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Differential Assessment for Agricultural Land Creates a Tax Haven for Speculators

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DIFFERENTIAL ASSESSMENT FOR AGRICULTURAL LAND CREATES A TAX HAVEN FOR SPECULATORS

INTRODUCTION

The annual loss of three million acres of farmland poses a serious challenge to policy-makers.[1] Expanding urban populations cause the development of surrounding agricultural land into commercial and residential communities.[2] Broad areas of agricultural and open land that surround suburbs are known as the urban fringe.[3] Scattered residential and commercial[4] development within the urban fringe prompts speculation and inflates the price of available land.[5] Farmers realize that the family farm may become the site of a shopping center and consequently ask higher prices when non-farmers seek to buy their land.[6]

1. Banks, *The Politics of Farmland Preservation*, 9 FLA. ENVTL. & URB. ISSUES 10, 10 (1982). The agricultural industry is an integral part of the national economy. The annual loss of farmland implicates urban, rural, economic and environmental interests. *Id.* at 11.

2. *See, e.g.*, Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D.L. REV. 548, 549 (1975). The United States population has been migrating to the suburbs and there has been a significant movement of industrial and commercial enterprises out of the central cities. *Id.*

3. Also known as the "Rurban Fringe" and "Rural-Urban Fringe," farmland surrounding growing cities is especially susceptible to development. *See generally* Conklin & Lesher, *Farm-Value Assessments as a Means of Promoting Efficient Farming in Urban Fringes*, 46 APPRAISAL J. 538 (1978); [hereinafter cited as Conklin]; House, *Partial Tax Exemption for Farmland Properties in the Rural-Urban Fringe*, 36 APPRAISAL J. 393 (1968); Land, *Unraveling the Rurban Fringe: A Proposal for the Implementation of Proposition Three*, 19 HASTINGS L.J. 421 (1968).

The terms "greenbelt" & "urban fringe" have similar connotations. Greenbelt describes large tracts of land in or near urban areas zoned for agricultural use. This is done to prevent the land from being converted for urban purposes. In Florida, "greenbelting" refers to preferential tax assessment given to land used for agricultural purposes. Cooke & Power, *Preferential Assessment of Agricultural Land*, 47 FLA. B.J. 636, 636-37 (1973). See *infra* text accompanying notes 85-87.

4. With high pressures toward urbanization, development becomes the major competitor for agricultural land. Once land develops, it is irretrievably diverted from agricultural use. *See* Stroud, *The Farm and the City*, 9 FLA. ENVTL. & URB. ISSUES 4, 4 (1981). *See also* Ellingson, *supra* note 2, at 550: "The rapidly increasing rate of conversion of farmland to urban uses is a problem which demands immediate attention. There is now a world food shortage, consequently, the potential of American agriculture makes productive farmland a critical natural resource." *Id.* In 1979, the agricultural industry was the greatest contributor to America's exports by sending abroad $40.5 billion in goods. Banks, *supra* note 1, at 10.

5. J. Reynolds & D. Tower, Factors Affecting Rural Land Prices in an Urbanizing Area (University of Florida, Institute of Food and Agricultural Sciences, Food and Resource Economics Department, Staff Paper 152, Apr. 1980) (presented at the Southern Regional Science Association meeting, Apr. 13-15, 1980 in Savannah, Ga.). See *infra* text accompanying notes 148-51.

6. Roulac, *Agricultural Land Investment: Profit Opportunity or New Speculative Bubble?*, 46 APPRAISAL J. 53, 56 (1978). Increasing concern about inflation stimulates investors' desires to acquire tangible assets. Land investment is viewed as a wise move. It is a commodity with a fixed supply facing growing demand. Unfortunately, population increases put continued pressure on the agricultural sector's ability to produce food and push land prices to unwarranted levels. *Id.* at 53.

In the early 1950's most states assessed all land for property tax purposes according to its highest value and best possible use.[7] In the urban fringe this assessment translated into developmental value, a rate substantially higher than agricultural value.[8] The income derived from farming was often insufficient to pay these higher property taxes,[9] and farmers found it more profitable to sell their land to developers.[10] Because such economic compulsion caused large annual conversion of agricultural land into urban development,[11]

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7. Highest value and best use signify the land's market or just value. It is the price at which the property, if offered for sale, would transfer under prevailing market conditions, between parties seeking to maximize their gains. The just value sets the taxable value of the property if there are no exemptions or deductions. Until recently, states and local governments viewed property taxation primarily as a means of generating revenue. Generally, the power to tax was constitutionally mandated at uniform and equal rates, which were set at the land's market value. *See generally* Woodward, *Appraisal: A Limited Form of Feasibility Analysis,* 48 APPRAISER & ANALYST 5, 7 (1982); Regional Sci. Research Inst., UNTAXING OPEN SPACE, AN EVALUATION OF THE EFFECTIVENESS OF DIFFERENTIAL ASSESSMENT OF FARMS AND OPEN SPACE (Prepared for the Council on Environmental Quality, Apr. 1976) available from the Superintendent of Documents, U.S. Gov't Printing Office, Washington, D.C.) [hereinafter cited as UNTAXING OPEN SPACE].

8. UNTAXING OPEN SPACE, *supra* note 7, at 3-5. Agricultural land can be productive in two markets: agricultural commodities and developmental sites. When land is assessed at its agricultural value, factors such as topography, soil quality, market and natural conditions are considered. If the assessment is based on the developmental value, then the land's proximity to urban areas, scenic or recreation conditions, and transportation facilities are determinants. For land located within the urban fringe, there is a large difference between the productive agricultural value of the land and its developmental value. *Id.* at 3-4. See *infra* text accompanying notes 143-48.

9. Currier, *An Analysis of Differential Taxation As a Method of Maintaining Agricultural and Open Space Land Uses,* 30 U. FLA. L. REV. 821, 822 (1978). Since agricultural activities do not make the demands on governmental services that urban uses make, farmers believed they were entitled to a tax break. J. JUERGENSMEYER & J. WADLEY, AGRICULTURAL LAW 125 (1982) [hereinafter cited as J. JUERGENSMEYER]. In comparison with nonfarmers, farmers' income is low in proportion to the amount of land owned and taxed. Currier, *supra,* at 822. Farmers have traditionally paid a greater portion of their income for property taxes than other citizens. Ellingson, *supra* note 2, at 554.

10. Wershow & Juergensmeyer, *Agriculture and Changing Legal Concepts in an Urbanized Society,* 27 U. FLA. L. REV. 78, 85 (1974). For farmers with uncertain taxable income, the burden of a fixed property tax became near confiscatory, forcing them to sell land and migrate to the cities. *Id. See generally* Wershow, *Ad Valorem Assessment in Florida—The Demand For a Viable Solution,* 25 U. FLA. L. REV. 49 (1972); Wershow, *Agricultural Zoning in Florida—It's Implications and Problems,* 13 U. FLA. L. REV. 479 (1960).

11. The net loss of agricultural land to urban uses involves 3 million acres per year. Banks, *supra* note 1, at 10; Comment, *Preferential Assessment of Agricultural Property in South Dakota,* 22 S.D.L. REV. 632, 632 (1977). The decision to sell a farm involves more than just the economic factors relating to property value and taxes. An important consideration in the farmer's decision to sell is whether a family member or neighbor is willing to take over the farm. Additionally, a desire for a new residence or different working conditions impacts on this decision. Although a combination of these factors induces farmers to sell, the sale price does influence almost every decision. As the price offered for farmland increases, there is an increased desire to sell; conversely, there is a decreased desire to sell as the price offered decreases. UNTAXING OPEN SPACE, *supra* note 7, at 50-52. Studying 40 sales of farmland in three New Jersey townships from 1966 to 1970, a report found that retirement, taxes, and price offered dominated the selling farmer's thinking. *Id.* at 53.

policy-makers determined that agricultural lands must be preserved.[12]

Florida and other states enacted differential assessments for property tax to preserve agricultural land.[13] These laws assess farmland based on its agricultural rather than market value.[14] This special tax treatment eliminates assessment of farmland based on developmental value. Differential assessment purportedly encourages farmers to maintain their land in agricultural use by reducing their tax bill. Currently, differential assessment also creates special tax advantages for land developers.[15]

This note examines Florida's differential tax system that encourages development of farmland through the "speculator's haven."[16] The core of the current problem is the legislature's inability to tailor a definition of the land eligible for differential assessment so that tax benefits inure only to farmers

12. *See generally* Florida House of Representatives Comm. on Agric. & Gen. Legislation, *Legislative Staff Rep.*, AGRICULTURAL LANDS IN FLORIDA (Mar. 30, 1981) [hereinafter cited as AGRICULTURAL LANDS IN FLORIDA]. "In the long run, Florida will have to develop the entire gamut of farmland preservation techniques if we are going to help America maintain its food self-sufficiency." *Id.* (statement of Bob Graham, Governor, State of Florida). The propriety of the legislative preservation is not examined in this note. This note will focus on the efficiency of the means chosen to further that end.

13. For a general discussion of the states' differential assessment programs, see UNTAXING OPEN SPACE, *supra* note 7. Differential assessment statutes give agricultural land special treatment regarding assessment for property taxes purposes. J. JUERGENSMEYER, *supra* note 9, at 125. *See* 1959 FLA. LAWS 226. See *infra* text accompanying notes 85-87. Since 1957 when Maryland enacted the first statute authorizing differential assessment, every state, except Georgia and Mississippi, has passed some form of differential assessment for agricultural lands. The history of Maryland's differential assessment statute illustrates some of the early problems encountered. *See* MD. ANN. CODE art. 81, § 19 (1965). Maryland's legislature had to override the Governor's veto for differential assessment to become law. The courts then found the law unconstitutional, so the state constitution was amended in 1960 to permit current use assessments for agricultural lands. The legislature repealed and re-enacted the law, *see id.*, hence, it took six years for differential assessment to become fully implemented. UNTAXING OPEN SPACE, *supra* note 7, at 132.

14. Batie & Looney, *Preserving Agricultural Lands: Issues and Answers*, 1979-80 AGRIC. L.J. 600, 610. Each state has its own method of determining agricultural value. In Florida, agricultural assessment is based on the land's productivity and income generating potential. The property appraiser considers the market, incomes, and economic merchantability, etc. when estimating the value of agricultural lands. FLA. STAT. § 193.461 (1981). The market approach relies heavily upon the comparison of land sales strictly for agricultural use. The income approach determines the land's agricultural productive value and its potential net earnings. The cost replacement figure estimates the contributory value of the improvements to land. The Division of Ad Valorem Tax of Florida's Department of Revenue publishes 46 pages of guidelines to direct the appraiser's determination of agricultural value. Division of Ad Valorem Taxes, Dept. of Revenue, Classified Use Real Property Guidelines Standard Assessment Procedures and Standard Measure of Value, Agricultural Guidelines (Feb. 20, 1982) (available from the Division of Ad Valorem Tax, Tallahassee, Florida).

15. Juergensmeyer, *Introduction: State and Local Land Use Planning and Control in the Agricultural Context*, 25 S.D.L. REV. 463, 465 (1980). "Although tax incentives may be useful and effective in certain situations and areas, their ultimate effectiveness depends upon economic factors that are seldom sufficiently coordinated with or encompassed within a given preferential scheme to guarantee results on a comprehensive and equitable basis." *Id.* at 465. *See also* Batie & Looney, *supra* note 14, at 611; Currier, *supra* note 9, at 821; UNTAXING OPEN SPACE, *supra* note 7, at 46-79.

16. *See, e.g.*, Ellingson, *supra* note 2, at 555.

and not land speculators. This note examines the effect of the speculators' haven on agricultural land. By tracing the historical development of differential assessment, this note explores other states' attempts to ameliorate the problem. Two main forms of differential assessment, the non-rollback and rollback tax, are analyzed to determine how successfully they preserve agricultural land. The note then focuses on Florida's legislative and judicial conflict over the definition of agricultural land in the state's assessment program. Finally, a proposal is presented to improve Florida's differential assessment for agricultural land.

THE SPECULATORS' HAVEN

Agricultural land rarely passes directly from productive farming into urban development.[17] Speculators usually purchase land from the farmer long before development actually occurs.[18] Speculators gamble by purchasing farmland in the urban fringe hoping it will soon make a profitable urban transition.[19] While awaiting development opportunities, speculators nominally maintain their land in agriculture. In some instances speculators lease the land's farming rights back to the farmer, and thereby qualify it for the agricultural assessment.[20] The effects of differential assessment negate its original objective of preserving agricultural lands. Substantial savings inuring from the special tax treatment diminish the speculator's costs of holding agricultural land.[21] Differential tax treatment encourages speculators to purchase agricultural property for future development.[22] Indiscriminate differential assessment there-

17. Conklin, *supra* note 3, at 539. Agricultural output can be reduced without selling to a buyer who will immediately put urban structures on the land. The investment needed to maintain a highly productive farming operation often is interrupted long before the actual transfer to urban use. During this transition stage, productive land may lie idle or be operated inefficiently. A process of premature disinvestment in farm improvements occurs even if the land remains nominally in agriculture. Thus, farmland may be lost even before urban occupancy. *Id.*

18. *Id.* Speculators prefer farmland for future development since the features that make land profitable for farming, topography and drainage, often make it more desirable for developmental purposes. House, *supra* note 3, at 394.

19. *See, e.g.*, Bass v. General Dev. Corp., 374 So. 2d 479 (Fla. 1979); Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978); Fogg v. Broward County, 397 So. 2d 944 (Fla. 1st D.C.A. 1981). See *infra* text accompanying notes 131-40.

20, Straughn v. K & K Land Management, Inc., 347 So. 2d 724, 725 (Fla. 2d D.C.A. 1977), *aff'd sub nom.*, Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978).

21. Cooke & Power, *Why Florida's Greenbelt Law Won't Work*, 2 REAL EST. REV. 84, 86 (1972) [hereinafter cited as Cooke]. Speculators often hold agricultural land on the urban fringe waiting for it to ripen for development. They will engage in sufficient agricultural activity to qualify for preferential treatment. As an apparent farmer, the speculator will operate the land even at a loss to receive the preferential assessment. *Id.*

22. Ellingson, *supra* note 2, at 555. The speculator's haven created by preferential assessment pressures farmers to sell their land to nonagricultural interests. *Id. See also* Goldshore, *Agricultural Preservation in the New Jersey Courts*, 105 N.J.L.J. 475, 489 (1980). Federal tax policies have also been criticized as encouraging development of open lands near urban areas. The federal income tax provides incentive for speculators purchasing open land for future sale or for immediate construction of rent producing buildings. Under federal law, real estate taxes and interest due to indebtedness are not required to be capitalized as part of the property's costs. Rather, they may be deductible from ordinary income. Under I.R.C.

fore increases both the amount of agricultural land held by speculators and the long run probability of its development.[23] Speculators enjoy these tax benefits because legislatures have difficulty defining which property is eligible for preferential tax treatment.[24] Most preferential tax schemes base assessment on agricultural use.[25] Broad definitions of agricultural use have allowed speculators to qualify for preferential treatment, even though farming operations are dormant or inefficient. Judicial attempts to clarify the definitions are helpful but have also led to conflict with legislative purposes.[26]

The local non-agricultural community bears the cost of differential assessment.[27] Property taxes are the primary source of local revenue needed for adequate public services.[28] The differential assessment shifts the property tax burden to the non-agricultural property owners.[29] The size of this shift depends

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§ 189(a) (1982) "no deduction shall be allowed for real property construction period interest and taxes." However, these amounts can be amortized at a rate of ten percent per year after 1981 for nonresidential real property and after 1983 for residential real property. For years prior to these dates the section has a schedule of percentages allowed as amortization. *See id.* § 189(b).

Additionally under *id.* § 195(a) start up expenditures may, at the election of the taxpayer, be treated as deferred expenses. "Such . . . expenses shall be allowed as a deduction ratably over such period not less than 60 months." Start up expenditures mean amounts incurred with "(A) investigating the creation or acquisition of an active trade or business, or (B) creating an active trade or business and . . . which, if paid . . . in connection with . . . expansion . . . of an existing trade or business . . . would be allowable as a deduction . . . ." *Id.*

Under *id.* § 164 property taxes are also deductible. These deductions and others help to finance and promote the development of open space lands. Gurko, *Federal Income Taxes and Urban Sprawl,* 48 DEN. L.J. 329, 387 (1972).

23. For various tax benefits, see *supra* note 22. Increasing experience and concern with inflation stimulates speculative desire to acquire tangible assets such as agricultural land. Further, as the costs of urban property rise to prohibitive levels, speculator's attention turns to agricultural land within the urban fringe. In order to maximize their return on investments, speculators wait until the market conditions are right and then develop the property. For a discussion of tax shelters for investors, see Martin, *Tax Shelter and the Real Estate Analyst,* 43 APPRAISAL J. 17 (1975).

24. The benefits of preferential assessment are conferred broadly. Generally, recipients need not demonstrate a furtherance of the policy of protecting farmland. J. JUERGENSMEYER, *supra* note 9, at 127.

25. See *infra* text accompanying notes 40-41. For differential assessment to be viable and equitable, the tax scheme must exclude speculators. However, as eligibility requirements are expanded, legislatures increasingly exclude potential bona fide farmers or land uses. When defining agricultural use, the object is to minimize both the number of illegitimate claimants included and the number of legitimate claimants excluded. Currier, *supra* note 9, at 826.

26. *See, e.g.,* Bass v. General Dev. Corp., 374 So. 2d 479 (Fla. 1979). In Florida, the broad statutory definition of agricultural use created substantial controversy between the legislature and judiciary. See *infra* text accompanying notes 103-40. South Dakota originally defined agricultural use for pure preferential assessment as "property used exclusively for agricultural purposes." S.D. CODIFIED LAWS § 10-6-31 (1967). This definition created controversy between farmland owners and tax assessors as to what land should be granted agricultural tax treatment. *See, e.g.,* Milne v. McKinnon, 32 S.D. 627, 144 N.W. 117 (1913). A South Dakota circuit court in an unpublished opinion resolved the dispute by providing the tax assessor specific criteria for determining exclusive agricultural use. The court stated that the assessor should primarily consider whether the farm unit is self-sustaining economically when determining if land qualifies as agricultural. The court upheld other criteria to guide the assessor such as

upon the extent of the tax relief provided by differential assessment and the amount of land eligible for the preferred treatment.[30] The residential and commercial community consequently subsidizes the speculator's investment.[31] By lowering property tax bills, the differential assessment encourages land speculation which increases agricultural land prices near the urban fringe.[32] Farmers may then have difficulty acquiring land for the expansion of their farming operation.[33] Conversely, those farmers near the urban fringe that anticipate an opportunity for a high-priced sale to a developer may stop investing in agricultural improvements.[34] If growth does not occur as rapidly as expected, these farmer-speculators may soon have run-down and inefficient farms.[35]

Differential assessment also places non-speculative farmers in a disadvantageous position to speculative ones. Anticipating large profits from de-

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the size of the tract, primary occupation of the property owner, and primary source of income of the farm operator. *See* Comment, *supra* note 11, at 646.

27. *See infra* notes 158-60 and accompanying text.

28. House, *supra* note 3, at 393. "Although the ability to raise revenue is essential to local governments, in general the taxing power is considered an attribute of sovereignty which inheres in the state legislature and not in local governments." Currier, *Exploring the Role of Taxation in the Land Use Planning Process,* 51 IND. L.J. 27, 39 (1975). *E.g.,* FLA. CONST. art. VII, § 9. The power to impose property taxes has typically been given constitutionally to local governments and constitutes their main source of revenue. Currier, *supra,* at 39.

29. Currier, *supra* note 9, at 832. Any tax plan that favors a particular land use indirectly taxes all other land use more heavily. *Id.* Most states set the property tax or millage rates in a taxing jurisdiction in the following manner: the tax base is the total assessed value of taxable property in the jurisdiction (AV). The taxing authority determines the needed tax revenues (T) and then sets the tax rate (R_1), which will provide the necessary revenues. Algebraically, this is stated as $R_1 = T/AV$. Assuming there are no cutbacks on government services, a reduction in the assessed value of one type of property by differential assessment reduces the total tax base by the same amount. Required tax revenues (T) remains the same, but differential assessment reduces the jurisdiction's assesed value of taxable property (p). Thus, the tax rate after differential assessment (R_2) will be larger. $R_2 = T/(AV-p)$. Since T continues at the same level, $R_2(AV-p) = R_1(AV)$ and $R_2 = R_1(AV)/(AV-p)$.

Since tax rates are computed in this manner, differential assessment shifts the incidence of tax away from agricultural property owners to all other property owners. Hence, the tax bills of residential and commercial property owners increase as farmland owners tax bills are reduced. UNTAXING OPEN SPACE, *supra* note 7, at 82-86.

30. Myers, *The Legal Aspects of Agricultural Districting,* 55 IND. L.J. 1, 9-10 (1979-1980).

31. Cooke & Power, *supra* note 3, at 638.

32. Dean, *The California Land Conservation Act of 1965 and the Fight to Save California's Prime Agricultural Lands,* 30 HASTINGS L.J. 1859, 1863 (1980). The value of real property constantly changes. For example, a parcel of agricultural land located five miles from an urban center may initially be valued only at its agricultural value. Later, a highway is constructed nearby and a motel is erected adjacent to the parcel. Although the land remains in agricultural use, its value increases tremendously. *Id.*

33. *See* Cooke, *supra* note 21, at 87. Sale of land with a differential assessment usually commands a higher purchase price. The additional amount is usually offset by differential assessment's long run tax benefits. This program discriminates against small farmers who do not have access to capital markets. *Id.*

34. Conklin, *supra* note 3, at 540.

35. *Id.*

velopment, speculators view farming activities only as a means to defray costs of holding the land.[36] Because speculators are not bound by the same economic restraints as rural farmers, they can afford to sell farm produce below competitive prices to the detriment of rural farmers.[37] Differential assessment laws were enacted as an economic incentive for farmers to maintain their lands in agricultural use. In effect, the assessment does not aid farmers per se, but rather aids any agricultural landowner near urban areas where the difference between agricultural value and market value can be substantial.[38]

THE DEVELOPMENT OF DIFFERENTIAL ASSESSMENT

Differential assessments for agricultural lands were introduced in 1957 and have been enacted in virtually every state.[39] In response to problems caused by the speculators' haven, states developed two main types of differential assessments: non-rollback or pure preferential and rollback. These assessment schemes will be examined to determine the extent to which each assessment method enhances the speculators' position.

Pure Preferential Assessment

Pure preferential assessment grants property tax relief to farmland owners by appraising land solely on the basis of agricultural value.[40] This assessment is valuable as long as the land remains in agricultural use.[41] Pure preferential may be the most advantageous assessment for agricultural landowners because they receive tax benefits without giving any promise to maintain the land's agricultural use[42] and no penalty is imposed when the land use changes.[43]

Pure preferential assessment programs are criticized because land may convert from agricultural use without any tax penalty.[44] Speculators receive the

36. See *infra* text accompanying notes 134-42.

37. Cooke, *supra* note 21, at 86-87 (government regulation has affected agricultural prices since the Great Depression; the farming industry, however, does operate under the constraints of competitive market forces). Conklin, *supra* note 3, at 541.

38. Cooke, *supra* note 21, at 86. Ellingson, *supra* note 2, at 555. See *infra* text accompanying notes 131-36.

39. *See supra* note 13.

40. *See, e.g.*, IND. CODE ANN. § 6-1.1-4-13 (Burns 1976). Indiana's agricultural preferential assessment is based on current use value. In comparison, residential, commercial, and industrial land assessments are based on fair market value. This is reflected by comparable sales which in turn are a function of potential and current use values. See UNTAXING OPEN SPACE, *supra* note 7, at 127-31.

41. *E.g.*, ARIZ. REV. STAT. ANN. §§ 42-123 & -136 (1974 Supp.); ARK. STAT. ANN. §§ 84-479 to -486 (1973 Supp.); DEL. CODE ANN. tit. 9, § 8330 (1974); N.M. CONST. art. VIII, § 1; N.M. STAT. ANN. § 72-2-14.1 (1973 Supp.) & § 72-29-9 (1975 Spec. Supp.).

42. Currier, *supra* note 9, at 827.

43. Under this tax scheme the farmland owner may use the tax incentive and later accept a lucrative sale offer. *See* Note, *Preservation of Florida's Agricultural Resources Through Land Use Planning*, 27 U. FLA. L. REV. 130, 138-39 (1974).

44. Currier, *supra* note 9, at 827; Ellingson, *supra* note 2, at 55; UNTAXING OPEN SPACE, *supra* note 7, at 31-38. Most studies of taxation in land use planning report that differential assessments alone have little effect on the rate of agricultural development. *See* Currier, *supra*, at 821; Juergensmeyer, *supra* note 15, at 465.

tax benefits of the special assessment while holding land until it is developed. Further, the local non-farming community supports and subsidizes the special assessment because it pays higher property taxes.[45] When the agricultural land is developed, the local non-farming community is not compensated for its costs.[46]

The Rollback Tax Assessment: Deferred and Restrictive Differential

The unfair tax burden on local non-farming communities of a pure preferential tax system and its failure to penalize landowners for land use changes prompted most states to enact rollback tax assessment programs.[47] These provisions require payment of back taxes when land converts from agricultural use,[48] thus forcing landowners to repay a portion of the tax savings derived from agricultural assessment.[49] Deferred and restrictive differential are the two types of rollback programs enacted. Deferred differential assessment is similar to the pure preferential assessment but includes a rollback provision. The yearly property tax is based on the land's agricultural use. The tax is the difference between taxes paid on the agricultural valuation and taxes that would have been paid had the land been assessed at market value.[50] The severity of tax varies among states, recapturing from two to ten years of the rollback tax.[51]

New Jersey enacted a differential farmland assessment imposing a three year rollback tax at the conversion of farmland use.[52] The New Jersey Farmland Assessment Act[53] provides that agricultural land shall be assessed at use value.

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45. *See supra* note 29.

46. *See* Cooke & Power, *supra* note 21, at 640.

47. Currier, *supra* note 9, at 828 n.37. Many states participate in some form of deferred differential assessment programs. *See, e.g.,* ALASKA STAT. § 29.53.035 (1974); CONN. GEN. STAT. ANN. §§ 12-63, -107 (Supp. 1974); HAWAII REV. STAT. § 246-12 (1975 Supp.); ILL. ANN. STAT. ch. 120 § 501a-3 (Smith-Hurd Supp. 1982); KY. REV. STAT. ANN. § 132.454 (Baldwin 1981); MASS ANN. LAWS ch. 61A § 13 (Michie/Law. Co-op. 1978); MINN. STAT. § 273.111 (1980); MONT. CODE ANN. § 84-437.4 to -.5 (Supp. 1977); NEV. REV. STAT. § 361A.280 (1979); NEB. REV. STAT. § 77-1340 (1976); N.J. STAT. ANN. § 54:4-23.8 (Supp. 1982); N.Y. AGRIC. MKTS. LAW § 305(1)(d) (McKinney Supp. 1981); N.C. GEN. STAT. § 105-274(c) (Supp. 1981); OR. REV. STAT. § 308.395 (Supp. 1979); 16 PA. STAT. ANN. § 11941 & 72 PA. STAT. ANN. § 5490.1-.13 (Purdon 1974); UTAH CODE ANN. § 59-5-91 (1953); VA. CODE § 58-769.10 (1950 & Supp. 1982); WASH. REV. CODE ANN. § 84.34.108 (Supp. 1982).

48. Ellingson, *supra* note 2, at 558. *See* MINN. STAT. § 273.111(4) & (8) (1980).

49. Ellingson, *supra* note 2, at 558. The local unit is reimbursed for the burden it bears. As in preferential assessment, the farmer still retains complete control over the decision to develop the land. *Id.*

50. *See, e.g.,* HAWAII REV. STAT. § 246.12 (1968). In Hawaii, when a land use changes, a rollback tax of up to ten years, plus a ten percent per annum penalty, is imposed. *Id.*

51. *See* UNTAXING OPEN SPACE, *supra* note 7, at 10-21. Kentucky, Maryland, and Rhode Island impose two year deferred taxes while Hawaii, Maine, and Oregon impose ten year penalties upon conversion. *Id.*

52. N.J. STAT. ANN. § 54:4-23.1 to -23.8 (West 1980). The loss of agricultural land prompted New Jersey's voters to amend the state constitution, authorizing use valuation for agricultural land. N.J. CONST. art. VIII, § 1; Goldshore, *supra* note 22, at 475; UNTAXING OPEN SPACE, *supra* note 7, at 142.

53. N.J. STAT. ANN. § 54:4-23.1 to -23.8 (West 1980).

To qualify, landowners must engage in exclusive agricultural use for two years.[54] The New Jersey tax scheme, however, has significant weaknesses. By failing to define exclusive, speculators enjoy tax benefits by maintaining only short-term farm operations.[55] The tax penalty at conversion is only a three-year rollback, which may be an inadequate deterrent to development. The New Jersey assessment therefore has not discouraged agricultural land speculation purchases.[56]

The Oregon legislature made deliberate efforts to exclude land speculators from the special assessment's benefits. Oregon's statute painstakingly defines what land qualifies as agricultural.[57] To receive that state's differential assessment, the land's primary use must be exclusively agricultural[58] and the agricultural activity must be conducted for profit.[59] Upon sale of the land, the state determines if the purchaser acts as a "prudent investor for farm use."[60] This standard is met if the purchaser reasonably expects an average annual return on capital investment from the farming enterprise of not less than current interest rates on first mortgages.[61] Such extensive statutory qualification excludes speculators from receiving the special assessment when the land is not used primarily for agriculture. When land converts from agricultural use, Oregon imposes a ten-year rollback tax.[62]

States implementing a rollback tax recognize that the market value of urban fringe farmland increases as population demands extend beyond the nearby suburbs.[63] The landowner benefits from the increased value when the land is

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54. *Id.* § 54:4-23.2 provides:

> For general property tax purposes, the value of land, not less than five acres in area, which is actively devoted to agricultural or horticultural use and which has been so devoted for at least the two successive years immediately preceeding the tax year in issue, shall . . . be that value which such land has for agricultural or horticultural use.

55. *See* Goldshore, *Trends in Environmental Litigation: A Survey of 1976 New Jersey Judicial Decisions*, 9 RUT.-CAM. L. REV. 21, 46-51 (1978).

56. *See generally* Goldshore, *supra* note 22. The rollback tax was intended as disincentive for conversion of farmland. The tax was inadequate in discouraging the sale or conversion of farmland. It was seen as merely a minor ingredient added to the overall purchase price. *Id.* at 480.

57. *See* OR. REV. STAT. § 308.345-.372 (1979). The Oregon deferred differential program has two variations: one for agriculturally zoned lands and one for unzoned lands. The local county authorities provide that any land located within the zones, used exclusively for farm use, shall be assessed at agricultural value. Land not within a farm use zone may be eligible for the special assessment if it is used exclusively for farming. *Id.*

58. *Id.* § 308.345(2). Farmland not within a farm use zone may still qualify as land used exclusively for farm use. It must have been operated as part of a farm for the preceeding three out of five years and have produced a gross income proportionate to the land's acreage. *Id.* § 308.372.

59. *Id.* § 215.203. Upon sale of the land the state determines if the purchaser is a "prudent investor for farm use."

60. *Id.* § 308.345(2).

61. *Id.* § 308.345(4). This qualification successfully excludes speculators' land from the special assessment if it is not used primarily for agriculture.

62. *Id.* § 308.395.

63. Ellingson, *supra* note 2, at 558.

sold or developed. Without a rollback tax, the owner would reap this profit without sharing in the local tax burden.[64] The rollback tax partially reimburses the local community for the farmers' earlier preferential tax treatment.[65] Agricultural landowners remaining in farming are not affected by the rollback tax.[66] The tax is not triggered when farmers purchase additional agricultural property for expansion, since the agricultural use is maintained.[67]

The deferred assessment system appears ineffective in preserving agricultural land.[68] The owner retains full control over the property and may, at any time, convert the use from agriculture. The system does reduce the potential benefit to speculators, but the deferred taxes are insignificant relative to potential profits of developers. The threat of potential rollback taxes rarely deters or postpones the development of agricultural lands.[69]

Lower tax assessments for agricultural lands alone cannot hold back urbanization, consequently several states have enacted restrictive assessment tax programs for agricultural land.[70] This second type of rollback tax combines preferential tax assessment with land use planning.[71] Under these programs, owners of qualifying land agree to restrict their land's use.[72] In exchange, local governments provide these landowners with substantial tax savings.[73] The

64. *Id.*

65. Stroud, *supra* note 4, at 4.

66. The deferred tax system has been criticized as an administrative burden. In some states, property must be assessed annually at its fair market value and use value. The amount of the rollback tax is computed using these assessments. *See* Currier, *supra* note 9, at 828.

67. The deferred tax is not targeted at the stage where farmland ownership transferred. Rather, any tax liability will be incurred when the land use changes. *E.g.*, KY. REV. STAT. § 132.450(f) (Supp. 1976).

68. Ellingson, *supra* note 2, at 558. Deferred taxation may postpone commercial development by temporarily relieving a landowner's economic pressure. *Id.* Deferred taxation does not account for the use value of the money not paid in annual taxes. The landowner thus benefits by the interest earned on the difference between market value assessment and agricultural assessment. Unless the rollback tax includes a penalty equal to this interest rate, the speculator will have in effect received an interest free loan. *See infra* notes 170-72 and accompanying text (Florida's outdoor recreational deferred differential assessment program contains a 6% annual interest rate on the rollback). *See* Coughlin, *The Economic Impact Differential Assessment and the Conversion of Land to Urban Uses*, PROPERTY TAX PREFERENCES FOR AGRICULTURAL LAND 43, 57 (1980).

69. Coughlin, *supra* note 68, at 57. Although differential assessment has some impact on land developmental patterns, property taxes alone cannot be the vehicle for resolving land use problems. Currier, *supra* note 28, at 55. *See, e.g.*, Bab, *Taxation and Land Use Planning*, 10 WILLIAMETTE L.J. 439 (1974); Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives*, 49 DEN. L.J. 1 (1972).

70. *See, e.g.*, ARIZ. REV. STAT. ANN. § 42-139.01 to .03 (1980); HAWAII REV. STAT. § 12.1-2 (1975 Supp.); ME. REV. STAT. ANN. tit. 36, § 1101-18 (1964); MD. ANN. CODE art. 81, §19(e) (1957); MINN. STAT. § 273.112 (1980 & Supp. 1981); N.H. REV. STAT. ANN. § 79-A:1 to :26 (Supp. 1982); OKLA. STAT. ANN. tit. 68, § 2404.1-.5 (West Supp. 1981). Three additional states have such a tax program for recreational land. *See* FLA. STAT. § 193.501 (1981); VA. CODE § 59-769.4 to .15 (1950 & Supp. 1982); WASH. REV. CODE ANN. ch. 84.34 (Supp. 1982) (recreational land).

71. *See* Currier, *supra* note 9, at 829.

72. *Id.*

73. *See, e.g.*, UNTAXING OPEN SPACE, *supra* note 7, at 278. Utilizing a complicated assessment procedure based on a "capitalization rate," California offers farmland owners ample tax

owner may change the land's use before the time allowed, however, this would constitute a breach of the restrictive agreement and subject the landowner to a tax penalty. In addition, the land then reverts back to the standard taxation level.[74]

California's restricted differential program, known as the Williamson Act,[75] allows eligible landowners to contract with their local government restricting the use of their land for at least ten years.[76] Over forty percent of California farmland is enrolled in such land use contracts.[77] The contracts bind successors in interest and can be enforced by either party through an action for specific performance.[78] If the landowner breaches the contract, the sanctions imposed may include an action for damages, specific performance or increased assessments. A fee equal to fifty percent of the assessment's full cash value at the time of cancellation may be imposed.[79] Upon the landowner's request, the local governmental authority can cancel the contract, if in the best public interest.[80]

Under the Williamson Act, land qualifies as agricultural if "the use of the land is for the purpose of producing plant and animal products for commercial purposes."[81] This definition may appear broad in comparison to Oregon's

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savings. In Santa Clara County, the average farm value assessment for cropland is only 25% of the average market value. *Id.* Most states require a minimum ten year land use restrictive commitment before they will give special tax treatment. *E.g.*, N.H. REV. STAT. ANN. § 79A:15-21 (Supp. 1973).

74. *See, e.g.*, N.H. REV. STAT. ANN. § 79A:15-A:21 (Supp. 1973). In New Hampshire, if the restrictive agreement is breached in the first half of its term, a sanction of 12% of assessed value is imposed. If the breach occurs in the second half of the term, then the rollback tax is calculated at six percent of assessed value. *Id.*

75. CAL. GOV'T CODE § 51200-85 (West 1967). The California Land Conservation Act (CLCA) of 1965 was the first comprehensive land use program collectively utilizing land use planning and preferential taxation. *See generally* Alden & Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination*, 42 S. CAL. L. REV. 59 (1969); Carman, *California Landowner's Adoption of a Use-Value Assessment Program*, 53 LAND ECON. 275 (1977); Dean, *supra* note 32; Myers, *supra* note 30; Comment, *One Tier Beyond* Ramapo: *Open Space Zoning and the Urban Reserve*, 15 SAN DIEGO L. REV. 1211 (1978).

76. CAL. GOV'T CODE § 51240-55 (West Supp. 1982).

77. *See* Carman, *supra* note 75, at 275-76.

78. CAL. GOV'T CODE § 51251-52 (West Supp. 1982).

79. *Id.* § 51283.

80. *Id.* §§ 51281.1-83.4. The parties may terminate their contractual relationship by nonrenewal or cancellation. Nonrenewal, available to both parties, means a unilateral termination prefaced only by the requirement of proper notice. Even though the nonrenewal is timely served, the contract remains in effect until the end of the existing term, usually nine years. During this period, the restrictions on use continue, thereby discouraging use of restrictive contracts by speculators. Cancellation allows the landowner to initiate an immediate termination of the arrangement. Concellation requires the approval of the local authority, and the burden is then on the landowner to demonstrate that cancellation is not contrary to the public interest. Dean, *supra* note 32, at 1870-71.

81. CAL. GOV'T CODE § 51201(b) (West Supp. 1982). The Williamson Act was amended in 1971 to permit the state to reimburse local governments for some of the tax revenue lost as a result of restricted value assessment. *Id.* § 16100-170. *See* UNTAXING OPEN SPACE, *supra* note 7, at 286.

statutory provision,[82] however, speculators interested only in short term farming operations would not enroll land in the restrictive program due to the substantial penalties triggered by development.[83] Consequently, this restrictive system succeeds in excluding speculators from reaping lower property tax benefits.[84] Owners of farmland within the urban fringe need the lower tax assessments to offset the increased market value of their land. Since these landowners hesitate to enroll in the restrictive land use contracts, the actual preservation benefits of such programs are uncertain.

Differential tax structures for farmland are not the agricultural land preservation panacea. Working within the legislative premise that differential assessment is necessary for *farmers*, the success of a tax system should be gauged by its ability to meet this goal without providing a tax boon to non-farmer landowners. The rollback and non-rollback differential assessment for agriculture and the distinction between deferred and restrictive rollback taxes serves as the backdrop for examining Florida's agricultural land taxation.

PURE PREFERENTIAL ASSESSMENT IN FLORIDA

Responding to escalating property values and farmland development, the Florida legislature established pure preferential assessment for agricultural land in 1959.[85] This law classified land used exclusively for agricultural purposes as agricultural land.[86] Only such classified land could be subject to the preferential agricultural assessment tax.[87] Land classified as agricultural will receive differential assessment without rollback, penalty, or land use restriction agreements. Under Florida's pure preferential system the classification of agricultural land is therefore the crucial factor.

Florida's preferential assessment statute soon faced constitutional challenge.[88] The 1885 Florida Constitution provided that all taxation must be at a uniform and equal rate.[89] The Florida Supreme Court held that the legislature can constitutionally classify property in determining just valuations

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82. *See supra* notes 58-59.

83. *See* Dowall, *Conclusion: How Ineffective Policies Gain Widespread Acceptance*, PROPERTY TAX PREFERENCES FOR AGRICULTURAL LAND 125-26 (1980). "The most significant aspect of California's apparently unique restrictive agreement approach is that the costs of conversion are so great that they appear to deter most owners who envision the possibility of converting their land within ten or fifteen years from enrolling." UNTAXING OPEN SPACE, *supra* note 7, at 291.

84. UNTAXING OPEN SPACE, *supra* note 7, at 291.

85. 1959 FLA. LAWS 226. The legislature stated that many persons were forced to abandon their livelihood in response to increased assessments on farm and agricultural land. Deeming such assessments "unreasonable," they feared farmers were being taxed out of existence. *See id.* (Preamble of House Bill No. 831). The competition for use of open space lands among farming, development, industrial and governmental concerns poses a difficult problem for Florida policymakers. J. WERSHOW, FLORIDA AGRICULTURAL LAW ch. 3, p. 1 (1982).

86. FLA. STAT. § 193.201 (1959) (current version at FLA. STAT. § 193.461 (1981)).

87. *Id.* § 193.201(5) (current version at FLA. STAT. § 193.461 (1981)).

88. Tyson v. Lanier, 147 So. 2d 365 (Fla. 2d D.C.A. 1962), *quashed*, 156 So. 2d 833 (1963).

89. FLA. CONST. art. IX, § 1 (1885) (current version at FLA. CONST. art. VII, § 2).

for taxation.[90] The court noted that the statute separately classified property for agricultural tax treatment but assessed land at a uniform rate within such classification.[91] The 1968 Florida Constitution recognizes the supreme court's classification/assessment distinction. The new constitution requires uniform assessments but specifically empowers the legislature to create special property tax classifications for agricultural land.[92] Land *classified* as agricultural is then *assessed* "solely on the basis of character or use."[93] In *Bass v. General Development Corp.*,[94] the Florida Supreme Court affirmed the constitutional grant of legislative authority to determine which lands should be separately classified to receive special tax treatment.[95] The court reaffirmed that classification is separate from, and precedes assessment of land.[96]

Following this constitutional mandate, the legislature has provided that all land used for agricultural purposes shall be classified agricultural.[97] Agricultural classification permits preferential tax assessment.[98] The legislature directed the property appraisers to uniformly assess all agricultural lands[99] based solely on their present use.[100] Florida courts have further directed the assessor to examine only the land's actual, not potential use, and to disregard who owns the land or for what purpose.[101] This judicial focus on actual use creates a significant

90. Tyson v. Lanier, 156 So. 2d 833, 837 (Fla. 1963); *see* Lanier v. Overstreet, 175 So. 2d 521, 523 (Fla. 1965); Markham v. Blount, 175 So. 2d 526, 527-28 (Fla. 1965). The uniformity requirement of the constitution applies to the rate of taxation only and not to legislative regulations to secure just valuation of property. 175 So. 2d at 523.

91. Lanier v. Overstreet, 175 So. 2d 521 (Fla. 1965). "If a legislative directive designed to secure a just valuation of a particular class of taxable property is reasonable, not arbitrary or unjustly discriminatory, and applicable alike to all similarly situated, it should be upheld by the courts." *Id.* at 523. *See* Rainey v. Nelson, 257 So. 2d 538 (Fla. 1972) (discusses equal protection with regard to the Greenbelt law).

92. FLA. CONST. art. VII, § 4. The 1885 Florida Constitution contained no reference to the creation of an exception concerning either assessment or classification. Commentary to FLA. CONST. art. VII, § 4, 26A FLA. STAT. ANN. 91 (1970). Other states had to amend their constitutions to provide for preferential assessment. Ellingson, *supra* note 2, at 555. *See* S.D. CONST. art. VIII, § 15 (1930).

93. FLA. CONST. art. VII, § 4(a). "Agricultural land or land used exclusively for non-commercial recreational purposes may be classified as general law and assessed solely on the basis of character or use." *Id.* The constitutional use language contains no present or actual limitation. Judicial construction of use as potential or future use, however, would ensnare litigants in impossible evidentiary battles. *But see infra* notes 120-26 and accompanying text.

94. 374 So. 2d 479 (Fla. 1979). The distinction between classification and assessment is observed in the statutes. Seven criteria are utilized in determining whether land should be *classified* as agricultural, FLA. STAT. § 193.461(3)(b) (1981), while different criteria are considered in *assessing* land under FLA. STAT. § 193.461(6)(a) (1981).

95. 374 So. 2d at 481. The legislature then has substantial discretion in defining the agricultural classification. *Id. See* J. WERSHOW, *supra* note 85, at 14.

96. 374 So. 2d at 481.

97. FLA. STAT. § 193.461(3)(b) (1981). *See generally* Conrad v. Sapp, 252 So. 2d 222 (Fla. 1971); Greenwood v. Oates, 251 So. 2d 665 (Fla. 1971).

98. FLA. STAT. § 193.461(6)(a) (1981).

99. *Id.*

100. *Id.*

101. *Id. See, e.g.*, Hausman v. Rudkin, 268 So. 2d 407 (Fla. 4th D.C.A. 1972); Smith v. Parrish, 262 So. 2d 237 (Fla. 1st D.C.A. 1972); Smith v. Ring, 250 So. 2d 913 (Fla. 1st D.C.A. (1971). "The fact that the land may have been purchased and was being held as a speculative

loophole that allows speculators holding agricultural land for future development to reap the benefits of Florida's pure preferential assessments.[102]

Florida's law has caused substantial litigation concerning the assessment of agricultural land soon to be developed. In *Matheson v. Elcook*,[103] the owners of a Key Biscayne coconut plantation claimed the land should be assessed at its agricultural value.[104] The tax assessor found the coconut plantation could have been operated as efficiently on approximately one-tenth of the available land.[105] The lesser portion was therefore classified as agricultural and the remaining land as commercial.[106] Although the coconut plantation was the land's secondary use, the trial court determined it was operated in good faith.[107] The court held that while the land was used agriculturally, the whole plantation was entitled to the agricultural classification's benefits.[108] After *Matheson*, the fact that the land may be held for speculation bore no consequence to its qualification for preferential assessment.[109]

The Florida legislature recognized that developers were only going through the motions of farming to qualify for the preferential assessment[110] and attempted to narrow this speculative loophole.[111] In 1972, while maintaining the use standard for determining property's classification,[112] the legislature redefined bona fide agricultural purposes as "good faith commercial agricultural use of the land."[113] The term "commercial" assures that only owners legitimately farming land for profit qualify for the special classification.[114] The statute also

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investment is of no consequence provided its actual use is for bona fide agricultural purposes." 250 So. 2d at 914. Only the present actual use of the land is relevant. Schooley v. Wetstone, 258 So. 2d 483 (Fla. 2d D.C.A. 1972).

102. *E.g.*, Harbor Ventures v. Hutches, 366 So. 2d 1173 (Fla. 1979); Straughn v. Tuck, 354 So. 2d 368 (Fla. 1978); Fogg v. Broward County, 397 So. 2d 944 (Fla. 4th D.C.A. 1981); Department of Revenue v. Goembel, 382 So. 2d 783 (Fla. 5th D.C.A. 1980); Fisher v. Schooley, 371 So. 2d 496 (Fla. 2d D.C.A. 1979).

103. 173 So. 2d 164 (Fla. 1965).

104. *Id.* at 165. The owner contended that the land's agricultural value was $54,312. An expert testified that the best use for the property would be commercial and valued the land at $2,359,600. *Id.* at n.2. According to the state constitution, land should be assessed at a "just value" for property tax purposes. FLA. CONST. art. VII, § 4. *See* 6 FLA. ADMIN. CODE 12D-1.02(5).

105. 173 So. 2d at 165.

106. *Id.* The property appraiser assessed the whole parcel at $490,510. *Id.*

107. *Id.* at n.1.

108. *Id.* at 166. As long as the land was used in good faith for agricultural purposes, then it had to be so assessed. *Id.*

109. Smith v. Ring, 250 So. 2d 915, 916 (Fla. 1st D.C.A. 1971).

110. *See* Comment, 7 FLA. ST. U.L. REV. 571, 574 n.19 (1979).

111. The legislature notes that "it is the declared policy of the state to conserve and protect and to encourage the development and improvements of its agricultural lands." 1972 FLA. LAWS 181 (Preamble).

112. Prior to 1972, the Greenbelt law utilized the term "zoned" instead of "classified." FLA. STAT. § 193.461 (1971). The legislature clarified the statute's terminology in the passage of House Bill 3772, 1972 FLA. LAWS 181.

113. FLA. STAT. § 193.461(3)(b) (1981).

114. Finance & Tax Comm. Rep., Florida House of Representatives, Free Market v. Agricultural Assessment (1980) (Presented to the Ad Valorem Tax & Local Gov't Subcomm). There is no distinction between a bona fide commercial agricultural operation and an agri-

provides a variety of factors assessors may consider in determining the property's classification.[115] These factors include whether the agricultural use has been continuous, whether the land is managed in accordance with accepted commercial agricultural practices, and whether the size of the land relates to its use.[116]

The legislature attempted to retreat from a rigid actual use standard by disqualifying land recorded as a subdivision plat from the agricultural classification.[117] This statute was based on the premise that owners recording subdivision plats, eventually plan to develop the property.[118] In *Bass*, the Florida Supreme Court found the statutory provision violated equal protection[119] because it unreasonably and conclusively presumed that the present use of platted land was not for good faith commercial agricultural purposes.[120] The court clearly stated that although the Florida Constitution does not require a present use standard, once the legislature enacted this standard it cannot discriminate in its enforcement.[121] *Bass* restates the Florida judiciary's consistent view that under the statute property's present use, rather than its intended future use, provides the standard for determining its eligibility for preferential classification.[122]

The legislature additionally sought to deny preferential treatment to land obviously purchased for non-agricultural purposes.[123] The statute provides that land sales for three or more times its agricultural assessment creates a rebuttable presumption that the land's primary use is not commercially agri-

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cultural operation that earns a fair return on investment. The absence of a fair return indicates that the owner invested in farmland for reasons beyond farming. *Id. See* 6 FLA. ADMIN. CODE 12D-5.01 & .02.

115. FLA. STAT. § 193.461(3)(b) (1982) provides:

> In determining whether the use of land for agricultural purposes is bona fide, the following factors may be taken into consideration: (1) the length of time the land has been so utilized: (2) whether the use has been continuous; (3) the purchase price paid; (4) size, as it relates to specific agricultural use; (5) whether an indicated effort has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforesting and other accepted agricultural practices; (6) whether such land is under lease and, if so, the effective length, terms, and conditions of the lease; and (7) such other factors as may from time to time become applicable.

116. *Id.*

117. 1972 FLA. LAWS 181. "The property appraiser shall reclassify the following lands as nonagricultural: . . . 4. Land for which the owner has recorded a subdivision plat . . . ." FLA. STAT. § 193.461(4)(a)(4) (1981).

118. Bass v. General Dev. Corp., 374 So. 2d at 483. *Cf.* Harbor Ventures, Inc. v. Hutches, 366 So. 2d 1173 (Fla. 1979).

119. 374 So. 2d at 486.

120. *Id.*

121. *Id.* at 485-86. The filing of a subdivision plat has little to do with the present use of land. *Id.* at 485. Cf. *infra* text accompanying notes 131-38.

122. Straughn v. Tuck, 354 So. 2d 368 (Fla. 1978). E.g., *supra* text accompanying notes 96-102.

123. *See generally* Comment, *supra* note 110.

culture.[124] This statute has withstood constitutional challenge[125] only because the presumption may be rebutted by showing the land's continued agricultural use.[126]

Consistently the Florida courts have negated legislative attempts to require more than just agricultural use in qualifying for the preferential classification.[127] In *Roden v. K & K Land Management, Inc.*,[128] the Florida Supreme Court reiterated that the land's actual use is the test for determining good faith agricultural use.[129] When defining agricultural use, the assessor should consider the factors enumerated by the legislature, but no single factor should be determinative.[130]

In *Roden*, farmland was purchased for approximately six times the agricultural assessed value, triggering the presumption of non-agricultural use.[131] The purchasers developed twenty-five of the total 575 acres into the Circus World tourist attraction.[132] While planning to develop the remaining grove land, the owners maintained the citrus operation.[133] The property appraiser removed the land's agricultural classification because of the excessive purchase price paid.[134] The grove was not commercial in the statutory sense because the owners did not expect a reasonable return but merely operated it to defer the cost of holding the land. In fact, the revenue from grove operations would only cover about one-fourth of the mortgage cost.[135] The Florida Supreme Court, however, disregarded the legislature's attempt to exclude speculators and held such economic factors as profit and efficiency were not determinative when

124. FLA. STAT. § 193.461(4)(c) (1981).

> Sale of land for a purchase price of three or more times the agricultural assessment placed on the land shall create a presumption that such land is not used primarily for bona fide agricultural purposes. Upon a showing of special circumstances by the landowner demonstrating that the land is to be continued in bona fide agriculture, this presumption may be rebutted.

Id.

125. Straughn v. K & K Land Management, Inc., 326 So. 2d 421, 424 (Fla. 1976). In Rainey v. Nelson, 257 So. 2d 538 (Fla. 1972), the Florida Supreme Court noted that no one has a right to the special tax treatment for agricultural lands. The court found preferential assessment constitutional because the legislative classification is a valid exercise of the state's police power and provides for equal protection. *Id.* at 540.

126. 326 So. 2d at 424-25. *See also* Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978).

127. *See* Czagas v. Maxwell, 393 So. 2d 645 (Fla. 5th D.C.A. 1981); Department of Revenue v. Goembel, 382 So. 2d 783 (Fla. 5th D.C.A. 1980); Fisher v. Schooley, 371 So. 2d 496 (Fla. 2d D.C.A. 1979).

128. 368 So. 2d 588 (Fla. 1978).

129. *Id.* at 589.

130. *Id. See* FLA. STAT. § 193.461(6)(a) (1981).

131. *Id.* at 589. The purchasers paid approximately $9,000 an acre for the grove land. Brief for Appellants at 4, *Roden*, 368 So. 2d at 588. *See also* FLA. STAT. § 193.461(4)(c) (1981).

132. Straughn v. K & K Land Management, Inc., 347 So. 2d 724 (Fla. 2d D.C.A. 1977), *aff'd sub nom.*, Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978). *See* Straughn v. K & K Land Management, Inc., 326 So. 2d 421 (Fla. 1976).

133. 368 So. 2d at 589. *See also* Comment, *supra* note 110, at 571.

134. *See supra* note 115.

135. 368 So. 2d at 589.

classifying the land as agricultural.[136] The court explained that the standard for classification was the land's present physical use.[137] Although the exorbitant purchase price triggered the presumption of non-agricultural use, the court found sufficient evidence of other factors for rebuttal.[138] Actual use then remains the statewide test for the agricultural classification, although this is not mandated by the constitution.[139] One court recently held that land may receive the preferential assessment benefits even though the paper, permit, and financial work was being done in preparation for a planned developmental unit.[140] Consequently, speculators reap the benefits of Florida's pure preferential assessment until the turning of the first shovel in the non-agricultural pursuits.

FLORIDA'S SPECULATORS' HAVEN: THE NEED TO MODIFY THE PURE PREFERENTIAL SCHEME

The failure of legislative attempts to wean the judiciary of the actual use standard allows speculators to loot Florida communities of substantial tax revenues. Florida is the fastest growing state in the southeast,[141] and its population increases encourage speculative investment in farmland. Since 1970 the state's counties bordering urban areas have experienced great population growth.[142] The demand for rural property for development increased substantially causing the market value of Florida's agricultural property to rise to unprecedented levels.[143] Yet, while agricultural land prices increased approximately three-fold,[144] net farm income decreased.[145] It is thus understandable why many farmers opt to sell their property to developers. The interplay of market forces results in the loss of millions of Florida's prime agricultural acres.[146]

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136. *Id.*

137. *Id.*

138. *Id. Accord* Lanier v. Walt Disney World, 316 So. 2d 59 (Fla. 4th D.C.A. 1975).

139. *See supra* notes 91-96 and accompanying text.

140. *See, e.g.,* Fogg v. Broward County, 397 So. 2d 944 (Fla. 4th D.C.A. 1981). The *Fogg* court found land may receive preferential assessment benefits even though substantial preliminary work was being done in preparation for a planned developmental unit. *Id.* at 950.

141. AGRICULTURAL LANDS IN FLORIDA, *supra* note 12, at 65. Florida's population is expected to increase from its 1980 mark of 9.5 million to 13 million within the next 20 years. *Id.* at 29.

142. *See generally* J. Reynolds & D. Tower, Factors That Influence Rural Land Prices in Florida (University of Florida, Institute of Food and Agricultural Sciences, Food and Resource Department, Staff Paper 150, Mar. 1980). One mile of interstate highway requires approximately 40 acres of land. *Id.* at 9.

143. Factors that influence rural land prices include net farm income, capital gains, technological improvements, real estate taxes, location, population pressures, and capital improvements. J. Reynolds & D. Tower, *supra* note 142, at 1.

144. AGRICULTURAL LANDS IN FLORIDA, *supra* note 12, at 33.

145. J. Reynolds & D. Tower, *supra* note 142, at 6.

146. AGRICULTURAL LANDS IN FLORIDA, *supra* note 12, at 65. Much of the state's farm land produces special crops which can be cultivated only where certain rare climatic and soil conditions coincide. Although the farming operations could move to other areas not threatened by urbanization, higher cost to farmers and consumers would result. Many Florida counties

The situation in Lee County, Florida, illustrates why that growth cycle continues. As the fastest growing county in the nation, Lee County's population increased ninety-four percent in the last decade.[147] Most growth occurred around the City of Fort Myers where in four years the market value of the county's agricultural land increased 112 percent.[148] Not surprisingly, twenty-three percent of the county's productive farmland also converted into development during the same period.[149] Farmers and speculators compete for the same land because both enterprises seek flat, easily accessible land.[150] As the market value of agricultural lands skyrockets, Florida's preferential assessment offers the farmers little enticement to remain in farming.[151]

The transition of agricultural land to development usually occurs in three stages: farming, speculating, and developing. In the farming stage, preferential assessment furthers the goal of protecting farmland.[152] Florida's assessment scheme taxes farmland only at agricultural use value. Thus farmers should not find the property tax prohibitive.[153] They pay taxes only proportionate to their land's use and income.

When speculators purchase agricultural land they usually intend to develop the property.[154] When land transfers from farmers to speculators, no physical land use changes. Under the current statute, therefore, the land still qualifies for Florida's preferential assessment tax program.[155] At this stage in the transition from agricultural to urban use, preferential assessment provides land speculators a tax break.[156] The legislative purpose is admittedly served

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containing the most unique farmland have been developed to the point of no return since that farmland could not be replaced. These areas represent the most critical loss of productive agricultural lands. *Id.* at 65-67. *Cf.* Dean, *supra* note 32, at 1862-63.

147. BUREAU OF ECON. & BUS. RESEARCH, UNIV. OF FLA., 1981 FLORIDA STATISTICAL ABSTRACT 5.

148. U.S. DEPT. OF COMMERCE 9, 1978 CENSUS OF AGRICULTURE 359 (Florida, State & County Data).

149. AGRICULTURAL LANDS IN FLORIDA, *supra* note 12, at 9.

150. *See supra* note 18.

151. In 1981, Florida's Greenbelt law decreased agricultural landowners' tax bills by 67%. Florida House of Representatives, House Finance & Tax Comm., Agricultural Assessment in Florida: 1973-1981 (1981). Differential assessment seeks to preserve agricultural land by giving farmers a needed tax break. The Florida Legislature intends the preferential assessment program to benefit only those farmers who in good faith maintain commercial farming operations. See *supra* text accompanying notes 113-16. Good faith commercial agricultural operation requires both an expectation of meeting investment costs and an expectation of realizing profits. FLA. ADMIN. CODE ch. 12D-5.01(2). As noted, agricultural land with potential urban use rarely passes directly from farming to development. Speculators place themselves as middlemen since they purchase agricultural land in anticipation of future development. See *supra* text accompanying notes 19-20.

152. UNTAXING OPEN SPACE, *supra* note 7, at 67.

153. Agricultural real estate taxes have a negative effect on rural land prices. It is estimated that when farm property taxes increase by one mill, and other things remain constant, the price of agricultural land would be expected to decrease about $145 per acre. J. Reynolds & D. Tower, *supra* note 142, at 8.

154. *See, e.g.*, Roden v. K & K Land Management, Inc., 368 So. 2d 588 (Fla. 1978).

155. FLA. STAT. § 193.461(3)(b) (1981). See *supra* text accompanying notes 97-102.

156. Address by State Representative Steve Pajcic, How Might Recapture Affect the

by present agricultural use, however, the long-term goal of preserving agricultural land is not furthered. Indeed, the long-term goal may be thwarted because the differential tax encourages speculation by reducing costs of holding the land.

Upon development, farmland is irretrievably lost,[157] and the benefits of preservation evaporate. Speculators eventually may profit from the development and also realize preferential assessment's tax savings. As discussed, subsidizing speculative investment through preferential assesment is expensive to Florida's non-farming community.[158] Florida's property tax, estimated at over three billion dollars in 1982, is the main source of revenue for local governments.[159] Differential assessment amounts to a seven percent reduction in property tax revenues, which represents the loss of nearly $237 million statewide.[160]

The object of differential assessment is to give farmers a needed tax break that reduces the cost of keeping otherwise highly valuable developmental land in agriculture. The legislature intends the benefit to inure only to good faith commercial farmers. Preferential assessment during the farming stage furthers the goal of preserving farmland, therefore, that portion of the increased tax burden is justifiable. Because of the strict judicial test of "actual use" speculators also reap these tax benefits. The differential assessment during the speculation stage does not promote the preservation goal and is unnecessarily

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Florida Farmer? (Presented at the Florida Citrus Mutual Symposium, May 19, 1980) [hereinafter cited as Pajcic].

157. Dean, *supra* note 32, at 1861.

158. *See supra* notes 29-31 and accompanying text. In Marion County, Florida, 1982 agricultural preferential assessment is estimated to reduce the county's real property tax base by 18.4%. Because of this reduction in the tax base, property taxes must be 19.3% higher in order to yield the same local revenue. Marion County homeowners with a taxable property value of $50,000 and subject to a 14.88 millage rate would pay $120.00 increase in property taxes. Finance & Tax Comm., Florida House of Representatives, 1982 Assessment Roll Forecasts (Exempt & Taxable Agricultural Value As a Percent of Tax Value Real, Table 22, Nov. 1, 1981; County 10 Mill Equivalent with Agricultural Market Values, Table 49, Nov. 1, 1981).

159. Prior to 1982, when the fifth cent was added to the sales tax, property tax was the number one source of revenue in the State of Florida. The collection and distribution of the property tax is administered at the local level. The distribution of the 1982 property tax revenues is estimated as follows:

ESTIMATED 1982 PROPERTY TAX

Distribution	Revenues (in millions)	% of Total
County	$1,286.9	38.45
City	575.3	17.19
Special Districts	234.3	7.00
Schools	1,250.4	37.36
	$3,346.9	100.00

Telephone interview with James Francis, Legislative Analyst, Finance & Tax Comm., Florida House of Representatives (Aug., 1982).

160. *Id.*

costing the other taxpayers the burden of unequal assessment. Florida's pure preferential method of tax assessment, therefore, should be modified to minimize the unequal tax burden and revenue losses to only that necessary to serve the preservation goal.

SUGGESTED APPROACH FOR FLORIDA: THE OUTDOOR RECREATIONAL MODEL

Florida has an innovative land use tax scheme for outdoor recreational land which serves as a useful model for modifying the agricultural assessment. In 1967, the Florida legislature acted to preserve outdoor recreational land[161] by combining preferential assessment with deferred taxation and land use restrictions.[162] Constitutionally,[163] outdoor recreational property may receive preferential assessment. First, however, it must fall within the special classification as defined by the legislature.[164] By general law, only land restricted for ten years qualifies for the classification.[165] Classification may occur when qualifying land development rights are transferred to local governments.[166] Alternatively, the owner may covenant with the local authority binding the land's use for certain agreed restrictions.[167] Classified lands are then assessed at their restricted but preferential use value.[168]

During the restrictive term, development may occur without triggering rollback taxes only if the governing authority finds the public will not be adversely affected.[169] Absent this finding, developing landowners must pay a rollback tax[170] equal to the difference between the taxes paid at the preferential assessment and those which would have been paid if the land received no special assessment plus six percent annual interest.[171] The rollback provision in

161. FLA. STAT. § 193.501 (1981). Noting that recreational and environmentally endangered lands require less of governmental services, the legislature passed restrictive differential assessment to encourage the establishment and maintenance of privately owned recreational and park facilities. 1967 FLA. LAWS 528.

162. FLA. STAT. § 193.501 (1981). Outdoor recreational or park purposes include boating, golfing, camping, historical, or scientific sites, and apply only to land that is open to the general public. *Id.* § 193.501(6)(a). Florida is one of eight states that include recreational land within differential assessment programs. UNTAXING OPEN SPACE, *supra* note 7, at 13. *See* [1975] FLA. ATT'Y GEN. ANNUAL REPORT 471.

163. FLA. CONST. art. VII, § 4(a).

164. FLA. STAT. § 193.501 (1981).

165. *Id. Compare id.* § 193.501(3)(1) *with id.* § 193.461(3)(b) (use is the standard for classifying agricultural lands).

166. *Id.* § 193.501(1)(a).

167. *Id.* § 193.501(1)(b). The covenant is defined as running with the land. *Id.* § 193.501(6)(f). See *supra* text accompanying notes 75-84.

168. FLA. STAT. § 193.501(3) (1981).

169. Participation in the outdoor recreational and environmentally endangered restricted differential program is low. The market value of participating land throughout the state is estimated at $30 million with a use value assessment of $19 million. Telephone interview with James Francis, Legislative Analyst, Finance & Tax Comm., Florida House of Representatives (Aug. 1982).

170. FLA. STAT. § 193.501(4) (1981). The tax collector shall distribute the revenue from rollback taxes to each governmental unit in proportion to its subsidy. *Id.*

171. *Id.* § 193.501(6)(g).

this preferential assessment scheme, encourages preservation of recreational lands and minimizes the unequal tax burdens to that necessary to further the legislative goal.

Utilizing the recreational program as a model, the legislature could limit agricultural assessment only to bona fide farmers.[172] The legislature created the speculator's haven by restricting the agricultural classification to land used for agricultural purposes.[173] "Use" allows speculators to qualify for agricultural classification.[174] Preferential assessments continue even while preparing for development so long as some agricultural use is maintained. To provide only farmers preferential assessment, the use standard for classifying agricultural property should be abandoned. Instead, agricultural classification should only be granted to agricultural land enrolled in a restrictive land use program with rollback provisions.[175] In exchange for the preferential assessment tax benefits, agricultural landowners would be required to restrict their land's use. Unlike the Williamson Act in California,[176] the suggested restrictive use enrollment would not be a covenant enforceable by specific performance or damages.[177] The restrictive enrollment would, however, bind successors in interest for the stated term[178] and violation of the restricted use will trigger the rollback tax.

The rollback tax should survive constitutional scrutiny. Under the Florida Constitution, classification of land as agricultural may be done only by the legislature.[179] The constitution allows the legislature to establish any classification criteria, so long as assessment is based on use. In addition, the case law requiring present use in considering classification would be inapplicable because it is based on statutory use classifications.[180] Statutory classification would only follow from such land enrollment. Use would be relevant only when determining the actual assessment amount.

CONCLUSION

Enactment of a restrictive differential assessment program for agriculture would eliminate the costly speculators' haven. Land restrictions and rollback

172. The present use test is merely a recognition that the legislature has generally chosen to classify land on the basis of use. *Bass*, 374 So. 2d at 482. See *supra text* accompanying notes 97-101.

173. FLA. STAT. § 193.461 (1981).

174. *Id.*

175. *See supra* notes 47-49 and accompanying text. There are many forms of restrictive land use programs. For a discussion of these restrictions, see generally Batie & Looney, *supra* note 14.

176. *See supra* notes 75-84 and accompanying text.

177. *Cf.* CAL. GOV'T CODE § 51251-52 (West Supp. 1982).

178. *Cf. id.* § 51243(b). This is consistent with the present practice in many states wherein the change of use triggers the tax and thus is borne by the purchaser. *See supra* note 70 and accompanying text.

179. FLA. CONST. art. VII, § 4(a). *See* Rhodes, *Regulating to Protect Agricultural Land: Statutory and Constitutional Issues*, 9 FLA. ENVTL. & URB. ISSUES 1 (1982) (examines land use restrictions in context of the federal and state due process requirements).

180. *See supra* notes 103-40 and accompanying text.

tax provisions are key elements which would discourage speculators from enrolling land in the program.[181] Thus, local non-farming communities would no longer subsidize speculative investments.[182] Bona fide farmers needing the assessment for long-run farming profitability would likely enroll their lands.[183] As a matter of wise public policy, farmers with land in the urban fringe should be encouraged to participate. The restrictions allow land to be taxed at agricultural value while farming operations continue.[184] The rollback tax, the difference in assessments at market and agricultural values, would be imposed following the restriction's breach.

Restrictive differential assessment for agricultural lands would not solve all the problems concerning the drastic loss of agricultural lands.[185] The legislature has determined that agricultural land should be assessed based on its agricultural rather than market value. A legislative choice was made to forego some property tax revenues in an attempt to preserve agricultural land.[186] Tailoring the classification of agricultural lands by restrictive covenants would further the legislative goal and eliminate the speculators' haven. The suggested restrictive rollback tax scheme would limit the tax revenue loss to that necessary to give farmers preferential assessment.

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181. See, e.g., *supra* text accompanying notes 75-80.

182. Restrictive covenants with deferred tax provisions do not dictate how persons utilize their land. Rather, they are a clear sign that state and local governments should get something in return for granting tax breaks. Pajcic, *supra* note 156.

183. The preservation of important farmland as a public policy has gathered support from a host of private interests. Farmers, businesses, sports enthusiasts, environmentalists, and citizens cite various reasons for their interest, but all are concerned with the loss of agricultural land. Banks, *supra* note 1, at 26-27.

184. Rhodes, *supra* note 179, at 20. "In attempting to protect agricultural land, government must remember the primary objective is to enable farmers to continue farming as a rewarding and profitable way of life." *Id.*

185. Ellingson, *supra* note 2, at 558.

186. Rhodes, *supra* note 179, at 20.

187. Pajcic, *supra* note 156.