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The Dilemma of Preserving Open Space Land - How to Make Californians an Offer They Can't Refuse

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THE DILEMMA OF PRESERVING OPEN SPACE LAND—HOW TO MAKE CALIFORNIANS AN OFFER THEY CAN'T REFUSE

I. INTRODUCTION

Californians are presently facing a land use crisis. Every day thousands of acres are being irrevocably committed to some form of development. At the same time, however, many groups are seeking to preserve open land in California for environmental, historical, recreational, or agricultural purposes. The widespread effects of this conflict will be explored in light of the limitations on land use controls imposed by the state constitution and will be analyzed in terms of past, present and future legislative responses to this increasingly significant problem.

II. CRITICISMS OF CURRENT LAND USE POLICY

A. Open Space: Where Has It Gone?

California has experienced unparalleled population and economic growth in the past 25 years, largely at the expense of its best agricultural land. In 1958, California had approximately 12,249,000 acres of crop land. Between 1958 and 1967 over one million acres of this land were converted to non-agricultural uses. The United States Soil Conservation Service estimates that unless some positive action is taken 808,871 additional acres of California's open space land will be lost to recreational subdivisions by 1980 and 1.1 million acres will be lost to other types

3. A list of these organizations would include the Sierra Club, the California Cattleman's Association, and the Association of Bay Area Governments.
4. CAL. CONST. art. XXVIII and CAL. CONST. art. XIII, § 37.
5. POWER & LAND IN CALIFORNIA, PRELIMINARY DRAFT, RALPH NADER TASK FORCE REPORT ON LAND USE IN CALIFORNIA V-4 (R. Fellmeth, ed. 1971).
7. NEEDS INVENTORY, supra note 2, at 3, 18.
8. Id.
9. Id. at 17.
of urban development. This amounts to over 1.9 million acres, nearly 529,000 of which will be prime agricultural land.

Although the use of open space for recreational facilities and housing needs may be justified, the loss of such a large amount of crop acreage will necessarily have a significant impact on California's food production capabilities. So far, improved agricultural production techniques have prevented serious food shortages. However, improved techniques will not always be sufficient to keep production and demand in equilibrium. Furthermore, the loss of this cropland acreage may seriously jeopardize California's position as the leading agricultural state, since much of the land threatened with development is currently used for the cultivation of "specialty crops," which can only be produced in areas where certain rare climactic and soil conditions coincide. While other areas may be found to produce these crops, the result will be increased costs to the farmer, which will be passed on to the consumer in the form of higher food prices.

As our population has grown, our cities have expanded to meet the need for more urban housing, resulting in a process known as urban sprawl. It has been estimated that nearly all the California cities which have experienced rapid population growth could be condensed to one-half of their present area without seriously affecting their functions as population centers. When scattered urban development, as opposed to contiguous urban development takes place, unused acreage within city perimeters becomes too valuable to be profitably used for farmland or other open space purposes.

It should be noted that agricultural land located in non-urban areas is also being subjected to development pressures. This is largely caused by so-called "recreational subdivision" developers who buy options to purchase land in non-urban areas

10. Id.
11. Id.
13. Id.
15. Id. at II-12.
17. Id. at 7-9.
at a price in excess of the market value of the land if it were to be used only for agricultural purposes. This activity drives up the market value and the taxes of the neighboring parcels until the landowners can no longer afford to retain the large tracts of land, thereby forcing the division of the nearby land into smaller, less economical parcels. The potential repercussions of this action can be tremendous. For example, since much of this type of property is marginal grazing land, the cattlemen who own the land can realize a profit only if the property is used in large tracts. Furthermore, because of the difficulty and cost of reassembling the tracts, division must generally be considered as an irrevocable commitment of land resources. Additionally, the division of the land into smaller units makes proper land management, soil conservation, and maintenance of watershed areas extremely difficult because of the problems encountered when dealing with a "proliferation of ownerships." The local government, in turn, is burdened by the necessity of providing services for the new "recreational community." While some developers provide these services initially, the problem of upkeep is eventually passed on to the local government, negating the advantage of second home developments: the added revenue they provide by virtue of inflated land prices and higher property tax assessments.

Advocates of second home developments have argued that much of the land used by recreational developers is of marginal value as grazing land but highly profitable as vacation housing. This view, however, overlooks the needs of the cattle industry in California. The development of recreational subdivisions and the subsequent increase of property taxes makes it increasingly difficult for cattlemen to operate profitably. If this trend continues, it will probably result in the eventual demise of the California cattle industry.

20. ZELVER, supra note 18, at pt. VII.
21. Id.
23. ZELVER, supra note 18, at pt. VII.
24. Id.
25. Id.
27. Id.
28. ZELVER, supra note 18, at pt. VII.
29. See C. Handley, Home Sweet Second Home, PSA FLIGHTIME, June, 1971, at 24. The author of this article was allegedly employed by Boise-Cascade, the largest of the recreational subdividers in California.
30. Telephone Interview with Mr. W. Steiger, California Cattleman's Association, Sacramento, July 25, 1972.
31. Id.
It has also been argued that the location of recreational subdivisions in the foothills has prevented urbanization of the more productive agricultural land in the valleys. This argument is valid to some degree; however, the benefit of foothill development may very well be offset by the water pollution and soil erosion caused by many of these developments, results which, in the long run, have a disastrous effect on prime valley land.

It is clear that agricultural and other open space land is being lost at a rapid rate. Although many factors contribute to urban sprawl and the proliferation of second home subdivisions, the two most important causes of the loss of open space are the property tax structure and the lack of adequate land use controls.

B. California Property Tax Assessments

In California, for property tax purposes, land has traditionally been assessed at a percentage of its "fair market value." However, when the population boom hit and the rush to develop residential and industrial facilities began, the potential dangers of this type of tax system to open space land became readily apparent. As land in a particular area was purchased, the tax assessor used the price paid for the property as a guide to the "fair market value" of all land similarly situated. The purchase price of the land was often several times the value of the property as farm land, since the highest or best use of the "test lot" was often industrial or commercial, which raised the assessed value of the nearby agricultural property to the commercial "test lot" level. Property close to a "test lot" was therefore often taxed at a rate far above the returns it could realize if it were used only for agriculture. This taxation policy has made it extremely difficult for farmers on the fringe of urban areas or near recreational subdivisions to profitably engage in agricultural operations because they are forced to pay taxes on the potential, not actual use of their land.

32. CALIFORNIA DEPT. OF CONSERVATION, ENVIRONMENTAL IMPACT OF URBANIZATION ON THE FOOTHILL AND MOUNTAINOUS LANDS OF CALIFORNIA 6 (1971).
33. Id. at 19-46.
34. NEEDS INVENTORY, supra note 2, at 3,18.
36. CAL. CONST. art. XI, § 12, requires that the assessment be at the "full cash value." For a discussion of the constitutionality of assessment at the "fair market value" see Justice Traynor's opinion in De Luz Homes v. County of San Diego, 45 Cal. 2d 546, 290 P.2d 544 (1955).
38. Id.
C. Interaction Between the Property Tax Structure & Zoning Controls

Until recently, the basic tool of land use control has been zoning. To a large degree, however, zoning has not been an effective means of controlling urban sprawl or preserving open space land because of the constitutional limitation on the exercise of the police power and dysfunctional institutional characteristics in the zoning system which cause many zoning ordinances to be permanent in form but mutable in practice.

Local legislative bodies have traditionally been responsive to public demands. In this responsiveness, however, is an inherent danger that they will alter zoning ordinances if sufficient pressure is applied by members of the community. This instability induces land developers to pay more money for property that is zoned for agricultural or other open space use than the zoning would seem to warrant, on the assumption that the zoning can always be changed to a higher use. The “speculative market value” then becomes the “fair market value” of the property and is used by the tax assessor when he determines the assessed value of the property.

Contributing to the zoning and taxing problems are the institutional characteristics of zoning appeals boards, which tend to inhibit the strict application of the laws by which variances and special use permits are granted. Although California Government Code Section 65911 makes it clear that zoning variances

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40. While zoning controls (i.e., the police power) may only be exercised to protect the health, safety, morals, or general welfare of the community, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926), and no land owner may be totally deprived of the use of his land without just compensation, Cal. Const. art. I, § 14, (but see Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), appeal dismissed, 371 U.S. 36 (1962) ) in numerous cases, the California courts have held that “... the line between taking and regulation is drawn in response to two factors: (1) the extent of public need, and (2) the relative burden to the landowner. Where the burden upon the landowner outweighs the public benefit, the scope of the police power is accordingly narrowed. Where acute public necessity is present, a great deal of regulation is permitted." California Legislature Joint Committee on Open Space Land, Final Report 112 (1970).
42. Id. at 7-9.
are to be granted only in case of hardship, all too often the Boards of Appeals consists not of planners but of businessmen who consider it an economic hardship if anything less than the maximum possible profit is extracted from a piece of property. To a large degree, this philosophy explains why assessors have been reluctant to recognize zoning when determining property value.

III. ATTEMPTS TO RESOLVE THE DILEMMA: A STUDY IN FRUSTRATION

A. The Answer Is Simple—Or Is It?

There have been several attempts to deal with the problems of preserving open space. The first came in 1957 when the legislature passed California Revenue and Taxation Code Section 402.5, which required the assessor to consider land use restrictions when evaluating the property for tax purposes. This section, unfortunately, was notably unsuccessful in reducing the property tax, largely because the impermanence of zoning laws was well known to land developers, who did not consider current zoning laws as serious restrictions to their intended use of the land. Accordingly, developers decided how much they would pay for a particular parcel of land in terms of its potential rather than its zoned use. The assessor, in turn, evaluated the land at a percentage of this "full cash value," i.e., the "fair market value," as mandated by Article XI, Section 12 of the California Constitution.

In 1966, section 402.5 was repealed and replaced by section 402.1, which attempted to alleviate open space tax problems by creating a rebuttable presumption to the effect that zoning restrictions are permanent in nature. Under the new section, the assessor was required to assume that the buying public had taken the land use restriction into account and that the "fair market value" of the property had not risen on account of potential non-zoned uses. The impact of this modification is not yet clear, but it seems likely that the public will continue to pay for land as if it were unrestricted, since the new code section does not alter the fact that land buyers still consider zoning laws impermanent restrictions. This problem, however, was squarely dealt with by

48. CAL. CONST. art. XIII, § 37.
Article XXVIII of the California Constitution, the so-called "Open Space Initiative," which passed in November, 1966. This Article stated the case for open space and provided that land may be restricted in its use and taxed in light of those restrictions.

Under the auspices of Article XXVIII, the California legislature passed sections 421 through 424 of the Revenue and Taxation Code. These sections require tax assessors to use the capitalization of income method when assessing the value of any land restricted by open space easements, scenic restrictions, or the Land Conservation Act of 1965 (Williamson Act). It should be noted that zoning is conspicuously absent from the definition of restrictions, presumably because of the legislative recognition that zoning restrictions are simply too unstable to have any significant impact on the "fair market value" of open space land. The importance of these sections, however, is in the tax assessment advantages they give to land restricted under the Williamson Act.

B. *The California Land Conservation Act—A Misnomer?*

1. *Operational Structure of the Williamson Act*

The Williamson Act was passed in 1965 as an attempt to prevent the loss of agricultural and other open space land to ur-

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50. CAL. CONST. art. XXVIII provides:
"Section 1. The people hereby declare that it is in the best interest of the state to maintain, preserve, conserve and otherwise continue in existence open space lands for the production of food fiber and to assure the use and enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens. The people further declare that assessment practices must be so designed as to permit the continued availability of open space lands for these purposes, and it is the intent of this article to so provide.

"Sec. 2. Notwithstanding any other provisions of this Constitution, the Legislature may by law define open space lands and provide that when such lands are subject to enforceable restriction, as specified by the Legislature, to the use thereof solely for recreation, for the enjoyment of scenic beauty, for the use of natural resources, or for production of food or fiber, such lands shall be valued for assessment purposes on such basis as the Legislature shall determine to be consistent with such restriction and use. All assessors shall assess such open space lands on the basis only of such restriction and use, and in the assessment thereof shall consider no factors other than those specified by the Legislature under the authorization of this section."

52. While the formula used to compute the tax is rather complex, the basic intent is to tax property on a percentage of the income actually produced on the property rather than a percentage of the land's full cash value. CAL. REV. & TAX CODE §§ 423-423.5 (West Supp. 1972).
54. CAL. GOV'T CODE § 6950 et seq. (West 1966).
ban sprawl. Although the Act has undergone substantial revision since its passage, this basic purpose has remained unchanged. In its present form, the Williamson Act authorizes cities and counties to enter contracts with individuals who own property in areas the local government designates as "agricultural preserves." The purpose of these contracts is to restrict the use of the land to agricultural or other compatible open space purposes for a minimum period of ten years. At the end of each year, the restriction contract is automatically renewed without any further action on the part of either local government or landowner. Even if the landowner or the local government decides not to renew the contract, the land use restriction remains in effect for the nine years remaining in the original contract. The landowner may, with the consent of the local government, cancel the contract; if he does so, however, he will be required to pay a cancellation fee, which may be waived only with the consent of the Secretary of the State Resources Agency.

2. Basic Criticisms of the Williamson Act

The acceptance of the Williamson Act by land owners and local governments has been nothing short of phenomenal. There are currently over twelve and one-half million acres of land under Williamson contracts. As remarkable and impressive as this figure sounds, however, a glance at a map indicates that much of the land under contract was never in danger of development, while land on the rural-urban fringe, the focus of the Williamson Act, has not been protected.

56. Interview with Harry J. Krade, Assistant Director, California Department of Agriculture, in Sacramento, June, 1972. Mr. Krade was a member of the advisory committee which drafted the original version of the Williamson Act.

57. Mix, Restricted Use Assessment in California: Can it Fulfill its Objectives?, 11 SANTA CLARA LAW. 259 (1971).

62. Id.
64. Id. GOV'T CODE § 51282 (West 1970).
65. Id. GOV'T CODE § 51283 (West Supp. 1972).
66. Memorandum from Jeff Reynolds, California Board of Equalization, to Mrs. Barbara Sorenson, California Department of Finance, Sacramento, California, July 21, 1972.
67. GOVERNOR'S OFFICE OF PLANNING & RESEARCH, STATE OF CALIFORNIA, CURRENT LAND USE-WILLIAMSON ACT LANDS MAP (1971). In addition see address by Ronald B. Welch, California Board of Equalization, before the California Assembly Committee on Planning and Land Use, Nov. 19, 1971.
68. Address by Ronald B. Welch, California Board of Equalization, before the California Assembly Committee on Planning and Land Use, Nov. 19, 1971.
Williamson's Shortcomings

Many local governments have been unwilling to utilize the Williamson Act as a means of protecting their open space land, largely because restricted land can no longer be taxed as its “fair market value,” a result which substantially reduces the tax revenue derived from that property. Furthermore, owners of open space land near urban areas object to placing their property in agricultural preserves, since this limits their ability to sell their land to urban developers. The potential economic value of unrestricted land is too great a temptation for the landowner to resist; many landowners therefore choose not to contract away potentially valuable options.

Adding to this problem is the fact that owners of open space land have often had to borrow money on their property in addition to paying high real estate taxes. In many instances, mortgagors have been unwilling to allow the owner of secured property to place a restriction on the land’s use, since restricted land may not allow the mortgagor to recoup his losses should he be required to foreclose on the property. This view, of course, overlooks the fact that the landowner is much more likely to survive economically with a Williamson Act contract because his taxes would then reflect the actual rather than the potential use of the land.

Land Protection Under Williamson—Improper Emphasis

In addition to not preventing urban sprawl, the Williamson Act has been criticized for protecting the wrong land, i.e., the land least likely to be developed, while giving the owners of that land substantial tax benefits. Supporters of the Act have countered this criticism by arguing that in rural areas not threatened by development there is very little difference between taxes computed under Williamson and taxes computed at a percentage of the “fair market value” of the property, because the “fair market value” of the nonthreatened land should closely reflect the agricultural or open space value of the property. If the threat of urbanization does not exist, the minimal decrease in county revenue is outweighed by the potential benefits gained by assuring

69. Id.
70. Interview with Harry J. Krade, Assistant Director, California Dep't of Agriculture, in Sacramento, California, June, 1972.
71. Id.
72. Address by Ronald B. Welch, California Board of Equalization, before the California Assembly Committee on Planning and Land Use, Nov. 19, 1971.
73. Id.
that property will remain as open space for a relatively long period of time.\textsuperscript{74} Local governments, therefore, have everything to gain and little to lose by applying the act to non-threatened rural areas. It has also been argued that decreased tax costs for the farmer will ultimately be reflected in lower food prices, benefiting the public with the advantages of open space land and lower grocery bills.

As attractive as these arguments sound, they are flawed by their assumption that the revenue decrease caused by open space land under Williamson Act contracts can be offset in other areas of the local tax base. The success of offsetting the tax loss necessarily depends upon the total revenue percentage contributed by open space land. For example, in Marin County the revenue from agricultural land amounts to only about four percent of the county's total property tax revenue,\textsuperscript{75} while in Fresno County over 45% of all property tax revenue\textsuperscript{76} is derived from taxes on agricultural land. The hardship caused by placing a greater tax burden on the other landowners in the latter situation clearly demonstrates that the county supervisors must carefully evaluate the advantages and disadvantages of protecting their agricultural tax base.

\textit{Subvention Payments}

The Williamson Act originally provided for compensation in the form of subvention (subsidy) payments to local governments and to landowners who had placed their land under Williamson contracts.\textsuperscript{77} This program, however, was rendered ineffective because local governments, unwilling to submit to the strict state controls provided for in the legislation, largely failed to utilize contracts as a means of implementing the Williamson Act.\textsuperscript{78} This occurred despite the fact that large scale subvention payments would, in effect, increase the tax base in rural counties and would make urban residents, who also enjoy the benefits of open space, pay their fair share.

During the First Extraordinary Session of 1971, the California Legislature passed several sections providing for subvention payments. For the fiscal year 1972-73, the Legislature has ap-

\begin{footnotesize}
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\item \textsuperscript{74} \textit{Cal. Gov't Code} § 51244 (West Supp. 1972).
\item \textsuperscript{75} Interview with Bert W. Broemmel, Marin County Assessor, in San Rafael, California, June 25, 1972.
\item \textsuperscript{76} Telephone interview with staff member of Fresno County Assessor's Office, July 20, 1972.
\item \textsuperscript{77} Cal. Stats. 1965, ch. 1443, § at —, (West Leg. Serv., repealed 1969).
\item \textsuperscript{78} Address by Ronald B. Welch, California Board of Equalization, before the \textit{California Assembly Committee on Planning and Land Use}, Nov. 19, 1971.
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appropriated $13 million for subvention programs, $15 million for the fiscal year 1973-74, and $17 million for fiscal year 1974-75. California Government Code Section 16107 provides that eligible local governments, (i.e., those with open space land subject to an enforceable restriction) shall receive subvention payments at the rate of $2 per acre if the land is prime agricultural land. (i) within an incorporated city, (ii) within one mile of the center of an incorporated city with less than 1500 registered voters, or (iii) within three miles of the boundaries of an incorporated city with more than 1500 registered voters. For all other prime land the subvention payment rate is $1.50 per acre, and for non-prime land of "statewide significance" subvention payments of $.50 per acre shall be paid to the extent that money is available. Government Code Sections 16113 and 16114 provide that local school districts are to receive a General Fund adjustment for land assessed under the provisions of Sections 423 or 423.5 of the Revenue and Taxation Code if the school district tax rate exceeds a certain figure. This open space adjustment is to be calculated by determining the difference between the value of land in the district in the year immediately preceding the application of sections 423-423.5 and the value of land within the district for the current assessment year. Should sub-

82. CAL. AD. CODE tit. 14, § 14112 (August 23, 1972) states that land is of "statewide significance" if it is:
1. An area of outstanding scenic or recreational value.
2. An area required as a wildlife habitat.
3. Forests and agricultural lands adjudged to be required in order to provide for the future needs of food, fiber and timber.
4. An area to provide open space in and around high density metropolitan areas.
5. An area needed to provide public access to coastal beaches, lake shores and riverbanks.
6. An area requiring special development regulations because of hazards or special conditions.
7. An area providing a connecting link between major open space and public recreational sites.
8. An area of major historic or cultural interest.
87. CAL. GOV'T CODE § 16113 (West Supp. 1972) provides that the local school district shall receive a General Fund dispersement adjustment if the school district tax rate exceeds: "... (a) two dollars ($2.00) for each elementary district, (b) one dollar and ten cents ($1.10) for each high school district, (c) three dollars and ten cents ($3.10) for each unified district maintaining grades Kindergarten through 12, three dollars and thirty-five cents ($3.35) for each unified district maintaining grades Kindergarten through 14, (e) twenty-five cents ($0.25) for each community college district."
vention claims exceed the amounts appropriated the payments are to be reduced on a pro rata per acre basis; first to be cut will be funds allocated to non-prime land, followed by funds to local governments with restricted prime land, and school district dispersement allocations.89

Since there are over 12,500,000 acres subject to enforceable restrictions,90 most of which are within the boundaries of at least one school district, it is apparent that cities and counties with restricted prime and non-prime land will get considerably less money from subvention payments than the statute seems to indicate, because of the school district priority in the distribution of the funds. While the subvention formula alleviates much of the hardship borne by school districts when Williamson Act contracts are entered into and the districts' revenue is reduced, it still does not represent a positive incentive for the local government to enter a contract since by doing so its own tax base will be decreased.

A Tax Loophole for Industry?

In recent years, many large business enterprises have acquired large tracts of land near urban areas, subsequently placing their newly-acquired land under Williamson Act contracts.91 Although these lands are eventually to be used for plant expansion or other urban purposes, tax benefits are being reaped from the Williamson Act before development. In fact, it has been argued that "big business" is violating the intent of the statute92 even though the public has also received benefits from the undeveloped property in the form of a reduction of urban sprawl. In reality, though, the problem with this type of arrangement is not that "big business" is getting a tax break, but that eventually this land is destined to become part of the problem the Act was designed to cure.

Parcel Size Requirements

Another difficulty with the Williamson Act is that it requires a minimum parcel size of 100 acres (except in unusual

90. Memorandum from Jeff Reynolds, California Board of Equalization, to Mrs. Barbara Sorenson, California Department of Finance, Sacramento, California, July 21, 1972.
91. Address by Ronald B. Welch, California Board of Equalization, before the California Assembly Committee on Planning and Land Use, Nov. 19, 1971.
92. POWER AND LAND IN CALIFORNIA, PRELIMINARY DRAFT, RALPH NADER TASK FORCE REPORT ON LAND USE IN CALIFORNIA II-38 (R. Fellmeth, ed. 1971).
circumstances) before an agricultural preserve can be established. The basic problem with this approach is that the small acreage parcels are usually the least economical to farm, and are, in fact, the very ones that need the tax break offered by the Williamson Act. The larger the acreage, the more likely it is that the farmer will be able to hold out without a tax break.

There are other interesting aspects of the size requirement. For example, some grain crops are economically feasible only if grown on 200 acres or more, while other types of crops, such as strawberries, may be economically grown on five acres or less. In addition to the crop type, factors such as soil, water, and climate also assist in determining how large a tract is needed for a particular crop.

Another factor involved in the minimum parcel size problem is the contribution of small amounts of acreage to “scattered development.” Small, privately held parcels of land in the middle of partially developed areas serve to increase local government costs because of the difficulties of providing services to areas developed in “checkerboard patterns.” On the other hand, open space or undeveloped land in a partially developed urban sector may contribute to the aesthetic qualities of the city.

The Impact of Williamson on the Foothill and Mountain Counties

The amount of protection the Williamson Act provides for foothill and mountain lands is clearly inadequate because the potential revenue gain from recreational subdivisions is often too great a temptation for the foothill and mountain counties to resist. Until now, many small counties have failed to recognize that any increase in revenue will more than likely be offset by the expenditures required to provide services to the newly developed areas. Furthermore, the desire of the rancher or farmer to “keep his options open” has often influenced him against placing his land under the protection of the Williamson Act.

IV. Possible Solutions

Zoning and tax structures have inadvertently contributed to the conversion of millions of acres of agricultural and other

94. Interview with Harry J. Krade, Assistant Director, California Dep't. of Agriculture, in Sacramento, California, June, 1972.
95. Id.
96. See p. 3, supra.
open space land to urban sprawl and recreational subdivisions. As our population increases and our society becomes more affluent, the need for the conversion of open land to other uses will continue. It is crucial, however, that this transformation be accomplished in accordance with a coherent, orderly plan which balances the need for urban expansion and the development of recreational facilities against agricultural and environmental requirements. Clearly Article XXVIII\textsuperscript{98} and the Williamson Act\textsuperscript{99} were attempts to resolve this dilemma. Their failure to accomplish this goal, however, is equally clear. Other solutions are needed as alternative means of preserving open space. These solutions are not exhaustive but are merely examples of the types of feasible open space controls. It should also be noted that these solutions are not necessarily mutually exclusive.

A. Direct State Action

1. Since local governments are currently required to draw up general plans containing open space elements\textsuperscript{100} with an agricultural use as a sub-element, and since the Governor's Office of Planning and Research has been directed to survey all current open space land in California,\textsuperscript{101} perhaps one further step should be taken. The State should be required to suggest or assign to each county on a proportional basis the minimal amount of open space land that it will be required to preserve. This would leave to the local government the determination of which parcels of land should be required to remain as open space.

In order to reduce local political opposition, the legislation should provide that the determination of the necessary amount of open space land in a particular county include the views of local officials. Maximum input should also be solicited, including public hearings and surveys.

Once local governments have determined which land to preserve, it is unlikely that a change in the zoning will occur, since land which is zoned for open space would have to be "traded" for land already zoned for urban use if the local government is to fulfill its open space requirement. In this case landowners in essentially equal positions would be competing with each other, and it seems unlikely that the local legislature would act to change the status quo. Furthermore, the added stability of this scheme should help reduce the tax assessment on the open space

\textsuperscript{98} CAL. CONST. art. XXVIII.
\textsuperscript{100} CAL. GOV'T CODE § 65560 et seq. (West Supp. 1972).
\textsuperscript{101} CAL. GOV'T CODE § 65570 (West Supp. 1972).
land, since the "fair market value" of the land would more accurately reflect the use for which it was zoned.

2. Even though local taxpayers probably have standing to institute mandamus proceedings\textsuperscript{102} against local officials to force compliance with the code section requiring the inclusion of an open space element in the local plan,\textsuperscript{103} there are several obstacles to the effective utilization of the mandamus procedure. The most significant of these is the evidentiary presumption that legislative bodies have acted properly.\textsuperscript{104} Since the statutes requiring an open space element do not clearly indicate what will satisfy the requirement, a court is unlikely to issue a writ of mandate as long as the local government makes what appears to be a good faith effort to exercise its power and establish an open space element. One possible way of overcoming this problem is a statutory requirement that the Director of Planning and Research or the Secretary of Resources determine whether any particular open space element meets the requirements of the code. This would, in effect, transfer the "validity of action" presumption from the local government to the State. Thus, the only question of fact left for the court would be whether the Director or Secretary abused his discretion in judging the sufficiency of open space elements in a particular community.\textsuperscript{105}

3. Poor local planning staffs and the inability of local legislatures to properly evaluate the costs of land development are problems that must be overcome if open space is to be preserved. One way to alleviate the problems caused by shortsighted officials is to provide subvention funds to local governments in an amount equal to the increase in revenue generated by the urbanization of open space land, less the cost of providing services to the area if it were in fact developed. Even if the difference in revenue were a negative amount, in which case the local government would not receive any subvention funds, this cost-benefit

\textsuperscript{102} CAL. CIV. CODE § 1085 (West 1956). This section provides that a writ of mandate may be issued to any "... corporation, board, or person to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust or station ..." and CAL. CIV. CODE § 1086 (West 1956) states that "... the writ must be issued upon the verified petition of the party beneficially interested." While the writ is generally only issued to compel the performance of a ministerial duty (Leftridge v. Sacramento, 81 Cal. App. 2d 450, 171 P.2d 659 (1943)), the courts have carved a major exception to this rule and will issue a writ of mandate to require local officials to "exercise their discretion" (Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1952)).

\textsuperscript{103} CAL. GOV'T CODE § 65302 (West Supp. 1972).

\textsuperscript{104} CAL. EVID. CODE § 664 (West 1966).

\textsuperscript{105} CAL. CIV. PRO. CODE § 1094.5 (West 1955).
approach would at least make local decision makers aware of the real costs of urbanization.

4. Since the preservation of California's agricultural base is of major concern, the State Department of Agriculture should be authorized and funded to undertake an intensive campaign designed to provide guidance and advice to local governments in the process of developing the agricultural sub-element of their general plans. The goal of this program would be the preservation of the open space necessary to maintain California as an economically viable agricultural producer.

5. Finally, the state could purchase all open space land and lease it back to the current owners or other potential users on a long term basis. These lease agreements could incorporate land use restrictions in the form of covenants that the land be used only for agricultural or other open space purposes. It has been estimated by various sources that this type of program could cost over 4.1 billion dollars. The initial acquisitions might be funded by the use of bonds, to be paid for by the lease returns. Although any decrease in tax revenue could be partially offset by the lease returns, it can be expected that a tax shift to other county landowners would be required to recoup the loss to the tax base. It is also likely that such a large-scale lease back arrangement would require a huge bureaucratic organization for administration, making this solution the most difficult and costly method of direct state action.

It should be noted that each of the suggested methods of direct state action will have only a limited effect on the preservation of open space land. For example, state allocation of the amount of land each county shall be required to preserve as open space does not necessarily mean that the local officials will preserve the land that is best suited for agricultural or recreational use. Similarly, court costs and burden of proof problems may preclude extensive use of the mandamus procedure. Furthermore, while subvention funding may provide the incentive for local officials to preserve open space, this may cause overzealous officials to zone land as open space even when such zoning will totally deprive the property owner of any reasonable use of his land. Finally, if the state were to make extensive use of the purchase-lease back method, the costs and administrative difficulties would be prohibitive. Clearly then, direct state action will be ineffectual unless a coordinated approach combining these factors can be developed.

B. Zoning Modifications

1. It has been previously indicated\textsuperscript{107} that the impermanence of zoning regulations leads the buying public and the assessor to believe that the market value of restricted property has not been substantially reduced. Therefore, the factors in our zoning laws which contribute to this problem should be modified by requiring that once open space zoning is adopted, it must remain unchanged for a definite period of time. Flexibility in open space zoning laws should be compromised for an assurance that open space land will be preserved; annual automatic zoning renewal can accomplish this result by maintaining open space land on a "restricted" basis for no less than five years.

Another possible alternative to the present zoning system would be to direct the assessor to conclusively presume that land zoned for open space use will remain that way indefinitely. This approach, however, raises several collateral problems; although land zoned "open space" may be subject to the assessor's presumption that it will not be rezoned, developers may still be convinced that zoning changes will occur, causing market value to rise in response to the developer's expectations. This will again force the assessor to compute taxes based on this "expectation" fair market value. Thus, even a conclusive presumption against a zoning change will not significantly reduce the market value of the land nor its taxes. Unless zoning is declared to be an "enforceable restriction" under Article XXVIII\textsuperscript{108} of the California Constitution and the capitalization of income method\textsuperscript{109} is used to compute the tax, the landowner will still be forced to pay taxes based upon the "fair market value" of the property as mandated by Article XIII, section 37 of the California Constitution.\textsuperscript{110}

In order to reduce the undesirable flexibility of the current zoning process, a regional control board should be established to insure that zoning in each community is compatible with the needs of the entire region. A regional board would reduce flexibility by being removed from the immediate pressures of the local government processes without being so remote as to be insensitive to the needs of the local community.

The present system of granting zoning variances should also be improved. In each local area, a referee who is an expert in the field of land use controls should be appointed to hear all variance requests. His opinions should be published in a State re-

\textsuperscript{107} See p. 7 \textit{supra}.
\textsuperscript{108} \textsc{Cal. Const.} art. XXVIII.
\textsuperscript{109} \textsc{Cal. Rev. & Tax. Code} §§ 423-423.5.
\textsuperscript{110} \textsc{Cal. Const.} art. XIII, § 37.
porter system, similar to those in existence for civil and criminal
courts, to ensure that decisional uniformity and standardized cri-
tera for granting zoning variances are maintained among the re-
gional referees. Furthermore, a reporter system would provide
a more complete record for any subsequent judicial review, and
added zoning stability would be reflected in a "fair market value"
equal to the property's zoned use.

2. An additional alternative is the establishment of a zoning
system to preserve open space land and avoid the problem of a
public taking of land without just compensation. In this system,
land zoned as open space would be appraised at its market value
immediately prior to the effective date of the open space zoning.
After appraisal, compensation would be paid to the landowners
based on the difference between the land's prior market value
and its market value as open space. Land subject to compen-
sable zoning should be taxed under the provisions of Article
XXVIII, taking into account the relatively high rate of taxes paid
during the years when the land was not subject to a compensable
zoning restriction.

It should be noted, however, that if an attempt were made
to implement this system, it would have at least two potentially
counter-productive side effects: (1) The creation of a zoning
precedent that could cause all property owners to seek compensa-
tion when their land is not zoned for its highest or best use
(which would hinder all community planning activities) and (2)
an immediate reduction in revenue received from property taxes.
This revenue reduction, however, should have short term signifi-
cance. A lot, when restricted under the compensable zoning
procedure, is effectively taken out of the open market for land with
development potential, causing prices of remaining lots to be
driven upward. However, since there tends to be a lag in the land
market mechanism, an immediate decrease in local government
revenue may occur. On a long term basis, though, it seems likely
that the law of supply and demand will cause the value of other
property to rise and tax revenues to return to their original level.

C. Williamson Act Modifications

1. A less drastic solution to the problem of preserving open
space land is a modification of the present Williamson Act. For
instance, the acreage limitation problem\(^\text{111}\) could be dealt with by
lowering the minimum parcel size requirement to five acres for
prime agricultural land, while retaining the 100 acre requirement

\textsuperscript{111} See text accompanying note 93, supra.
for non-prime land. Any additional land the city considers necessary for aesthetic or other purposes should be included in an agricultural preserve, provided the local government makes a finding that it is necessary to retain the land as open space in order to protect the health, safety, or general welfare of the community.

2. One of the most significant features of the Williamson Act is the fact that it is voluntary for both the local government and the property owner. The problems this creates have been previously discussed. However, it should be emphasized that local governments can place land in an agricultural preserve without placing it under contract. Landowners have not received significant tax reductions from this approach, however, since the Revenue and Taxation Code does not consider non-contract land to be enforceably restricted. To minimize the impact of this omission, the assessor should be directed to presume that land in a preserve but not under contract will remain in the preserve indefinitely. Although this presumption is not significantly different from the presumption dealing with zoning, the change in terminology may cause both the potential purchaser and the county assessor to view this type of restriction as being more stable than zoning. This, in turn, will lower the property's market value and the landowner's property tax bill.

3. The California legislature should pass legislation enabling local governments to impose enforceable restrictions on owners of open space land. This land, once restricted, should be assessed under the provisions of Revenue and Taxation Code Sections 421-424. The unilateral imposition of restrictions by local governments must, of course, be done carefully because of constitutional prohibitions against taking private property without just compensation. Williamson Act restrictions, however, could be given somewhat broader application than zoning restrictions since the landowner will be compensated in the form of tax relief. This mandatory procedure would be especially effective if used in conjunction with larger subvention payments to local governments, providing them with both the incentive and the means to preserve open space land. Finally, individual landowners should be given the right to demand that their land be placed under Williamson Act contract if it is economically viable agricultural land, or is land having statewide significance.

112. See text accompanying note 69, supra.
113. See text accompanying note 38, supra.
V. CONCLUSION

Before California can adequately protect its agricultural base, prevent urban sprawl, and provide for the recreational needs of an expanding population, its problems of property taxation and inadequate land use controls must be faced and overcome. Article XXVIII and its implementation through the Williamson Act were significant steps in this direction, although the solutions provided by the Act have not been effectively utilized. The choice of which method or combination of methods we use to protect open land, or indeed, whether any attempt is made, will undoubtedly be the subject of much controversy. It is clear, however, that while the range of options which may be utilized to preserve open space land is somewhat limited, the provisions of Article XXVIII would be sufficient to accomplish this purpose, either within the framework of a modified zoning system or a revamped Williamson Act.

W. Gary Kurtz