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DIFFERENTIAL ASSESSMENT AND OTHER TECHNIQUES TO PRESERVE MISSOURI'S FARMLANDS

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I. INTRODUCTION

It has become readily apparent that a growing number of Americans prefer to live near—but not in—relatively large cities.[1] This is reflected by a large and growing demand for rural land. Increases in the market value of farmland have been dramatic in recent years. From 1970 to 1974 the increase was almost 13 percent per year.[2] Increases in income from farmland, however, have not kept pace with these increases in market value. In fact, in many instances farmland income has declined.[3]

When a significant amount of land in a predominantly farming area is devoted to residential or industrial uses, the market value of the remaining farmland tends to rise.[4] Therefore, assessments based on market value will increase. This occurs despite zoning regulation to the contrary because the assessor, acting on the assumption that increased developmental pressures will force zoning variances to be granted, raises his assessment to reflect expected developmental value.[5] A higher assessment results in a higher property tax, and the increased taxes are so burdensome that farmers are often forced to sell the land or convert it to nonagricultural uses.[6] This loss of prime agricultural land reduces the potential for food production, pushes aesthetic benefits associated with open spaces farther away from the

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1. R. GLOUDEMANS, USE-VALUE FARMLAND ASSESSMENTS: THEORY, PRACTICE AND IMPACT 4 (1974).

2. *Id.*

3. *Id.* at 6.

4. *Id.* at 5.

5. *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); Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis - St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1075 (1974).

6. *See* R. GLOUDEMANS, *supra* note 1.

city core, and destroys economies inherent in large-scale farming operations.[7]

The problems of urban sprawl and improper regional growth have received wide national attention in the past fifteen years.[8] Concern has been expressed not only for preservation of agricultural lands, but also for preservation of other types of open space. There is interest that swamp lands not be drained, that forest lands be maintained intact, and that land along wild rivers and other waters not be developed. In order to preserve land in a natural or open state to satisfy the agricultural, recreational, and aesthetic requirements of both rural and urban populations, a policy of carefully planned development must replace that of wasteful unplanned growth.[9] A number of methods have been proposed to implement such a policy. Several of these methods and the consequences of their adoption will be discussed.

II. DIFFERENTIAL ASSESSMENT

Differential assessment is one technique which has been advanced to alleviate the effects of increased property tax burdens on farmland. The technique involves assessing the land at its value as a farm in use instead of assessing the land at its fair market value. Assuming that the use-value is less than the fair market value of farmland in developing areas, land assessments and therefore property taxes should be reduced for farmland owners. The expectation is that lower property taxes will encourage farmers to maintain the land in agricultural use in the presence of nearby development. In addition, the percentage of personal income which the farmer must apply to the payment of real estate taxes should decrease, approaching the percentages incurred by non-farm landowners.

A. *Description*

1. Common Approaches to Differential Assessment

The use of taxation schemes to implement open land policies has a relatively recent history.[10] Early suggestions, beginning in the 1920's, focused on reduced taxation for golf courses and recreational areas.[11] Legislative action began in the 1950's. Minnesota enacted a statute providing tax relief to landowners in exchange for use of the property for hunting or fishing.[12] In 1956, Maryland became the first state to enact a

7. *See* Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117 (1974).

8. Lewis, *Waking Up*, N.Y. Times, Jan. 3, 1974, at 35, col. 1.

9. *See* U.S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, 87th Cong., 1st Sess., *Governmental Structure Organization and Planning in Metropolitan Areas*, 40 (Comm. Print 1961).

10. *See* Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 634.

11. *Id.*

12. MINN. STAT. ANN. § 272.59 (West Supp. 1976).

comprehensive taxation scheme for agricultural lands with some land use planning motives.[13]

Differential assessment for farmland and open space can be adopted in any of several basic forms. The first general approach is preferential assessment, whereby land devoted to agricultural use is assessed on the basis of its value in that use. Under a preferential assessment program, no penalty is imposed if the owner decides to put his property into non-farm uses.[14] This is the approach Missouri has adopted. A second technique is deferred taxation. Under this approach land is assessed according to its value in its current use. If the owner changes the use of the land to some use not qualifying under the law, a deferred tax (frequently called a rollback tax) is levied. The amount of the tax is equal to the tax savings received by the owner for a designated number of years preceding the change in use.[15] A third method is the use of restrictive agreements. Under this method the state or local government may make agreements with landowners by which the landowners agree to restrict the use of their land for a specified period of years in return for tax concessions. If the landowner changes the use of the land, charges or penalties may be imposed.

There are two significant differences among these approaches to differential assessment. First, those taxes which the landowner saves under a tax deferral scheme, or some portion of them, are recovered by the state or local government when the land is converted to a non-qualifying use. This recovery of lost taxes is not available in preferential assessment programs. Second, restrictive agreements are granted as a matter of governmental discretion, and thus the state or local government will generally enter into a restrictive agreement with a landowner only after a determination that such an agreement serves the public purpose. In deferred taxation or preferential assessment programs a landowner is entitled to the benefits of these programs as a matter of right if his land meets the eligibility requirements.

In addition to these approaches, several other methods are available to provide farmlands with the advantages of assessment at less than fair market value. One method is a classified property tax system in which different assessment ratios are applied to different types of properties.[16] The assessment ratio for each type of property is fixed. Thus any increase in market value results in an equal percentage increase in the assessed

13. MD. ANN. CODE art. 81, § 19(b) (Supp. 1976). Note that Ontario had a differential assessment plan the year before. ONT. REV. STAT. ch. 32, § 27 (1970).

14. *See* T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND 2 (U.S. Econ. Research Serv. Ag. Econ. Rept. no. 256, April 1974)

15. *Id.*

16. For a more complete discussion see International Association of Assessing Officials, Research and Technical Services Dept., "Classified Property Tax System," mimeographed (Chicago: IAAO, Research and Technical Services Dept., April 1974), *as cited in* R. GLOUDEMANS, *supra* note 1, at 23.

value. In the use-value assessment systems previously discussed, market value fluctuations do not necessarily affect the assessed value because there is no predetermined assessment ratio.

Another method is the general directive. Under this approach the assessor is directed to consider all current land use controls to be permanent. Any potential for development in excess of that permitted by the zoning ordinance or other restriction currently in force is to be ignored.[17]

Tax relief can also be provided in the form of exemptions from or limitations to the applicable tax rates. Current statutes which exempt farm structures and improvements from the property tax can be broadened to include farmland. Alternatively, the property tax can be applied in a limited fashion, setting the tax rate on farmland lower than the rate applied to other types of real estate.[18]

Finally, there is a newly proposed alternative to differential assessment, the so-called "circuit-breaker."[19] Under a circuit-breaker system, property tax payments which exceed certain percentages of income would either be deducted from state income taxes or directly rebated to the taxpayer.[20] A serious problem with circuit-breakers based on farm income is that rebates to speculators will probably be much greater than those to farmers. This problem is being met in Michigan by a requirement that the landowner forfeit his rights to develop the land in exchange for circuit-breaker relief.[21]

2. Missouri Legislation

A large number of states have adopted differential tax assessment programs for the preservation of agricultural and open space lands.[22] Missouri became a member of this group in July of 1975 with the passage of the Agricultural Valuation and Assessment Act.[23] This act adopts the preferential assessment approach to differential assessment. It directs the assessor to assess land which is actively devoted to agricultural or horticultural use at its use-value.[24] Land is deemed to be in agricultural use when it is devoted to the production for sale of plants and animals. It is deemed to be in horticultural use when devoted to the production for sale of fruits of all kinds.[25] Before the use-value assessment can be employed, the average

17. *See* Hagman, *supra* note 10, at 636.

18. *See, e.g.*, IOWA CODE ANN. § 426.1 *et seq.* (West 1971 & Supp. 1976); ONT. REV. STAT. ch. 32, § 29 (1970).

19. *See* Lockner and Kim, *Circuit-Breakers on Farm-Property-Tax Overload: A Case Study*, 26 NAT. TAX J. 233 (1973).

20. MICH. COMP. LAWS ANN. § 554.710 (Supp. 1975).

21. *Id.*

22. At least 35 states have such programs. *See* Hansen & Schwartz, *Landowner Behavior at the Rural-Urban Fringe in Response to Preferential Property Taxation*, 51 LAND ECON. 341 (1975); T. HADY & A. SIBOLD, *supra* note 14.

23. §§ 137.017-137.026, RSMo (1975 Supp.).

24. § 137.017(1), RSMo (1975 Supp.).

25. § 137.012(2), (3), RSMo (1975 Supp.).

gross sales of agricultural or horticultural products from the land in question must have been at least $2,500 (or clear evidence of anticipated gross sales of such an amount must be produced) for a period of five years.[26] Land which satisfies the above requirements is not automatically assessed at its use-value, however. To qualify his land for such a valuation an owner must apply to the county assessor by October 1 of the year preceding the year in which the use-value assessment is to be made.[27] Once the land is established as qualified, the land must be assessed at its use-value.

Land which is eligible for use-value assessment remains eligible as long as the owner retains the land in any qualifying use.[28] The landowner must certify before March 1 of each year that the use of the land or of any part of the land has not been changed to a nonqualifying use. If there has been a change to a nonqualifying use or if the owner fails to file the certification, the assessor must reassess the land, presumably as of January 1 of the year in which certification is required.[29] This is the only penalty for changing to a nonqualifying use.

So long as the land remains in a qualifying use, the landowner may sell or otherwise transfer the land without jeopardizing the eligibility of the land under the statute.[30] In addition, if one part of a parcel of land which is receiving use-value assessment is sold or converted to a nonqualifying use, this does " . . . not impair the right of the remaining land to continuance of valuation and assessment for general property tax purposes . . ."[31] at its value for agricultural or horticultural use.

The Missouri statute directs that in valuing qualified land the assessor "shall consider only those indicia of value which the land has for agricultural or horticultural use."[32] These indicia of value include the assessor's personal knowledge, judgment, and experience; soil survey data; economic factors; parity ratios; and relevant recommendations of the state tax commission.[33] The statute requires the state tax commission annually to determine and publish a range of values for each of the several classifications of land in agricultural use within the state.[34] The commission must make these ranges of fair value available to the assessors of each county before January 1 of each year. The ranges of value may reflect return to land

26. § 137.017(4), RSMo (1975 Supp.). If the land lies contiguously along two sides of a county or township line, the $2,500 minimum requirement applies to the entire parcel of land rather than separately to two tracts. § 137.121(4), RSMo (1975 Supp.).

27. § 137.019(1),(2), RSMo (1975 Supp.). The application must contain a notarized affidavit that the facts set forth are true.

28. § 137.023, RSMo (1975 Supp.).

29. § 137.023, RSMo (1975 Supp.).

30. § 137.019(3), RSMo (1975 Supp.).

31. § 137.021(3), RSMo (1975 Supp.).

32. § 137.021(1), RSMo (1975 Supp.).

33. *Id.*

34. § 137.026, RSMo (1975 Supp.).

capitalized at a 7% rate.[35] Although the statute does not clearly explain the meaning of this provision, it seems to indicate that the state tax commission can determine returns to the land, *i.e.*, net income per acre reduced by that income attributable to factors other than the land itself, capitalize these returns by dividing them by 7%, and then utilize the resulting figures as one factor affecting the commission's determination of a range of values.[36]

B. *Eligibility Requirements*

There are a variety of features common to the many differential assessment programs now in operation. Several such features relate to qualification requirements which must be met before a landowner can utilize the applicable program. These requirements involve such matters as acreage, landowner income, a history of agricultural use, and the process of application to the program.

1. Acreage

A number of states require that a landholding be a minimum number of acres before it can qualify for differential assessment.[37] This acreage is normally required to be contiguous. A minimum acreage requirement arguably deters conversion of land use, since conversion of large blocks of land may result in significant reassessments. But even this effect is eliminated by the operation of a split-off provision such as appears in the Missouri statute. A split-off provision allows conversion or sale of part of the land without a reassessment or rollback penalty to the remaining land. Early versions of the Missouri legislation required a minimum tract of ten acres, although no such provision now appears in the statute.

2. Income

At least fourteen states require that the farm owner derive some percentage of his income from his farmland.[38] The purpose of this requirement is to make the benefits of use-value assessment available to bona fide farmers but not to non-farmer speculators. Alaska requires that the landowner derive one-fourth of his income from his farmland. Minnesota is even stricter, requiring that the farm be the farmowner's homestead or that

35. *Id.*

36. The State Tax Commission of Missouri has established seven categories of farmland, based on soil quality and potential productivity. These categories are defined as seven different soil grades. Grade 1 soil is to have an assessed value of $116 per acre. Grade 7 soil is to have an assessed value of $10 per acre. Letter from State Tax Commission to Senators, Representatives, Assessors, and County Clerks, containing a copy of guidelines, application, and definitions for application of the act (August, 1975).

37. *See, e.g.*, DEL. CODE tit. 9, § 8329 (Supp. 1976); KY. REV. STAT. § 132.010(7) (Supp. 1976).

38. *See* R. GLOUDEMANS, *supra* note 1, at 22.

it have been in his family's possession for seven years.[39]

Minimum gross income requirements are often criticized because they apply irrespective of acreage, thereby permitting large landholders with only a nominal farm income to qualify alongside bona fide farmers. The Missouri statute is of this variety. It requires only that the land yield gross sales of $2,500 per year from agricultural or horticultural products (or that there be clear evidence of anticipated sales of this amount) regardless of acreage.[40] This gross sales requirement somewhat offsets the absence of the minimum acreage requirement, since a minimum number of acres is necessary to produce $2,500 worth of products. Several states have attempted to tailor the income requrement so that non-farm landholders cannot easily qualify. New Jersey requires $500 of income on the first five acres, plus $5 per tillable acre in excess of five acres, plus $.50 per acre of woodlands and wetlands.[41] In Minnesota gross farm income must be $300 plus $10 per tillable acre, or it must constitute one-third of total family income.[42] Hawaii and Utah also require a minimum average return per acre.[43] Other states require that a certain percentage of the owner's gross income derive from participating land.[44]

3. Prior Use

Another common type of requirement for eligibility is that the land have been in a qualifying use for a minimum number of years prior to participation in the differential assessment program.[45] This tends to reduce the participation of speculators in differential assessment programs because the landowner must affirmatively show a continuous, active engagement in farming over some time period. The Missouri law appears to require five years of prior use, although it is confusingly and poorly written on this point.[46]

4. Application

The majority of states which have use-value assessment statutes require an affirmative application to the program by the landowner before his land becomes eligible. Missouri is one of these. Several states allow the

39. MINN. STAT. ANN. § 273.111 (West Supp. 1976). *See* W. Bryant, Farmland Preservation Alternatives in Semi-Suburban Areas, A.E.Ext. 75-5, Dept. of Agric. Econ., Cornell U. (April 1975).

40. § 137.017(4), RSMo (1975 Supp.).

41. N.J. STAT. ANN. § 54:4-23.5 (West Supp. 1975).

42. MINN. STAT. ANN. § 273.111 (West Supp. 1976).

43. HAW. REV. STAT. § 246-12(a) (Supp. 1975); UTAH CODE ANN. § 59-5-89 (Supp. 1975).

44. *See, e.g.*, ALASKA STAT. § 29.53.035(c) (1962); MONT. REV. CODES ANN. § 84-437.2(1)(b) (Supp. 1975).

45. *See, e.g.*, N.J. STAT. ANN. § 54:4-23.1 (Supp. 1975); OR. REV. STAT. § 308.370 (1975); FLA. STAT. ANN. § 193.461 (Supp. 1976).

46. § 137.019(1), RSMo (1975 Supp.).

initial applications to be automatically renewable.[47] Many states, including Missouri, require annual renewal.[48] Others require less frequent renewal, such as North Dakota where the period between renewals is five years.[49]

C. *Valuation*

A serious practical problem encountered in the implementation of any differential assessment program is that of determining the value of land used as farmland. In practice, the majority of states (and provinces in Canada) providing for use-value farmland assessments furnish the assessor with some guideline for determining farm value.[50] Maryland maintains that "farm use-value" is the value of agricultural lands located away from urban development and speculative influences.[51] Arizona has a variable ratio by which appraised values are multiplied by a special factor to arrive at an assessed value.[52] Oregon has established special criteria whereby assessors must value farmland. One of these criteria is the capitalization of farm income.[53]

Capitalization of income and the use of soil productivity ratings are two of the most commonly accepted approaches to the valuation of farmland. Income for farmland appraisal purposes generally takes two forms. It can be rent receipts for the use of the land when someone other than the owner is doing the farming, or it can be an owner-operator's net income after all costs but land costs have been paid. A capitalized value is derived by dividing the income figure by a percentage figure representing a reasonable return on investment, such as seven or eight percent. Alternatively, the assessor can base his appraisal on estimated soil productivity.[54] In Maryland, the Soil Conservation Service has classified all the farmland in the state into six capability classes based on potential yield of corn crops.[55] The Missouri state tax commission has established seven categories of farmland based on soil quality and potential productivity.[56] These categories may reflect returns to land at a capitalized value of seven percent per acre.[57]

There may be a question whether the presence of minerals or other

47. *See, e.g.*, ARK. STAT. ANN. § 84-484(D) (Supp. 1975); UTAH CODE ANN. § 59-5-89 (Supp. 1975); WASH. REV. CODE ANN. § 84.34.060 (Supp. 1975).
48. § 137.023, RSMo (1976 Supp.).
49. N.D. CENT. CODE § 57-02-27 (Supp. 1975).
50. *See* R. GLOUDEMANS, *supra* note 1, at 16.
51. MD. ANN. CODE, art 81, § 19(b) (Supp. 1976). *See also* Henke, *supra* note 7.
52. ARIZ. REV. STAT. § 42-227 (Supp. 1976).
53. OR. REV. STAT. § 308.345 (1975).
54. For a good discussion of land capability classification systems see J. Barron, Open Space Taxation: Guidelines for Assessing Open Space Property Values (Coop. Ext. Serv., Wash. St. U., 1971).
55. *See* R. GLOUDEMANS, USE-VALUE FARMLAND ASSESSMENT: THEORY, PRACTICE AND IMPACT, at 59 (1974).
56. *See* note 36 *supra*.
57. § 136.026, RSMo (1976 Supp).

valuable resources underneath the surface should be considered by the assessor in valuing farmland. So long as land use controls prevent the exploitation of these resources, it seems reasonable that any increase in market value should be ignored.[58] Attempts to recover minerals from underground should be deemed to be incompatible and nonqualifying uses, so that even if the statutory requirements are met, *e.g.*, minimum agricultural income, the land would become ineligible.

D. *Rollback and Deferred Taxes*

All differential assessment programs, whether preferential assessment, tax deferral, or restrictive agreement, contain particular provisions governing eligibility of land and methods of use-value appraisal. Tax deferral and restrictive agreement programs further provide for governmental recovery of property tax savings that result from assessing land at its use-value rather than its market value. Under a typical tax deferral statute, a rollback tax is imposed when land being assessed at its value for farm or other specific purposes is converted to an unqualified use. This tax is levied against the tax savings which resulted from using the deferred taxation program.[59]

This rollback tax is only one form of penalty imposed under the tax deferral statutes to recover tax savings, although it is the most common.[60] Some states charge interest in addition to the rollback taxes.[61] Other states impose a penalty in addition to the rollback tax if the landowner changes the land use without giving proper notification to governmental authorities.[62] In California the penalty for breaking the agreement not to change the use of the land is that the owner must pay 12.5 percent of the fair market value of the land.[63] New Hampshire imposes a tax of 10 percent of full cash value on open space land which loses its classification.[64] Connecticut levies a so-called conveyance tax on sales of land assessed at use-value.[65] In its efforts to reduce the amount of land leaving agricultural production, Vermont has adopted an agressive capital gains tax on short-term land transfers.[66] The tax liability for a change in use attaches to the

58. *See* Hagman, *supra* note 10, at 649.

59. *See* R. GLOUDEMANS, *supra* note 55, at 19-20.

60. The rollback is employed by at least twenty-four states. One example is VA. CODE § 58-769.10 (Supp. 1976).

61. These include Florida, Hawaii, Illinois, Maine, Rhode Island, Virginia, and Washington. *See* R. GLOUDEMANS, *supra* note 55, at 21.

62. R. GLOUDEMANS, *supra* note 55, at 20. The penalty varies from 10 percent of the amount of rollback in North Carolina to up to 100 percent in Utah.

63. CAL. GOV'T CODE § 51283 (West 1966 & Supp. 1975).

64. NEW HAMP. REV. STAT. ANN. § 79-A:7 (Supp. 1973).

65. CONN. GEN. STAT. ANN. § 12-504a, 12-504e (West Supp. 1976). The tax operates on a sliding scale, ranging from 10 percent of the sales price if the land is sold during the first year of acquisition or use-value assessment, whichever is first, and declining one percentage point each subsequent year until no tax is imposed after the tenth year.

66. *See* Note, *State Taxation—Use of the Taxing Power to Achieve Environmental*

land rather than to the owner. Therefore, if a transferee of property continues to farm the land, no rollback tax will be applied. If the transferee decides to devote the land to a non-farm use, the land will be subjected to the rollback penalty.[67] Clearly the assessment practices applied to the land of any selling owner will be important to a prospective purchaser.[68] Thus a complete system of recordation seems essential for the free transfer of real estate in an area where a differential assessment program utilizing tax deferral is in operation.

E. *Constitutional Considerations*

Differential assessment programs have encountered serious constitutional difficulties. These programs appear to violate state constitutional provisions which require that land be assessed at its just value, full value, market value, or true value.[69] In addition, the assessment of farmland at use-value and other land at market value violates a number of state constitutions which require that property be assessed in an "equal and uniform" manner.[70] Furthermore, even in those states which allow classification of property, differential assessment statutes may be invalidated on the ground that the classification is unreasonable. These difficulties have normally been addressed by constitutional amendments.[71] Wisconsin, however, chose not to amend its constitution in an effort to preserve its forest lands. Instead, it chose to exempt all forest land from taxes and to tax the timber when harvested.[72] Hawaii is singular among the states in that its constitution never included an "equal and uniform" provision.[73]

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); Baker, *Controlling Land Uses and Prices by Using Special Gain Taxation to Intervene in the Land Market: The Vermont Experiment*, 4 ENVT'L AFFAIRS 427-480 (1975).

67. *See* R. GLOUDEMANS, *supra* note 55, at 20.

68. The deferred or rollback taxes should be a lien on the real property just as any other real estate tax. In this case the statute should provide for recordation. *See* Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 649.

69. MO. CONST. art. X, § 3(b) provides in part: "Property in classes 1 [real property] and 2 and subclasses of class 2, shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class and for each subclass of class 2."

70. *See* Rose, *Vermont Uses the Taxing Power to Control Land Use*, 2 REAL EST. L.J. 602 (1973); Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274, 292 (1966); 51 AM. JUR., Taxation §§ 119, 156 (1944).

71. *See, e.g.*, KAN. CONST. art. 11, § 12; N.J. CONST. art. 8, § 1(b); N.J. STAT. ANN. § 54:4-23.1 (Supp. 1976). *See also* Nelson, *Differential Assessment of Agricultural Land in Kansas: A Discussion and Proposal*, 25 KAN. L. REV. 215 (1977).

72. WISC. STAT. ANN. § 77.03 (1957 & Supp. 1976).

73. HAW. REV. STAT. § 246-12 (1975 Supp.). This has prompted some writers to comment that Hawaii is one of the few states where land tax policy has truly been wedded to land use policy. *See* M. LEVIN, J. ROSE, & J. SLAVET, NEW APPROACHES TO STATE LAND-USE POLICIES 51 (1974); Hagman, *The Single Tax and Land-Use Planning: Henry Goerge Updated*, 12 U.C.L.A.L. REV. 762, 782-788 (1965).

The risk that a court will find that a differental assessment program unreasonably classifies property may be reduced by the inclusion of a preamble stating legislative purposes.[74] A differential assessment law also may avoid constitutional invalidation if it is construed to create an exemption from taxation instead of creating a classification of property. A court could find that because the legislature has the power to grant full exemption from taxation, it has the power to grant partial exemptions.[75]

The urban-rural service district, which involves manipulating the tax rate rather than the assessment value to grant tax concessions, also might be used to avert constitutional invalidity. In an urban-rural service district, the rate of taxation on urban and rural lands within a single taxing jurisdiction depends on the level of services provided. Therefore, if an area within a political unit is rural or agricultural in nature, it can be designated as such and taxed at a lower rate. This technique was held valid in Tennessee despite the presence of a state uniformity of taxation clause.[76]

The chances that an agricultural or open land taxation statute will be held constitutional are improved if the statute provides that the land be burdened by a use restriction. If the land is restricted by law to agricultural use and the restriction cannot easily be removed, the market value might well coincide with the agricultural use-value. If the restricted open land is valued in the market differently than unrestricted open land, the assessment will in fact be based on fair market value rather than use-value and will not violate uniform or market valuation requirements of state constitutions.[77]

A tax deferral statute is less likely to be held unconstitutional than a preferential assessment statute.[78] In theory a tax deferral statute only delays payment of a part of the tax, so that this may not constitute a lack of uniformity. Furthermore, there is an assessment made at market value which is satisfied at the time the deferred taxes are due and payable.[79] A preferential assessment statute makes no provision for later payment of current tax savings. This possible advantage of tax deferral over preferential assessment is somewhat diluted by the fact that tax deferral statutes typically provide for only a partial payment of the taxes which were saved prior to the conversion of the land out of a qualifying use.

Two of these constitutional issues are particularly important in Missouri. First, the Argicultural Valuation and Assessment Act probably vio-

74. *See* Moore, *supra* note 70, at 292.

75. *See* Hagman, *supra* note 68, at 643. *See also* Judge Prescott's dissent in State Tax Commission v. Wakefield, 222 Md. 543, 161 A.2d 676 (1960).

76. *See* Frazer v. Carr, 210 Tenn. 565, 360 S.W.2d 449 (1962). *See also* Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis - St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1076-77 (1974).

77. *See* Hagman, *supra* note 68, at 644-5.

78. *See* Freilich & Ragsdale, *supra* note 76, at 1076.

79. *See* Hagman, *supra* note 68, at 645.

lates the Missouri constitutional provisions requiring uniformity of taxation and assessment at market value. Second, the Act probably unconstitutionally sub-classifies real property.

The constitution classifies taxable property as follows:

> . . . class 1, real property; class 2, tangible personal property; class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature . . . residence or business of the owner, or the amount owned.[80]

This language seems to imply that the general assembly cannot create sub-classifications of real property (class one) for purposes of taxation. The Supreme Court of Missouri so interpreted this section in 1961:

> An intentional plan or design of discrimination by which one kind or class of property is systematically assessed at a higher percentage of its value than other property in the county works a constructive fraud upon each property owner thus discriminated against.[81]

Although in this case the court was dealing with timberland valuation practices rather than legislation, the ruling suggests the invalidity of the Agricultural Valuation and Assessment Act.

The Missouri constitution states that property "shall be assessed for tax purposes at its value or such percentage of its value as may be fixed by law for each class . . . ."[82] Case law indicates that the value or percentage of value used should be the market value based on the general mass of other taxable property in the county.[83] This suggests that agricultural lands cannot be assessed on a basis other than fair market value, such as use-value. It may be that in an area where the general mass of land is devoted to agriculture and there is little likelihood of significant development, fair market value will coincide with use-value for farming. Even in this situation, however, fair market value is the basis for assessment rather than use-value, regardless of whether the two values are equal.

The Missouri constitution should be amended so that differential assessment legislation would be of unquestionable validity. House Joint Resolution 36, which was submitted during the same legislative session in which the Agricultural Valuation and Assessment Act (then known as Senate Bill 203) was passed, would have begun the process to amend the constitution to remove any constitutional clouds from differential assess-

80. MO. CONST. art. X, § 4(a). *See* R. Bevins & J. Looney, Differential Assessment in Missouri?, Considerations for Community Decision Making, U. Mo. - Columbia Ext. Div. No. 5061 (December, 1972).

81. Drey v. State Tax Comm'n, 345 S.W.2d 228, 237 (Mo. 1961). *See also* Koplar v. State Tax Comm'n, 321 S.W.2d 686 (Mo. 1959); Cupples Hesse Corporation v. State Tax Comm'n, 329 S.W.2d 696, 699 (Mo. 1959).

82. MO. CONST. art X, § 4(b).

83. *See, e.g.*, State *ex rel.* Kahler v. State Tax Comm'n, 393 S.W.2d 460, 465 (Mo. 1965).

ment legislation.[84] Unfortunately, this resolution died in committee.

The use of an amendment to remove any constitutional questions is not without precedent in Missouri. Before enacting the Missouri State Forestry Law[85] the legislature apparently considered a constitutional amendment necessary so that special tax treatment for forestry and certain other lands be clearly valid. This amendment allowed partial relief from taxation for lands devoted exclusively to forestry. The language of that amendment might be used as a model for an amendment validating differential assessment for lands devoted to agricultural and horticultural use. It provides:

> Section 7. For the purpose of encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment and rehabilitation of obsolete, decadent or blighted areas, the general assembly by general law may provide for such partial relief from taxation of the lands devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe; provided, however, that in the case of forest lands, the limitation of twenty-five years herein described shall not apply.[86]

III. An Evalution Of Differential Assessment And The Missouri Statute

An evaluation of a differential assessment program begins with a consideration of the objectives of that program. The two most commonly cited purposes for the adoption of differential programs are to provide property tax relief to farmers when real estate market values are rising and to encourage farmland owners to retain their land in agricultural uses. One must also consider the cost of the program and other consequences that may ensue when such a program is implemented.

A. *A Method to Provide Tax Relief to Farmers*

It is generally accepted that in most states agricultural assessments are low in relation to other real estate assessments. One reason for this is that as

84. House Joint Resolution no.36, which was introduced in the first regular session of the 78th General Assembly, proposed amendment of article X of the constitution by adding a new section 16 to read as follows:

> Section 16. For the purpose of encouraging the agricultural and horticultural use of land, the general assembly may by general law provide for such partial relief from taxation of the lands devoted to such purpose, by any method or methods, for such period of time, and upon such terms, conditions, and restrictions as the general assembly may prescribe.

85. Chapter 254, RSMo 1969. The statute provides partial tax relief and, in particular, it sets fixed assessments per acre for privately owned lands classified as forest croplands. § 254.090, RSMo (1976 Supp.).

86. Mo. Const. art X, § 7.

a matter of practice much agricultural property is assessed on a use-value or modified use-value basis rather than a market value basis regardless of differential assessment laws. A 1972 report of the U.S. Department of Commerce indicates that farmland acreage is generally underassessed more than other real estate in states without use-value legislation than it is in states with such legislation.[87] This appears to be the situation in Missouri also. Several months after use-value assessment was adopted in Missouri the chairman of the state tax commission indicated that farmers in rural areas of Missouri had not sought participation because this would normally increase the assessed value as then applied by the local assessing officials.[88] However, participation of farmland owners near developing areas is significant, and the benefits of use-value assessment there are evident.[89]

It may be that use-value assessment will only benefit owners in a transitional area where development is foreseeable but not yet present.[90] In these areas the inducement to develop or sell farmland for non-farm uses is not so intense as in currently developing areas. The owner may wish to continue the agricultural use of his land even though the developmental value (market value) exceeds the use-value of the farmland. In those areas where development is relatively unlikely, *i.e.*, in rural areas located far away from urban centers, the market value of the land will approach the use-value, and the tax benefits of use-value assessment will be marginal or nonexistent.[91]

If the purpose of the program is to provide tax relief for farmers, preferential assessment is theoretically sufficient without the penalties and complications of deferred taxation and restrictive agreements. The advantage of deferred taxation and restrictive agreements, particularly those programs with long deferral or rollback periods, is that they reduce benefits to speculators who have no real interest in farming.[92]

Use-value farmland assessment programs have generally proved effective to relieve farmers on the urban fringe of the tax burden.[93] In Califor-

87. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 2 1972 CENSUS OF GOVERNMENTS 34 (pt. 2 1973).

88. Letter from Chairman of State Tax Commission of Missouri to Robert J. Bevins (Dec. 19, 1975).

89. The chairman also indicated that a large number of applications had been filed in St. Charles County, Clay County, and Platte County.

90. *See* Note, *Property Taxation of Agricultural and Open Space Land*, 8 HARV. J. LEGIS. 158, 189 (1970).

91. *See* Hagman, *supra* note 68, at 633; Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 176 DUKE L.J. 1, 28.

92. *See* T. HADY & A. SIBOLD, STATE PROGRAMS FOR THE DIFFERENTIAL ASSESSMENT OF FARM AND OPEN SPACE LAND 15 (U.S. Econ. Research Serv. Ag. Econ. Report No. 256, April 1974); Bevins, Some Thoughts on Taxation to Halt Urban Sprawl, 39 J. AM. SOC'Y OF FARM MANAGERS AND RURAL APPRAISERS 13 (1975).

93. *See* Hansen & Schwartz, *Landowner Behavior at the Rural-Urban Fringe in Response to Preferential Property Taxation*, 51 LAND ECON. 341, 344 (1975). *See also* R. GLOUDEMANS, *supra* note 55, at 53.

nia numerous studies have been conducted on landowner practices since the adoption of a differential assessment program with strict tax deferral provisions.[94] Although the existence of multiple objectives has complicated evaluation of the performance of the California program,[95] it does appear that the program has provided significant tax relief in rural areas affected by speculation.[96] The studies indicate that participation in the program is much heavier in areas located away from development activity rather than nearby.[97] This may have occurred because farmland owners near development activity, who anticipate conversion or sale of the land in the near future, are wary of the stringent tax deferral provisions in the California program.[98] In one study it was found that most landowners who enrolled in the program did not expect development to occur within ten years.[99]

B. *A Method for Land Use Planning*

Use-value assessment programs, whether preferential assessment, tax deferral, restrictive agreement, or other, have not yet proved to be fully effective methods to preserve agricultural lands.[100] Studies of the California program commonly conclude that the potential effectiveness of differential assessment as a means of reducing both premature conversion out of agricultural use and urban sprawl is minimal.[101] In fact, the program may be costing California taxpayers over $50 million per year with little public benefit to justify it.

The reasons use-value assessment programs have not proved to be fully effective methods to preserve agricultural lands are varied. One reason is that owners of lands near population centers, who are most susceptible to developmental pressures, have been noticeably unwilling to participate in use-value assessment programs which have significant penalties for conversion to nonqualifying uses.[102] Judging program effectiveness

94. CAL. GOV'T CODE § 51200 *et seq.* (West 1966 & Supp. 1977). *See also* Hansen & Schwartz, *supra* note 93; Gustafson and Wallace, *Differential Assessment as Land Use Policy: The California Case*, 41 J. AM. INST. PLANNERS 379 (1975); Note, *supra* note 90.

95. *See* Gustafson & Wallace, *supra* note 94, at 387.

96. *Id.*

97. *See* Hansen & Schwartz, *supra* note 93, at 345; Note, *supra* note 90, at 190. *See also* note 102 and accompanying text *infra*.

98. CAL. GOV'T CODE § 51283 (West 1966 & Supp. 1977).

99. *See* Hansen & Schwartz, *supra* note 93, at 348.

100. A study in Maryland has concluded that preferential tax treatment alone has little effect on conversion decisions. Washington Center for Metropolitan Studies, Taxation and Development, The Use of Tax Policies for Preserving Open Space and Improving Development Patterns in the Bi-County Region 8, 19 (1968). *See also* Carman & Polson, *Tax Shifts Occurring as a Result of Differential Assessment of Farmland: California*, 1968-69, 24 NAT'L TAX J. 449, 455 (1971). As for restrictive agreements, see R. FELLMETH, POLITICS OF LAND at 40-41 (1973).

101. Hansen & Schwartz, *supra* note 93, at 351; Gustafson and Wallace, *supra* note 94, at 387.

102. *See Property Tax Relief and Reform Act of 1973: Hearings on S. 1255 before the*

by high participation close to urban areas may be misleading, however, because high enrollment of otherwise developable land near urban areas may encourage a leapfrog development which exacerbates sprawl, produces unsightly areas, and increases the cost of providing public services.[103]

Another reason is that any tax consessions are largely over-shadowed by opportunities associated with development. This is due to several factors. First, any penalties imposed by a rollback tax are usually quite small relative to developmental opportunities. Because the size of the penalty depends on the divergence of market value from use-value, the larger the potential rollback penalty, the larger the potential capital gain associated with sale or land use conversion. In addition, rollback taxes or other deferred taxes will be deductible expenses for federal income tax purposes.[104] Second, the amount of these penalties is frequently less than the amount of the tax which the owner has saved. Thus, he will never pay more taxes than he would if he were not in the program, and he will often pay less. If there is no interest penalty on the deferred tax, he will also gain free use of the money involved.

A third reason why use-value assessment is not an effective land use control device is that assessment of high quality farmland at higher use-values than poor land makes the conversion of the better farmland more likely, because the better land will be subject to smaller deferred or rollback taxes.[105] A farmer planning on selling all or part of his land upon retirement also may be discouraged from continuing operations and thus decide to sell his land, because the accrued tax obligations will lower the market value of his land.[106]

If the purpose of the program is to influence land use, preferential assessment is a poor device. In fact, it may be the least effective method for land use control.[107] It imposes no responsibility on the landowner to maintain an agricultural use of the land. Since it is available to any landowner who meets the requirements, it may frustrate broad planning procedures. Several states in recent years appear to have found preferential assessment laws unsatisfactory and have moved toward either deferred taxation or restrictive agreements.[108]

Subcomm. on Intergov'tal Relations of the Senate Committee on Government Operations, 93d Cong.; 1st Sess., 813-16 (1973).

103. Hansen & Schwartz, *supra* note 93, at 351-52. *See also* R. BEVINS & M. LAPPING, PUBLIC TOOLS FOR INFLUENCING LAND USE, (U. Mo. - Columbia Extension Div, no. 8506, April 1976).

104. *See* Schoenbaum & Rosenberg, *supra* note 91, at 33.

105. *See* Henke, *Preferential Property Tax Treatment for Farmland*, 53 ORE. L. REV. 117, 128 (1974).

106. R. GLOUDEMANS, USE-VALUE FARMLAND ASSESSMENTS: THEORY, PRACTICE, AND IMPACT, at 42 (1974).

107. *See* T. HADY & A. SIBOLD, *supra* note 92, at 16.

108. Maryland and Connecticut have had preferential assessment laws for some time but have supplemented them so as to collect additional tax revenue from land which has been granted preferential assessment and afterwards passed into

Tax deferral programs also are less than satisfactory devices to influence land use. Although tax deferral tends to discourage a farmland owner from converting his land to a nonagricultural use, the only real advantage to the landowner is a postponement of taxes. If the program is only voluntary, landowners may shy away from it, fearing an accumulation of deferred taxes.[109] In addition, a tax deferral system may be expensive to establish and administer.[110]

It is not clear whether the rollback tax discourages land speculation. Probably it does not.[111] Any hope for the prevention of a land use change depends upon the participating farmer being so penalized in the form of a lower sales price that he is discouraged from selling. Only in this regard can the rollback tax be considered an encouragement, and then not a guarantee, for maintaining land in agricultural use.[112] Certainly the rollback tax has some marginal effect upon land use. More importantly, it provides society with a means of recapturing tax concessions which were made without securing the intended social benefit.

Restrictive agreements, on the other hand, are more likely to accomplish this objective of influencing land use. Restrictive agreements penalize a change in use, and they are normally closely related to planning objectives because the availability of tax concessions is in control of governmental authorities.[113]

The Missouri statute has no rollback provision. In this respect the law is particularly weak as a land use planning device. It provides the possibility of large tax savings for speculators without a compensatory obligation.[114] The Missouri statute also allows a landowner to change the use of part of his land without forfeiting the eligibility for preferential assessment on the rest of his land. Allowing landowners to enjoy a tax subsidy while reaping profits derived from the conversion of property out of agricultural use may have damaging effects on efficient agricultural production. Increasingly, researchers have come to believe that a certain "critical mass" of land is necessary for efficient agricultural production and the economies of scale

nonqualifying uses. MD. ANN. CODE art, 81, § 19(b) (Supp. 1976); CONN. GEN. STAT. ANN. § 12-107c (1958 & Supp. 1976). Florida has a preferential assessment program for farmland. But when this program was extended to outdoor recreation and parkland, it provided for restrictive agreements. FLA. STAT. ANN. § 193.501(1) (West Supp. 1976).

109. *See* Williams, The Property Tax on Forest Land and Timber, Taxation and Conservation of Privately Owned Timber 67 (Bureau of Bus. Research, U. of Ore. 1959).

110. *See* T. HADY & A. SIBOLD, *supra* note 92, at 16.

111. R. GLOUDEMANS, *supra* note 106, at 42.

112. *Id.*

113. *See* T. HADY & A. SIBOLD, *supra* note 92, at 16.

114. There was an effort to have a rollback provision attached to the legislation before it was enacted. The major sponsor of the bill as passed said himself, "[I]f it appears that law is being abused, I would be the first to come back with something like a rollback provision." St. Louis Post-Dispatch, Oct. 27, 1975, at 1C.

to support agribusiness enterprises.[115] Though this minimum land requirement varies for key crops, continous reduction of the agricultural land base through split-offs could undermine farming in certain areas. The split-off provision in the Missouri law seems to frustrate any land use planning objectives and extends only marginal tax relief to the farmer. The statute might be improved by requiring that land remaining after a split-off of part of the land become disqualified for a given period before becoming eligible for requalification. Perhaps the split-off provision should simply be eliminated.

Whether or not any use-value assessment program can have a significant effect upon land use, numerous studies indicate that it cannot do the job *alone*.[116] Differential assessment cannot be expected alone to curtail development when the market value of the farmland exceeds its use-value and conversion to a non-agricultural use is profitable, although use-value assessment combined with a love for farming or immobilities in the farm labor and capital markets may influence a landowner to retain his land in agriculture.[117] Some commentators suggest that one improvement would be to make a use-value assessment program mandatory for all land under qualifying uses.[118] It may also be an effective control technique if complemented by well-planned agricultural zoning which reduces developmental expectations.[119] In that case, improved land use control should be attributed to stronger regulation rather than use-value assessment itself.

C. *Costs and Consequences of Differential Assessment*

Differential assessment programs are also subject to further criticism. One such criticism is that differential assessment can cause a reduction in the tax base of the taxing jurisdiction and thereby reduce local government revenues in the area. The ability of a county to supply certain services will be sharply curtailed if a significant amount of land is brought into the program and if tax rates on nonparticipating land cannot be adjusted upward enough to compensate for the loss.

One study of the preferential assessment program in Maryland determined that eight counties on the fringes of Baltimore and Washington,

115. *See* Phillon & Deer, *Critical Mass of Agriculture and Maintenance of Productive Open Space*, 2 J. NORTHEASTERN AGRICULTURAL ECON. COUNCIL 1, 23-24 (1974); R. Stammer, A Mathematical Programming Model for Industry: With Empirical Application to the New England Livestock Feed Processing Industry (unpublished Ph.D. dissertation, Dept. of Agric. Econ., U. of Conn. 1971).

116. *See* T. Hady & A. Sibold, *supra* note 92, at 12. *See also* W. BRYANT, FARMLAND PRESERVATION ALTERNATIVES IN SEMI-SUBURBAN AREAS, A. E. Ext. 75-5, Dept. of Agric. Econ., Cornell U. (April 1975); Note, *supra* note 90, at 189.

117. R. GLOUDEMANS, *supra* note 106, at 39. The relationship may be more complex. *See* Hansen & Schwartz, *supra* note 93, at 352.

118. *See* Gustafson & Wallace, *supra* note 94, at 387; Hagman, *supra* note 68, at 648.

119. *See* Gustafson & Wallace, *supra* note 94, at 386; Hansen & Schwartz, *supra* note 93, at 351.

D.C. saw a reduction in revenues of approximately 3.6 percent.[120] This illustrates the need to consider carefully not only the perceived benefits of a differential assessment program, but also its costs, when comparing it to other methods of land use control. California reimburses local taxing jurisdictions for revenue lost through use-value assessment. Missouri also makes compensatory payments, but only in lieu of taxes foregone by differential assessment of forest croplands.[121]

Differential assessment also raises the property tax burden on non-farm landowners.[122] This effect is reduced under deferred taxation schemes, since the burden shifts as land is changed from a qualifying use to a nonqualifying use. A 1973 study in New Jersey indicates that state's differential assessment program shifted some $48 million in taxes from farmers to non-farmers. This represented nearly a $50 per acre shift in assessment rates.[123] While a study of the Connecticut differential assessment system suggests that there has been little shift in the tax burden,[124] this was largely the result of statewide development and growth which offset the loss of revenues.

It is further argued that differential assessment programs which are applied on a statewide basis unnecessarily benefit strictly rural land by giving equal preferential treatment to land which is well beyond the pressures of urban development as well as to land directly bordering urban areas.[125] This argument overlooks the fact that the market value is closer to use-value for farmland not subject to developmental pressures. Consequently, tax savings are less.

Another aspect of the costs inherent in a differential assessment program is the many administrative problems which must be faced. Agricultural uses and other qualifying uses must be defined. Many determinations must be made as to compliance with eligibility requirements. Criteria for determining use-value must be developed, and in the case of tax deferral, market value assessments as well as use-value assessments must be made.

The essential policy issue that emerges from these considerations is

120. Revenues to Montgomery County in Maryland in the amount of the tax loss could have supported a vigorous public land acquisition program. *See* House, Differential Assessment of Farm Land Near Cities, Experience in Maryland Through 1965, Econ. Research Serv., U.S.D.A. ERS-358 at 24 (1967).

121. § 254.110, RSMo 1969.

122. *See* T. HADY & A. SIBOLD, *supra* note 92, at 13. For a good discussion of shifting tax burdens, see Henke, *supra* note 105, at 124; Carman & Polson, *supra* note 100.

123. *See* T. Kolestar & J. Scholl, Misplaced Hopes, Misspent Millions: A Report on Farmland Assessments in New Jersey, in Differential Assessment of Farmland and Open Space (Princeton, N.J.: The Center for Analysis of Public Issues, 1972).

124. Fellows, The Impact of Public Act 490 on Agricultural and Open Space in Connecticut, Seminar on Taxation of Agricultural and Other Open Land, Mich. St. U. Coop. Ext. Serv. (1971).

125. *See* Schoenbaum & Rosenberg, *supra* note 91, at 28.

who will pay for the benefits perceived from land use control. Land use controls, particularly those aimed at "open spaces," seem to generate widely dispersed and generally small increments of benefit. The direct costs of land use control, on the other hand, may be highly concentrated. The costs fall upon the few owners whose land use options are limited, the local government that loses property tax base, and the region that sees limits on its potential for development.[126]

Differential assessment laws can be justified on a basis of promoting tax equity if the laws are so written that only the intended persons are eligible to receive the benefits of use-value assessment. But several studies suggest that the greatest benefits have gone to wealthy corporate landowners rather than to needy farmers.[127] If tax relief or the promotion of tax equity is to be an objective of such a program, the objective must be precisely delineated so that the program can be designed effectively.

IV. Other Approaches To Preserving Land In Agriculture

The value of differential assessment programs to preserve land in agriculture is questionable at best. Many differential assessment statutes seem to have tax favoritism as the main purpose rather than effective control of land use in the public interest. Other methods, being suggested and implemented elsewhere, may hold promise in terms of ability to preserve the resource base.

A. *Zoning*

Perhaps the most familiar form of land use control is traditional zoning, whereby local governmental authorities attempt to regulate the pattern of development through exercise of the state's police power. The constitutionality of zoning as a permissible use of the police power was upheld in 1926 in *Village of Euclid v. Ambler Realty Co.*[128] Governmental authorities cannot, however, impair a landowner's rights *unreasonably* on the basis of the police power alone.[129] This constitutional limitation of reasonableness is particularly important in view of the courts' general

126. *See* Libby, *Land Use Policy: Implications for Commercial Agriculture*, 56 AM. J. AGRICULTURAL ECON. 1143, 1150 (1974).

127. *See, e.g., Subcommittee Chairman's Report to Subcommittee No.1, House Select Committee on Small Business*, 90th Cong., 2d Sess., Tax Exempt Foundations and Charitable Trusts: Their Impact on Our Economy iii (1967); Gustafson & Wallace, *supra* note 94, at 387. However, another study indicated a strong tendency of corporate landowners to avoid participation in the California program. Hansen & Schwartz, *supra* note 93, at 348.

128. 272 U.S. 365 (1926). *See also* Nectow v. City of Cambridge, 277 U.S. 183 (1928).

129. Robinson v. Town Council of Narragansett, 60 R.I. 422, 434, 199 A. 308, 313 (1938). *See generally*, Berger, *To Regulate or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 LOY. L.A.L. REV. 253 (1975); Uddo, *Land Use Controls: Aesthetics, Past and Future*, 21 LOY. L. REV. 851 (1975).

reluctance to approve of police power regulation to promote aesthetic objectives,[130] although judicial support of regulation for aesthetic purposes has been growing.[131]

The difficulty in relying upon zoning to preserve agricultural land and other open space is the lack of objective standards for determining whether the property use restriction is reasonable under the circumstances.[132] It is clear that regulation need not permit the most profitable use of the land,[133] but open space regulations often benefit the regulated landowners very little, and they usually prohibit permanent structural uses. Zoning for open space purposes thereby restricts land value more severely than does conventional zoning.[134] Such regulations which impose serious burdens without any compensating benefits are likely to be held unconstitutional.[135] However, many open space regulations such as flood plain zoning, building setbacks, and grazing districts do involve reciprocity of benefits and burdens and are therefore supportable.

One common approach to zoning to preserve agricultural land and other open space is to adopt minimum lot size regulation. There was a recent trend toward invalidating large lot zoning in urbanizing surburban areas on the basis that minimum lot size requirements had the effect of excluding poor people and racial minorities of which a disproportionate number are poor.[136] This trend has been reversed, and courts now recognize the value of minimum lot zoning as one aspect of comprehensive land

130. *See, e.g.*, City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925); Bismark v. Bayville, 49 Misc. 2d 604, 267 N.Y.S.2d 1002 (Sup. Ct. 1966).

131. *See* Eskind v. City of Vero Beach, 159 So.2d 209 (Fla. 1963); State v. Diamond Motors, Inc., 50 Haw. 33, 429 P.2d 825 (1967); Jasper v. Commonwealth, 375 S.W.2d 709 (Ky. 1964); *In re* Cromwell v. Ferrier, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967). Leighty, *Aesthetics As a Legal Basis for Environmental Control*, 17 WAYNE L. REV. 1347-60 (1971). *See also* Steinbach, *Aesthetic Zoning: Property Values and the Judicial Decision Process*, 35 MO. L. REV. 176 (1970); Snadon, *Aesthetic Regulation and the Police Power*, 35 MO. L. REV. 445 (1970).

132. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

133. *See* Goldblatt v. Hempstead, 369 U.S. 590 (1962); Reinman v. Little Rock, 237 U.S. 171 (1915); Mugler v. Kansas, 123 U.S. 623 (1887).

134. *See* Kusler, *Open Space Zoning: Valid Regulation or Invalid Talking*, 57 MINN. L. REV. 1, 5, 7 (1972).

135. *See generally*, Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964); Hofkin v. Whitemarsh Township Zoning Bd. of Adjustment, 88 Montg. 68, 42 Pa. D&C 2d 417 (Pa.C.P. 1967); Morris County Land Imp. Co. v. Township of Parsipanny-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

136. *See, e.g.*, Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970). *See generally*, R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING, LAND USE REGULATION AND HOUSING IN THE 1970'S (1973). The U.S. Supreme Court has recently held that exclusionary or discriminatory effects of zoning alone, with no showing of improper purpose, do not render the zoning regulation violative of federal constitutional requirements. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 97 S.Ct. 555 (1977).

use control.[137] Planners can avoid any confiscatory impact on the farmers if minimum lot size regulation is applied in those areas where development is not reasonably expected for 15 to 20 years. The farmer retains an economic rural use for the land, and at the same time there is no urban use for his land of which he is deprived.[138]

Another regulatory method is exclusive agricultural zoning.[139] Under this form of zoning only farming uses are allowed. Therefore, the value of the land is its value for farming purposes, and the problems of assessments or appraisals based on non-farm use are eliminated.[140] This type of regulation is more likely than minimum lot zoning to be deemed an unreasonable confiscation because the impact of permitting only one use is so severe. There will almost certainly be parcels of land in the zoning area not suitable for agriculture, and they will be regulated into uselessness.

A third approach to zoning is compensable zoning.[141] Although this method involves more than simple regulation, it has been held a valid exercise of both the police power and of eminent domain.[142] An owner is compensated for the loss of the development value of his property due to restrictions imposed under the police power. Compensation is based on development value at the time the restrictions are imposed for open space purposes, but the owner is not eligible to receive compensation until he sells the property. The rationale is that he has incurred no loss before he sells.[143] Condemnation costs are paid by assessing those within the planning district who are benefited by the regulation. The benefit assessment allows a recapture of some of the planning benefits and their redistribution to

137. *See* Steelhill Dev., Inc. v. Town of Sanbornton, 469 P.2d 956 (1st Cir. 1972); Salamar Builders, Inc. v. Tuttle, 29 N.Y.2d 221, 275 N.E.2d 585, 325 N.Y.S.2d 933 (1971); Nopro Co. v. Town of Cherry Hills Village, 504 P.2d 344 (Colo. 1972).

138. *See* Freilich & Ragsdale, *Timing and Sequential Controls—The Essential Basis for Effective Regional Planning: An Analysis of the New Directions for Land Use Control in the Minneapolis - St. Paul Metropolitan Region*, 58 MINN. L. REV. 1009, 1064-65 (1974).

139. Santa Clara County in California and Lancaster County in Pennsylvania have both made extensive and effective use of agricultural zoning. *See* W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 23 (1959). *See also* Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370; Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URB. LAW. 344 (1971).

140. *See* W. Bryant, Farmland Preservation Alternatives in Semi-Suburban Areas, A.E.Ext. 75-5, April 1975, Dept. of Ag. Econ., Cornell U. (April 1975).

141. *See generally* Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Krasnowiecki & Strong, *Compensable Regulations for Open Space*, 29 J. AM. INST. PLANNER 87 (1963).

142. *See* Kansas City v. Kindle, 446 S.W.2d 807 (Mo. 1969). *Compare* Otto v. Steinhilber, 382 N.Y. 71, 24 N.E.2d 851 (1939), *with* Fulling v. Palumbo, 21 N.Y.2d 30, 233 N.E.2d 272, 286 N.Y.S.2d 249 (1967), *and* Kenyon v. Quinones, 43 App. Div.2d 125, 350 N.Y.S.2d 242 (1973).

143. *See* Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635, 638 (1974).

those suffering injury.[144] Administrative problems and costs of condemnation may make such a technique unduly expensive in some areas. However, the theory of compensable regulation paves the way for the concepts of public purchase of development rights and development rights transfer, which have received a great deal of attention.

Through state zoning enabling legislation at least twenty-one states have reserved for local governments the power to zone land for agricultural use.[145] While much of this legislation was passed to allow creation of exclusive agricultural districts, such programs have not proved to be as popular as those which provide for other land uses in predominantly agricultural zones. This type of non-exclusive zoning apparently has resulted largely from pressure from the farmers and the desire on the part of local governments to placate agricultural interests.[146] The consequence is a loss of effectiveness of zoning as a technique to preserve agricultural land.

Hawaii has adopted an effective program of exclusive agricultural zoning. All the land in the state has been assigned to urban, rural, agricultural, and conservation districts, and zoning ordinances in the agricultural districts are based on agricultural use. The good results achieved in Hawaii may depend, however, on elements peculiar to tropical agriculture and the unique State Land Use Plan.

California has adopted a greenbelt zoning statute which differs from traditional zoning in that the owner's consent is required to restrict land to exclusively agricultural use. The statute provides that any land which is zoned, by the consent of its owners, exclusively for agricultural use pursuant to a master plan cannot be annexed to a city without the owner's consent.[147] This statute is not sufficient for effective comprehensive planning, because the greenbelt restriction can be removed if the owner obtains approval of the county supervisor. In addition, an owner in a greenbelt area who has not consented to the restriction is free to develop his land.[148]

The most significant weakness of zoning as a land use control device, constitutional issues aside, is that even the most carefully prepared zoning map may be overwhelmed by variances, zoning amendments, and special exceptions.[149] As development approaches the area, speculators who anticipate the granting of variances will cause increases in market value and assessment value, resulting in an increasing property tax burden on the

144. *See* Freilich & Ragsdale, *supra* note 138, at 1069.

145. *See* E. Solberg & Pfister, Rural Zoning in the United States: Analysis of Enabling Lesislation, U.S.D.A. Econ. Research Serv. Misc. Pub. No. 1232, (1972).

146. *See* J. BEUSCHER, LAND USE CONTROLS: CASES AND MATERIALS (1967).

147. CAL. GOV'T CODE § 35009 (West 1968).

148. *See* Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

149. *See* Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1, 19; Sterch, *The Zoning Variance, A New Look in Missouri?*, 34 MO. L. REV. 631 (1969).

landowners.[150] Another drawback is that zoning decisions are normally controlled by politically vulnerable local government authorities. Finally, lack of coordination of policies among different political subdivisions with conflicting interests and the absence of mandatory state guidelines or supervision can easily frustrate comprehensive regional planning.[151]

The integration of a use-value assessment program with a zoning scheme can influence the pattern and timing of development. A growing number of commentators argue that either method or both in combination should not represent an unreasonable and therefore unconstitutional use of public regulatory powers.[152] All land within a specified area can be zoned exclusively for open space and agricultural uses and can be designated by the county as an agricultural preserve, making all land within the zoned area eligible for assessment at use-value. In this situation, zoning is much less vulnerable to the "unfair taxation" argument. Arguments for zoning variances or changes are much weaker when a landowner can avoid rising property taxes by applying for use-value assessment.[153] Both California and Oregon have integrated zoning with a differential assessment program.[154]

B. *Fee Simple Purchase and Leaseback*

When zoning regulation proves to be inadequate to control land use, politically unacceptable, or constitutionally unacceptable, governmental authorities might simply purchase the land by exercising their power of eminent domain.[155] The Missouri Open Space Conservation Act authorizes certain state political subdivisions to acquire from private persons various interests in real property for open space purposes, either through voluntary transfer or the exercise of eminent domain.[156] These subdivisions may

150. *See* Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 631; Kusler, *supra* note 134; Moore, *The Acquisition and Preservation of Open Lands*, 23 WASH. & LEE L. REV. 274 (1966).

151. *See* Henke, *supra* note 105, at 129; W. Bryant, *supra* note 140, at 5-7.

152. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); Hayman, *Planning and the Constitution: The Great "Property Rights" Fallacy*, 3 CRY CALIFORNIA 29-35 (Summer 1968).

153. *See* Gustafson & Wallace, *Differential Assessment as Land Use Policy: The California Case*, 41 J. AM. INST. PLANNERS 379, 387 (1975).

154. CAL. GOV'T CODE § 51220 (West 1966); OR. REV. STAT. § 308.370(1) (1975).

155. R. H. Platt presents an interesting article in which he contends that the eminent domain power arose out of the power of the English sovereign to preempt land by fiat, and that the police power is inherited from the "commons," a figurative or actual assembly of individual tenants whose rights in common opposed economic pressure towards enclosure. *See* Platt, *Fedual Origins of Open Space Law*, 4 LAND-USE CONT. Q. 27 (1970).

156. §§ 67.870, RSMo 1969. The state park board, counties with a population in excess of 200,000, and cities and counties adjoining such counties may:

> acquire by purchase, gift, grant, bequest, devise, or otherwise, the fee, development right or restrictive covenant, conservation easement, coven-

also acquire the fee title to any property for the purpose of leasing the property back to the original owner. There is little doubt concerning the effectiveness of such a program to preserve open space.[157] However, the usefulness of fee simple purchase is limited by two factors. First, under both the federal constitution and many state constitutions (including Missouri's)[158] land can only be acquired for a public purpose. Second, outright purchase is a very expensive method to control land development.[159]

Growth control by means of public purchase through the power of eminent domain requires the acquisition of interests in land well in advance of actual use. Some jurisdictions have held that excess or future condemnation is not a public purpose. According to this view, acquisition for uses well beyond those clearly foreseeable may be invalid.[160] Puerto Rico is the only jurisdiction to have considered a true land banking scheme, which involves purchasing and holding land without immediately committing it to a specific future use and then gradually disposing of the land to governmental and private parties.[161] The Supreme Court of Puerto Rico upheld land banking legislation, finding it well within the limits of public use and purpose.[162]

The high costs of a fee simple purchase program can sometimes be offset by funds made available through a number of federal government programs to protect open space.[163] Alternatively, the governmental agency can purchase the fee and then lease it back to farmers for farming or to other private parties for other purposes. The lease back not only reduces the cost of the program, but may also avoid constitutional difficulty, since the uses for which such land is acquired are immediate.

As a farmland preservation technique, fee simple purchase and

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ant or other contractual right in land or water rights located within such counties or cities necessary or appropriate to maintain, improve, protect, limit the future use of, or otherwise conserve and properly utilize open spaces and areas within such counties or cities.

§ 67.895, RSMo 1969. The act also requires assessors and taxing authorities to take due account of and assess private property interests with due regard to the limitation of future use of the land. *Id.*

157. *See* Rose, *supra* note 143, at 639.

158. MO. CONST. art. 1, § 27.

159. *See* Moore, *supra* note 150, at 279; Rose, *supra* note 143, at 639.

160. *See, e.g.*, Board of Educ. v. Baszewski, 340 Mich. 265, 65 N.W.2d 810 (1954); Opinion of the Justices, 330 Mass. 713, 113 N.E.2d 452 (1953). *See also* Freilich & Ragsdale, *supra* note 138, at 1074-75.

161. *See* Schoenbaum & Rosenberg, *supra* note 149, at 34-36. *See generally* Fishman, *Public Land Banking: Examination of a Management Technique*, in 3 MANAGEMENT AND CONTROL OF GROWTH 61 (R. Scott ed., 1975).

162. Commonwealth v. Rosso, 95 P.R.R. 488 (1967), *appeal dismissed*, 393 U.S. 14 (1968). *See also* Ruebo v. Oklahoma City, 435 P.2d 139 (Okla. 1967); Carlor Co. v. Miami, 62 So.2d 897 (Fla.), *cert. denied*, 346 U.S. 821 (1953).

163. *See, e.g.*, Cropland Adjustment Act, 7 U.S.C. § 1838 (1970); Land and Water Conservation Fund Act, 16 U.S.C. § 460*l*-5 (Supp.II, 1972); Watershed and Flood Protection Act, 16 U.S.C. §§ 1001-05 (Supp.II, 1972).

leaseback has not had extensive application. In the few instances where farmland was purchased under a New Jersey program, farmer opposition was strong and the leaseback procedure was a failure, primarily because the leaseback period was only one year.[164] On the other hand, in the province of Saskatchewan over one-half million acres have been purchased and leased back to farmers. This program is part of a larger rural development effort aimed at aiding the small farmer. The success of this program may be attritutable to the number of small farmers in the province. Applicants for land cannot have had family annual net incomes averaging over $10,000 in the prior three year period, nor can an applicant's net worth during this period have exceeded $60,000.[165]

Purchase and leaseback programs are beneficial to the farmer in that estate tax and property tax problems are reduced, and the farmer receives full compensation for his land.[166] But he loses the pride of ownership and becomes a rent-paying tenant instead. As a tenant he is less likely to make substantial investment in machinery, which is often necessary to efficient agricultural production. Governmental agencies make poor landlords, because they tend to prefer short leaseback periods possibly with competitive bidding to determine rent levels from one period to the next. Bureaucracies also are notoriously slow to make decisions about such things as repairs and capital improvement.[167] Another problem is that publicly owned land may be vulnerable to special interest groups who favor policies inconsistent with solid farming practices. Finally, expenses of administering the program along with maintaining the public properties could be prohibitive.

C. *Development Rights Acquisition*

As an alternative to purchasing the entire fee, local governments may acquire the rights to develop the land. Such interests are often referred to in the literature as scenic easements, conservation easements, or simply

164. *See* W. Bryant, *supra* note 140, at 16.

165. *See* Young, *The Saskatchewan Land Bank*, 40 SASK. L. REV. 1, 4-5 (1975).

166. The farmer's tax problems are not eliminated, however. The leasehold is taxable property, although the value of the leasehold is less than that of the fee. *See* Offutt Housing Co. v. County of Sarpy, 351 U.S. 253 (1956); State ex rel. Benson v. Personnel Housing, Inc., 300 S.W.2d 506 (Mo. 1957). *See also* Penn, *Real Property—Taxation of Private Leaseholds in Exempt Government Property*, 41 MO. L. REV. 613 (1976). The federal estate tax has also been a serious problem for farmers. Prior to 1977 real property was assessed at its market value for federal estate tax purposes whether or not it was assessed at some other value for property tax purposes. There has been a change due to the Tax Reform Act of 1976. New I.R.C. § 2032A states that with certain qualification, for purposes of the estate tax the value of qualified real property shall be its value for the use under which it qualifies. I.R.C. § 2032A. The term "qualified use" includes devotion of the property to use as a farm for farming purposes. I.R.C. § 2032A(b)(2). The value of a farm for farming purposes is determined by a type of capitalization of income method. I.R.C. § 2032A(e)(7).

167. *See* W. Bryant, *supra* note 140, at 17.

development rights.[168] Nondevelopmental uses such as farming and grazing normally remain available to the landowner. He retains the fee interest and transfers to the governmental agency only his right to develop the land. He keeps all his other rights of ownership, including the right of possession. The encumbrance runs with the land and binds all subsequent purchasers.[169]

This approach is similar to compensable zoning regulation, where the governmental authority zones out the right to develop and then compensates the landowner for any losses suffered. However, the costs of compensable zoning, whereby the landowner is not compensated until he sells the property, are not incurred as soon as the costs of a development rights acquisition program, in which the rights are paid for at the time acquired. On the other hand, compensable regulation is subject to zoning variances, while easements or development rights are normally acquired in perpetuity.[170]

It is well settled that public acquisition of these rights in land for conservation and other open space purposes is within the power of eminent domain.[171] However, it may be a requirement for the valid exercise of the power of eminent domain in purchasing development rights that the rights and limitations on the owner's use of his restricted land be clearly specified.[172] In this respect many enabling acts appear deficient,[173] including the Missouri Open Space Conservation Act which is silent as to the owner's use.[174]

Public acquisition of development rights presents several advantages over purchase of the fee.[175] It can be expected that the purchase price will be somewhat less, since the landowner retains the fee simple.[176] Landown-

168. *See* W. Whyte, Securing Open Spaces for Urban America: Conservation Easements, Urban Land Inst. Tech. Bull. no.36 (1959).

169. *See* Rose, *supra* note 143, at 640.

170. *See* text accompanying notes 141-44 *supra*. *See also* Moore, *supra* note 150.

171. *See* Rindge Co. v. County of Los Angeles, 262 U.S. 700 (1923); Berman v. Parker, 348 U.S. 26 (1954); United States v. Gettysburg Elec. Ry., 160 U.S. 668 (1896); Kamrowski v. Wisconsin, 31 Wis.2d 256, 142 N.W.2d 793 (1966). *See also* Ciriacy-Wantrup, *The "New" Competition For Land and Some Implications for Public Policy*, 4 NAT. RESOURCES J. 252, 264-66 (1964); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638, 644 (1960). Both articles discuss whether compensation for easements constitutes a gift of public funds under the California constitution.

172. Pontiac Improvement Co. v. Bd. of Comm'rs, 104 Ohio St. 447, 135 N.E. 635, 640 (1922); Bumpus v. United States, 325 F.2d 264, 266 (10th Cir. 1963).

173. *See* Eveleth, *An Appraisal of Techniques to Preserve Open Space*, 9 VILL. L. REV. 559, 566 (1964).

174. *See* note 156 *supra*.

175. *See* W. WHYTE, THE LAST LANDSCAPE (1968).

176. This has generally been the experience of the Wisconsin Highway Commission in purchasing scenic easements along the Great River Road. *See* Jordahl, *Conservation and Scenic Easements: An Experience Resume*, 39 LAND ECON. 343, 354 (1963).

ers receive cash in exchange for giving up a right in the land which they may never have intended to exercise, and they continue as landowners rather than as tenants. Not only does encumbered property remain on the property rolls, but when the value of the development rights is low the tax base will not be significantly reduced. Moreover, the expense of maintaining the property is not transferred to the governmental agency, and the landowner can continue to put the land to productive, though limited, use.[177] Another advantage is that the property tax pressures on the owner will be decreased because the encumbrance causes the assessment to decrease.[178] If the landowner makes a gift to the government of development rights, a charitable deduction may be taken on his federal income tax return for a contribution of development rights.[179] This encourages the landowner to make such a donation, further reducing the government's cost of acquisition.

There have been two serious impediments to implementation of development rights acquisition programs. First, the general public and local governing bodies have not fully understood the nature of conservation or scenic easements as techniques to provide open space. As a result, easements have been difficult to enforce. Damages after the fact for violations are often inadequate, as, for example, when trees are cut contrary to an easement agreement.[180] The difficulties that arise with the implementation of such a program are illustrated by the experience of the National Park Service. After acquiring scenic easements for a number of years, the National Park Service discontinued the practice, reporting that, "On the basis of 20 years of experience, such easements breed misunderstandings, administrative difficulties, are difficult to enforce, and cost only a little less than the fee."[181]

The second problem that arises in connection with development rights programs is that development rights can still be quite expensive, even if they are more economical than purchasing the entire fee. In rural areas where development potential is low, such rights should be relatively inexpensive.[182] In developing areas where the value of development rights is higher, not only is the cost of acquisition higher, but the reduction in the tax base is also more significant. A method to fund an acquisition program

177. *Id.*

178. Smith, *Easements to Preserve Open Space Land*, 1 ECOLOGY L.Q. 728, 735 (1971).

179. Rev. Rul. 73-339, 1973-2 C.B. 68. *See also* Browne & Dorn, *Charitable Gifts of Partial Interest in Real Property for Conservation Purposes*, 29 TAX LAW. 69 (1975); May, *The California Open-Space Easement Act: The Efficacy of Indirect Incentives*, 16 SANTA CLARA L. REV. 359 (1976).

180. *See* Eveleth, *supra* note 173, at 567.

181. H.R. Rep. No. 273, 87th Cong., 1st Sess. (1961). *See also* Rose, *supra* note 143, at 641.

182. *See* Smith, *supra* note 178, at 741.

is needed. However, it is often politically difficult to finance acquisition programs at the local level for such abstract future benefits as open space when there is need for a new hospital or school.[183] Instead, the state is the logical source of funding assistance. California finances its program by issuing bonds,[184] while Wisconsin funds its highway programs for scenic and conservation easements by a special one-cent tax on cigarettes.[185] There is also some funding assistance available from the federal government through the Open Space Land Program of the Department of Housing and Urban Development.[186]

In drafting development rights agreements one must be careful not to run afoul of common law doctrines relating to easements. Under the common law new types of easements may not be recognized, easements in gross may not be assignable, and they may be extinguished by merger if ownership of the easement and the fee are unified in one person.[187] Perhaps these development rights should not be referred to as easements at all.

New York's Suffolk County, situated on Long Island within commuting distance of New York City, has had limited experience with the public purchase of development rights.[188] The program was adopted in response to concern about potential over-population, because the demand for residential land was so high. The program has attracted strong support from county residents. Some perceive it as a way to limit the further growth of the county. Others see it as a way to guarantee open space. Still others think it is a way to make sure that plentiful amounts of fresh vegetables and fruit will be on their tables. The greatest support comes from the farming community. This is not surprising, since farmers may receive $6,000 per acre as windfall profits for sale of the rights and at the same time keep their land. Enthusiasm for the program among non-farmers may be largely attributed to a high level of public interest in the "quality of life," these taxpayers' particular ability to afford the high costs of the program, and strong program leadership.[189]

183. *Id.* at 744.

184. *Id.* at 745.

185. WIS. STAT. ANN. § 139.31 (West 1974). *See* Note, *Progress and Problems in Wisconsin's Scenic and Conservation Easement Program*, 1965 WIS. L. REV. 352.

186. Easements must generally be in perpetuity and receive H.U.D. advance approval to qualify for funding assistance. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, A HUD GUIDE: GRANTS FOR OPEN SPACE LAND (1970). *See also* Smith, *supra* note 178, at 746-48.

187. *See* Note, *Scenic Easements*, 8 IDAHO L. REV. 131, 138 (1971); Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962).

188. The county adopted the program pursuant to statute, N.Y. GEN. MUN. LAW § 247 (McKinney 1974), by passing Local Law No. 19, Local Law Relating to the Acquisition of Development Rights on Agricultural Lands, Suffolk County, New York (1974). *See* Bryant & Conklin, *New Farmland Preservation Programs in New York*, 41 J. AM. INST. PLANNERS 390, 394 (November 1975).

189. *See* W. Bryant, *supra* note 140, at 20.

D. *Transferable Development Rights*

It is often difficult to predict when a given land use restriction will be deemed a permissible exercise of police power regulation and when the restriction imposed requires compensation as an exercise of the power of eminent domain. A relatively new technique known as development rights transfer may provide some resolution to the problem.[190] The most common example of this technique is the development district. Under this type of program a given area is designated as a district. Within the district certain land (the preservation zone) is kept free of development, while other land is allowed to be developed at densities greater than otherwise permitted, so as to absorb the growth being deflected from the preservation zone. Overall development within the district thus can reach the same density it would have reached without the preservation of open areas.

Development of district land which lies outside the preservation zone is typically restricted by zoning regulation. However, development of this land can exceed that permitted by the zoning ordinances if additional development rights are purchased from landowners in the preservation zones.[191] Development rights may be allocated among owners on various bases such as acreage or value of potential development. They may even be time-phased. For instance, land ownership may be the source of an annual grant of generalized development rights. Importation or exportation of rights among districts would not be allowed generally, as this could easily frustrate the concept of controlled development.

Under any transferable development rights (TDR) proposal the development rights are freely transferable among private parties or between a private party and a public intermediary agency at market prices, and the use of these rights is subject only to a comprehensive land use plan for the pertinent area.[192] A landowner in a preservation zone finds himself owning land with fewer use alternatives and owning development rights which relate to land he may not own.[193]

Four types of TDR programs have been proposed.[194] The first and simplest was developed for New York City. Owners of landmarks upon which further development is prohibited would be allowed to transfer unused development rights only to adjacent parcels of land. The second

190. *See* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975).

191. B. Chavooshian and T. Norman, Transfer of Development Rights: A New Concept in Land Use Management, Extension Leaflet 492, Rutgers Univ. (1973).

192. *See* Shlaes, *Who Pays for Transfer of Development Rights?*, 40 PLANNING 7 (1974).

193. *See* Field & Conrad, *Economic Issues in Programs of Transferable Development Rights*, 51 LAND ECON. 331, 332 (1975).

194. *See* Costonis, *Whichever Way you Slice It, DRT Is Here To Stay*, 40 PLANNING 10 (1974).

proposal, illustrated by a plan for Chicago,[195] permits transfer of development rights to any developable sites within a designated district. A third pattern proposed for Puerto Rico[196] and New Jersey[197] encompasses transfer of rights from nonurban areas to protect open spaces, agricultural lands, or environmentally sensitive areas.[198] Fourth, transferable development rights might be assigned to all lands within the jurisdiction.[199] The idea that affirmative rights in real property can be transferred from one situs to another is not new.[200] In fact, the British have used development rights transfer for over twenty-five years.[201]

The TDR proposal does not fit precisely into the definition of either the police power or the power of eminent domain. It has some of the characteristics of both. The proposal involves more than police power regulation, because some landowners are selectively deprived of their rights to develop their land. Compensation is provided in the form of transferable development rights, but an established requirement for the valid exercise of the power of eminent domain is that compensation be in the form of money. A great deal of the legal literature on TDRs has been concerned with the question whether it is a constitutionally valid method of land use management.[202]

Whether TDR programs will be deemed confiscatory and therefore invalid under a theory of police power regulation depends on the magnitude of the reduction in economic return that the courts will tolerate. One commentator suggests that TDRs should not be viewed as a taking, but rather as a reasonable exercise of the police power, because the governmental authority has not taken away the landowner's right to build; it has regulated the locations for permissible development.[203] If TDR programs

195. *See* Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972).

196. *See* Woodbury, *Transfer of Development Rights: A New Tool for Planners*, 41 J. AM. INST. PLANNERS 3, 5 (1975).

197. *See* B. Chavooshian & T. Norman, *supra* note 191.

198. *See* Costonis, *supra* note 194.

199. This proposal is credited to Audrey Moore, a district supervisor of Fairfax County, Virginia, and to William Goodman of the Maryland Senate. *See* Moore, Transferable Development Rights: A Substitute for Zoning, presentation to the Virginia Advisory Legislative Council Land Use Committee, December 2, 1972; Goodman, *Development Rights: Alternative to Chaos?*, CENT. ATLANTIC ENVT'L NEWS 3, 5-6 (January 1973).

200. For an extensive discussion of the precedent for development rights, see Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. L. REV. 35, 53 *et seq.* (1974).

201. *See* Shlaes, *supra* note 192; Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635, 642 (1974).

202. *See* Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974); Rose, *The Transfer of Development Rights: A Preview of an Evolving Concept*, 3 REAL EST. L.J. 330 (1975); Costonis, *supra* note 190.

203. *See* Marcus, *supra* note 202, at 105.

are deemed to be regulatory measures, the courts may determine the reasonableness of such programs on the basis of the restrictions alone, disregarding the compensatory aspects of the programs.[204]

However, it is quite likely that the application of a TDR system will be deemed to involve an exercise of the eminent domain power on the ground that the owner will not be able to realize a reasonable return from the use of his land.[205] If so, the landowner must receive just compensation for the loss of the right to develop his own land. It is unclear whether TDR certificates for use on other property will be held by the courts to be compensation.[206] A New York court has found transferable development rights to be inadequate.[207]

A TDR proposal may face further constitutional challenge from the developers. Developers may claim that they are denied substantive due process and equal protection, because they bear the cost of a program which benefits an entire planning region, while the need for the program cannot be attributed uniquely to them. However, it is not clear that developers will in fact bear the full costs of the program. They may be able to pass some or all of the costs of TDRs to subsequent purchasers or tenants.[208]

The major constitutional difficulty for TDRs seems to be that compensation in the form of transferable development rights is not a sum certain in payment and is nonmonetary.[209] The value of these rights is determined by the market for the rights within the planning district or region. The vagaries of this market may be of concern to the courts. One commentator suggests two methods to avoid this problem. First, by exercising strict control over development, stabilization of market values for the development rights may result.[210] Second, the governmental agency can set up a development rights bank to purchase the rights from owners and resell to developers.

TDRs present several advantages over other land use control devices.[211] The timing and pattern of development can be partially controlled by zoning and manipulation of the availability of public utility and other services. Funding by the public treasury for land management objectives

204. *See generally* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 51 (1971).

205. *See* Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1104 (1975).

206. *See* Rose, *supra* note 202, at 354.

207. Fred F. French Investing Co., Inc. v. City of New York (Tudor City), 77 Misc.2d 199, 352 N.Y.S.2d 762 (Sup.Ct. 1973).

208. One commentator argues that the developer cannot effectively pass along the costs of the program to purchasers or tenants of the newly developed property, but that there are no costs to be borne at all other than administrative costs. *See* Shales, *supra* note 192, at 8. *But see* Woodbury, *supra* note 196, at 7.

209. *See* Rose, *supra* note 202, at 354.

210. *See* Note, *supra* note 205, at 1110.

211. *See* Carmichael, *supra* note 200, at 105.

need not be increased, because the compensation for the curtailment of development prerogatives comes from private parties who purchase the rights.[212] TDR systems correct a flaw of other land use devices by charging the land development process with costs that formerly, and improperly, fell upon the community in the form of environmental damage or the costs of repairing that damage.[213] TDRs are also a flexible tool for resource protection, which can be adapted to protect virtually any resource endangered by market forces.

The most serious obstacle to the implementation of a TDR program is the possibility that there will be insufficient demand for the development rights. Unless owners of land in the preservation zones can find willing buyers for the development rights at a fair price, the value of the rights to the landowner is severely limited. In a poorly organized or noncompetitive market the developer is likely to reap large benefits from the development rights sellers, because he will be able to select the landowner willing to sell his rights for the lowest price. Furthermore, the developer will be able to pass his costs of development rights purchases to consumers in terms of higher purchase prices or rents.[214] The presence of a public intermediary agency, acting as auctioneer or operating a development rights bank, could resolve this problem by controlling the available supply of development rights and by making market information available to prospective sellers.[215] Any program must insure that an active market for the rights will exist if the program is to meet its objectives without unintended results.[216]

Still other drawbacks to a TDR program have been cited. It is claimed that TDRs will lead to chaos in planning,[217] although competent implementation of the program may avert this possibility.[218] TDRs can result in greater development densities in already congested areas.[219] They may be unnecessary where other tools for preservation purposes are available.[220] Inaccurate projections by planners of future development needs may result in insufficient demand for development rights, or alternatively, large benefits for speculators.[221]

212. *See* Marcus, *supra* note 202, at 110.

213. *See* Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75, 100 (1973).

214. *See* Field & Conrad, *Economic Issues in Programs of Transferable Development Rights*, 51 LAND ECON. 331, 338-9 (1975).

215. *See* Woodbury, *supra* note 196, at 5.

216. *Id.*, at 9. One author has drafted proposed legislation which should induce owners to preserve their land in open space and also create a market for development rights. *See* Rose, *supra* note 201, at 651-663.

217. *See* Marcus, *Air Rights Transfers in New York City*, 36 LAW & CONTEMP. PROB. 372, 287 (1971).

218. *See* Costonis, *supra* note 194, at 12.

219. *See* Note, *supra* note 205, at 1102.

220. *See* Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338, 370 n.161 (1972).

221. *See* Rose, *supra* note 202, at 357.

The value of a TDR program in an agricultural setting is particularly questionable. Testing and development of TDRs has predominantly occurred in municipal areas.[222] Farmland owners may be reluctant to give up control of development rights which they cannot use and whose value cannot be realized unless an outside developer decides to purchase them. Large-scale rezoning allowing nonagricultural uses will be necessary in order to obtain an active market in an agricultural setting.[223] Furthermore, if the development rights are taxed as real property, the farmland owners will only get tax relief when a developer decides to purchase the development rights from the farmer.[224]

TDR programs cannot be effective unless adequately funded, professionally staffed, and relatively free of political interference. As with any program authorizing distribution of lucrative franchises and privileges, there is naturally a potential for abuse. The details of the transfer program must be clearly meshed with market conditions and requirements, since overly harsh developmental controls may discourage development completely. Harsh controls also may encourage developers to seek relaxation of the more stringent provisions through political pressure. Much more development and refinement of the concept must occur if TDR programs are to become an acceptable alternative to current techniques of farmland preservation.

E. *The Trust Concept*

Placing land to be preserved into a trust is another measure of land use control. At least three methods have been proposed: the private land trust, the public trust, and the community trust. The private trust consists of a private nonprofit corporation which accepts private donations with the objective of holding land in its open and natural state. One model is the Maine Coastal Heritage Trust, which is attempting to inventory and control the use of the coastal islands of Maine. The success of this type of trust depends upon the wealth of private donors. The concept, however, might be adopted as a framework to protect agricultural land in a public program to purchase development rights.

The traditional common law doctrine of the public trust is not very helpful for preserving agricultural land. The basic public trust theory is that the state holds the public lands of the state in trust for the public, and any attempt by the state to sell these lands to private interests or otherwise divert them to private uses is subject to judicial scrutiny.[225] Inherited from

222. *See* W. Bryant, Farmland Preservation Alternatives in Semi-Suburban Areas, A.E. Ext. 75-5, Dept. of Agric. Econ., Cornell U. (April 1975).

223. *Id.*

224. Under one proposal, transferable development rights would not be taxed. Rural owners would be taxed on the present use of the land rather than potential use as reflected in market value. The same principle is, of course, involved in differential assessment. *See* note 199 *supra.*

225. *See* Large, *This Land Is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1067 *et seq.*

English common law,[226] the public trust principle is limited mostly to tideland areas and protection of public interests in navigation, commerce, or fishery.[227] The concept may prove very useful for preservation of natural resources.[228] However, the doctrine is ill-suited to modern agricultural land use policy, because it precludes use of the land for the benefit of private interests.

The community land trust may prove significant for preserving farmland.[229] This allows a farmer to allocate the developmental potential of all his land to a certain portion of his acreage, *e.g.*, 20 percent, if he dedicates the remainder of his acreage to a community land trust.

The scheme proposes a voluntary agreement between the owner of the farm and the local governmental entity. First, the agreement would establish the developmental value of the entire farm under the standard zoning district regulations at the time of the agreement. Second, the agreement would designate a limited area for development at a density that would create a developmental value equal to that of the entire farm. Clearly, the program is only feasible if zoning regulation allows non-farm use of the land designated for development. Finally, the agreement would require the remaining farmland to be offered for dedication to a community land trust.

Since preservation of prime farmlands is the primary objective, the area selected for development should be the least arable portion of the total farm which would still allow for economic development and be compatible with the community master plan. Upon executing the agreement, the farm owner could sell the developable land at the current market price or hold it. He and his successors would have the right to active farming use of the dedicated land upon payment of a nominal rental fee. Thus, an operating farmer who could sell his development rights would no longer have his capital frozen in his business. Furthermore, he would not be paying real estate taxes on the farmland. Neither would he lose his capital value in the land, nor the potential appreciation, if he should choose to hold the development area for future sale. Property taxes on the developable land would, of course, increase as the developmental value of that land increases.

A second feature of the proposed scheme would allow for the transfer of development rights. This permits several farmers to cooperate in pre-

226. *See* J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN THE WATERS AND IN THE SOIL AND SHORES THEREOF 24-25 (2d ed. 1847).

227. *See* Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892). *See also* Ripley, Cohen, and Dwyer, *Environmental Land-Use Control: Common Law and Statutory Approaches*, 28 MIAMI L. REV. 135, 151 (1973).

228. *See* Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972).

229. *See* Reuter, *Preserving Farm Land Through Zoning and a Community Land Trust*, 1971 LAND-USE CONTROL ANNUAL, 169, 171-73. Reuter's article is the source of the material on community land trusts.

serving their farms and make large-scale farming operations possible. Furthermore, by pooling the development rights from several farms, larger and more attractive development areas could be created.

F. *Agricultural Districting*

The community trust proposal is an untested attempt not only to preserve farmland and protect the farmer from rising taxes, but also to insure that farming be economically feasible by releasing some of the farmer's capital investment. New York has developed a method known as agricultural districting to serve similar purposes. Agricultural districting, however, allows the landowner to retain his ownership of the land. The program permits farmers voluntarily to form a district and thereby receive several benefits, including property tax concessions.

The agricultural district program has won wide-based support, because it has emphasized initiation of control at the local level.[230] The impetus to create a district generally must come from local landowners who apply for such status by submitting a proposal to the county legislature, although the state can initiate a district through the Commissioner of the Department of Environmental Conservation, where "unique and irreplaceable" agricultural lands are threatened.[231] Even in the case of state-initiated districts, local legislative bodies or planning boards must assent if the district is to be developed.

The process of developing a district is a long one, and many local bases of authority in rural areas are consulted. A proposal must be approved by the county legislature, the agricultural advisory committee (composed of four farmers, four agribusinessmen, and one legislator), and the town and county planning boards. A series of hearings provide a process of general public review before it is referred to the State Commission of Environmental Conservation. When the state review process is completed the Commissioner can approve the proposal for adoption or make modifications. Final approval on the proposal is reserved for the county legislative body. The entire process may take six months.[232]

Participation in the program is voluntary. A proposed district must include at least 500 acres, and the farmers making the proposal must own at least ten percent of the land to be included. After formation, a district is affected by the following provisions. First, farmers may apply for use-value assessment for property tax purposes. A later conversion to a noncompatible use subjects the owner to a rollback levy on tax savings in the prior five-year period. Second, with the exception of health and safety regulations, local governmental bodies with a district in their jurisdiction may not regulate either farm practices or structures within the districts. This pre-

230. Lapping, *Preserving Prime Agricultural Land: The New York Experience*, TOWN & COUNTY PLANNING, 394-397 (Sept. 1975).

231. N.Y. AGRIC. & MKTS. LAW § 304 (McKinney Supp. 1975).

232. *Id.*

vents even the regulation of farm odors, for instance, a favorite target of suburban residents who reside in a transitional or fringe area. Third, state agencies are directed to modify their policies and programs so as to encourage commercial agriculture. Fourth, though it does not preclude the state's exercise of the power of eminent domain, the agricultural district law makes it a more difficult and rigorous process by forcing public agencies which might utilize this power to examine alternative areas for their projects. Fifth, where local agencies have the ability to provide funding for community facilities which might encourage non-farm development or act as catalysts to it—water and sewage facilities for example—this power will be modified. Sixth, where special service districts have been established to tax land for sewage, water, and non-farm drainage programs, this power is limited to assure low taxes on farmlands.

Eight years after formation, each agricultural district must be reexamined by the county and state. District boundaries may be modified, as when part of a district is in strong demand for non-farm uses. But changes can only be made at eight-year intervals, and not before the initial eight-year contract has expired. The state and county have the authority to continue any district indefinitely, regardless of local wishes.[233]

By creating a district, local landowners and governmental authorities acknowledge the intention to preserve agricultural land in the area. Given the degree of public involvement necessary to create a district, much of the discouragement occasioned by potential land conversion and speculation is alleviated, and investment in farming is encouraged. This is especially important in New York where the heavy commitment of land and resources essential to efficient dairy farming adds little to the developmental value of the land for other purposes. The local problem of a shrinking tax base is offset partially by state reimbursement of lost revenues for as much as fifty percent.

The minimum area for a district is 500 acres because the program is committed to the concept of a "critical mass" of land being necessary for farming.[234] In those cases where a farmer is not in a district, because of an acreage limitation or some other factor, he may still take advantage of the tax deferral aspects of the law by entering an eight-year contract analogous to the eight-year contracts of farmers in the district. The idea of preserving large contiguous blocks of farmland seems to increase the acceptability and credibility of a farmland preservation program in the eyes of the non-farm public.[235] Since the county is responsible for creating districts at the local level, districts need not observe town boundary lines.[236]

233. *See* W. Bryant, *supra* note 222, at 12.

234. On the importance of a critical mass of land in agriculture, *see* Phillon & Derr, *Critical Mass of Agriculture and the Maintenance of Productive Open Space*, 3 J. NORTHEASTERN AGRICULTURAL ECON. COUNCIL, 1, 23-34 (May 1974).

235. *See* Bryant & Conklin, *New Farmland Preservation Programs in New York*, 41 J. AM. INST. PLANNERS 390, 392 (November 1975).

236. *See* W. Bryant, *supra* note 222, at 12.

New York's agricultural district program has received a high degree of participation since the enactment of the Agricultural District Law in 1971.[237] By June, 1976, 294 districts had been formed controlling nearly four million acres, or well over one-third of all agricultural land in the state.[238] Although a great many acres have been enrolled in the districting program, there is not yet available good evidence on the effectiveness of districting as a farmland preservation tool. Constitutional difficulties with "taking" and the police power appear to be absent, since the program is voluntary. Districting has been most popular in rural and semi-rural areas, where the probability of selling farmland at greater than farm value in the near future is not great. Conversely, in developing or semi-suburban areas,[239] the program has met resistance. The reason is, of course, that farmland owners anticipate imminent conversion of land use.[240] Other preservation methods are necessary in these areas. This is why Suffolk County has employed a program of development rights purchase, as discussed above.

V. CONCLUSION

An effective method of implementing land use policy is essential to preserve and maintain our farmland and to minimize the inordinate consumption of land in developing areas.[241] Comprehensive planning should begin at the state level. This would include methods for identifying areas of critical concern and monitoring land uses within these areas.[242] Planning and control should then continue at local levels. A variety of preservation methods is available, and perhaps no method alone is sufficient.

Zoning regulation, whether or not it excludes all nonagricultural land use, depends on proper exercise of the police power and the reasonableness of constraints placed upon the land. Compensable zoning may resolve constitutional difficulties and adjust for shifts in land value.[243] However, even the most carefully orchestrated zoning regulation is subject to variances, exceptions, and rezoning hampering its dependability for controlling development.[244]

237. N.Y.AGRIC. & MKTS. LAW §§ 300-307 (McKinney 1972 & Supp. 1975).

238. Agricultural Resources Commission, State of New York Monthly Report on the Status of Agricultural Districts, No. 44 (June 15, 1976).

239. For definitions of various classes of land, *i.e.*, rural, semi-rural, semi-suburban, suburban, and urban *see* Bryant & Conklin, *supra* note 235, at 392-4.

240. Land prices have ranged from five times the value of land for agricultural purposes to over 10 times that value.

241. For a discussion of problems facing full-scale land use planning in North Carolina, *see* Hinkley, *A State's Approach to Land Use*, 6 WATER SPECTRUM No. 2, 23 (1974).

242. *See* Slavin, *Toward a State Land-Use Policy*, 44 STATE GOV'T. 2 (Winter 1971), *reprinted in* 4 LAND-USE CONT. Q. 42, 48 (Fall 1970); Libby, *Land Use Policy: Implications for Commercial Agriculture*, 56 AM. J. AGRICULTURAL ECON. 1143, 1147-8 (1974).

243. *See* Carmichael, *supra* note 200, at 105.

244. One commentator suggests that zoning be abolished altogether, at least

Public purchase of interests in land—either the entire fee or some lesser interest such as development rights—will provide complete governmental control over the uses applied to those lands. The large costs required are the most significant drawback. Although a leaseback program together with purchases reduces the drain on the public treasury, leaseback programs have encountered stubborn resistance from farmers.

Any program which allows the farmer or other landowner to retain his ownership of the fee simple will not solve the onerous problems of the federal estate tax which have plagued farmers. Thus, those programs such as fee simple purchase and leaseback or trust arrangements which remove the ownership of the property from the farmer may be preferable to those which allow the farmer to retain the title to his land. However, this tax advantage has been significantly reduced by the Tax Reform Act of 1976.[245]

Development rights transfer may provide a means of guiding growth and preserving open space without violating the "taking" clause on the one hand and without massive public expenditures on the other. The urgent need for effective and efficient land use control may demand the type of far-reaching innovation that TDRs represent.[246] TDRs require a vigorous and efficient market, and this would be particularly difficult to establish in an agricultural setting.

The experience in New York with agricultural districting is promising. The program is popular, and as yet has faced no constitutional challenge. It may provide effective protection for New York's agricultural lands, although more time is required to evaluate the program. The major deficiency of districting is its inability to influence land use in developing areas, where the need to control growth is most immediate and visible.

The success of a farmland preservation policy depends upon its political acceptability and effectiveness in attaining stated objectives. Differential assessment in all its various forms has already been adopted by a majority of the states. The tax relief differential assessment provides for farmers may be its only valid justification. However, since the benefits of use-value assessment seem to be regularly enjoyed by large corporate interests and speculators, a social objective of aiding farmers may be thwarted.

The eligibility requirements of the Missouri statute are relatively easy to meet. Moreover, the provision allowing a split-off of part of the land for development or other nonqualifying use, while the remaining land continues to be qualified, is particularly favorable to landowners who are not serious farmers. The Missouri statute can better meet an objective of providing farmers tax relief and excluding non-farmers by requiring a

within a municipal context. *See* Heeter, *Toward a More Effective Land-Use Guidance System*, 4 LAND-USE CONT. Q. 8 (Winter 1970).

245. *See* note 166 *supra*.

246. *See* Schoenbaum & Rosenberg, *The Legal Implementation of Coastal Zone Management: The North Carolina Model*, 1976 DUKE L.J. 1, 37.

minimum acreage or minimum farm income based on acreage and by restricting the amount of allowable income from sources other than qualified farmland.

In order to promote farmland preservation, further changes are needed in the Missouri program. First, the Missouri legislature should promptly begin the process of constitutional amendment, so that the Agricultural Valuation and Assessment Act conforms to the Missouri constitution. In addition, a penalty should be included in the Act assessing the landowner for converting land receiving use-value assessment to a nonqualifying use. A rollback tax or some variation of it will discourage conversion of farmland to more highly developed uses, but such a penalty cannot alone control development in the face of rapidly rising property values. A scheme combining differential assessment with tax deferral and agricultural zoning may produce the desired results.[247] It seems likely, however, that restrictive agreements might also be needed to provide even more direct governmental control over the pattern of development.

An acceptable farmland preservation program must be tailored to specific agricultural situations in the state. Perhaps the most useful approach at the state level is enactment of enabling legislation which will authorize local or regional development of preservation programs. Agricultural districting is particularly appealing because of its emphasis on local participation in the planning process. At the same time, local programs must be integrated with state-wide land use policies. A large and growing number of techniques is available,[248] and the General Assembly should begin now to develop a carefully planned and comprehensive land use policy.

247. *See* Woodbury, *supra* note 196, at 7.

248. *See* W. Washbon, The Prime Farmlands Transfer Fee: A Technique to Utilize Non-tax Money for Choice Farmland Retention, A.E. Ext. 76-40, Dept. of Agric. Econ., Cornell U. (October 1976). The author, an experienced land use consultant, presents a new proposal to encourage farmland retention.