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CONTROLLING LAND USES AND PRICES BY USING SPECIAL GAIN TAXATION TO INTERVENE IN THE LAND MARKET: THE VERMONT EXPERIMENT

*By R. Lisle Baker**

INTRODUCTION

Concern over escalating land prices and the increasingly rapid conversion of open space to more intensive uses has led to renewed interest in taxation as a technique for land use control.¹ This article will discuss in detail one recent tax innovation: the Vermont tax on up to 60% of gain realized from short-term sales of land, better known as the Vermont land gains tax.

While land value increment taxation has been a subject of some discussion in the past and has become law in several foreign jurisdictions, the Vermont land gains tax is apparently the first of its kind to be enacted in the United States.²

The land gains tax is so new that hard data about its effects have not been accumulated. The tax, however, raises important issues about the relation of the land market to the land development process, about the participants in that process, and about the rightful ownership of appreciation in land values.

In order to explore these issues more fully, this article will discuss the background of the Vermont land gains tax and its test in the Vermont courts, analyze the tax in relation to a model of the Vermont land market to estimate the likely effects of the gains tax on Vermont land uses and prices, note similar tax innovations now being undertaken or considered elsewhere, and, finally, explore some of the wider implications of the tax in light of issues raised by the Vermont Supreme Court.

I. THE VERMONT LAND GAINS TAX

A. *Background*

Vermont is a rural state with most of its population of only

450,000 scattered in the countryside or in small towns. In such an environment, the green valley becomes a community asset over which even the regular visitor believes he has acquired a prescriptive scenic easement. When such expectations are disrupted by the accelerating conversion of open space to more intensive uses, conflict results.

In 1970, the Vermont legislature responded to this conflict by enacting Act 250, which provided Vermont with a statewide permit system for much of its land development, and required preparation of a three-stage statewide land use plan.³ In 1972, Governor Thomas Salmon was elected partly because of his support for property tax relief for Vermont landowners and a capital gains tax on land speculation.⁴

In April, 1973, the Vermont legislature, with Governor Salmon's support, enacted Act 81, providing increased property tax relief with partial funding from a new land gains tax.⁵

Act 81 expanded the state's existing "circuit breaker" program of payments to elderly property taxpayers to include Vermont citizens of all ages, including tenants as well as homeowners. The actual amount received was to be equal to the excess of the claimant's real property taxes (or 20% of his annual household rent) over from 4 to 6 percent of his household income, with a total payment limit of \$500 per household.⁶ Funding for this program was to come from federal revenue sharing, but the Vermont legislature considered alternative supplementary funding measures, including increases in the Vermont income tax, sales tax, real estate transfer tax, and the imposition of a special capital gains tax.⁷ The Vermont House Ways and Means Committee heard various reasons for the selection of a capital gains tax: the control of development,⁸ the availability of profit to tax because of the preferential tax treatment afforded capital gains for federal and state income tax purposes,⁹ and the "discouragement of sales of property for speculative reasons, sales and transfers of property as a commodity rather than as a portion of a social good . . ." ¹⁰

B. What the Tax Provided

The heart of Chapter 236¹¹ was the rate schedule which placed the burden most heavily on the short-term speculator realizing high profits from his land sales.¹²

Years Land Held by Transferor	Gain, as a Percentage of Basis (Tax Cost)			TAX RATE
	0-99%	100-199%	200% or more	
Less than 1 year	30%	45%	60%	
1 year, but less than 2	25%	37.5%	50%	
2 years, but less than 3	20%	30%	40%	
3 years, but less than 4	15%	22.5%	30%	
4 years, but less than 5	10%	15%	20%	
5 years, but less than 6	5%	7.5%	10%	

In addition to progressive exemptions for long-term holdings, the law provided two other primary exemptions: one for gain attributable to a maximum of one acre of land "necessary for the use of a dwelling used by the taxpayer as his principal residence" and one for gain attributable to "buildings or other structures."¹³

Not all short-term land transfers are affected. For instance, transfers without consideration or transfers where no gain was recognized for purposes of federal income taxation are exempt.¹⁴ Moreover, since the gains tax followed the federal tax rules for definition of basis, land acquiring a stepped-up basis at death for federal tax purposes also acquires a stepped-up basis for purposes of the land gains tax. Unlike the federal model, however, the Vermont tax provides no offset for land losses.¹⁵

Since the tax applies only to land, a seller must allocate the gain on a sale of land containing buildings and other structures between the land and the structures on the basis of "fair market value."¹⁶

The transferor is liable for the tax,¹⁷ but the buyer must withhold ten percent of the consideration paid for the land and remit it to the Vermont Commissioner of Taxes. Within 30 days of the taxable transfer, the seller must file a return with the Commissioner setting forth the amount of the tax due and enclosing the balance owing or making a claim for a refund.¹⁸

Chapter 236 contains stringent enforcement procedures. Not only is the tax due a personal debt of those liable to pay or withhold it, but it also constitutes a lien in favor of Vermont "upon all property

and rights to property, whether real or personal, belonging to the person liable for the tax or for the withholding."¹⁹

Finally, willful attempts to "defeat or evade" the tax result in imprisonment and fines for individuals and for "any officer, employee, director, trustee or other responsible person of a corporation or other taxable entity," as well as for anyone who "counsels, aids, abets, participates in, or conceals" such conduct.²⁰

C. The Challenge to the Gains Tax

Governor Salmon signed Act 81 into law on April 23, 1973. By Bill of Complaint dated April 24, 1973, a Vermont individual, a Vermont limited partnership, and a Vermont corporation, all allegedly engaged in the sale or development of Vermont land, began an action against Vermont Tax Commissioner Robert Lathrop challenging the constitutionality of the tax and requesting an injunction restraining the Commissioner from collecting or enforcing it.²¹

Plaintiffs alleged in conclusion that the tax was unconstitutional because it had "an obvious purpose of attemptation to impede and interfere with the ownership, sale, transfer, development and improvement of lands within this state."²²

After a hearing, plaintiffs became more specific and requested the court to make a finding of fact that

The reasons for the selection of the method of taxation contained in this legislation were to curtail development within the state and obtain the needed revenues from land speculators.²³

The Washington County Court declined to make this finding. It found that during debate in the Vermont House of Representatives, arguments were made that "[the tax] would curtail development within the state . . . [and] affect the out-of-state land speculator." However, the court went on to find that "the impact the tax would have on out-of-state land speculators" was "speculative in the extreme."²⁴ The court made other findings of fact which, summarized, were: (1) Act 81's primary purpose was property tax relief; (2) the gains tax was designed to supplement primary funding from federal revenue sharing; and (3) the primary purpose of the gains tax was to raise revenue to help fund the tax relief program. The court concluded:

Based on the above findings the Court concludes that the presumption of constitutionality of any act passed by the legislature has not been overcome by any of the facts found by the Court.²⁵

Plaintiffs then moved to re-open the hearing to present additional evidence regarding a June 28, 1973 statement by Governor Salmon:

The tax is working in terms of its premier mission which was not so much to raise money . . . but to substantially slow down rapid subdivision growth in Vermont, it's done that, and I suspect it will continue to do this.²⁶

Based on this evidence, plaintiffs sought to have the court make additional findings of fact that one of the purposes and effects of the tax was to slow down subdivision growth in Vermont. Furthermore, they requested a conclusion of law that the tax violated both the state and Federal Constitutions because it "has had the effect of interfering and obstructing the ownership, sale, transfer, development and improvement of land."²⁷

The court found that the Governor had made such a statement, but it concluded that since his remarks occurred after the enactment of Act 81, they could have no bearing on the legislative purpose of the tax.²⁸

On August 6, 1973, the trial court entered a judgment order dismissing plaintiff's complaint.²⁹ Plaintiffs appealed,³⁰ and on February 5, 1974, the Vermont Supreme Court affirmed the judgment of the Washington County Court.³¹

While most of the Vermont Supreme Court's opinion is discussed in the last section of this article, its treatment of plaintiffs' land development claims is worth noting here. The court determined that deterring speculation through taxation was a constitutionally legitimate state concern so as to justify the variable rate scheme in the tax against plaintiffs' equal protection challenge.³² The court added:

. . . we may take judicial notice of an increasing concern within the state over the use and development of land as a natural resource, a concern to which the legislature has responded in other instances with appropriate legislation [Act 250] Speculation falls within the ambit of such concern as a land use; indeed it has a bearing on many other uses to which the land might be put.³³

The court apparently came to its conclusion about the land use consequences of speculation without the aid of the trial record or argument by either party, at least to the extent that those arguments are reflected in their written briefs. Whether the court's conclusion was justified is explored next.

II. LAND MARKET ANALYSIS

The effects of the land gains tax in Vermont have not yet been measured empirically³⁴ but the fact that it is designed as a variable exemption transfer tax on land value increments implies effects on the land market. The land market is one of the less studied, yet

more important aspects of the land development process because it is through the market that much of the fuel for the land development—capital gains—is realized.³⁵

There are other reasons for examining the land market. A sense is emerging that the more traditional land use controls, such as zoning and subdivision regulation, affect the land development process too late to be more than an accommodation to market decisions already made by developers.³⁶ Hence a desire exists to find a land use tool to intervene earlier. Moreover, part of the concern motivating the Vermont land gains tax (and land value increment taxation elsewhere) is the rising cost of land.³⁷

But how does the land gains tax affect the land market? What effect does the process of land transfer have on land uses and prices? To arrive at an understanding of some answers to these questions, it is useful to look at the Vermont land market and then discuss the land gains tax in relation to it.³⁸

A. Some General Observations about Land Markets

Land prices are apparently determined by market supply and demand.³⁹ While the supply of land, as distinguished from improvements, is relatively fixed (except where dredging and filling operations can expand it), this supply can be transferred an almost infinite number of times. The transfer process by itself does not use up any land, although activities such as subdivision or construction may effectively pre-empt a particular parcel for a particular use, except where public or private redevelopment occurs.

Thus, when discussing a transfer tax such as the Vermont land gains tax, one should focus on land supply not as the absolute stock of buildable land which stock in fact may be shrinking because of continuing construction, or private or public land use regulation, as discussed below, but on the amount of land offered for sale at a particular time. Such a supply is better termed the “effective” supply of land.

Another way to describe this effective supply is to assume that the amount of land offered for sale at any particular time will increase in response to higher offering prices. This response can be plotted graphically with price asked constituting a vertical axis and land offered, a horizontal axis.⁴⁰

The other side of the land market is land demand. The desire of potential transferees to purchase land is likely to be affected by a variety of factors.⁴¹ But as a mirror image of effective land supply, the amount of land sought is inversely proportional to price.

Individual land parcel sales will occur as a coincidence of a land-owner's willingness to sell a given acreage at a given price with a prospective purchaser's willingness to purchase such acreage at that price.⁴² The aggregate of decisions by individual land market participants is called the land market. Effective supply and demand interact through the market to determine land prices and land transferred.

Effective land supply, land demand and the land market are all illustrated schematically in figures 1-3 below.

The Land Market

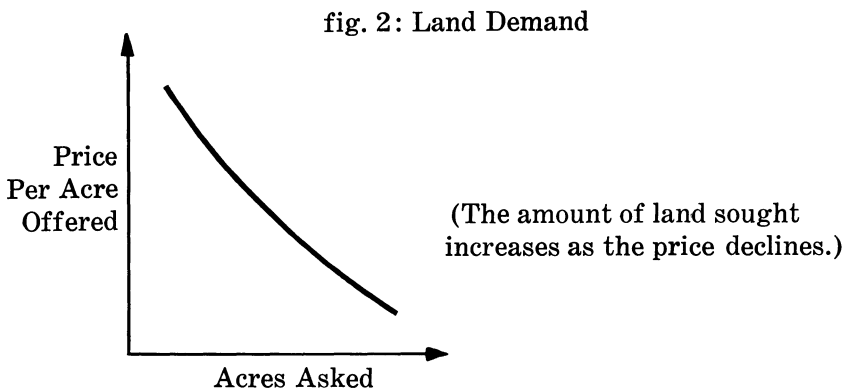
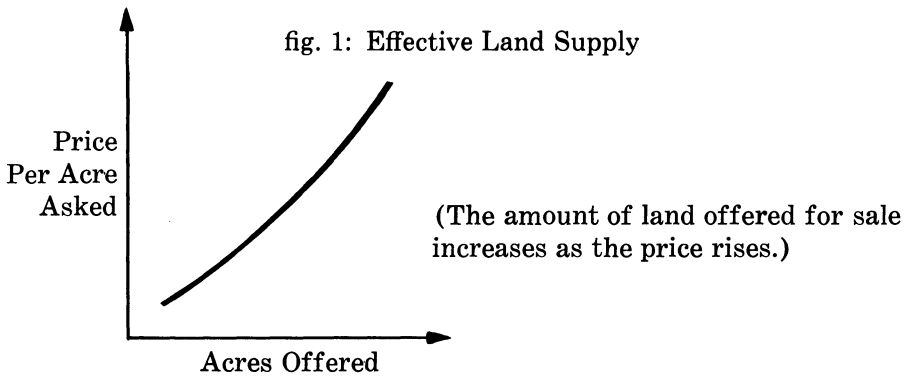
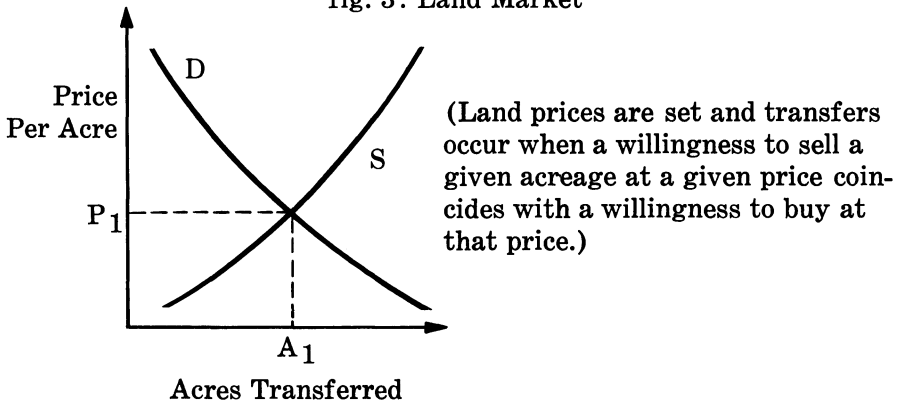


fig. 3: Land Market



B. *The Effect of the Land Gains Tax on this Land Market*

A quantitative analysis of the effect of the land gains tax requires sophisticated information about the impact of other factors that determine land supply and demand. Until such information is obtained from carefully analyzed field research, the best that can be done as an introductory analysis is to estimate some of the qualitative effects of the tax.

1. *Supply effects*

Assuming that the amount of land offered for sale plotted against the per acre price asked produces an average "effective supply" curve, what is the likely effect of the land gains tax? First, it is important to point out that some land market participants will not be affected by the land gains tax. (See figure 4(a)). These include landowners who have held their property longer than six years, some residential sellers and those engaging in tax-free transfers.⁴³ Those transferors affected⁴⁴ by the tax may make one of two responses. The first is illustrated in figure 4(b). An owner may avoid part or all of the tax by withdrawing land from the market, postponing transfers until some or all of the six-year holding period has expired.⁴⁵ An alternative response is for the seller to increase the price asked in order to cover the amount of the gains tax. This effect is illustrated in figure 4(c).

But not all participants are likely to respond to the tax in the same way. Some participants may elect inflation as a response, other may elect withdrawal. The composite effect of all the private decisions involved is illustrated in figure 4(d) where the supply curve has shifted both vertically and horizontally to reflect a composite inflation and withdrawal tax effect.⁴⁶

fig. 4: Possible Effects of the Land Gains Tax on Effective Land Supply

fig. 4(a): No Tax

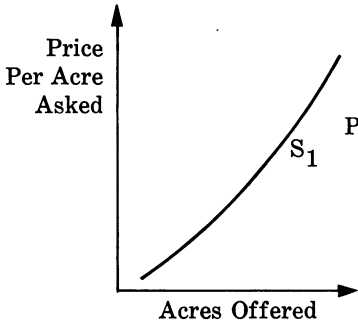


fig. 4(b): "Withdrawal" Tax Effect (Price unaffected, but less land offered.)

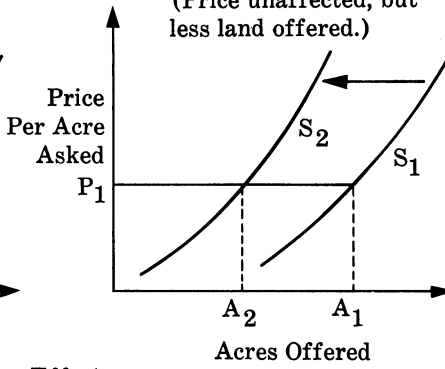
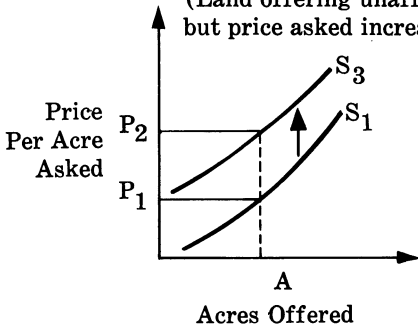
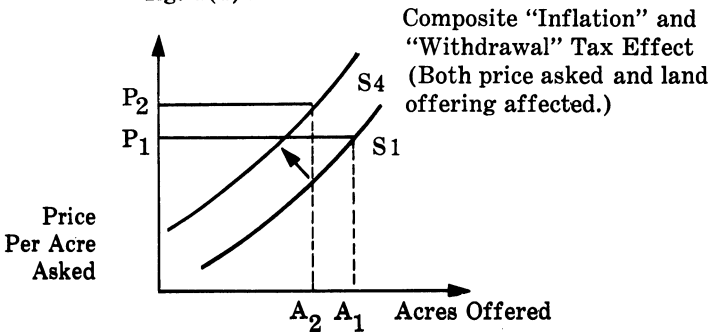


fig. 4(c): "Inflation" Tax Effect (Land offering unaffected, but price asked increased.)



- S_1 = Effective Supply without land gains tax
- S_2 = Effective Supply with land gains tax if only "withdrawal" occurs
- S_3 = Effective Supply with land gains tax if only "inflation" occurs
- S_4 = Effective Supply with land gains tax if both "withdrawal" and "inflation" occur

fig. 4(d):



Composite "Inflation" and "Withdrawal" Tax Effect (Both price asked and land offering affected.)

Which effect—inflation or withdrawal—is likely to dominate is uncertain. Some participants in the land market who have high holding costs, such as interest payments, may find withdrawal an unpalatable alternative. Others with income producing property, such as some farmers, may find withdrawal acceptable. Those to whom withdrawal is not a solution may elect to increase their prices. Whether such land market participants will be successful may depend on how much competition they will face from offerors of similar parcels not subject to the gains tax and how much land demand will absorb price increments. Thus some participants may find both postponement or inflation unfeasible, and may elect in the future to invest outside the Vermont land market.

2. *Demand Effects*

The possible effects of the land gains tax on land demand are set forth in figure 5.

Figure 5(a) indicates the amount of demand where no gains tax is involved. Figure 5(b) illustrates the withdrawal effect which is likely to occur when some potential land market participants decide that the risk of land gains taxation on resale of the parcel they acquire (and possible tax-induced effects on prices themselves—discussed later) makes purchasing Vermont land an undesirable alternative to other investments. Thus the demand schedule for those participants would shift to the left along the horizontal axis to reflect no change in price but a decline in the amount of land sought.⁴⁷ Conversely, some participants who desire to remain in the Vermont land market may choose to lower the prices they are willing to offer land owners in order to offset the anticipated tax which they might have to pay upon resale. This deflationary effect of the tax, in which the amount of land sought by those participants does not decline, but a drop in the offering price occurs, is illustrated in figure 5(c). Of course, some participants may elect to absorb any future land gains taxes completely and consequently will not change their market position, but the number of participants who either withdraw from the market or deflate the prices they offer is likely in the aggregate to produce a leftward shift in the demand schedule with a composite withdrawal and deflationary effect from the tax.⁴⁸ This composite effect is illustrated in figure 5(d).⁴⁹

fig. 5: Possible Effects of the Land Gains Tax on Land Demand

fig. 5(a) : No Tax

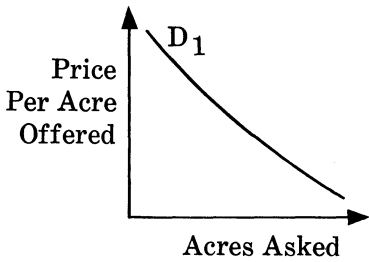


fig. 5(b) : "Withdrawal" Tax Effect
(Price unaffected, but less land sought.)

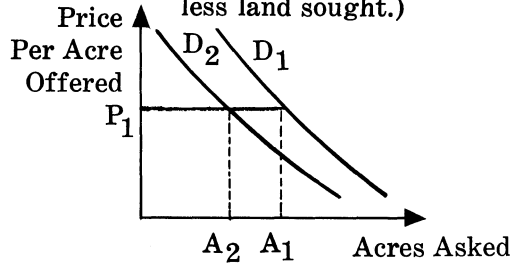
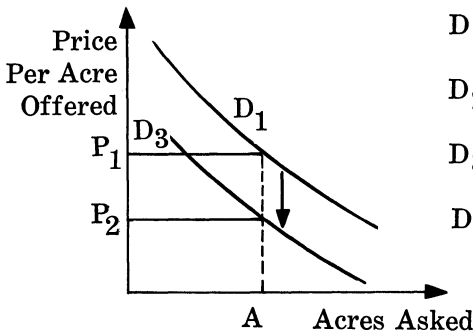
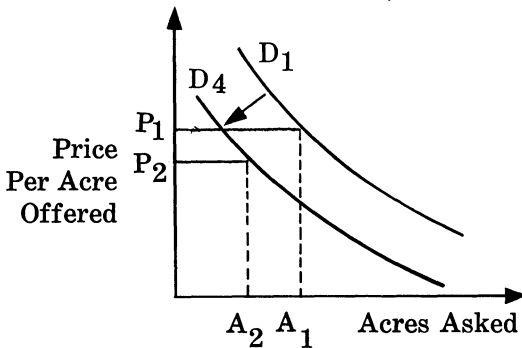


fig. 5(c) : "Deflation" Tax Effect
(Land sought unaffected, but price offered decreases.)



- D_1 = Demand without land gains tax
- D_2 = Demand with land gains tax if only "withdrawal" occurs
- D_3 = Demand with land gains tax if only "deflation" occurs
- D_4 = Demand with land gains tax if both "withdrawal" and "deflation" occur

fig. 5(d) : Composite "Deflation" and "Withdrawal" Tax Effect.
(Both price offered and land sought affected.)



3. Composite Effects

What emerges from the foregoing analysis is a sense that the gains tax is likely to induce a reduction in both the amount of land offered for sale and the land sought for purchase, especially among specific participants in the land market, as discussed below. This decline in supply and demand may produce further effects on the land market illustrated in figure 6. Figure 6(a) illustrates how a land supply contraction combined with a land demand contraction can produce not only a reduction in the amount of land transferred but also a net decline in prices. Figure 6(b) shows how a slight adjustment in the relative strength in the supply and demand effects of the tax produces a net price increase. Thus if supply shifts are more severe than demand shifts, prices will rise somewhat, benefiting sellers and taxing "buyers". If demand reductions are more severe than supply shifts, prices will "fall," benefiting purchasers and levying an additional "tax" on sellers.⁵⁰ It is important to note, however, that regardless of the price effect of the gains tax, the number of transfers is likely to fall.⁵¹

fig. 6(a) : Price decline because of combined land supply and demand effects of land gains tax; decline in land transferred.

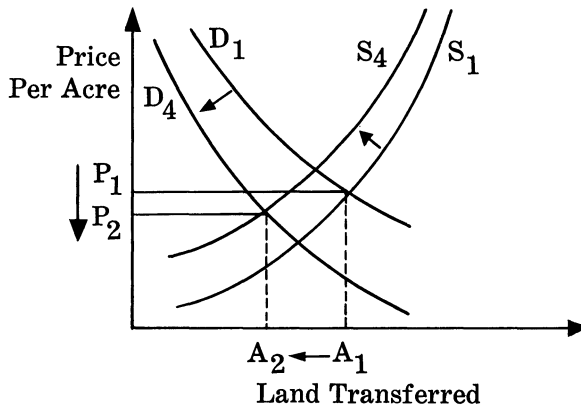
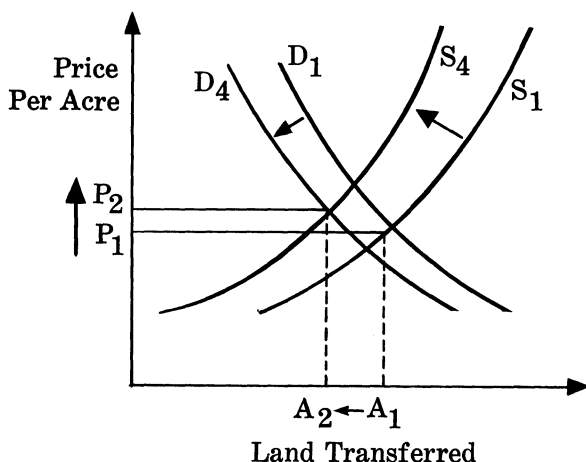


fig. 6: Possible Effects of the Land Gains Tax on Land Prices

fig. 6(b) : Price increase because of combined supply and demand effects of land gains tax; decline in land transferred.



(NOTE: To the extent that the land gains tax modulates land prices, it may effect only a change in the rate of increase and not an affirmative reduction, since other factors, such as costs of borrowing, may be more important. If an affirmative reduction were to occur because of a severe land gains tax-induced drop in land demand, the gains tax effect itself would be affected since the tax operates only on appreciation in land values and is most severe at high rates of profitability.)

The foregoing discussion is potentially misleading in treating even the local land market as a monolith. Furthermore, a simple supply and demand analysis has inherent limitations in being focused on only one frame in time.⁵² Finally, it does little to illuminate the land use consequences of the tax, which the Vermont Supreme Court indicated might flow from the tax's likely impact on speculators.⁵³

Consequently, it may be useful to look at the likely effect of the land gains tax on some key Vermont land market participants. Such an analysis must deal with several factors. First, while Vermont is a predominantly rural state with much of its land in relatively low intensities of use, it has recently been subject to intense growth pressures, especially from the second-home industry.⁵⁴ Second, the gains tax is fundamentally a transfer tax, with many transfers exempt. Third, the tax was apparently targeted (either prospectively or retrospectively) at speculators and subdividers.⁵⁵

C. A Look at the Land Gains Tax and Key Participants in the Land Market

The reasons land is bought and sold are as diverse as the participants in the market, but it is possible to distinguish at least four categories of participants by the dominant motive for their activity.

1. **USERS:** Those who purchase and hold land for use (homeowners, governments) or income (farmers, industries, commercial or residential landlords).
2. **SPECULATORS:** Those who purchase and hold land for transfer after appreciation induced by market forces or new public improvements nearby.
3. **SUBDIVIDERS:** Those who purchase and hold land for transfer after appreciation in part induced by subdivision, rezoning or preconstruction activity they undertake or induce.
4. **BUILDERS:** Those who purchase and hold land for transfer to users or speculators after construction or renovation of buildings or other structures.⁵⁶

How is the gains tax likely to affect these participants?

1. Users as Suppliers of Land.

Those who purchase and hold land for use or income usually enter the land market with the intention of acquiring property for the long term. Consequently, it is likely that the length of the users' holding period would be higher than that for almost any other class of land market participants. Moreover, residential purchasers have the additional advantage of a limited exemption from the land gains tax. Finally, owners of improved income-producing property may find that much of the gain on a sale of such property may be successfully attributed to rising demand for the structure (such as in a rental apartment complex) and not the land itself. Consequently, users probably will not be significantly affected by the land gains tax.

2. Speculators.

Unlike users who can either derive income from their property, or, as in the case of a homeowner, sustain property ownership through outside sources of income, the speculator by definition acquires and holds land for transfer after appreciation induced by market or other forces outside his control. The holding cost for many speculators, including property taxes and interest payments, may make it undesirable for them to hold the land for a long period, leading to an attempt to raise prices. Others may respond by withdrawing land from the market in hopes of waiting out the tax. Consequently, some of the shift in the land market supply schedule will be the result of speculator decisions.

On the demand side, some speculators, especially those with high holding costs, are likely either to find long-term holding undesirable or to find property subject to land gains taxation to be an unacceptable investment.⁵⁷ In either case they may withdraw from the land market, as indicated in the original supply and demand analysis. If this decline in demand is significant, it may lead to a secondary contraction in the amount of Vermont land held by speculators. Thus the absolute land supply held by speculators may contract over time, leaving more of the Vermont land bank in the hands of other market participants.

3. *Subdividers*

Subdividers differ from speculators because they alter what they purchase. The alteration may be merely surveying a lot or two for resale or it may involve substantial terrain alterations, including installation of streets and utilities. As suppliers, some subdividers may be able to extract from prospective purchasers certifications that a primary residence will be constructed on the lot sold.⁵⁸ To that extent, such subdividers would not be affected by the land gains tax. On the other hand, the land gains tax will have a larger impact on those subdividers whose primary market consists of second home sites. As a class, subdividers may be more severely affected than speculators because their holding costs after predevelopment construction loans may be significant. Like speculators, subdividers finding the prospect of waiting out the tax unacceptable, and inflation an undesirable alternative, may elect to withdraw from subdivision activity in Vermont altogether, especially if speculators constitute some of the prospective purchasers of subdivided land.⁵⁹

Subdividers are also likely to be severely affected by the land gains tax if much of any gain realized results from the conversion of a large "economy-sized" parcel into a collection of smaller, proportionately more expensive lots which must then be quickly sold. If many such subdividers decide to leave the Vermont market, the result could mean fewer smaller lots offered for sale. Many subdivided lots, however, are not built upon,⁶⁰ especially in the recreational subdivision industry. Thus, if subdivider land demand declines significantly over the long term, the effective supply of subdivided land is likely to undergo a secondary contraction in addition to the primary contraction caused by subdividers electing sale postponement or price inflation.⁶¹

4. *Builders*

The builder's large capital outlay for construction means that he is under more pressure than the subdivider to turn his investment around quickly. However, a large portion of the gain on a sale of

improved property, as opposed to subdivided property, may be allocable to the structure, which is exempt from gains taxation. For example, a builder who purchases a lot for \$10,000 might erect a structure for \$40,000 and sell both lot and structure within a year for a net return of \$60,000. Under the statute, the \$20,000 gain realized is allocable between the house and the land on the basis of fair market value. Even assuming that the land and the structure each capture gain in proportion to initial costs, most of the gain will still be allocable to the structure, and therefore exempt from the tax.⁶²

Additionally, if the land involved is residential and the seller has used or the purchaser intends to use the property for primary residential purposes, up to ten acres of that land may also be exempt from taxation. Consequently, builders are likely to fare much better than either subdividers or speculators under the land gains tax.

5. *User-Demand*

User-demand for land may be affected by prospective gains taxes. Such an effect is likely to be less significant than, for example, the effect on investors, since a user's demand for land is likely to be a reflection of his needs for potential income rather than the incremental costs of the land gains tax on any potential resale. Moreover, as indicated earlier, residential sales involving primary homesites will be completely exempt in many cases and partially exempt in others where large lots are involved.

What is the variation in the impact on various land market participants likely to mean in terms of land use in Vermont?

An answer to that question involves a look at the growth cycle.

III. THE LAND GAINS TAX AND THE GROWTH CYCLE OR TAXING TRANSFERS FACILITATING INCREASES IN LAND USE INTENSITY

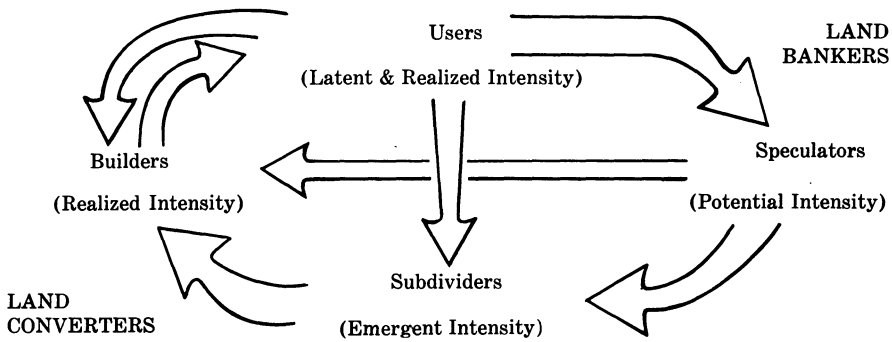
A parcel of buildable open space normally has two intensities of use—one actual and one possible, with the latter limited by natural conditions (such as slope), and private land use regulation (such as conservation easements). Land not so limited is likely to be affected by public control which can set a relatively low potential use intensity through such devices as large lot zoning. When the possible use becomes the actual use what had been merely a latent use intensity becomes realized.

These changes in land use intensity involve transfers either between several land market participants acting in different capacities or two participants acting in a variety of capacities. The transfers

involving these shifts in use intensity may be schematically described as indicated in figure 7, with land passing from a latent through a potential and emergent use until the use is realized through construction.

fig. 7

Cycle of Land Market
Transfers Affecting
Changes in Land Use Intensity



While a single parcel will rarely move from a latent to a realized intensity of use more than once (except where private or public redevelopment occurs), the process can be called a cycle because the user is both a supplier of buildable open land and purchaser of developed properties. (The use of the term "development" is avoided as much as possible in this discussion because of the risk of confusing preconstruction activity, such as subdivision, with new construction, which often occurs at a different point in time and by the efforts of a different land market participant.)

Users and Speculators are designated land bankers since owners acting in those capacities do not physically convert land from a lower to a higher intensity of use but provide sources from which subdividers and builders (land converters—effecting a physical or boundary change in the land they hold) might draw.

While each component in the land market is a potential transferor or transferee (the user-user house sale, the speculator-user farmland sale), only transfers resulting in an increment in land use intensity are illustrated. It should be noted that land does not have to pass through the entire cycle. Participants of the system can be bypassed (such as the builder who constructs a planned unit development on land purchased from a timber company),⁶³ or an owner can elect to act in multiple capacities without even transferring land at all (such as the farmer who builds a house for his daughter). Thus, each participant in the system is a potential transferor or "supplier" of land (*i.e.*, he holds land now which he may transfer) and a potential transferee (he does not hold land now but may do so in the future).

The activity of all participants taken together acting either as potential "suppliers" of land or potential "transferees" (*i.e.*, demanders of land) is another way of describing the land market.

How is the land gains tax likely to affect transfers by these participants? First, aside from the overall market effects discussed earlier, (*i.e.*, modulation of amount of land transferred and modulation of land prices), the gains tax may produce a reduction in the number of transfers "up" the growth cycle, especially where second homes are involved. If the land gains tax affects speculators and second-home subdividers significantly over the long run, the builder may find that he can purchase land directly from users with less competition from wholesalers and retailers (the speculator and the subdivider). Such a reduction could produce a significant opportunity to save transfer costs such as broker's commissions and attorney's fees which are often at least 10 percent of the value of each transfer. For example:

Case #1: A farmer with a ten year holding period sold his 200 acre farm in June, 1971 to Speculator for \$100,000. In July, 1973, Speculator sells to subdivider for \$200,000. Subdivider does \$50,000 worth of site preparation and sells to second home builder in August, 1974 for \$400,000. Builder does his construction work and sells off his project in September, 1975 for several million with \$500,000 allocable to the land. In each transfer, transfer costs (broker's commissions, etc.) are assumed to be 10 percent of the sale price. (Few land development projects are likely to be sold wholesale but the hypothetical is designed to illustrate the transfer effects.)

Case #2 is the same as Case #1 except that the farmer sells to builder in 1971 and builder spends \$50,000 on site preparation.

Case #3 is the same as Case #1 except that the farmer sells to builder in 1973 and builder does \$50,000 worth of site preparation.

These three situations are set out in tabular form in figure 8.

fig. 8

Case #1

<u>Year</u>	<u>Transfer</u>	<u>Sale Price</u>	<u>Site Preparation</u>	<u>Transfer Costs</u>	<u>Taxable Gain</u>	<u>Rate</u>	<u>Tax</u>
1971	Farmer-Investor	\$100,000	\$ 0	\$ 10,000	\$ 0	0	\$ 0
1973	Investor-Subdivider	200,000	0	20,000	80,000	20%	16,000
1974	Subdivider-Builder	400,000	50,000	40,000	110,000	25%	27,500
1975	Builder-User	500,000	0	50,000	50,000	25%	12,500
	Total			\$120,000	\$240,000		\$56,000

Case #2

1971	Farmer-Builder	\$100,000	\$ 0	\$10,000	0	0	0
1975	Builder-User	500,000	50,000	50,000	300,000	20%	60,000
	Total			\$60,000			

Case #3

1973	Farmer-Builder	\$200,000	\$ 0	\$20,000	0	0	0
1975	Builder-User	500,000	50,000	50,000	200,000	40%	80,000
	Total			\$70,000			

NOTE: If the growth cycle middlemen can be bypassed, the opportunity for profits at the end may increase, in large measure because the transfer costs of the intermediate sales can be minimized.

The table indicates how important transfer costs can be as a component of land prices. To the extent that the gains tax causes such transfer costs to be reduced, it may perform a considerable service.

The transfer costs thus saved can mean more profits for either the farmer-user or the builder (or both), assuming that demand for the builder's finished product is not likely to be significantly affected by the gains tax.

But such an analysis, while useful to indicate the importance of transfer costs in the land development process, assumes that the user-farmer can get at least the same amount for his land before the gains tax as after. Is this assumption accurate? If he loses some subdividers or speculators as part of his available market or others offer him lower prices because of the tax's deflationary effect (discussed above) will he be able to sell? If he must sell, will the sale be at a distress price? In other words, how necessary are the growth cycle intermediaries as a means of private price supports for the primary user?⁶⁴

The answer to that question depends on whether the effect of gains tax-induced inflation and withdrawal on other users causes the shift in the effective land supply to match or exceed any shift in land demand. The drop-out effect so postulated will probably not be as severe on the user-seller as one might expect because some user-sellers will elect either to inflate their price or withdraw from the market temporarily. Thus, while the aggregate demand for land may decrease through the loss of certain market participants, the aggregate effective supply will also have dropped, leaving the farmer who must sell in a more favored position than otherwise anticipated. Similarly, builders should not find their market severely curtailed, primarily because of the residential homesite exemption, and also because the land gains tax would constitute a relatively small part of their overall investments. Moreover, the transfer cost savings available to builders through growth cycle bypass may enable them to offer higher prices, leading to a lesser shift in land demand than might otherwise occur. Again, certainty will have to await empirical research, but at this point, it seems that the demand effects of the tax on primary users who wish to sell may not be as harsh as anticipated.

While earlier supply and demand analysis indicated that the land gains tax would produce an overall modulation in land prices, amplifying that analysis by looking at the growth cycle indicates that such a modulation may take place predominately at the expense of

the speculator and subdivider and not at the expense of the user or the builder. Thus the gains tax could have the unusual effect of making possible lower land prices for the ultimate users of improved land while increasing the bargaining room of those builders who purchase unsubdivided land, meaning high prices in some cases for user-sellers of unsubdivided land.

Aside from the considerable saving produced by eliminating the transfer costs of moving land "up" the growth cycle (which can distress only brokers or others who live off the land transfer process), the land gains tax may have an important environmental benefit in removing some subdividers from the land market.

To the extent that the gains tax reduces the relative amount of land moving into the hands of subdividers, the gains tax will have accomplished one of Governor Salmon's objectives and helped move Vermont land out of the "lot first" development pattern, which often results not only in an unsound land use plan for a subdivided parcel but also in a significant number of lots that are never used for construction but are no longer virgin open space.⁶⁵

It is important to note that even with the expanded homesite exemption enacted in 1974, the land gains tax will apply to precisely the large lot subdivisions that do not now come under the Act 250 process.⁶⁶ Hence the gains tax may be a complement to Act 250.

While the gains tax may not significantly affect the amount of construction in Vermont—indeed the structural exemption may stimulate some investors to move into structures if they withdraw from land—the six year holding period and the slow-down in second home subdivision are likely to afford greater opportunities for careful land-use planning, both for particular parcels and for the state itself.

Finally, the structural exemption, as well as the difficulty of making allocations of gain between new construction and land, is likely to permit and perhaps even encourage land owners to improve structures on their land without anxiety that portions of the increments in value will be captured by the state should a sale occur.

To summarize, the structure of the land gains tax implies that the tax will have a beneficial effect on the rate at which open land is converted from latent to realized intensities of use, with the most significant slowdown occurring at the level of emergent use intensities. The gains tax is also likely to permit more opportunities for users and builders to bypass investors and subdividers—the land market middlemen.

Together these projected effects indicate that some open Vermont

land which might be purchased by speculators or subdividers will remain in its current use. This can have important effects to the extent that such land is used for agricultural purposes.⁶⁷

Do the conclusions of the model bear any relation to what has actually happened in Vermont? Until some broad-ranging research can be undertaken, it is difficult to judge, but it may be useful to look at some indications provided by facts currently available.

Since 1968, Vermont has had a property transfer return which must be filed whenever a deed evidencing a transfer of title to real property is delivered to the town clerk for recording. The town clerk cannot record the deed unless it is accompanied by a completed return and the tax owed, if any. Except for certain exempt transfers, the amount due is .005 of the price paid for the property.⁶⁸

The following table indicates what these transfer tax returns reveal about Vermont real estate both before and after passage of the land gains tax.

Vermont Real Estate Sales
As Indicated by Vermont
Property Transfer Returns
(The Vermont Property Tax Return Statute
became effective January 1, 1968.)

Fiscal Year (July 1 - June 30)	Dollar Amount	Percent change in Dollar Amount	Number of transfers involving pay- ment of trans- fer tax**
1968-69	\$230,638,000	Not Available	Not Available
1969-70	\$206,431,000	-10%	Not Available
1960-71	\$226,992,000	+10%	16,630
1971-72	\$332,312,000	+46%	21,032
1972-73	\$405,879,000	+22%	21,550
1973-74*	\$323,550,000	-20%	16,130

(*The land gains tax became effective on May 1, 1973.

**Because of a number of exemptions, in some cases no transfer tax may be due even though a return is filed. The Vermont Department of Taxes presently has figures for only those returns reflecting a transfer tax payment.)⁶⁹

As indicated by the model, the number of transfers declined after passage of the land gains tax. But is this properly attributable to the land gains tax or to other causes? 1973-74 marked a severe credit

crunch involving both high interest rates and tight money. Consequently, while the figures could be taken to confirm the economic analysis, judgment should be withheld until more sophisticated field information can be collected and analyzed.

In addition, the land gains tax has not resulted in the amount of revenue originally anticipated, producing \$1,288,520 in tax liability for fiscal year 1973-74.⁷⁰ But again, without more data it may be a mistake to ascribe the shortfall to the transfer-reducing and price-modulating effects of the gains tax predicted by the model.

Having looked at the land gains tax in terms of the land market and its land use consequences, we turn to innovations in other jurisdictions.

IV. LAND VALUE INCREMENT TAXATION

The Vermont land gains tax is not an entirely new idea,⁷¹ but merely the first domestic appearance of a special tax on land value increments. A tax almost identical to the 1973 Vermont version was narrowly defeated in Montana in 1974.⁷² Another version, known as a Land Sales Excise Tax, was proposed in Washington in 1975. This tax involves a rate unaffected by profitability of the sale, beginning with a rate of fifty percent for transfers with a holding period of less than a year. Also, while the Vermont land gains tax provided a "straight-line" rate drop as the Seller's holding period increased (with no tax due after the sixth year), the Washington tax rate declines slowly, not reaching 25% until the fourth year of the holding period has passed. The severity is offset by providing a one percent increment in basis for each month of the seller's holding period. Another feature of the bill is an agricultural exemption for sales of land that have been actively farmed.⁷³

Outside the United States, land value increment taxation has recently appeared in three British Commonwealth jurisdictions.⁷⁴ In Ontario, Canada, the tax has taken the form of a 1974 "Land Speculation Tax" on 50% of the gain derived from nonexempt "dispositions" of land, essentially transfers by nonresidential sellers who fail to significantly improve the land they sell. The aim was to take the steam out of Ontario land price escalation.⁷⁵

In New Zealand, the concept of land value increment taxation takes the form of the Property Speculation Tax. Here, unlike Vermont, gain on structures is also taxed—beginning at a 90% rate for dispositions within six months of acquisition and declining to 60% for disposition within two years, with dispositions thereafter exempt.⁷⁶

Finally, the British have recently begun to tax gains derived from the disposal of certain land and buildings at ordinary income rather than capital gains rates.⁷⁷

V. THE IMPLICATION OF STATE LAND VALUE INCREMENT TAXATION

Some of the important issues raised by devices such as the Vermont Land Gains Tax were discussed in the challenge to the tax in the Vermont Supreme Court. As noted above, the Vermont Supreme Court upheld the tax against its challenge by Vermont land developers.⁷⁸ Much of the court's opinion, specifically the challengers' primary claim of denial of equal protection of the laws, has already been discussed elsewhere and will not be duplicated here.⁷⁹ Several key issues, however, remain to be analyzed.

A. *The Exclusionary Issue*

One of these issues was the alleged "exclusionary" effects of the land gains tax, which the Andrews court framed as follows:

. . . since nonresidents receive no benefits from the property tax relief provisions of the statute, they are deterred from purchasing land subject to the gains tax; thus, the sellers' market available to such nonresident purchasers is limited unless they are willing to pay the tax, and the available buyers' market of prospective transferors whose land is subject to the tax is also limited.⁸⁰

The court disposed of this argument by noting that the appellant "has failed to introduce any evidence to establish that such discrimination in fact occurs, and so has failed to meet his burden as to these allegations."⁸¹ But even if the appellants had produced the needed evidence, they appeared to be confusing the property tax relief provisions of Act 81 with the land gains tax. Certainly it is difficult to conceive that individuals affluent enough to afford a second home in Vermont would be significantly deterred from purchasing such a home because they would not qualify for property tax relief, especially since their household incomes are likely to exceed the tax relief threshold anyway.

If appellants meant to argue that the primary residence homesite exemption provided in the land gains tax deters out-of-state purchasers, the argument seems unpersuasive. This exemption, if it provides an incentive at all, induces such a purchaser to become a Vermont domiciliary, not remain a nonresident. Moreover, it is worth noting that second-home development, at least in neighboring New Hampshire, will apparently receive less judicial protection

from exclusionary land use controls than that afforded primary home development.⁸² Finally, appellants argued (though it is not reflected in the Supreme Court opinion) that the gains tax was designed to deter out-of-state speculators.⁸³ Appellees replied that all speculators were deterred regardless of residence,⁸⁴ and thus partially echo the land market analysis made earlier in this article.

B. The Taking Issue

A second important aspect involves the "taking" issue. The plaintiffs in their original bill of complaint alleged that the land gains tax violated the Fifth Amendment's prohibition against taking private property for public use without just compensation. However, they did not elaborate in their bill on the nature of the interference with this constitutional provision.⁸⁵ In their later briefs, appellants abandoned the taking issue altogether (except in the guise of a double taxation argument) and the court did not take it up itself.⁸⁶ Nonetheless, because it raises questions about the ownership of appreciation in land values, the issue is worth exploring further.

The invalidation of a tax as an unconstitutional taking is an extremely rare event. So far such invalidation has apparently been undertaken on three rationales: just compensation, government competition and tax-shifting.

1. The Just Compensation Rationale

The just compensation argument has emerged in two areas—the incorporation of a taxing district and the special assessment. As an example of the first, the territorial legislature of Utah, by special act, included within the corporate limits of the town of Moroui City some 16,000 acres of land, including 160 acres owned by one Daniels. Daniels refused to list his farm for tax assessment. He defended against his conviction for violating the listing law on the ground that his property was located far beyond the circle of city improvements and beyond the range of city police. The Supreme Court of Utah reversed his conviction, holding that the tax constituted a taking of his property for which he received no compensation in services.⁸⁷ The court construed the Fifth Amendment bar against the taking of private property "for public use without just compensation" broadly:

The government may appropriate the property of the individual when necessary in one of three ways: First, by taking in the mode prescribed after paying the owner for it; second, by estimating the benefits to the

owner's property from the improvements to be made, and taking the amount estimated in money; third, by taking the property in the form of money by the methods of taxation for which the benefits of protection and other advantages are furnished by the government. The same principle underlies all these methods. When the property is taken under the right of eminent domain, the public pays the owner in money; when money is exacted by means of a special assessment, the owners are compensated in special benefits to their property by public improvements made in its expenditure; and when money is exacted by a general tax, the payer is compensated in the benefits received from the government in any and all of the ways that a government may benefit society. Thus the individual is compensated for the property he parts with, whether it consists of lands or money or other property.⁸⁸

The *Daniels* case, however, apparently represents a minority view.⁸⁹

The other category of cases, in which the just compensation argument has been more successfully invoked, involves special assessments where the assessment made allegedly exceeded or was disproportionate to the benefit received. The most well-known of these is *Norwood v. Baker*,⁹⁰ in which the village of Norwood, Ohio assessed upon land abutting each side of a new street an amount covering "not simply a sum equal to that paid for the land taken for the street, but in addition, the cost and expenses connected with the condemnation proceedings." In invalidating the excess assessment, the Supreme Court of the United States reasoned:

In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess*, a taking, under the guise of taxation, of private property for public use without compensation. We say "substantial excess," because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.⁹¹

2. *The Government Competition Rationale*

A second theory for invalidating a tax is that a "taking" has occurred when the government uses its powers of taxation in a punitive way to benefit its dominantly proprietary activities. The only apparent case in which this theory has been advanced is *Alco Parking Corp. v. City of Pittsburgh*.⁹² In that case, the Pennsylvania Supreme Court struck down a 20 percent gross receipts tax on all commercial parking garages in Pittsburgh on the ground that the

tax, which combined high rates with direct governmental competition in the form of a public parking authority charging lower rates, was confiscatory. The court noted that two prior challenges to parking lot gross receipts taxes⁹³ had been turned aside because the aggrieved taxpayers had failed to produce sufficient evidence establishing two "essential elements" before a tax can be held to be confiscatory:

First the taxpayer must show that more than "an occasional operator cannot afford to continue in business". . . Secondly, he must show that the tax cannot be passed on to the consumer.⁹⁴

In the *Alco* case itself, the court determined that while the appellants had shown on the record that more than an occasional operator could not afford to continue in business, that alone was insufficient to overturn the tax. But the fact of direct public competition proved that the tax could not be passed on to parking lot customers, since such competition made a rate increase virtually impossible. The court relied on the theory, advanced by Professor Sax, that when the government acts as an appropriator for its own use a "taking" has occurred.⁹⁵

In July, 1974, the Supreme Court of the United States decided its first tax/taking case in many years and overruled the Pennsylvania Supreme Court's decision in *Alco*.⁹⁶

The Court noted that neither the parties nor the Pennsylvania court differed with the principle that a tax could not be overturned on due process grounds even where it is so excessive as to bring about the destruction of a particular business, following their earlier holding in *Magnano Co. v. Hamilton*.⁹⁷ The decision, however, turned on whether the *Alco* situation involved one of those "rare and special instances"⁹⁸ where the taxing statute is

so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as for example, the confiscation of property.⁹⁹

The Court did not agree that government competition was enough to invalidate the tax, citing *Puget Sound Co. v. Seattle*,¹⁰⁰ a 1934 case upholding a city gross receipts tax imposed on a power and light company at the same time the city was actively competing with the company in furnishing power.¹⁰¹

The Court did not completely eliminate government competition as a rationale for invalidating a tax on "taking" grounds,¹⁰² but it did not further define what the "rare and special instances" might be.

3. *The Tax-Shifting Rationale*

A third theory for invalidating a tax is that the tax drives out the affected business because the tax cannot be shifted to the consumer. Neither the just compensation nor the governmental competition ground would be easily available to challengers to the Vermont land gains tax. Note, however, that before adopting the competition rationale, the Pennsylvania court indicated that for a tax to be held confiscatory, the taxpayer must demonstrate both that more than an occasional operator cannot afford to continue in business and that the tax cannot be passed on to the consumer.¹⁰³

The court was speaking in the context of a gross receipts tax on parking garages. Nevertheless, could the *Andrews* plaintiffs have claimed successfully by way of analogy that more than an occasional land speculator or subdivider could not afford to continue in business and could not pass the tax on to the consumer?

The holding costs for undeveloped land¹⁰⁴ plus the burden of the gains tax might satisfy the first test because some land market participants could no longer afford to stay in business. The second test might be satisfied if competition from long-term holders of similar parcels and a gains-tax induced drop in land demand meant the tax could not be shifted forward. Even so, the twin *Alco* tests would still meet the Supreme Court's view that a tax could legitimately destroy a business. In *Magnano* itself, a tax on butter substitutes would have met the same tests. Consequently, *Magnano* would be controlling if a Fifth Amendment challenge were made on the twin *Alco* tests.¹⁰⁵ Moreover, it is hard to conceive that a "taking" occurs in the land gains tax case when the "taking" is at least avoidable by waiting out the holding period.

C. *The Regulation Issue*

Finally, could the *Andrews* plaintiffs have been more successful if they had sought to establish (1) that the tax was merely regulation in the guise of a tax and (2) as a *regulation*, if not as a tax, the land gains tax constituted an unlawful "taking"? The *Andrews* court never decided that issue because plaintiffs did not raise it.

While the *Andrews* plaintiffs spent a great deal of time and effort trying to persuade the trial court of the tax's effect on land development in the state,¹⁰⁶ they also attacked the validity of the tax on the ground of improper enactment. Having thus framed the issue around the constitutionality of a revenue-producing tax with ancillary regulatory objectives, rather than vice-versa, they made it easier for the Vermont Supreme Court to follow *Magnano* and uphold

the legitimacy of land use regulation through taxation, even though the court implied that it might not have sustained the tax as bare regulation.¹⁰⁷

D. Land Gains Taxation, Transferable Development Rights and the Landowner's Entitlement to Land Value Appreciation

Even if the land gains tax might have withstood a "taking" challenge, the issue raises interesting questions about the rightful ownership of appreciation in land value. If that appreciation is not "property," then no taking has occurred. In this regard, a number of commentators have noted a trend toward a view of land as a resource rather than a commodity.¹⁰⁸ The recent proliferation of environmentally-based controls imposed at even the federal level¹⁰⁹ has prompted warnings of a backlash from aggrieved landowners who find the rewards going to a favored and diminishing few who can jump the increasing number of barrels on the land development ice.¹¹⁰

In order to deal with this problem commentators have been focusing on the idea of transferable development rights as a means of preserving urban landmarks,¹¹¹ open space and farmland,¹¹² environmentally fragile areas,¹¹³ or as a means of dealing with the equal protection aspects of the taking issue generally.¹¹⁴

Transferable development rights proposals generally involve either government acquisition in districts where development is undesired followed by resale to developers in transfer districts or government restriction in preservation districts, followed by free market transfer of the restricted right to owners in transfer districts. An extended discussion of the merits and demerits of transferable development rights is beyond the scope of this article.¹¹⁵ In short, however, the scheme is predicated on the assumption that the owner of land is entitled to profit from it, or as Professor Carmichael has put it:

Development and redevelopment will doubtless continue to be a strongly protected incident of land ownership. This incident is certainly a principal basis of expectations within our system of private ownership rights, and its destruction would not be tolerated.¹¹⁶

It seems likely that the widespread adoption of some form of TDR scheme would fulfill his prophecy since even landowners barred from developing their land by sound environmental or other regulation would still profit by its nondevelopment.

If land is going to be viewed as something precious in which future

generations have a legitimate interest which should be protected, it may be premature to enshrine the current owner's development expectancy into alienable and publicly protected "rights." A counter-current is at work, fueled by the widening understanding of ecological principles,¹¹⁷ promoted by social theorists,¹¹⁸ given respectability by commentators,¹¹⁹ and supported by court decisions such as the famous case of *Just v. Marinette County*.¹²⁰ In the *Just* case, the court redefined the owner's property entitlement, in the context of a county ordinance barring lakeshore land filling without a permit, to land in its "natural state."¹²¹

In the view of the counter-current, changes in land use intensity are presumptively "ameliorative waste"¹²² of the interests of later generations rather than "development" or "improvements."¹²³

Pending a resolution of this fundamental question of the owner's entitlement to profit from changes in the intensity of the use of his land, it is useful to ponder the Vermont land gains tax. Rather than choosing one school of thought over the other, the land gains tax implies a concern for the legitimate land use interests of future generations and also a recognition that land in Vermont still is very much a commodity. It consequently taxes only some appreciation in land value, then only as realized, and even then only that appreciation that seems "unearned." Until the "new property" emerges, the tax may be a useful intermediate step.¹²⁴

Finally, the land gains tax helps to focus on how taxation relates to the other two principal tools of land use control—condemnation and regulation.

When eminent domain is involved, the government compensates the affected landowner. When regulation occurs, neither pays (directly). But when taxation occurs, the affected landowner pays the government. As noted above, however, the courts defer to governmental exercise of the taxing power as long as equal protection issues are met and "confiscation," as yet relatively undefined, has not occurred. Thus until more guidance is forthcoming from courts or commentators, governments who want land use controls that help pay their way are likely to look at taxation in general and the Vermont Land Gains Tax in particular.

CONCLUSION

The Vermont land gains tax is an unproven but promising innovation in the arsenal of land use controls. It intervenes in the land market—a market that may have had more influence on land uses than many realize. Unlike most conventional land use controls and

property tax exemptions, the land gains tax affects both land demand¹²⁵ and land supply—not just supply alone. The exemption structure of the tax targets it effects most heavily on the speculator and the subdivider, the middlemen in the growth cycle, improving chances for profit and planning for land users and builders. The tax raises questions as to who owns the appreciation in land value and as to the nature of entitlements to make changes in land use intensities. Furthermore, it leads to renewed examination of taxation as a device for land use control. Finally, it may lead land use planners and tax collectors for a jurisdiction to begin to think of ways that they can work toward similar, rather than separate and often conflicting, goals.



FOOTNOTES

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¹ See URBAN LAND USE POLICY, 207-276 (Andrews ed. 1972); De-logu, *The Taxing Power as a Land Use Control Device*, 45 DEN. L. J. 279 (1968); Gurko, *Federal Income Taxes and Urban Sprawl*, 48 DEN. L. J. 329 (1972); Zimmerman, *Tax Planning for Land Use Control*, 5 URBAN LAWYER 639 (1973).

Aside from governmental use of the taxing power, conservationists (aided by tax counsel) can use it to preserve open space and valuable land for future generations. For a series of case studies of three such efforts, see BERGIN, PARTIAL DEVELOPMENT FINANCES OPEN SPACE PRESERVATION IN LINCOLN, MASSACHUSETTS; CHERINGTON, BARGAIN PURCHASE OF LAND BY AN EXEMPT ORGANIZATION: A VERMONT CASE STUDY; EMORY, CONSERVATION EASEMENTS PRESERVE AN ISLAND ON THE MAINE COAST; all 1974 Case Studies in Land Conservation edited by Kingsbury Browne, Esq. of Boston available from the New England Natural Resources Center, Boston, Massachusetts.

² For other commentary on the Vermont land gains tax, see Rose, *From the Legislatures: Vermont Using the Taxing Power to Control Land Use*, 2 REAL ESTATE LAW JOURNAL 602 (1973); Note, *State Taxation—Use of Taxing Power to Achieve Environmental Goals: Vermont Taxes Gains Realized from the Sale or Exchange of Land Held Less than Six Years*, — Vt. Stat. Ann., tit. 32, §§ 10001-10 (1973), 49 WASH. L. REV. 1159 (1974); for a discussion of other existing or proposed land value increment taxes, see notes 72-77, *infra*.

³ See 10 V.S.A. § 6001 et seq. (1974).

The permit process and land use plan have been discussed in detail elsewhere. See F. BOSSELMAN AND D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL*, 54-108 (1971); MYERS, *SO GOES VERMONT* (Conservation Foundation, 1974); Levy, *Vermont's New Approach to Land Development*; 59 A.B.A.J. 1158 (1973); Walter, *The Law of the Land: Development Regulation in Maine and Vermont* 23 ME. L. REV. 315 (1971).

Briefly stated, Act 250 provided that:

No person shall sell or offer for sale any interest in any subdivision . . . or commence construction on a subdivision or development, or commence development without a permit. 10 V.S.A. § 6081(a)(1969).

The state was divided into nine regions, each with a specifically appointed district commission which was to hear application for development permits and evaluate them on a variety of criteria, including environmental and aesthetic considerations, impact on local public facilities, and conformity to local and land use plans. 10 V.S.A. § 6086 (1974). While "development" was defined to include both construction of improvements for commercial and industrial purposes on parcels of more than 10 acres in size, (or one acre if within a municipality lacking permanent subdivision and zoning controls), and housing projects (such as condominiums) of more than 10 units, subdivisions did not come within the Act 250 process unless 10 or more lots of less than 10 acres were involved. 10 V.S.A. §§ 6001(3), (11) and (19) (1973). Thus, as has been pointed out, a 45 acre tract could be divided into nine 5 acre lots or four 11.25 acre parcels, and still be exempt. Walter, *supra* note 3, at 322. See also, Vermont State Planning Office, *A Progress Report on Vermont's Land Use Plan* (Feb. 1974).

⁴ Myers, *supra* note 3 at 34.

⁵ Act 81 of the 1973 Vermont laws, amending 32 V.S.A. §§ 5951, 5960(e), 5967-68, 5973; adding 32 V.S.A. §§ 5976-77 and 32 V.S.A. §§ 10001-10010; repealing 32 V.S.A., § 5966. Act 81 also set aside the first \$500,000 collected each fiscal year under the gains tax for property mapping. Act 81 (1973). 32 V.S.A. § 3409 (1967) required the state to undertake property mapping, but funding had apparently not been available until Act 81. Conversation with Vermont Tax Commissioner Robert Lathrop on September 12, 1974. Commissioner Lathrop considers the property mapping program funding by the land gains tax to be one of the key benefits of the tax. When the process, (involving orthophoto base maps achieved in part through high resolution aerial photography) is complete, the state will have a base map which will be invaluable not only for property tax but also for land planning purposes.

⁶ The rebate claimant must be a Vermont domiciliary and not a full time student claimed as a dependent by another taxpayer for federal income tax purposes.

A household income (defined more broadly than federal taxable income) of \$4,000 or less qualifies for a rebate if the tax or rent portion paid exceeds 4 percent. This income percentage increases gradually to a ceiling of six percent for incomes over \$16,000. For example: A Vermont citizen is 70 years old and has a household income, including social security, of \$3,500. She pays \$1,200 a year in rent. Her "tax" is 20 percent of her rent or \$240. Four percent of her income is \$140. She qualifies for a rebate of \$100. Claimants 65 and over have first claim on the property tax relief fund. 32 V.S.A. § 5976-7 (1973).

If Vermont household incomes correspond to the northeast region of the United States, the tax relief program is likely to primarily benefit households with incomes below \$10,000. A table prepared for the Advisory Commission on Intergovernmental Relations indicates that 1970 real estate taxes on owner-occupied family homes in the northeast region constituted an average of 5.3 percent of family incomes of between \$10,000 and \$15,000 and up. Shannon, *The Property Tax: Reform or Relief*, in PROPERTY TAX REFORM 27 (G. Peterson ed. 1973).

⁷ Record at 33, *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974).

⁸ *House Committee Hearing*, January 16, 1973 (remarks of Tax Commissioner Robert Lathrop), *Id.* Record at 27.

⁹ *House Committee Hearing*, February 22, 1973 (remarks of Norris Hoyt, the Governor's Special Counsel and one of the principal draftsmen of the land gains tax). *Id.* Record at 24.

¹⁰ *House Committee Hearing*, February 22, 1973 (remarks of Jonathan Brownell). *Id.* Record at 28.

¹¹ 32 V.S.A. §§ 10001-10010 (1973).

¹² 32 V.S.A. § 10003 (1973).

¹³ 32 V.S.A. § 10002 (1973). The cost of improvements to the land, such as roads, sidewalks, sewer and water systems, increase basis. Vermont Land Gains Tax Reg. No. § 1.10005(a)-1.

¹⁴ 32 V.S.A. §§ 10004(a), 10005(c) (1973).

¹⁵ 32 V.S.A. § 10005(a), (e) (1973).

¹⁶ 32 V.S.A. § 10005(b) (1973). The Vermont Land Gains Tax Regulations provide no additional guide as to how this allocation is to be made.

¹⁷ 32 V.S.A. § 10006 (1973).

¹⁸ 32 V.S.A. § 10007 (1973). The statute provides that the trans-

feror may pay any tax due in advance or if no tax is due, obtain a ruling to that effect in advance from the Commissioner. Upon receipt of certification to either payment or no tax due from the Commissioner, the buyer is relieved from his withholding obligation. 32 V.S.A. § 10007(c).

¹⁹ 32 V.S.A. § 10007(d), (e) (1973).

²⁰ 32 V.S.A. § 10010(b) (1973).

²¹ Record at 2-9, *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974).

Plaintiffs' bill made two principal allegations: (1) as a revenue bill, the gains tax was improperly enacted because it failed to originate in the Vermont House of Representatives as required by Chapter 2, section 6 of the Vermont Constitution; and (2) the gains tax rate schedule and exemptions made the tax unconstitutionally discriminatory under the equal protection provisions of the Vermont and U.S. Constitutions.

²² *Id.* Record at 7. Plaintiffs did not elaborate as to how a land development aim or result rose to the level of a constitutional defect except in the argument on appeal that anti-development impact lacked an alleged constitutionally requisite nexus to property tax relief.

²³ *Id.* Record at 26. At the same time, plaintiffs, in an effort to strengthen their claim of constitutional invalidity because of defective enactment, made a request to the court that it find that a primary purpose of the act was to raise revenue.

²⁴ *Id.* Record at 35.

²⁵ *Id.*

²⁶ *Id.* Record at 40-42.

²⁷ *Id.* Record at 41-42.

²⁸ *Id.* Record at 44.

²⁹ *Id.*

³⁰ *Id.* Record at 45.

³¹ *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974).

³² *Id.* at 863. While the court agreed with the trial judge that statements of individual legislators and others as to the purpose of the land gains tax was of "doubtful relevance to the present inquiry," its own analysis of the structure of the tax indicated a legislative aim to discourage the rapid turnover of land at high profits. Thus the court seemed to have agreed with appellants' claim of an anti-speculation statutory purpose without accepting the evidence introduced at trial to substantiate it.

³³ *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974). For discussion of Act 250, see *supra* note 3.

While the developers lost in court, they won a small victory in the 1974 session in the Vermont legislature. By legislation effective July 1, 1974, section 10002 of chapter 236 was amended by providing that the residential exemption was raised to a maximum of five acres. Moreover, that exemption was extended not only to individuals already owning a primary residence in Vermont at the time of sale, but also to purchasers who intended the subject dwelling to become their principal residence. To qualify for that exemption, the purchaser must execute a form supplied by the Commissioner of Taxes certifying that he is domiciled in Vermont or the property will be used as his principal residence and that he understands that as a Vermont domiciliary, all of his income is subject to Vermont income tax laws.

The burden on subdividers was also alleviated somewhat. The amendment provided that where there is no existing dwelling completed and fit for occupancy as the purchaser's principal residence at the time of transfer of title, the purchaser can certify that construction on the dwelling will commence within a year of the date of transfer of title and will complete it and occupy it within two years of transfer. The deed or other transfer instruments must also state the amount of tax which the transferor had been relieved of by virtue of the purchaser's certification, and if any of the certifications turn out to be untrue, the Commissioner can collect from the buyer the tax upon profit allocable to the wrongly excluded land. Finally, if local zoning ordinances require minimum lot sizes of larger than five acres up to ten acres of such minimum lot sizes may be excluded for purposes of residential exemptions. 32 V.S.A. § 10002 (1974) amending 32 V.S.A. § 10002 (1973).

To minimize collection problems caused by the change in the law, the Vermont Department of Taxes has attempted to use lenders to help in enforcing compliance. The Department has taken the position that normally a state lien for the tax will not arise on the land conveyed until the state gives appropriate notice to the buyer and seller and makes a filing in the town land records. Vermont Land Gains Tax Reg. No. 1.10007-3(a). Such a provision eases the difficulty of satisfying purchaser's lenders that no liens exist on property conveyed at the time of conveyance. But in the case of a sale of raw land to a purchaser who alleges an intent to construct his principal residence on the land, the Department Regulations state that the lien against the buyer will arise by operation of law, and the instrument of transfer must state that the amount of the tax of which the seller has been relieved is a "lien running on the land . . . until the

tax has been paid or the purchaser has filed a statement with the Department . . . that the dwelling has been constructed and occupied with the conditions previously certified." Vermont Land Gains Tax Reg. No. 1.10007-3(b); 1.10005(c)-7(a).

The legislature also amended the law to ease the burden on the surviving joint owner of property. 32 V.S.A. § 10005(d) (1974) amending 32 V.S.A. § 10005(d) (1973).

³⁴ More empirical research into the actual effects of land use controls has been urged. See d'Arge, *Economic Policies, Environmental Problems, and Land Use*, in ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING (McAllister ed. 1973).

³⁵ Two recent readable and angry books on this subject, especially the process of subdivision without construction, are A. WOLFF, UNREAL ESTATE (Sierra Club, 1973) and L. DOWNE, MORTGAGE ON AMERICA (1974).

³⁶ See M. CLAWSON, NEGOTIATION AND LAND CONVERSION (Resources for the Future, 1970).

³⁷ In the Vermont context, the property tax relief provisions partially funded by the land gains tax were in part aimed at the property tax increases brought on by increased valuations of parcels that weren't sold, but were comparable to those that were. Professor Donald Hagman of the University of California, Los Angeles, refers to this phenomenon as floating value—where the scarcity of parcels for sale means that those that do sell go for high prices, leading tax assessors to assume erroneously that comparable unsold parcels would bring the same or similar returns when in fact a large offering would depress the market. See SUMMARY OF PROCEEDINGS OF A CALIFORNIA TOMORROW LEGAL SEMINAR ON THE USE AND REGULATION OF LAND, PRIVATE PROPERTY AND THE PUBLIC INTEREST, 9 (1974).

³⁸ The author hopes that readers would respond by indicating whether the following analysis is corroborated by their own experience in Vermont or elsewhere, since this discussion is designed to undertake rather than conclude a study of land market interventions such as the Vermont tax. In short, the following analysis is not designed to be a definitive solution but only the beginning of an excursion into understanding.

³⁹ See Corty, *The Land Market and Transfer Process*, in RURAL LAND TENURE IN THE UNITED STATES 195 (A. Bertrand and F. L. Corty, eds. 1962).

⁴⁰ When an individual land owner's response to a particular offering price is plotted on the graph, the average of those responses can

be plotted as a rough curve commonly known as a supply curve. It is important to note that a variety of factors will affect the shape of the curve including holding costs, market expectations, and regulatory land use controls.

⁴¹ Land demand may be a function of population growth and migration, economic growth, costs of borrowing, transportation problems such as no gasoline, market expectations and the availability of attractive alternative investment. *See generally*, Corty, *supra* note 3 at 195.

⁴² For purposes of illustration assume the transaction costs involved are insignificant, although later in this discussion that assumption is challenged.

Some economists may argue that a land market is a fiction since nonfungible commodities are involved and the choice of alternatives is usually made within a localized context. Nevertheless, this article sets forth a supply and demand analysis since such an analysis would apply even in localized markets and is also useful in itself to illustrate the inflation-withdrawal responses discussed below.

⁴³ *See text at notes 12-16.*

⁴⁴ The land gains tax paid is apparently treated by the Internal Revenue Service as a selling expense resulting in a decrease in the net gain taxable for federal income tax purposes. Thus changes in the supply schedule may be less severe because the land gains tax has partially replaced what might otherwise be taxable gain or income for federal income tax purposes.

The Vermont Department of Taxation has obtained an Internal Revenue Service private ruling on the treatment of the land gains tax. Conversation with Vermont Tax Commissioner Robert Lathrop in early fall of 1974. *See also* Vermont Land Gains Tax Reg. No. 1.10001-2 which provides

The Land Gains Tax itself is a transfer tax for the purpose of the Federal Income Tax and is therefore a selling expense. Thus, in determining Federal Income Tax the Land Gains Tax will be a deduction against ordinary income or will reduce amount realized depending on whether the seller is in the business of selling land, an investor in land or whether he is in some other category. However, in determining the amount of gain for the purpose of the Land Gains Tax, this tax itself cannot reduce the amount realized.

⁴⁵ Studies of investor responses to capital gains tax rate differences provided by transfer postponement are few, but the studies that have been done indicate that investors responding to favorable treatment of long term gain under the Internal Revenue Code elect to postpone transfers in order to take advantage of tax rate differen-

tials. It is uncertain whether the conclusion of these studies would apply to the land gains tax experience since they were based on large marginal tax rate differences between short and long term gain realizations—11.5% to 65.7% depending upon the adjusted gross income of the taxpayer involved. See Hinrichs, *An Empirical Measure of Investors' Responsiveness to Differentials in Capital Gains Tax Rates Among Income Groups*, 16 NATIONAL TAX JOURNAL 224 (1963); Fredland, Gray, and Sunley, Jr., *The Six Month Holding Period for Capital Gains: An Empirical Analysis of Its Effect on the Timing of Gains*, 21 NATIONAL TAX JOURNAL 467 (1968).

By contrast, the yearly incremental exemption provided by the Vermont land gains tax is small (5 to 10 percent without considering the modulating effect of federal income taxation) though the advantage of full term postponement from the first to the sixth year can mean savings for the seller of up to 60% of the gain realized.

⁴⁶ The unavailability under the land gains tax of an offset for losses realized on sales of other parcels in Vermont makes it unlikely that the supply schedules before and after the land gains tax would cross at the price at which capital gains just balance capital losses on land transfers. See Somers, *An Economic Analysis of the Capital Gains Tax*, 1 NATIONAL TAX JOURNAL 226, 229 (1948); Gemmill, *The Effect of the Capital Gains Tax on Asset Prices*, 9 NATIONAL TAX JOURNAL 289 (1956); Holt, *A Note on R. F. Gemmill's Article, "The Effect of the Capital Gains Tax on Asset Prices"*, 10 NATIONAL TAX JOURNAL 186 (1957).

Both Somers and Gemmill made their analyses on the assumption that the capital gains tax on income applied at a uniform rate rather than on a variable rate based on the length of time the asset was held. This led to their analyses imputing only an inflationary effect, rather than a withdrawal effect, on capital asset supply. Such an "inflationary" analysis is inadequate for the Vermont context.

Gemmill argues that Somer's assumption that investors will automatically increase the asking price of property sold to cover the average net capital tax liability is erroneous when applied to the investor interested in capital gains as opposed to income. If his analysis is correct, inflation may be only a partial response to contemplated land gains tax liability. See Gemmill, *supra*, at 292-95.

Participants in the land market act with differing degrees of sophistication. While some institutional market participants or sophisticated individuals may in time devise ways of avoiding the tax completely, many transferors and transferees will elect to avoid the tax, if at all, by taking advantage of the progressive exemption for

a long-term holding or by electing an alternative investment. The contraction in "supply" may be augmented by the tax relief program's removal of some of the burden on low-income land owners who might be forced to sell land to pay real property taxes.

⁴⁷ The withdrawal effect for prospective land market participants is likely to be accentuated by the unavailability of any offset for losses realized from sales of Vermont land under the land gains tax.

⁴⁸ Part of this demand analysis assumes that a number of participants will be affected by the gains tax on resale, despite the modulating effect of federal income taxation. See *supra* note 44.

⁴⁹ The president of one land investment concern has indicated these responses—withdrawal, inflation, deflation—to be strategies he has observed in Vermont since the tax became effective. Conversation with Dick Perkins of Landvest, Inc., on September 26, 1974.

⁵⁰ This effect illustrates the "hidden" taxation effects that may be involved in market intervention devices such as the land gains tax. The tax that produces price declines takes money from a prospective seller as effectively as one which separates him from the profits of his sale more directly through collection of a tax such as the Vermont land gains tax. However, the gains tax may merely accelerate or dampen price shifts produced primarily by other causes rather than altering existing price trends completely.

⁵¹ The amount of land transferred may be determined more strongly by other causes with the gains tax only modulating such stronger market forces.

⁵² At some point it might be useful to construct a more sophisticated model of the land market which could take advantage of some of the recent advances in systems analysis. But until data is gathered and a suitable analysis made, perhaps with some computer assistance, lawyers interested in this field will have to rely on the more classical static models. See also *supra* note 42.

⁵³ See text accompanying note 33.

⁵⁴ See Myers, *supra* note 3.

⁵⁵ See text accompanying notes 26 and 33.

⁵⁶ Outside of second home industry, the Vermont pattern for residential construction is that a builder buys a subdivided lot, constructs a house with bank financing, and sells the package to a prospective homeowner. Conversation with Vermont Planning Director Arthur Risteau, September 12, 1974. The few residential lot owners who arrange their own construction would also be classified as builders even though they do not undertake construction with the anticipation of immediate resale. Also, owners of land which is to

be developed into office buildings, apartments, shopping centers, etc. would also be classified as builders even though the practice is often for a general contractor to undertake construction. Thus, builders are distinguished from other market participants by the effect of their decisions in placing structures on the land.

⁵⁷ The effects of "taxation" here would include both the tax paid directly to the state and the indirect tax paid from any price increment abatement induced by the gains tax effect on land demand. *See supra* note 50.

⁵⁸ *See supra* note 33.

⁵⁹ Many recreational lots are not built upon immediately, but are acquired more for investment purposes than for construction. *See* text accompanying note 65, *infra*. This effect may in part be derived from the merchandising efforts of land subdivision companies. *See* Wolff, *supra* note 35.

⁶⁰ *See supra* note 59.

⁶¹ Because of the 1974 amendment, the impact on subdividers who sell lots for primary residences will be less severe than on those who sell recreational homesites. *See supra* note 33.

⁶² The allocation problem is one of the thorniest issues confronting the Vermont Department of Taxation and the regulations promulgated by the Department are not much clearer than the statute, providing only that gain realized between land and structures must be made on the basis of fair market value. *See* Vermont Land Gains Tax Reg. No. 1.10005(b)-3.

⁶³ The effect of the land gains tax on such participant bypass is explored below.

⁶⁴ The argument has been raised that speculators are a proper part of any land market system, acting as insurers who assume this risk of land price increases or decreases (*See* L. ROSE, *TAXATION OF LAND VALUE INCREMENTS ATTRIBUTABLE TO REZONING* (Economic Research Center, University of Hawaii, 1971) at 42), or acting as land bankers who acquire land in advance of need in order to release it later at periods of high demand, thus modulating price swings that might otherwise be produced because of lack of intermediaries. (*See* Elias and Gillies, *Some Observations on the Role of Speculators and Speculation in Land Development*, 12 U.C.L.A. L. REV. 789 (1965).)

Others argue either that short-term speculation serves no banking function, or that it is inherently inflationary. *See* Note, *State Taxation—Use of Taxing Power to Achieve Environmental Goals: Vermont Taxes Gains Realized from the Sale or Exchange of Land Held Less Than Six Years—Vermont Statute Ann. tit. 32, §§ 10001-1*

(1973), 49 WASH. L. REV. 1159, 1163 (1974); ONTARIO MINISTRY OF ECONOMICS AND INTERGOVERNMENTAL AFFAIRS, *THE LAND SPECULATION TAX* (1974).

As far as short-term speculation is concerned, the critics appear to have the better argument. First, it is questionable whether analogies from the grain futures market as argued by Elias and Gillies bear any relation to the land market, which has little seasonal "supply" problem. Moreover, the transfer costs of continued sale and resale can contribute significantly to the rising cost of land.

Even if the land market is analogous to the grain market, and the land speculator serves a useful purpose in purchasing land in times of plenty and selling land in times of scarcity, it is questionable whether the land market operates in such short cycles that the speculator penalized by the land gains tax will be the speculator who is operating in the "banking" capacity suggested. In short, will not the speculator most severely affected be the short-term, high-profit speculator who is attempting to ride a market crest upward rather than one who buys at depressed prices and holds for the long term to sell at higher prices?

⁶⁵ This problem is acute in the second-home lot development where only a few subdivided lots are ever built upon. According to one recent source, six recreational lots were sold nationwide in 1971 for every home constructed. See TASK FORCE ON LAND USE AND URBAN GROWTH, CITIZENS' ADVISORY COMMITTEE ON ENVIRONMENTAL QUALITY, *THE USE OF LAND: A CITIZENS GUIDE TO URBAN GROWTH* 264 (1973).

Thus to the extent that more Vermont open space stays in unbroken parcels until it is ripe for development, the opportunity is increased for the land plan for a Vermont parcel to be successfully integrated with subsequent construction. This is particularly important since a poorly designed subdivision can do more environmental harm than ugly buildings on it. *THE USE OF LAND* described the process this way:

If past experience is any guide, many of the lots now being created will never be used at all: in this case, it is, "lots first, buildings never." The lot lines will remain on the record books, though, and land titles will become ever more clouded as decades pass. Tough for the land buyers? Yes. Tough also for the environment as is shown by any number of "dead subdivisions" created forty or fifty years ago. If a few scattered lots are built upon, the subdivision may become a sparsely settled rural slum. . . . Once the countryside has been given over to quarter acre or 1-acre lots (and most recreational lots sold in 1971 were one-quarter to 1-acre in size), you can forget thoughts of clustering, variable densities,

common open spaces, and the like. . . .the lot lines will survive to block sensitive use of the land.

Id. at 275-76.

For additional discussion of the environmental problems of poor land planning, see I. McHARG, *DESIGN WITH NATURE* (1969); Toner and Thurow, *Let Nature Decide the Land Use*, 40 *PLANNING* 17 (January 1974).

Note also the additional pressures on subdividers from the Interstate Land Sales Act, 15 U.S.C. §§ 1701-1720, new regulations published, 38 Fed. Reg. 23866-23909 (Sept. 4, 1973). The Act exempts from filing requirements lots on which buildings have been erected (or are required to be erected) within two years. 15 U.S.C. § 1702. Finally, the Department of Housing and Urban Development has recently been enjoined from approving the interstate land sales filing for a 3,000 lot development on 7000 acres of Oklahoma land for lack of an environmental impact statement required by the National Environmental Policy Act. *Scenic Rivers Association v. Lynn*, 7 E.R.C. 1172 (E.D. Okla. 1974).

⁶⁶ See *supra* note 3.

⁶⁷ The traditional method of dealing with the preservation of agricultural land has been to lower tax rates to reflect the agricultural use. See generally Note, *Property Taxation of Agricultural and Open Space Land*, 8 *HARV. J. LEGIS* 158 (1970). Such measures have, however, been criticized as relieving the sale induced by high taxation, but not protecting against the unrefusable offer. To the extent the gains tax intervenes in demand for such land, it may begin to attack the "forgotten" side of the preservation issue.

For example, in 1945 there were over 30,000 farms in Massachusetts and over two million acres in production. By 1973, the number of farms had dwindled to 5,700 with only 700,000 acres in farm use. COMMONWEALTH OF MASSACHUSETTS, FINAL REPORT OF THE GOVERNOR'S COMMISSION ON FOOD, JUNE 25, 1974, 32; THE COMMISSION TASK FORCE #1 FINAL REPORT ON FOOD SUPPLY AND PRODUCTION, 2.

This uneasy situation—especially when energy sources are increasingly uncertain—makes the preservation of farmland close to population centers of more than nostalgic concern. (For other discussion of the importance of agriculture, but in the context of the property tax, see Zimmerman, *supra* note 1, at 653-54).

Thus, to the extent that the land gains tax prevents farmland from being subdivided and sold when no buildings will be needed for some time (the recreational lot pattern, for instance), it will buy some time to begin to work on the problem of food.

⁶⁸ 32 V.S.A. ch. 231 (1970).

⁶⁹ The major non-taxable transfers are transfers to secure or discharge a debt, and some intra-family gratuitous transfers.

⁷⁰ Letter from Commissioner Robert Lathrop dated October 1, 1974. The tax is self-regulating to a degree. To the extent its land market effects curtail land value appreciation, the staggered rate schedule means less profit may be drawn off by the tax directly. If on the other hand, the effect of the tax is to cause land market effects that add to land value increments, the same rate structure will capture a larger portion for the state.

⁷¹ See NETZER, *ECONOMICS OF THE PROPERTY TAX* 212-13 (1966); *REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY*, 391-92 (Douglas Chmn. 1968); Harriss, *Alternative Bases for Real Estate Taxation*, in *PROPERTY TAXES* 219 (1940); Harvith, *Subdivision Dedication Requirements—Some Observations and an Alternative: A Special Tax on Gain from Realty*, 33 *ALB. L. REV.* 474 (1969); Lent, *The Taxation of Land Value*, 41 *INTERNATIONAL MONETARY FUND STAFF PAPERS* 89 (1967); Spengler, *The Taxation of Urban Land Value Increments*, 17 *JOURNAL OF LAND AND PUBLIC UTILITY ECONOMICS* 54 (1941); L. ROSE, *TAXATION OF LAND VALUE INCREMENTS ATTRIBUTABLE TO REZONING* (Econ. Research Center, University of Hawaii, 1971). Walker, *Taxation of Land Value Increases*, 38 *TAX POLICY NOS.* 8-9 (1971).

Land value increment taxation has been in use for some time outside the Anglo-Saxon countries in Israel, some African and Latin American countries, Denmark and Spain, and Taiwan, *See* Lent and Netzer, *supra*; communication from Orville F. Grimes, Jr., of International Bank for Reconstruction and Development, Jan. 14, 1975.

⁷² In February, 1974, Representative Ora J. Halvorson introduced into the Montana legislature a modified version of the Vermont tax as House Bill No. 651. After being reported out favorably by the Taxation Committee, it was killed by the House on a 48-39 vote. Representative Halvorson indicates she intends to reintroduce the bill again in some form in the 1975 legislative session. Conversation with Representative Halvorson on July 23, 1974.

House Bill 651, as approved by the Committee on Taxation, was similar to the 1973 Vermont land gains tax (before the 1974 amendments) with several important differences. First, the Montana tax would be collected by a filing of a return and payment of any tax due when the transferor filed his Montana income tax return,

though losses, as in Vermont, would not apparently be available to offset gains. Second, the act would not apply to the sale, lease, or agreement to buy and sell land where the parties to the transaction enter into a covenant running with the land, which is revocable only after a period of at least six years, that the land will be used exclusively for agricultural purposes. Finally, the revenues obtained from the tax would be paid into the general fund, and not earmarked for special purposes as in Vermont.

⁷³ House Bill 502. The agricultural exemption may have questionable utility as a means of preserving farmlands. *See supra* note 67. Also, as in 1973 Vermont legislation, the proposed Washington bill provides a one-acre residential homesite exemption.

⁷⁴ For a readable brief history of the recent emergence of special real estate gain taxes in parts of the Anglo-Saxon World (Vermont), United Kingdom, Canada, Australia and New Zealand *see* D. Hagman and D. Misczynski, *Special Capital and Real Estate Windfall Taxes (Screwts)—A Short Story* (unpublished paper for the British Columbia Institute for Economic Policy Analysis Conference on the Pricing of Local Services and Effects on Urban Spatial Structure, June 26, 28, 1974, Vancouver, British Columbia, Canada.) The author wishes to acknowledge his debt to Professor Hagman in alerting him to these developments.

⁷⁵ The Land Speculation Tax Act was designed to curb escalating housing costs (close to 2 percent a month, compounded) by attacking land speculation which the government felt artificially fueled land price increases. Conversation on July 18, 1974 with Larry Leonard of the Tax and Fiscal Policy Branch, Ministry of Treasury Economics and Intergovernmental Affairs, Province of Ontario.

As to the Ontario tax itself, with one exception discussed below, there is no abatement for the length of time the land was held by the transferor.

Like the 1974 Vermont Tax, the Land Speculation Tax exempts the primary residence of the transferor, but it also extends that exemption to include transfers of the transferor's principal recreational property and up to 20 acres of surrounding land, unless the disposition is to a non-resident person as defined in Land Transfer Tax Act, 1974. (Ontario also enacted the Land Transfer Tax Act, 1974, which provides for a tax of twenty percent of the consideration paid for any transfer to or in trust for any transferee who is a nonresident. Statutes of Ontario, 1974, Chapter 8, as amended by 1974, Chapter 16. The tax was aimed at deterring foreign investment which had escalated the cost of Ontario land, especially in the To-

ronto Area. Conversation with Larry Leonard, *supra*).

Like the proposed Montana legislation, the Ontario tax attempts to protect agricultural transfers, providing an exemption for land actively used in farming which is disposed of to a member of the transferor's family or to a farming corporation for the purpose of enabling the transferor to carry on farming.

Instead of providing a blanket exemption for structures, like Vermont, the Land Speculation Tax provides total exemption if the sale involves structures meeting certain specific criteria. For example, the disposition is exempt if it involves land on which the structures were constructed or renovated by the transferor, and such improvements meet certain threshold values, or land on which the structures account for 40 percent or more of the sale proceeds and are used for commercial, industrial or tourist resort purposes. Tax Act, Sections 1.-(1)(b); 4.(9); 4.(d).

Apartment rental property disposed of after April 9, 1977, constituting 40 percent of a parcel's fair market value, qualifies for a thirty percent reduction in the tax with an additional ten percent reduction for each year thereafter during which the property is held without disposition. Tax Act, Section 20.(1) and (2). This provision constitutes the closest analogue to the long term holding exemption provided by the Vermont rate schedule.

Finally, dispositions of subdivided land are exempt if the transferor assumes the liability for the tax and begins construction on at least half of the lots sold to him within nine months and on the remainder within eighteen months.

⁷⁶ On August 22, 1973 New Zealand enacted the Property Speculation Tax Act, 1973 (No. 18) applying to dispositions taking place after June 15 of that year.

The Act, as implied from its name, was designed to penalize property speculation which was not defined in the Act but has been defined by the inland revenue department as "the trafficking in land with a view to short term profits and without having contributed any worthwhile improvements in the period between purchase and sale." HEAD OFFICE, INLAND REVENUE DEPARTMENT, PROPERTY SPECULATION TAX EXPLANATORY NOTES AT 1. (November, 1973).

Unlike Vermont, but like Ontario, the Property Speculation Tax defines land to include structures on the land. Section 2(1). INLAND REVENUE DEPARTMENT, PROPERTY SPECULATION TAX EXPLANATORY NOTES at 1 (November, 1973).

Also like Ontario, the New Zealand Tax contains exemptions for certain land in which the transferor has constructed improvements

or undertaken renovation of certain threshold costs. Section 20 (no express provision applying to subdivision).

Like Vermont (as amended) the New Zealand Act provides an exemption for transfers of land acquired for the purpose of occupancy or construction of a residence, (provided profit was not a motive) though there is no requirement of construction within a limited time. The act also exempts certain transfers of business property (other than property involved in the business of land development). Section 19.

Finally, unlike Vermont, the New Zealand tax provides that losses arising from short term dispositions of land may offset subsequent gains until the loss is exhausted. Section 10.

⁷⁷ The British Finance Act 1974 contained a complicated set of provisions designed to tax certain gains arising on the disposal of land and buildings at ordinary income rather than more favorable capital gains rates. In addition to other exemptions where the total proceeds of all disposals of land and buildings by an individual in a tax year do not exceed £10,000, no part of the new gains would be subject to the special tax. Sections 38 and 39.

⁷⁸ 315 A.2d 860, 865-66 (Vt 1974). On the enactment issue, the Vermont Supreme Court held that since the trial court had found that the primary purpose of the land gains tax was to raise revenue to fund the tax relief program, it need not have originated in the House, since only "revenue bills" enacted to produce general revenue were required to originate there. The court also noted that since the revenue-raising provisions were germane to the subject matter of the whole bill, they could properly have been raised for consideration as an amendment by the Senate.

Appellants had also claimed that the tax was unconstitutionally discriminatory.

Their first two claims were: (1) that the one-acre residential exemption had discriminatory effects on rural landowners (since rural zoning regulations often required a five-acre minimum residential lot), and (2) that nonresidents were discouraged from purchasing property subject to the gains tax. (This latter argument is discussed in more detail below in the text.) The court found that appellants had failed to introduce any evidence to establish that such discrimination occurred.

Appellants next argued that sellers were already burdened with a Vermont income tax on gains derived from the sale or exchange of capital assets, including land. To this the court responded that the legislative intent to burden those already taxed was clear.

As to the final issue, the reasonableness of the six year classification, the court said:

a quantitative distinction created by the legislature will be upheld unless it is so "wide of the mark" that it cannot be said to tend toward achievement of any legislative purpose it might be said to serve. The court said that the legislature's discretion was especially broad in the field of taxation, and that appellants had not shown it to be unreasonable. *Andrews v. Lathrop*, *supra* at 864-65.

All parties in the *Andrews* case apparently operated under the assumption that Vermont's state constitution imposed no greater equal protection restriction than that of the Fourteenth Amendment. *Andrews v. Lathrop*, Brief for Appellant at 1-16. Whether a land gains tax enacted in a jurisdiction having a more stringent state constitutional equalization provision would survive a challenge is uncertain in light of the tax's variable rates and applicability to only one class of real property—land. *See generally*, W. NEWHOUSE, *CONSTITUTIONAL UNIFORMITY AND EQUALITY IN STATE TAXATION* (1959).

⁷⁹ See Note, *State Taxation, etc.*, *supra* note 2.

⁸⁰ *Andrews v. Lathrop*, 315 A.2d 860, 863 (Vt. 1974).

⁸¹ This evidentiary failure and the Court's response might usefully be contrasted to the successful attack on a growth control scheme enacted by the City of Petaluma, California, because of unconstitutional interference with the right to travel of prospective homebuyers. *Association of Sonoma City, et al. v. City of Petaluma*, ___ F. Supp. ___ (N.D. Cal. 1974). Counsel for one of the Petaluma plaintiffs has credited part of the success in the District Court to a carefully laid foundation of expert testimony on the likely economic effect of the plan on the market for housing in the San Francisco Bay area and its coincident effect on the prospective Petaluma homebuyer. Address by Malcom A. Misuraca, American Law Institute—American Bar Association Conference on Land Use Litigation, Chicago, June 8, 1974.

⁸² *Steel Hill Development, Inc. v. Sanbornton*, 469 F.2d 956 (1st Cir. 1972).

⁸³ *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974), brief for Appellant, at 19-20. This argument arose in the context of equal protection, but has overtones of unconstitutional interference with interstate commerce. For a useful recent discussion of this issue oriented around the Oregon Minimum Deposit Act, which was designed to discourage the use of throwaway beverage containers, *see*, Note, *State Environmental Protection Legislation and the Commerce*

Clause, 87 HARV. L. REV. 1762 (1974). See also, Note, *Constitutional Law—State Taxation of Interstate Commerce—Commerce Clause Analysis*, 76 W. VA. L. REV. 380 (1974).

⁸⁴ *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974), brief for Appellee at 13-16.

⁸⁵ *Andrews v. Lathrop*, 315 A.2d 860 (Vt. 1974), Record, at 3-7.

⁸⁶ For a general discussion of the Taking Issue, see F. BOSSELMAN, D. CALLIES, & J. BANTA, *THE TAKING ISSUE* (1973); reviewed by Hagman, 87 HARV. L. REV. 482 (1973).

⁸⁷ *Territory v. Daniels*, 6 Utah 288, 22 P. 159 (1889).

⁸⁸ *Id.*, 6 Utah at 297, 22 P. at 162.

⁸⁹ The dominant rule is set forth in *Kelly v. Pittsburgh*, 104 U.S. 78 (1881). In that case, 80 acres of land in Pennsylvania were, through an act of the legislature, placed within the boundaries of the City of Pittsburgh, and assessed by the city to pay a water tax, gas tax and street tax. The landowner, Kelly, attacked the municipal taxation of his property without due process of law in violation of the Fourteenth Amendment on several grounds, including that he received no benefit from these taxes. The Supreme Court turned aside his claim:

We cannot say judicially that Kelly received no benefit from the city organization. These streets, if they do not penetrate his farm, lead to it. The water-works will probably reach him someday, and may be near enough to him now to serve him on some occasion. The schools may receive his children, and in this regard he can be in no worse condition than those living in the city who have no children, and yet who pay for the support of the schools. . . . This court cannot say in such cases, however great the hardship or unequal the burden, that the tax collected for such purposes is taking the property of the taxpayer without due process of law.

104 U.S. at 82-83. The *Daniels* court distinguished *Kelly* on the grounds that *Kelly* was based on the Fourteenth Amendment and not the Fifth Amendment, which was not then applicable to the states. *Territory v. Daniels*, 6 Utah 288, 300-01, 22 P. 159, 163 (1889).

But *Kelly* has proved to be the dominant line of cases (see NICHOLS, *EMINENT DOMAIN*, § 1.41[2] (Rev. 3rd ed. 1974)) and indeed Utah itself later adopted the *Kelly* rationale. *Kimball v. Grantsville City*, 19 Utah 368, 57 P. 1(1899), overruling *Kaysville City v. Elliston*, 18 Utah 163, 55 P. 386 (1898).

The *Kimball* court laid great stress on the perils of an anticipated flood of litigation from aggrieved taxpayers if the principles of *Daniels* were followed.

⁹⁰ 172 U.S. 269 (1898). See generally cases cited in NICHOLS, *EMINENT DOMAIN*, § 1.41[4] (Rev. 3rd ed. 1974).

⁹¹ 172 U.S. at 279. Appellants in *Andrews* did not explicitly adopt the just compensation arguments made in these cases, but they raised them implicitly in their brief. *Andrews v. Lathrop*, 315 A.2d 860 (1974), brief of Appellants at 10. In any case, appellants did not press the argument and the court did not deal with it in its opinion.

⁹² *Alco Parking Corp. v. Pittsburgh*, 453 Pa. 245, 307 A.2d 851 (1973), rev'd, 417 U.S. 369, (1974); Noted 35 U. Prrt. L. Rev. 335 (1973); 26 HAST. L.J. 215 (1974).

⁹³ *Philadelphia v. Eglin's Garages, Inc.*, 342 Pa. 142, 19 A.2d 845 (1941); *Philadelphia v. Samuels*, 338 Pa. 321, 12 A.2d 79 (1940).

⁹⁴ 307 A.2d at 860 [citations omitted].

⁹⁵ *Id.* See Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). Professor Sax subsequently revised his own earlier analysis. See Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. (1971).

⁹⁶ *Pittsburgh v. Alco Parking Corporation*, 417 U.S. 369 (1974).

⁹⁷ *A. Magnano Co. v. Hamilton*, 292 U.S. 40. (1934) (Magnano sustained a state excise tax of 15 cents per pound on all butter substitutes sold within the state.)

⁹⁸ *Id.* at 44.

⁹⁹ *Id.*

¹⁰⁰ 291 U.S. 619 (1934).

¹⁰¹ 417 U.S. 369, 377 (1974). The court also noted that even if "an uncompensated and hence forbidden 'taking' could be inferred from an unreasonably high tax in the context of competition from the taxing authority," the record in the case did not indicate that government competition itself was the source of the harm since a shortage of parking spaces meant that if the private facility operators were damaged, the damage would come from those who could no longer afford the increased price for downtown parking at all, not from those who preferred the cheaper public parking lots. 417 U.S. at 378.

¹⁰² Mr. Justice Powell concurred in a separate opinion in order

to emphasize my understanding that today's decision does not foreclose the possibility that some combination of unreasonably burdensome taxation and direct competition by the taxing authority might amount to a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments. . . . It is conceivable [however] that punitive taxation of a private industry and direct economic competition through a governmental entity enjoying special competitive advantages would effectively expropriate a private business for

public profit. Such a combination of unreasonably burdensome taxation and public competition would be the functional equivalent of governmental taking of private property for public use and would be subject to the constitutional requirement of just compensation.

417 U.S. at 379.

¹⁰³ *Alco Parking Corporation v. City of Pittsburgh*, 453 Pa. 245, 307 A.2d 851, 860 (1973).

¹⁰⁴ "According to one responsible calculation, holding costs for undeveloped land amount to roughly one-fifth of its value annually. Thus, unless the price more than doubles each five years, the speculator will lose." G. LEFCOE, *LAND DEVELOPMENT LAW*, 1 (2nd ed. 1974).

¹⁰⁵ See *Alco Parking Corp. and Magnano* discussed at notes 98-105; See also Zimmerman, *supra* note 1 at 645, n. 10.

¹⁰⁶ See the remarks of Vermont Governor Salmon concerning the purpose of the land gains tax, quoted *supra* in text at note 26.

¹⁰⁷ . . . It is by now beyond question that the legislature may legislate to achieve particular social and economic ends by the manner in which a tax is imposed, even if such objectives might otherwise be beyond the legislature's constitutional powers The objective may extend to discouragement of what is otherwise, as here, a legitimate economic activity.

132 Vt. at 262, 315 A.2d at 863-864. In so holding the court marked a reaffirmation of continued judicial recognition that a social purpose will not render a tax invalid. See Zimmerman, *supra* note 1 at 645, n. 10.

¹⁰⁸ G. LEFCOE, *LAND DEVELOPMENT LAW* (2nd ed. 1974); C. L. HARRISS, ED., *THE GOOD EARTH OF AMERICA* (1974); F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

¹⁰⁹ See for example, the proposed indirect source and transportation controls under the Clean Air Act, 42 U.S.C. 1857(f); 39 Fed. Reg. 25292 (July 9, 1974) and 39 Fed. Reg. 30440 (August 22, 1974); see also Batchelder, *Land Use/Transportation Controls for Air Quality*, 6 *URB. LAWYER* 235 (1974); King, *Federal Land Use Controls for Clean Air*, 3 *ENV. AFF.* 507 (1974); and Federal Water Pollution Control Act, 33 U.S.C. 1288 which requires states to develop areawide or regional waste treatment management plans, including land use controls.

¹¹⁰ In a sense, this constitutes the "equal protection" component of the "taking" issue. For an elaboration, see D. Hagman, *Windfalls for Wipeouts* in C. L. HARRISS, ED., *THE GOOD EARTH OF AMERICA*, 109-133 (1974); Hagman, *A New Deal: Trading Windfalls for Wipeouts*, 40 *PLANNING* ____ (SEPT., 1974).

¹¹¹ COSTONIS, J., *SPACE ADRIFT-LANDMARK PRESERVATION AND THE MARKETPLACE* (1974); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

¹¹² Chavooshian & Norman, *Transfer of Development Rights: A New Concept in Land Use Management*, 32 URBAN LAND (ULI) 11 (Dec., 1973).

¹¹³ Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U. L. REV. 35 (1974).

¹¹⁴ See *supra* note 111 and Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973). Costonis, *Development Rights Transfer: Easing the Police-Power-Eminent Domain Deadlock*, 26 LAND USE AND ZONING DIGEST (ASPO) 6 (1974); *Anyway You Slice It, DRT Is Here to Say*, 40 PLANNING 10 (July, 1974); Shlaes, *Who Pays for Transfer of Development Rights?* 40 PLANNING 7 (July, 1974). See also URBAN LAND (January, 1975) which contains an extensive bibliography and is entirely devoted to the subject.

¹¹⁵ Three private market variants of TDR concept can be illustrated in a simplified manner as follows:

(a) *Bulk TDR*: Owner of parcel A can, under the local zoning by-law, build a structure with a Floor Area Ratio (F.A.R.) of 4. By acquiring adjacent and similar parcel B, he can now go up 8 stories on parcel A, having aggregated parcels A and B for purposes of F.A.R. Suppose, however, that parcel B is not adjacent, but down the street. Why can't owner A aggregate it as well? And why buy parcel B at all? Why not just buy the "air" rights? It is only a small step to transferable development rights (with thanks to Donald H. Siskind, Esq., of the New York Bar). See also Pedowitz, *Transfer of Air Rights and Development Rights*, 9 REAL PROP. PROB. & TR. J. 183 (1974).

(b) *Space TDR*: Jurisdiction A enacts a subdivision control ordinance in accordance with appropriate enabling legislation as follows:

1. The subdivision of land into two or more lots without a permit from the (agency) is unlawful.
2. No permit shall be granted for the subdivision of any parcel where any resulting lot is less than (number) acres in size.
3. The owner of any parcel for which a subdivision permit has been issued may transfer such permit to become appurtenant to other land, but no additional permit shall be issued by the (agency) for the parcel to which the permit transferred was originally appurtenant unless sufficient land remains to qualify for another permit.

4. An owner may subdivide land into lots of whatever size he desires so long as the number of lots subdivided is equal to or less than the number of lot permits he holds either initially or as transferee, and such permits must be surrendered to the (agency) upon recording of the subdivision plan.

Such an ordinance would convert a minimum lot size ordinance into a crude TDR scheme, though it may have exclusionary effects and also lacks the land plan whereby preservation and transfer districts are chosen.

(c) *Parking TDR*: Parking spaces as a form of TDR have recently received a modified endorsement in *South Terminal Corporation v. EPA*, 6 ERC 2025 (1974). *South Terminal* involved a requirement under the Clean Air Act transportation control plan for the Boston region containing provisions requiring a freeze on parking spaces in designated areas, and requiring operators of private, off-street parking facilities in the "core" area to keep 40 percent of their facilities vacant from 7 to 10 a.m. on work days. The affected operators, among other objections, attacked the regulations as a taking without compensation in a petition for review of the plan before the First Circuit court of appeals. In turning aside the claim, the court noted that the plan regulated only one use of petitioner's land:

The right to use is not extinguished entirely; nor is it transferred to anyone else. Indeed, the ingenuity of operators may result in fewer disadvantages than urged. For example, some operators may be able to "buy" from others the right to use spaces, leaving the seller of spaces free to use the land under his parking lot for other purposes while the buyer enjoys a higher occupancy rate.

6 ERC at 2044.

¹¹⁶ Carmichael, *supra* note 113 at 47.

¹¹⁷ See McHarg, *supra* note 65.

¹¹⁸ INTERNATIONAL INDEPENDENCE INSTITUTE, *THE COMMUNITY LAND TRUST, A GUIDE TO A NEW MODEL OF LAND TENURE IN AMERICA* (1972).

¹¹⁹ Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1038 (1973); See also Bosselman and Callies, *supra* note 108 at 314-318; also Bosselman, Callies and Banta, *supra* note 86 at 240:

The idea that a regulation of the use of land which prevents the owner from making money can amount to a taking assumes that a landowner has a constitutional right to use and develop his land from some purpose which will result in personal profit, regardless of the effect that such development will have on the public. Such a holding gives land as a commodity a constitutional status higher than other commodities—a status land no longer deserves.

¹²⁰ 56 Wis.2d. 7, 201 N.W.2d 761 (1972), recently followed in New Hampshire in *Sibson v. State of New Hampshire* (N.H. Sup. Ct. March 31, 1975).

¹²¹ The Justs argue their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based on changing the character of the land at the expense of harm to public rights is not an essential factor or controlling. 56 Wis.2d at 23, 201 N.W.2d at 771 (1972).

For a useful analysis of the implication of this redefinition of "property," especially in terms of valuation for purposes of property taxation and eminent domain, see *Large, supra* note 119, at 1078-1081.

¹²² The concept of "ameliorative waste" is a useful way of focusing on the fact that changes in land use intensity have been fostered in part by the favorable bias inherent in terms like "development" and "improvements." What is more important is to decide whether the change is worthwhile in the particular case. For a discussion of "ameliorative waste" see generally AMERICAN LAW OF PROPERTY, § 20.11 (1952). In effect the doctrine states that acts may be waste even though they increase the value of the land because they injure the successor's interest. § 20.11. See also *Melms v. Pabst Brewing Co.*, 104 Wis. 7, 79 N.W. 738 (1899); *Crewe Corp. v. Feiler*, 28 N.J. 316, 146 A.2d 458 (1958).

¹²³ If this counter-current prevails, in the future years, we may see special taxes for the conferral of development rights. Certainly if land in its "natural state" is all the owner can claim as his entitlement, then any increment in use intensity beyond that entitlement constitutes a benefit conferred by the government which might be recaptured through taxation to the extent of the benefit received.

¹²⁴ The concept of the land gains tax as an "intermediate step" must be fairly credited to Professor George Lefcoe of the University of Southern California and Boston University Law Schools since he raised it in a conversation with the author in December, 1974 when we were discussing some of the thoughts in this article.

¹²⁵ Recall that because of the nature of participants in the market, the demand for land may usefully be distinguished from the demand for improvements.