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Preferential Land Assessment In Virginia

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PREFERENTIAL LAND ASSESSMENT IN VIRGINIA

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The post-World War II land boom has seen cities and many towns snake outward into the countryside, engulfing millions of acres of formerly open land and developing them into suburbs. Cities have expanded not merely in numbers of people; they have over the past several decades also swallowed up vast areas of heretofore rural and farm land as city dwellers have fled to the suburbs.[1]

This sprawl has had a direct and serious impact upon land surrounding urban areas. Farmland adjoining these areas has been bought up at rapidly rising prices, both for immediate development and by speculators and investors hoping to cash in on the rise in price. The price of land, particularly farmland near urban areas, has risen as much as tenfold in certain areas within the past decade.[2] These higher prices have had two major effects: first, a large increase in real estate taxes;[3] and secondly, the rapid conversion of land from open or agricultural land to developed or abandoned-fringe land.[4] There seems to be little if any causal relationship between these two phenomena.[5] Nonetheless, with pressure from both

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1. *See* W. WHYTE, THE LAST LANDSCAPE (1968).

2. The explanation for this terrific increase in the price of land, even within three or four hours from urban areas is that, in addition to the demands for residential sites, the demand for recreational and weekend properties has ballooned. Industry, likewise, has moved in increasing numbers out of metropolitan areas into suburbs or fringe areas, competing both for land and labor with the agricultural industry.

3. Real property taxes on farms in the United States rose from 5.7% of a farmer's personal income in 1961 to 7.6% in 1971. ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, REPORT NO. 256, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND (1972) [hereinafter cited as STATE PROGRAMS]. As a national average, this figure does not clearly reflect the much larger increase of farm land taxes close to urban areas. *See also* ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, REPORT NO. 12, FARM REAL ESTATE TAXES, RECENT TRENDS AND DEVELOPMENTS (1972). In Nassau and Suffolk County, N.Y., approximately 60 to 150 miles from New York City, a farmer can pay up to $100 per acre per year in real estate taxes on open agricultural acreage. *See* J. KLEIN, FARMLANDS PRESERVATION PROGRAM, REPORT TO THE SUFFOLK COUNTY LEGISLATURE, SUFFOLK COUNTY, N.Y. (1973) [hereinafter cited as SUFFOLK COUNTY REPORT].

4. *See* W. WHYTE, THE LAST LANDSCAPE (1968).

5. *See* J. KILESAR & J. SCHOLL, MISPLACED HOPES AND MISSPENT MILLIONS, A REPORT ON

agriculturalists[6] and conservationists,[7] some thirty-six states[8] have provided for tax relief in one form or another to farmland, forests or open lands. As presently structured, however, these tax incentive laws have proved ineffective in stemming the tide of conversions of open land; rather their shotgun approach has bestowed economic assistance on non-farmers and others who neither deserve nor need it. In short, these laws in general, and Virginia's in particular, offer too much financial assistance combined with too little planning or preservation assistance.

This article will examine the effectiveness of these laws in general with particular attention to the Virginia statute and an eye toward various alternative methods of achieving the goals of land preservation and tax relief.

FARMLAND ASSESSMENTS IN NEW JERSEY, (1972) [hereinafter cited as KILESAR & SCHOLL].

6. Agriculturalists are generally interested in economic support in any form but are understandably opposed to any limitation on their right to sell or develop their land.

7. Conservationists and environmentalists are interested by definition in preserving open space, protecting water supplies, keeping prime soils for local food supply and maintaining open space near cities, all of which are indisputably logical and necessary goals.

8. ALA. CODE tit. 51, § 17 (Cum. Supp. 1973); ALAS. STAT. ANN. § 29.53.035 (Cum. Supp. 1974); ARIZ. REV. STAT. ANN. §§ 42-136, -227 (Cum. Supp. 1974); ARK. STAT. ANN. §§ 84-483, -484 (Cum. Supp. 1973); CAL. GOV'T CODE §§ 51230-95 (West Cum. Supp. 1975); CAL. REV. & TAX. CODE §§ 421-429 (West 1970), *as amended*, §§ 421-32 (West Cum. Supp. 1975); COLO. REV. STAT. ANN. §§ 39-1-103 (5), (6) (1973); CONN. GEN. STAT. ANN. §§ 12-63, -107a to -107e (1972), *as amended*, §§ 12-107c to -107f (Cum. Supp. 1975); DEL. CODE ANN. tit. 9, §§ 8328-37 (1974), *as amended*, § 8329 (Supp. 1974); FLA. STAT. ANN. § 193.461 (Cum. Supp. 1975); HAW. REV. STAT. §§ 246-10 to -12 (Supp. 1974); ILL. ANN. STAT. ch. 120, §§ 501 to 501-3 (Cum. Supp. 1975); IND. STAT. ANN. tit. 6, §§ 1-26-2, -3 (1972); IOWA CODE ANN. §§ 441.21-.23 (1971); *as amended*, §§ 441.21-.23 (Cum. Supp. 1974); KY. CONST. § 172A; ME. REV. STAT. ANN. tit. 36, ch. 105, §§ 563-64 (1964), *as amended*, § 565 (Cum. Supp. 1974); MD. CODE ANN. art. 81, §§ 19(b), (d) (Repl. Vol. 1975); MINN. STAT. ANN. § 273.111 (1969), *as amended*, §§ 273.111-.112 (Cum. Supp. 1975); MONT. REV. CODE ANN. §§ 84-437.1 to -452 (Cum. Supp. 1974), *as amended*, §§ 84-437.2 to -437.17 (Interim Supp. 1974); Nev. Stat. 1961, ch. 300, *declared unconstitutional*, Boyle v. Nevada *ex rel.* Dickerson, 80 Nev. 160, 390 P.2d 225 (1964); N.H. CONST. pt. 2, art. 5-B; N.H. REV. STAT. ANN. ch. 79-A (Supp. 1973); N.J. STAT. ANN. §§ 54:4-23.1 to -23.23 (Supp. 1973); N.M. STAT. ANN. §§ 72-2-14.1-14.2 (Supp. 1973); N.Y. AGRIC. & MKTS. LAW art. 25AA (McKinney Cum. Supp. 1974); N.C. GEN. STAT. §§ 105-227 to -227.01, -227.2 to -227.7 (Cum. Supp. 1974); N.D. CENTURY CODE § 57-02-08 (15) (Repl. Vol. 1972), *as amended*, §§ 57-02-08(15), -27 (Supp. 1973); ORE. STAT. §§ 308.345-.403 (1974); PA. STAT. ANN.tit. 16, §§ 11941-47 (Cum. Supp. 1975); R.I. GEN. LAWS §§ 44-5-12 (*reenacted* 1970); S.D. COMP. LAWS ANN. §§ 10-6-31 to -33 (1967), *as amended*, §§ 10-6-31 to -33.4 (Supp. 1974); TEX. CONST. art. 8, § 1(d); UTAH CODE ANN. §§ 59-5-86 to -105 (Repl. Vol. 1974); VT. STAT. ANN. tit. 10, §§ 6301-08, tit. 24, § 2741 (1969); VA. CODE ANN. §§ 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended*, (Cum. Supp. 1975); WASH. REV. CODE ANN. §§ 84.34.010-.921 (Supp. 1974); WYO. STAT. ANN. § 39-82(c) (Cum. Supp. 1975).

VARIOUS APPROACHES TO PREFERENTIAL PROPERTY TAX TREATMENT

The two major goals of preferential land assessment legislation have been to provide farmers, foresters and other agriculturalists with *ad valorem* real property tax relief and to aid local planners and conservationists in their battle to promote the orderly development of land resources.[9] Though the different states have approached the problem with many varying methods,[10] there are three basic categories of preferential property tax laws: (1) straight preferential assessment; (2) restrictive agreements; and (3) tax deferral.

Straight preferential assessment[11] is the type of statute enacted by Maryland in 1956, the first preferential property tax statute in the United States.[12] It is the simplest form of preferential tax treatment as there is simply a reduction of taxes if land is used for agricultural purposes, the lower tax being based on the farmland's agricultural, income-producing potential. There is usually no tax penalty for subsequent development or conversion of farmland to other nonagricultural use. A farmer's land may qualify without any application on his part or he may be required to make annual application for the special taxation. In addition, there are varying re-

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9. The purposes set forth in the Virginia act are:

> (a) to encourage the preservation and proper use of such real estate in order to assure a readily available source of agricultural, horticultural and forest products and of open spaces within reach of concentrations of population, to conserve natural resources in forms which will prevent erosion, to protect adequate and safe water supplies, to preserve scenic natural beauty and open spaces and to promote proper land-use planning and the orderly development of real estate for the accommodation of an expanding population, and (b) to promote a balanced economy and ameliorate pressures which force the conversion of such real estate to more intensive uses and which are attributable in part to the assessment of such real estate at values incompatible with its use and preservation for agricultural, horticultural, forest or open space purposes. VA. CODE ANN. § 58-769.4 (Repl. Vol. 1974).

10. *See* note 8 *supra*.

11. The states having a form of straight preferential assessment include Arkansas, Colorado, Delaware, Florida, Indiana, Iowa, New Mexico, North Dakota, South Dakota and Wyoming. For statutory citations see note 8 *supra*.

12. Md. Acts 1956, ch. 9, § 19(b), *declared unconstitutional*, State Tax Comm'n v. Wakefield, 222 Md. 543, 161 A.2d 676 (1960). After a constitutional amendment, *see* MD. CONST., DECLARATION OF RIGHTS arts. 15, 43, the present statute, MD. CODE ANN. art. 81, § 19(b)(1) (Repl. Vol. 1975), was enacted. Maryland, having amended its statute several times, no longer has a straight preferential tax but uses elements and combinations of preferential assessment, restrictive agreement and deferred taxation. It should be noted that varying combinations of all three methods are employed by several states.

quirements that the land have been in agricultural use for 2-5 years prior to the tax year in question. The vital characteristic of this kind of assessment approach is that the local government has no choice but to allow the lower assessment if the land qualifies. A straight preferential assessment law generally amounts to a tax bonus to those farming, with the bonus as the only incentive to keep the property in agricultural use. The Delaware statute is a good example. It provides that "the value of land, not less than 5 acres in area, which is actively devoted to agricultural, horticultural or forest use and which has been so devoted for at least the 2 successive years immediately preceding the tax year in issue, shall . . . be that value which such lands have for agricultural, horticultural or forest use . . . ."[13]

Restrictive agreements[14] illustrate another manner in which some states have approached the tax incentive question. These statutes generally allow a local government to make an agreement with the landowner who in turn agrees to keep the use of his land restricted to the desired use for a period usually ranging from 5 to 10 years.[15] One prime difference between these statutes and other methods of preferential property tax treatment is that under restrictive agreement statutes the locality has the option to choose the area or land it desires to preserve and contract with a limited group of landowners; with preferred assessment and deferred taxation, states and localities have little choice concerning what specific land is granted the tax benefit. Unfortunately, restrictive agreement statutes are usually not enforceable by injunction or severe damage penalties but instead have relatively minor penalties for breach of the agreement. In Washington, for example, once land has qualified, its use may not be changed for 10 years. If this agreement is breached, the taxes not charged are then collected, plus the legal interest rate and 20% penalty on the back taxes charged back for 7 years.[16]

Deferred taxation statutes[17] also reduce the current tax on agricul-

13. DEL. CODE ANN. tit. 9, § 8329 (Supp. 1974).

14. The states having a form of restrictive agreement statute include California, Florida, Hawaii, Maine, Maryland, New Hampshire, New York, Pennsylvania, Vermont and Washington. For statutory citations see note 8 *supra*.

15. *See generally* STATE PROGRAMS, *supra* note 3, at 3-4.

16. WASH. REV. CODE ANN. § 84.34.080 (Supp. 1974).

17. The states having a form of deferred taxation include Alaska, Connecticut, Hawaii,

tural, open space land and often forest land. As the name implies, however, these statutes only defer the uncollected tax. If the use changes, the back taxes are charged for a period of years, usually five or so, plus interest. Virginia's law[18] most clearly approximates this category, though deferred taxation is a misnomer for the Virginia statute, because after five years the taxes are no longer deferred but are forgiven and become irretrievable. For these statutes to work, a record of the taxes deferred should be kept, though some states have based the "lost" or deferred tax on fair market value on date of sale or conversion.[19]

The qualifying uses for all three categories vary from state to state. Some restrict benefits to agricultural land, others include forest lands, and some also include open space land, golf courses and flood plains.[20] In addition, the definition of "agricultural use" varies from no definition at all[21] to Maryland's list of twenty-nine criteria regulations for local assessors.[22]

To ensure that farmers are the recipients of these tax benefits, some states have attempted to restrict qualification by requiring that the land be in agricultural use for a number of years prior to qualification.[23] Others use minimum acreage, sales, revenues or productivity requirements.[24] Alaska, for example, requires that at least ten percent of the owner's income come from farm use land.[25]

The variation in preferential tax treatment from state to state makes generalization quite difficult, but the purpose of such laws

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Illinois, Kentucky, Maine, Maryland, Minnesota, Montana, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, Texas, Utah and Virginia. For statutory citations see note 8 *supra*.

18. VA. CODE ANN. §§ 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended*, (Cum. Supp. 1975).

19. *See, e.g.*, Pub. Act No. 152, §§ 1, 5, Conn. Laws 1972; N.H. REV. STAT. ANN. ch. 79-A:7(I) (Supp. 1973).

20. The Virginia statute includes all these uses. *See* VA. CODE ANN. §§ 58-769.4 to -769.5 (Repl. Vol. 1974).

21. Wyoming has a two-sentence law with no guidelines. WYO. STAT. ANN. § 39-82(c) (Cum. Supp. 1975).

22. *See* STATE PROGRAMS, *supra* note 3, at 4.

23. *Id.*

24. *Id.* Virginia's regulations, established by the State Land Evaluation Advisory Committee, require minimum productivity, but no longer have any income or sales requirements.

25. ALAS. STAT. ANN. § 29.53.035(c) (Cum. Supp. 1974).

is principally two-fold: to reduce the farmer's heavy real estate tax load (basically an equity problem); and to influence subsequent development.

THE VIRGINIA APPROACH

In 1971, Virginia amended its constitution to permit use assessment taxation of certain real property.[26] Pursuant to this constitutional authority, the General Assembly enacted a Land Use Assessment Law[27] enabling localities to adopt ordinances[28] for the special assessment of real property when that property is devoted to a qualifying agricultural, horticultural, forest or open space use.[29] Within its first year, ordinances were adopted by three urban fringe counties and one city.[30] Subsequently, nineteen additional localities

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26. VA. CONST. art. X, § 2.

27. VA. CODE ANN. §§ 58-769.4 to -769.16 (Repl. Vol. 1974), *as amended*, (Cum. Supp. 1975).

28. *Id.* § 58-769.6 (Cum. Supp. 1975). The adoption of such a local ordinance is optional.

29. *Id.* § 58-769.5. The statute defines the various qualifying uses:

(a) *"Real estate devoted to agricultural use"* shall mean real estate when devoted to the bona fide production for sale of plants and animals useful to man under uniform standards prescribed by the Commissioner of Agriculture and Commerce or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government.

(b) *"Real estate devoted to horticultural use"* shall mean real estate when devoted to the bona fide production for sale of fruits of all kinds, including grapes, nuts, and berries; vegetables; nursery and floral products under uniform standards prescribed by the Commissioner of Agriculture and Commerce; or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agreement with an agency of the federal government.

(c) *"Real estate devoted to forest use"* shall mean land, when devoted to tree growth in such quantity and so spaced and maintained as to constitute a forest area under standards prescribed by the Director of the Department of Conservation and Economic Development pursuant to the authority set out in § 58-769.12, including the standing timber and trees thereon.

(d) *"Real estate devoted to open-space use"* shall mean real estate when so used as to be provided or preserved for park or recreational purposes, conservation of land or other natural resources, floodways, historic or scenic purposes, or assisting in the shaping of the character, direction, and timing of community development, under uniform standards prescribed by the Director of the Commission of Outdoor Recreation pursuant to the authority set out in § 58-769.12, and the local ordinance.

30. For the tax year 1973, the law was adopted by the counties of Fauquier, Loudoun and Prince William and the City of Virginia Beach. *See* Fauquier County, Va., Ordinance, Oct. 11, 1973; Loudoun County, Va., Ordinance, Sept. 29, 1972; Prince William County, Va., Ordinance, Feb. 17, 1972, *as amended*, Nov. 20, 1973; VA. BEACH CODE, ch. 33, art. II, div. 3 (Supp. No. 3, June, 1973).

adopted such ordinances[31] and many others are presently considering that course of action.

The value of land for special assessment purposes, as well as the requirements for qualification are determined by the State Land Evaluation Advisory Committee.[32] The special valuation is determined by establishing a net capitalization rate value of productivity based on soil type.[33] Using this method, in 1974, the per acre values ranged from a maximum of six hundred and eighty dollars per acre for the most productive soil to a minimum of thirty dollars per acre for the poorest.[34]

Under the Virginia statute, four classes of use may qualify for the special assessment[35] and the qualifications may differ for each use.[36] Generally, the agricultural category has had by far the largest amount of qualifying acreage.[37] Applications for special assessment are made in the locality and must be submitted by November 1st of the year preceding the tax year.[38] After the first year of participa-

31. Hanover County and the City of Petersburg adopted ordinances effective 1974; the counties of Albemarle, Chesterfield, Clarke, Frederick and James City (agricultural and horticultural only), effective 1975; Amelia, Culpepper, Cumberland, Prince George, Powhatan, Roanoke and Warren counties and the cities of Chesapeake, Fredericksburg and Suffolk, effective 1976; Augusta and Bedford counties, effective 1977.

32. VA. CODE ANN. § 58-769.11 (Repl. Vol. 1974) creates the committee whose standards of qualification for each category are binding, but whose values for taxation are only recommended. As a practical matter, all localities have thus far accepted these values in applying the special tax.

33. STATE LAND EVALUATION ADVISORY COMMITTEE, METHODOLOGY FOR DETERMINING RANGES OF USE-VALUES FOR AGRICULTURE, HORTICULTURE, FOREST AND OPEN SPACE LAND IN VIRGINIA (1974).

34. *Id.* at 12.

35. *See* note 29 *supra*.

36. Pursuant to VA. CODE ANN. § 58-769.5(a) (Repl. Vol. 1974), the State Commissioner for Agriculture and Commerce sets the qualifications under which agricultural land will qualify and distributes these qualifications to the localities. Briefly they are:

(a) The real estate must contain at least five (5) acres and have been devoted, at least five years previously, to the commercial production of plants or animals;

(b) The use of the property must be consistent with the land use plan of the city or county;

(c) The owner may not apply for a re-zoning to a more intensive use classification;

(d) There must be a minimum of one animal unit for each 5 acres for three months of the year on each tract;

(e) For crops, the minimum yield must equal each year at least one-half of the average county yield for three previous years.

37. *See* Appendix, Chart II.

38. VA. CODE ANN. § 58-769.8 (Cum. Supp. 1975).

tion, annual verification by affidavit that no change has occurred may be required by the locality.[39]

Virginia's statute attempts to discourage changes in use by assessing a qualifying owner with payment of the taxes deferred plus interest at the rate of six per cent on the deferred taxes.[40] These charges, termed "roll-back" taxes, are assessed for the year in which use change occurred and the next preceding five years.[41]

CRITIQUE AND ANALYSIS

After two tax years under the statute, the obvious questions are, whether the law has accomplished its goals, and more importantly, whether farm and forest land has been preserved as a result of its use. From an empirical standpoint,[42] this question is nearly impossible to answer as records of land changes and their reasons have not been catalogued. Clearly, however, certain aspects of the Virginia statute appear deficient. The requirements for qualification are minimal. There is no income from agricultural pursuits required of the applicant. Rather, a "farmer" with twenty cows can obtain qualification on four hundred acres annually simply by placing the cows for a three month period on each of four one-hundred acre parcels.

The requirement that the property be devoted to commercial production of plants or animals for the previous five years[43] is the most stringent standard to be found in the statute. This requirement, as well as the proscription against re-zoning applications, is to prevent in an indirect manner, speculators and developers from benefiting from the lower tax and then changing the use of the land. Upon close examination, however, it is apparent that no single definition of commercial production suffices, and with an average of two thou-

39. The requirement is a local option under VA. CODE ANN. § 58-769.8 (Cum. Supp. 1975).

40. *Id.* § 58-769.10.

41. *Id.*

42. *See* J. BARRON & J. THOMSON, IMPACTS OF OPEN SPACE TAXATION IN WASHINGTON (1973) [hereinafter cited as IMPACTS]. The report found that in Washington, a deferred taxation statute had little impact upon the decision to convert open space land. The statute in Washington is even more stringent than Virginia's. Upon conversion, a land owner must pay seven years back taxes plus 10% interest and 20% additional penalty. *Compare* WASH. REV. CODE ANN. § 84.34.080 (Supp. 1974) *with* VA. CODE ANN. § 58-769.10 (Cum. Supp. 1975).

43. *See* note 36 *supra*.

sand applicants per locality, there are simply no practical methods to ascertain whether the land is in fact used for a qualifying use, except the applicant's word. In addition, this commercial production requirement could operate in contravention of its own goal. Suppose certain qualifying land is out of commercial production for one year, for whatever reason, and the truthful farmer so reports. He would not be eligible for special assessment treatment but under the requirements, would have to wait another five years before qualifying again.

The land also becomes ineligible when the owner makes an application for re-zoning to a more intensive use. From the application, it appears that he is no longer concerned with maintaining the open space or agricultural use regardless of the outcome of the application. Yet no guidelines are given as to whether, in the event that the application to re-zone fails, the owner may requalify at a later time. In either case, the owner could transfer the property to his son or wife, who could then qualify. This "protection" is no protection at all, but merely an after-the-fact penalty which has no teeth. This protection is ineffective in preventing conversion as the benefit of special assessment has already been received and the roll-back sum is an insignificant amount when compared to potential development profits. This fact could tend to encourage the use of special assessments by speculators as a means of reducing carrying costs until sale or development. Efforts in the General Assembly to increase the roll-back penalties have to date been ineffective.[44]

Land planning is another oft-cited purpose of the Act. The statute is also a failure in this regard as the special assessment serves to promote unplanned preservation, which is as harmful as unplanned development. No priorities are established as to which lands should be maintained and preserved. This major flaw, coupled with little or no regional planning, leaves the preservation of open space and prime farmland in a helter-skelter situation as costly as that accompanying "sprawl" development.[45] In fact, a tax deferral on the

44. An attempt was made in February, 1974 to amend the Code to extend the roll-back period from five to ten years and to increase the interest rate from six to eight percent; the effort failed. *See* House Bill No. 746, Virginia General Assembly (Feb. 5, 1974).

45. OFFICE OF POLICY DEVELOPMENT, ENVIRONMENTAL PROTECTION AGENCY, THE COSTS OF SPRAWL (1974).

urban fringe could make it harder for the subdivider and industry to buy close-in-lands thereby accentuating the present hop-scotch pattern of urban sprawl.[46] If land in the path of controlled and planned growth is artificially kept off the market, land farther from urban services must accommodate the growth of the community. Hence costs of providing services to these developments are increased and inefficient planning is promoted. This phenomenon, known as "leap frogging," is a problem common to many suburban areas.[47]

Another avowed purpose of the preferential use tax is the preservation of good agricultural lands, preventing their development and possible loss from food production. But, in fact, the tax encourages the conversion of good farmland. Because the penalty or roll-back tax is computed as the difference between fair market value and use value, and the use value on good soils is higher than poor soils, the monetary benefit of preferential taxation is greater for those lands with poor soils. A developer with two tracts, equally capable of nonagricultural development would presumably follow the economically logical course and develop the better soiled land. This problem results from use valuation based upon soil type income producing capability. Better soils produce more income and hence are taxed higher. If the purpose of use valuation is to preserve good soils, the good soils should be given the higher benefit, thereby encouraging the poor soils to convert to their highest and best use.

In rural counties where expenditures for services are low, and tax rates are correspondingly low, there should be no need for preferential assessments. In fact, one locality declined adoption of the preferential tax system until a new reassessment was done, as the values established under the preferential system were generally higher than the existing fair-market valuation.[48] The "highest and best use" value according to the assessor was less than the actual use. This exemplifies the subjective nature of tax valuation.

The financial assistance intended for agricultural users has been

46. IMPACTS, *supra* note 42, at 4.

47. *See* W. WHYTE, THE LAST LANDSCAPE (1968).

48. Letter from Lennie R. Blanchard, City Assessor, City of Suffolk, Virginia, to the author, April 9, 1975.

an over-success in Virginia[49] to the point that a recent study by the Governor's office indicated that the actual reduction in taxes was in excess of what was needed or anticipated.[50] In spite of their best intentions, some localities which rely heavily upon real estate taxation for their income may be inadvertently voting deficit budgets by enacting the land use system of assessment. If the local expenditures rise or remain constant more revenue must be obtained to balance the ledger. Obviously the taxpayers in a locality who do not qualify will pay proportionally higher tax bills when the real estate tax rate is raised to pay this difference. This burden will be even greater for owners of single family residences in rural or semi-rural areas who live in a jurisdiction where some part of the tax base is not paid by industrial and commercial activities.

The public is generally not aware of the resulting revenue losses to government, nor can a legislative body accurately predict these losses in advance. Indeed, this explains why such low-visibility subsidies are so often used and lobbied for by various interest groups.[51] Such incentives tend to be self-perpetuating and are difficult to legislate away once entrenched. Localities under the Virginia law, not being required to keep records of the tax base reduction caused by the preferential system, do not have to inform the public of the tax dollar losses resulting from the special tax assessments. The available statistics show that in the counties adopting it, the land use tax has made a considerable financial impact.[52]

This resulting loss of revenue could be viewed as a legislative balancing if it successfully prevented the conversion of farm land. In rural areas, however, even before preferential taxation, real property taxes were and still are normally not high enough to "force" the conversion of farmland to more intensive use. In addition, it is a well-known and acknowledged fact that agricultural land has always been and continues to be assessed with a "de facto" preference.[53] Attempts are being made to eliminate this phenomenon in

49. *See generally* Appendix, Chart III.

50. GOVERNOR'S REPORT TO TAX REFORM STUDY COMMITTEE, REFORMING THE PROPERTY TAX 22 (1974).

51. For a discussion of tax incentives versus direct subsidy see Surrey, *Tax Incentive as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

52. *See generally* Appendix, Chart IV.

53. A comparison of the effective property tax rates on all taxable real property and on farm

conjunction with the implementation of land use assessment.[54]

An empirical study in Washington[55] concluded that the amount of land converted to urban uses in the next decade would not be significantly different whether the open space taxation program existed or not.[56] Studies of the preferential tax systems in Maryland,[57] Pennsylvania,[58] Oregon,[59] New York[60] and New Jersey[61] indicate the same result: the conversion of farmland is insignificantly affected by preferential taxation. New York presents a particularly interesting case; even though farmland was assessed at $8,000.00 to $10,000.00 per acre, the preferential tax, however voluntary its application, did not stem the tide of conversion.[62]

The rationale of special assessment taxation assumes as an underlying value judgment that the real estate taxes based on fair market value are unfair to farmers. While it may be true that farmers pay a large portion of income in property taxes, others also pay property taxes out of proportion to their incomes. Property taxes are, in a sense, a tax on net worth[63] and this is often quite large for farmers. To justify this underlying assumption farmers and other agriculturalists argue that they demand fewer public facilities and services, and derive less benefit, in proportion to their real estate taxes, from

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realty for Virginia and the United States shows that farm realty receives de facto tax relief:

PERCENTAGE EFFECTIVE TAX RATE PER $100 ASSESSED VALUES

	All Taxable Property	Farm Realty
Virginia	.9	.6
United States	1.4	.9

These statistics are from 1962, before Virginia and most other states legitimized preferential treatment by statute. *See* R. NETZER, ECONOMICS OF THE REAL PROPERTY TAX (1962).

54. Address by William H. Forrest, Tax Commissioner, Local Government Officials Conference, Charlottesville, Virginia, August 27, 1974. *See also* STAFF REPORT OF PROPERTY TAX REFORM STUDY ADVISORY COMMITTEE, REFORMING THE PROPERTY TAX: RECOMMENDATIONS TO THE GOVERNOR (1974).

55. IMPACTS, *supra* note 42.

56. *Id.* at 1-2.

57. WASHINGTON CENTER FOR METROPOLITAN STUDIES, THE USE OF TAX POLICIES FOR PRESERVING OPEN SPACE AND IMPROVING DEVELOPMENT PATTERNS IN THE BI-COUNTY REGION (1968).

58. *Id.*

59. Hencke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974).

60. SUFFOLK COUNTY REPORT, *supra* note 3.

61. KILESAR & SCHOLL, *supra* note 5.

62. *See* SUFFOLK COUNTY REPORT, *supra* note 3.

63. *See generally* R. NETZER, ECONOMICS OF THE REAL PROPERTY TAX (1962).

the facilities and services provided. There are, of course, many other kinds of property which do not create any additional burden on the public services nor use a proportionally larger amount of services. Schools are the largest item of local expenditure, yet no suggestion has been made by these reformists that taxes be proportionate to the number of school-age children per household. If that were ever true, commercial and industrial establishments would pay nothing in real property taxes.

Real property taxes represent a partial payment for the use of land as reflected in socially-created demands.[64] The community recaptures in taxes some of the value it has created, including the local government's spending on streets, schools and other facilities. This theory has led to very vocal and academic proposals of taxing land according to its city value.[65] Another alternative is to have a state capital gains tax levied at time of sale replacing the property tax,[66] thereby recapturing the socially created value without taxing the agriculturalist off his property. The statement that farmers and foresters place a smaller burden on local community services than other property taxpayers may be true, but it is hardly a justification in and of itself for lower real estate taxes.

It may be true that by aligning the tax burden more closely with an owner's ability to pay the preferential tax smoothes a rough edge of inequity created by the *ad valorem* property tax. Nevertheless, the benefits are not limited to the specific group most needful or most deserving of such aid. Proponents of the present preferential tax cite examples of the plight of the farmer who seeks out just enough from his hard labors to meet the heavy tax burden imposed by an *ad valorem* tax. But the nature of the tax makes it very difficult to ease the farmer's burden without also subsidizing developers, corporations and speculators. At the same time, there are many home-owners on fixed incomes having to sell their residences and move because of their inability to pay the same *ad valorem* taxes.

64. *Id.*

65. *See* Comment, *Tax Assessment of Real Property: A Proposal for Legislative Reform*, 68 YALE L.J. 335 (1968); D. HOLLAND, THE ASSESSMENT OF LAND VALUE (1970).

66. *See, e.g.*, VT. STAT. ANN. tit. 32, § 10001 *et seq.* (Cum. Supp. 1975).

POSSIBILITIES FOR FUTURE CHANGE

The possibilities for improvement of the Virginia statute are numerous. If the purpose is to provide financial assistance to farmers, direct subsidies would be less expensive, easier to regulate, as well as more visible to the public.[67] That form of financial aid could be restricted specifically to farmers, the intended recipients. Even under the present tax incentive system, aid could be restricted by requiring the recipient to derive a certain percentage of his income from agricultural pursuits and to place a cut-off or circuit breaker limit on such income.[68] For example, a gross income limit could be proportionate to the total real estate farmland taxes of the applicant. This limitation would tend to ensure that the intended benefits get to farmers and only those farmers who need them.

A much-needed revision of Virginia's special assessment law is the identification of and concentration upon land desired for preservation. Regional planning bodies are capable of this task but as yet no efforts have been made to coordinate the special assessment and land planning considerations. All land should not be eligible for special assessment.

If Virginia is to continue with a deferred taxation statute, the

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67. *See* Surrey, *Tax Incentive as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

68. Virginia already utilizes the concept of an income limit in the tax exemption for the elderly. *See* VA. CODE ANN. § 58-760.1 (Repl. Vol. 1974), *as amended*, (Cum. Supp. 1975). In order to obtain relief, an elderly homeowner must have a combined income of less than $10,000 and a combined net worth of less than $35,000.

The concept of an income limit was apparently envisioned by some during debates on the new constitution:

> We must in good faith determine in the future that such relief will preserve and conserve real estate for open space and these other stated purposes. I have some doubt as to whether this provision will in fact have that effect but certainly that is a judgment that we can leave to fair minds in the future. The second reservation is that even if that determination is made, the relief be conditioned to apply only to those otherwise qualifying who were *bearing some hardship by virtue of the tax with reference to their income*, just as we have provided to the elderly.

Proceedings and Debates of the Senate of Virginia Pertaining to Amendment of the Constitution 1969 Ex. Sess., at 461-62 (Senator Bateman) (emphasis added).

A bill applying the circuit-breaker principle to preferential assessment was introduced in Michigan. The proposal provided for a tax rebate or credit to eligible farmers for that portion of their real estate taxes that exceeded a given percentage of farm income. Senate Substitute for House Bill No. 4244, Michigan Legislature, 1973 Session. *See* STATE PROGRAMS, *supra* note 3, at 40.

deferral should remain outstanding until sale of the property rather than forgiven after five years. An exception could be made for death and inheritance of the property so that the property does not have to be sold to pay the deferred tax, as is often the case with estate taxes. At present the roll-back tax plus six percent interest can have no realistic deterrent effect in light of empirical data from states with even more stringent penalties. At a minimum, roll-backs should extend ten to fifteen years.

Restrictive agreements are preferable to deferred taxation statutes, but only if the locality is empowered to enjoin violations and conversions. The agreements should be for a minimum of ten years and the public should be made aware of the tax revenue lost annually.

Several other devices are available which have been considered after the tax incentive route to land preservation was found inadequate. First is outright purchase by negotiation or condemnation. Purchase is both the most effective and the most costly method of land preservation and control. For many years, it has been used by local governments in varying degrees and for various purposes.[69] The locality has complete control of the land which it may maintain for agricultural use by leasing back to the farmers. This would insure the desired use of the land. In addition, the rent could be applied to the purchase costs.

Another option after purchase is to sell the land back to the owner or to sell it at an auction but retain the development rights. One writer has suggested that in certain areas (including near-urban areas) the program could operate at a profit.[70] The land on re-sale is then absolutely protected from future development. It is felt that the resultant protection would be an asset to the property that would raise its value. The problem with this program is its initial cost.

One locality presently using a large scale modification of this

69. *See* INSTITUTE OF PUBLIC ADMINISTRATION, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ADVANCE LAND ACQUISITION BY LOCAL GOVERNMENT (1969). Richmond, Virginia has successfully used advance land acquisition for school sites since the 1940's.

70. WASHINGTON CENTER FOR METROPOLITAN STUDIES, THE USE OF TAX POLICIES FOR PRESERVING OPEN SPACE AND IMPROVING DEVELOPMENT PATTERNS IN THE BI-COUNTY REGION (1968).

device is Suffolk County, New York.[71] Suffolk County is east of New York City on Long Island extending from fifty to one hundred miles from New York. It consists of 528,230 acres of land with agricultural products annually amounting to $57.5 million. Between 1950 and 1972, approximately one-half of the 123,346 active agricultural acreage dropped out of production. A county study indicates that the better soils are being developed while marginal agricultural lands are left vacant. It was found that the good farmlands are generally more attractive for development because they are large units of nearly level, clear, well-drained land in the ownership of one or two persons.

Essential elements of a purchase program are the zoning and planning considerations examined to determine which areas are to be acquired.[72] The selection is based on soil suitability, present land use, continuity of farms, development pressure and the price of the land. Under this program a farmer can sell his development rights for cash and continue to farm his land. He is better able to acquire nearby agricultural land to expand his operations because he has received the cash payment; the loss of his development rights eases developmental pressure on adjoining land thereby decreasing its price. His farm is taxed in accordance with its reduced value without the development rights. The farmer retains his land and maintains it rather than the county. The county purchases all rights except the right to possession and agricultural use.

The impetus for the New York program was the failure of several alternative methods of tax incentive such as preferential assessment and use easements. The conclusion of both local government officials and planning officers was that outright acquisition of development rights was the only effective mechanism to preserve agricultural land and give needed assistance to farmers.

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71. *See generally* SUFFOLK COUNTY REPORT, *supra* note 3.

In Suffolk County, the legislature has approved a $45 million public bond issue to finance the acquisition of development rights. Presently, the owners of 9,000 acres of prime agricultural land are being invited to offer bids to the county. In the event that an agreed price cannot be reached, the county has the power to condemn the development rights or the fee.

72. Under a purchase program, the initiative remains with the locality to determine which lands are to be preserved. In contrast, the usual preferred taxation scheme leaves the initiative with the individual owners to determine which lands will qualify for preferential treatment and therefore which lands will be encouraged to remain agricultural or open space areas.

Though land acquisition or the acquisition of development rights have become excellent vehicles for land preservation, the methods are expensive. As a less expensive alternative, zoning could be primarily relied upon with only minor assistance from these alternative techniques. Statewide land planning legislation[73] is a potential future development which could assist a land preservation program.

Another device used for land preservation is the Vermont tax[74] on the sale or exchange of non-residential land in excess of five acres, most appropriately termed a tax-disincentive. To discourage speculative profits on the sale of land, the tax goes as high as 60% on profits of 200% or more. This discouragement of land speculation is not only an excellent device for land preservation but may indeed aid the farmer indirectly as it relieves some of the development pressure, cooling land prices and thus reducing the property tax based on fair market value. At worst, it could prove to be a good source of revenue which could be passed back to the localities to finance alternative means of land preservation.

CONCLUSIONS

The special assessment tax incentive laws, both in Virginia and elsewhere, are giving property tax assistance to all who qualify regardless of their need or the location of their land. The door is wide open not only to farmers but to others who neither need nor equitably deserve the aid. In return the localities are receiving neither firm nor realistically enforceable commitments to preserve the land. Unfortunately, many states may be lulled into believing that preferential assessments are solving the problem. Land conversion is presently at a lull due to the economic situation and many states, including Virginia, will have wasted millions of dollars and later lose thousands of acres of precious and non-recoverable farmland and forests.

The primary goal of Virginia's legislation was to prevent conversion of prime agricultural land. Assistance to agriculturalists,

73. Hawaii, Maine, Vermont and Florida are the only states having enacted major state land use legislation. *See generally* Note, *Land Use Law in Virginia*, 9 U. RICH. L. REV. 513, 637-55 (1975); F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

74. VT. STAT. ANN. tit. 32, § 10001 *et seq.* (Cum. Supp. 1975).

though omitted from mention in the purpose clause of the act,[75] is superceding attempts to curtail conversion. Hence the penalties and enforcement powers are limited, with a predictable result: the law does not significantly affect the conversion of farms to factories. Nor does the law assist or promote planning. In fact, it often promotes the conversion of the better farmland.

The alternatives are clear if the true purpose is the preservation of farmland and open space. Local or state governments must be given authority to acquire the power to control land use. If, in our legal system, they must purchase that power, then methods of finance must be formulated. Such purchases are not prohibitively expensive and are fairer to the taxpayers. Taxpayers are presently paying large amounts to support the scheme of preferential assessment but are acquiring nothing. The New York method of development rights purchase appears most desirable. It purchases development rights now, as they will only get more costly as time passes. Combining this with a capital gains tax on the sale of all agricultural or open space real estate with significant tax rates on speculative profits would stem the present gold rush of land speculation and help local planners in their battle for controlled growth and preservation of productive farmland.

If special assessment tax incentive laws are to remain intact, some degree of planning must be injected. At a minimum, land should be identified for preservation and this priority, not the soil analysis, should be the basis for tax relief. In order to be meaningful, the penalties for conversion should be increased so that the law is not only a reward to non-converting landowners but also a future deterrent.

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75. *See* note 9 *supra*.

APPENDIX

STATISTICS OF VIRGINIA LOCALITIES WHICH HAVE ADOPTED AND UTILIZED THE LAND USE ASSESSMENT ACT[76]

CHART I: ACREAGE IN PREFERENTIAL USE

County or City	Acres in County	Acreage in Preferential Use			% of County
		1973	1974	1975	
Loudoun	327,000	—	109,290	—	33.3
Prince William	179,310	52,903	—	—	30.0
City of Va. Beach	165,568	69,499	58,973	61,548	36.5
Fauquier	442,400	177,884	186,507	—	44.0
Frederick	279,040	—	—	88,437	32.0
Albermarle	473,600	—	—	175,000	37.0

CHART II: ACREAGE BY TYPE OF PREFERENTIAL USE

Year	County or City	Acres in Agricultural Use	Acres in Horticultural Use	Acres in Forest Use	Acres in Open Space
1974	Londoun	84,750	50	24,200	260
1973	Prince William	32,007	——	20,088	808
1975	City of Va. Beach	39,317	321	21,686	224
1974	Fauquier	119,425	154	66,801	129
1975	Frederick	43,722	7,138	35,275	418

76. The statistics were gathered by the author from personal communications and interviews with local commissioners of revenue.

CHART III: REDUCTION OF PROPERTY TAX ON PREFERENTIAL ACREAGE

Year	County or City	Fair Market Tax	Special Assessment Tax	% Reduction
1974	Loudoun	$26,358,130	$10,515,090	60.8
1973	Prince William	$15,531,580	$ 5,287,660	66.0
1973	City of Va. Beach	$17,683,470	$ 7,821,840	55.8
1973	Fauquier	$14,510,580	$ 6,709,900	53.8

CHART IV: TAX BASE REDUCTION

Year	County or City	Acres in Land Use	% Tax Base All Realty	Reduction Land Only
1974	Loudoun	109,270	9.0	20.6
1973	Prince William	52,903	—	18.5
1973	City of Va. Beach	60,497	19.5	21.5
1973	Fauquier	177,884	12.6	24.1

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