April 1967

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https://doi.org/10.15779/Z383T9W

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ASSESSMENT OF FARMLAND UNDER THE
CALIFORNIA LAND CONSERVATION ACT
AND THE "BREATHING SPACE" AMENDMENT

As America is converted into an urban society, the old ratio of city to countryside and factory to farm is rapidly changing. To meet the increasing metropolitan demand for land, rural areas have been urbanized at a rate of 3,000 acres a day:1 "[T]he subdivisions of one city are beginning to meet up with the subdivisions of another."2 Because of the prominent part played by California in the nation's farm economy,3 the state has become increasingly concerned about the resulting pressures and problems as traditional agricultural areas have been approached, surrounded and finally consumed by population growth and urbanization.4

Although the results of this process are profound and far-reaching, the process itself is simple to understand. As urban pressures build, farmland on the metropolitan fringe becomes increasingly attractive for subdivisions or related development. This increasing attractiveness is reflected in higher market value, higher appraised and assessed valuation, and consequently a higher real property tax bill.5 Some rural landowners welcome a paper increase in value because they are holding their land only for speculative purposes,6 but for the bona fide farmer the increase may be unwelcome. The latter is in the business of agriculture, not land speculation; his parcel of land is a productive resource. When outside factors increase the value of that resource beyond its agricultural worth by inflating his assessed valuation and his tax bill, the farmer must reevaluate his economic position if he wishes to remain competitive in the free market. When he also considers the additional burden of personal property taxes that he must pay on his farm equipment,7 his new economic picture

1 Whyte, Urban Sprawl, in THE EXPLODING METROPOLIS 115 (1958). Latest figures show no decline in this pace. Today in the New York City region alone, 2,000 acres a week are being transformed to urban uses. Newsweek, Nov. 28, 1966, p. 114. "In Southern California, urbanization is marching into the countryside at the rate of 70 square miles a year. In the San Francisco Bay Area, the annual rate is 21 square miles." Los Angeles Times, Sept. 25, 1966, § C, p. 1.
2 Whyte, supra note 1, at 115.
3 California supplies twenty-five per cent of America's table crops and leads all other states in value of farm produce. Included in this production are forty-three per cent of the nation's vegetables and forty-two per cent of the nation's fruits and nuts. Should Agricultural Land Be Taxed on the Basis of Its Use?, The Commonwealth, Aug. 15, 1966, p. 40.
4 See note 10 infra and accompanying text.
5 See Doerr & Sullivan, Property Taxation and Land Use, in CALIFORNIA ASSEMBLY INTERIM COMMITTEE ON REVENUE AND TAXATION, TAXATION OF PROPERTY IN CALIFORNIA pt. 5, at 203, 205 (1964).
7 See Shapiro, Assessment and Taxation of Tangible Personal Property on Farms, 18 NAT'L TAX J. 25 (1965).
of increased value and increased taxes may make it unprofitable or marginal for him to continue to hold his parcel in agriculture. Frequently his response is to sell to a developer and move his operation to new land farther from the city, where the same process may well be repeated.8

If this transition were occurring in an area of relatively unlimited resources, society would have little to worry about other than the inconvenience of forced relocation for the farmer and the loss of some easily accessible scenery for the city-dweller who longs to recreate his rural heritage on weekends.9 However, since most of this development is occurring on lands most naturally suited for agriculture,10 available farmland resources are being exhausted at a rapid rate. Fortunately society is becoming aware of this growing depletion, and what has been called "the Myth of Superabundance"11 is giving way to fears for our future food supply.12

California has over 100 million acres of total land area,13 but less than seven per cent of this land qualifies as "very good" or "good" for purposes of cultivation.14 It is this prime agricultural land which is feeling the pressures of urbanization, and it is this land at which the legislature has directed the California Land Conservation Act of 1965.15 This act seeks to retard the premature conversion of prime agricultural land.16

8 "As for the farmers who sell their groves and pastures to the builders of sprawling suburbs, they simply move to farm land elsewhere and begin again. In California, where farm-land prices have shot up 60% since 1957, that process has lately meant that growers from Orange County . . . have been bidding up the much lower price of land in the Sacramento Valley 500 miles north." Time, April 29, 1966, p. 96. For further discussion of this exodus from Orange County, see Hearings Before Assembly Interim Committee on Municipal and County Government on the Operation and Administration of County Assessors Offices app. 5, at 4-6 (San Francisco, Dec. 8 & 9, 1965) (statement of John Lynch, President of State Board of Equalization).


10 See, e.g., Ciriacy-Wantrup, The "New" Competition for Land and Some Implications for Public Policy, 4 Natural Resources J. 252 (1964). According to the author, level alluvial valleys and plains are not only the most desirable location for irrigated agriculture, but also the most desirable for assembly-line subdivisions as well as for industry, transportation, and communication. "In net value product per acre, these are 'higher' land uses than irrigated agriculture—except greenhouses and certain horticultural enterprises. Thus, at the margin of urban-industrial development, irrigated agriculture is quickly priced out of the land market." Ibid.


12 See Whyte, supra note 1, at 122. Using the current rates of population increase and land conversion, it has been estimated that all of California's cropland will be lost to urbanization by the year 2020. Doerr & Sullivan, supra note 5, at 207-08. See Gregor, Urban Pressures on California Land, 33 Land Econ. 311 (1957).

13 Wohletz & Dolder, Know California's Land 7 (1952).

14 Id. at 5, 7. See note 16 infra.


16 The term "prime agricultural land" is defined as "(1) all land which qualifies for
to urban uses by enabling local governments and local farmers to place their farmland under enforceable contractual restrictions concerning its future use.

The intricate machinery in the Land Conservation Act which allows these contractual restrictions does not operate in a vacuum. Land under contract is still subject to the real property tax assessment standards of California law, and land under contract still must be appraised for value by the county assessor. This Comment will examine the problems raised by the necessary and continuous interaction between the act and the tax structure for real property in California.

Part I will explain and discuss the basic operation of the California Land Conservation Act. Part II will analyze the state’s real property assessment standards and practices covering the land to which the act applies. Finally, part III will evaluate the Land Conservation Act in light of current assessment practices, with special emphasis on the changes brought about by the 1966 “Breathing Space” Amendment to the California Constitution.

I

THE CALIFORNIA LAND CONSERVATION ACT OF 1965

After declaring it to be in the public interest to protect agricultural land, the California Land Conservation Act sets forth the procedure by which the restrictive instruments are to be established.

A. Contracts Restricting Use

Under the act, the restrictive contract is intended essentially to provide a means by which the farmer can place his land under binding use restrictions in return for a “freeze” of the assessed valuation on his land.

rating as class I or class II in the Soil Conservation Service Land Use capability classifications, or (2) land which has returned from the production of unprocessed agricultural plant products an annual gross value of not less than two hundred dollars ($200) per acre for three of the previous five years.” Cal. Gov’t Code § 51201(c). On its 1950 map of the generalized classifications of land use in California, the United States Department of Agriculture Soil Conservation Service defines class I land as, “Very good cultivable land. Deep soil, nearly level, little or no erosion, adapted to a wide variety of crops. No special difficulties in farming,” and class II land as, “Good cultivable land. Gentle slopes, usually moderately deep soil, or other minor problems. Frequently requires some moderate degree of protection from erosion or improvement of the drainage.”

17 See text accompanying notes 19-23 infra.

18 Cal. Gov’t Code §§ 51220(d), 51223. The act states that “in a rapidly urbanizing society agricultural lands have a definite public value as open space, and the preservation in agricultural production of such lands . . . constitutes an important physical, social, esthetic and economic asset to existing or pending urban or metropolitan developments.” Cal. Gov’t Code § 51220(c).
The first step in this procedure is the designation by a city or county of a specific area consisting of at least 100 acres of land as an "agricultural preserve." The owners of the prime land devoted to agriculture within this preserve can then enter into contracts with the local government to keep their lands in agriculture. As a result, legally binding and enforceable restrictions are placed on the use of their land.

If the landowner could easily be released from the conditions of his preserve contract when an attractive opportunity to sell appeared, the purpose of the act would be thwarted. To prevent use of the contract merely to stabilize assessments while holding the land for speculation, the consent of the state as well as that of both parties is necessary for revocation. Moreover, before the state can consent, the State Board of Agriculture and the Director of Agriculture must find that such cancellation is in the public interest and is not intended merely to serve the

19 CAL. GOV'T CODE § 51242(b). In practice this required size will probably mean that the average preserve will be set up in unincorporated county areas. Therefore, for purposes of simplified and useful discussion, this Comment will treat the county as the contracting local governmental unit.

After the agricultural preserve is established, the land within its boundaries will be restricted to agricultural and compatible uses. CAL. GOV'T CODE § 51201(d). The act does not set out exactly what are to be considered "compatible uses" but instead leaves this definition to the county administering the preserve, stipulating only that land occupied by certain public utilities shall not be excluded from a preserve because of such use. CAL. GOV'T CODE § 51201(e).

20 For the definition of "prime agricultural land" as used in the act, see note 16 supra.

21 CAL. GOV'T CODE §§ 51242, 51243(a). A sample agreement under the Land Conservation Act is reproduced in the Appendix to this Comment. The term of each contract is ten years, with automatic renewals at the end of each year for an additional ten-year period, unless either the owner or the government decides not to renew. CAL. GOV'T CODE § 51244. Thus, land under a contract which has been renewed will always face ten years of use restrictions; without action by either party, the contract regenerates itself yearly and keeps a ten-year life at all times.

If either party decides not to renew, written notice of such intention must be served upon the other party before the annual renewal date of the preserve contract. Upon such notice, the contract runs its remaining nine years and then expires. CAL. GOV'T CODE §§ 51245, 51246. This refusal to renew is to be distinguished from actual cancellation of the contract. See note 22 infra and accompanying text. The only immediate consequence of a failure to renew is that the contract will expire at the end of nine years; unlike a cancellation, no penalty payments can arise from a failure to renew.

When the local government has designated the preserve and thereafter contracted with a landowner within it, a similar contract must be offered to the owners of prime land in the preserve. CAL. GOV'T CODE § 51241. These contracts will run with the land to succeeding owners and will be transferred from a contracting county to any succeeding city. CAL. GOV'T CODE § 51243(b). Other provisions in this article deal with the appointment of an advisory board on agricultural preserves (§ 51253), the filing of maps and contracts with the county recorder and the California Director of Agriculture (§§ 51250-51), and the necessity of obtaining the Director of Agriculture's consent to all contracts before such contracts become effective (§ 51250).
private pecuniary interest of the individual landowner. No contract may be cancelled without a public hearing; and if the owners of more than half of the contracted acreage in the preserve object at or before the hearing, the contract cannot be cancelled.

What does the farmer receive under the Land Conservation Act in return for the development rights he has foregone? The scheme of compensation to the contracting parties in the preserve contract program takes two forms: annual payment by the state to the contracting local government to defray partially the costs of administering the preserve (one dollar per acre of land that the local government has placed under contract); and, more important, annual payment by the local government to the owner of the land under contract (five cents for each dollar of assessed valuation). However, the contracting landowner may waive compensation, and the county can require such a waiver of payments on

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22 CAL. GOV'T CODE §§ 51280-82. Section 51283 provides a stiff penalty for cancellation to ensure that the owners who place their land under the act are not speculators looking for a short-term tax shelter. The section specifies that after cancellation of the preserve contract the landowner must pay to the city or county an amount equal to fifty per cent of the new assessed valuation, as soon as reassessment occurs. Apparently this payment is to be made even if the local government is the moving party behind the cancellation.

However, the penalty payment may be wholly or partially waived if the State Board of Agriculture and the Director of Agriculture find such a waiver to be in the public interest, and provided also that “(1) the cancellation is caused by an involuntary transfer or change in the use which may be made of the land and the land is not immediately suitable, nor will be immediately used, for a purpose which produces a greater economic return to the owner; and (2) the city or county has recommended to the State Board of Agriculture that no such payment be required, or that the deferment of such payment or portion thereof be allowed, and the board has determined that it is in the best interests of the program to conserve agricultural land use that such payment be either deferred or not required.” CAL. GOV'T CODE § 51283(b).

It seems clear that it would be very difficult for city councilmen or county supervisors to request a cancellation and then do other than waive the penalty payment, because of the possible political repercussions of such a seemingly inequitable decision. Unfortunately, this question is left open in the act, and contracting parties under the statute should be aware of their potential liabilities in the absence of such a waiver.

For a suggested contractual treatment of this problem, see clause seven of the sample agreement in the Appendix.

23 CAL. GOV'T CODE §§ 51284-85. The last segment of the act, article 6, provides that it is state policy to avoid “whenever practicable” the location of public improvements or utilities within agricultural preserves. CAL. GOV'T CODE § 51290. This policy is specifically implemented by § 51292(a): “No public agency or person shall locate a public improvement within an agricultural preserve based primarily on a consideration of the lower cost of acquiring land in an agricultural preserve.”

However, in the event it does become necessary for the state to take contracted land by eminent domain, the preserve contract is void, as to the land actually being acquired, when the action is filed. CAL. GOV'T CODE § 51295.

24 CAL. GOV'T CODE § 51260.

25 CAL. GOV'T CODE § 51261.
the amount up to the property’s assessed valuation at the time the contract is made.26

At first glance it may seem unrealistic to expect a landowner voluntarily to place restrictions on the future use of his land and at the same time agree to waive any payment from the government for these restrictions. However, this waiver is the crux of the act; it is intended that, through a complicated chain of circumstances, the waiver of payments will bring about a freeze in the assessed valuation of the preserved land for the life of the contract.27 In effect, the local government promises to reimburse the farmer for any additional tax which may be assessed, thus removing the utility of such a raise. An indirect freeze of real property taxes is expected to occur because of a combination of factors:

First, the waiver by the farmer of payments from the local government under a preserve contract is effective only up to the amount of the assessed valuation at the time the contract is made.28 If the assessment on land under contract is increased, the government cannot claim the landowner has waived his payments on this increment.

Second, in the absence of waiver, the payments on preserve contracts are five dollars per 100 dollars of assessed valuation,29 but the average county general tax rate is under three dollars per 100 dollars.30

Thus the county as a governmental unit would be placed in the economically untenable position of receiving less from the increased assessment which it initiated than it would be obliged to pay out under its preserve contract obligation. In theory, the system would tend to keep the assessments stable through the workings of governmental self-interest.31

26 Ibid.
27 Ibid. Although not mentioned explicitly in the act, such stabilization of assessed valuation was intended to be implicit in the wording of § 51261. John C. Williamson, former chairman of the Assembly Committee on Agriculture and a principal proponent of the act, has stated repeatedly that in return for "guaranteeing the prospective agricultural use of his land, the landowner would receive a virtual freeze on his assessed valuation, and offset payments in case it rose above the valuation at the time of originally entering the contract." Press Releases from Assemblyman Williamson's office, March 16, 1965, and August 4, 1965; Remarks of Assemblyman Williamson before the Association of State Soil Conservation Districts, December 7, 1965.
28 CAL. GOVT CODE § 51261.
29 Ibid.
30 According to Don Collin, Director of Research for the California Farm Bureau Federation, the general tax rate of California counties ranges from a low of approximately $1.62 per $100 of assessed valuation in the most industrialized counties to highs of just over $3 in mainly rural areas. This "general" rate is not to be confused with the much higher "composite" rate, which incorporates within it the tax rates of other governmental units and is merely collected by the county for the convenience of these other units. Interview With Mr. Collin in Berkeley, California, May 3, 1966.
31 Since as a practical matter such waiver of payments will usually be required of the
B. "Agreements" Restricting Use

Farmland within the boundaries of an agricultural preserve can be restricted to agricultural or compatible uses by the "agreement" procedure of the Land Conservation Act. This is true even though the land does not qualify physically or economically as prime. The act leaves the actual terms of the "agreement" to be determined by the parties; its conditions are more likely to be the result of a give-and-take negotiation process than are the more closely controlled terms of a contract. Furthermore, under an "agreement" no provision can be made for payments to the landowner, apparently because the land is not as desirable for agricultural purposes as prime land. This means that the potential benefits of the compensation waiver-tax freeze scheme are available only to the owner of prime land.

The waiver of payments and concomitant assessment freeze formerly were vital to the success of the act. County assessors could not be relied upon to assess land consistently on the basis of current restricted use. However, this lack of provision for payment in the agreement may now become more a difference in form than in substance. Under both the contract and the agreement, the important event has occurred: Enforceable contractual restrictions on use have been placed on the land. These use restrictions have become vital because the approval of Proposition 3 in the 1966 California general election makes it possible for the legislature to ensure that assessed valuation will be based upon current restricted use rather than possible future use.

Since the enactment of the Land Conservation Act, farmers and local governments have not rushed to execute these contracts and agreements. The hesitation has been due in large part to an uncertainty on the part of

landowner, contractual consideration problems could arise. In the Land Conservation Agreements of Marin and San Mateo Counties, drawn under the enabling provisions of the act, payments are expressly waived; the consideration for the execution of the agreement is stated to be "the substantial public benefit to be derived therefrom and the advantage which will accrue to owner as a result of any reduction in the assessed valuation of said property due to the imposition of the limitations on its use contained herein." This appears to be adequate consideration to make the contract valid and enforceable.

33 See note 16 supra for a discussion and definition of prime land. An agricultural preserve can be established even if it contains no prime land. Cal. Gov't Code § 51201(d).
34 Cal. Gov't Code § 51256. According to Hugh Strachan, Tax Counsel of the State Board of Equalization, this article was added as an afterthought in case landowners proved hesitant to place their property under the more rigid and limiting article 3 contracts. Strachan, California Land Conservation Act of 1965, a paper presented at the Annual Conference of District Attorneys and County Counsels at Santa Clara, California, March 24, 1966.
35 Cal. Gov't Code § 51255.
36 See the discussion of assessment practices in the text accompanying notes 39-58 infra.
37 See notes 66-73 infra and accompanying text.
local governments concerning the likely interaction of the act's restrictions with the obscure California tax assessment standards operating in this area. A knowledge of the fundamentals of the California real property tax assessment system is necessary to understand the scope of the problem.

II

CALIFORNIA ASSESSMENT STANDARDS

A. Assessment of Real Property in General

Any discussion of California property taxation must begin by directing specific attention toward the official upon whose interpretations the system depends: the county assessor. It is the assessor's task to place exact dollar valuations upon all taxable property so that the abstractions of the tax rate can be transformed into the realities of the tax bill. To perform his task correctly the assessor must be insulated against the pressures of political influence and public opinion, and must be free from personal greed. When he yields to one of these influences, the consequences can destroy his value to the community.

The assessor's office is an independent arm of county government. In the performance of his duties, the assessor is neither directed nor protected by any other county official. It would seem vital for such a precariously placed official to have a set of clear and legally recognized assessment standards to be used as tools for valuation and as shields against unwarranted criticism. Yet in California no such standards exist. No single definitive list of legal criteria for assessments is available; instead, the assessor must glean his standards from various sources, including local custom and his own political experience as well as the often cryptic state constitutional provisions, statutes, and case law.

38 This very independence from other county officials could portend difficulties in the implementation of the Land Conservation Act. The assessor could conceivably decide to increase substantially his appraisal of preserved land, even though as a result of this increase the county would have to pay out more under the preserve contract than it would receive from the increased tax revenues. Cf. note 31 supra and accompanying text. For further discussion of this problem see text accompanying notes 59–69 infra.

39 Interview With Raymond Sullivan, Assistant Consultant, California Assembly Committee on Revenue and Taxation, in Sacramento, California, March 21, 1966; Early, Local Equalization Practice in California, 4 SANTA CLARA LAW. 147, 158 (1964). See Hagman, Open Space Planning and Property Taxation—Some Suggestions, 1964 WIS. L. REV. 628, 638.

There is an "Assessor's Handbook" in California, published by the State Board of Equalization, which in its "General Appraisal Manual" segment attempts to collect and discuss legal standards of assessment in summary fashion. See note 58 infra and accompanying text.

For an excellent and exhaustive exposition of the general problems of assessing real property, including a table of the constitutional and statutory valuation requirements of 48 states, see Note, 68 YALE L.J. 335, 335–69, 386 (1958).

40 Some California public officials are unhappy with this situation. Attorney General
1. Constitutional Standards

The California Constitution provides four different standards for the assessor. His basic touchstone is the portion of article 13, section 1, which provides that all property must be taxed "in proportion to its value, to be ascertained as provided by law, or as hereinafter provided." Section 2 states that "land, and the improvements thereon, shall be separately assessed. Cultivated and uncultivated land, of the same quality, and similarly situated, shall be assessed at the same value." The other constitutional criteria are only somewhat more helpful. They are found in: (a) article 11, section 12, which provides that all taxable property "shall be assessed for taxation at its full cash value"; (b) article 13, section 9, which, in setting forth the duties of the state and county boards of equalization, states that these boards shall make assessments conform to the property's "true value in money"; and (c) article 13, section 14, which states that certain enumerated public utilities shall be assessed at "actual value."
Thus the constitution tells the assessor to value all land at its "value," its "full cash value," its "true value in money," or its "actual value." None of these standards is sufficiently specific to tell the farmer how his preserved land will be valued, or to tell the assessor how to appraise that land. In his attempt to ascertain the meaning of these general standards when applied to specific preserved land, the assessor must look to the statutes and to case law.

there are still four areas in which a constitutional problem could conceivably develop. However, it is unlikely that any of the following sections would be interpreted as being in conflict with the act:

(1) Section 31, article IV of the California Constitution prohibits the making of any gift of public money to any individual. However, contractual payments to farmers under the act are for an avowed public purpose (see notes 18-19 supra and accompanying text), and such expenditures are not to be regarded as gifts even though certain individuals may receive particular benefits from them. See Veterans' Welfare Bd. v. Jordan, 189 Cal. 124, 140-41, 208 Pac. 284, 291 (1922); Opinion of Legislative Counsel No. 2454, Jan. 28, 1966, at p. 4; 47 Ops. Cal. Att'y Gen. 171, 181-82 (1966).

(2) Section 25, article IV of the California Constitution prevents the legislature from enacting local or special laws for the assessment of taxes or the exemption of property from taxation. The Land Conservation Act provides for contractual restrictions on land use; no exemption from taxation is contemplated under the act. (For a comprehensive treatment of California property tax exemptions, see Taxation of Property in California, supra note 5 at 55). Furthermore, the statute does not qualify as a "special law" under the interpretation of that term in such cases as Lelande v. Lowery, 26 Cal. 2d 224, 232, 157 P.2d 639, 645 (1945); Sacramento Municipal Util. Dist. v. Spink, 145 Cal. App. 2d 568, 572-3, 303 P.2d 46, 51 (1956) (an act which applies uniformly to a single class is not special legislation when the class is founded upon natural, intrinsic or constitutional distinctions which reasonably justify differences in treatment.)

(3) The California Constitution also provides in article XIII, § 6, that "the power of taxation shall never be surrendered or suspended by any grant or contract to which the state shall be a party." No cases have been found construing the section in a context relevant to the Land Conservation Act. However, it seems clear that agricultural preserve contracts do not suspend the power of taxation within any common understanding of the term. Taxes are still paid on the farmland as they were before the contract was made; the amount of the taxes may decrease, or may increase less rapidly than before, but this change will be due only to the use restrictions placed on the land and not to any surrender or suspension by the state of its taxing power.

(4) Some equal protection questions could arise on the behalf of holders of non-prime agricultural land, but it appears that the legislature has made a genuine attempt at basing the act's classifications on reasonable standards (see, e.g., Cal. Gov't Code §§ 51201, 51220-23), and that the distinctions made between prime lands and other lower quality farmlands are "classifications which have a substantial relation to a legitimate object to be accomplished." Lelande v. Lowery, supra at 232, 157 P.2d at 645. See Martin v. Superior Court, 194 Cal. 93, 100-02, 227 Pac. 762, 765-66 (1924).

The Attorney General's Opinion agrees that the equal protection objections have been met: "Since we have found that the statutes in question make reasonable distinctions between different kinds of property and do not require more favorable taxation of lands in an agricultural preserve than is inherent in the restriction of the use of the land, there is no basis for holding that these statutes [the Land Conservation Act and the old §§ 402.5 and 402.6 of the Revenue and Taxation Code, now replaced by § 402.1] deny equal protection of the laws to those who fall without the ambit of the Act." 47 Ops. Cal. Atty Gen. 171, 181 (1966). For a discussion of the replacement of these statutes, see note 59 infra.
2. Statutory Standards

The California Legislature has provided only two criteria relevant to the general assessment problem: one merely repeats the constitutional standard of "full cash value"; the other defines "value," "full cash value," and "cash value" as "the amount at which property would be taken in payment of a just debt from a solvent debtor." These statutes do nothing more than tell the assessor that if the contractual use restrictions would affect the market price of the preserved land, his assessment should reflect this effect.

3. Judicial Standards

The courts have only infrequently attempted to delineate some legally acceptable standards of assessment; and when taken in toto, the cases seem to conflict in some areas. Moreover, they provide only meager assistance to the assessor when he must decide how to value land under enforceable use restrictions. Large gaps are left to his unbridled discretion. He is told that "actual cash value" is the same as "full cash value," and that "full cash value" is synonymous with "market value." The assessor is warned of his duty to value property in proportion to its worth, but is told not to use as his standard the present profitability of the property as the present owner is choosing to use it.

The most ambitious judicial attempt to provide a workable reference for the assessor is the definition of "full cash value" in De Luz Homes, Inc. v. County of San Diego. The California Supreme Court there defined "full cash value" as

the price that property would bring to its owner if it were offered for sale on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other. It is a meas-

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40 For specific statutory instructions to the assessor in the agricultural area, see notes 59-65 infra and accompanying text.
46 CAL. REV. & TAX. CODE § 401.
47 CAL. REV. & TAX. CODE § 110.
49 See Michael Todd Co. v. County of Los Angeles, 57 Cal. 2d 684, 695-97, 371 P.2d 340, 346-7 (1962); Crocker v. Scott, 149 Cal. 575, 585, 87 Pac. 102, 106 (1906); Opinion of Legislative Counsel, 4 JOURNAL OF THE ASSEMBLY 5670 (1959).
51 Texas Co. v. County of Los Angeles, 52 Cal. 2d 55, 61-62, 338 P.2d 440, 443 (1959); De Luz Homes, Inc. v. County of San Diego, 45 Cal. 2d 546, 566, 290 P.2d 544, 557 (1955). The passage of Proposition 3 may vitiate this language insofar as the cases forbid assessment of restricted open space land on the basis of its restricted present use. See text accompanying notes 67-75 infra.
ure of desirability translated into money amounts . . . and might be called the market value of property for use in its present condition. 63

The "market value" of preserved land "for use in its present condition" presumably would be lowered by the contractual restrictions, but by how much? What factors should the assessor use to determine this market value? The cases tell him it is proper to consider every use to which the property is naturally suited, 64 and to evaluate comparable sales, replacement costs and capitalization of income. 65 First and foremost, no matter what method he chooses, he is to use his own honest discretion and judgment. 66 He violates his duty only when his conclusions are arrived at dishonestly or are made pursuant to some arbitrary and necessarily discriminatory rule. 67

63 Id. at 562, 290 P.2d at 554.
66 Eastern-Columbia, Inc. v. County of Los Angeles, 61 Cal. App. 2d 734, 745, 143 P.2d 992, 998 (1943). "The test is not what someone else thinks is a proper method of valuation, but whether the method used by the assessor was legitimate, fair, and reasonable." Early, supra note 39, at 158-59.
67 Eastern-Columbia, Inc. v. County of Los Angeles, supra note 56, at 745, 143 P.2d at 998. Wide discretion in the assessor is increased by the extremely limited opportunity given the individual taxpayer to question the valuation once it is set. "The weakest spot in the whole property tax structure . . . is the machinery of protest and appeal available to the individual taxpayer." Note, 75 Harv. L. Rev. 1374, 1384 (1962).

If the citizen cannot prove that the assessor has failed to exercise his own fair judgment in his appraisal, no adjustment will be made and the property owner must pay his taxes as assessed. Eastern-Columbia, Inc. v. County of Los Angeles, supra at 745, 143 P.2d at 997; Miller & Lux, Inc. v. Richardson, 182 Cal. 115, 128, 187 Pac. 411, 416 (1920). "Mistakes or overvaluations honestly made are not grounds for refund of a protested charge." Hammond Lumber Co. v. County of Los Angeles, 104 Cal. App. 235, 240, 285 Pac. 896, 898 (1930). "The functions of an assessor are considered judicial in nature; hence, when he has acted within the limits of a reasonable discretion, his judgment, even though erroneous, usually will not be interfered with in the absence of actual or constructive fraud . . . ." Opinion of Legislative Counsel, 4 Journal of the Assembly 5670, 5672 (1959) (citing the Eastern-Columbia case, supra.)

With respect to the heavy burden resting upon the protesting taxpayer, see generally Early, supra note 39, at 148. However, the system set up by the Land Conservation Act could in practice free the protesting owner of preserved land from some of this burden, in the following manner: The taxpayer's first appeal court is the county board of supervisors sitting as a board of equalization, and those same supervisors have already executed a contract with this taxpayer under the act. They are committed to making the contract work and are likely to be ill-disposed toward upholding an assessment so high that it might thwart the purpose behind the preserve contract and future contracts they might wish to negotiate.
4. Highest and Best Use

Assessors use an additional standard: the standard of “highest and best use.” Although apparently not derived from any specific California statutory or judicial language, this concept plays a vital practical part in the everyday evaluation process which the assessor uses for real property. Since the standard is based on practical usage rather than definite statutory language, “highest and best use” is an elusive concept. Perhaps the best definition is that used by California assessors and appraisers:

Appraisers, in making an appraisal, must appraise on the basis of some use or uses. The principle that must be followed in market value appraisals, where the value reflects the consensus of the market, is that all property is appraised on the basis of the highest and best use. The highest and best use is defined as the most profitable use over a period of time. It is the program of property utilization which will develop the highest value.\(^{58}\)

B. Assessment of Preserved Land Under the Land Conservation Act—California Revenue & Taxation Code Section 402.1

When the assessor attempts to combine these general and somewhat vague standards for assessment and apply them to a specific parcel of land under an agricultural preserve contract, a special and complex problem confronts him. Can he follow his constitutional mandate and still assess farmland at its value for agricultural purposes only? Or must he add to his assessment an amount reflecting some higher potential market value, even though the land has been placed under a contract which restricts marketability by restraining potential development for substantial periods of time?

It seems clear that if the assessor were to take the first course and assume a perpetual agricultural use for the land solely on the basis of a finite ten-year preserve contract, he would be closing his eyes to the possibility of later urbanization and increased value of the contracted land. On the other hand, if the contractual restrictions are ignored or

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\(^{58}\) California State Board of Equalization, Assessor's Handbook: General Appraisal Manual 35 (2d ed. 1962). According to the Foreword by John H. Keith, chief of the Division of Assessment Standards, this manual attempts to “summarize the Constitutional and statutory provisions as interpreted by the courts, together with the best thinking of appraisers and economists. The endeavor has been to coordinate legal and economic thought with efficient and tested administrative procedures to accomplish the desired objective [promoting uniformity of assessment].” Id. at iv.

No cases using the term “highest and best use” are cited in this section of the Appraisal Manual. The term is not listed in the three standard California references (McKinney's New California Digest, West's Pacific Digest, and California Words, Phrases, and Maxims). The only references in West's Words and Phrases are an Illinois case, Frieberg v. South Side Elevated R.R., 221 Ill. 508, 515, 77 N.E. 920, 922 (1906), and a Louisiana case, Department of Highways v. Hedwig, 133 So. 2d 180, 182 (1961).
belittled by the assessor, the Land Conservation Act will not fulfill its intended purpose.

The answer lies between these two extremes. For the conservation scheme to be workable, the assessor must consider the detrimental effect of the restrictions on current market value along with the fact that these restrictions do not run with the land forever. He must adjust his estimate of highest and best use and cash value accordingly. To aid the assessor in balancing these factors, the legislature has enacted a statute dealing with this problem. Section 402.1 of the Revenue and Taxation Code instructs the assessor to value land only after considering all enforecable restrictions on its use, including “any recorded contractual provision limiting the use of lands entered into with a governmental agency pursuant to state law...” This phrase referring to contractual provisions limiting use exactly describes an agricultural preserve contract.

By enacting section 402.1, the legislature instructed the assessor to value contractually restricted farmland on the basis of its current agricultural use and not on the basis of any potential urbanized use. However, the legislature could not remove by statute the constitutional mandate upon the assessor to value this same land at its full cash value, and it is possible that assessors could have construed such a mandate as inconsistent with section 402.1.

Assessors know that even with an enforceable preserve contract in

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\[59\] Section 402.1 was added to the Revenue and Taxation Code by \(\text{§} 34.1\) of Assembly Bill 80, Cal. Legislature, Budget Sess. (1966). Section 34.2 and 34.3 of Assembly Bill 80 repealed the old Revenue and Taxation Code sections dealing with this problem (§§ 402.5 and 402.6). These old sections were the statutes to which a large part of the Attorney General’s opinion on the Land Conservation Act was directed. 47 Ops. Cal. Atty Gen. 171 (1966). See note 44 supra.

The new statute implements both the assessor’s and the land planner’s tasks by clarifying the methods to be utilized for the assessment of land restricted by zoning or contract to certain uses.

In analyzing the old sections, the Attorney General stated that “sections 402.5 and 402.6 have the effect of preventing the assessor from ignoring limitations on the use of the property and the resultant reduction in the fair market value of the property, but do not require assessments based on something less than fair market value.” 47 Ops. Cal. Atty Gen. 171, 179 (1966). There appears to be no reason to expect a substantially different interpretation of the new § 402.1.

\[60\] Cal. Rev. & Tax. Code § 402.1. Under this section there is a rebuttable presumption that “restrictions will not be removed or substantially modified in the predictable future and that they will substantially equate the value of the land to the value attributable to the legally permissible use or uses.” To rebut this presumption the assessor may show “past history of like use restrictions in the jurisdiction in question and the similarity of sales prices for restricted and unrestricted land. The possible expiration of a restriction at a time certain shall not be conclusive evidence of the future removal or modification of the restriction unless there is no opportunity or likelihood of the continuation or renewal of the restriction, or unless a necessary party to the restriction has indicated an intent to permit its expiration at that time.”

\[61\] See note 43 supra.
existence, agricultural use of the land can be ensured at the longest for only ten years from any given date.\(^6\) At the end of the contractual period the property can be freed from its restrictions and thrown open to development. Assessors could have decided that this possibility of future change in use, which could be characterized as a "transitional value,"\(^6\) would be reflected in the land's present market price and thereby in its assessed value. Depending upon an assessor's judgment in a particular situation, this transitional value could offset a significant portion of the decrease in assessment which would otherwise have been granted.

This confusion as to the correct interpretation and application of the act's restrictions has made many local governments understandably reluctant to enter into preserve contracts. Even with section 402.1 on the books, counties have found it difficult to decide whether to implement the Land Conservation Act. They have been uncertain whether the assessor would decide that he was constitutionally compelled to value preserved land more dearly than its current agricultural use would dictate. Although it appeared that the California Land Conservation Act itself was not unconstitutional,\(^6\) the assessor had to be completely relieved of this confusing option\(^6\) so that farmers and local governments could be certain that the act would accomplish its intended task completely and effectively. On November 8, 1966, the path was cleared and the problem all but solved when the voters of California approved Proposition 3.

III

THE "BREATHING SPACE" AMENDMENT

Proposition 3,\(^6\) called the "Breathing Space" Amendment by its author,\(^6\) enables the legislature to label areas restricted to recreational

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\(^{6}\) CAL. GOV'T CODE § 51244.

\(^{6}\) This term first appears in the Attorney General's opinion on the act. 47 Ops. CAL. ATT'Y GEN. 171, 176 (1966). Apparently it is used to mean the amount of money a parcel under a preserve contract is worth on the market over and above its value for strictly agricultural uses during the period the contractual restrictions are in force. The amount of transitional value of the preserved land reflects the amount of urban and speculative pressures on it generated by the expectancy that the land will be freed from its finite contractual restrictions in the foreseeable future.

Now that the voters have added article XXVIII to the California Constitution by approving Proposition 3 (see notes 66-73 infra and accompanying text), the Attorney General's concept of transitional value will have only limited relevance to agriculturally preserved lands under contractual use restrictions.

\(^{6}\) See note 44 supra and accompanying text.

\(^{6}\) The Attorney General's opinion states that the California Constitution as it then stood "does require the inclusion of transitional value in making a market value appraisal." 47 Ops. CAL. ATT'Y GEN. 171, 179 (1966).

\(^{6}\) Senate Constitutional Amendment No. 4, which appeared on the November 1966 California general election ballot as Proposition 3.

\(^{6}\) Former State Senator Fred D. Farr (D-Carmel).
and scenic use or agricultural production as "open space lands." These open space lands must be valued by the assessor for tax purposes not on a basis of full cash value as determined in part by potential future uses, but on the basis determined by the legislature to be consistent with their restricted current use.\(^6\) For land to be valued on this special basis, it must be subject to enforceable restrictions such as those provided by the contracts and agreement of the Land Conversation Act. Section 2 of Proposition 3 gives the legislature the power to determine the basis for assessment only when the land is "subject to enforceable restriction."\(^6\) Assuming that the legislature will take action under the enabling provisions of the amendment, the resulting legislation should aid immeasurably in the establishment of agricultural preserves since the legislature can remove any duty upon the assessor to value preserved land on any basis other than agricultural use. Transitional values brought about by urban pressures and based upon some concept of highest and best use are no longer constitutionally compelled.

The barrier to widespread implementation of the Land Conservation Act will be removed when the legislature enacts assessment standards under the new constitutional provision. This is true both for the act's "contracts"\(^7\) and for its "agreements,"\(^7\) since the operative factor of both instruments is the enforceable use restriction called for by Proposition

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\(^6\) The favorable vote of the people adds Proposition 3 to the California Constitution as article XXVIII. Its full text reads:

**Open Space Conservation**

"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 and 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 provision 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."

\(^7\) For this reason the passage of Proposition 3 was urged by the chief architects of the California Land Conservation Act, former Assemblyman Williamson, see note 27 supra, and Don Collin, Director of Research for the California Farm Bureau Federation. See note 30 supra.

\(^7\) See notes 21-25 supra and accompanying text.

\(^7\) See notes 32-37 supra and accompanying text.
tion 3. When the legislature acts under the amendment, the complicated scheme of payment waiver and assessment freeze which the Land Conservation Act provides for preserve "contracts" will diminish in importance. This will occur because the pressure of encroaching urbanization, which formerly would have forced assessments to increase, will no longer be relevant to an agricultural assessment scheme based on current use alone.

However, until the legislature takes action under the new constitutional provision, the widespread uncertainty about the correct techniques of valuation of preserved land can only inhibit utilization of the Land Conservation Act. The posture of local officials with respect to the current scheme is generally confused; opinions range from unqualified support to firm opposition. When confronted with this confusion among local officials, the traditionally conservative individual farmer will probably not be favorably disposed toward initiating contractual negotiations. This current wariness on the part of the farmer points up the basic weakness of the act as an overall tool of land planning: Its effectiveness and application must, in the final analysis, depend upon the initiative and self-interest of the individual property owner rather than upon some general scheme of land use developed to serve the public interest. Countries will hesitate to set up agricultural preserves which curtail their future tax revenues without some display of political muscle by individuals and farm pressure groups. Thus, preserves are likely to be established on a scattered basis in response to these pressures. This potentially fragmented approach provides a challenge to land planners. Full use will have to be made of the other weapons in their rural land planning arsenal to ensure that

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72 Such legislation could prove to be little more than a restatement of the substantive provisions of § 402.1 of the Revenue and Taxation Code couched in the terms called for by the amendment.

73 See notes 26–31 supra and accompanying text.

74 It is probable that the entire payment scheme of preserve contracts was established to provide a means of lessening the impact upon agricultural land of the assessor's full cash value mandate. Thus, the subsequent passage of legislation under Proposition 3 would in large measure vitiate the need for such a payment scheme. See text accompanying note 37 supra.

76 For example, in response to a letter of general inquiry about the Land Conservation Act sent to all the county counsels in the state, six offices registered enthusiastic approval of the act and its goals, four were opposed to implementing the act on constitutional or political grounds, and eleven were indifferent or felt the act was legally inapplicable to their counties because of their limited agricultural lands. The other county counsels either expressed no opinion on the act (twenty-six) or failed to answer the letter (ten). Letters From County Counsels to Dallas Holmes; on file, California Law Review.

78 Possible additions or alternatives to the Land Conservation Act in the development of a comprehensive scheme of agricultural land-use planning include:

(1) Public acquisition of the fee to the desired land, either through outright purchase, eminent domain or donation by the landowner. (California's Santa Clara County distributes
a coherent and consistent land conservation program results for California.

CONCLUSION

For all its detailed provisions, the Land Conservation Act is only one attempt to solve an ongoing problem. Its efficacy turns on the assumption that finite contractual restrictions on land use will have an impact on assessed valuation; only when the legislature acts under Proposition 3 can this assumption become sufficiently reliable to induce large-scale action by local government. However, if in the interim the Land Conservation Act is given a sympathetic reading and application by local officials who are concerned about the problem of premature loss of farmland which it is designed to alleviate, they can provide a service to the people of California.

If the legislature will act under Proposition 3, the current uncertainty about the act can be dispelled. The farmer can then decide intelligently whether he should restrict the profit potential and marketability of his an excellent pamphlet, Gifts of Land, which sets out the possible income tax benefits accruing from such private gifts.)

(2) Public acquisition of partial ownership through government purchase of conservation easements and private dedication of development rights. Since 1959 California has had legislation enabling local authorities to allocate public funds “in order to preserve, through limitation of their future use, open spaces and areas for public use and enjoyment.” Cal. Gov’t Code §§ 6950-54. See Ciriacy-Wantrup, The “New” Competition for Land and Some Implications for Public Policy, 4 Natural Resources J. 252, 264-66; Comment, 50 Cal. L. Rev. 483 (1962); Note, 75 Harv. L. Rev. 1622, 1637 (1962).

(3) Zoning restrictions such as California Government Code § 35009 (land zoned for agriculture pursuant to a master plan cannot be annexed by a city without its owner’s consent) modeled after the greenbelt regulations currently constraining the sprawl of Great Britain’s industrial cities. For a discussion of the British experience with greenbelts and New Towns, see Prof. Daniel Mandelker’s works: Green Belts & Urban Growth: English Town & Country Planning in Action (1952); Controlling Land Values in Areas of Rapid Urban Expansion, 12 U.C.L.A. L. Rev. 734 (1965); Notes from the English: Compensation in Town and Country Planning, 49 Calif. L. Rev. 699, 704-741 (1961).

(4) Preferential assessments for agricultural land, in states unhampered by constitutional restrictions on assessments of real property. At least nine states have experimented with such statutes (Minnesota, Maryland, Connecticut, Florida, Hawai, Indiana, Oregon, New Jersey, and Nevada). Assembly Interim Committee on Agriculture, California Legislature, Preserving Agricultural Land in Areas of Urban Growth: A Look at the Record (Geyer & Hanauer ed. 1964); Wershaw, Agricultural Zoning in Florida—Its Implications and Problems, 13 U. Fla. L. Rev. 479, 481-85 (1960). For a useful table of these statutes, see Hagman, supra note 39, at 658-59.

(5) Special open space districts maintained by assessments on surrounding properties. Los Angeles recently enacted an enabling ordinance for this purpose. See Volpert, Creation and Maintenance of Open Spaces in Subdivisions: Another Approach, 12 U.C.L.A. L. Rev. 830, 833-845 (1965), for a reproduction of this “Open Space Maintenance Ordinance of 1964.”

land by placing it under a preserve contract. However, he must be able to make this decision before encroaching urban pressures effectively obliterate his freedom of choice and force him to take his land out of agricultural production. At the same time, local officials will then be able to weigh the real value of the Land Conservation Act for their particular community. Clarifying legislation will enable them to determine whether their citizens can better afford the cost of preserving accessible rural areas than the cost of doing without them.

The rapid growth of California's cities and suburbs makes time of the essence. Inaction by the legislature under Proposition 3, or inaction by the local government and the individual farmer under the Land Conservation Act, will not slow the pace of urbanization; and one more step will be taken toward allowing the prime agricultural expanses of the state to become but a pleasant memory for tomorrow's urbanite.

Dallas Holmes

APPENDIX

Sample Agreement Under the California Land Conservation Act of 1965

THIS AGREEMENT, made this ______ day of ______ , 19____, by and between ________________________________, hereinafter referred to as "OWNER," and the County of _______________________, a political subdivision of the State of California, hereinafter referred to as "COUNTY":

WITNESSETH:

WHEREAS, OWNER possesses certain real property located in COUNTY, which property is presently devoted to agricultural use and is generally described in Exhibit A attached hereto; and

WHEREAS, said property is located within the boundaries of an agricultural preserve established by COUNTY pursuant to California Government Code Sections 51201 (d) and 51242; and

WHEREAS, both OWNER and COUNTY wish to limit the use of said property to agricultural purposes in order to discourage its premature conversion to urban use, recognizing that such land has substantial value to the public as open space and that its continuation in agricultural use constitutes a physical, social, aesthetic, and economic asset to existing or future urban developments in COUNTY; and

WHEREAS, the parties have determined that the highest and best use during the life of this agreement is use for agricultural purposes;

NOW, THEREFORE, the parties, in consideration of the mutual covenants and conditions set forth herein and the substantial public benefits to be derived therefrom, do hereby agree:

This agreement is an attempt by the author to set forth a possible instrument under the act. This same instrument can be used for prime land by deleting the term of art, "Agreement," and substituting the term, "Contract." If waiver of payments is not desired on prime land, delete paragraph 4 and substitute the amount and conditions of payment.

This clause can be deleted if and when the legislature acts under the enabling provisions of Proposition 3 (see text accompanying notes 69-76 supra).
1. This agreement is subject to all the provisions of the California Land Conservation Act of 1965 (California Government Code Sections 51200 to 51295).

2. During the term of this agreement the above described land shall be used only for the production of agricultural commodities for commercial purposes. No structures shall be erected upon said land except such structures as are compatible with agricultural use, including but not limited to residences for those individuals engaged in the management and working of said land and their families; storage facilities for crops and agricultural implements; and irrigation facilities necessary to provide water to the said land.

3. This agreement shall become effective on the ______ day of _________, 19___, and shall remain in effect for a period of ten (10) years therefrom.

This agreement shall be automatically renewed at the end of each year for an additional ten (10) year period, unless written notice of nonrenewal is given pursuant to California Government Code Section 51245.

4. OWNER shall not receive any payment from COUNTY in consideration for the obligations imposed hereunder, it being recognized that the consideration for the execution of this agreement is the substantial public benefit to be derived therefrom and the advantage which will accrue to OWNER as a result of any reduction in the assessed valuation of said property due to the limitations herein imposed upon its use.

5. This agreement shall run with the land and shall be binding upon the heirs, successors, and assigns of the parties hereto.

6. The filing of an action in eminent domain by any public agency for the condemnation of the land described in Exhibit A, or any portion thereof, shall have the immediate effect of voiding all provisions of this agreement. Said eminent domain action shall have no effect on the other contracts or agreements in the agricultural preserve within which this land is located; to cancel these other contracts or agreements the regular procedure of California Government Code Sections 51280 to 51286 must be followed.

7. In case the COUNTY initiates proceedings for the cancellation of this agreement, and these proceedings in fact lead to such cancellation; or in case such cancellation is caused by an involuntary transfer or change in the use which may be made of the land, and the land is not immediately suitable, nor will be immediately used, for a purpose which produces a greater economic return to OWNER than he was receiving before the cancellation; then the COUNTY shall not require the payment by OWNER of any penalty assessment in the nature of the one set out in California Government Code Section 51283.

IN WITNESS WHEREOF, the parties hereto have executed this agreement by the day and year first above written.

COUNTY OF ______________________:

BY ________________________________
Chairman, Board of Supervisors

ATTEST:

______________________________
Clerk of the Board of Supervisors

OWNER:

______________________________