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THE TAXING POWER AS A LAND USE CONTROL DEVICE

BY ORLANDO E. DELOGU*

Not only have local governmental bodies overlooked the potential value of taxation policies in the encouragement of desired land uses, but they also have far too often established tax policies in direct conflict with the land use planners' objectives. Many of the existing conflicts could be obviated by the uncomplicated legislative changes suggested by Mr. Delogu. In addition, he argues for the development of a variety of positive tax programs which would induce desirable uses of land — or penalize landowners who persist in uses adverse to the interests of the total community.

THE subject of land use control normally evokes notions of zoning, subdivision control, or some similar application of the police power. Some persons recognize that a wider range of powers exists capable of affecting land use, such as the power of eminent domain, governmental proprietary power, the power of governmental spending, and the persuasive ability of the executive. Unfortunately, however, the power to tax is rarely recognized as an available land use control device;[1] and rarer still are examples and programs which use the taxing power to achieve desired land use objectives.

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[1] This paper makes no attempt to lay out or justify the historical and changing relationship between taxation as a revenue-gathering device and taxation as a regulatory device. Instead it assumes what to almost all authorities in the field of taxation is self-evident, *viz.*, that both of these goals are explicit or implicit parts of every form of taxation historically used or in use today. *See, e.g.*, S. SURREY & W. WARREN, FEDERAL INCOME TAXATION 1-2 (1962); S. RATNER, AMERICAN TAXATION, ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY (1942); J. PECHMAN, FEDERAL TAX POLICY (1966); J. COMMONS, INSTITUTIONAL ECONOMICS (1934); E. GRISWOLD, CASES AND MATERIALS ON FEDERAL TAXATION 3-12 (4th ed. 1955).

> [T]he American distinction between the taxing power and the police power is, to a great extent, a legal fiction growing out of our system of government, and is unnecessary from the economic and fiscal standpoint....
>
> For the police power is none other than the sovereign power to restrain or suppress what is deemed, by the dominant interests, to be disadvantageous, and to promote and foster what they deem advantageous for the commonwealth. Taxation then, is the most pervasive and privileged exercise of the police power....

J. COMMONS, *supra* at 820.

> Some believe that special [tax] provisions go too far toward promoting economic incentives, others believe that these provisions do not go far enough. Nonetheless, tax policy is generally regarded as a legitimate and useful device for promoting economic growth and stability, provided the particular measures chosen are effective means of accomplishing their objectives. Within these broad areas of agreement, there is considerable controversy regarding the relative emphasis to be placed on [tax] equity and economic objectives.

J. PECHMAN, *supra* at 5-6.

The title of the Tariff Act of 1922, of which § 315 is a part, is "An Act to provide revenue, to regulate commerce with foreign countries, to encourage the

I. THE FAILURE TO RECOGNIZE THE POWER TO TAX AS A LAND USE CONTROL DEVICE

The extent of the failure to recognize the relationship between the power to tax and land use objectives is best evidenced by the almost total lack of coordination in municipal government between property tax assessment policy and land use planning policy.[2] Local tax assessors, acutely aware of revenue needs, tend to value lands not at their present use value but at their potential market value if used in some problematical highest and best capacity.[3] For example, agricultural or open land in the path of future subdivision development will often be valued as land capable of being subdivided many years before the area is actually needed or desired for that purpose. This practice raises the tax burden substantially and often forces

industries of the United States and for other purposes." Whatever we may think of the wisdom of a protection policy, we can not hold it unconstitutional. So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate congressional action. United States v. Kahriger, 345 U.S. 22 (1953) (combined tax collection with regulation of off track betting); United States v. Sanches, 340 U.S. 42 (1950) (combined tax collection with marihuana regulation); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 412 (1928); *see* Child Labor Tax Case, 259 U.S. 20 (1922); United States v. Doremus, 249 U.S. 86 (1919) (combined tax collection with narcotics regulation); McCray v. United States, 195 U.S. 27 (1904) (combined tax collection with oleomargarine regulation).

[2] W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Institute Tech. Bull. No. 36, 1959).

> As more land is developed, the more the community needs money to meet the new burden of services, and thus the more it needs to raise taxes. Result; more scatteration. The assessor has become de facto a master planner, and the fact that it is by inadvertency only makes the problem worse.
>
> It can be pointed out to him that the "highest and best use" of land is often not residential subdivision; that open land frequently returns benefits to the community out of all proportion to the services it requires; conversely, the developed land which yields higher taxes may require services so costly that the community pays out far more than it gains. It can also be pointed out that his assessment policies may be negating many of the long-range plans the community is set on. To all of which the assessor can reply that his job is to collect taxes; it's not to do the master planning; and until the public, through its state government, changes the rules for him, he has to keep on doing just as he's been doing.

Id. at 38.

[3] Hagman, *Open Space Planning and Property Taxation — Some Suggestions,* 1964 WIS. L. REV. 628.

> Finally, the owner of vacant rural-urban or fringe land is feeling the pinch of high property taxes to a greater extent than in the past. In the past such land may have enjoyed an illegal preference because of a practice of undervaluing, strong taxpayer resistance accompanied by assessor sympathy, a recognition of basic policy beliefs that vacant fringe land should be valued lower, and an inability of assessors to make accurate assessments. A number of counter-pressures have arisen, however, which may result in the land now being taxed at nearer its proper value. These pressures include: widespread revaluation programs; pressure for raising assessed values in communities which are hard-pressed for tax dollars while, at the same time approaching debt limits tied to assessed valuations; greater state supervision of assessment practices; more frequent reassessments in areas of rapidly rising values; more competent assessors; and greater focus on the requirement of following statutory valuation provisions.

Id. at 636-37 (footnotes omitted).

subdivision, simply to pay the tax when both the owner of the land and the local planning agency may have desired to retain the area in its open or agricultural state. The past and present disappearance of many rich agricultural areas and scenic open-space or wooded areas near growing urban and suburban complexes can be attributed in part to these assessment practices.[4] The irony of the situation is made complete when we recognize that the community may (now or in the future) be spending a portion of its tax revenue to acquire land for park and open-space purposes, which the land use planner has recommended. In this situation there is not only a failure to use the power to tax positively to achieve land use control objectives but taxing policy is actually at cross purposes with and serves to defeat land use objectives.

Another aspect of local government tax policy which has a negative effect on local land use objectives is the practice of immediately raising the assessed value and thus raising the property tax on properties which have recently completed improvements. These improvements may have been made as a matter of personal or civic pride, in response to the enforcement of a building or housing code, or as part of a neighborhood rehabilitation program.[5] Whatever the motivation, the fact is that a desired land use objective, *viz.*, the care, maintenance, and improvement of real property, is less likely to occur because an immediate and direct penalty attaches. The greater the extent to which the land use objective is sought to be advanced (the higher the value of the improvement), the greater is the penalty.[6]

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[4] Krueger, *The Rural-Urban Fringe Taxation Problem: A Case Study of Louth Township,* 33 LAND ECON. 264 (1957); Stocker, *How Should We Tax Farmland on the Rural-Urban Fringe?,* in NATIONAL TAX ASSOCIATION PROCEEDINGS 463 (1961); Walker, *Land Use and Local Finance,* TAX POLICY, July, Aug., Sept. 1962; Note, *Techniques For Preserving Open Spaces,* 75 HARV. L. REV. 1622, 1641 (1962). An argument in favor of undervaluing open or agricultural land in proximity to urbanizing areas runs as follows:

> Land used in agriculture produces an income and supports a value that is only a fraction of what a developer or foresighted investor would pay. Because farm income barely covers expenses as it is, the farmer does not have sufficient capital to pay the current taxes and speculate on the future capital gain. At some point the stakes become so high that the farmer becomes prey to the interim speculator. To tax the farmer at the higher rate is not fair because he is not receiving the benefits which cause the high rates on the urbanized property. Moreover, in terms of ability to pay, the farmer is in a bad position because of his low income.

Hagman, *supra* note 3, at 637, n.34.

[5] *See, e.g.,* 42 U.S.C. § 1452b (Supp. II, 1966); ME. REV. STAT. ANN. tit. 30, § 4804.2.A, C (1964).

[6] J. PICKARD, TAXATION AND LAND USE IN METROPOLITAN AND URBAN AMERICA (Urban Land Institute Research Monograph No. 12, 1966); Harrison, *Housing Rehabilitation And The Pittsburgh Graded Property Tax,* 2 DUQUESNE L. REV. 213 (1964).

> Present city property tax policies place a premium on neglect and discourage owners from renewal rehabilitation, or adequate maintenance of property. Property taxes are not the only factor contributing to blight in our cities, but they certainly weigh in on the wrong side of the scale in terms of incentives for urban renewal.

J. PICKARD, *supra* at 10.

These examples clearly evidence a failure either to perceive the relationship between taxing power and land use objectives or to reconcile tax policy with these objectives. Theoretically tax policies having negative effects on land use objectives are capable of being corrected, and, perhaps of greater importance, a range of positive uses of the taxing power can be developed which will encourage acceptance and achievement of land use objectives. Both devices which eliminate (or minimize) existing conflicts between taxing and land use policy and positive programs capable of using the power to tax to achieve land use objectives can be designed. Whether or not these devices and programs, as simple as some of them may be, will be used is another question — a question of political will.

II. CORRECTING CONFLICTS BETWEEN TAX AND LAND USE POLICIES

In many instances the conflict between local tax assessors and land use planners could be remedied by legislation which required that the market value of comprehensively zoned land, and thus its assessment value, reflect only those alternative uses permitted under the applicable zoning ordinance instead of those land uses which necessarily presuppose a zoning change. California has enacted legislation specifically aimed at achieving this end:

> In the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected. Restrictions shall include but are not necessarily limited to zoning restrictions limiting the use of land and any recorded contractual provisions limiting the use of lands entered into with a governmental agency pursuant to state laws or applicable local ordinances. There shall be a rebuttable presumption that restrictions will not be removed or substantially modified in the predictable future and that they will substantially equate the value of the land to the value attributable to the legally permissible use or uses.[7]

A similar Florida statute directs that "[a]ll lands being used for agricultural purposes shall be assessed as agricultural lands . . . regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development."[8] These statutes do not conflict with constitutional or statutory requirements of

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[7] CAL. REV. & TAX CODE § 402.1 (Supp. 1967).

[8] FLA. STAT. ANN. § 193.11(3) (Supp. 1966); Tyson v. Lanier, 156 So. 2d 833 (Fla. 1963) (sustaining the statute).

> The lower court also fell into error in holding that "full cash value" had reference to value for any and all potential uses. This interpretation ignored the legislative classification of agricultural lands for tax purposes on the basis of actual use which the legislature was authorized to make....
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> ....
>
> ... The said act classified property being used for agricultural purposes in a category by itself for assessment purposes and directed that it be assessed as "agricultural lands upon an acreage basis" when so used. The only restriction on the legislature's power appears to be that it be "not arbitrary, unreasonable, and unjustly discriminatory, and apply similarly to all under like conditions."

Id. at 837.

tax uniformity if these requirements are interpreted (as they usually are) to mean that taxes must be uniform only within reasonably differentiated classes and categories of property.[9] The process of zoning establishes such classes and categories of property. Consequently, the highest and best land use permitted in one zoning district (and thus the property tax burden imposed) may be substantially different from that of another district without breaching the concept of uniformity. Uniformity will only demand that all land similarly zoned be similarly taxed.

The conflict between local tax policy and land use objectives caused by the immediate upward reassessment of properties which are improved seems capable of being remedied by establishing a period of years during which the assessed valuation on improved or repaired properties would not be raised. This time period would allow repair and improvement costs to be assimilated into the fair market value of the whole property before a reassessment takes place; and in the case of commercial and industrial properties a major portion of these costs could be recovered under existing depreciation, improvement write-off, and maintenance and repair expense provisions of federal and state tax codes.[10] Thus, tax policy would become an incentive rather than a deterrent to achieving land use objectives. Existing Wisconsin tax legislation, which includes a lengthy justification of the substantive tax provision and a statement of the desired land use objectives, takes this approach exactly.

> (a) Any city, town or village may establish a conservation area (hereafter in this subsection referred to as "area") by resolution of its governing board. Such resolution shall state:
>
> (1) The boundaries of the area;
>
> (2) The substandard, outworn or outmoded condition of the industrial, commercial or residential buildings in the area;
>
> (3) That such conditions impair the economic value of the area;
>
> (4) That the continuation of such conditions depreciates values, impairs investments and reduces the capacity to pay taxes;
>
> (5) That it is necessary to create with proper safeguards inducements and opportunities for the employment of private investment and equity capital in the replanning, rehabilitation and conservation of the area;
>
> (6) That through rehabilitation, conservation or replanning the area may improve the general welfare of the city, town or village and protect its tax base;
>
> (7) That by virtue of additions, betterments, or alterations made to the structures in the area, the health, safety, morals, welfare and reasonable comfort of the citizens will be protected and enhanced.

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[9] 84 C.J.S. *Taxation* § 36 (1954).

[10] *E.g.*, INT. REV. CODE of 1954, §§ 167, 178.

> (b) Any improvement made by an owner commenced after the adoption of a local ordinance or resolution, through private investment to any existing completed structure in the area shall be deemed to be made for the purposes and objectives of the area and shall be excluded by the assessor of such locality in arriving at the assessment of the real estate, but not to exceed the maximum amount established by the municipality in the exemption period specified in par. (c), provided that the actual cost of such additions, betterments or alterations to the owner of the property is $200 or greater.
>
> (c) The assessment exemption granted by this subsection may continue for five assessment years and shall not be extended beyond that time. The maximum value of any assessment exclusion for said five-year period shall be either $1,000 or 10 per cent of the value of the improved property.[11]

The approach which this statute embodies also does not appear to conflict with tax uniformity requirements. A reasonable classification of property is established (improvements to existing structures) to which a different assessment or tax policy may legitimately be applied. Furthermore, uniformity requirements have never been interpreted to mean that the legislature is deprived of its power completely to exempt certain classes of property from taxation.[12]

III. POSITIVE PROGRAMS WHICH USE THE TAXING POWER TO ACHIEVE LAND USE GOALS

In addition to eliminating tax policies having a deleterious effect on land use, tax programs can be devised to facilitate the achievement of planning goals. Some of these programs appear quite innocuous in scope while others are more far-reaching. Most will require legislative action to bring them into being. However, some may require nothing more than appropriate action by the Internal Revenue Service or by state departments of taxation. A commercial or industrial taxpayer, for example, could be allowed to have the benefit of an accelerated depreciation schedule under federal and state income tax codes for expenditures which serve stated land use objectives.[13] This approach was taken by the federal government to

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[11] WIS. STAT. ANN. § 70.11(24) (Supp. 1967).

[12] Opinion of Justices, 141 Me. 446, 42 A.2d 47 (1945).

> It is settled in this State that full power over taxation is vested in the Legislature including that of determining upon what kinds and classes of property taxes shall be imposed and what shall be exempt from taxation . . . .
>
> . . . .
>
> . . . We are of opinion that the Legislature still has the power to determine what kinds and classes of property shall be taxed and what kinds and classes shall be exempt from taxation.

Id. at 446-47, 42 A.2d at 49.

[13] *Cf.* INT. REV. CODE of 1954, § 179.

spur investment spending during the early and mid-1960's.[14] It seems particularly well-suited to situations where repairs or improvements as part of an area rehabilitation program are desired or where installation of costly air or water pollution control equipment is desired. Wisconsin has enacted legislation limited to stimulating construction of waste treatment plants and purchase of pollution abatement equipment.[15] The legislation provides for a complete write-off in the year of cash disbursement of the full cost of such equipment or construction. Similar federal or state legislation could be broadened to benefit a much wider range of land use objectives. Furthermore, this approach could be extended to individual income taxpayers who repair or improve their properties in accordance with a publicly declared land use objective by allowing them to deduct all or part of the cost of these repairs or improvements on their individual federal and state income tax returns.[16]

Another opportunity to use the taxing system to achieve land use objectives arises when the public's interest in a given piece of land can be fully satisfied by acquiring less than the "fee" interest in that piece of land, *i.e.*, purchasing an easement.[17] Easement purchase is widely advocated by planners today,[18] and an increasing number of governments (local, state, and federal)[19] have used this device to gain access to or over certain lands, to preserve scenic areas, or to conserve marsh, woodland, and open-space areas. Permitting private landowners to treat payments received for relinquished property rights as a capital gain instead of ordinary income would tend to encourage the sale of easements to agencies of government.[20] There is

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[14] W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY (1966).

> Most important among the measures to speed the advances of productivity were $3 billion of tax incentives to investment in plant and equipment recommended in April 1961 and put into effect in 1962. Added to these were another $3 billion of corporate tax rate deductions in 1964. The combination of investment tax credits, more liberal depreciation, and lower corporate rates may be thought of as a $6 billion shift from public to private saving, one that offered direct investment stimulants in the form of expanded cash flows as well as increased profitability of investment projects.

Id. at 74.

[15] WIS. STAT. ANN. § 71.04(2b) (Supp. 1967).

[16] *Cf.* INT. REV. CODE of 1954, § 163 (interest paid); *id.* § 164 (taxes paid); *id.* § 165 (losses); *id.* § 166 (bad debts); *id.* § 170 (charitable contributions); *id.* § 213 (medical dental expenses); *id.* § 214 (child care deduction).

[17] Colson v. Salzman, 272 Wis. 397, 75 N.W.2d 421 (1956). "An easement has been defined in Wisconsin as a liberty, privilege or advantage in lands, without profit, and existing distinct from the ownership of the soil." *Id.* at 423.

[18] W. WHYTE, OPEN SPACE ACTION (Outdoor Recreation Resources Review Commission Study Report No. 15, 1962); W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS (Urban Land Inst. Tech. Bull. No. 36, 1959); Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343 (1963).

[19] *See, e.g.*, WIS. STAT. ANN. §§ 15.60(6)(i), 62.22(1m) (Supp. 1967).

[20] A thorough and competent note evaluating this and other aspects of Wisconsin's easement purchase program was prepared by James A. Olson in 1965. Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352.

some indication that such treatment would be allowed for the sale of a perpetual affirmative easement;[21] but, if the easement purchase device is to become a useful tool in the hands of governmental agencies, every conceivable type of easement (positive, negative, perpetual, and those for a term of years) should be accorded capital gains treatment.

A more far-reaching tax program which seeks to achieve land use objectives is one which frankly recognizes that uniformity may not be desirable in all situations. For example, Wisconsin's taxation of forest crop lands largely frees these lands from general property taxes but subjects the lumber crop to taxation at the time of severance (or harvest).[22] Forest crop land is statutorily defined and represents a category of real property into which any landowner may place his lands. The purpose of the program is to

> encourage a policy of preserving from destruction or premature cutting the remaining forest growth in this state, and of reproducing and growing for the future adequate crops of forest products on lands not more useful for other purposes, so that such lands shall continue to furnish recurring forest crops for commercial use . . . .[23]

By removing the burden of general property taxation based on some present market value which looks to a more or less future speculative or potential highest and best use, the taxing system induces landowners to use their land for forest crop purposes.[24]

Recently New Jersey took a similar approach to meet a desired land use objective. The state constitution was amended to allow agricultural and horticultural lands to be taxed at non-uniform rates,[25] thus allowing their continued existence in close proximity to rapidly urbanizing areas. Like the Wisconsin forest crop tax, the New Jersey approach recognizes a land use objective and then seeks to adjust the taxing system to allow the achievement of that objective. Both states frankly recognize that there are some public goals which justify non-uniform property taxation.

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[21] However, even as to this type of easement the suggested tax treatment is not completely assured but turns on a limited number of Internal Revenue Rulings and possibly on the quantum of rights relinquished by the landowner. *Id.* at 358-59 & n.35.

[22] WIS. STAT. ANN. §§ 77.02-.16 (Supp. 1967). Forest crop taxes in Maine are discussed in Comment, *Timberland and Taxes in Maine: Property and Federal Income Taxes,* 17 MAINE L. REV. 227 (1965).

[23] WIS. STAT. ANN. § 77.01 (1957).

[24] Waite, *Land Use Controls and Recreation in Northern Wisconsin,* 42 MARQ. L. REV. 271 (1959).

> The tendency of the tax features of the Forest Crop Law is to encourage owners to allow timber to mature before cutting and to follow good forestry practices while the trees are growing. To the extent that owners do use the land for forestry purposes, its recreational potential is protected and enhanced through the exclusion of conflicting uses of an industrial, agricultural or commercial nature.

Id. at 273.

[25] N.J. CONST. art. VIII, § 1(b) (Supp. 1965).

Completely eliminating uniformity requirements in property taxation might also be considered. Some will think this suggestion radical — a complete departure from concepts of equal protection and fairness. However, when one recognizes that there is really very little uniformity in the property tax system today because of variations in local assessment,[26] the early failure to insist upon state-wide uniformity (uniformity is demanded only within individual municipal units),[27] and a failure to demand uniformity among all types and classes of property (uniformity is demanded only within individual classes of property),[28] the suggestion hardly appears more than a candid recognition of present reality. Non-uniform property taxation could incorporate any number of safeguards and would as a matter of course be expected to deal equally with property taxpayers who in fact were similarly situated. The rationale for such an approach to property taxation is that there are so many combinations of land type and land use in existence that are not uniform that a system of property taxation which recognizes this non-uniformity is fully justified.

The legislature could establish a hierarchy of land use objectives to be accorded appropriate tax treatment. For example, dumps and junk yards adjacent to major highways, scenic lakes, or coastal areas

[26] F. BIRD, THE GENERAL PROPERTY TAX: FINDINGS OF THE 1957 CENSUS OF GOVERNMENTS (1960); 1 ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX (No. A-17, 1963).

> A mildly exacting evaluation of the Census Bureau's findings discloses that the indicated quality of assessment administration ranged from superior to reasonably satisfactory in only one-fifth of the areas, while, at the other extreme, it was incredibly poor in one-sixth of the areas. The selected areas included 395 with populations of 50,000 and more in 1950, and therefore clearly large enough to have competent professional assessment administration. An acceptable degree of uniformity was indicated for 22 percent of these areas, including a number with high-quality accomplishment; but the index in 20 percent of the areas disclosed almost incredible inequity. The differences among the States, as indicated by comparison of the median area indexes, were as conspicuous as for the individual areas. Wisconsin, Connecticut, and Maryland made a superior showing, a few others a good showing; but in 5 States there were no selected areas with acceptable performance and in 13 other States less than one-tenth of the areas could be so ranked.
>
> While the findings of the Census Bureau's study seemed to indicate that the quality of local assessing ranges from mediocre to almost unbelievably inferior over a wide portion of the Nation, they were encouraging in their indication that some results (at least for one important class of property) reach a very satisfactory degree of uniformity.

Id. at 42-43.

[27] Jensen v. Board of Supervisors of County of Polk, 47 Wis. 298, 2 N.W. 320 (1879).

> The fact that one county, town or city is burdened with a greater weight of taxation than another is not a violation of the rule of uniformity. If it were there would be no lawful tax levied in the state, as nearly every municipality raises a different amount of taxes upon the same amount of taxable property, the amount depending upon the necessities of the municipality, or the will of its officers.

Id. at 331.

[28] Note 9 *supra.*

could have a high property tax. Similar activities situated more discretely could have a lower property tax. Slum tenements, old warehouses, abandoned or damaged buildings, and unusable dockyard facilities could be taxed heavily while low-income housing, subdivisions which cluster house units in order to retain an open or natural area, and rehabilitation projects could be induced by favorably low property tax treatment.[29] Property taxes aimed at discouraging certain land use activities can be increased (made more onerous) in a step process over a series of years until the objective is achieved.[30] Highly favorable property tax treatment designed to induce a desired type of land utilization could be ended after a given number of years or could also employ a step process which eventually levels out at the average rate of taxation for such activities and which thus serves to concentrate the tax incentive in the early years of the undertaking.[31] The point is that such an approach is a direct harnessing of the property tax system to land use goals: The system can act as a deterrent to remove or relocate undesirable land uses or as an incentive to induce desirable uses.

An even more dramatic departure from present methods of tax collection which might serve land use objectives in our society is complete abandonment of property taxation as a means of revenue collection. Many critics feel that the property tax is inherently inequitable because it raises general revenues by taxing only some property owners or types of property within the community. It is alleged that if the property tax is not inherently inequitable it nonetheless produces inequitable results because of the limitations we have placed on the concept of uniformity and because of the difficulties of

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[29] The proposal being made is an extension of Hagman's approach, *supra* note 3, which accepts the concept of preferential property tax treatment but which limits its use to land controlled for open space preservation purposes.

> Lands controlled for exclusively agricultural, ranching, recreational, airport, golf course or conservation uses would seem to be the prime candidates for special tax treatment. Lands kept in reserve as water storage areas, flood plains or potential sites for parks, community facilities and industrial tracts, might also be eligible if land use controls are applied. Forest land might be included if special forest tax provisions are non-existent or inadequate.

Hagman, *supra* note 3, at 648-49. The view of this paper, however, is that once the concept of preferential property tax treatment to achieve land use objectives is accepted, the legislature after viewing the complete spectrum of such objectives can and should establish a hierarchy or set of preferences as between them and accord to each appropriate property tax treatment.

[30] This proposal is loosely analogous to a number of other concepts in the law which utilize essentially coercive devices to achieve desired ends or to deter undesirable types of action, *e.g.*, punitive damages, triple damages, penalty taxes.

[31] *Cf.* INT. REV. CODE of 1954, § 167(b) (concentrates depreciation allowances in the early years of the useful life of depreciable property by allowing use of the declining balance and sum of the years-digits methods of computation); ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE-LOCAL TAXATION AND INDUSTRIAL LOCATION (No. A-30, 1967) *passim.*

administering the tax.[32] Many feel that it stifles investment and that the historical nature of statutory and case law in existence with respect to this tax renders it relatively inflexible — incapable of adapting to meet other community goals such as land use objectives.[33] In short, persuasive arguments can be made for raising needed governmental revenues by some alternative means — a method free from all of the defects listed above and one which would leave local governments free to determine land use goals and objectives without the necessity of working within or around the present property tax system. A trend in the direction of reducing state and local governments' reliance on the property tax as a source of revenue is already evident. In 1929 over 60 percent of all state and local receipts were derived from property taxes. In 1966 only 28 percent of such receipts were derived from the property tax.[34]

The proposal to abandon the property tax at this time is consistent with recent proposals by Walter Heller and Joseph Pechman

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[32] Notes 9, 26 & 27 *supra*; *cf.* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, 1 THE ROLE OF THE STATES IN STRENGTHENING THE PROPERTY TAX (No. A-17, 1963).

> Strong arguments have been advanced, time and again, for abolition of all ad valorem taxation of personal property and restriction of the property tax to real property. (Many of the advocates of this general policy would retain business machinery and equipment in the tax base.) Cited in support of this program are the unadministrable features of personal property taxation, the widespread condoning of evasion, the injustices inherent in some of the legal provisions, and the need to focus all resources on improving administration of the tax on real property.
>
> Actually, the case for thus narrowing the tax base is not as strong as it might appear. Personal property, no less than real property, is part of the wealth of individuals; an owner of personal property is as much an owner of property as the owner of land and improvements. The property tax is a tax on things, not on net wealth or net income of persons, and when it discriminates among classes of property it favors some classes at the expense of others.

Id. at 32.

[33]

> A tax as ancient as that on property tends to become an institution and to accumulate fondly clinging traditions as it evolves over the years. Certain concepts more admired a hundred years ago than now found their way into State constitutions from which some States have not yet been able to extricate them, and rudimentary methods of administering the tax that worked only fairly well in colonial days are still cherished in some areas with what has been described as "a touching though misplaced fidelity." Since rehabilitation of the property tax involves a challenge of some of its institutional idiosyncrasies, their identification may be useful.

Id. at 3; M. MEYERSON & E. BANFIELD, BOSTON: THE JOB AHEAD (1966).

> But the most serious defect of the real property tax is that it discourages new investment. As it stands, the tax offers property owners no incentive to tear down old houses, office buildings, stores, and factories and build better ones in their places. On the contrary, it actually penalizes efforts at modernization; a new building is at a tax disadvantage as compared to an old one.

Id. at 28.

[34] King & Lefkowitz, *The Finances of State and Local Governments*, SURVEY OF CURRENT BUSINESS, Oct. 1967, at 26, table 5.

which advocate an increased reliance upon the income tax revenue gathering capacity of the federal government.[35] They argue that the progressive income tax is more equitable, that the administrative machinery for collection is established, efficient, relatively inexpensive to maintain, and could easily be expanded if necessary.[36] Their proposals call for a sharing back to the states of a portion of the total revenues collected, and one can easily imagine a second stage of sharing by states to local governments.[37] The advantage that such an arrangement would have with respect to land use objectives is that incentives aimed at corporations and individuals could be made part of a taxing system which would uniformly cover the entire nation and which would thus give uniform national impetus to these objectives. Furthermore, the formula for sharing back the collected revenues from the federal government to the states and from the states to local units of government could take into account the degree to which these state and local units of government adhere to legislatively adopted land use objectives. For example, states which make an effort to deal effectively with air and water pollution would be entitled to relatively more money than states which neglected these problems. Cities which make a vigorous attempt to ameliorate problems of ghetto schools and housing, waste disposal and treatment, and urban transportation would be entitled to relatively greater sums than cities which neglect their responsibilities in these areas.

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[35] W. HELLER, NEW DIMENSIONS OF POLITICAL ECONOMY 117-72 (1966).

> In capsule, the revenue-sharing plan would distribute a specified portion of the Federal individual income tax to the states each year on a per capita basis, with next to no strings attached. This distribution would be over and above existing and future conditional grants.

Id. at 145.

[36]
> One of the false issues of efficiency that besets the debate is the perennial charge that channeling Federal Funds to the states increases government costs by "the additional freight of a round-trip to Washington." This charge would hardly merit serious debate were it not such a stubborn weed in the garden of fiscal coordination. Yet it should wither before the facts. First, costs of collecting Federal taxes are far below costs of collecting state and local taxes. Second, given vast advantages in jurisdiction, size, and scale, the Internal Revenue Service is an inherently more efficient tax administering agency than those of the states. Third, with respect to plans like revenue sharing, there would need to be no new machinery and no added administrative costs of any consequence. The round-trip to Washington would cost less than a round-trip to the state house or city hall. On these, admittedly narrow, efficiency grounds, the flow-through of Federal income tax funds to the states would get high marks.

Id. at 167.

[37] This second stage of sharing will pose few difficulties. Most states to some extent already share general state tax revenues with local units of government either on an unrestricted basis to augment local tax revenues or on an earmarked basis for particular local expenditures of state-wide concern (most frequently education).

To some extent these incentive devices already exist in federal and state tax sharing and aid programs,[38] but they would have greater weight if incorporated as part of a national system of income taxation and revenue sharing which at the same time contemplated the abandonment of the property tax and which consequently would be the principal source of revenue for all levels of government.

The abandonment of the property tax does not depend on expanding the federal income tax mechanism to fill the void and produce needed revenue. Individual states, many of which already have an income tax and collection machinery, could perform the function quite satisfactorily. They could program into their respective income tax structures incentives designed to achieve land use objectives, and they also could share the taxes collected with local governmental units in a manner which induces compliance with land use goals.

It would not be impossible to extend the principle inherent in federal and state tax-sharing programs (or grant-in-aid programs) to individuals and corporations. That is, individuals and corporations that undertake to carry out at their own expense legislatively endorsed federal, state, or local land use objectives would qualify for a subsidy or grant-in-aid which would cover a portion of the total costs incurred.[39] Tax revenues expended in this manner induce private funds to be spent on essentially public land use objectives. The partnership of public and private funds is healthy, and the fact that private as well as public benefits may accrue should not deter an exploration of this approach.

Milton Friedman and others have advocated a "negative income tax" as a means of assisting (making payments to) individuals whose

[38] A familiar example is state school aid formulas which favor consolidated districts over independent or unconsolidated districts: *e.g.*, WIS. STAT. ANN. §§ 40.70(5), (6) (1957). Federal aid programs which condition assistance on the existence of coordinated and comprehensive planning efforts similarly create a strong incentive to act in the desired manner: *e.g.*, 23 U.S.C. § 134 (1964) (highway construction); 33 U.S.C. § 466(e) (1964) (construction of sewerage-treatment plants); 42 U.S.C. § 1500(b) (1964) (open-space acquisition).

[39] The federal income tax system in the form of personal deductions and exemptions and in the manner it allows corporations to define and handle business expenses and depreciation already gives incentive and impetus to a wide range of goals which Congress has deemed socially or otherwise desirable. These include dental and medical care; consumer purchases of housing, automobiles, and other durable goods; religious and charitable contributions; capital goods investment spending; and soil conservation expenditures. A more complete listing of congressional beneficence can be compiled by examining the Topical Index headings "business expenses," "depletion," "depreciation," "exempt income" and "personal deductions" of the INT. REV. CODE of 1954.

income falls below some minimum level.[40] A variation of this approach might be applied, for example, to housing improvement. Individuals whose residences did not measure up to building code standards would qualify for a money payment which could be used only to make those necessary improvements which would bring the house up to code standards. The farther below the code standards (that is the more rundown the structure was initially) the larger would be the payment. If the substandard housing unit is a rental or an apartment house and the owner is indifferent to its condition, the payment could be made to the tenant, to a tenants' union, or to a local court to insure that the sums paid were in fact allocated to the improvement of the housing unit.[41] The owners of such structures should not object to their improvement by these means, and to prevent the possibility that owners with newly refurbished structures would either raise the rent or evict the present tenants, lease arrangements could be entered into at the outset of the repair and improvement program.

Another taxing approach which would further land use objectives is one which relies on a combination of special assessment concepts and the concept of effluent charges. Special assessment tax theory holds that a levy on property for special benefits conferred upon such property by a governmental act or improvement may be

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[40] M. FRIEDMAN, CAPITALISM AND FREEDOM (1962); Tobin, Pechman, & Mieszkowski, *Is a Negative Income Tax Practical?*, 77 YALE L.J. 1 (1967).

> The arrangement that recommends itself on purely mechanical grounds is a negative income tax. We now have an exemption of $600 per person under the federal income tax (plus a minimum 10 per cent flat deduction). If an individual receives $100 taxable income, i.e., an income of $100 in excess of the exemption and deductions, he pays tax. Under the proposal, if his taxable income minus $100, i.e., $100 less than the exemption plus deductions, he would pay a negative tax, i.e., receive a subsidy. If the rate of subsidy were, say, 50 per cent, he would receive $50. If he had no income at all, and, for simplicity, no deductions, and the rate were constant, he would receive $300. He might receive more than this if he had deductions, for example, for medical expenses, so that his income less deductions, was negative even before subtracting the exemption. The rates of subsidy could, of course, be graduated just as the rates of tax above the exemption are. In this way, it would be possible to set a floor below which no man's net income (defined now to include the subsidy) could fall — in the simple example $300 per person. The precise floor set would depend on what the community could afford.

M. FRIEDMAN, *supra* at 191-92.

[41] Davis & Schwartz, *Tenant Unions: An Experiment in Private Law-Making*, 2 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 237 (1967), *reprinted and expanded in* N.Y.U. SCHOOL OF LAW, PROJECT ON SOCIAL WELFARE LAW, SUPP. NO. 1, HOUSING FOR THE POOR: RIGHTS AND REMEDIES 100 (1967).

collected.[42] The concept of effluent charges maintains that an economic entity that disposes of its waste products in the waters of a state may be required to make a payment to the state for that privilege. It is in the nature of an excise tax.[43] The revenues collected by such a charge either could be paid over to those individuals injured by the water pollution or could be expended to erect water pollution control and treatment facilities.[44] The present proposal is simply to subject every undesirable or offensive land use situation to a system of taxation based on one or the other or both of these two theories. The size of the tax would be measured by the costs incurred by the public to remove or correct the undesirable or offensive situation. For example, public improvement of a slum tenement would confer a special benefit on the owner of the building justifying a tax in the nature of a special assessment. The tax could cover all or only a part of the total costs incurred.[45] The costs to the public of planting and maintaining a screening to block from view a dump or junk yard would be the measure of a tax more akin to the effluent charge. The privilege of carrying on this activity in an undesirable and indiscriminate manner may be allowed to continue, but the cost of ameliorating the undesirable effect upon the rest of the community will be forced back on the owner of the dump or junk yard facility. Should the community desire to create by purchase and then to maintain a park or open-space area in a particular neighborhood, a portion of the costs of such an endeavor might well be passed on to those landowners whose property values are enhanced by the creation of such a facility. To the extent that the creation and continued maintenance of such a facility in the neighborhood is more nearly a privilege than

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[42] J. FORDHAM, LOCAL GOVERNMENT LAW (1949).

> A familiar method of financing local improvements is the special assessment. It is usually and properly classified as a form of taxation and, like general taxes, may be levied only for public purposes. While jurisdiction to impose general taxes is conventionally made out by reference to the general benefits of government extended by the taxing unit, a special assessment is based upon benefits in a more exacting sense. The tax is laid for a special purpose, which is calculated to benefit the property burdened to a degree not enjoyed by property not assessed.
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> The device is far from new. In English law and practice it goes back to the Sixteenth Century improvement commissioners. It was employed in colonial America. A statute of 1691 made provision for such financing by New York City. That and other early instances of legislation on the subject are noted in the leading case of People ex rel. Griffin v. Brooklyn, 4 N.Y. 419, 438 (1851).

Id. at 451.

[43] A. KNEESE, THE ECONOMICS OF REGIONAL WATER QUALITY MANAGEMENT (1964); Delogu, *Effluent Charges: A Method of Enforcing Stream Standards*, 19 MAINE L. REV. 29, 39-44 (1967).

[44] *Id.* at 41-42 & 44-47.

[45] A tax which covered only part of the total costs incurred would simply recognize, as many special assessment situations actually do, that there is some degree of general benefit in almost every public improvement, even those which ostensibly and most directly benefit only a few individuals.

a right and clearly confers a special benefit on neighborhood residents, a tax measured by the costs of initial acquisition and upkeep does not seem unreasonable.[46]

Once again, a hierarchy of undesirable land use situations and countervailing public actions could be constructed by the legislature and appropriate tax rates imposed designed not only to discourage the private continuation of these undesirable situations but also to produce a fund which would enable public repairs or improvements to be made. In some instances the public action will confer a direct benefit on a private landowner, and in other instances the public action will simply provide for an adequate buffer or shield so that adverse effects of the undesirable situation will not be felt by an entire community. In either case the essential fairness of such an approach is clearly evident, for the direct beneficiary of a public improvement is called upon to bear part of the cost of such governmental action and the creator of an unsightly or otherwise adverse land use condition bears the cost of amelioration.

CONCLUSIONS

Present systems of taxation in this country neither provide for accomplishing land use objectives nor do they remain neutral. In far too many instances taxing systems contradict and serve to defeat land use objectives. However, contradictions can be corrected, and tax programs which facilitate the attainment of land use objectives can be developed. A range of such programs in outline form only has been presented in this paper. Each is capable of being expanded, tailored to meet individual objectives, and developed in the course of actual application — but the promise is there.

The extent to which oil and gas depletion allowances in the federal income tax system[47] have spurred extractive and land exploiting activities is ample proof that a similar harnessing of the taxing power to the attainment of a wide range of land use objectives would also be successful. It is hard to imagine that a tax-incentive program which even approached present oil and gas depletion allowances would not be capable of producing clean air over cities most in need of air pollution control activities or clean water in lakes, rivers, and streams most in need of attention. It also seems hard to believe that many other undesirable and offensive land use conditions which today exist in our society could not be induced to change for the better by taxing systems which provide adequate tax incentives or penalties.

However, tax reform has never been an easy process in our society. Advocates of conservation, the wise use of resources, and environ-

[46] It is very analogous to the concept of waste load surcharges employed by municipalities to defray sewage disposal costs and user charges generally.

[47] INT. REV. CODE of 1954, §§ 611-14.

mental improvements have no strong lobby in Congress or state legislatures. Our society is only now awakening to the dimensions of the problem in these areas and is rather belatedly discussing and developing tools capable of achieving land use objectives. The power to tax is such a tool and should be thoroughly examined and effectively used. The principle of the carrot and the stick is an old one. It has been made to work before — it can be reasonably and fairly applied and made to work again.