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Commentary, Florida's Greenbelts: Preservation of Public and Private Interests

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FLORIDA GREENBELTS: PRESERVATION OF PUBLIC AND PRIVATE INTERESTS

Land use regulation has traditionally been accomplished by exercise of the state's police power and power of eminent domain. Although utilization of the state's taxing power to regulate land use is not a new concept, it was infrequently practiced until the last decade. Increasing expansion of urban areas, however, prompted a search for new methods of land use regulation that would preserve existing nonintensive land use in peripheral urban areas. Preservation of urban fringe areas that have not as yet succumbed to suburbia, or "greenbelts"[1] as they are popularly known, can be achieved through coordination of land use planning and ad valorem taxation policies. Florida's unprecedented population growth, occurring almost exclusively in urban centers,[2] makes the need for such a program particularly acute in this state.

FLORIDA'S PRESENT SYSTEM

Florida's current statutory scheme has some characteristics of greenbelting, born out of a legislative desire to protect the individual agriculturalist from prohibitive ad valorem taxation due to urban expansion.[3] The farmer's land has traditionally increased in value as surrounding land has been developed for nonagricultural uses.[4] The corresponding increase in ad valorem taxes has often made agricultural operations economically impractical.[5] The legislature,

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1. A "greenbelt" is an area of land bordering on an urban center that has deliberately been preserved in its undeveloped state; the land is not used at all or is used only for agriculture. Genuine greenbelting presupposes two conditions: (1) a public agency has made a determination that the land in question should be preserved in its undeveloped state; and (2) some consideration, usually a tax advantage, has been offered to the landowner to induce compliance with the agency's determination. Wershow, *Recent Developments in Ad Valorem Taxation,* 20 U. FLA. L. REV. 1, 12 (1967).

2. See text accompanying note 31 *infra.*

3. Fla. H.R. 3772, *Preamble* (Reg. Sess. 1972).

4. By mandate of FLA. CONST. art. VII, §4, land is usually assessed as a value assuming its highest and best use. While the highest and best use of land in rural areas may be agricultural, as the urban area expands, approaching the farmer's land, his land becomes increasingly valuable for development. This now becomes the land's highest and best use despite the fact that he continues to farm it. Ad valorem taxes also increase generally as the population increases, due to the demand for additional public services. Wershow, *supra* note 1, at 11.

5. The first in a series of statutes to protect the farmer was passed in 1959, Fla. Stat. §193.201 (1959). The statute contained the following preamble:

"Whereas the climate of Florida has made the agricultural business the number one money producing business in our state, and

"Whereas, much of the recent real estate development has tended to increase assessments on farm and agricultural land and other agricultural products to unreasonable and unprofitable proportions, thus forcing many persons to give up their livelihood because of being taxed out of existence, and

"Whereas, for the protection of the general welfare of the citizens of our state and our

therefore, has provided that as long as land is being used for agriculture it will be assessed at its value as agricultural land.[6] Although initially the constitutionality of the statute was in controversy, the Florida supreme court upheld it in *Lanier v. Overstreet*.[7] Thus, if a farmer wanted to continue farming despite urban encroachment, the statute prevented taxation from making it economically impossible.[8]

In the context of greenbelting the presumption was that the preferential assessment given to farmland would induce continued use of the land for that purpose. In addition to protecting the individual farmer, the statute was intended to discourage haphazard expansion of urban fringe areas. Such desultory development, commonly called "urban sprawl," increases the cost of public services such as fire, police, education, transportation, and utilities.[9] The legislature believed that if a tax break were given only to land being used for agriculture, it would be economically advantageous to continue that use until conversion to intensive use was warranted.

JUDICIAL INTERPRETATION

This statutory scheme has proved unsatisfactory. Although the statute purports to key preferential assessment to "bona fide agricultural purposes,"[10] it requires that the assessment decision "be based *solely* on [the land's] agricul-

economy, and to perpetuate, and continue, and encourage agricultural pursuits, Now, Therefore . . . ."

Fla. Laws 1959, ch. 59-226, at 864.

6. Fla. Laws 1959, ch. 59-226, at 864-66. "Value as agricultural land" has been interpreted as that which a willing, but not obligated, buyer would pay for it if the buyer were to use it for agriculture. Stiles v. Brown, 182 So. 2d 612 (Fla. 1966).

7. 175 So. 2d 521 (Fla. 1965). The issue was whether the requirement in the 1885 constitution of "uniform and equal rate of taxation" and "just valuation" of property permitted the legislature to make a distinction between agricultural and nonagricultural land, giving the farmer preferential assessment. In a 4-3 decision the court held that the constitution required uniformity of the rate of taxation and not uniformity of legislative regulations designed to achieve a just valuation of land. The majority found the statute to be protective of every man's right to use his land as he sees fit, regardless of the fact that such use impedes "progress" in the view of some. There was a vigorous dissent that believed the statute unconstitutionally shifted "the burden of government on those who are not fortunate enough to be brought within a favored class." *Id.* at 526.

This controversy is of little more than historical interest now because the 1968 constitution provides: "Agricultural land or land used exclusively for non-commercial recreational purposes may be classified by general law and assessed solely on the basis of character or use." FLA. CONST. art. VII, §4a.

8. Cursory examination of the Alachua County tax rolls reveals that agricultural assessments may be one-half to one-third of the normal assessment.

9. The last of the amendments to the current statute, Fla. Laws 1972, ch. 181, at 571, has the following preamble: "Whereas, Agricultural and outdoor recreational lands in many parts of the state are under urban pressure from expanding metropolitan areas. This urban pressure takes the form of scattered development in wide belts around urban areas, and brings conflicting land uses in juxtaposition, creates high costs for public services and stimulates land speculation . . . ." *See also* Alden & Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination?*, 42 S. CAL. L. REV. 59, 59-61 (1969).

10. FLA. STAT. §193.461(3)(b) (1973).

tural *use*,"[11] as gleaned from several enumerated factors.[12] Because the statute directs the assessor to consider *only* these factors,[13] Florida courts have excluded consideration of the owner's intent to hold the land for speculation. Thus, real estate speculators have reaped the benefits of the tax break with a skeleton farm, selling out when they thought the land ripe for development.[14]

In *Smith v. Parrish*,[15] for example, the assessor contended that the plaintiff taxpayer and a group of investors had purchased the land in question for the primary purpose of holding it for future real estate development. The use of the land for grazing cattle and growing timber was therefore "purely incidental to the primary purpose of land speculation"[16] and did not constitute a bona fide agricultural purpose. Plaintiff, of course, contended he was entitled to an agricultural assessment. Rejecting the assessor's approach, the court agreed with the plaintiff that "the fact that the land may have been purchased and was being held as a speculative investment is of no consequence provided its actual use is for a bona fide agricultural purpose."[17] Similarly, in *Hausman v. Rudkin*[18] plaintiff's vendor had farmed his land since 1944. He sold the land to plaintiff in 1966 for 975 dollars per acre. Plaintiff immediately leased the land back to the vendor to use for agricultural purposes only, until such time as the land was sold. In the year in question, plaintiff was offering the land for 4,000 dollars per acre. The assessor contended plaintiff's use of the land was not for agricultural purposes, but for realization of a gain on resale and that such use disqualified the land for preferential assessment.[19] The court held in favor of the plaintiff on the ground that his intent and desire for capital gain were immaterial; if the land were physically used for agricultural purposes, it must be assessed accordingly.[20]

This interpretation of the statute has produced a result exactly opposite to that intended by the legislature. Because any speculative motive is currently disregarded by the judiciary, the Florida greenbelt statute has been a boon to

11. FLA. STAT. §193.461(6)(a) (1972) (emphasis added).
12. *Id.*
13. *Id.*
14. The classic example is Matheson v. Elcook, 173 So. 2d 164 (3d D.C.A. Fla. 1965). Sixty-seven acres on Key Biscayne had been operated as a coconut plantation for over 40 years. The land's true value was $2,359,600; its agricultural value was $54,000. The lower court found the plantation was operating at a loss and the same yield could have been extracted from 5 acres. Therefore, the court allowed agricultural assessment of 8 acres only. The decision was reversed on appeal, the court holding that "bona fide" could mean no more than in good faith and as long as all of the land was used in good faith for agricultural operations, the owner was entitled to preferential assessment. *See also* Conrad v. Sapp, 252 So. 2d 225 (Fla. 1971); Greenwood v. Oates, 251 So. 2d 665 (Fla. 1971); Schooley v. Wetsone, 258 So. 2d 483 (2d D.C.A. Fla. 1972); McKinney v. Hunt, 251 So. 2d. 6 (1st D.C.A. Fla. 1971); Smith v. Ring, 250 So. 2d 913 (1st D.C.A. Fla. 1971); [1969-1970] FLA. ATT'Y GEN. BIENNIAL REP. 340.
15. 262 So. 2d 237 (1st D.C.A. Fla. 1972).
16. *Id.* at 238.
17. *Id.*
18. 268 So. 2d 407 (4th D.C.A. Fla. 1972).
19. *Id.* at 409.
20. *Id.*

real estate speculators, instead of an inducement for continued use of the land for agricultural purposes. Cognizant of this weakening of the statute, the legislature amended it to allow the assessor to take into consideration new factors that may enable him to weed out the speculator.[21] Most pertinently, sale of land for a price three or more times its agricultural assessment creates a rebuttable presumption that the land is not used for bona fide agricultural purposes.[22]

There have been no decisions construing the amended statute to date.[23] Nevertheless, only a judicial about-face can produce the desired results because courts must be willing to look below the surface to determine whether the land is in truth being used for bona fide agricultural purposes. As of yet, they have not demonstrated a willingness to do so. If the present statute were to be applied to protect bona fide agriculturalists but not those investing in rural lands for speculative purposes, then the interests of the individual farmer would be protected, as would the public interest in orderly growth. If land held with a view toward development were assessed at its development value, then its attractiveness as an investment would be lessened until expansion became imminent. Thus, while the agricultural character of the land would not be preserved indefinitely, speculators would not profit at the expense of the general community and expansion would occur at a more appropriate time.

THE TAX DEFERRAL ALTERNATIVE

If accomplishment of the relatively short range objectives discussed above, protection of the farmer and promotion of orderly growth, is all that is desired, the tax deferral method presents distinct advantages over the present system.[24] The basic operation of the deferral method is as follows: upon determination that the land in question is being used for agricultural purposes, the assessor makes two valuations — one based on the highest and best use to which the land could be put irrespective of its agricultural status, the other based on its use for agricultural purposes only. As long as the land is used for agriculture, tax is assessed on the basis of the second valuation. Upon conversion to a nonagricultural use, however, the difference between what the owner would have paid and what he actually paid in those years becomes due.[25]

The same result could conceivably be achieved under the current Florida system if the farmer were protected and speculation in anticipation of development were discouraged.[26] Nevertheless, the deferral system has two advantages not found in the Florida system. First, it provides more of an incen-

21. *See* Fla. Laws 1972, ch. 92-181, at 572.

22. FLA. STAT. §193.461(4)(c) (1973).

23. The amendment did not become effective until January 1, 1973.

24. This method has been used by other states. For representative statutes see: CONN. GEN. STAT. §§12-107(a)-(e), §§12-504(a)-(f) (Supp. 1973); ORE. REV. STAT. §§308.345-.395 (1972).

25. Hagman, *Open Space Planning and Property Taxation — Some Suggestions,* 1964 WIS. L. REV. 628, 638-39.

26. *See* Sullivan, *The Greening of the Taxpayer: The Relationship of Farm Zone Taxation in Oregon to Land Use,* 9 WILLIAMETTE L.J. 1 (1973).

tive to farmers to continue to use their lands for agriculture by providing a penalty when the use is changed.[27] Second, recapture of the taxes at the moment the land is put to more intensive use produces additional revenue to offset the cost of expanding public services necessitated by the new development. In addition, the deferral system takes some of the pressure off the assessor in making the initial determination whether the land is being used for bona fide agricultural operations. Assuming an initial determination is incorrectly made, higher taxes are merely deferred rather than completely avoided.[28]

SATISFACTION OF LONG-TERM PUBLIC INTERESTS

There are, however, long-range public interests that neither the current Florida system nor a tax deferral system can satisfy.[29] Florida is presently experiencing the greatest population increase in its history: 6,000 new residents per week.[30] In 1972, 80 per cent of the population lived in urban areas, and it is estimated that by 1982 the state's urban population will increase by 66 per cent and comprise 91 per cent of the total population.[31] As the size of urban areas increases, so does the potential for pollution. Thus, there is a public interest in establishing greenbelts to act as "clean air sheds."[32] Greenbelts also serve the public interest by providing scenic land for aesthetic and recreational purposes and fertile land for food production.[33] The point is that these interests can be satisfied only if provision is made for preservation of agricultural and undeveloped land on a *permanent* basis.[34]

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27. However, setting the number of years for which taxes can be recovered is difficult; limited recapture of back taxes provides little deterrence to the farmer who can sell out at a high price to the developer; on the other hand, unlimited recapture of back taxes may be so prohibitive as to make many farmers forego the benefits of the system. Alden & Shockro, *supra* note 9, at 62-63.

28. A change to the deferral system would not result in an appreciable increase in administrative costs because the two valuations are made anyway.

29. *See* Gainesville (Fla.) Sun, Nov. 22, 1973, at 11a, cols. 1, 2; Gainesville (Fla.) Sun, Nov. 23, 1973, at 2c, cols. 3, 4.

30. FLORIDA DIV. OF STATE PLANNING, FLORIDA 10 MILLION (1973).

31. *Id.*

32. Heichel, *Plants, Oxygen, and People,* FRONTIERS IN PLANT SCI., fall 1971, at 6.

33. In Florida the most productive croplands are close to the major population areas of Miami, Fort Lauderdale, West Palm Beach, Tampa, and Orlando. Times Union & Journal (Jacksonville, Fla.), Oct. 28, 1973, at B7, col. 3. "Florida is the 12th largest agricultural state in the nation and one of the fastest growing. Agriculture is a $10 billion business in Florida . . . generates about one-third of all the state's jobs . . . [and] there is not an acre of land in Florida that is not urban or affected by urban development and that famers are farming 'down town' so to speak." Tefertiller, *Outlook on Florida Fuel and Farms,* Gainesville (Fla.) Sun, Feb. 1, 1974, at 1D, col. 1.

34. Cooke & Power, *Preferential Assessment of Agricultural Land,* 47 FLA. B.J. 636 (1973). The authors reach the same conclusion as this commentary but by a significantly different route. Analyzing the effect of preferential assessments on cost factors as they determine the profitability of agricultural operations, the authors conclude that a preferential assessment system results in inefficient allocation of resources. As a solution they propose the same type of greenbelt program outlined above. They fail, however, to consider the proposition that certain land, because of its proximity to urban areas, may best be utilized for agricultural

Traditional methods of zoning and outright purchase of land by the state are inadequate to accomplish the task on the scale demanded by current conditions. Zoning is not a viable remedy because, as the push to expand becomes more urgent, local pressures are exerted to change zoning regulations at the precise time long-range goals demand standing fast.[35] Condemnation or purchase of land for greenbelts is not economically feasible because expanding communities must direct revenue toward development of public services, and the excess is insufficient for the lower priority purchase of land.

THE REMEDY

If the public goals outlined above are to be achieved through the ad valorem taxation system, then the system will have to incorporate a greater degree of permanency.

The basic fault of both the present Florida system and a deferral system is that the benefits of the statute are keyed to the *present* use of the land.[36] This kind of system gives the public no control over the long-range use of the land[37] because the owner is free to convert to intensive nonagricultural land use detrimental to public needs.[38]

The solution to the problem lies in conditioning eligibility for preferential assessment upon a commitment by an owner to continue nonintensive use of the land for a long period.[39] Florida already has a statute providing for such a commitment, but it relates only to parks and recreational lands.[40] The statute could be enlarged to include agricultural land as well as land that should be preserved in its natural state for scenic and environmental reasons.

The basic structure of such a statute would be as follows: land owners

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operations, which they concede are profitable if given a tax break, or left in its natural state for recreational and aesthetic reasons.

35. Alden & Shockro, *supra* note 9, at 61. On Feb. 10, 1974, the CBS "60 Minutes" television program presented an in-depth report entitled "Bigger Is Better?" concerning the failure of zoning to prevent urban sprawl, air and water pollution, and a water shortage in Hillsborough County, Florida.

36. FLA. STAT. §193.461 (1973).

37. "[T]here is little public gain to balance against public loss in tax revenue" when the statute provides that preferential assessment is to be granted on the basis of present use alone because such a statute gives the public no control over the land. Hagman, *Open Space Planning and Property Taxation — Some Suggestions,* 1964 WIS. L. REV. 628, 646.

38. *Id.*

39. The essential features of California's Williamson Act, Land Conservation Act of 1965, CAL. ANN. GOV'T CODE, §§51,200 *et seq.* (West Supp. 1973), [hereinafter cited as Williamson Act] could provide a model for a greenbelt program for Florida. Hawaii also has developed a statutory scheme that successfully coordinates taxation and land use policies. *See* HAWAII REV. STAT. §§205(1)-(6), 246(10), (12) (1968).

40. FLA. STAT. §193.501 (1973). A recent article reported that the statute "was enacted by the Legislature late in its 1967 session with the primary sponsors, a House member from a family with large land holdings and a senator closely associated with a golf club and developer, possibly being the only lawmakers personally acquainted with what the bill would do." Times Union & Journal (Jacksonville, Fla.), Oct. 28, 1973, at B7, cols. 4, 5.

whose property falls within designated greenbelt areas[41] would be given the opportunity to enter into a covenant with the county. The owner would lease to the county all rights of development in the land for a minimum period of ten years.[42] The covenant would restrict use of land to agricultural operations as public recreation or provide that the land be left in its natural state. For the duration of the agreement, the land would be assessed at its value subject to the restrictions in the covenant.[43] In the event of cancellation or breach, any tax benefits reaped from the preferential assessment – that is, the difference between the taxes actually paid and the taxes that would have been paid had the land been assessed at its highest and best value – would become due immediately with interest.[44]

Adoption of this system would serve both the public and private interest in this area. It would give the agriculturalist and the owner of undeveloped land relief from rising ad valorem taxation bills due to urban expansion.[45] At the same time it would benefit the public by allowing accomplishment of long-range land use goals.[46] Essentially a refinement of the deferral system, this program simply requires a long-term individual commitment as a precondition to preferential treatment.

The state will have to subsidize this program to some extent in order to compensate for the reduction in local revenue.[47] The amount of state participation would vary according to the amount of land subject to restriction in each county. Such state subsidy would tend to equalize the burden on ad valorem taxpayers in each county.[48] While effective land use management may require a substantial public investment, "the cost of curing the problems of unplanned growth and development would require an even greater investment by the public in the long run."[49]

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41. *See* text accompanying notes 50-54 *infra* as to the necessity of planning in conjunction with the establishment of a greenbelt program.

42. The covenant, for obvious reasons, would run with the land. It would be renewed automatically every ten years unless five years' notice was given at the end of the fifth year. This feature of the covenant will curb speculation because the speculator will not be motivated to invest in land the use of which is restricted for a relatively long period of time, and upon which full tax liability is incurred if the use is changed.

43. In arriving at a valuation for land restricted to agricultural use, the assessor would consider the same factors he does under the current preferential assessment system. Presumably, the value of land restricted to recreational uses or land to be left in its natural state, would be nil for purposes of taxation.

44. The legislature may want to consider inclusion of a penalty clause, as provided in both the California and Hawaii plans *cited* in note 39 *supra*.

45. See notes 4, 5 *supra* and accompanying text.

46. See text accompanying notes 31-34 *supra*.

47. Participating counties in the land conservation program in California have suffered a decline in revenue generated by ad valorem taxes. The state picked up approximately 60% of the difference in 1972 based on a sliding scale of proximity to urban areas and value of the land for agricultural operations. D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 763-64 (1973).

48. But for state subsidization, the revenue lost in each county would have to be made up by other property owners in the same county. State participation would place some or all of the burden on the general taxpayer.

49. ENVIRONMENTAL LAND MANAGEMENT STUDY COMMITTEE, REPORT.

The establishment and preservation of true greenbelts require more than a modification of ad valorem taxation policy. They require coordination of land planning and taxing policies on a local, regional, and statewide basis.[50] Precisely because achievement of long-range public goals requires preservation of greenbelts over a substantial period of time, the decision to designate a certain area as a greenbelt must be made with care and foresight. It is a step that should be taken before the opportunity to enter restrictive covenants is extended to individual landowners. The necessity of growth and expansion must be balanced against environmental concerns and the desirability of preserving Florida's natural beauty.[51]

The Florida Legislature's recognition of the need for long-range planning has culminated in the report of the Environmental Land Management Study (ELMS) Committee.[52] The Committee found that presently 60 per cent of the land in Florida does not come under a comprehensive planning program.[53] The keystone of the Committee's recommendations was proposed legislation providing for mandatory land use planning on a local, regional, and state-wide basis.[54] A comprehensive planning program of this scale is vital to the success of a greenbelt program.

CONCLUSION

Florida's current population crisis leaves precious little time to construct peripheral urban land use to preserve agricultural, recreational, and scenic lands. The opportunity is available, but if action is not taken quickly, it will be lost. Both Florida's present method of protecting farming interests on the urban fringe and the tax deferral method are inadequate to protect long-term public interests in this area. Preservation of greenbelts on a relatively permanent basis can best be achieved by requiring the individual landowner to make

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50. "I think in more ways than one, the tax assessor rather than the planner is today, inadvertently perhaps, planning the use and development of land. Until we get tax and assessment policies and planning policies coordinated, or at least running in parallel instead of opposite directions, we will accomplish little in the planning field." Max S. Wehrly, *quoted in* CONG. RESEARCH SERVICE, 92d CONG., 1st SESS., PROPERTY TAXATION: EFFECTS ON LAND USE AND LOCAL GOVERNMENTAL REVENUES 22 (Comm. Print 1971).

51. Preserving Florida's natural beauty is a state policy of constitutional dimension. Fla. Const. art. II, §7. *See also* Seadode Indus., Inc. v. Florida Power & Light Co., 245 So. 2d 209 (1971).

52. The report was prepared by a select committee representing affected private and public interests. It was the result of both extensive study and public hearings.

53. ELMS, *supra* note 49, at 21.

54. *Id.* at 18-60. The ELMS recommendations did not go so far as to require approval of county and regional planning programs by a state agency; instead they suggested that neighboring counties share information about planning proposals. With the benefit of nine years' experience, however, the California Joint Committee on Open Space Land recommended that state, regional, and local planning agencies be created, with the state agency empowered to veto regional and local proposals. The Committee believed it was necessary to have some state control over local planning programs in order to achieve maximum preservation of open space land in a coordinated fashion. CALIFORNIA LEGISLATURE JOINT COMM. ON OPEN SPACE LAND, Final Report (app. to S.J., Reg. Sess. 1970).

a commitment to the public as a condition to receiving the benefits of a preferential assessment system. The necessary prerequisite is a comprehensive planning system on both the state and local levels that would allow the state to use its ad valorem taxation policies to achieve desirable land use patterns, both now and in the future. The cornerstone exists in Florida Statutes, section 198.501 and the ELMS planning proposals. The time to build upon them is now.

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