would rise, yet, as a proportion of the increased rental income, they would remain the same, assuming that a comparable market for higher priced rentals exists. Hence, it is simply market conditions, not tax policy, that make the investment unprofitable.¹³⁸

Taxes are a relevant factor because they would be an additional cost, but the question whether rehabilitation investment will pay for itself will probably be of greater significance because of the relative costs differentials between the improvements and the tax.¹³⁹

Secondly, a "tax on land only" form of assessment may also create blight. There are no pure "land only" property tax systems in the United States, but two cities have a graded tax system which taxes land more heavily than improvements.

Pittsburgh has employed a graded tax since 1913.¹⁴⁰ Since 1925, land has been taxed at twice the rate of improvements.¹⁴¹ Studies examining Pittsburgh's graded tax have come up with little evidence that the graded tax has stimulated property improvements.¹⁴² This may be due to the fact that only one of three taxing jurisdictions has the graded tax. Further, the more recent study found that

[t]he graded tax system apparently did not prevent blight from affecting many areas of the city. In addition, since most of those surveyed

¹³⁶ PROPERTY TAXES, HOUSING at 29.

¹³⁷ *Id.* at 6.

¹³⁸ Curran, *The General Property Tax and Residential Rehabilitation*, PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 250, 254-55 (1964).

¹³⁹ *But see* Zimmerman, *supra* note 7, at 649-50.

¹⁴⁰ Richman, *The Theory and Practice of Site-Value Taxation in Pittsburgh*, in PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 259 (1964).

¹⁴¹ PRICE WATERHOUSE & Co., A STUDY OF THE EFFECTS OF REAL PROPERTY TAX INCENTIVE PROGRAMS UPON PROPERTY REHABILITATION AND NEW CONSTRUCTION 3 (1973). The city, county and school district all tax Pittsburgh property. Only the city has the graded tax. Walker, *Some Observations on Land Value Taxation*, THE APPRAISAL JOURNAL, Jan. 1973, at 96.

¹⁴² Richman, *supra* note 140 and PRICE WATERHOUSE & Co., *supra* note 141.

in Pittsburgh either did not know the graded tax existed or did not understand it, there has to be considerable doubt that it functions as an incentive in Pittsburgh.¹⁴³

Honolulu has a graded tax of more recent origin than the Pittsburgh system. The high ratio of land to improvements values, and the high cost of development in Honolulu, may work against the tax having a significant impact on land use patterns. A major study of Honolulu's experience to date with its tax has concluded that there is little if any discernible incentive in Honolulu's graded tax program to redevelop blighted areas.¹⁴⁴

Concerning the role the property tax plays in the creation of blight, it can be fairly concluded from the information presented here that it is not the tax itself or whether the tax is on improvements as well as land that contributes to blight as much as the administration of assessment programs. This was a major conclusion of a 1973 HUD sponsored study of blighted property:¹⁴⁵

A clear pattern emerges in which poor-quality housing in blighted neighborhoods, occupied by low income tenants, pay property taxes at a substantially higher rate than property in other neighborhoods. Since the millage rate is uniform throughout each city, neighborhood differences in effective tax rates are due entirely to differential assessment/market value ratios.¹⁴⁶

Infrequent reassessment may be the cause of the overassessment of deteriorating and blighted neighborhoods. This means changes in the neighborhood characteristics and property values will not be reflected in property taxes. As a result both overvaluation of declining neighborhoods and undervaluation of upward transitional neighborhoods occurs.¹⁴⁷ One alternative explanation has been suggested: that assessors may take into account the greater amount of services that must be provided to areas with a high population density per dollar of property value and assess such areas higher than other parts of the tax jurisdic-

¹⁴³ PRICE WATERHOUSE & Co., *supra* note 141, at 3.

¹⁴⁴ *Id.* See also Hulton, *Hawaii's Modified Property Tax Base Law*, in PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION 52 (1969).

¹⁴⁵ ARTHUR D. LITTLE, INC., A STUDY OF PROPERTY TAXES AND URBAN BLIGHT, SEN. COMM. ON GOV'T. OPERATIONS, SUBCOMM. ON INTERGOV'TAL RELATIONS, 93d CONG., 1ST SESS. (Comm. Print 1973). This study of ten major urban areas was the research on which PROPERTY TAXES, HOUSING, *supra* note 21, was based. An analysis was undertaken of the relative property tax burden in each of those areas for different economic levels of housing. As a measure of tax burden, the ratio of actual market value to assessed value for each class of housing was used.

¹⁴⁶ ARTHUR D. LITTLE, INC., *supra* note 145, at 10.

¹⁴⁷ PROPERTY TAXES, HOUSING at 6, 19-26.

tion.¹⁴⁸ It should be noted, however, that inaccurate assessment is not inherent in a property tax system.¹⁴⁹

A second way in which property taxation is thought to have contributed to the present land use crisis is as an inducement to sprawl or scatter development. The taxation of improvements as well as land, assessment of property at its current fair value rather than its highest and best use, and interjurisdictional tax variations are pointed to as the causal elements.

Taxing improvements creates an incentive for sprawl, some assert, by discouraging intense use of land and encouraging horizontal spreading out and increased lot coverage and use of land.¹⁵⁰ The property tax on a building is like an increased cost and will deter building. Spreading out development results, to a degree, in capital cost savings, when compared with building up a smaller parcel. So, although property taxes reduce the intensity of use of a parcel, they will induce land consumption.¹⁵¹ It is currently unknown how significant a factor the property tax on improvements is in the process by which metropolitan areas sprawl. It may be that consumers strongly prefer low density type developments and are willing to suffer the commuting and other expenses that must be incurred to get such housing which may be forced out to or beyond the existing fringe of development by the general demand for land. Consumers' perceptions of the tax and benefit mix which can be involved in locational decisions, as the capitalization studies show,¹⁵² may also play a role here. At any rate, it is not clear that relying on a land tax only is a viable alternative. The experience with site value taxation in Australia and New Zealand has shown that sprawl may still occur,¹⁵³

¹⁴⁸ Oldman & Aaron, *Assessment-Sales Ratios Under the Boston Property Tax*, 18 NAT'L TAX J. 36, 43 (1965).

¹⁴⁹ The HUD-sponsored study done by Arthur D. Little, Inc. found several of the ten cities studied had very similar median effective property tax rates among different neighborhoods. For instance, in San Francisco, blighted property has a median effective rate of 1.9 percent, downward transitional property 2.5 percent, upward transitional 2.0 percent and stable neighborhoods 2.2 percent. Baltimore, on the other hand was not so consistent. Its rates for the same categories of neighborhoods were 14.9 percent, 9.8 percent, 1.4 percent and 1.6 percent respectively. PROPERTY TAXES, HOUSING at 10, Table A. Further, the Montana study of property tax capitalization found no significant variation in assessment-sales ratio with respect to property value, age or location. Wicks, Little & Beck, *supra* note 87, at 264.

¹⁵⁰ Gaffney, *Tax Reform to Release Land*, in MODERNIZING URBAN LAND POLICY 130-31 (M. Clawson ed. 1973).

¹⁵¹ *Id.*

¹⁵² See notes 116-19 *supra* and text accompanying.

¹⁵³ See Lefcoe, *Tax and Urban Design Policy*, *supra* note 10. Lefcoe reports that in Sydney low density housing can be built in areas far from the center city where land is a bargain and the tax rate reflects that bargain. Also, in that metropolitan area, many of the suburbs have voted against the site value tax.

and that the tax may have unwanted harsh effects on certain land users, particularly low-income homeowners living in or near the central city.¹⁵⁴

Secondly, the administration of the property tax arguably leads to (or acquiesces in the face of) sprawl by assessing land at its current fair market value rather than at its highest and best use. The consequence of this may be that inefficient uses of land are tolerated and new, more efficient uses are forced to spread out into areas that have not been developed. If this means that the property could be used as a means of pricing out certain inefficient land uses by making their costs prohibitive, then it may be that the current form of assessment allows sprawl. Private land users can choose to buy out current inefficient users in urban areas. That they have not done so indicates that the urban-suburban land price differential is a powerful incentive to the creation of sprawl. A tax on land only or a strongly graded tax might force current inefficient land users out. This would probably depend on whether the tax will put inefficient users in a position where they do not have the cash to meet the tax payments. Otherwise, since land costs would remain the same because of increased taxes, no change would be made in the urban-suburban price differential, and the same sprawl incentive would remain. The Australian experience has been that the site value tax has helped the turnover of land uses in high demand center city areas:

The most important role of the site value tax system in the . . . redevelopment process appears to be in increasing the availability and the early use of redevelopment sites in the area of increased demand. It increases the availability of sites by accelerating the transition of properties to the status of economic redevelopment sites and then positively encouraging their sale for redevelopment.¹⁵⁵

Finally, property taxation may influence urban sprawl through the influence of locational incentives created by interjurisdictional tax differ-

¹⁵⁴ Woodruff, *Land Value Taxation: A 1966 Evaluation*, in *THE PROPERTY TAX: PROBLEMS AND POTENTIALS* (Tax Institute of America 1967). Woodruff reports:

In the older parts of almost every city elderly pensioners of limited means found it difficult to retain their homes in neighborhoods where land values were rising as commercial and industrial uses began to supersede single residences. These 'hold-outs' were non-economic underusers in the classic sense, but their strong emotional ties to their residences were a political factor too important to ignore and the 'hardship' exemptions were enacted to enable such owners to stay put.

Id. at 435. In Hawaii special legislation was enacted to relieve pressure on taxpayers living in older homes and those less financially able to make substantial improvements in their property under Hawaii's graded tax system. Hulton, *Hawaii's Modified Property Tax Base Law*, in *PROCEEDINGS OF THE NATIONAL TAX ASSOCIATION* at 62 (1969).

¹⁵⁵ R.W. ARCHER, *SITE VALUES TAXATION IN CENTRAL BUSINESS DISTRICT REDEVELOPMENT 17* (ULI Res. Rpt. no. 19) (1972).

entials. The Oates¹⁵⁶ and Sabella¹⁵⁷ studies demonstrate that land users, at least residential land users, react to interjurisdictional incentives. While there may not be sprawl-inducing differentials in metropolitan areas in the sense that central city areas can be characterized as high-tax areas while suburban areas can be characterized as low-tax areas,¹⁵⁸ there are benefit differentials that can work a like effect. This is especially true for welfare expenditures, which are highly concentrated in non-suburban areas. This gives central city property owners who normally do not directly receive these benefits an incentive to move to possibly more tax expensive jurisdictions in which they will be the more direct beneficiaries of the services their tax dollars provide.

B. Sales Tax

The sales tax will influence land use by changing the income available to be spent on all purchases, including those related to land, and by creating a set of interjurisdictional price incentives which will influence general sales and business activity levels and thus shape land use decisions. Further, the capitalization of benefits financed by sales and gross receipts tax revenues may affect property values. Sales taxation as a revenue source for state and local governments is second only in importance to property taxation.¹⁵⁹ All states tax selective items such as motor fuels, alcohol, and tobacco, and 45 states levy general sales and gross receipts taxes.¹⁶⁰ In the aggregate, such taxes raised approximately 33 billion dollars for state and local governments in 1971.¹⁶¹

To date, the study of land use impacts of the sales tax has been ignored despite the likelihood that there are some impacts. Any analysis of such impacts, if any, may be based, at least in part, on speculation. If land users can shift these taxes (as commercial users might be able to do to their customers) it will be most difficult to even speculate about the effect of sales taxation on particular land uses. Focusing on residential land use, it is doubtful whether the tax, considered by itself,

¹⁵⁶ See Oates, *supra* note 103.

¹⁵⁷ See Sabella, *supra* note 105.

¹⁵⁸ On the question of whether urban and suburban areas can be characterized as tax-expensive and tax-inexpensive, respectively, compare Note, *The Property Tax—A Withering Vine*, 60 KY. L.J. 174, 187-89 (1971) with Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303, 1328-29 (1972).

¹⁵⁹ 1973 STAT. ABSTRACT at 411, figure 28. For a breakdown on a state-by-state basis of the percentage of general revenue raised by sales and gross receipts taxes see ACIR 1973-74 at 38, table 25.

¹⁶⁰ See notes 44-46 *supra*.

¹⁶¹ 1973 STAT. ABSTRACT at 419, table 668. The sales tax burden as a percentage of income was mildly regressive in 1970 at least in the urban centers. See ACIR 1972 at 62-63, table 39.

has a substantial effect on the timing, location, or style of residential development. The tax usually represents no more than two percent of family income and does not vary too much among income groups.¹⁶² Translated into monthly figures, the sales tax would not represent a large percentage of a family's housing expenses. If the tax were eliminated and not replaced by another tax, the amount of money that each family would have, even if all of it were spent on housing, would probably not put it in a position to demand much different housing than it already has. This may be an even more certain result at the lower end of the income spectrum.

A more interesting exercise is to consider the effects on residential land uses of dropping the sales tax and replacing it with an increased property tax. This should indicate the opportunity costs which are borne by residential land users. It is hard to know exactly how much the property tax rate would have to be increased if state and local governments chose to finance expenditures by greater property taxes rather than imposing sales taxes, but based on 1971 figures total property tax receipts would have had to rise over 40 percent to generate the revenue produced by the general sales tax.¹⁶³ The use of sales taxes most likely maintains property values at a higher level than if revenue needs were financed by property tax increases. Everyone, not just land-owners, pays sales taxes, and it is less likely that such taxes will be capitalized into property values than will be property taxes. Consequently, the demand for residential land would probably be higher than under a property tax scheme, if only marginally. For agricultural and open space land uses the income reducing aspect of sales taxation has also probably had a negligible effect. Assuming again, however, that sales taxes are imposed as a substitute for property tax increases, then the use of sales taxation may prevent increased tax costs to open space and agricultural land users. This may slow down a little the conversion of such land to other uses.

The income reducing effect of sales taxation on commercial and industrial land use is likely to be of small consequence if commonly held beliefs about the extent of shifting of such taxes in this context are accurate. Mieszkowski reports after a review of empirical studies on tax shifting that sales and gross receipts taxes are almost fully

¹⁶² See ACIR 1973-74 at 55, table 40; ACIR 1972 at 62-63, table 39.

¹⁶³ In 1971 the state-local property tax contributed 39.9 percent to total state and local tax receipts and the general sales tax contributed 16.4 percent. 1973 STAT. ABSTRACT at 411, table 28. The 40 percent figure given in the text results from figuring what percentage of the property tax figures the sales tax figure is.

shifted.¹⁶⁴ While some small percentage of sales taxes will be borne by these land users, and while the shifting of such taxes may mean some loss in income because of sales declines, it would still seem that sales and gross receipts taxes do not decrease incomes enough to alter land use demands. It may be the case, however, that interjurisdictional price differentials will have a strong income reducing effect for local or small market area businesses which will impact on land use.

Sales taxes can also impact on land use by creating interjurisdictional price differentials which create incentives effecting the level of business and sales activity.¹⁶⁵ Such incentives can affect the spatial distribution of business activity, and thus the demand for land uses interjurisdictionally. A corresponding effect on income may strongly influence the behavior of business land users with geographically small markets.

The imposition of a sales tax will create price differentials between the tax-imposing jurisdiction and non-tax-imposing jurisdictions which can cause sales activity to concentrate in those jurisdictions without a tax. This will depend on the rate of sales taxation within the tax-imposing jurisdictions and on the proximity of tax-imposing jurisdictions to areas which do not impose such a tax.

Several studies documenting the effects of sales taxation on business levels and the significance of available non-tax-imposing jurisdictions have been made. One such study compared sales tax changes between 1948-1965 in New York City and the state of Alabama.¹⁶⁶ New York City was chosen because of the availability of non-tax jurisdictions in close proximity, while Alabama was chosen because of the few nearby jurisdictions which did *not* impose a sales tax. It was found that sales activity was negatively influenced in New York City because of available alternatives, while the sales tax in Alabama appeared to exert no similar negative effect.¹⁶⁷ Another study focused on sales activity in three border cities in the state of Washington which all had non-taxing jurisdictions just across the state border.¹⁶⁸ It concluded that:

¹⁶⁴ See Mieszkowski, *supra* note 115.

¹⁶⁵ See Mikesell, *Central Cities and Sales Tax Differentials: The Border City Problem*, 23 NAT'L TAX J. 206 (1970).

¹⁶⁶ Hamovitch, *Sales Taxation: An Analysis of the Effects of Rate Increases in Two Contrasting Cases*, 19 NAT'L TAX J. 411 (1966).

¹⁶⁷ The technique was to test for growth in sales tax revenue before and after sales tax rate increases. As a result, it would seem that possible differences in consuming patterns would not be responsible for the differing results. *Id.*

¹⁶⁸ McAllister, *The Border Tax Problem in Washington*, 14 NAT'L TAX J. 362 (1961).

In every case for the three cities of Vancouver, Walla Walla and Pullman, the trade pattern is different from what would be expected if the sales tax were not a factor in buying decisions. An examination of the reasons given by buyers for purchasing in non-tax areas shows that escaping the sales tax is a dominant reason in people's minds. The unusual buying pattern, coupled with the fact that people overwhelmingly feel that the tax is important, make it difficult to escape the conclusion that a desire to obtain a price advantage by not paying Washington's retail sales tax is one important reason why border residents will shop in non-tax states.¹⁶⁹

A later study compared sales activity in Illinois for border and non-border counties to test for sales volume differences which can be attributed to tax avoidance by shopping outside of the state on the part of consumers.¹⁷⁰ The results of this study also indicated that total sales per capita and sales tax revenues per capita are adversely effected in counties located on the border. This supports the theory that stores in high sales tax border areas do suffer a tax-induced sales migration.¹⁷¹

The land use impact of these interjurisdictional incentives is uncertain. For residential land uses, it is unlikely that these incentives strongly affect locational preferences.¹⁷² For business and commercial activities, it is likely that interjurisdictional price incentives will intensify business activities in non-tax jurisdictions. This will increase the demand for commercial land uses within the non-taxing jurisdiction and should lower or dampen the demand for such land uses within tax imposing jurisdictions; thus the spatial distribution of land uses will likely be altered by sales taxation.

¹⁶⁹ *Id.* at 374. McAllister used both an empirical and an interview technique. McAllister contrasted total sales per capita between three border cities and nonborder cities to reach his empirical results. He also employed an interview technique, which is subject to the criticism that an incentive exists for purchasers to complain about the effects of taxes in the hopes that such complaints will influence future sales tax change decisions.

¹⁷⁰ Mikesell, *Sales Taxation and the Border County Problem*, 11 Q. REV. OF ECON. AND BUS. 23 (1971).

¹⁷¹ *Id.* at 28. Mikesell grouped all Illinois counties into two groups, those bordering on adjacent states and those not, and compared the effects of variables including average county income, percentage of county residents with incomes over \$10,000 per year, as well as border proximity to lower tax areas, on per capita sales. Mikesell concluded that ability to avoid taxes did impact on per capita sales. Specifically, he found that border county per capita sales would be between \$23-188 lower than nonborder counties, with average per capita sales for all counties being \$1,321.

¹⁷² Different types of business and commercial land uses will be affected in different ways by sales taxation. Studying the situation in Illinois, Mikesell found that while tax avoidance was possible, sales volume did not fall off for convenience goods and automobile sales. For the former category of goods, Mikesell explained this result by conjecturing that for convenience products, proximity to the buyer is an important factor in the shopping choice. Regarding automobile sales, Mikesell noted that although sales tax savings on the purchase of a car can be substantial, the auto must be registered and licensed in the state of operation, which can often collect a use tax. So savings from auto purchase in a lower sales tax state is likely to be absent. *Id.* at 28-29.

Finally, the use of a sales tax may have impacts on land use patterns if sales tax revenues are used for the provision of services which are capitalized into property values. This has not been tested for, but benefit capitalization has been studied and the focus there is on the services provided, not the source of the revenue used to finance the service.¹⁷³ Therefore, there is no reason not to believe the phenomenon will operate with sales tax-financed benefits as well as property tax-financed ones.

C. State and Local Incomes Taxes

State and local governments¹⁷⁴ have increased their reliance on income taxation as a revenue source in recent years.¹⁷⁵ Almost all the states levy an income tax,¹⁷⁶ and several states have given their local

¹⁷³ See notes 116-80 *supra* and text accompanying.

¹⁷⁴ Because the focus of this article is on state and local taxes, no attempt is made to discuss the influence of the federal income tax on land use. However, such an influence exists and is surely a profound one. See generally Gurko, *Federal Income Taxes and Urban Sprawl*, 48 DENVER L.J. 329 (1972). Provisions in the Internal Revenue Code allowing interest on mortgages, property taxes and other expenses relating to a home to be deducted from income while not providing for any of the tax benefits to be passed on to renters and not taxing owners on the imputed rental income of their homes point up a bias in the federal tax laws for homeownership. Further, these deductions give homeowners more resources to spend on their houses and probably encourage consumption of housing. The progressive rate of taxation exacerbates this because it makes these deductions mean more to higher income taxpayers. Federal tax law also encourages speculation in land by allowing deductions against income (whether derived from the property or not) for expenses related to the purchase and development of rental property. Then investors are often allowed to report the profit they make as a capital gain which has a favorable tax rate. This policy would seem to stimulate sales activity and development on the rural-urban fringe and beyond, driving up prices and hastening the conversion of open space and agricultural land to suburban uses. While the tax advantages of real estate investment might be expected to increase the supply of rental housing, the general lack of differentiation between incentives to invest in low income apartments as opposed to moderate and upper income apartments means that the housing most needed will not be built. A real estate tax shelter to be most effective requires ample mortgage credit for averaging, a relatively assured income and resale value, plus some prospect for a capital gain on sale. Luxury housing tends to meet these requirements best. If the federal tax laws favor homeownership and encourage consumption of land for single-family housing, encourage development on the rural-urban fringe and do not encourage the provision of low-income housing, then federal tax policy will diminish whatever land use planning benefits a local tax program might contain. Tax reform for land use planning requires a full understanding of how federal taxation relates to state and local planning and taxation policy.

¹⁷⁵ As a percentage of total state and local revenue nationally, state-local individual income taxes increased over 300 percent to 8.2 percent from 1942 to 1971. ACIR 1973-74 at 36, table 23. For a history of income taxation by state and local governments see Deran, *An Overview of the Municipal Income Tax*, in 28 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 441 (R. Connery ed. 1968).

¹⁷⁶ At least Florida, Nevada, New Hampshire, South Dakota, Texas, Washington, and Wyoming do not have a state income tax. See ACIR 1973-74 at 36, table 23. Practices vary among the states. Connecticut, for example, does not have a personal income tax but does tax capital gains and dividends. CCH STATE TAX GUIDE, ALL STATES ¶ 15-295 (1967).

governments the power to levy such a tax.¹⁷⁷ Income taxation has an income reduction effect, which will alter the purchasing power of the taxpayer and can affect land use. Local income taxation can create interjurisdictional tax liability differentials which can alter the spatial distribution of land uses. If the revenues derived from an income tax are used to provide services the values of which are capitalized into property values, benefit capitalization may also occur.

The importance of local income taxation obviously varies depending on the level of the tax, but wherever it is used it represents a significant portion of local tax revenues.¹⁷⁸ There are several forms in which the local income tax is levied. It can be, of course, a flat rate tax on earned income. New York City has a graduated tax.¹⁷⁹ The taxing jurisdiction is normally that of the taxpayer's domicile, though some cities tax nonresident employees.¹⁸⁰ New York City taxes nonresidents at a lower rate than residents.¹⁸¹ Where income taxation on the municipal level is widely employed, workers who are taxed in both their home and employment cities are given relief by state mandated income tax liability ceilings and tax sharing plans.¹⁸²

Residential land uses can be influenced by this tax in several ways. Empirical studies of the impact of income taxation on residential land uses are nonexistent, but in theory certain results can be expected. Demand for more expensive residential land uses should be depressed by income taxation. Income taxation should reduce purchasing power, while the expenditure of income tax revenues may be capitalized into higher property values. This means lower incomes and greater demand for housing with the services that have been attached to it. This may force some consumers to switch to less expensive land uses. To the extent that less expensive land uses are equatable with more intense land uses, such as apartments and multi-family structures, land consumption will decline. This result is likely to grow in strength if the form of income taxation is progressive rather than flat rate, and if unearned income as well as earned income is included within the tax base, largely because such forms of taxation more heavily affect the affluent rather than those with lower incomes.

¹⁷⁷ See note 42 *supra* and text accompanying.

¹⁷⁸ The percentage of revenue municipal tax collections represented in 1971-72 in cities over 50,000 population ranged from 14.2 percent in Baltimore to 80.5 percent in Springfield, Ohio. The median figure was 46.0 percent. ACIR 1973-74 at 291-94, table 150. See also, CCH STATE TAX GUIDE, ALL STATES ¶ 15-691 (1967).

¹⁷⁹ Deran, *Tax Structure in Cities Using the Income Tax*, 21 NAT'L TAX J. 147 (1968).

¹⁸⁰ See generally, UNITED STATES ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, *THE COMMUTER AND THE MUNICIPAL INCOME TAX* (1970 ed.).

¹⁸¹ *Id.* at 7.

¹⁸² *Id.* at 15.

A second way in which income taxation can impact on residential land use is through the creation of interjurisdictional tax liability differentials. This can occur if an income tax is applicable to residents but not to nonresidents, and can also occur if an income tax-imposing jurisdiction is in close proximity to a jurisdiction which does not impose income taxes. While studies focusing on this migration incentive are lacking, the work that has been done suggests that such effects are small. Buehler,¹⁸³ for example, in describing the experience which Philadelphia has had with income taxation, reports that an incentive to avoid taxation has not developed. He believes this is attributable to the deductibility of local income taxes from federal income tax liability, and to the level of property taxation which has prevailed, which many feel is low due to the revenue generated by the income tax.¹⁸⁴ A study of the New York experience with income taxation also concluded that migration incentives are small.¹⁸⁵

Agricultural and open space land uses can also be influenced by income taxation. Whether such uses are benefited by higher income taxes and lower property taxes will depend on the relative tax liability of land owners of land in such uses, under both income and property taxation, which can vary among taxing jurisdictions. But agricultural land users should be better off when income taxes are substituted for property taxes. The ratio of property taxes to personal income for the farm and non-farm population shows that agriculture contributes a disproportionately large share of local public revenue. In 1970 taxes on farm property in the United States were 13.9 percent of the income of the farm population, while taxes on non-farm property amounted to only 4.0 percent of the income of non-farm population.¹⁸⁶ If this situation is altered by the imposition of a flat rate income tax, agricultural land users should pay a smaller portion of local tax bills. Depending on the profitability of individual operations, such land users might pay a smaller portion of tax bills under a progressive rate income tax. This, of course, will only result if property taxes are lowered (or remain lower than they would be) when an income tax is levied. This would appear to be the case.¹⁸⁷

¹⁸³ Buehler, *Philadelphia's Experience*, in PROCEEDINGS, *supra* note 175, at 449.

¹⁸⁴ *Id.* at 451.

¹⁸⁵ White, *Economic Evaluation of the Municipal Income Tax*, in PROCEEDINGS, *supra* note 175, at 455.

¹⁸⁶ Gustafson, *supra* note 129, at 40.

¹⁸⁷ Deran, *supra* note 179, at 152.

D. *Taxes, Tax Climates, and Business Uses of Land*

Much of the available information about the relationship of taxes and land use concerns residential uses of land. At this point, however, it is appropriate to focus specifically on business uses. Commercial and industrial land users are subject to a variety of taxes which can influence land use decision making. The array of taxes to which businesses are subject can reduce income available to be spent for all purchases, including land uses, and can also create interjurisdictional incentives based on tax differentials which can alter the spatial distribution of commercial land uses. The incentives which taxation creates for business and commercial uses of land can be important for two reasons. First, such taxes may affect the quantity and location of business land uses. Secondly, to the extent that residential land uses can be viewed as influenced by the location of commercial land uses,¹⁸⁸ such taxation will exert influences over a larger variety and quantity of land uses than just commercial uses.

The relationships between taxation in general and business or commercial land uses have been frequently studied. Yet the relationships between each of the taxes considered here and business land uses are not well understood because most studies have lumped together all taxes which a firm may face in a particular locale. Industrial and manufacturing land uses have received the most study, and other commercial land uses are less clearly understood. In addition, these studies have concentrated on the interjurisdictional price incentive effects of tax policies rather than analyzing income reduction effects of business taxes. This discussion will examine current opinions on tax policies related to business uses, focusing on industrial and manufacturing firms.

One technique used to study the relationship between taxes and business uses has been to look at the growth of some measure of business or industrial activity in various states and to compare these growth rates with each state's relative total tax burden. The implicit assumption of such studies is that growth rates and tax burdens should be inversely related.

An early study compared industrial growth in Iowa with several other states.¹⁸⁹ Growth in manufacturing employment and capital outlays of manufacturers were selected as the measures of industrial activity. Growth in tax collections was employed as the measure of tax burden, though this was not limited to taxes on industries only. The

¹⁸⁸ See, e.g., L. SAGALYN & G. STERNLIEB, *ZONING AND HOUSING COSTS* (1973).

¹⁸⁹ Bloom, *State and Local Tax Differentials* (Bureau of Bus. Res., Univ. of Iowa, 1955).

states with the higher taxes showed the greatest growth in manufacturing. The conclusion was that taxes do not retard industrial growth. For a number of reasons, this analysis is less than convincing. It may indicate nothing more than the fact that states with industrial growth received tax revenues that those without industrial growth did not because of lack of businesses to tax.

Thompson and Mattila employed significantly more sophisticated analytical techniques in their analysis of 29 manufacturing industries in several states for the period 1947-1954.¹⁹⁰ They examined a number of growth indicators, the most important of which they felt was growth in manufacturing employment, and determined that there was no significant relationship between interstate tax differentials and growth in employment.¹⁹¹

A third study of this type, conducted in 1967 by the Advisory Commission on Intergovernmental Relations,¹⁹² divided the nation into eight regions and compared states within each region on the basis of growth in manufacturing employment and total business tax liability in each state. This study also found that tax differentials did not significantly effect growth rates.¹⁹³

These tax and growth studies are of limited value. They seem to indicate that taxes and economic stagnation are not directly related, but leave many important questions unanswered. For instance, would industrial growth have been even higher in the high growth states if taxes had been lower? Do taxes influence the in-state selection of location or the amount of land used? It is difficult to determine from the studies whether it is that the taxes are not significant, or that other governmental or private stimuli have offset otherwise potentially large effects which taxes might exert. The Advisory Commission on Intergovernmental Relations felt the latter was the case:

¹⁹⁰ W.R. THOMPSON & J.M. MATTILA, *AN ECONOMETRIC MODEL OF POSTWAR STATE INDUSTRIAL GROWTH* (1959).

¹⁹¹ Thompson & Matilla employed a model in which they used taxes paid by businesses per employee and the measure of an individual state's tax burden for the industry in question. Growth in manufacturing employment was used as the indicator of economic growth. One limitation of this study may be that it does not deal with the effects of property or gross receipts taxes on capital-intensive rather than labor-intensive indicator levels.

¹⁹² ACIR 1967 at 63-68.

¹⁹³ The ACIR study was substantially like that employed by Thompson & Matilla. However, the ACIR did not attempt industry-by-industry comparisons. Rather, the ACIR assumed that growth in each state (within a given region) in total manufacturing employment would be a good indicator of economic development. Like the Thompson & Matilla study, this study failed to indicate the impact of taxation on capital-intensive as opposed to labor-intensive industries.

This lack of relationship can be attributed in no small measure to the fact that States are constantly taking steps to insure that their taxes do not "get out of line" with those of their neighboring jurisdictions. A state usually moves into this competitive arena armed with many tax options and sufficient political support to enable it to go a long way toward neutralizing any tax differential advantage possessed by a neighboring State.¹⁹⁴

A second technique used to study the relationships between taxes and business land use is the interview technique in which business leaders are questioned about the factors that have influenced their location decisions. They usually indicate that taxes play a minor role. The availability of supplies and labor, and accessibility to markets, are generally more significant.¹⁹⁵ One review of several surveys of firms moving out of New York City from 1947-1955 showed that some 14 percent of those responding to the surveys indicated that taxation was the major reason for their move.¹⁹⁶ The author suggested that ". . . changes in the structure of a firm may well change its best location from a tax viewpoint. As a firm grows in size, for example, its income may increase more rapidly than its property needs, and, as a result, the best location for a firm may shift."¹⁹⁷

One portion of Strasma's study, mentioned earlier,¹⁹⁸ used the interview technique. Strasma polled several hundred Massachusetts' manufacturers and inquired about the effects of both state and local taxes on their choices of location. Some 16 percent of those responding stated that local taxes definitely influenced their decisions, while 19 percent made the same reply for state taxes. Further, slightly higher percentages indicated that state and local taxes would affect future expansion and new location decisions.¹⁹⁹

Campbell's and Strasma's findings cannot be accepted unreservedly :

It must be kept in mind that (these studies) do not indicate the magnitude of the tax influence in location decision making. Likewise, the anti-tax attitude of many businessmen conditions them to stress the tax factor, as does the belief that their answers may influence the conclusions of the survey and thus ultimately bring lower taxes.²⁰⁰

¹⁹⁴ ACIR 1967 at 70.

¹⁹⁵ See, e.g., MICHIGAN SURVEY RESEARCH CENTER, INDUSTRIAL MOBILITY IN MICHIGAN (1950); Plant Site Preferences of Industry and Factors of Selection (Business Week Res. Rep., 1958).

¹⁹⁶ Campbell, *Taxes and Industrial Location in the New York Metropolitan Region*, 11 NAT'L TAX J. 195 (1958).

¹⁹⁷ *Id.* at 206.

¹⁹⁸ See STRASMA, note 131 *supra*.

¹⁹⁹ *Id.* at 14.

²⁰⁰ Due, *Studies of State-Local Tax Influences on Location of Industry*, 14 NAT'L TAX J. 163 (1961).

A third method employed to test the relationships between taxes and industrial location is to analyze the role of state and local taxes as an element of industrial cost. One approach has been to use data for hypothetical firms, and to determine the tax burden which would exist for such firms in various locations.²⁰¹ Usually, fairly substantial differences are found among jurisdictions. Alternatively, the actual operating data of firms with multistate plants has been used.²⁰² Again, differences in tax burden are frequently noted.

These studies may demonstrate no more than that tax differentials exist which could act as inducements or barriers to industrial location. Even the studies of firms with multistate operations are inconclusive because of the noncomparability of operations in various states and inadequate samples. The willingness of firms who pay high taxes to cooperate may also bias the sample and the results of these studies.²⁰³

Making sense of these various studies of tax effects on business land uses is a difficult task. Strasma has had the most success to date. Strasma posits that a firm's decision to locate a plant is a three step process. First is the selection of a region, then the selection of communities within this region, and finally the selection of a site. A region will be chosen from which the product market can be adequately served and materials and skilled labor readily obtained. Communities will be selected which appear to offer the most attractive combination of services and low costs. Finally, the most satisfactory of the available sites in or near the selected town will be acquired.

Strasma asserts that the tax influences are present in the second step of the selection process, rather than in the last stage, site selection, where taxes are often thought to be determinative if two or more sites are equal in all other considerations. Strasma believes the tax effects often come into play in a negative way in the elimination of all locations in the general region that are not believed to offer the most attractive environments.²⁰⁴ This occurs not because firms objectively assess all communities within a region, but rather because in selecting communities businessmen rely on "tax reputations."

²⁰¹ See, e.g., J. FLOYD, EFFECTS OF TAXATION ON INDUSTRIAL LOCATION (1951); STRASMA, *supra* note 131; Campbell, *supra* note 196. The Campbell study is representative. Campbell compared both actual and hypothetical operating costs for 25 manufacturing firms in both their present and 64 alternative sites. The impact of real and personal property taxes, corporate income taxes, corporate franchise taxes, gross receipt taxes, and unemployment compensation taxes on each firm was compared for each location. Clear differences were noted.

²⁰² See, e.g., D. YNETMA, COMMONWEALTH OF PENNSYLVANIA, TAX STUDY COMMISSION, THE TAX PROBLEM (1953); MICHIGAN TAXES ON BUSINESS (1959)

²⁰³ See Due, *supra* note 200, at 166.

²⁰⁴ See STRASMA, *supra* note 131, at 7.

Strasma's surveys led him to conclude that a state with a bad tax reputation does not realize how many firms eliminated the state without serious consideration of their communities as locations.²⁰⁵ Also, within states, businessmen sometimes decide against locating in larger cities, because large cities have higher per capita expenses than smaller towns and suburbs.

Since Strasma's work, two studies of business land uses have generally concurred with his approach.²⁰⁶ One emphasized the importance of tax images or reputations:

There is also evidence that once a State or a locality is identified as a high tax location or a location in which firms are taxed unfairly, it is difficult to erase the image. Once a state has been identified as being a "high tax" State for industry, the "image" persists even though that State subsequently changes its laws and administrative practices. Tax managers ascribe this to the attitude of top executives and boards of directors, who having once been exposed to what they regard as unreasonable tax treatment, are reluctant to repeat the mistake.²⁰⁷

What now needs to be understood is which taxes can help and which can injure a location's tax reputation. Strasma concluded that businessmen prefer property taxes on real estate to property taxes on both real estate and personal property (machinery and inventories), and that property taxes are preferred over income taxes.²⁰⁸ The Advisory Commission in Intergovernmental Relations, surveying a number of tax preference studies, found that sales taxation was preferred to income taxation because it was not considered a serious deterrent to retail trade and because it spread the costs of government more evenly.²⁰⁹ It would seem, then, that personal income taxation is the least acceptable form of taxation to businessmen. Assuming firms are interested in minimizing tax costs, it would seem that firms will prefer the taxes which burden them the least. Thus, a tax program should vary depending on what type of business a community wants to attract or discourage. Firms with large labor forces relative to capital investments, for example, should prefer property taxation to payroll levies, while capital intensive firms would prefer the opposite emphasis.

The existing studies have focused largely on interjurisdictional tax cost differentials and ignored the income reducing effects of taxation on

²⁰⁵ *Id.* at 8.

²⁰⁶ *See* Due, *supra* note 200; ACIR 1967.

²⁰⁷ ACIR 1967 at 62.

²⁰⁸ STRASMA, *supra* note 131.

²⁰⁹ ACIR 1967 at 42-45.

business land use. Such effects are probably minor, because important off-sets to income reduction exist. One will be tax shifting. Mieszkowski's review of business tax shifting indicates that tax shifting would appear to be fairly complete.²¹⁰ A second offset is the availability of services which tax revenues provide. If state or local taxes are used to provide services which the firm would otherwise have to finance for itself, such as waste disposal, or are used to provide services which the firm views as useful or essential to attracting and maintaining a labor force, then such taxes will be unlikely to alter land use decision making. Finally, the deductibility of many taxes from both state and federal income taxation will act as an offset to income reduction.

The impact of taxation on commercial land uses other than industrial and manufacturing type businesses will vary with the type of business the land user conducts. The impact of taxes on one major non-industrial business use, agriculture, has received tremendous attention in recent years and is the subject of the next section.

E. *The Special Case of Agricultural Land*

Farmers have received special property tax treatment for some time.²¹¹ The justification offered was that farmers use less community services per acre than do city dwellers. But today, when property taxes are used for many purposes other than those directly benefiting property, this argument is not as persuasive. Today agricultural interest groups have joined with environmentalists to argue that high property taxes will force the conversion of agricultural and open space to suburban uses. In response, many states have adopted special tax assessment programs in which agricultural and open space land is taxed on its value in its present use rather than on its fair market value. Since 1956, when Maryland first adopted such a program, approximately thirty states have enacted similar legislation.²¹² These programs are distinct in several material respects, raise different kinds of legal problems, and have met with varying degrees of legal and practical success.

²¹⁰ See Mieszkowski, *supra* note 115.

²¹¹ Early Indiana law permitted farms within city borders exceeding five acres to be exempt from city general purpose tax levy. IND. LAWS chs. 15 & 58 (1867), held constitutional in *Hamilton v. City of Fort Wayne*, 40 Ind. 491 (1872). For other examples see 111 A.L.R. 1486 (1937). For history of open space taxation see Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WISC. L. REV. 628.

²¹² See T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND (U.S. Dept. of Agric., Agric. Econ. Rept. 265, April 1974); Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117, at 117 n.1 (1974).

One major difference among the programs is the land uses to which they apply. Some programs cover only agricultural uses. Others include woodlands, open space, or recreational land uses as well.²¹³ Interestingly, however, none of the programs attempt to distinguish between urban fringe and remote rural locations. An owner is entitled to preferential treatment whether or not the land is in the path of development or would probably remain relatively open even without reduced property tax.

Another difference among the programs is their requirements of the owner in exchange for a tax advantage. In some cases, owners who have received tax relief may be penalized when their use changes to one not within the scope of the program. The typical restrictive agreement²¹⁴ is most burdensome from the perspective of the landowner. Here, the owner contracts with the relevant governmental unit for a term—often ten years—to keep his land in a certain use. Should he be allowed to cancel or should he choose to refuse to renew his agreement at term's end, the landowner must pay deferred taxes based on the tax advantage he has gained during the term of the agreement.²¹⁵ California, rather than collecting deferred taxes, reduces the advantage over the remainder of the restricted period after a contract is not renewed.²¹⁶ It would seem that the longer the owner observes the contract, the greater the back tax liability would be when he gets out of the program. Usually, however, back taxes will be limited to no more than a seven to ten year period.²¹⁷ Some states provide for a stiff 20-25 percent penalty for failure to notify a government agency of change in use.²¹⁸

About 18 states have programs which fix the conditions (including penalties) of the program by statute rather than individual agreements with landowners. The back taxes that are collectible under these programs can be as much as ten years worth.²¹⁹

²¹³ See, e.g., CONN. GEN. STAT. §§ 12-107a to f (1975).

²¹⁴ Approximately ten states use the restrictive agreement approach. Among them are California, Florida, Maryland, Pennsylvania, Vermont, and Washington. All land in the program is not necessarily covered by agreements. For instance, Florida has covenants for recreation and parks, FLA. STAT. § 193.501(1) (Supp. 1975) which do not apply to agriculture. See FLA. STAT. § 193.461 (Supp. 1975).

²¹⁵ See WASH. REV. CODE § 84.34.030 (Supp. 1974); FLA. STAT. § 193.501(4) Supp. 1975); HAWAII REV. STAT. § 246-10(f) (3) (Supp. 1974).

²¹⁶ CAL. REV. & TAX. CODE § 426 (West Supp. 1975).

²¹⁷ Washington and Florida are examples of seven and ten year limits respectively. See note 215 *supra*.

²¹⁸ Washington charges 20 percent. WASH. REV. CODE § 84.34.080(2) (Supp. 1974).

²¹⁹ ORE. REV. STAT. § 308.395 (1973). Other states with this type of deferred tax program include Alaska, Connecticut, Illinois, Kentucky, Minnesota, Montana, New Jersey, North Carolina, Rhode Island, Texas, Utah, and Virginia.

Since an owner is not contractually bound, these programs do not burden him with obtaining cancellation approval. Preferential assessment laws have no deferred tax or penalty and require only that land use be restricted for each year of tax relief.²²⁰ The trend is away from preferential assessment laws toward deferred tax and restrictive agreement programs. Because of the penalties these laws contain it is believed they will more effectively control the conversion of land from agricultural or open space uses.

Programs also differ in how land becomes enrolled. They can be compared by focusing on whether they are voluntary and on how eligibility is defined. Most programs are voluntary. In addition to awaiting the landowner's initiative, some statutes permit local officials to solicit participants, allowing local governments a more active role in implementing a program.²²¹ California follows this latter course, but also leaves to local government the initial decision whether landowners in a jurisdiction can participate in the state program, and thus does not uniformly encourage participation of all eligible lands.²²² In order to more firmly control land use, Oregon has established farm use zones where eligible landowners are automatically enrolled.²²³ The statutes have other various ways of defining eligible land or landowners, all keyed to the objectives of the particular program.²²⁴

For the land that programs do enroll, administrative differences among programs produce varying burdens on government and landowners. Assessment of land in its restricted use may be figured on either an actual or potential basis. The latter method is often thought to promote efficient agricultural production. Three specific evaluation methods are employed: recent comparative market sales of similar land (when available),²²⁵ certain statutorily prescribed factors applied to the re-

²²⁰ States with preferential assessment laws include Arkansas, Colorado, Delaware, Indiana, Iowa, and Wyoming.

²²¹ See, e.g., CAL. GOV'T CODE § 51230 (West Supp. 1975).

²²² CAL. GOV'T CODE § 51240 (West Supp. 1975).

²²³ ORE. REV. STAT. § 308.370(1) (1971).

²²⁴ Some states are concerned with separating speculators from agricultural producers. Kentucky requires a showing that the land has been used for agricultural purposes plus current production by the landowner. KY. REV. STAT. § 132.450(2)(a), (b) (1971). In urban fringe areas, the speculator label would seem to attach to all, making separation difficult. For use assessment problems in agriculture see Ganley, *Assessing Farm Land Under Maryland's "Use Value Assessment Law,"* 33 ASSESSORS NEWSLETTER 4 (Jan. 1967).

Regarding open space uses, some states focus on the land in its natural state, or as developed for recreational use. See, e.g., FLA. STAT. § 193.501(6)(a), (b) (Supp. 1975).

²²⁵ Oregon gives this method priority with provision for income capitalization in the alternative. ORE. REV. STAT. § 308.345(3) (1973).

stricted use,²²⁶ and some form of income capitalization. Within this last category, the multiples may be legislatively determined, or may be calculated from a number of alternative approaches to capitalization.²²⁷ This latter method of capitalization of income often includes variables sensitive to current circumstances and so may be the most accurate. But it is the most burdensome because of the effort involved in ascertaining the essential data, some of which cannot be verified.²²⁸ Whether landowners consider the method of calculating the tax as an incentive or disincentive to participation will depend on whether they prefer more stable tax cost or the flexibility of a variable expense, and may well turn on their perception of the accuracy of calculation.

Another administrative problem is the dual use and market value assessment required whenever a program has a deferred tax element. Because the deferred tax is calculated on the differential of these values for the most recent years,²²⁹ the government must make two assessments each year. Assuming the difference increases, the tax liability continues to increase despite the limited number of years' penalty that can be collected. Thus, the landowner may be encouraged to sell early. Connecticut penalizes the owner a percentage of market value, and the percentage diminishes to zero after ten years of participation.²³⁰ This offers an incentive to keep the land in the restricted use.

Potentially significant side effects may occur depending on the particular structure of a program. If there is no tax penalty on participating landowners, a portion of the county tax burden will be shifted to

²²⁶ Florida has refined a statutory list, currently comprised of the following use factors: (1) quantity and size of property; (2) condition of property; (3) present market value as agricultural land; (4) income produced; (5) productivity of land in its present use; (6) economic merchantability of the agricultural produce; and (7) other agricultural factors. FLA. STAT. § 193.481 (Supp. 1975). See Wershow, *Ad Valorem Assessment in Florida—The Demand for a Viable Solution*, 25 U. FLA. L. REV. 49 (1972).

²²⁷ Capitalization is a fixed rate in Colorado, set at 11-½ percent. COLO. REV. STAT. § 39-1-103(5) (1973). The multiplier may be based on production or a fair rental value. When such data is unobtainable, California uses a multi-component method: a safe component (percent equaling long term government lands), a risk component (based on location and type of crop), an amortization for perennials (crops), and a property tax component (percent of total market value). CAL. REV. & TAX. CODE § 423(a)(1), (2); § 423(b) (Supp. 1975). There may be a significant tax effect resulting from small changes in capitalization rates. See Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEG. 158, 184 (1970).

²²⁸ In testimony before the Assembly Select Committee on Open Space Lands (March 23, 1973), R.B. Welch, Asst. Exec. Sec'ty of the California State Board of Equalization, emphasized the difficulty of determining the risk component.

²²⁹ To calculate, add up the actual differences between the years subject to recapture, or take the most recent year's differential and multiply by the appropriate number of years.

²³⁰ CONN. GEN. STAT. § 12-504a (Supp. 1975). This system looks more like preferential assessment laws as the tenth year is approached.

non-program lands as local governments seek to replace lost revenues.²³¹ Tax deferral allows the recovery of part of the lost revenues, although the time lag is still a problem for financially strapped governments.²³² State support of these programs can cut down on the financial burden these programs impose. Only a few states have adopted this practice, and the amounts committed to such programs are limited.²³³ At some point the magnitude of the tax shift will probably cause non-program landowners to develop their lands prematurely in order to fight increasing taxes. Under this influence, both current and prospective program participants would tend to re-examine the efficacy of receiving the tax advantage. Thus, where tax rate increases are greatest, the potential for this injurious effect may be anticipated and would conflict with governmental plans for orderly growth.

Although most of the differential assessment laws are of recent origin, a number of studies have analyzed the functioning of these programs. They focus on agricultural uses. Some of the questions considered have been what land programs have enrolled, how incentive levels and program procedures affect participation, whether programs have slowed conversion of urban fringe land to suburban use, and what the magnitude and effect of the tax burden shift to non-program lands has been. Generally, these studies do not recommend abandoning the programs, but suggest ways to improve them and enumerate areas in need of further study.

Several studies have examined what land particular programs have affected. A survey of farm, timber, and other open space land participants in Washington's program showed that a high percentage of owners in that program intended to continue their current land use for at least 15 years, and disclosed a low percentage of those who would have to change use if denied the tax advantage.²³⁴ Thus, in Washington, it appears the tax break among participating owners was not a significant factor in controlling land use.

²³¹ R. FELLMETH, *POLITICS OF LAND: RALPH NADER'S STUDY GROUP REPORT ON LAND USE IN CALIFORNIA* 42 (1973).

²³² When landowners begin to leave the program, the cost of their decision, which is the deferred tax, helps reduce revenue loss to local government. *Id.*

²³³ See Maine for forests, ME. REV. STAT. ANN. tit. 36 § 563 (1965), New York for agriculture, N.Y. AGRIC. & MKTS. LAW § 305 (McKinney Supp. 1974), and California for all restricted uses, CAL. GOV'T CODE §§ 16140-43 (West Supp. 1975). For an analysis of the related property tax equalization issue raised by the school finance decision which may cause these programs to institute reparation schemes see Hagman, *Property Tax Reform: Speculations on the Impact of the Serrano Equalization Principle*, 1 REAL ESTATE L. REV. 115 (1972).

²³⁴ Barren, *Impacts on Open Space Taxation in Washington*, WASH. AGR. EXPT. STA. BULLETIN 772 (March 1973).

However, since the property tax burden nationally is greater on farm than on non-farm income,²³⁵ it would seem property tax relief would be important to land use decisions in many areas. In California, where property taxes on net personal farm income rose to 22.2 percent in 1970,²³⁶ tax relief would seem to be called for. However, after seven years of existence, California's program covered 11.4 million acres—or only 22 percent of all private lands, and 32 percent of the farmland, in the state.²³⁷ A thorough analysis of the program indicated that land quality was not significantly related to the process influencing enrollment, finding prime agricultural land in equal proportion to other farmland in and out of the program.²³⁸ Thus, a tremendous amount of lesser quality land is being benefited by the program and, to some extent, the program is merely providing low holding costs to wealthy owners and long term speculators.²³⁹ A Ralph Nader group report draws this conclusion, finding that just ten large landowners enrolled one-fifth of all program land.²⁴⁰ Taking its own survey of Santa Clara county restrictive use contracts, the group discovered many enrollments of land remote from cities, while farmers living on urban fringe land were having applications rejected because their lands were too likely to be developed.²⁴¹ The study concluded that "the beneficiaries of the land are not the small, independent, dedicated farmer . . . that the Act and its proponents envisioned."²⁴²

A number of studies have looked at program incentives and procedures to determine what effect they may have on participation levels. One theoretical analysis concluded that a landowner in Santa Clara County, California, could cancel his ten year contract after six years without suffering loss,²⁴³ although changes from the assumed land inflation rates, capital return rates, and cycles of market value reassessments

²³⁵ Gustafson, *supra* note 129, at 41.

²³⁶ *Id.* This figure was up from 6.6 percent in 1955.

²³⁷ *Id.* at 50-54.

²³⁸ *Id.* at 64. There apparently was, however, a marked increase in enrollment of prime agricultural land following the 1969 amendments which made the enrollment contracts less restrictive. Wagenseil & Harris, *supra* note 224, at 189-90.

²³⁹ The California program has been criticized because "it does not provide for permanent open space, but simply lowers holding costs for the long term speculators." 1 ASSOCIATION OF BAY AREA GOVERNMENTS, HOW TO IMPLEMENT OPEN SPACE PLANS 53 (1973).

²⁴⁰ Fellmeth, *supra* note 31, at 4. Although critical of many aspects of the report, Professor Ellickson does agree that the California program is a complicated system of tax evasion for the state's large landowners. Ellickson, Book Review, 47 So. CALIF. L. REV. 641, 650 (1974).

²⁴¹ Fellmeth, *supra* note 231, at 42.

²⁴² *Id.* at 41.

²⁴³ Mix, *Restricted Use Assessment in California: Can it Fulfill its Objectives?*, 11 SANTA CLARA LAW. 259, 264-67 (1971).

could severely limit the accuracy of the analysis.²⁴⁴ A study done in Maryland, however, emphasized the importance of a tax penalty limit in obtaining tax relief.²⁴⁵ According to a study done of the operation of the California act around Sacramento, though, the initial decision to participate hinges not on overall tax incentive but on whether the landowner perceives early development.²⁴⁶ This report found the perception that early development would occur to be higher among corporate and individual owners who did not live on their land.²⁴⁷ It was not determined if this phenomenon was attributable to land passing from local to remote ownership as the development horizon approached. The differing perceptions about development for similarly located lands at least leaves open the question whether all owners consider development the primary focus for decision.

A study of Florida's use value assessment procedure found that the requirements and interests of local assessors produce non-uniform valuations. Thus the program will not have the same effect statewide.²⁴⁸ The high cost of appealing assessor decisions blocks the achievement of uniform assessments that would make the program most effective.²⁴⁹ It was suggested that the program might be improved if regional boards evaluated similar type lands across several counties, in a practice modelled after the English procedure.²⁵⁰ This assumes landowners will not enter the program unless they receive comparable tax relief to similarly situated landowners throughout the state. Gustafson believes that the uneven effect of California's plan results from permitting local governments to decide whether to implement the state program within its jurisdiction.²⁵¹ Thus, the procedures chosen may affect participation by altering the state level of tax incentive or directly limiting potential enrollment when the program is at the discretion of local government.

²⁴⁴ *Id.* at 266. Noting the increase in enrollment in 1970-71 which was contrary to the assertion that the program was excessively restrictive and punitive, Mix offers the following explanation from an affected rancher: "We don't like a lot of things about the Williamson Act, but right now we have no choice . . . we're boxed in. It's this or go broke." *Id.* at 278.

²⁴⁵ House, *Partial Tax Exemption for Farmland Properties in the Rural-Urban Fringe*, THE APPRAISAL JOURNAL, July 1968, at 405-06.

²⁴⁶ LAND USE RESEARCH GROUP, UNIVERSITY OF CALIFORNIA AT DAVIS, REPORT TO THE ASSEMBLY SELECT COMMITTEE ON OPEN SPACE LANDS, THE CALIFORNIA LAND CONSERVATION ACT IN SACRAMENTO COUNTY: IMPLEMENTATION AND EFFECTIVENESS 2 (Oct. 1972).

²⁴⁷ *Id.* at 30-32.

²⁴⁸ See Wershow, *supra* note 226.

²⁴⁹ *Id.* at 67; Wershow, *Regional Valuation Boards—A British Answer to Ad Valorem Assessment Problems in Florida*, 21 U. FLA. L. REV. 324-25 (1969).

²⁵⁰ See Wershow, *supra* note 226, at 57; Wershow, *supra* note 249, at 326-32.

²⁵¹ Gustafson, *supra* note 129, at 40-54, 92-93. Gustafson describes the spatial distribution of land in the program and indicates that part of the problem of uniform application is the lack of commitment to orderly growth by local government.

The studies have indicated that programs have not been very successful in slowing conversion of land to suburban use. Gustafson shows that the greater the distance from population centers, the higher the participation in the California program.²⁵² A study of the earliest of these programs in Maryland confirms this experience.²⁵³

Data concerning use assessment in Maryland in 1967 demonstrated that assessed valuation per acre still varied with distance from cities rather than land use.²⁵⁴ Gustafson's study suggests that development opportunities created by forces of urban dispersal can outweigh the full tax break offered when landowners evaluate alternative decisions.²⁵⁵

If tax relief alone is not going to slow conversion of land at the fringe of development, perhaps these programs should be abandoned completely, or severely restricted to apply only to land which should be temporarily withheld from development.²⁵⁶ Whether tax policy can be successfully combined with more vigorous zoning in the agricultural/open space area has not been evaluated.²⁵⁷ Nor has the concept of state reparations to local government been analyzed to assess its ability to encourage enrollment of prime agricultural land located in the urban fringe.²⁵⁸

²⁵² Gustafson, *supra* note 129, at 65-67.

²⁵³ See House, *supra* note 245, at 395-96.

²⁵⁴ *Id.* at 396.

²⁵⁵ Gustafson, *supra* note 129, at 22-26, 43, 89.

²⁵⁶ One writer made this point over a decade ago. Stocker, *Taxing Farmland in the Urban Fringe*, Tax Policy III, No. 12, 7-8 (Dec. 1963). Stocker also indicated the state should buy an interest in land it wanted to keep permanently open. House, *supra* note 242, at 403-04, discusses this alternative based on existing revenue sources. No study explores the effect of a government buying land it desires to keep in agricultural uses. An earlier article by Stocker admitted that "where a community has formulated a clear plan for regional development . . . there is a positive and constructive role for some form of tax abatement on land designated for agriculture. . . . Without such a plan . . . we should not expect tax deferral in itself to accomplish much toward preserving open spaces or agriculture production." Stocker, *How Should We Tax Farmland in the Rural-Urban Fringe?*, in PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL CONFERENCE ON TAXATION 463, 470 (1961).

²⁵⁷ Oregon's utilization of farm use zones has been at the discretion of local governments and in accordance with their general land use plans, generally in remote rural areas. ORE. REV. STAT. § 215.203(1) (1973). An interesting provision allows for other compatible uses in these farm zones including residential areas for farm workers, provided they are on the lesser quality lands in the area. ORE. REV. STAT. § 215.213(3)(b), (c), (d) (1973). This may help direct urban growth around unique and valuable farmland. A thorough legislative report discussing the connection of zoning with tax benefits concluded that "[b]y compensating the landowner . . . the Legislature may authorize the imposition of restrictions which are more rigorous than those allowed under conventional zoning." CAL. LEGIS. JT. COMM. ON OPEN SPACE LAND, FINAL REPORT 114 (Feb. 1970). Supporting more mandatory participation, is the notion that individual planning has left land idle awaiting capital gains and caused premature development. Stocker, *How Should We Tax Farmland in the Rural-Urban Fringe?*, in PROCEEDINGS OF THE FIFTY-FOURTH ANNUAL CONFERENCE ON TAXATION 463, 467 (1961).

²⁵⁸ The statute provides for reparations (called subventions) scaled in amount to particular lands and location: \$3.00 per acre per year for prime agricultural land located

Both theoretical and empirical studies have examined the tax shift to local government and non-participating landowners. A comprehensive survey of New Hampshire's program identified the three most significant variables: the total valuation of qualified property, the participation level among those eligible, and the percentage of tax relief.²⁵⁹ This evaluation found that non-participants in small urban-fringe districts would pay a disproportionately larger tax (8.3 percent).²⁶⁰ For states with wide variation in the size of districts having urban-fringe characteristics, the study suggests a regional or statewide tax base would be more equitable.

The additional tax burden on local governments who must replace revenue lost under a tax relief program is substantiated by Carman and Polson.²⁶¹ Gustafson suggests non-participants in the limited area of urban fringe are induced to early development as the increases in participation will increase their burden.²⁶² While it would be difficult to prove that the tax burden alone forces development, it is certainly an influence.²⁶³ Tax deferral, after a lag when the program begins, can minimize the bad effect of the shift. It may be possible to discover the balance between the government's need to generate revenue and the incentive needed to get owners into these programs. Limiting back tax liability to a fixed percentage may be a reasonable way to arrive at a certain and satisfactory figure.²⁶⁴ The fixed percent of market value is flexible in stable and deflationary markets and maintains alienability of land during unfavorable economic conditions.

There has been more intensive study in the last decade of the influence of these differential assessment programs as a means of controlling certain land uses than of any other aspect of the taxes and land

within three miles of incorporated areas greater than 1,500 population or within one mile or less of smaller areas, \$1.50 for other prime agricultural land and \$.50 for all other qualifying open space land. CAL. GOV'T CODE § 16142 (West Supp. 1975).

²⁵⁹ Ching & Frick, *Effect of Use Value Assessment on Property Tax Rates*, 52 AM. J. OF AGR. ECON. 603 (1970).

²⁶⁰ *Id.* at 604-05. The study included 231 towns in New Hampshire divided into eight groups according to population size. The model varied in participation from 10-90 percent of qualified lands and ranged from 30-75 percent in tax abatement. The study tested the model for an ongoing program, running a time period which showed the effect of government recovery of deferred taxes as some participants left the program. They found an overall 1.5 percent increase in the tax rate for government to replace revenues in an ongoing program through 1985.

²⁶¹ Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California 1968-69*, 24 NAT'L TAX J. 449 (1971).

²⁶² Gustafson, *supra* note 129, at 89. See also Note, *supra* note 227.

²⁶³ House, *supra* note 245, at 400-02, indicates the tax shift is 10-12 percent for urban fringe counties and only 4-5 percent for more remote counties.

²⁶⁴ *Id.* at 405-07.

use planning relationship. On the whole, commentators have not found these programs to be very successful. With all of the attempts to determine why they have failed, the easy answers are probably closest to the truth. Owners of land ripe for development are hesitant to pass up a chance to make a tremendous profit by restricting their land to farm or open space use. Owners remote from the immediate path of urban expansion have much to gain and little to lose from enrolling in these programs, and so they do at a greater rate than those whom the scheme was designed to protect in the first place. Whether changes in these tax relief mechanisms can be made that will accomplish the objectives of preserving land in agricultural and open space uses remains to be seen.

IV. CREATING A POSITIVE ROLE FOR TAXATION IN THE LAND USE PLANNING PROCESS

A. *The Need for Context—Some Growth and Land Use Goals Identified*

Gaining some insight into how certain taxes may influence the value, use, or consumption of land is only a first step in using taxes to cope with the problems of growth. Determining when taxes should replace, or might be reformed to better complement, regulations requires identifying land use objectives and formulating a program that utilizes all the tools at government's disposal to achieve them.

The existence of competing interests, many of them involving fundamental rights and principles, makes drawing up a comprehensive set of land use objectives a most difficult task. In practice a community's list of goals is often stimulated by fiscal and environmental problems brought about by rapid growth. In these situations the thrust of the planning effort is to dodge rather than cope with growth and land use problems. Such programs are obviously not long range solutions to the land use problems we face. However, some common objectives can be discerned from several recent sources which would seem to be desirable parts of a responsible set of land use objectives.

A high priority in recent plans and local reports is the preservation of unique and irreplaceable environmental resources. This reflects the rapid and substantial manner in which the nation's environmental consciousness has been raised in the last few years. A prime example of this is Colorado, where a grass-roots campaign resulted in the rejection of the 1976 Winter Olympics by Colorado's citizens in a November 1972 vote.²⁶⁵

²⁶⁵ One of the leaders of this movement, Richard Lamm, was subsequently elected Governor of Colorado. His campaign emphasized environmental issues.

It is not surprising that environmental protection is a high priority item in Colorado, for it has an abundance of these resources to safeguard. The debate over how to preserve these resources has been a sharp one.²⁶⁶ The state's geography and the patterns of settlement are at the root of the problem. The Front Range has been the center of the economic and population boom in Colorado. This area is a narrow strip along the eastern slope of the Rocky Mountains²⁶⁷ in which approximately three-fourths of all Coloradeans live. Residents of the Front Range have generally been the most vocal opponents of continued, unchecked growth. This is perhaps in response to the crowding and environmental deterioration of the area itself. Those who have settled outside the heavily populated Front Range are not anxious to tear up the countryside. However, farmers, ranchers, other landowners, and small-town businessmen are anxious to participate in some of the economic benefits the more urbanized part of the state has reaped with the arrival of new industry and new people. They do not want to close Colorado's doors if it means giving up this potential prosperity. Therein lies the conflict. The votes for Governor Lamm and against the Olympics illustrate the political climate, but recreational and other development has not stopped. The state legislature has recognized the need to confront the problems of growth on a statewide basis. It set up a commission and charged it with the responsibility of developing a land use program for the state. The report that resulted recognized the importance of environmental resource preservation:

Colorado faces three major land-use challenges in the environmental field:

- To control development so that it respects land capacity and preserves environmental amenities, including air and water quality.
- To preserve environmentally fragile areas, areas of scenic beauty, and significant natural, historic, and cultural resources.
- To provide adequate and accessible recreational opportunities for its citizens.²⁶⁸

There may be some cause for concern that opportunity for disadvantaged persons is jeopardized by the rise of environmentalism. The protection of natural resources can be inconsistent with the expansion of job and housing opportunities for the poor. Also, environmental

²⁶⁶ See generally CITIZENS GUIDE, at 42-46; Cameron, *Growth is a Fighting Word in Colorado's Mountain Wonderland*, FORTUNE, Oct. 1973, at 148.

²⁶⁷ The Front Range extends roughly from Pueblo north through Colorado Springs, Denver, Boulder, and on to Fort Collins.

²⁶⁸ REPORT BY THE COLORADO LAND USE COMMISSION, A LAND USE PROGRAM FOR COLORADO 56 (1974).

concerns sometimes mask what are really exclusionary attitudes. Despite these worries we have a common interest in preserving our environmental resources—for both economic and recreational reasons. Methods must be devised of accommodating the need for environmental protection with housing and economic opportunities for the poor. Concepts such as planned unit developments, new towns, and inclusionary ordinances²⁶⁹ are some of the ways cities and states can accommodate population increases and protect economic and housing opportunities without permitting environmental deterioration to continue.

Related to environmental preservation is the effort to insure that sufficient open space and green belt areas are provided within urban centers. Such areas guarantee that all residents will have recreational opportunities, and supply some visual relief to the cement and grayness of cities. Areas around schools, flood plains, and areas difficult to develop (such as mountain slopes) can be used for open space and green belt purposes. The devotion of land to this use can provide boundaries within a metropolitan area and a sense of relief from crowding and congestion.

Another growth goal that many governments share is the redevelopment and revitalization of already urbanized areas and the working toward a rational pattern of metropolitan expansion. One reason for the concern in this area is the conversion (at least prematurely) of prime agricultural land on the rural-urban fringe to suburban uses. Another justification is the economic waste that occurs in deteriorating sections of metropolitan areas and increased community costs caused by sprawl and leap-frog patterns of development. If people are to be housed adequately, and land at the urban fringe is to be preserved, there must be more in-filling of already developed areas.

San Diego is an example of a city that recognizes that its future is dependent on the ability to continually renew its urbanized area and control its urban expansion. San Diego's population has more than tripled since 1940, and it is now among the fifteen largest cities in the nation.²⁷⁰ Disenchantment with the way the city was developing led to the election of Pete Wilson, a young state legislator, as mayor. Wilson ran on a platform calling for government, not developers, to control when and where development would occur. A majority of the city coun-

²⁶⁹ See Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A.L. REV. 1432 (1974).

²⁷⁰ For background on San Diego, see CITIZENS GUIDE at 48-49; Harris, *Californians Are Saying 'No' to Growth in a Spreading Revolt That Makes Strange Allies*, CALIFORNIA JOURNAL, July 1973, at 225-26.

cil elected at the same time was sympathetic to this stand. An early confrontation between the new San Diego government and developers took place over Mira Mesa, a leap-frogged area of development where tract houses were proliferating without adequate schools, sewers, or other necessary elements of infra-structure. The developers capitulated there, agreeing, in the face of a threatened building permit moratorium, to fund schools, sewers, and other improvements. San Diego's policies have since been formalized:

It shall be the policy . . . to permit phased growth in undeveloped areas and more intensive development and redevelopment of areas previously urbanized only after a total cost/revenue analysis. The City Council shall establish growth priorities among the various areas now largely undeveloped.

It shall be the policy . . . to assist the private sector in more intensive development and redevelopment of areas previously unban-ized after a total cost/revenue analysis.²⁷¹

This policy recognizes the need to regulate new development and re-development of areas to bring them into closer correspondence with San Diego's capability to provide services needed to sustain such development and to the rationalization of growth with the area's environmental objectives.

Finally, enlightened land use goals must be responsive to social problems. Three related principles are involved:

- (a) Maximization of individual mobility, choice of town size and living accommodation;
- (b) Acceptance of all natural growth by an area, subject to environmental limitations; and
- (c) Provision to all citizens, regardless of land use impacts, of certain minimum services and the equitable spreading of the financial costs of providing such services.

These concepts have not been endorsed wholeheartedly by many local governments. The no-growth movement is evidence that this is the case. However, some governments have recognized their responsibility to deal with rather than to avoid the social problems that this country faces. An excellent example is the Colorado Land Use Commission's Report which was briefly mentioned earlier.²⁷² It identifies three important land use related social concerns: access for all residents to decent housing and adequate community services reasonably close to job centers, preservation of the state's diverse styles of living and his-

²⁷¹ City of San Diego, Council Policy No. 600-18 (adopted July 6, 1972).

²⁷² See REPORT, note 268, *supra*.

torical inheritance, and equitable distribution of financial burdens incurred in carrying out land use programs.²⁷³ Care must be taken so that environmental objectives do not unnecessarily justify exclusive preserves for the wealthy. The Colorado Land Use Commission urges the formulation of a socially responsive land use program which will be based on facts rather than supposition about the impacts of growth, and which will move toward a policy of broad and reasonable accommodation of growth.²⁷⁴ Recognition of responsibility to all segments of the population must be an essential component of any set of land use goals.

State governments several decades ago abandoned much of their authority over land use planning to local governments because the locals were in a better position to decide how their health, safety, and general welfare could be maximized. But local governments have become more provincial and self-centered in the exercise of their delegated powers while the basis for the delegation has been disappearing. If it was true that one community's actions did not impact on nearby communities, such is the case no longer. Some governments, both state and local, are recognizing that their own interests, as well as the nation's, are best served by accepting the fact that they can never be insulated from the problems growth creates. The solution of our land use crisis depends on the general acceptance of this notion and on the formulation of a set of land use and growth objectives with which we can all live.

²⁷³ *Id.* at 131-43.

²⁷⁴ The Report sets forth the need for particular measures to promote the fair spread of indirect costs for land use programs across the population:

Care should be taken that the net effect of State fiscal policy in respect to land use is to narrow rather than widen the income differentials among population groups. The incidence of any special assessments or other land-use-related taxes should generally be progressive. Any proposed use of development incentives such as tax exemptions or deferments should be scrutinized for its net effect on the public treasury and the overall incidence of tax burdens (direct loss in tax collections vs. long-term impacts on revenues through increased property values, income multiplier effects, etc.).

User charges, even though they are generally regressive, have a place in land-use and environmental programs. However, care should be taken that the structure of user fees does not have the effect of altogether excluding lower-income groups (the elderly, the unemployed) from the service or facility involved. State financial planning and institutional change, as related to implementation of state land-use policies, over time should contribute to reducing the fiscal disparities among communities within the same region and SMSA. These disparities are reflected in the variations in the tax rates, property tax assessment practices, and per capita expenditures for public services often existing among neighboring cities and towns. This contrast is most striking between affluent, low-density suburban communities and inner cities which often have greater welfare burdens, unemployment and other social ills. Such problems are essentially a consequence of imperfections in the overall regional economy (i.e. labor and housing market); means should be explored for distributing the resulting burden more equitably on a statewide, regional, or metropolitan basis.

Id. at 133-34.

B. *Using Taxes as a Land Use Planning Tool*

If a government has settled on a set of land use objectives, it must then develop the best program to achieve them. Police power regulations along with other devices in the control of local governments will play a major part in any such program. The question here is what can and should be the role of the tax power. It has been demonstrated that taxes do influence the value of land, the consumption of land, and when and how land will be developed. Given this, at a minimum local governments should undertake to eliminate the land use effects of their taxes which cut against their land use planning objectives. More positively, communities might want to consider tax reforms that would be designed to make tax policy an integral part of land use policy. This would require some restructuring of local governments in order to have planners, assessors, and budget-makers working together more than is the current practice. Relying on taxation as a land use planning technique will also require much additional study more specifically aimed at the broad land use impacts of a tax than have been past studies.

Assessing the role which the major taxes considered in this article could play in planning based on the current state of research is a speculative affair. However, a simple example using some of the land use objectives previously discussed shows that further work in this area is likely to be a worthwhile endeavor. Taking the most extreme case, compare the land use consequences in a jurisdiction assuming it chose to raise all of its revenue by means of only one of the taxes this article has discussed. What would be the likely land use differences in a jurisdiction that raised its money solely by a sales tax rather than solely by the property tax? Assume that the same amount of revenue is raised under both taxes and that it is spent in the same manner. It is reasonable to infer from the studies done that environmental goals are more likely to be achieved, and that there will be less inducement to sprawl and blight, under a sales tax than under a property tax.

Land values should be higher under the sales tax. Oates²⁷⁵ and Sabella²⁷⁶ have demonstrated the existence of tax and benefit capitalization. Since the same benefits will be provided under either tax, the capitalization of those benefits should be the same under either tax.

Tax capitalization, however, should not be the same under the two taxes. Oates and Sabella focused on the capitalization of the property tax into land values, and found that land value was reduced by an

²⁷⁵ See Oates, note 103 *supra*.

²⁷⁶ See Sabella, note 105 *supra*.

amount roughly equal to the property tax burden associated with the land. No one has studied whether a sales tax would be so completely capitalized into land value. In fact, there is good reason to believe that such capitalization would not be present. It is true that the sales tax reduces income just like the property tax, forcing taxpayers to reduce expenditures in some manner. However, the sales tax is not tied directly to the land, and taxpayers have a number of expenditures they may trim to pay the tax. If taxpayers reduced only their housing and other land related expenses, the sales tax would be capitalized like the property tax, but this seems unlikely to occur. More probably taxpayers will cut a little spending from a number of areas to pay the tax. A very high sales tax, therefore, might be capitalized to some extent into land values, but the amount should be small, certainly less than the capitalization of the property tax.

Thus, since the benefits, which increase land value, will be capitalized similarly under either tax, but the tax, which reduces land value, will be more fully capitalized under a property tax system, it is reasonable to suggest that higher land values will exist in a jurisdiction which employs a sales tax rather than a property tax. Increased land values may mean less land consumed per person, which would seem to aid local governments seeking to preserve environmental resources and maintain open space.

George Peterson's recent property tax study²⁷⁷ is also of significance in determining the differences in a jurisdiction under a sales or a property tax. Peterson found that assessment inequalities do exist in the administration of the property tax. These inequalities are the underassessment of land in stable and upwardly transitional areas and the overassessment of land in declining areas. Because taxpayers can get more house and land and less tax in stable or upwardly transitional areas, they are induced to move there. Further, those who remain in declining areas are actually penalized by paying more tax than they would pay in an equitable property tax. Many times these areas are newer and further away from the central city than declining areas.

The sales tax, to the contrary, requires no assessment and is neutral with respect to location. One could expect, therefore, that the incentive to move out to newer areas would be lessened by the removal of the assessment break Peterson observed. Further, owners of property in declining areas will not be impeded by overly large tax bills from maintaining or rehabilitating their property. If these effects come about be-

²⁷⁷ See PROPERTY TAXES, HOUSING.

cause a sales tax rather than a property tax is relied upon, there should be less incentive to sprawl, with its attendant destructive effects on environmentally valuable land and open space, and less chance that blight will occur.

If a jurisdiction elected to raise its revenue by means of an income tax, one would expect many of the same results as under a sales tax. Benefit capitalization, assuming similar expenditures, should be the same regardless of the tax used to raise the revenue. As was the case with the sales tax, however, tax capitalization is unlikely to be significant for the income tax. Thus, the same land use benefits which might flow from adopting a sales tax instead of a property tax should come from an income tax.

Because an income tax is levied at the point income is earned rather than spent, however, some land use consequences may result from deciding to choose an income tax rather than a sales tax. For example, saving is one way a taxpayer can avoid or reduce his taxes if a sales tax is in force, an option unavailable under an income tax scheme. To the extent taxpayers increase savings, more investment money will be available. Increased supply of capital may stimulate development through lower interest rates or activities of lenders who are anxious to make use of all their funds. Two possible land use effects may derive from increased savings. On the one hand, the investment capital could be used to renew and revitalize developed areas. It could also stimulate the construction of apartments and other housing for moderate and low-income people. Surplus capital, on the minus side, however, may find its way into housing on the fringes of the city which may be inconsistent with environmental and open space objectives.

Admittedly the preceding discussion is superficial, but it illustrates the possibility that tax changes might influence land use decisions. Planners, economists, lawyers, budget-makers, and others who are involved in what have generally been perceived to be different and distinct aspects of government must begin to explore how the taxing and planning activities can be rationalized and harmonized. It should be apparent that the failure to do this may negate considerably the effectiveness of any land use plans, and perpetuate the financial squeeze and land use crisis about which many communities are complaining.