Restricted Use Assessment in California: Can It Fulfill Its Objectives

Averill Q. Mix
RESTRICTED USE ASSESSMENT IN CALIFORNIA: CAN IT FULFILL ITS OBJECTIVES?

Averill Q. Mix*

The California Land Conservation Act of 1965 (also known as the Williamson Act and occasionally, though improperly, termed "greenbelting") was an attempt to preserve agricultural land and other open spaces. The means chosen was assessment based on a method other than the normal standard of highest and best use. The original Act did not achieve this purpose, and a remedy was sought by means of the "Open Space Amendment" to the California Constitution in 1966.

As a result of this Amendment, the original Act has been revised extensively, and the Legislature has also passed additional implementing legislation governing assessment practices. The assessor is now authorized to assess at other than the highest and best use only if there is an "enforceable restriction" established on one of the following four bases: a contract, an agreement, a scenic restriction, or an open-space easement. The four methods provided are exclusive.

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3 See 47 Op. CAL. ATT'Y GEN. 171 (1966). The Attorney General stated that the inclusion of "transitional values" in assessment of lands in developing areas was Constitutionally required.


6 CAL. REV. & TAX. CODE § 42 (West 1970).

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Since passage of the Open Space Amendment and implementing legislation, there has been a rapid increase in restricted acreage. However, one writer estimated in 1969 that the “agreement” procedure then accounted for approximately 98 percent of the restricted land. Thus, other methods appeared to be insignificant. Amendments to the Act in 1969 have now eliminated the “agreement” method. Nevertheless, the “agreement” method is historically important in analyzing the present state of the law. An “agreement” was essentially a simplification of today’s “contract.” Thus, an understanding of the “contract” procedure is essential in order to realize the significance of these simplifications. It should be kept in mind, though, that the “contract” procedure (except for the rarely used provisions regarding scenic restriction and open-space easements) is today the only generally available means of obtaining relief from assessment based on highest and best use.

**Contract Method**

Under the “contract” procedure land must be “devoted to agricultural use” and located in an area designated by the city or county concerned as an “agricultural preserve.” The former requirement of state approval of the contract was eliminated in

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7 R. Alden & M. Shockro, *Preferential Assessment of Agricultural Lands: Preservation or Discrimination?* 42 S. Cal. L. Rev. 59, 66 (1969) [hereinafter cited as Alden & Shockro]. The reader is urged to review this excellent article. Unfortunately, many of its conclusions are no longer correct because of the extensive 1969 amendments to both the Government Code and the Revenue and Taxation Code.


9 Cal. Gov’t Code §§ 51201(b), 51242 (West Supp. 1971). The former requirement that it be “classified as prime agricultural land” was deleted by Cal. Stats. 1969, ch. 1372, § 11, at 2810. Other uses compatible with agriculture are also permitted. Cal. Gov’t Code §§ 51201(e), 51238, 51243 (West Supp. 1971).

10 Id. §§ 51201(d), 51230, 51242. Although the prior requirement of a minimum size of 100 acres is basically retained, the agricultural preserve may be of smaller size if consistent with the general plan of the county or city and if smaller size is necessary due to unique characteristics of agricultural enterprises in the area. Id. § 51230. After January 1, 1971, only counties and cities having general plans may establish agricultural preserves. Id. The local planning body must review any proposal to establish an agricultural preserve to determine whether or not it is consistent with the general plan. Id. § 51234.

If a contract is entered into with any landowner in an agricultural preserve, a similar (but not necessarily identical) contract must be offered to every other landowner within the preserve. Id. § 51241.

The agricultural preserve may include “land devoted to recreational use or land within a scenic highway corridor, a wildlife habitat area, a saltpond, a managed wetland area, or a submerged area . . . .” Id. § 51205. For definitions of these terms, see id. § 51201.
1969. This modification helped make today's "contract" procedure resemble the now obsolete "agreement" procedure more closely. The city or county may enforce the contract by specific performance, injunction, or any other remedy available at law. Restrictions and privileges of the contract are binding on successors to both parties. Thus, cancellation (as opposed to nonrenewal) may be undertaken only upon request of the landowner.

However, if the property is located within one mile of a city and the city properly files a protest and notice of intention not to be bound, the contract is null and void in the event of subsequent annexation of the property by the city. Of course, the city is entitled to notice and an opportunity to be heard when the land involved is located within one mile of its limits.

The contract must restrict the land to agriculture or other compatible uses for a minimum period of ten years. Thereafter, it is automatically renewed upon each annual anniversary for an additional one-year term, unless advance notice of nonrenewal is given by either party. Thus, at any given time prior to such notice, the minimum period during which the contract remains enforceable is nine years.

Alternatively, the contract may be cancelled upon request of the landholder, but only under extremely restrictive circumstances and at a financial penalty that may be economically prohibitive. Cancellation may be permitted by mutual agreement of the county or city and the landowner, but only after a finding has been made that cancellation is not inconsistent with purposes of the law and not contrary to the public interest. The statute clearly states (subject to limited exceptions) that opportunity for alternative use and uneconomic nature of the agricultural use are not acceptable reasons.

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13 Id. § 51243(b).
14 Id. § 51281.
15 Id. § 51243(b). This provision may provide an advantage to a landowner located within one mile of a city limit. If the contract is thus automatically void, without a specific request by the landowner, the city will probably waive any penalty fee. See note 22, infra, and accompanying text.
16 Id. §§ 51233, 51243.5.
17 Id. §§ 51243(a), 51244.
18 Id. §§ 51244, 51245. Special renewal provisions apply where the initial term is 20 years or longer. Id. § 51244.5. Nonrenewal as to a portion only is also authorized under certain circumstances. Id. § 51245.
19 Id. § 51282.
Even if cancellation is permitted, it is subject to a cancellation fee (in lieu of deferred taxes) of 50 percent of the value of the property as reassessed without the restriction.\textsuperscript{20} This cancellation fee would approximate one-eighth of the land's fair market value.\textsuperscript{21} Although the Act does provide for modification or waiver of this fee if the owner's act is involuntary or if he in fact continues agricultural use, such modification is strictly discretionary with the county or city.\textsuperscript{22} Obviously, then, the local political situation may be of the utmost importance in determining whether or not a modification is granted or even if cancellation is permitted at all.

AGREEMENT METHOD

Prior to November 10, 1969, a summary "agreement" procedure was available under which it was not necessary that the land be prime agricultural land; designation of an "agricultural preserve" was not required; there were no cancellation penalties; and length, terms, conditions, and restrictions were determined by negotiation between the county or city and the landowner. However, these statutes have now been repealed.\textsuperscript{23} The result is that the "agreement" procedure (if it exists at all) is now indistinguishable from the "contract" procedure. Thus, the heavy preponderance of use of the "agreement" procedure vanished in 1970. In practice, too, agreements made by many counties incorporated almost verbatim the statutory contract provisions.\textsuperscript{24} The 1969 amendments now make it mandatory that any contract or agreement be at least as restrictive as existing statutory provisions in order to obtain the benefits of the Act.\textsuperscript{25}

As a result, even though one statute still acknowledges existence of the "agreement" procedure,\textsuperscript{26} the effect is merely to prevent invalidation of assessments made under prior agreements.\textsuperscript{27} The

\textsuperscript{20} Id. § 51283.
\textsuperscript{21} Alden & Shockro, 42 S. Cal. L. Rev. 59, 64 (1969).
\textsuperscript{24} Alden & Shockro at 67-68. However, it is interesting to examine contract forms used by various counties. Differences between some are substantial. See, e.g., note 52, infra.
\textsuperscript{26} Cal. Rev. & Tax. Code § 422 (West 1970).
\textsuperscript{27} See statement of purpose of the 1969 amendments to the Land Conservation
fact that all references to “agreements” have now been deleted from Chapter 7 of the Government Code indicates that this informal method is no longer available.

On the other hand, the 1969 amendments did delete some of the features which rendered the “contract” method objectionable, primarily by eliminating the requirement of state approval and control. But, certain significant protections to the landowner were also deleted, such as the provision that the land use limitation is a determination that agriculture is the highest and best use and all provisions relating to state compensation to local governments and to landowners for public use.

Thus, it must be assumed that in the absence of an informal “agreement” procedure, the “contract” method will take over the 98 percent ratio formerly enjoyed by the “agreement” procedure. Or, as seems more likely, the total utilization of the Act may decline due to the greater restrictions. Use of the scenic restriction and open-space easement methods will probably continue to be minimal in view of statutory limitations on qualifying factors and additional restrictions imposed on the landowner.

**Consequences of Cancellation or Nonrenewal**

If reduced property taxes are to achieve their intended purpose of preserving open spaces, there must be some deterrent to render indiscriminate cancellation or nonrenewal unattractive. Here, a limited recapture of back taxes will be only a slight deterrent to the farmer who has the opportunity to reap a large capital gain; while the possibility of unlimited recapture may be so punitive that few landowners will be willing to seek the benefits of the statutes.

California has attempted to achieve a middle ground between these two extremes. Under the now repealed “agreement” procedure, a cancellation penalty was not mandatory and was rarely imposed.

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28 See note 11, supra.
33 However, cancellation penalties must be applied to such agreements after March 1, 1971, if the landowner is to retain the benefits of the restricted use assessment. Cal. Adm. Code tit. 18, § 51 (Fpb, 28, 1970). But see note 52, infra.
This fact was undoubtedly an important motivation behind the 98 percent estimated utilization of the "agreement" method. Since repeal of the "agreement" procedure and other changes made in 1969, penalties in California now seem to be more heavily weighted on the punitive side. Thus, substantially decreased utilization of the Williamson Act in future years seems to be a distinct possibility.

Cancellation

Cancellation at the landowner's request\textsuperscript{34} offers the advantage of relatively prompt availability of the land free of the enforceable restriction. However, the burden of proof required for the landowner to justify cancellation is correspondingly heavy. Furthermore, even if the landowner sustains his burden of proof, cancellation is not available to him as a matter of right but is discretionary with the city or county.\textsuperscript{35}

Under the current California practice of assessment at 25 percent of total cash value,\textsuperscript{36} the 50 percent fee imposed upon cancellation will approximate one-eighth of the fair market value of the land at the time cancellation is granted. Although this fee may seem prohibitive at first glance, its consequences are largely dependent upon the economics of the particular factual situation. A set of hypothetical figures is helpful to analyze the possibilities.

Assume a 100-acre parcel in a developing urban fringe area. Its fair market value when used strictly for agricultural purposes is $660 per acre, or a total of $66,000. If available for residential purposes, the same parcel might reasonably be valued at $10,000 per acre. Based on the 25 percent equalization ratio, assessed valuations would therefore be $16,500 and $250,000, respectively. Assuming a composite tax rate of $10 per $100 of assessed valuation (a common rate in areas of California that are in the process of change from rural to urban), Table 1 shows the property tax consequences of cancellation at the end of any given year through the first 15 years of a restrictive contract carrying the required automatic renewal clause.

The figures in Table 1 show a large net loss to the landowner in

\textsuperscript{34} Cal. Govt's Code § 51281 (West Supp. 1971). This option cannot be exercised by the city or county. Under prior law, cancellation could be initiated by any governmental body. Cal. Govt's Code § 51281 (West 1966), amended, Cal. Stats. 1969, ch. 1372, § 31, at 2813. Fear has been expressed that such cancellation could have been politically motivated. See Alden & Shockro at 68.

\textsuperscript{35} Cal. Govt's Code § 51282 (West Supp. 1971).

\textsuperscript{36} Although a few counties assessed at lower ratios until recently, Cal. Rev. & Tax. Code § 401 (West 1970) makes the 25 percent ratio compulsory statewide beginning with the lien date for the 1971-72 fiscal year, i.e., March 1, 1971.
<table>
<thead>
<tr>
<th>Year</th>
<th>Assessed Value as Agricultural</th>
<th>Property Tax as Agricultural</th>
<th>Assessed Value as Residential</th>
<th>Property Tax as Residential</th>
<th>Cumulative Net Tax Saving by Restriction</th>
<th>Less Cancellation Fee at 50% of Assessed Value</th>
<th>Net Gain (loss) to Owner if Cancelled</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
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<td>$1,650</td>
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<td>$25,000</td>
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the early years, but a significant gain in the later years. However, this table assumes a stable assessed valuation for both purposes during the entire 15-year period. This, of course, is unlikely to occur in practice, and the example in Table 1 must therefore be considered an oversimplification.

The illustration may be made more practical by assuming that the same 100-acre parcel has the same fair market value of $660 per acre as agricultural land at the time the contract is signed. Again, the assessed valuation would be $16,500. But assume now that the value of agricultural land inflates at a rate of five percent per year in each succeeding year.

Assume further that the land will not be developed for five years from the date of the contract and will not be valued for residential purposes at $10,000 per acre until the lien date of that taxable year. The assessed valuation in the fifth year will therefore be $250,000, but this value must be discounted for prior years. Therefore, assume that the value for residential purposes is discounted based on a ten percent compounded annual return on investment through the fifth year. Finally, assume that the value of the property if still not developed during the fifth year inflates thereafter at only five percent a year. Table 2 shows the result of this more sophisticated analysis.

In the illustrations in both tables there is a definite crossover point where the cancellation penalty becomes less than the net reduction in the landowner's property taxes. Thus, in later years, the penalty can hardly be said to be prohibitive. It is essential, however, that the economics of each situation be analyzed in detail in some such manner as this.

Such an analysis, though essential, is severely limited in usefulness by the many intangibles involved. Estimating rates of inflation in value will be extremely difficult; they will rarely follow such a uniform annual course, and, even if they do, the likelihood of their being reflected immediately in the assessed valuation is limited. A change in the assumed rate of return on invested capital will make a significant difference; also missing from the calculation is any allowance based upon the possibility of alternative employment of the capital involved. Finally, the element of risk, including the possibility of denial by the city or county of permission to cancel, will be almost impossible to estimate in terms of dollars; and in the event that sale of a large parcel is imminent, federal income and estate tax consequences to the landowner can be extremely significant.

In short, too many intangibles are involved to permit analysis
<table>
<thead>
<tr>
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purely on the basis of mathematical formula. The final decision must depend on the good business judgment of the landowner and his advisors. Nevertheless, the financial penalty for cancellation may be more apparent than real in many economic situations. Of course, once cancellation is accomplished and the enforceable restrictions are removed, the assessor has no alternative but to immediately assess the land in accordance with the standard of highest and best use.\(^7\) Presumably, therefore, the farmer will not attempt to cancel unless a profitable sale for development is likely in the immediate future.\(^8\)

**Nonrenewal**

Contrasted with the limited applicability of cancellation, nonrenewal is available to either party as a matter of right. It is, however, subject to the requirement of proper notice,\(^9\) or else the contract will renew automatically. The major problem, however, is that nonrenewal and removal of enforceable restrictions cannot be effective for at least nine years from the next succeeding anniversary date of the contract, except in the unlikely event that cancellation is granted during the nine-year period after notice of nonrenewal. This period could, of course, be made even longer by provisions of the contract. The difficulties of planning for the economic situation that might exist nine years in the future are obvious.

Assume, though, that the trend toward urbanization in the particular area is sufficiently well established so that the landowner can reasonably foresee the possibility of a profitable sale after expiration of the restrictions; what, then, will be the financial consequences to him of holding the land for the nine-year period required? In the case of agricultural land, the most significant expense of holding will usually be the property tax, determined by the value placed on the land by the assessor. Here, the statutes regarding the course to be followed by the assessor appear confusing, and, probably due to the very limited use so far of the contract procedure, no appellate cases on the point have yet been decided.

The position of the assessor must necessarily be limited by

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\(^{8}\) However, use of such reasoning to justify cancellation is expressly prohibited by CAL. Gov't Code § 51282 (West Supp. 1971). This prohibition may lead to attempts to use trumped-up justifications.

\(^{9}\) The landowner must give notice of nonrenewal at least 90 days prior to an anniversary date of the contract, while the city or county is required to give 60 days notice. CAL. Gov't Code § 51245 (West Supp. 1971). The lengthy period that must elapse prior to final termination of the restriction seems to minimize the possibility of political manipulation.
two extremes. The position most liberal to the farmer is that the assessor will continue to assess at the value for agricultural use during the entire period (nine years or more) prior to final expiration of the enforceable restrictions. The basic method of assessment would therefore be the capitalization of income method without consideration of comparative sales data. Such a simplistic approach is useful, however, only in determining the lower limits of assessment.

On the other hand, a maximum assessment would be realized if the assessor takes the position that notice of nonrenewal renders expiration of the restrictions certain at a particular time in the future. He might thus reason that restrictions are no longer enforceable. If so, section 422 of the Revenue and Taxation Code would no longer apply, and assessment based on highest and best use (discounted for present value) is the required method.

The actual approach to be used is spelled out in section 426(b) of the Revenue and Taxation Code. This approach is extremely complex and requires a combination of the methods already outlined as the two extremes. However, since nonrenewal of many contracts at some time in the future is a practical certainty, the consequences must be considered by every landowner seeking to enter into any of the restrictive arrangements provided by the Williamson Act.

Under section 426(b) the assessed value must be recomputed by a six-step procedure each year until final termination of the restrictions. To illustrate the procedure, let us assume the same factual situation as used previously in the computation of the financial consequences of cancellation, i.e., a 100-acre parcel valued today at $660 per acre for agricultural use and estimated to be valued

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40 CAL. REV. & TAX. CODE § 423 (West 1970). The method provided is quite complex. Essentially, it is based on either actual income or a reasonable yield under prudent management and subject to the enforceable restrictions. Since the assessor is not permitted even to look at comparative sales data for the purpose of determining the capitalization rate (CAL. ADM. CODE tit. 18, § 8(i) (Feb. 28, 1970)), this method will usually result in the lowest possible assessment. See also Alden & Shockro, 42 S. CAL. L. REV. 59, 66 n.37 (1969).

41 CAL. REV. & TAX. CODE § 426 (West 1970) was added in 1969 and expressly provides:

Notwithstanding any provisions of section 423 to the contrary:

(a) If land is subject to an enforceable restriction . . . the county assessor shall value such land as provided in subdivision (b) under any of the following conditions:

(1) Where the owner of land subject to contract or agreement has served notice of nonrenewal . . .,

(2) Where the county or city has served notice of nonrenewal . . .,

(3) Where less than six years remain to the expiration of the enforceable restriction.

42 (West 1970).
five years from now at $10,000 per acre for residential development. The statute provides for computation as follows:

“(1) Determine the full cash value of the land as if it were not subject to enforceable restrictions.” This means the value for the highest and best use. Since our assumption is that this use is residential development, the fair market value in five years will be $1,000,000. This figure, since it is the estimated value five years hence, must be discounted by the same procedure used in Table 2. Thus, the full cash value today is $683,016.

“(2) Determine the value of the land by capitalization of income as provided in Section 423 and without regard to the existence of any of the conditions in subdivision (a).” The fact that notice of nonrenewal has been given is to be ignored and the capitalization method used. To avoid the complex calculation of the capitalization method, which is not directly in point here and which would require the assumption of many additional facts, assume that the figure of $660 per acre (or a total of $66,000) is the result of this computation.

“(3) Subtract the value determined in subdivision (b)(2) by capitalization of income from the full cash value determined in subdivision (b)(1).” $683,016 minus $66,000 is $617,016.

“(4) Using the rate announced by the board pursuant to subdivision (b)(1) of Section 423, discount the amount obtained in subdivision (b)(3) of this section for the number of years remaining until the termination of the enforceable restriction.” The rate announced on September 1, 1970, was 6.75 percent. Therefore, $617,016 must be discounted by this rate for the remaining contract period. Using standard present worth tables at 6.75 percent for ten years, the result is $321,095.

“(5) Determine the value of the land by adding the value determined by capitalization of income as provided in subdivision (b)(2) and the value obtained in subdivision (b)(4).” Adding $66,000 and $321,095, we get $387,095. This is considered, for
purposes of Article 1.5 of the Revenue and Taxation Code, to be the value of the land today.

"(6) Apply the ratio prescribed in Section 401 to the value of the land determined in subdivision (b)(5) to obtain its assessed value." Therefore, the assessed valuation is 25 percent of $387,095, or $96,774.

Table 3 shows the result of this calculation, assuming that the landowner properly served notice of nonrenewal prior to the first anniversary date of his contract. Again, a composite tax rate of $10 per $100 of assessed valuation is used, and the same assumption is made that the value of the land for strictly agricultural purposes inflates at a constant rate of five percent per year, while for development purposes it inflates at ten percent annually for the first five years and thereafter at five percent.

Under the assumed facts, Table 3 shows a net saving in taxes of only $69,115 (or 26 percent) over the ten-year period, compared with taxes the farmer would have paid if he had not sought the benefits of the Act. Even this saving is based on a historically high rate of capitalization. Use of a lower rate would increase the figures obtained under section 426(b)(4) and would, in turn, increase the taxes payable during the period following notice of nonrenewal.

The available saving seems to be small compensation for the landowner's surrender of his freedom of action for a ten-year period. Further, the farmer may have sought the benefits of the Act due to his inability to pay a tax based on residential assessment out of his income from cultivation of the land. If he later finds that cultivation is uneconomical and that nonrenewal would be a better alternative, he is faced with the prospect of paying taxes for nine years at a rate nearly as high as he would have paid had he not entered into the restrictive contract. Still, he may not use the land for any purpose other than agriculture; he may thus be totally unable to pay the taxes assessed and be forced to sell prematurely to a land speculator—a consequence that the Act was intended to avoid.

Even so, he may be unable to find a speculator willing to buy land that is restricted from any development for up to nine years. The speculator, too, would be required to pay the expense

48 Some farmers, feeling that they will be forced to sell in the near future, have apparently given serious consideration to permitting their taxes to become delinquent for the maximum redemption period of five years allowed by CAL. REV. & TAX. CODE § 3511 (West 1970). They evidently feel that such delinquency may be economically preferable to accepting restrictions that they consider unreasonable. It is, of course, impossible as yet to determine if they will follow through on such a course of action. Interview with Mr. Raymond C. Benech, President, Santa Clara County Farm Bureau, in San Jose, California, January 19, 1971.
## Table 3

<table>
<thead>
<tr>
<th>Year</th>
<th>426(b) (1) Full Value Residential</th>
<th>426(b) (2) Full Value Agricultural</th>
<th>426(b) (3) (1) minus (2)</th>
<th>426(b) (4) Discounted at 6.75%</th>
<th>426(b) (5) Land Value (2) + (4)</th>
<th>426(b) (6) Assessed Value at 25% Ratio</th>
<th>Property Tax on Residential (Table 2)</th>
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</thead>
<tbody>
<tr>
<td>1</td>
<td>$683,016</td>
<td>$66,000</td>
<td>$617,016</td>
<td>$321,095</td>
<td>$387,095</td>
<td>$96,774</td>
<td>$1,650*</td>
</tr>
<tr>
<td>2</td>
<td>751,316</td>
<td>69,300</td>
<td>682,016</td>
<td>378,860</td>
<td>448,160</td>
<td>112,040</td>
<td>11,204</td>
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<tr>
<td>3</td>
<td>826,448</td>
<td>72,764</td>
<td>753,684</td>
<td>446,935</td>
<td>519,699</td>
<td>129,925</td>
<td>12,993</td>
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<tr>
<td>4</td>
<td>909,092</td>
<td>76,404</td>
<td>832,688</td>
<td>527,092</td>
<td>603,496</td>
<td>150,874</td>
<td>15,087</td>
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<tr>
<td>5</td>
<td>1,000,000</td>
<td>80,224</td>
<td>919,776</td>
<td>621,585</td>
<td>701,809</td>
<td>175,452</td>
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<td>6</td>
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<td>84,236</td>
<td>965,764</td>
<td>696,702</td>
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<tr>
<td>7</td>
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<td>88,448</td>
<td>1,066,552</td>
<td>821,352</td>
<td>909,800</td>
<td>227,450</td>
<td>22,745</td>
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<tr>
<td>8</td>
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<td>92,872</td>
<td>1,177,628</td>
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<td>1,299,936</td>
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<td>102,392</td>
<td>1,434,916</td>
<td>1,344,229</td>
<td>1,446,621</td>
<td>361,655</td>
<td>36,166</td>
</tr>
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</table>

Total Taxes During 10-year Period $194,391 $263,506

Net Saving by Restricted Use Assessment $69,115

* In the first year there can be no effective notice of nonrenewal. Therefore, the formula is not applicable, and taxes will be assessed based on agricultural use only.
of carrying the land out of his own pocket, since, presumably, the agricultural use to which he was limited would not support the taxes assessed. Even if a speculator would purchase land under such circumstances, he would certainly be unwilling to pay anything approaching the true worth of the land.

Thus, the economics of nonrenewal appear to be highly punitive to the farmer. Cancellation, with its single penalty payment presumably made from the proceeds of sale, seems a far better alternative. However, it must be remembered that cancellation is not available to the landowner as a matter of right. Further, the uneconomic nature of the agricultural operation is specifically declared not to be a sufficient reason for cancellation. Thus the farmer may be left only with the prospects of continuing to lose money in agriculture, entering into a forced sale, or, at worst, sale of his property for unpaid taxes. Faced with such unpalatable alternatives, he may be sorely tempted to find a way of exerting political pressure to cause the governmental body concerned to grant his request for cancellation. Finally, it must be remembered that the landowner may not be able to base his decision on comparative costs alone. His decision may, in fact, be dictated by the pragmatic consideration of whether or not he has sufficient cash available at the time required.

Problems in interpretation of the statutes

Although the complex assessment formula set forth in section 426(b) of the Revenue and Taxation Code seems complete, certain apparent inconsistencies in the statutes cast some doubt on the general applicability of the formula.

Subsection 426(a)(5) of the Revenue and Taxation Code provides that the assessment formula applied here in Table 3 is to be used "[w]here less than six years remain to the expiration of the enforceable restriction." But since the contract must have an automatic renewal provision to be eligible for favorable tax treatment,

49 But see Alden & Shockro at 64. However, the contrary opinion therein was expressed prior to the passage of Cal. Rev. & Tax. Code § 426 (West 1970), which contains the mandatory assessment formula.

60 Cal. Gov't Code § 51282 (West Supp. 1971). Weighing against the statutory command is the fact that the taxing jurisdiction will immediately receive substantially increased revenues: first, from the cancellation penalty (unless waived); second, from a substantially increased assessment based on highest and best use of the land; and, ultimately, an even greater increase at the time the property is improved. In the Land Conservation Act of 1965 as originally enacted, state subsidies were provided to minimize the incentive of local governments to cancel, but these subsidies have now been repealed. Formerly Cal. Gov't Code §§ 51260-63 (West 1965), repealed, Cal. Stats. 1969, ch. 1372, § 30, at 2813. See Alden & Shockro at 67.

51 (West 1970).

notice of nonrenewal cannot be effective for at least nine years. Thus, there is an apparent inconsistency in the time periods specified. A close reading of the statute, though, shows that the formula is to be applied "under any" of several enumerated situations. Consequently, the various time periods can be mutually exclusive, and the inconsistency vanishes.

tit. 18, § 51(a)(1) (Feb. 28, 1970) applies the same requirement to pre-1970 agreements, effective March 1, 1971. The latter section references Article 1.5, Chapter 3, Part 2, Division 3, of the Revenue and Taxation Code. This is in error because no such Division exists. Apparently, the reference should be to Division 1, i.e., Cal. Rev. & Tax. Code §§ 421-29 (West 1970).

But even assuming that the proper reference is to Division 1, the retroactive application of the Administrative Code seems to be based on somewhat nebulous authority, although section 421(c) of the Revenue and Taxation Code might be interpreted in some such manner. The Administrative Code is not statutory law. Essentially, it consists of administrative regulations that must be based on statutory authority and that must not be inconsistent with any relevant statutes. See Cal. Gov't Code §§ 11373-74 (West 1966).

Furthermore, section 421(c) of the Revenue and Taxation Code may be an unconstitutional impairment of a contract obligation under U.S. Const. art. I, § 10, and Cal. Const. art. I, § 16, if it is interpreted to require that pre-1970 agreements must be brought up to current standards. Although this exact point has never been decided, a traditional Constitutional approach would certainly hold it invalid as so interpreted. See 16 C.J.S. Const. Law § 285 (1956) and cases cited therein. Note, however, that most authority on the point is quite well-aged. The clearest United States Supreme Court decision on a related subject dates back to 1938 and states: "[A] legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions within the protection of Article 1, § 10. [Footnote omitted.] If the people's representatives deem it in the public interest they may adopt a policy of contracting in respect of public business for a term longer than the life of the current session of the legislature . . ." Indiana ex rel Anderson v. Brand, 303 U.S. 95, 100 (1938). See also Comment, The Continuing Vitality of the Contract Clause of the Federal Constitution, 40 S. Cal. L. Rev. 576 (1967).

The contract in use by Santa Clara County during 1970 apparently avoids the Constitutional question by inclusion of the following sentence in paragraph 1: "This contract is subject to all provisions of this Act [the California Land Conservation Act of 1965] including any amendments thereto which may hereafter be enacted." A partial survey covering most California counties having rapidly expanding urban areas showed that in December, 1970, contracts in use in the following counties included substantially similar provisions: Monterey, Napa, Orange, San Bernardino, Solano, and Sonoma. However, in the following counties there were no such provisions and the Constitutional issue is present: Alameda, Los Angeles, Marin, San Mateo, Santa Barbara, and Santa Cruz. A third group of counties attempts to meet the Constitutional problem in other ways: Contra Costa, Fresno, Riverside, San Diego, and Ventura.

Finally, the intent of the 1969 amendments to the Williamson Act seems contrary to an interpretation applying section 421(c) to pre-1970 agreements. For example, one of the amended sections states: "Any contract or agreement entered into pursuant to this chapter prior to the 61st day following final adjournment of the 1969 Regular Session of the Legislature may be amended to conform with the provisions of this act as amended at such session upon the mutual agreement of all parties . . ." Cal. Gov't Code § 51253 (West Supp. 1971) (emphasis added). Of course, the language of sections 421(c) and 422 may also mean that the landowner has a choice of whether or not to consent to amend his agreement. But, if he does not, his land will not qualify for assessment based on an enforceable restriction.

Section 402.1 of the Revenue and Taxation Code established "a rebuttable presumption that restrictions will not be removed or substantially modified in the predictable future." Thus the assessor must assess only in accordance with permitted uses. However, this presumption provides no solace for the landowner who has given notice of his intent not to renew, since a specifically listed ground for rebuttal is that "a necessary party to the restriction has indicated an intent to permit its expiration . . . ." Nevertheless, the assessor is permitted to consider "representative sales of comparable land not under restriction but upon which natural limitations have substantially the same effect as restrictions." This proviso may give the landowner an opening for introduction of carefully selected evidence of the uneconomic nature of the agricultural use. Such evidence may be difficult to obtain, though, since the required absence of enforceable restrictions will probably raise the selling price of other comparable land.

A final problem is whether taxes on land currently assessed at its highest and best use will be rolled back or merely frozen at the rate effective when the contract is entered into. Although the intent of the Williamson Act would seem to require such a rollback in order to encourage farmers to enter into restrictive agreements, one commentator feels that the current statutes are unclear. One regulation, effective on March 1, 1971, seems to deny restricted use assessment where an agreement made prior to November 10, 1969, provided for a guaranteed rollback. Since there is no comparable provision governing restrictions arrived at through the contract procedure, the implication is that a contract providing for a rollback is effective. Ultimately, the question of whether or not there will be a rollback depends on the result of application of the formula provided in section 423 of the Revenue and Taxation Code.

**ALTERNATE METHODS**

Although the contract restriction is by far the most significant way for the urban fringe farmer to obtain property tax relief, other methods are also available. First, zoning restrictions alone (i.e., not incorporated into a contract) are enforceable restrictions. Zoning alone may be effective in particular cases, but such an approach is

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54 Id. § 402.1  
55 Id.  
56 Id. (emphasis added).  
57 Alden & Shockro at 67.  
58 CAL. ADM. CODE tit. 18, § 51(b) (Feb. 28, 1970) provides in part: "An agreement in order to qualify for restricted use assessment must not contain any of the following: (1) A provision purporting to bind the assessor to a particular assessment formula."
closely related to the approach of the Land Conservation Act of 1965 as it was originally enacted. That approach failed because the assessor was required by other statutes to consider comparative sales that might reflect the "transitional value" of an expiring restriction.59

The problem with zoning is much the same. Experience has shown that zoning restrictions in the urban fringe areas are subject to frequent change.60 Thus, the assessor must consider the "transitional value" based on the possibility that zoning, though presently enforceable, may be changed in the future. Although section 402.1 of the Revenue and Taxation Code establishes a rebuttable presumption that such restrictions will not be removed or substantially modified in the predictable future, rebuttal on the basis of "past history of like use restrictions"61 is specifically allowed. In urban fringe areas a past history of change is common.

Thus, restriction by zoning will usually be ineffective except in areas where the change from rural to urban is relatively slow. But in such areas farmers will not be under the heavy pressure of drastically increased assessments, since land values will not be rising precipitously. Such farmers will usually have little need for the tax benefits of enforceable restrictions.

Scenic restrictions62 and open-space easements63 are other possible methods of achieving tax savings. Contrasted with noncontract zoning restrictions, these are "enforceable restrictions" within the meaning of section 422 of the Revenue and Taxation Code.64

Statutes regarding scenic restrictions date back to 1959, and restricted use assessment seems to have been applied merely as an afterthought. By definition, though, scenic restrictions are of extremely limited applicability. Cancellation and nonrenewal problems are similar (though not identical) to those already discussed. Furthermore, it seems probable that any attempted cancellation could turn into an emotional (and hence political) issue that could easily outweigh legal and financial considerations. Thus, the utilization of scenic restrictions will probably continue to be minimal.

60 Alden & Shockro at 61.
62 CAL. GOV’T CODE §§ 6950-54 (West 1966); CAL. REV. & TAX. CODE § 421(d) (West 1970).
64 (West 1970).
The open-space easement is a more recent innovation (1969). Thus, it was also more closely tied in with the Williamson Act. Although the original statutes regarding scenic restrictions remain on the books, they seem to be nearly swallowed up by the newer provisions.\footnote{See CAL. GOV'T CODE § 51056 (West Supp. 1971).}

Open-space easements are subject to acceptance by the city or county\footnote{Id. § 51055.} in accordance with specific statutory standards.\footnote{Id. § 51056.} These standards reflect the general public interest in preservation of open space and include, among others, such factors as scenic value, preservation of trees, flood control, value as a wildlife preserve, and the possibility that the land will eventually be acquired for public use. Obviously, establishment of any of these requisites would inhibit any later attempt by the owner to justify cancellation of the restrictions.

Furthermore, the minimum term for open-space easements is 20 years,\footnote{Id. § 51053.} and the city or county may limit extraction of natural resources.\footnote{Id. § 51054.} Thus, the landowner may find his hands tied even more tightly than under a contract in an agricultural preserve. The emotional factor discussed in relation to scenic restrictions may also come into play.

Finally, the mind of the lawyer may boggle at the terms "easement" and "covenant running with the land," as they appear continually throughout the controlling statutes.\footnote{See, e.g., id. § 51051.} Since recording of both acceptance of the easement\footnote{Id. § 51059.} and its abandonment\footnote{Id. § 51062.} are required, could a failure to agree on abandonment after expiration of the 20-year term amount to a permanent cloud on the title?

\section*{Conclusion}

The original Land Conservation Act of 1965 undoubtedly had defects. The "agreement" procedure, whereby all cancellation penalties could be avoided, was clearly too liberal toward the farmer. The 1969 amendments have certainly provided strong deterrents that will aid in accomplishing the ultimate objective of retaining land as open space. But there is also a real danger that the amendments have become so punitive that few landowners will be willing to
accept the restrictions of the Act.\textsuperscript{73} Thus, the objectives may be totally defeated. Excessively punitive provisions are present in all of the presently available methods, namely, contract restrictions, scenic restrictions, and open-space easements.

The experience of late 1970 and early 1971 does not, however, bear out this prediction. In Santa Clara County, for example, 209 applications to include 47,431 acres in the agricultural preserve were approved by the Board of Supervisors on February 24, 1971. This compares with 143 applications, covering 23,694 acres, approved in 1969–70.\textsuperscript{74} And in Alameda County, applications covering approximately 40,000 acres were filed in 1970, compared with a total of slightly less than 100,000 acres set aside during the entire period from 1966 through 1969.\textsuperscript{75} In explaining their reasons for accepting use restrictions, ranchers are quoted as saying, "We don't like a lot of things about the Williamson Act, but right now we have no choice . . . we're boxed in. It's this or go broke."\textsuperscript{76} Also, "They tax land at $13 per acre, and the most you can get in grazing fees is $7. They have some of our property valued at $1,000 per acre . . . . If you come across any buyers with that kind of money, I'd sure appreciate hearing about it."\textsuperscript{77}

These reactions of ranchers reveal an acquiescence to the Act only as a last resort. Probably their motivation has been greatly intensified by the forced compliance of all counties with the statewide 25 percent assessment ratio.\textsuperscript{78} Clearly, many assessors are only

\textsuperscript{73} In apparent recognition of this possibility, A.B. 2175 was introduced, but failed to pass, in the 1970 Regular Session of the California Legislature. This bill would have provided for fifty-year development planning contracts, subject to annual review for the immediately ensuing five-year period. Such contracts would have been designated "enforceable restrictions" within the meaning of Article XXVIII of the California Constitution. The stated purpose of the bill was "to provide for timely and orderly development of land consistent with the needs of an expanding urban area while obviating scattered or premature development . . . ." A.B. 2175 § 66452.5.

\textsuperscript{74} During the February 24, 1971, meeting, the Board also postponed action on an additional 64 applications covering 1,598 acres. In these cases some governmental body had filed a notice of objection. The Board rejected 28 applications covering 147 acres. All parcels in the latter group were smaller than ten acres each.

Santa Clara County inclusions actually approved in prior years are as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Applications</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>1966-67</td>
<td>35</td>
<td>83,781</td>
</tr>
<tr>
<td>1967-68</td>
<td>56</td>
<td>64,767</td>
</tr>
<tr>
<td>1968-69</td>
<td>88</td>
<td>22,723</td>
</tr>
</tbody>
</table>

\textsuperscript{75} "Taxes Threaten Ranches—Rural Landowners Rush to Ag Preserve As 'Last Hope For Survival,'" The Times (Pleasanton, Cal.), Jan. 20, 1971, at 1, col. 1.

\textsuperscript{76} Id.

\textsuperscript{77} Id. col. 3.

\textsuperscript{78} See note 36, supra.
now catching up with values that have been increasing over many years. Thus, 1970 may ultimately prove to have been a highly abnormal year, and it still seems reasonable to predict that farmers will reduce their voluntary utilization of the Williamson Act in future years. Furthermore, the increase in applications in 1970–71 may cause some counties, and the Legislature, to become concerned about the quantity of acreage that is becoming committed to reduced assessment for long periods of time. This may cause the Legislature to subject applicants for admission to the benefits of the Act to even more restrictive requirements.

Clearly, a delicate balance must be struck that is neither too liberal in permitting cancellation or nonrenewal by the landowners nor too punitive in its economic consequences. California does not yet seem to have found this balance. Until it does, we cannot expect that assessment based on restricted use will fully achieve its stated objective of “preservation of a maximum amount of the limited supply of agricultural land . . . .”\textsuperscript{79}

\textsuperscript{79} \textit{Cal. Gov't Code} § 51220(a) (West Supp. 1971).