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AN ANALYSIS OF DIFFERENTIAL TAXATION AS A METHOD OF MAINTAINING AGRICULTURAL AND OPEN SPACE LAND USES

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INTRODUCTION

Each year in this country thousands of acres of land turn from the greens and browns in which nature has clothed them to the neon brightness and gray-concrete dullness that frequently signifies the outward march of the city. The public outcry to slow or stop the conversion of open space land to urban/suburban uses is predictable in light of the rather staggering statistics that environmentalists and others assemble.[1] The responses of policymakers to this situation have been diverse. A program that has attracted significant attention as a means to curb the disappearance of undeveloped land is one that treats farm or open space land specially for property tax purposes. Such programs generally result in a lower tax bill for the owner of such land. This is an intriguing phenomenon because a significant number of studies — by far the majority of those done — have concluded that such programs will not have a significant impact on the pace at which undeveloped land disappears.

These tax relief measures have been given various labels. In this analysis they will be generally referred to as differential taxation programs.[2] Their common characteristic is that qualifying land is assessed at its value in its qualifying use[3] with the tax rates being applied to that valuation. More than forty states have such differential tax programs providing special property tax treatment for land in agricultural, recreational and other open space uses.[4] Current programs are aimed at and primarily benefit agricultural uses;

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1. For instance, an official of the United States Department of Agriculture's Soil Conservation Service reported recently that at least 2,000,000 acres of farmable land is lost each year to development. Ulman, *Role for Government in Saving Farmland Gets Boost From New Massachusetts Law,* Wall St. J., Dec. 2, 1977, at 8, col. 3.

2. This term is broad enough to encompass the several distinct approaches usually considered together as tax relief programs for farmers and owners of open space land. Two frequently used names for these programs, "preferential assessment" and "deferred taxation," are given specific meanings here, referring to particular types of programs within the broader category of differential taxation programs. See notes 31-42 *infra.*

3. See notes 7-10 *infra* and accompanying text.

4. Relatively current citations to these programs are provided in REGIONAL SCIENCE

only about one-third of the existing schemes include recreational or other open space uses within those eligible for tax relief.

Differential taxation has been promoted in part by the role it can play in preserving recreational or environmentally important open space. Most states, however, have not utilized the concept for that purpose; therefore, the data from which to draw any conclusions about the viability of such programs in more densely populated areas is insufficient. The lack of undeveloped land in urban areas and the historical reliance on government to provide parks and other recreational facilities may make the implementation of a differential tax program for this purpose in settled areas somewhat problematical.

An initial remark about the scope of this article must be made. Differential taxation programs have objectives in addition to the preservation of open space and farm land. It is often alleged that farmers pay too much property tax because (1) farmers pay much more tax relative to the services they receive than do non-farmers in the same tax jurisdiction, and (2) vis-a-vis non-farmers their income is low in relationship to the amount of land they own and on which they are taxed.[5] As a matter of equity, then, farmers ought to be given some relief from their property tax burden. An easy way to accomplish this is through a differential tax program. This article does not focus on the desirability of using differential taxation as a means of bolstering the farmer's income.[6] Rather, the inquiry here is whether differential tax schemes can play a positive role in the preservation of open space. Certainly, however, if differential tax programs cannot be justified as helping to maintain desirable land uses, critical analysis of other functions of these programs will be essential.

Procedures and Problems in Determining Use-Value

Although all differential taxation programs share the characteristic that land in the program is assessed for property tax purposes differently from other land in the tax unit, there is no unanimity as to how the assessment should be made. The objective is to eliminate the speculative or development value that increases the value of farm or open space land well beyond what it is or will be worth for those uses. A crude way to accomplish this would be to assess qualified land at a percentage lower than is applied to all other

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Research Institute, Untaxing Open Space 20-21 (Council on Environmental Quality) [hereinafter cited as Untaxing Open Space]; and Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and a Proposal*, 25 Kan. L. Rev. 215, n.4 (1977).

5. R. Gloudemans, Use-Value Farmland Assessments: Theory, Practice, and Impact 10-11 (International Association of Assessing Officers 1974); Hady & Sibold, *State Programs for the Differential Assessment of Farm and Open Space Land*, 256 Agriculture Econ. Rep. 6, (United States Department of Agriculture 1974); *cf.* Henke, *Preferential Property Tax Treatment for Farmland*, 53 Or. L. Rev. 117, 126-27 (1974).

6. Generally, analysts have concluded that differential taxation programs provide needed income relief for farmers. R. Gloudemans, *supra* note 5, at 53; Untaxing Open Space, *supra* note 4, at 44-45. Whether the program is a fair way to relieve the farmer's income squeeze is a complicated question and will not be considered in detail here. *See generally, id.* at 80-99.

land subject to the property tax.[7] Most states have chosen more complicated methods of assessing land to be differentially taxed in order to more closely approximate the value of such land for the qualifying use. These complex methods should result in an assessment low enough to have the intended effect, but not so low that these landowners are too favorably treated vis-a-vis all other property taxpayers.

The problems with determining a use-value for agricultural and open space land stem from the scarcity of comparable sales of such property for those limited purposes. This lack of data makes difficult the accurate calculation of the fair market value of the land for such uses. Once the owner of farm or open space land decides to sell, his natural objective is to obtain the highest price possible for the property. Even if the eventual purchaser intends to continue the prior use, he will have to bid against all those who are interested in the property. These other bidders would include developers and other investors whose offering prices take into account the development value of the property. Thus, sales of proximate parcels sufficiently similar to be "comparable" will partially reflect the speculative value of the land. Indeed, the theory of differential taxation legislation assumes that most sales of farm and open space land will reflect the development value. If not, the program would seem to be unnecessary.

In the absence of comparable sales to use as a basis for the use-value assessment, techniques that have been utilized include the capitalization of income method and a soil productivity rating system.[8] The capitalization of income method yields a use-value assessment when the annual income from the use of the land is divided by a capitalization rate that represents a reasonable return on the landowner's investment. Soil productivity rating systems are based on the quality of the land for agricultural purposes. This may be preferable to the capitalization approach in that it might encourage the highest and best agricultural use of the qualifying land rather than accepting for assessment purposes the minimal farming activity in which speculators might choose to engage in order to secure the reduced tax rate.[9]

Very little attention has been given to the land use consequences of these different methods of determining use-value and the effects of shifting from one method of valuation to another have not been studied. Also unsettled is the utility of the assessment techniques used for agricultural land in assessing open space land. Certainly the soil rating approach to valuation has

7. Assessment of property for property tax purposes at less than 100 percent of actual value has been authorized by various means including a state constitutional requirement, TENN. CONST. art. 2, §28(a)-(d) (1977 Supp.) (farm and residential property assessed at 25 percent of value; industrial and commercial property assessed at 40 percent of value; public utility property assessed at 55 percent of value), and a state statute, KAN. STAT. §79-1439 (1969) (assessed value to equal 30 percent of actual value). Even without constitutional or statutory authority, some assessors in practice use an assessment ratio of less than 100 percent, thereby affording farmland preferential treatment. *See* O. OLDMAN & F. SCHOETTLE, STATE AND LOCAL TAXES AND FINANCES 243-89 (1974). See note 57 *infra*.

8. *See* R. GLOUDEMANS, *supra* note 5, at 15-17; Currier, *Exploring the Role of Taxation in the Land Use Planning Process*, 51 IND. L.J. 27, 76-77 (1975).

9. *See* R. GLOUDEMANS, *supra* note 5, at 18.

no application to open space land valuation. Capitalization of income would be hard to apply where property is not generating income. Appraisal experts are turning their attention to these and other problems in the operation of differential taxation programs.[10] Perhaps more refined techniques for assessing agricultural and open space land will emerge in the near future as a result of their efforts.

Other potential problems for differential taxation programs, are questions about the legality of affording this sort of tax relief.[11] Does differential taxation run afoul of a state constitutional command that that property be assessed at its full or true value? Does differential taxation violate a requirement that all property be taxed uniformly? Similarly, does differential taxation violate the equal protection clause of the United States Constitution or a state constitution by singling out certain land uses for special property tax treatment? These are difficult questions. Nonetheless, these questions have not deterred most of the states from adopting some type of differential taxation program. Where the legal barriers to the program were substantial, state constitutional amendments have been passed to clarify the legality of the program.[12] Since the legal questions have not impeded the growth of the differential taxation concept, they will not be considered in detail here.

THE RANGE OF DIFFERENTIAL TAX PROGRAMS

Considerable variety exists among differential tax programs that have been created by state legislatures. It is useful and interesting to compare and contrast the approaches taken. In this section, attention will be given to the type of use that qualifies for special tax treatment, the inducement offered or penalty imposed to keep land in the program and its open space use, and the way in which programs are administered — specifically the division of responsibilities between state and local governments for promoting and operating the program.

The Coverage of Differential Taxation Programs

All differential taxation programs include land used for agricultural purposes among those land uses eligible for special tax treatment. Twelve states also provide some coverage of undeveloped land of scenic, environmental or

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10. *See, e.g.*, Schott & White, *Multiple Regression Analysis of Farmland Values by Land Classes*, 45 APPRAISAL J. 427 (1977); Wise, *Modifying the Income Approach to Farm Appraisal*, 45 APPRAISAL J. 505 (1977).

11. *See generally*, Currier, *supra* note 8, at 41-44; Hagman, *Open Space Planning and Property Taxation — Some Suggestions*, 1964 WIS. L. REV. 628, 640-45; Lapping, Bevins & Herbers, *Differential Assessment and Other Techniques to Preserve Missouri's Farmlands*, 42 MO. L. REV. 369, 278-81 (1977); Nelson, *supra* note 4, at 230-35.

12. Maryland was the first state to adopt a differential tax program in 1956. That law was declared unconstitutional in State Tax Commissioner v. Wakefield, 222 Md. 543, 161 A.2d 676 (1960). The next year constitutional amendments were passed that would have validated the program and it was reenacted. *See* MD. DECLARATION OF RIGHTS, arts. 15, 43; MD. CODE ANN. §19(b) (Supp. 1974).

historical significance.[13] A smaller number of states, eight according to the latest compilation, allow tax relief for land in certain recreational uses.[14]

Usually, qualifying agricultural uses are broadly defined in the legislation creating a differential tax program.[15] Allowable uses range from relatively obscure activities such as beekeeping[16] and the raising of flowers[17] to more common pursuits such as growing crops, fruits and vegetables and raising livestock.[18] Often, however, additional eligibility requirements are imposed on the landowner or the land to promote the particular public policies to which the law is directed.

One such public policy is that the tax advantage the program creates inure only to the benefit of farmers, not to speculators.[19] To achieve this result, several approaches have been devised.[20] In Missouri, for example, in order to qualify land for preferential assessment, it must be shown that gross sales of agricultural products from that land have averaged at least $2500 annually over a five year period.[21] An alternative to this single gross sales measurement employs a standard of income per acre in order to eliminate coverage of owners of large tracts who derive only a nominal income from their farming operations.[22] Other variations on this theme include the requirement that a certain percentage of family income be derived from farming operations[23] or that the property be in the owner's family or used for an eligible purpose for a certain number of years.[24] Several states use a combination of these eligibility requirements or employ them as alternative ways of qualifying for property tax relief.[25]

Each of these limiting eligibility requirements potentially excludes the very individuals or land uses that differential tax schemes are designed to

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13. UNTAXING OPEN SPACE, *supra* note 4, at 13.

14. *Id.*

15. For example, in Florida preferential taxation is available only to land used primarily for bona fide agricultural purposes. The phrase is defined to mean "good faith commercial agricultural use of the land." FLA. STAT. §193.461(3)(b) (1977).

16. OR. REV. STAT. §215.203(2) (1977).

17. *See* R. GLOUDEMANS, *supra* note 5, at 18.

18. VA. CODE §58-769.5(a), (b) (Supp. 1977).

19. The availability of the tax benefit to speculators or owners of land not under development pressure has always been a problem with differential tax programs. *See*, Alden & Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination?*, 42 So. CAL. L. REV. 59, 68 (1969); Hagman, *supra* note 11, at 646-52.

20. Hady & Sibold, *supra* note 5, at 4-5.

21. MO. REV. STAT. §137.017(4) (Supp. 1975). For a general discussion of Missouri's approach, see Lapping, Bevins & Herbers, *supra* note 11, at 372-76.

22. *E.g.*, N.J. STAT. ANN. §54:4-23.5 (West Supp. 1978); UTAH CODE ANN. §59-5-89 (Supp. 1977).

23. *E.g.*, ALASKA STAT. §29.53.035(c) (Supp. 1976) (amending ALASKA STAT. §29.53.035(c) (1962) (25 percent); TEX. CONST. art. 8, §1-d(a).

24. *E.g.*, ILL. REV. STAT. ch. 120, §501a-1 (Supp. 1978) (three years); OR. REV. STAT. §308.370(2) (1977) (two years).

25. In Utah, for instance, receipts from farming must equal at least $250 per acre or the owner must derive at least 80 percent of his gross income from the land sought to be enrolled in the differential tax program. UTAH CODE ANN. §59-5-89 (Supp. 1977) (amending UTAH CODE ANN. §59-5-89 (1975)).

protect. However, if it is important to the viability or equity of the tax scheme to exclude speculators, the relevant question is how many bona fide farmers are excluded by the added eligibility criteria and how many speculators are able to qualify for the program despite these criteria.[26] Whatever standards are decided upon, the objective is to minimize both the legitimate claimants who are excluded and the illegitimate claimants who are included.

Although differential taxation programs have been most frequently analyzed in their relation to farmland preservation, a number of these programs provide tax benefits for land in other open space or recreational uses. Two factors are often utilized to determine whether such land can qualify for special tax treatment as "open space land." The first of these is designation of the land as open space land by a comprehensive land use plan or zoning scheme.[27] The second method commonly used to qualify land for preferred tax status involves a formal petition by the landowner requesting a determination by appropriate authorities that the preservation of the land in its present open space use would enhance natural or scenic resources, protect water resources, conserve soils or marshes, enhance the public value of abutting open space, enhance recreation opportunities, preserve historic sights, or retain in its natural character urban tracts of five or more acres open to some form of public use.[28]

A small number of states have authorized tax relief for land in certain recreational uses.[29] This type of provision usually supplements the coverage of open space uses and will apply to land dedicated to boating, camping, swimming, horseback riding, or golfing uses. The primary beneficiary of these programs appears to have been the country club.[30]

Methods of Providing Property Tax Relief

Once the decision is made regarding those land uses to be included in a differential tax scheme, policymakers must select an appropriate mechanism to provide relief. There are two significant objectives. First, the program should be structured to enroll as much of the targeted land as possible. Second, the program should preserve the land in its desired use, rather than just delay its development or facilitate the holding of land for development by giving a low tax bill to the owner who will sell or develop the property at the earliest opportunity. Arguably, these two goals are conflicting. To enroll the maximum amount of land, the program should have the fewest

26. *See* Nelson, *supra* note 4, at 222. These errors probably occur because speculators receive the tax break rather than because bona fide farmers are being denied it. Certainly this would be true of schemes that automatically cover all eligible land. *E.g.*, IND. CODE §6-1.1-4-13 (Supp. 1975). Attempts to more precisely refine the eligibility criteria are likely to be challenged on legal grounds. See notes 11-12 *supra* and accompanying text.

27. *E.g.*, CONN. GEN. STAT. §12-107(2) (1975).

28. WASH. REV. CODE §84.34.020(1) (Supp. 1977).

29. *E.g.*, ARIZ. REV. STAT. §42-136 (Supp. 1974); FLA. STAT. §193.501 (1977).

30. Maryland authorizes special tax treatment for country clubs. MD. TAX & REV. CODE ANN. §19(3) (1975). A report on the operation of Oregon's Program indicates that 80 percent of the property that was preferentially assessed as open space land was devoted to golf course use. UNTAXING OPEN SPACE, *supra* note 4, at 207.

possible disincentives to participation. Requiring the land to remain in the qualifying use for a stated period of time or imposing a penalty when the owner desires to withdraw his land from the program could discourage many landowners from participating. Yet such measures are the surest way to keep land in the desired use.

Three distinct approaches to differential taxation have evolved: preferential assessment, deferred taxation and the restrictive agreement. They reflect different judgments regarding the proper mixture of incentives to enroll land and disincentives to withdraw land from a differential tax program. Each approach depends upon the assessment of the land in its qualifying use rather than upon the determination of the land's value for property tax purposes according to its fair market value.

Pure preferential assessment programs[31] provide tax benefits to owners of eligible land by computing the tax on the basis of the land's use value. Taxation on such a basis continues as long as the land remains in the qualifying use. The owner is not penalized if at any time the eligible land is converted into a non-qualifying land use. The preferential assessment may be granted to all qualifying land in a tax unit[32] or given only to land that is zoned or planned for eligible uses.[33] Other variations exist among pure preferential assessment programs. For example, in some programs the landowner must apply for preferential assessment and his reduced tax bill; in other states the tax benefit is granted to all qualifying land whether or not an application for such preferential assessment has been made.[34]

Generally a pure preferential assessment program is the most advantageous to the landowner. The tax benefit is received without any promise on his part to maintain the land in current use. From the standpoint of the community, there are both advantages and disadvantages to this particular approach. Reduced property taxes may increase the likelihood that land will be retained in the desired open space or agricultural use.[35] The disadvantage is that the revenue lost on conferring the tax advantage must be recaptured somewhere else and owners of non-qualifying land in the tax jurisdiction probably will have to bear this expense.[36]

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31. The following states' programs can be classified as representing the pure preferential assessment variety: Arizona, Arkansas, Colorado, Delaware, Florida (agricultural uses), Idaho, Indiana, Iowa, Missouri, New Mexico, North Dakota, Oklahoma, South Dakota, and Wyoming. For statutory citations *see* UNTAXING OPEN SPACE, *supra* note 4, at 20-21.

32. *E.g.*, DEL. CODE tit. 9, §8330 (1974).

33. WYO. STAT. §39-1-106 (1977). In Florida a landowner may lose the preferential assessment if he requests and obtains a rezoning of his property to a nonagricultural use or if he records a subdivision plat with respect to the property. FLA. STAT. §193.461(4)(a) (1977). Furthermore, land may be classified nonagricultural by county commissioners if continued agricultural use of the property will inhibit orderly expansion of nearby urban area. FLA. STAT. §193.461(4)(b) (1977).

34. *Compare* MO. REV. STAT. §137.019.1(2) (Supp. 1978) (annual application for preferential assessment required) *with* IND. CODE ANN. §6-1-26-3 (Burns 1978) (all land in agricultural use shall be preferentially assessed).

35. Non-participating land, however, may be developed earlier or more intensively. Currier, *supra* note 8, at 82.

36. See notes 90-91 *infra* and accompanying text.

Deferred taxation programs also provide for the determination of a qualifying landowner's property tax bill on the basis of its value in the qualifying use.[37] These programs differ from pure preferential assessment schemes because upon a change to a non-qualifying use some recapture is made of the taxes the landowner has saved through the program. This additional feature is arguably justified on two counts. Recapture forces the landowner, upon sale or development of his property, to return to the community a portion of the benefits previously received due to preferred tax status.[38] This may be particularly equitable because the earlier benefits were probably subsidized by higher taxes on non-qualifying property.[39] Further, and probably erroneously, it is believed by some that the charge will deter those who have been receiving tax benefits from converting land to a non-qualifying use.[40]

How the payment is determined when land is transferred from an eligible to an ineligible use varies from state to state. These programs can be an administrative burden. In some programs the property must be assessed each year at both its fair market value and use value.[41] The amount of tax benefit received can then be computed using those figures and the tax rate for each year, with recapture constituting a portion of the tax benefit received. The number of years' benefit that will be recaptured ranges from two[42] to twenty[43]

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37. These schemes are the most popular. Some 25 states have adopted deferred tax programs: Alaska, Connecticut, Hawaii, Illinois, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Virginia and Washington. Citations to specific statutory sections can be found in UNTAXING OPEN SPACE, *supra* note 4, at 20-21.

38. R. GLOUDEMANS, *supra* note 5, at 42; Hagman, *supra* note 11, at 639; Nelson, *supra* note 4, at 223-24.

39. See notes 90-91 *infra* and accompanying text.

40. UNTAXING OPEN SPACE, *supra* note 4, at 68-76. This report concludes that while there may be a slight additional deterrent to development from the imposition of a recapture and/or penalty provision, the effects on land use of a deferred tax program are not likely to differ substantially from those of a pure preferential assessment program. This has become the general view. *See, e.g.*, R. GLOUDEMANS, *supra* note 5, at 41-42. Yet, there is an undeniable appeal to the suggestion that putting this added cost on the development of farmland will inhibit such development. If it does not, intuition may suggest that the charge is insufficiently low. *Cf.* Nelson, *supra* note 4, at 223-24. Despite analysis to the contrary, there remains a strong adherence to the belief that deferred tax programs will inhibit development. See note 87 *infra* and accompanying text. This adherence, together with the perception that this approach is fairer than pure preferential assessment, explains why deferred taxation is the most frequently utilized differential taxation scheme.

41. *E.g.*, KY. REV. STAT. §132.450(2)(g) (Supp. 1977). The more land in an area enrolled in a program, the more difficult it is to make a fair market value assessment, especially if there are few sales of comparable land.

42. *E.g.*, N.J. STAT. ANN. §54:4-23.8 (West Supp. 1978).

43. A provision of Hawaii's program provides for 20 year dedications of land to a qualified use. Upon such dedication the land will be assessed at only 50 percent of its use value. Conversion of enrolled land will result in all deferred taxes becoming due plus a ten percent penalty. However, notice of cancellation or enrollment can be given in the nineteenth year and the land when converted after the twentieth year with no recapture of the tax benefit received. HAWAII REV. STAT. §246-12(c) (Supp. 1977). *See* UNTAXING OPEN SPACE, *supra* note 4, at 164-201.

with an average of about five years.[44] In other programs the assessor need not make a yearly calculation of the fair market value of all enrolled land. Rather, at the time of change to a non-eligible use, he determines the fair market value and a charge is levied based upon the current difference between the fair market value and the use value.[45] This recaptures the tax benefit and is administratively less cumbersome. However, the procedure complicates an owner's calculation of his recapture liability should he sell his land and makes less certain the redistribution of the tax burden within a taxing unit.[46] As an additional incentive to keep land in the program, a number of states also charge interest on the deferred taxes that are due.[47]

From the standpoint of the landowner, the third differential tax scheme is the most burdensome. The restrictive agreement approach requires the owner to contract with the relevant governmental unit for a term, generally ten years, to keep his land in its qualifying use.[48] Changing the use of the land is a breach of that agreement and will lead to the imposition of a stiff penalty.[49] Although the governmental unit may be empowered to bring an action to specifically enforce the contract,[50] apparently this power is not utilized. Thus, as with deferred tax programs, the owner may be able to develop his property whenever he believes it makes economic sense, although he will be penalized for doing so.[51] Restrictive agreements are arguably more desirable from the community's standpoint because the community itself is a necessary party to the contract and can control to some extent the location and quantity of land benefitting from a reduced tax burden.[52] However, the cost of this control may be too high. Stiffer penalties than provided by deferred tax schemes may deter some owners from enrolling in the program. Nonetheless, the restrictive agreement method, like preferential assessment and deferred tax programs, strikes a balance between the competing policies of enrolling the land area that the community would like to see retained in agricultural or open space use and preventing certain owners from taking

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44. *Id.* at 13.

45. *E.g.*, OR. REV. STAT. §308.397 (1977).

46. UNTAXING OPEN SPACE, *supra* note 4, at 102.

47. *Id.* at 13; R. GLOUDEMANS, *supra* note 5, at 20-21. *See, e.g.*, VA. CODE §58-769.10 (Supp. 1978) (six percent interest on the tax deferred).

48. This approach has been the least popular. It is utilized in California, Florida (regarding outdoor recreational and park uses), Michigan, New Hampshire and Vermont. For specific statutory citations, *see* UNTAXING OPEN SPACE, *supra* note 4, at 20-21.

49. In California the penalty is 12.5 percent of market value. UNTAXING OPEN SPACE, *supra* note 4. at 284. In Washington, a breach of the restrictive agreement triggers recapture of the tax benefit plus a 20 percent penalty. WASH. REV. CODE §84-34.080 (Supp. 1977). These programs provide various ways of terminating or ending the agreement. In California, for example, the agreement is automatically extended each year for an additional year. Upon notice of non-renewal, the property is assessed gradually closer and closer to fair market value. Thus, at the end of the tenth year the preferential assessment has disappeared. *See* UNTAXING OPEN SPACE, *supra* note 4, at 279-84.

50. *E.g.*, CAL. GOV'T. CODE §51251 (West Supp. 1978).

51. Nelson, *supra* note 4, at 224-25.

52. Of course, an owner must secure all necessary governmental approval for any development such as obtaining the proper zoning for the intended use.

advantage of the program by deriving both large gains from tax savings and profits from the development of their land.

Administration of Differential Taxation Programs

States impose differing responsibilitiess on state and local governments in the operation and administration of differential taxation programs. These distinctions in part are reflections of the differences inherent in the type of differential tax program adopted. For instance, because of the longer duration and the need for negotiation of restrictive agreements, jurisdictions with such programs often rely on local governments to identify and enroll desirable land in the program.[53] Pure preferential assessment and deferred tax schemes, on the contrary, are mandated at the state level and generally do not require or depend on the participation of local governments.[54] Other significant differences among the programs include the amount of discretion afforded local assessors in determining the method of computing use-value and the assessment procedure employed once the method has been decided upon.[55] Most statutory schemes provide some guidelines for assessors to use in determining use-value. However, variations among areas of a state are still possible. For instance, if soil productivity ratings are to be used to determine the use-value of farmland, a determination must be made as to whether the local assessor or a state-level assessor should be empowered to determine the productivity of a particular parcel of land.[56]

THE EFFECT OF DIFFERENTIAL TAXATION ON OPEN SPACE AND AGRICULTURAL LAND

Assessment of Farm and Open Space Land in the Absence of a Differential Tax Program

A basic assumption of differential tax schemes is that a reduction of tax bills will help maintain land in open space or agricultural uses. The reduced tax results from applying the appropriate tax rate to the use-value assessment of land rather than to the full fair market value assessment that would normally be used in the computation. The tax reduction, then, is a

53. For a California landowner to receive a reduced assessment, his property must be within an agricultural preserve that is designated by a county or city. CAL. GOV'T CODE §51230 (West Supp. 1978). In addition, he must enter into a contract with the city or county to restrict the use of his land for a period of at least ten years. CAL. GOV'T CODE §§51240-51285 (West Supp. 1978).

54. Nevertheless, because some of these programs depend on governmental activity such as the promulgation of zoning ordinances, the local governments may have some involvement.

55. See notes 7-10 *supra* and accompanying text.

56. Compare the practice in Indiana with that in Maryland. Both states have developed soil productivity ratings for agricultural land. In Indiana local assessors utilize ratings as basic guidelines and retain a large amount of discretion on the determination of land productivity. In Maryland soil productivity maps have been formulated at the state level and are used by assessors in conjunction with tax maps to determine how much land falls into each soil classification. UNTAXING OPEN SPACE, *supra* note 4, at 128-30, 133-34.

function of the difference between the use-value and fair market value assessments. Thus, if this difference between the use-value and fair market value assessments is minimal, few tax dollars will be saved by the owner and there will be little incentive to the owner to maintain the desired use.

A way by which the tax break might be minimized is if land in a qualifying use is being assessed at less than its full fair market value. It has been suggested that in many instances assessors informally assess agricultural land close to its use-value rather than at its fair market value.[57] Further, regardless of the method used in assessing a parcel, farmland is commonly listed on the tax rolls at a lower percentage of its value than other real estate.[58] Thus, farmland apparently has been receiving a tax benefit of some magnitude for a number of years.

Due to these variable assessment practices, it is difficult to predict the impact of a differential tax scheme. Conceivably, the assessed valuation of agricultural land would increase.[59] Such a result is unlikely, however, and is inconsistent with the objectives of differential tax programs. Further, since these programs are generally voluntary, owners of qualifying land would not be likely to enroll until they perceived a benefit from the program. However, tax bills of participants in a differential tax program still might rise. A tax rate increase might be necessary to offset the decline in the tax base when use-value assessment is initiated. Where the tax base is primarily agricultural, an individual's property tax bill could be greater than before the commencement of a differential tax program if the reduction in the assessed value does not completely offset the higher tax rate the program necessitated.[60]

Even if farmland is underassessed in practice, differential tax programs might still help relieve the farmer's tax burden and promote the maintenance of land in agricultural use. The less than full fair market value assessment or reporting of farmland at a lower percentage of value than other real estate might not fully reflect the difference in value between fair market and actual use-values of the land. Moving to a differential tax program would, therefore, reduce further the landowner's tax bill.

Arguments for preferential assessment of farmland may also be in anticipation of calls for reforms in the general property tax system aimed at improving the uniformity of assessment between farm and non-farm property or between rural and non-rural areas of a state.[61] Assuming low assessments of farmland, differential taxation programs would avoid property tax increases

57. R. GLOUDEMANS, *supra* note 5, at 28-30.

58. *Id.*

59. Lapping, Bevins & Herbers, *supra* note 11, at 382.

60. In particular circumstances, the tax bills of participants in a differential taxation program might actually increase. The initiation of such a program would result in a decline in the tax base, with a corresponding decrease in tax revenues. The obvious method of restoring revenues to previous levels would be through a tax rate increase. In such an instance, an individual's property tax bill could be greater than its pre-program level if the reduction in assessed value did not completely offset the rise in the tax rate. Such a possibility has been noted by Gloudemans. R. GLOUDEMANS, *supra* note 5, at 37.

61. *See id.* at 28.

that might result from general reforms to the property tax system even though there would not be significant reductions from the tax payments farmers had been making.

There is little in the literature to suggest that the same under-assessment that has been found with respect to agricultural land exists for land in other open space uses. However, some basis for suggesting that a tax advantage accrues to the owner of open space land from the manner in which the property tax is administered is provided by a recent study by George Peterson and others considering the effect of property taxes on the provision of housing in urban areas.[62]

Peterson reported that owners of land in parts of an urban area where land and property values were increasing at an above average rate were taxed at a lower effective tax rate than those in areas where land and property values were falling.[63] This occurred despite the fact that state law mandated uniform taxation within the tax units studied. Although his study did focus on developed land in cities,[64] the phenomenon Peterson observed may be present as well when comparing the effective tax rate on open space land at the urban fringe with other parts of an urban/suburban area. There exists a belief that property values on the urban fringe are rapidly increasing and rising at an above average rate. Indeed, this perception is part of the basis on which support for differential taxation programs has been built. It would appear that this urban fringe land is comparable to developed land in upwardly transitional neighborhoods, that, according to Peterson, are taxed at a lower effective rate than property in declining areas. This suburban area at the fringe of development contains the open space land that differential tax programs seek to maintain in open space use. In practice the current property tax system may provide some tax advantage to owners of such land. This advantage is analagous to the tax advantage received by owners of agricultural land that actually may be underassessed.

If land devoted to farm and open space uses has been receiving some de facto tax benefit, perhaps farmers, environmentalists and others interested in preserving such land uses should remain silent rather than suggesting that differential tax programs be adopted or expanded. Fear of abuse in the property tax system is intensifying and will continue to grow as long as property taxes rise. Advocates of tax relief for farm and open space uses might as well confront those who suggest that this type of tax benefit ought not to be allowed.

Furthermore, for participants in a differential taxation program, as well as those who must pay increased taxes as a result of it, the tax expenditures of the program should be accounted for so that reasoned judgments can be made about its continuation and expansion. Reasoned judgments cannot be made unless the program is formalized and satisfactory records kept.

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62. G. PETERSON, A. SOLOMON, H. MADJID, & W. APGAR, JR., PROPERTY TAXES, HOUSING AND THE CITIES (1973).

63. *Id.* at 21-23.

64. *Id.* at 79-80.

Finally, to the extent that the tax benefit results from the individual assessor's activities, there may be a troubling inequality of treatment within large tax areas or among tax areas within a state. A program should be designed and administered to make the tax break available to all those owning the type of land that such a program seeks to preserve in its existing use. The tax benefits should not be dependent upon the whim and caprice of the local assessor.

The Process by Which Land is Converted to Urban/Suburban Uses

To ascertain whether differential taxation will encourage the maintenance of land in agricultural or open space use, it is necessary to understand how such land is converted to urban uses. Whether farm and other open space land will be developed depends upon the supply of land for conversion and the demand for such land. Differential tax programs assume a high demand for land for conversion.[65] They attempt to slow down or control the amount of land converted by providing tax benefits to landowners, thereby reducing landowner incentive to release their land for development and thus, effectively reducing the supply of land available for conversion.[66]

Whether lower property taxes will affect the supply of land available for development is open to question. An open space or agricultural landowner's decision to develop land or sell it for development is influenced by a number of factors. Perhaps the primary consideration is the price at which the land can be sold or the return that would be received if the property were developed.[67] Personal factors, however, also influence such a decision. In *Untaxing Open Space,* a recent report issued by the Council on Environmental Quality, the significance of these personal factors is explored.[68]

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65. Cooke & Power, *Preferential Assessment of Agricultural Land,* 47 FLA. B.J. 636, 640 (1973).

66. The likelihood of non-enrolled land being developed might well increase, however. Less land for development on the market should mean a higher price for such land and more or earlier sales. Higher land values means higher taxes and this will encourage early development. *See* Currier, *supra* note 8, at 82. Further, if owners closest to developed areas enroll their land and refrain from or delay development, there may be increased pressure to develop land further removed from urbanized areas. This would result in a leapfrog pattern of development. Adamson, *Preferential Land Assessment in Virginia,* 10 U. RICH. L. REV. 111, 119-20 (1975). It is likely, however, that few owners of land close to urban areas will refuse the chance to cash in on the development value of their land. Lapping, Bevins, & Herbers, *supra* note 11, at 383-84. A student of California's Williamson Act demonstrates that participation levels increase as the distance from population centers increases. G. Gustafson, The California Land Conservation Act of 1965: An Economic Analysis of a New Took of Land Use Policy 65-67 (1973) (unpublished doctoral dissertation, U. Cal. at Berkeley).

67. The expectation of a large gain on the sale of agricultural land is a central reason why owners do not participate in differential tax programs, for it may be difficult or expensive to withdraw from the program when the right deal comes along. Carman, *California Landowners' Adoption of a Use-Value Assessment Program.* 53 LAND ECON. 275 (1977); Hansen & Schwartz, *Landowner Behavior at the Rural-Urban Fringe in Response to Preferential Property Taxation,* 51 LAND ECON. 341 (1975).

68. UNTAXING OPEN SPACE, *supra* note 4, at 49-56.

The report emphasizes the fact that retirement and death are among the leading reasons for transfers of farmland or the conversion of farmland to suburban uses.[69] For example, in a study of forty sales of farmland in New Jersey in the late 1960's, 22.4 percent of the reasons recited for the sale of farmland were the retirement of the owner.[70] In a study of land sales in Baltimore County, Maryland, death or retirement accounted for 42 percent of all sales and 85 percent of the sales of land that eventually was developed for residential use.[71] From a planning standpoint, these personal factors help identify the particular owners who may be affected by the tax relief provided by differential taxation programs.

Another determinant of the success of differential tax programs is the dedication of landowners to the maintenance of their land in the desired use. Some owners are committed to maintaining the current use of their property and are unlikely to convert or sell it unless a continuation of the present land use would be economically impracticable. Other landowners are "speculators" who are merely waiting to convert their property until the maximum profit can be extracted. A third group falls between the committed farmer and the speculator. These are persons who would prefer to maintain their land in agricultural or open space, but would willingly sell or convert if the price is right.

This last group will be most influenced by the tax relief offered by differential tax programs. By reducing the carrying costs of the land, the differential tax program may cause the owner to delay conversion or sale or to abandon the idea completely. Consequently, the success of a differential tax program depends on the number of landowners who would like to keep their land in its present use but are not committed to doing so.

Existing research has not focused satisfactorily on the role that personal considerations and commitments to current land use play in the development

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69. When the owner of farmland dies, the imposition of an estate tax can force the sale or development of farmland to generate funds in order to pay the tax. This is particularly likely if the land must be valued in the estate at its highest and best use. Congress was aware of this problem and moved to provide some relief in the Tax Reform Act of 1976. The House Report states: "[w]hen land is actually used for farming purposes . . ., it is inappropriate to value the land on the basis of its potential 'highest and best use' especially since it is desirable to encourage the continued use of property for farming . . . . [W]here the valuation of land reflects speculation to such a degree that the price of the land does not bear a reasonable relationship to its earning capacity . . . it (is) unreasonable to require that this 'speculative value' be included in an estate with respect to land devoted to farming. . . ." H. R. REP. No. 1380, 94th Cong., 2d Sess. 21-22 (1976).

The Internal Revenue Code now provides that under certain conditions (designed to make certain the benefit accrues only to the bona fide farmer and his successor in interest), agricultural land may be valued in the decedent farmer's estate at its value for agricultural purposes rather than its fair market value. I.R.C. §2032A.

70. Nagel & Derr, *A Preliminary Analysis of the Data on Participants in the New Jersey Farm Real Estate Market*, 1966-1970 (N.J. Agricultural Experiment Station, Rut. U., February, 1972), cited in UNTAXING OPEN SPACE, *supra* note 4, at 53 n.1.

71. Peterson, *Tax Policy and Land Conversion at the Urban Fringe* (Urb. Inst., Land Use Center Working Paper 0875-04, December, 1974), cited in UNTAXING OPEN SPACE, *supra* note 4, at 53 n.2.

process. Apparently, many sales or conversions of farm and open space land are related to personal factors far removed from the burden the property tax imposes and will occur with or without a differential tax program.

Moreover, a differential tax program will not encourage speculators to keep their open space or farm land in its current use. The tax benefit that speculators receive if their lands are eligible for special tax treatment may permit them more flexibility in timing the conversion or sale of their land in order to maximize their return. Open space may be preserved temporarily, but this mere delay in the conversion of open space land would not seem to be the type of preservation of land use for which the program was intended and certainly furnishes no reason to establish or continue such a program.

Differential tax programs are also unlikely to affect the decision of those who are committed to maintaining their farm or open space use. The tax reduction these schemes provide should increase the income of owners of enrolled land. However, differential tax programs will not significantly influence the land decisions of owners with a personal commitment to maintain their land in farm or open space uses.

An Analysis of the Impact of Differential Taxation on the Maintenance of Land in Farm or Open Space Use

In the twenty-odd years that differential taxation has existed in this country, it has been intensively studied. Yet because many current programs are of recent origin, their impact on farm and open space land uses is still in doubt. Moreover, studies that have been done focus almost exclusively on the impact of differential taxation on the preservation of agricultural land uses. Thus, whether this approach to land planning can succeed in preserving other types of open space uses remains unsettled.

Arguably, open space land uses are of a character sufficiently different from land in farm use that studies of the latter use would have little relevance in evaluating the effectiveness of differential taxation in preserving open space uses. For example, many owners of open space land may rely much less on the income producing capability of their land than do the owners of agricultural land. Consequently, the profitability of the land in its current use, taking into account the property tax, would not be as significant a factor in the owner's decision whether to keep his land in its open space use.

Reports of the operation of differential tax schemes show a wide variation in the percentage of land in a state that becomes enrolled in a tax relief program. Some states include all land in the qualifying use and obviously have full participation.[72] One of the highest levels of participation is in the state of Oregon,[73] due in part to the automatic preferential assessment afforded all land zoned exclusively for agricultural uses.[74] However, Oregon farmers

72. See note 34 *supra.*

73. It has been estimated that from 75 to 90 percent of the eligible farmland in Oregon is preferentially assessed. UNTAXING OPEN SPACE, *supra* note 4, at 213.

74. *See* OR. REV. STAT. §308.370(1) (1977).

whose land is not zoned exclusively for agricultural use can also apply for special tax treatment.[75] The high level of enrollment by those landowners may be due in part to their perception that the manner in which use-value is determined in Oregon yields some very low assessed values.[76] The greater the tax benefit, the more likely it is that eligible persons will avail themselves of the program.

Oregon's experience can be contrasted with states with similar or even more attractive programs which nonetheless do not attract a significant amount of land. For instance, in Kentucky, less than 1 percent of the total tax base of farmland was enrolled in its program in 1973.[77] It is hard to determine why more land has been enrolled in Oregon than in Kentucky. Both programs are of the deferred tax variety. In fact, the recapture of deferred taxes is greater in Oregon than it is in Kentucky.[78] This suggests that Kentucky's program should be more desirable and more heavily used than Oregon's. However, Oregon's program has been in existence several years longer than Kentucky's and this longer existence has afforded the Oregon landowners time to become better acquainted with the program. Perhaps the sizable assessment reduction that occurs in Oregon when land is enrolled in that program is not matched in Kentucky. If an informal use-value standard is prevalent among Kentucky assessors, there would be less incentive for owners of farmland to enroll in the program. These disparities among the states in the level of participation in differential tax programs call for further study.

Beyond examining the success of differential tax schemes in enrolling land, the characteristics of the land enrolled need to be scrutinized. Is such land the prime farmland or the land in or close to the fringe of development at which the program was directed from a land planning viewpoint? Although not encouraging, studies generally conclude that land removed from the fringe of development is more likely to be enrolled than land more proximate to land already developed.[79] Further, differential tax programs are relatively unsuccessful in halting the conversion of prime land from open space and agricultural uses to suburban housing and commercial uses.[80]

California's Williamson Act has been criticized because of the large percentage of enrolled land that is distant from areas that are ripe for develop-

75. OR. REV. STAT. 308.370(2) (1977). A large percentage of the preferentially assessed land may not be zoned exclusively for agricultural purposes. UNTAXING OPEN SPACE, *supra* note 4, at 217.

76. Henke reports that the income capitalization formula used in Oregon for calculating use-value has resulted in some dramatic decreases in market value of even remote agricultural land, the value of which would presumably be unaffected by development pressures. Henke. *supra* note 5, at 124-25.

77. R. GLOUDEMANS, *supra* note 5, at 46. In 1976, 100 of Kentucky's 120 counties applied the use value assessment procedure to farmland and the tax base was approximately two billion dollars less than if the land had been assessed at fair market value. Kentucky Department of Revenue, Ky. Prop. Tax Newsletter 4 (October 1977).

78. Oregon requires repayment of ten years of tax benefit, OR. REV. STAT. §308.395 (1977); while Kentucky collects only two years back taxes, KY. REV. STAT. §132.454 (1977).

79. *E.g.*, Gustafson & Wallace, *Differential Assessment as Land Use Policy: The California Case*, 41 AIP J. 379, 381 (1975).

80. *See, e.g.*, UNTAXING OPEN SPACE, *supra* note 4, at 139-40, 159-60.

ment.[81] At the beginning of this decade a legislative report noted that only 6.4 percent of the land in the program was within three miles of a city and less than 2 percent was within one mile of a city.[82] Subsequent studies have not questioned the conclusion that the program has failed to enroll land on the fringe of development.[83] In fact, Los Angeles County and San Francisco County have not even taken the necessary legislative steps under the California law to qualify for participation in the program.[84] Other counties in developing areas have among the lowest rates of participation in the state.[85] The data from other states is scanty. However, the results of studies in Virginia, Washington and New Jersey, indicate that California's experience is not unique.[86]

The inability of differential taxation schemes to attract the land most likely to be converted to suburban uses seriously undercuts the usefulness of these programs in their present form as an aid to maintaining open space and agricultural land uses. From a land planning perspective the critical factor is not how much land is enrolled in a differential tax program but whether the program halts or significantly slows the conversion of open land to urban/suburban uses. Unfortunately, few studies have indicated that success has been achieved.

The failure of differential taxation programs to deter the development of open space and farmland, especially in the rural/urban fringe area, is predictable for several reasons. First, many programs have failed to enroll land that the community wishes to maintain in its current use. Tax relief programs obviously will not deter development when owners decline their benefits. Second, speculators and those deeply committed to farming will not be significantly influenced by tax relief in their decisions regarding the use or sale of their property. Further, for those landowners who might be influenced by the tax relief provided in differential tax programs, personal considerations prove to be very important in decisions involving the sale or development of property. Thus, since the pool of owners affected by differential tax schemes is much smaller than might have been thought, the impact of such programs will be less than predicted.

Studies on the effectiveness of differential tax programs in maintaining land in its current farm or open space use are most often in survey form which asks owners of enrolled land the significance of the tax break in the owner's decision to maintain the current use of his property. A frequently cited study of the Washington program surveyed participants in that state's program. Generally, the study concluded that the availability of the use-value

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81. *E.g.*, R. FELLMETH, POLITICS OF LAND 42 (1973).

82. CALIFORNIA LEGISLATIVE JOINT COMMITTEE ON OPEN SPACE LAND, FINAL REPORT 116 (1970).

83. *See generally*, Gustafson & Wallace, *supra* note 79.

84. See UNTAXING OPEN SPACE, *supra* note 4, at 288. Local government action is required as condition precedent for a landowner's participation in the program. The procedure is briefly described in UNTAXING OPEN SPACE, *supra* note 4, at 272-73.

85. *Id.* at 288-89.

86. R. GLOUDEMANS, *supra* note 5, at 47-51.

assessment did not influence land use decisions and that only a few participants in the program would be influenced by the penalties associated with the withdrawal of enrolled land from the program.[87] This result is particularly significant because Washington has among the most severe recapture and penalty provisions of all the programs that have been adopted. Thus, even a stiff deterrent to the withdrawal of land from the program apparently will not halt the conversion of land to urban/suburban uses.

One question that has not yet been directly addressed is how the type of program adopted[88] will affect the preservation of land in open space or agricultural uses. From a land use perspective the trade-offs between the programs are fairly clear. Under a pure preferential assessment approach, a large number of owners will participate. However, since there are no penalties for conversion to a non-qualifying use, the program itself is no deterrent to development. At the other extreme, the restrictive agreement approach is the most binding on the landowner and should be the greatest deterrent to development. Yet, because of the restrictions on conversion to a non-qualifying use, only those with a long-term commitment to farming or another qualifying use will choose to enroll in the program. Deferred tax programs occupy the middle ground. The greater the recapture and other charges on conversion, the lower the enrollment is likely to be. Lesser sanctions on conversion to a non-qualifying use will encourage enrollment but will be less likely to deter owners who are desirous of developing or selling their property.

Another significant matter not yet considered in this article is the effect that a differential tax program will have on non-participating land in the tax jurisdiction. Non-participation could result either from voluntary non-participation or from ineligibility under the requirements of the program. Non-participants may assume larger shares of the tax burden when program benefits are granted. This tax shifting, as noted earlier, may force early development of non-enrolled land or cause unwanted sprawl.[89] Also, tax shifting should be examined as it relates to the equity of differential tax programs. Tax relief for qualifying landowners requires others to pay additional tax to satisfy the revenue needs of the taxing entity.[90] This burden will be borne by other property owners in the same area, not by all taxpayers in the state

87. J. Barron & J. Thompson, Impacts of Open Space Taxation in Washington, Wash. Agricultural Experiment Station Bull. 772 (1973). It may be that the respondents did not fully understand the operation of the penalty and rollback provision of the Washington program. UNTAXING OPEN SPACE, *supra* note 4, at 54. Perhaps a fuller understanding of the program might have caused more of the surveyed owners to indicate that the penalties would discourage them from changing their land use. It might also have caused fewer owners to enroll.

88. See notes 31-52 *supra* and accompanying text.

89. See note 35 *supra* and accompanying text.

90. If services were reduced causing a decrease in revenue needs, other taxpayers would not have to carry a disproportionate share of the tax burden. But this is an unlikely possibility. For empirical reports confirming tax shifting from enrolled land to non-enrolled land, see Hady & Sibold, *supra* note 5, at 13-14; UNTAXING OPEN SPACE, *supra* note 4, at 82-95; Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California 1968-69*, 24 NAT'L TAX J. 449 (1971); Ching & Frick, *Effect of Use Value Assessment on Property Tax Rates*, 52 AM. J. OF AGRICULTURAL ECON. 603 (1970).

or any other group.[91] The analysis of differential taxation and its impact in this article centers on the effectiveness of differential taxation to achieve one of its major goals — the maintenance of land in certain desired uses. If it cannot accomplish this purpose, then the possible inequitable shifting of taxes would be especially difficult to justify.

CONCLUSION

Differential tax programs are responsive to a number of public concerns. This analysis emphasized the function differential taxation can play in preserving agricultural and open space land uses, especially at the urban fringe where the pressure to develop land is intense. Focusing on this objective of differential taxation programs is appropriate, because their general acceptability may depend to a great extent on the belief that this purpose is being served. How much public support would there be for differential taxation if it was promoted as an income maintenance program for farmers? As public support turned to public opposition, how much legislative support would these programs continue to receive?

When these programs were still in their infancy, Professor Hangman commented: "Too much of the present legislation constitutes a blatant tax favoritism, clothed for acceptance and respectability with land use planning motives."[92] He proposed a number of specific measures to make the programs fairer and more likely to achieve their land use goals,[93] and suggested that unless these reforms were forthcoming, "the results will be poor and adverse reaction to the movement will destroy it."[94] At that time fewer than a dozen states had adopted differential tax programs. Now the number exceeds forty.

Experience and study, as reported in this article, have demonstrated the accuracy of Hagman's early criticism. However, his prediction regarding the plight of differential taxation programs has not come to pass, perhaps because the general public believes that differential taxation is working to retard, control and direct the development of land.[95] These programs generally do not require the appropriation of any money, a feature that makes the programs particularly attractive to legislatures which are anxious to show their sensitivity to land use and environmental problems, but are wary of imposing new taxes for such purposes.

Other reasons for the continued popularity of differential tax programs may exist. The curious fact is that despite general agreement among those

91. Only California provides financial support at the state level for its differential taxation programs. These subventions do not fully compensate counties and school districts for lost property tax revenues, but they do reduce the severity of the impact. In the 1974-75 fiscal year, $24 million was appropriated for this purpose. *See* UNTAXING OPEN SPACE, *supra* note 4, at 95-98; Gustafson & Wallace, *supra* note 79, at 381-82.

92. Hagman, *supra* note 11, at 657.

93. These proposals include the tying of the tax benefit to the planning activity, and the implementation of controls on those individuals entitled to the benefit. *Id.* at 646-57.

94. *Id.* at 657.

95. Gustafson & Wallace, *supra* note 79, at 387.

who have studied differential taxation programs regarding the failure of the programs to maintain farm and open space land uses, the programs continue to be advertised as serving that purpose. Therefore, there is a hesitancy to concede that some other way to preserve such land uses should be found.

It may be, of course, that while these programs fail as land use planning tools, they serve other functions well. For instance, differential taxation eases the income squeeze on farmers. In recent years, higher market value for farmland and consequent higher property taxes on farmland have not been accompanied by higher incomes for farmers.[96] An increased property tax burden exacerbates what farmers contend is already an unfair situation – that they pay property taxes disproportionate to the public services they use that are supposedly funded by the property tax.[97] A discussion of the need for income maintenance for farmers and the fairness of the property tax are beyond the scope of this article. However, if income maintenance for farmers purpose of differential taxation programs, then these programs ought to be analyzed in that context.

Differential taxation programs may continue to exist because they can be used in land use planning in conjunction with other programs and laws, even though they cannot do the job alone. For example, it is suggested that differential tax programs could be used with zoning.[98] Zoning can force land into the desired use. This would remove the "voluntariness" aspect of the differential tax approach, an aspect that may frustrate its effectiveness.[99] Of course, zoning can accomplish that end whether or not it is used in conjunction with differential taxation. Arguably, combining differential taxation with zoning lessens the chances that zoning land to very low density uses such as open space and agriculture will be found confiscatory and declared invalid. Tax relief does reduce the holding costs of restrictively zoned land with a high development value. But the zoning question remains whether such land use restrictions can be justified as furthering the health, safety and general welfare of the community. Although the substance of the question could be seriously debated, courts have shown a willingness to accept open space and environmental purposes as legitimate objectives of zoning.[100] Moreover, they

96. *See* R. GLOUDEMANS, *supra* note 5, at 4-10; Henke, *supra* note 5, at 119.

97. UNTAXING OPEN SPACE, *supra* note 4, at 80-82.

98. *E.g.*, Gustafson & Wallace, *supra* note 79, at 386-87.

99. *Id.*

100. *See generally*, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); Kusler, *Open Space Zoning: Valid Regulation or Invalid Taking*, 57 MINN. L. REV. 1 (1972). In Just v. Marinette County, 56 Wisc. 2d 7, 201 N.W.2d 761 (1972), one of the most radical opinions in support of the right to restrict land use for open space, agricultural and environmental purposes, the court said: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. The exercise of the police power in zoning must be reasonable and we think it is not an unreasonable exercise of that power to prevent harm to public rights by limiting the use of private property to its natural uses." 56 Wisc. 2d at 17, 201 N.W.2d at 768. In Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938), Judge Lehman distinguished a valid land use regulation from a taking for which compensation must be paid: "the restriction leaves the owner subject to the burden of payment of tax-

have done so without tying the restriction to a tax reduction for the development value that has been "taken." Thus, zoning by itself may be able to achieve the land use objectives offered to support differential tax programs. One could assert that it is fairer to give landowners a tax reduction if the community asks that their land use be so restricted. Viewed this way, differential taxation is related to the concept of compensatory zoning.[101] Although the idea of combining differential taxation with zoning may have some merit, it is questionable whether differential taxation programs should continue to exist and benefit certain landowners at the expense of others during what will be an extended debate over the proposition.

Another problem with the zoning-differential taxation union is that it depends on zoning classifications remaining stable over time. Zoning has not historically demonstrated a capacity to resist changes called for by owners and developers responding to market demands. Can differential taxation assist zoning and make it more likely that land zoned open space or agricultural will remain so zoned? One of the previously discussed findings regarding the performance of differential tax programs indicated that the programs are unsuccessful in preserving open space or farm land in the face of development pressures. Owners perceiving early development will not enroll in the program, while owners of land already enrolled will withdraw from the program and pay whatever penalty is assessed when the right offer for their property is made. Current zoning practices and proposed differential taxation programs probably will not produce any better results when combined, because they share a similar fundamental weakness: the inability to resist development pressures.

One way to insure the maintenance of agricultural and open space land in those uses would be through governmental acquisition of an interest in such land. This acquisition could be accomplished by acquiring a full fee interest in the property or the development rights for the property.[102] These programs do cost money and they do involve the government in the ownership and development of private property, which may be undesirable.[103] However, if the public wants land preserved in these uses, such an approach may hold more promise than does differential taxation.

Obviously, a persuasive case can be made for abandoning differential taxation programs as they currently exist. They are advertised, at least in part, as a land use tool, yet studies have concluded that they do not succeed as such. Moreover, there is little evidence that differential taxation can be

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ation, while outright confiscation would relieve him of that burden."

101. *See* Hagman, *Zoning by Special Assessment Financed Eminent Doman (ZSAFED)*, 28 U. FLA. L. REV. 655 (1976).

102. The range and variety of these programs is considered in Lapping, Bevins & Herbers, *supra* note 11, at 392-406.

103. For an interesting discussion and analysis of the more direct and intense government involvement in land development and planning in Europe and how this participation relates to the United States, *see* Lefcoe, *When Governments Become Land Developers: Notes on the Public Sector Experience in the Netherlands and California*, 51 SO. CAL. L. REV. 165 (1978); Lefcoe, *The Right to Develop Land: The German and Dutch Experience*, 56 OR. L. REV. 31 (1977).

used with other land use planning devices to preserve more effectively the land uses that are the targets of differential tax schemes. If such programs are to be continued, it should be because they serve other important public policies, such as supporting the income of farmers. Whether these programs can serve such policies needs further study. Whether differential taxation would survive if it were justified only on such bases is doubtful.