

# Taxing and Untaxing Land: Current Use Assessment of Farmland

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The debate over appropriate property tax treatment of farmland touches on many complex issues: equitable distribution of the tax burden; assistance to family farmers in difficult financial straits; promotion of agriculture as a source of production, a landscape amenity, and a way of life; and land use planning to avoid sprawl and protect open space. Because those goals sometimes conflict, tax and land policies addressing them often have contradictory elements as well. There is also much uncertainty as to whether specific policies, such as preferential property taxes, actually help achieve larger goals, such as long-term preservation of farmland. Nearly a half-century of experience with agricultural taxes based on use value rather than market value provides a vantage point from which to consider these controversies. Wisconsin, the most recent state to adopt use value taxation, offers some particularly provocative lessons in this regard.

## History and Rationale

The concept of “use value” or “current use” assessment can appear deceptively simple, but its application has evolved in complex and unexpected ways. It began as a means of reducing development pressure by taxing farmland on its value in its current state, as agricultural land, rather than on its fair market value, which could reflect potential for some other use. Some states have extended this method of taxation to forests, open space, and other forms of property as well.

Maryland established the nation’s first use value program in 1956 through a one-sentence enactment: “Lands which are actively devoted to farm or agricultural use shall be assessed on the basis of such use, and shall not be assessed as if subdivided or on

any other basis.”<sup>1</sup> As in many states, this change necessitated amendment of the state constitution, which mandated uniformity in taxation. And again as in many states, the popularity of use value assessment allowed such an amendment to be approved easily.<sup>2</sup>

Use value’s popularity reflects a sense that it is unfair to tax a farmer on a land value that contemplates a nonfarming use, such as real estate development. Use value assessment is generally perceived as a means of taxing only the value of the land as a farm, freeing the owner from taxes on hypothetical values and preventing the tax burden from forcing sale of the land for development. It is not hard to understand why the Maryland legislature initiated a nationwide movement. It was seen as a means of preserving family farms, protecting agricultural land, and preventing urban sprawl — all by basing assessments on actual conditions

<sup>1</sup>This initial farmland assessment legislation was ruled unconstitutional in *State Tax Commission v. Wakefield*, 222 Md. 543, 161 A.2d 676 (1960). With speed that demonstrated dramatic political support, the state constitution was amended that same year to adopt verbatim the language of the overturned statute. See Wade Newhouse, *Constitutional Uniformity and Equality in State Taxation*, Vol. 1, at 606 (2d ed. 1984).

<sup>2</sup>See Wayne F. Foster, “Validity, Construction, and Effect of State Statutes Affording Preferential Property Tax Treatment to Land Used for Agricultural Purposes,” 98 *American Law Reports* 3d 916 (1980). The insertion of this provision in the Maryland Declaration of Rights has a decidedly ad hoc character. Article 43 of the declaration now reads: “That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and the general melioration of the condition of the People. The Legislature may provide that land actively devoted to farm or agricultural use shall be assessed on the basis of such use and shall not be assessed as if sub-divided.” Historically, this article had been considered “to have been intended to impress upon it [i.e., the state legislature] the necessity of exercising for the public good the vast powers which it possesses.” *State ex rel. Clark v. Maryland Institute for Promotion of the Mechanical Arts*, 87 Md. 643, 41 A.126 (1898).

rather than on values that could be realized only through sale for development. By the year 2000, every state had some form of preferential tax treatment for agricultural land, and in almost all cases it took the form of use value assessment.<sup>3</sup>

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The popularity of use value assessment is readily understandable, but it rests on assumptions that may be challenged. The questions raised by use value assessment include (1) how value in use is to be measured; (2) whether the benefits of use value assessment accrue primarily to hard-pressed family farmers; (3) whether this approach achieves long-term farmland preservation; and (4) whether it helps combat urban sprawl.

### Use Value and Market Value

The meaning of “use value” is itself often unclear. Logically, it suggests a distinction between two elements of ownership: the right of current occupancy, measured by rental values, and the right of sale, which includes the speculative potential for gain due to price appreciation. From this perspective, use value would be measured by current rent, just as the traditional British “rates” based property taxes on annual rental values and required payment from the occupier rather than the owner. However, agricultural use tax provisions rarely attempt to measure rental values directly, and in many states use values are set by formulas or expert opinions based on various indicators, such as crop prices and soil productivity indexes.<sup>4</sup> This greatly simplifies the

<sup>3</sup>See Russell Kashian, “State Farmland Preferential Assessment: A Comparative Study,” 34 *Journal of Regional Analysis & Policy* 1, 6-7 (2004); Jane Malme, “Preferential Property Tax Treatment of Land,” Lincoln Institute of Land Policy Working Paper (1993).

<sup>4</sup>For example, the Massachusetts Department of Revenue explained the valuation method adopted by its Farmland Valuation Advisory Committee as a “Net Income Capitalization model . . . based on a combination of factors, including land use and agricultural productivity, soil type, net farm income and a capitalization rate. Agricultural land is assigned to one of six farmland categories and an income weight is assigned to each category. . . . The state’s capitalized income value is divided by the total weighted acreage figure for all classes combined resulting in a dollar value. This dollar value is multiplied by the acreage income weight to arrive at a per acre value. The per acre value is then multiplied by the soil

(Footnote continued in next column.)

assessment process, but is far from basing the tax on the value of current use. As a result, hotels and office parks may pay nominal taxes because their ornamental plantings or fruit trees meet the definition of a farm or orchard, and real estate developers may hold land essentially tax-free while preparing for construction. In such instances, the value of the property to the owner greatly exceeds the value assigned to its current use for tax purposes.

The concept of “value in use” has a long history in property tax valuation, but one that is in some ways at odds with the approach of current use assessment of farmland. In property tax cases, “value in use” is often contrasted with “value in exchange” when property has special serviceability to its current owner. This concept of value in use is a variant of value to the owner, and almost always *higher* than market value. Special value to the owner is generally irrelevant to a property tax based on market value. As the Pennsylvania Supreme Court wrote, “[U]se value or value-in-use represents the value to a specific user and, hence, does not represent fair market value. . . . Because value-in-use is based on the use of the property and the value of that use to the current user, it may result in a higher value than the value in the marketplace. Value-in-use, therefore, is not a reflection of fair market value and is not relevant in tax assessment cases because only the fair market value (or value-in-exchange) is relevant in tax assessment cases.”<sup>5</sup>

Courts have occasionally upheld exceptions to the literal interpretation of market value when costly special features designed for a specific owner, such as customized manufacturing facilities, have little utility for other potential purchasers. In that situation, courts are understandably reluctant to permit a major investment fulfilling its intended purpose to escape taxation. Moreover, in eminent domain or insurance cases, it is clear that owners would not be fully compensated for loss or destruction of such property by a nominal payment. But the subjectivity involved in identifying value to the owner, and the difficulty of quantifying it, make it extremely problematic as a basis for tax assessment. Courts have consequently taken a very restrictive approach to its application. For example, in denying a jurisdiction’s request to examine a property owner’s income tax returns, the New Jersey Superior Court held that taking account of any single owner’s tax situation would violate state constitutional provisions requiring “objective standards” for valuation: “Thus, the

rating. . . . The resulting figure is the recommended farmland valuation for the land class.” Brenda Cameron, “Farmland Valuation,” Massachusetts Department of Revenue, Division of Local Services, *City & Town*, October 2001, p. 7.

<sup>5</sup>*F & M Schaeffer Brewing Co. v. Lehigh County Board of Appeals*, 530 P. 451, 457-458; 610 A.2d 1, 3-4 (1992).

focus must be on the value of the property in the market place, without regard to the particular or peculiar circumstances of the owner. Were this not so, adjacent parcels of land improved with identical structures might be valued differently to the extent that their respective owners' personal situations differed, even though in the open market each parcel would sell for the same price."<sup>6</sup>

What is the value of agricultural land to a bona fide farmer? The value of current occupancy is certainly one part of the property's value to the owner, but investment value is also a legitimate and crucial component of the total. Failure to acknowledge this can distort the rationale and structure of agricultural assessment programs, leading to the assumption that farmers sell land for development only because of their property tax burden, and that preferential assessment is therefore the remedy for farmland loss.

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In fact, the perceived unfairness of taxing land on the basis of its most profitable use is a complaint against all market value assessment, and not limited to agricultural concerns. That view was well summarized by Alan Hevesi, now New York state comptroller, when early in his career he wrote, "A home's market value is irrelevant to a property owner unless and until he or she sells."<sup>7</sup> This echoes a New York farmer's statement to a newspaper that "owning large tracts of farmland is not a measure of one's ability to pay property taxes, but merely a necessary part of producing safe, affordable food."<sup>8</sup> Yet the sale value of their property is of enormous concern to homeowners, and home equity loans and other financial instruments allow that potential to be realized even before sale. Both homeowners and farmers are intensely concerned with their property as an investment, not only as a residence or workplace. It is not surprising, therefore, that the success

of use value assessment for farmland has led to suggestions for its extension to homeowners as well.<sup>9</sup>

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Homeowners and farmers often hold real estate producing little or no current earnings but with high sale value. Just as the owner of a uniquely useful but unsalable factory would not be compensated for its loss by a nominal insurance payment or eminent domain award, so a farmer losing property with development potential would not be fully compensated by a payment ignoring that land value element. The farmer uses the land as a factor in agricultural production and also as a capital investment in its own right.

The pejorative connotations of "speculation" can confuse this point when that term is associated with absentee owners holding land idle in hopes of future profit. Speculation (or some less freighted synonym) can instead simply denote a purchase motivated by the hope of future gain.<sup>10</sup> Speculation can be one of a number of factors, including a love of the land and a commitment to agriculture, influencing a farmer's real estate purchases. Use of land for crop production does not negate its simultaneous use as an investment. The Utah Supreme Court recognized this in a 1991 decision upholding agricultural assessment of land despite the taxing jurisdiction's

<sup>9</sup>In June 2005, the Maine Legislature approved for the November ballot a proposed state constitutional amendment that would allow use value assessment for "working waterfront" property. Gov. John Baldacci (D) proposed a companion measure to permit use value assessment of homestead property; this was initially approved by both the Maine House and Senate, but later returned to committee and carried over to the following year's session. Douglas Rooks, "Lawmakers Clear 'Working Waterfront' Question for Ballot," *State Tax Notes*, June 27, 2005, p. 973, 2005 STT 121-13, or Doc 2005-13630. The concept of "use value assessment" of homestead property appears not to involve any measure of current rental value. It would permit jurisdictions "to freeze current assessments and then allow them to rise only by overall inflation, immune from any local real estate boom." Douglas Rooks, "Amendment to Freeze Homestead Values Stalls in Senate," *State Tax Notes*, Feb. 14, 2005, p. 436, 2005 STT 25-12, or Doc 2005-2358.

<sup>10</sup>*The MIT Dictionary of Modern Economics* (4th ed. 1995; David W. Pearce ed., p. 404) defines "speculation" as "[t]he practice of buying or selling with the motive of then selling or buying and thus making a profit if prices or exchange rates have changed."

<sup>6</sup>*Borough of Fort Lee v. Hudson Terrace Apts.*, 175 N.J. Super. 221, 226; 417 A.2d 1124 (1980), cert. denied, 85 N.J. 459, 427 A.2d 559 (1980).

<sup>7</sup>Alan G. Hevesi, "100% Market Value as Assessment Basis for Homes Is Unfair," *Newsday*, Jan. 29, 1982.

<sup>8</sup>"New York Taxes Farm Property Too Heavily," *The Buffalo News*, Nov. 27, 1995, p. 2B.

complaint that the owner “is a real estate developer and its agricultural activity on this land is nominal at best.”<sup>11</sup>

[T]he fact that the land is held primarily for residential development and that the grazing of cattle thereon is an incidental and secondary use does not disqualify the land from assessment under the F.A.A. [Farmland Assessment Act] so long as the acreage, income, and other requirements of section 59-5-89 are met. The very purpose of the F.A.A. is to allow land which has become valuable for a nonagricultural use to be assessed as agricultural land as long as agricultural activity is actually carried on and the minimum qualifying requirements of the act are satisfied.<sup>12</sup>

The farmer’s current use of the property is legitimately multifaceted when it is an investment and a retirement fund as well as a source of agricultural production. That complexity is responsible for many inconsistencies in agricultural property tax subsidies. Bona fide farmers are often extremely hostile to governmental efforts to restrict their rights of use and sale. As researchers at the University of Wisconsin found, “In most public forums, it is often the nonfarm residents (many of whom had recently moved to their rural homes) that are the most ardent supporters of policies discouraging farmland conversion, while the older farmers who attend such meetings frequently seek to preserve their rights to sell their lands however they see fit as they plan for their own retirements.”<sup>13</sup> But without restricting future use and sale, no long-term preservation of farmland is accomplished, and the farmer’s right to develop the property prevents any simple exclusion of developers from the benefits of farmland assessment.

Use value assessment is generally promoted as a response to community land use goals and to farmers’ economic need, but the financial benefits of these programs now reach far beyond low-income farmers, and their land use benefits achieve far less than long-term farmland preservation.

<sup>11</sup>*Salt Lake County ex rel. County Board of Equalization v. State Tax Commission ex rel. Bell Mountain Corporation*, 819 P.2d 776, 778 (Utah 1991).

<sup>12</sup>*Id.* After the *Bell Mountain* decision, the Utah Legislature amended the Farmland Assessment Act to require “a reasonable expectation of profit” from the farming activities. See *County Board of Equalization v. Stichting Mayflower Recreational Fonds*, 943 P.2d 238, 245 (Utah Ct. App. 1997). This does not negate the potential for multiple economic uses of legitimate agricultural land.

<sup>13</sup>Douglas Jackson-Smith and Jill Bukovac, “Limitation of Agricultural Land Use Planning Tools in Rural Wisconsin,” University of Wisconsin-Extension, Program on Agricultural Technology Studies, Paper No. 3 (July 2000), at p. 4.

### Family Farmers, Hobby Farmers, Agribusiness, and Developers

Although much of the political and emotional appeal of use value assessment stems from a desire to assist hard-pressed family farmers, many of those statutes do not distinguish between family farms, corporate farms, hobby farms, and even land being prepared for subdivision and development. Last year The Associated Press reported that “[m]illions of dollars in property tax breaks intended to preserve farmland are going instead to companies that bulldoze farms to build housing subdivisions, malls and industrial parks,” citing examples such as these:

In Iowa, real estate developer Knapp Properties Inc. owns 239 acres near the Des Moines Airport. The land, close by a Wingate Hotel and a Federal Reserve check-processing plant, is subdivided for commercial development and is for sale at a total price of \$7 million. But because Knapp allows local farmers to plant corn and soybeans on it, the company paid \$14,345 in property taxes last year instead of \$320,514.

In Denver, Delmer Zwegardt is building a subdivision called Deer Creek Farms. As the houses started going up, he grazed a few cows on the edge of the property. City officials pointed out that zoning laws don’t allow cows in a subdivision, but the state Board of Assessment ruled that the presence of cows was enough to qualify Zwegardt for the tax break anyway. This reduced his total tax bill on 48 house lots from \$22,000 a year to \$60 until the subdivision was nearly completed in 2002, leaving no room for cows.

In Mobile County, Ala., Delaney’s Inc. has planted pine seedlings on 54 acres left over after building a Hampton Inn, a Marriott Courtyard, a Lowe’s and a Wal-Mart. This “tree farm” has been subdivided and laced with paved streets in preparation for development, and local officials insist the land is not suitable for growing timber. But the developer’s lawyer pointed out that the law doesn’t require Delaney’s to be a good farmer — just a farmer. The result: a 2003 tax bill of \$152 instead of \$64,230.<sup>14</sup>

In April, *State Tax Notes* reported that Idaho Gov. Dirk Kempthorne (R) “vetoed legislation that would have phased out developers’ use of a property tax exemption originally intended to benefit farmers . . . . The exemption, established in 2002, was intended to help farmers avoid dramatically higher property tax

<sup>14</sup>Allen G. Breed and Martha Mendoza, “Loopholes Limiting Land-Preservation Efforts?” *Telegraph Herald* (Dubuque, Iowa) Apr. 4, 2004, p. B7.

burdens on land they were planning to develop but had yet to sell for that purpose. Developers, however, became the prime beneficiaries of the exemption, according to legislative analysts.<sup>15</sup> Idaho newspapers reported that Kempthorne and his wife claim this exemption on 13.7 acres of land they own. Without it, their property tax would be \$1,300, but they pay \$18.56.<sup>16</sup>

The Idaho situation illustrates a larger problem with property tax preferences that reduce the tax base and so increase revenue pressure on other taxpayers. In the same session in which he vetoed the phaseout of the developer's exemption, Kempthorne signed five major pieces of legislation designed to offer tax incentives to corporations locating or expanding in the state.<sup>17</sup> One major and controversial package, intended to encourage Micron Technology to remain in Boise, was precisely targeted. It limited property valuations to \$800 million for companies employing at least 1,500 people and investing at least \$25 million a year in new property or equipment. "The original proposal set the cap at \$700 million, but that figure was increased to quell criticism that the Idaho Legislature was being asked to approve a measure that would benefit just one company. Micron, the state's largest private-sector employer, currently has property holdings valued at just over \$700 million in the Boise area."<sup>18</sup>

Not surprisingly, property tax limitation measures are gaining support in Idaho, particularly in fast-growing areas where demand for vacation property and second homes has driven residential prices sharply higher in recent years. Eight measures for homeowner tax relief were introduced in the last state legislative session, and a legislative committee held hearings this summer on property tax reform. The homeowners' complaint against market value assessment closely tracks the arguments supporting

agricultural preferences — "We built this place to live in, my wife and I. We're retired now . . . We don't care what it's worth — we want to live in."<sup>19</sup> — but a diminished base increases the tax burden on the remaining taxpayers. An Idaho news article quoted a taxpayer who invoked the developer's tax exemption to lower his property taxes from \$1,000 to \$5.14. Under the law, his lot will not be taxed at market value until a structure is built on it. The owner, "who doesn't plan to build on the new lot, said unreasonable property assessments drove him to seek the exemptions. 'I think it's unfair I pay so much and everybody else in the county with the same services pays so little.'"<sup>20</sup>

New Jersey, a state with a strong commitment to agriculture and open space conservation — and also the site of an incipient property tax revolt — allows use value assessments for lots as small as five acres, with only \$500 in annual agricultural earnings.<sup>21</sup> A comment titled, "New Jersey's Farmland Assessment: Welfare for New Jersey's Landed Gentry or Beneficial Open Space Program?" noted that its beneficiaries included the King of Morocco, an heirless to the M&M candy fortune, and Steve Forbes.<sup>22</sup> As an official of the State Division of Taxation told *The New York Times*, "The law is blind in respect to who owns the land; it can be Exxon. The intent was to preserve the family farm in New Jersey."<sup>23</sup>

These results may be consistent with farmland assessment legislation, and even with the concept of taxation on current use. Just as full-time farmers may also be bona fide land speculators in hopes of profitably reselling their property at an appropriate time, so may full-time land developers undertake bona fide farming as an interim preconstruction activity. But tax subsidies for these activities are not consistent with support for preferential assessment measures based on a belief that they will help preserve family farms.<sup>24</sup> Moreover, at a time when

<sup>15</sup>Dave Wasson, "Governor Vetoes Phaseout of Property Tax Break for Developers," *State Tax Notes*, Apr. 25, 2005, p. 249, 2005 STT 76-16, or Doc 2005-8258. The governor said he supported reform of the legislation but vetoed this bill because it did not provide a sufficient transition period for landowners still eligible for the tax reduction. Two Republican state senators said they would continue the effort to repeal this exemption in the next legislative session. Dave Wasson, "Lawmakers to Renew Push to Repeal Rural Property Exemption," *State Tax Notes*, July 18, 2005, p. 195, 2005 STT 132-2, or Doc 2005-14766.

<sup>16</sup>Dean Ferguson, "Maybe We Should All Be Glad That Politicians Aren't Geniuses," *Lewiston (Idaho) Morning Tribune*, Apr. 28, 2005, p. 1A.

<sup>17</sup>Betsy Z. Russell, "Potential Big Employers Catch Breaks In Idaho," *Spokesman Review* (Spokane, Wash.), Idaho Edition, May 28, 2005, p. B1.

<sup>18</sup>Dave Wasson, "House Tax Panel OKs Property Tax Break to Keep Manufacturer in State," *State Tax Notes*, Mar. 21, 2005, p. 829, 2005 STT 49-4, or Doc 2005-5246.

<sup>19</sup>Betsy Z. Russell, "Property Tax Faces Overhaul," *Spokesman Review* (Spokane, Wash.), Idaho Edition, June 26, 2005, p. A1.

<sup>20</sup>Dean Ferguson, "Property Tax Loophole Comes Home," *Lewiston Morning Tribune* (Idaho), July 6, 2005, p. 1A.

<sup>21</sup>N. J. Stat. Ann. sections 54:4-23.1 to 54:4-23.24.

<sup>22</sup>Jeffrey A. Friedman, "Comment: New Jersey's Farmland Assessment: Welfare for New Jersey's Landed Gentry or Beneficial Open Space Program?" 15 *Temple Environmental Law & Technology Journal* 83 (1996).

<sup>23</sup>Jerry Gray, "Whitman Sold Wood to Trim Farm Taxes," *The New York Times*, Aug. 15, 1993, sec. 1, p. 40 (reporting on then-Gov. Christine Whitman's qualification for current use assessment by sale of \$500 worth of firewood to relatives and friends).

<sup>24</sup>*The Atlanta Journal-Constitution* drew attention to this disparity in opposing the Farm Security Act of 2002. "Once upon a time, during the Depression, it was prudent that the federal government help sustain the family farmer. By 1996, however, a majority in Congress finally acknowledged that

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farm households as a whole are wealthier than nonfarm households,<sup>25</sup> even subsidies for family farmers require justification on grounds of need or as a means of achieving land-planning objectives.

**At a time when farm households as a whole are wealthier than nonfarm households, even subsidies for family farmers require justification on grounds of need or as a means of achieving land-planning objectives.**

Use value assessment by its nature is of least benefit to farmers outside the urban fringe. Where development pressure is greatest, the difference between the market value of agricultural land and the value based on agricultural income will also be greatest. In truly rural areas, where farming is the most profitable use of the land, the current use is the highest and best use. Of course, formulas based on crop prices can still provide a current use value far below the sale price of land for agricultural purposes. However, an artificially low assessment may not benefit a taxpayer in a rural jurisdiction where all properties receive equally low assessments and tax rates must increase correspondingly to raise the needed revenue from the diminished base. An entirely rural area where all property qualified for agricultural assessment would have “winners” and “losers” from this tax shift, because current use formulas are not a simple percentage of full market value. But farmers would still bear the entire local tax burden.

### Preserving Farmland and Open Space

Many supporters of use value assessment view it as a tool for protecting farmland and limiting sprawling suburban development. From this perspective, the forgone taxes, and the correspondingly higher taxes on other property owners, constitute an investment in landscape preservation. This raises

federal subsidies were no longer going to the few family farmers still plowing. Rather, billions in farm welfare payments were being channeled to some of the wealthiest citizens and largest companies.” Editorial, “Passing Farm Security Act Would Extend Extortion,” *The Atlanta Journal-Constitution*, Jan. 16, 2002, p. 9A.

<sup>25</sup>Ashok K. Mishra, Hisham S. El-Osta, Mitchell J. Morehart, James D. Johnson, and Jeffrey W. Hopkins, “Income, Wealth and the Economic Well-Being of Farm Households,” U.S. Department of Agriculture, Economic Research Service, Agricultural Economic Report No. 812, at 36 (2002). (“[A]verage wealth for farm households exceeds that of non-farm households all along the continuum.”)

questions as to the durability of the protection thus achieved and its place within regional growth plans.

If agricultural owners are free to sell their land for development at any time, no long-term preservation is ensured. Indefinite preservation of agricultural land requires legal limits on development, whether through zoning, agricultural preservation easements, sale or transfer of development rights, or outright public purchase of the land. In itself, use value assessment does not ensure farmland preservation. In fact, 15 states do not impose any financial penalty for withdrawal of farmland from use value assessment programs.<sup>26</sup> Approximately an equal number impose a charge, generally a “rollback” assessment reflecting the difference between the agricultural use taxes and the amount that would otherwise have been due for some number of years preceding the sale.<sup>27</sup> However, those penalties are often a small percentage of the ultimate profit from farmland conversion. A minor payment for a change in use will not have a decisive influence on a financial decision of this magnitude. In a presentation to the 2002 conference of the National Tax Association, Rebecca Boldt, an economist with the Wisconsin Department of Revenue, reviewed prior studies on farmland preservation and concluded that they found “use value has a minimal impact on preserving farmland.”<sup>28</sup>

The news reports already cited give a sense of the scale of tax reduction that use value assessment can provide without achieving long-term farmland preservation. As Prof. Robert Glennon has written:

Arizona has a tax scheme affectionately dubbed “rent-a-cow” by county assessors and

<sup>26</sup>Richard W. England, “Current-Use Property Tax Assessment and Land Development: A Review of Development Penalties,” *State Tax Notes*, Dec. 16, 2002, p. 793, 2002 STT 241-5, or Doc 2002-27316.

<sup>27</sup>*Id.* See also Barry A. Currier, “An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses,” 30 *University of Florida Law Review* 821, 827 (1978).

<sup>28</sup>Rebecca Boldt, “Impact of Use Valuation of Agricultural Land: Evidence from Wisconsin,” National Tax Association Proceedings — 2002, 165, 167 (2003); *State Tax Notes*, Feb. 24, 2003, p. 677, 2003 STT 36-38, or Doc 2003-4754. The studies reviewed by the author were Robert E. Coughlin, David Berry, and Thomas Plaut, “Differential Assessment of Real Property as an Incentive to Open Space Preservation and Farmland Retention,” 31 *National Tax Journal* 165 (1978); Jane Malme, “Preferential Property Tax Treatment of Land,” Lincoln Institute of Land Policy Working Paper (1993); John Kolesar and Jay Scholl, “Misplaced Hopes, Misspent Millions: A Report on Farmland Assessment in New Jersey,” Center for Analysis of Public Issues (1972); Jerry T. Ferguson, “Evaluating the Effectiveness of Use-Value Programs,” 7 *Property Tax Journal* 157 (1988); New York State Board of Equalization and Assessment, “Agricultural Assessment Program Impact: 1986 through 1989,” (1991).

state revenue officials. Trying to protect agricultural interests, the Arizona legislature mandated that agricultural and grazing land be assessed solely by an income approach to value (annual net cash rental), not by market value. Land used for agricultural purposes, even if adjacent to urban areas and a prime target for development, qualifies for this benefit. In a recent Pima County, Arizona case, the Assessor took the position that, when a developer purchased the land for investment, the land no longer qualified as agricultural land. The developer candidly testified that the purchase was for investment and that he had taken initial steps toward developing it. The developer, however, leased grazing rights to a neighboring rancher for five to seven head of cattle for \$250 a year. The Arizona Court of Appeals held that the developer was entitled to have the land assessed as agricultural, notwithstanding the owner's intention to develop, and that the paltry annual rental did not provide a reasonable rate of return on the investment. The upshot was that land purchased for \$4,500,000 was assessed at \$3455. The differential between the assessed and actual value is approximately 1300 times. The beneficiary of this loophole, according to the Pima County Assessor, is "any developer who is big enough to have his own legal staff."<sup>29</sup>

*The New York Times* studied the current use tax benefit afforded to the 20-acre corporate headquarters of BMW North America, located in an affluent New Jersey suburb "flanked by apple and peach trees. Not only does the orchard offer a pleasant view to BMW workers choosing to eat lunch outdoors on warm days, it also provides a significant tax break for the company."<sup>30</sup> BMW paid \$373.52 in property taxes for its 20 acres, while homeowners across the road paid \$3,446.94 for 1.2 acres and \$2,651.18 for three-quarters of an acre. The neighboring homeowners were paying an average of \$3,200 in taxes for one acre of land, or more than 170 times the amount BMW paid on each of its acres. In New Jersey, the penalty for withdrawal of land from current use assessment is the difference between the taxes due on full market value and the taxes actually paid under current use assessment for the current year and the past two years.<sup>31</sup> By enrolling in the program, the farmer, developer, or office park

manager loses nothing, and after three years can realize an enormous cumulative tax savings even if the land is then developed.

***In itself, use value assessment does not ensure farmland preservation. In fact, 15 states do not impose any financial penalty for withdrawal of farmland from use value assessment programs.***

Maintaining any particular farm in agricultural use may or may not help avoid sprawl and promote desirable growth patterns. In the worst case, reducing taxes on land under the greatest development pressure, close to the urban fringe and served by existing infrastructure, may encourage "leapfrog" growth farther into the countryside — with the protected land simply developed for greater profit at a later time. Leapfrog development, and the consequent need for infrastructure expansion, are often unintended consequences of efforts by individual communities to restrict growth near the urban perimeter. In March 2003, *The Washington Post* reported on the Washington region's "war on sprawl," under which planning restrictions prohibit typical suburban housing developments on more than half the land in the metropolitan area. "No other U.S. region of comparable size has protected so much land this way, according to a survey of urban planners. But while the limits on rural building are supposed to be saving farmland, forests and meadows, a regional view of development patterns indicates that many of these antisprawl measures have accelerated the consumption of woods and fields and pushed developers outward in their search for home sites."<sup>32</sup> The *Post* quoted Bruce Katz, a Brookings Institution expert on land development: "If you have each county limiting development, it's going to jump elsewhere."<sup>33</sup> At one time large-lot zoning was considered a significant instrument for preserving open space.<sup>34</sup> A quarter-century later, the director of the Boston Metropolitan Area Planning Council said, "What those restrictions really do is encourage development in a land-hungry manner."<sup>35</sup>

<sup>29</sup>Robert Glennon, "Taxation and Equal Protection," 58 *George Washington Law Review* 261, 305 (1990) (citations omitted). The case discussed here is *Stewart Title & Trust v. Pima County*, 156 Ariz. 236, 751 P.2d 552 (Ariz. Ct. App. 1987).

<sup>30</sup>Robert Hanley, "Five Acres, and a Tax Break?" *The New York Times*, Jan. 12, 1997, Sec. 13NJ, p. 1.

<sup>31</sup>N. J. Stat. Ann. section 54:4-23.8.

<sup>32</sup>Peter Whoriskey, "Density Limits Only Add to Sprawl; Large Lots Eat Up Area Countryside," *The Washington Post*, Mar. 9, 2003, p. A1.

<sup>33</sup>*Id.*

<sup>34</sup>Open space can be significantly preserved by regulating the minimum size of building lots." Clarence J. Malone and Mark Ayesth, "Comprehensive Land Use Controls Through Differential Assessment and Supplemental Regulation," 18 *Washburn Law Journal* 432, 437 (1979).

<sup>35</sup>Peter Whoriskey, note 32, above.

The ultimate beneficiary of these subsidies may be the property developer. If current use assessment requires only modest farm activity, developers can legitimately reduce their taxes during the preconstruction period by leasing land to farmers or hiring workers to undertake minimal cultivation. Even statutes that limit agricultural assessment to lands “used primarily for bona fide agricultural purposes” cannot avoid this problem. Florida’s provision to this effect<sup>36</sup> has been held by courts not to bar agricultural assessment of land rezoned nonagricultural at the owner’s request,<sup>37</sup> land purchased by a developer of an amusement park,<sup>38</sup> and farmland purchased “to develop the land as a commercial property or resell it for such purposes.”<sup>39</sup> The court in the latter case found that although the primary goal of the owners was “to use all or part of the land for a shopping center . . . commitments for the requisite financing were not forthcoming. Thus, development remained only a hope or future expectancy. There was absolutely no nonagricultural commercial activity on the land.”<sup>40</sup>

Other Florida cases have taken the same approach: “The fact that the land may have been purchased and was being held as a speculative investment is of no consequence provided its actual use is for a bona fide agricultural purpose.”<sup>41</sup> “As we interpret the statute, the intent of the title holder and his desire for capital gain are immaterial to the application of agricultural zoning.”<sup>42</sup> Similarly, a Kansas court upheld agricultural assessment of otherwise vacant land whose owner had seeded it with grass and allowed a lessee to remove the hay free of charge. “The fact that the taxpayer’s land is inside the city limits is irrelevant, especially in light of the fact that property across the street is classified as agricultural land. There is no minimum acreage requirement in the statute, nor is there a requirement that profit be made from the property. The fact that the parcel contains 2.26 acres is irrelevant, as is the fact that the taxpayer is not a farmer by occupation.”<sup>43</sup> Or, as the Kansas Board of Tax Appeals

succinctly concluded, “There is no statutory prohibition against the landowner planting grass in order to obtain a more favorable classification.”<sup>44</sup>

Under the Massachusetts Agricultural Preservation Restriction (APR) program, the state purchases development rights from farmers who agree to continue agricultural use of their land. Early experience demonstrated that covenants to ensure agricultural activity did not in themselves preclude large-lot development. A former state commissioner of Food and Agriculture said he “has seen wealthy individuals with little interest in agriculture pay large sums for APR farms, demolish suitable, existing homes and build mansions . . . [T]he state’s intent is to preserve farmland and keep it affordable for first-time buyers. A mansion surrounded by farmland is a perversion of the program . . . ‘We want to encourage farmers to have homes, but not \$4 million homes,’ he said.”<sup>45</sup> After similar sales in Vermont, a news article asked, “Would Vermonters be willing to continue spending tax dollars to protect farms that will end up as private estates?” The president of the Vermont Farm Bureau gave the alternate perspective: “We don’t need the state to get into the business of telling farmers what they can and can’t sell their farms for.”<sup>46</sup>

Almost 30 years ago, the question was raised, “How much public support would there be for differential taxation if it was promoted as an income maintenance program for farmers?”<sup>47</sup> The question might be sharpened by adding, “. . . and real estate developers?” More than 40 years ago, Professor Donald Hagman wrote of farmland assessment, “Too much of the present legislation constitutes a blatant tax favoritism, clothed for acceptance and respectability with land use planning motives.”<sup>48</sup> Throughout the world, agricultural subsidies are a notoriously problematic intersection of policy and politics. Current use programs in this country are no exception, and require reform and improvement if this cynical perception is to be refuted.

<sup>36</sup>Fla. Stat. section 193.461(3)(b).

<sup>37</sup>*Harbor Ventures Inc. v. Hutches*, 366 So.2d 1173 (Fla. 1979).

<sup>38</sup>*Roden v. K & K Management Inc.*, 368 So. 2d 588 (1978).

<sup>39</sup>*Fischer v. Schooley*, 371 So.2d 496 (Fla. Dist. Ct. App. 1979).

<sup>40</sup>*Id.* at 498.

<sup>41</sup>*Smith v. Ring*, 250 So.2d 913, 914 (1971).

<sup>42</sup>*Hausman v. Rudkin*, 268 So. 2d 407, 409 (Fla. Dist. Ct. App. 1972).

<sup>43</sup>*Board of County Commissioners of Johnson County v. Smith*, 18 Kan. App. 2d 662, 666-667; 857 P.2d 1386 (1993).

<sup>44</sup>Marion R. Johnson, “What Constitutes Agricultural Use? A Kansas Problem,” 3 *Assessment Journal* 24, 25 (1996).

<sup>45</sup>Dan De Leo, “Farmers, State at Odds,” *Worcester Telegram & Gazette*, Dec. 12, 1999, p. B1.

<sup>46</sup>Candace Page, “Critics Worry Some Vermont Farmland is Being Conserved for the Wealthy,” *Burlington Free Press*, Jan. 26, 2005, p. 1.

<sup>47</sup>Barry A. Currier, note 27, above.

<sup>48</sup>Donald Hagman, “Open Space Planning and Property Taxation — Some Suggestions,” 1964 *Wisconsin Law Review* 628, 657.



### The Wisconsin Experience

The state of Wisconsin, “America’s Dairyland,” offers a particularly instructive example of the complexities involved in balancing farmland preservation, tax subsidies for hard-pressed family farms, and fair distribution of the property tax burden. As in most states, debate in Wisconsin combined all these elements, with use value assessment seen as “a small price to pay to help farmers hang onto their land and help slow down urban sprawl.”<sup>49</sup>

Wisconsin is also typical in its provision for uniformity in taxation, which required an amendment of the state constitution to permit use value assessment. That measure was approved by the voters in 1974. At that point, however, Wisconsin chose an atypical path. It and Michigan became the only two states to provide tax assistance to farmers through state-funded income tax credits rather than preferential assessments that reduce local tax collections.

The Wisconsin tax credits were available to farmers who entered contracts to preserve their land in agricultural use and whose land was located in counties with agricultural land use plans or exclusive agricultural zoning provisions.<sup>50</sup> Low-income full-time farmers received the greatest assistance, with income measured by household earnings rather than farm income, to help distinguish full-time farmers from hobby farmers.<sup>51</sup> Those unconventional efforts to direct aid to the neediest farmers and to encourage local land use regulations were an innovative attempt to conserve farmland without indiscriminate subsidies to politically powerful constituencies.

For 20 years after its constitutional amendment to permit use value assessment, Wisconsin did not

avail itself of this option. Until 1996, Wisconsin farmland, like all other real property in the state, was assessed at market value based on highest and best use. Wisconsin was unique in this regard, for even Michigan directed that assessment should take zoning and existing land use into account.

The Wisconsin situation changed in 1995, when the Legislature provided that “agricultural land shall be assessed according to the income that could be generated from its rental for agricultural use,”<sup>52</sup> with a two-year agricultural assessment freeze followed by a decade of phasing in the new use values. A number of factors contributed to this dramatic shift. The income tax credit, which could exceed \$4,000 in individual cases but averaged less than \$1,000 by 1998,<sup>53</sup> did not provide the magnitude of tax relief that the new assessments offered to large acreage in the urban fringe. Political pressure to expand eligibility for the credit diluted its impact while program funding growth did not even keep pace with inflation.<sup>54</sup> The state planning director who had helped draft the tax credit legislation said, “We spent a lot of money in tax subsidies for land in this state that’s not under development pressure. No attempt was made to have discretion between land in the path of development and land way the heck in some rural area.”<sup>55</sup> Yet at the same time, many farmers resented the development restrictions required for the tax credit, and Michigan and Wisconsin’s first- and second-place rank in average farm property taxes<sup>56</sup> increased pressure to conform to the practice of other states.

In 1999 the Wisconsin revenue secretary advocated immediate implementation of use value assessment, decrying the fact that “Wisconsin, with its strong farming heritage, had not fully adopted use value assessment, while its neighbors — Illinois, Iowa and Minnesota — have had it for decades.” She told the Farmland Advisory Council, “With Wisconsin being a strong agricultural state, the fact that we are one of the last ag states in the country to have use value, it’s embarrassing.”<sup>57</sup>

Wisconsin’s experience with exclusive agricultural zoning also mirrored the problems encountered elsewhere, as the limitation of one residence to 35 acres of agricultural land turned out to encourage sprawl rather than to protect agriculture. A 1999

<sup>49</sup>Amy Rinard, “Hastening Use-Value Would Let Farmers Reap Big Benefits,” *Milwaukee Journal Sentinel*, Oct. 24, 1999, p. 2.

<sup>50</sup>Douglas Jackson-Smith and Jill Bukovac, note 13, above, at p. 4.

<sup>51</sup>Wis. Stat. section 71.58. “The idea was simple. Let farmers voluntarily apply for tax breaks that discourage them from selling to developers. Accomplishing this was trickier. To get the tax credits that many farmers wanted, towns and counties had to enact a strict form of zoning called ‘exclusive agricultural,’ and to develop comprehensive local land use plans. To qualify for the tax credits, a farm had to have at least 35 acres, produce farm profits of \$6,000 in the preceding year, be devoted to farming for at least one year in the past three, and be blanketed by exclusive agricultural zoning. After meeting those criteria, farmers then signed a 10-year to 25-year agreement with the state to continue meeting conservation requirements, or otherwise not sell to a developer. If farmers broke the agreement, they were supposed to pay back all the accumulated tax credits with a 10 percent penalty.” Luke Timmerman, “Losing Ground,” *Capital Times* (Madison, Wisc.), Oct. 16, 1999, p. 1A. Note that the Wisconsin farmland preservation credit is distinct from the Wisconsin farmland tax relief credit, Wis. Stat. section 71.07 (3m), another program for reducing the agricultural property tax burden.

<sup>52</sup>Wis. Stat. section 70.32(2r)(c).

<sup>53</sup>Luke Timmerman, note 51, above.

<sup>54</sup>Douglas Jackson-Smith and Jill Bukovac, note 13, above, at p. 5.

<sup>55</sup>Luke Timmerman, note 51, above.

<sup>56</sup>Federation of Tax Administrators, “Taxes on U.S. Agricultural Real Estate Examined,” *57 Tax Administrators News* 127 (November 1993) (ranking average agricultural property tax collections per \$100 in market value).

<sup>57</sup>Amy Rinard, note 49, above, p. 2.

news article said, “Surely, the idea was, such a limit would stop all those urbanites from moving into the country; who would pay for 35 acres of land so they can build one house on it? Well, it turns out, people apparently are willing to pay that price — and make others pay the price for urban sprawl.”<sup>58</sup> This requirement was repealed in 2000.<sup>59</sup>

On November 30, 1999, two years into the 10-year phase-in of use value assessment, the state Revenue Department cited record-low milk prices as grounds for an emergency rule “for the immediate preservation of the public peace, health, safety or welfare” to fully implement use value assessment in one month. Supporting that measure, then-Gov. Tommy Thompson (R) said, “Milk prices are at \$9.80 per hundred-weight. About three months ago they were at \$16.50 per hundredweight,”<sup>60</sup> leaving open the question as to whether a permanent property tax reduction was the best means of addressing such a dramatic change over three months.<sup>61</sup> This immediately reduced farmland values on the property tax rolls by \$2.2 billion.<sup>62</sup> In individual cases the taxable value of an acre of farmland dropped from \$5,800 to \$643, from \$5,450 to \$646, and from \$32,000 to \$630.<sup>63</sup>

Urban representatives protested the acceleration of use value assessment,<sup>64</sup> which shifted state aid as well as taxes. Wisconsin, like many states, apportions school aid according to a formula that takes into account local property wealth, in order to direct more funds to poorer areas with less tax capacity. Substituting use value assessment for full market value shifted school aid from urban jurisdictions to rural areas. A Milwaukee columnist wrote, “Granting farmers an immediate property tax break through the proclamation of an emergency is an exercise in raw power that flies in the face of rational policy even if it is politically expedient.”<sup>65</sup> The ensuing legal battle offered insight into the many interest groups affected by use value assess-

ment. The ultimately unsuccessful legal challenge to accelerated implementation was brought by mayors of four cities, together with the executive directors of the League of Wisconsin Municipalities and the Wisconsin Alliance of Cities. Although the action was brought against the revenue secretary, interveners defending the acceleration included the Wisconsin Farm Bureau Federation, the Farmers Educational and Cooperative Union of America, the National Farmers Organization, the Wisconsin Agribusiness Council, the Wisconsin Agri-Service Association, the Wisconsin Cattlemen’s Association, the Wisconsin Corn Growers Association, the Wisconsin Federation of Cooperatives, the Wisconsin Pork Producers Association, the Wisconsin Potato and Vegetable Growers Association, the Wisconsin Soybean Association, and the Wisconsin State Cranberry Growers Association.<sup>66</sup>

The shift to use value assessment naturally raised questions as to the future of the original farmland preservation tax credit. In 2003 the governor vetoed a measure to end the credit, saying, “America’s Dairyland is losing about five farms a day and many of the next generation are simply deciding not to stay on the farm.” On the same day, the governor announced that he would sign a provision extending preferential property tax treatment to swamplands, wetlands, and forests contiguous to productive farmland by assessing these properties at 50 percent of market value.<sup>67</sup> The executive director for public relations of the Farm Bureau Federation applauded this move: “To keep more money in farmers’ pockets is a great thing.”<sup>68</sup> A county supervisor protested the extension to swampland and wetland: “I’m going to be paying for tax breaks to people who just want to come out to the country and have a secluded country living surrounded by a lot of land . . . Why do we want to give millions of dollars of tax breaks to speculators and investors and people who don’t farm at all?”<sup>69</sup>

Although its use value statute directs that farmland be assessed “according to the income that could be generated from its rental for agricultural use,”<sup>70</sup> Wisconsin, like many states, does not base these values on actual property transactions. Instead, a Farmland Advisory Council advises the Department

<sup>58</sup>“Seeking Ways to Limit Sprawl,” *Milwaukee Journal Sentinel*, Oct. 17, 1999, p. A11.

<sup>59</sup>Wisconsin Legislative Fiscal Bureau, “Farmland Preservation and Tax Relief Credits,” Informational Paper 25 (January 2005), p. 6.

<sup>60</sup>Amy Rinard, “Thompson Defends Farmers’ Early Tax Break,” *Milwaukee Journal Sentinel*, Dec. 17, 1999, p. 3.

<sup>61</sup>In fact, an October 1999 article considering the position of a typical Wisconsin farmer said, “Milk prices are good now, but you nearly went broke with what they were two years ago.” Luke Timmerman, note 51, above.

<sup>62</sup>Amy Rinard, “Farmland Tax Break to Hit Homeowners,” *Milwaukee Journal Sentinel*, Dec. 4, 1999, p. 1.

<sup>63</sup>*Id.*

<sup>64</sup>Lawrence Sussman, “Moving Away From the Farm: High Property Taxes Forcing Farmers Out,” *Milwaukee Journal Sentinel*, Dec. 14, 1995, p. 1.

<sup>65</sup>Avrum D. Lank, “Farm Tax Break Hurts Free Market,” *Milwaukee Journal Sentinel*, Dec. 22, 1999, Business Section, p. 1.

<sup>66</sup>*Norquist v. Zeuske*, 231 Wis.2d 238, 604 N.W.2d 304 (Wisc. Ct. App. 1999) (unpublished), *appeal dismissed*, 253 Wis.2d 445, 645 N.W.2d 869 (2002) (per curiam).

<sup>67</sup>Todd A. Berry, “Governor to Keep Farm Preservation Credits,” *State Tax Notes*, July 21, 2003, p. 178, 2003 STT 136-37, or Doc 2003-16605.

<sup>68</sup>Amy Rinard, “Doyle to Spare Family Farm Tax Credits,” *Milwaukee Journal Sentinel*, July 10, 2003, p. 1B.

<sup>69</sup>Amy Rinard, “Farm Tax Credit Program May End,” *Milwaukee Journal Sentinel*, July 1, 2003, p. 1B.

<sup>70</sup>Wis. Stat. section 70.32(2r)(c).

of Revenue “on rules to implement use value assessment of agricultural land and to reduce expansion of urban sprawl.”<sup>71</sup> The council developed a formula for current use value that incorporated corn prices, corn yield, costs of corn production, and a capitalization rate reflecting interest on one-year agricultural loans. Given that falling milk prices in “America’s Dairyland” were the impetus for immediate implementation of use value assessment, an approach based solely on corn production data illustrates the somewhat arbitrary nature of many use value formulas.

Wisconsin may have been the last state to adopt use value, but its enthusiasm for reducing farmland assessments was second to none. In 2000, taxable agricultural values fell almost one-third. Declining corn prices resulted in 2002 agricultural values that were approximately 45 percent lower than in 2001.<sup>72</sup> 2003 saw another reduction of nearly 30 percent in statewide average use values, lowering property taxes to an average of \$3.23 per acre.<sup>73</sup> In September 2003, the council froze values when it became clear that its formula would result in negative 2004 assessments. As the DOR noted, this would lead to “the ‘illogical conclusion’ that farmers would be paid to own the land.”<sup>74</sup> The department estimated that the average value of an acre of Grade 1 agricultural land would drop to -\$253 in 2004 and less than -\$400 by 2007.<sup>75</sup> The department committed to use the time gained by freezing the 2003 values for a “substantial review” of the formula.<sup>76</sup> The revenue secretary announced, “We have what we think is a relatively painless, short-term solution. Let’s freeze it, and then fix it next year so we don’t get into this predicament again.”<sup>77</sup> One year later he announced

another one-year freeze, again retaining 2003 values.<sup>78</sup> In June 2005 the department adopted an emergency rule “for the immediate preservation of the public welfare” basing 2005 assessments on 1998-2002 corn production data and 2000-04 capitalization rates.<sup>79</sup> The department announced, however, that a new formula would be put in place — no less complex and again taking only corn production into account, but based on a landlord-tenant model rather than assuming an owner-operated farm.<sup>80</sup>

In 2005, the Wisconsin Public Policy Forum studied property taxes in the southeastern part of the state, containing 37 percent of the state’s total property value. It concluded that although 47 percent of the region was agricultural, farmland accounted for only 0.1 percent of the property tax base. Since the introduction of use value assessment in 1995, the taxable value of farmland there had dropped by 92 percent.<sup>81</sup>

### The Challenge for Policy Analysis

In presenting her work on use value assessment in Wisconsin to the National Tax Association, DOR economist Rebecca Boldt concluded:

Our regression analysis suggests that use value has had a disparate effect on farmland preservation across municipalities. In rural areas, the tax savings afforded under use value have contributed to farmland preservation. In urban areas, however, there is little evidence that use value has preserved farmland most subject to development pressure in spite of the fact that use value has provided dramatically more tax savings in these areas.

The analysis also suggests that the reduced property taxes under use value have been capitalized, to some extent, into higher land prices. Capitalization is found to be greater in areas most subject to development pressure. To the extent that the cost of owning farmland is unchanged due to capitalization, the property tax relief under use value has been offset by higher land values. This may help explain why

<sup>71</sup>Wis. Stat. section 73.03(49)(a). The council consists of the secretary of revenue, an “agribusiness person,” a person with knowledge of agricultural lending practices, a University of Wisconsin agricultural economist, the mayor of a city with a population above 40,000, an environmental expert, a “nonagricultural business person,” a professor of urban studies, and a farmer. Wis. Stat. section 73.03(49)(e).

<sup>72</sup>Rebecca Boldt, note 28, above.

<sup>73</sup>“Wisconsin Governor Announces Drop in Farmland Use Values for 2003,” *Doc 2002-23187* or *2002 STT 202-32* (news release).

<sup>74</sup>Todd A. Berry, “Farmland Council Freezes Agricultural Use Value,” *State Tax Notes*, Oct. 13, 2003, p. 111, *2003 STT 193-35*, or *Doc 2003-21779*.

<sup>75</sup>Wisconsin Legislative Fiscal Bureau, “Use Value Assessment of Agricultural Land,” *Doc 2003-12765* or *2003 STT 139-26*.

<sup>76</sup>Todd A. Berry, note 74, above.

<sup>77</sup>Scott Milfred, “Farmland Value to Be Frozen Next Year,” *Wisconsin State Journal* (Madison, Wisc.), Sept. 26, 2003, p. C1.

<sup>78</sup>Matt Pommer, “Farmland Value to Remain Frozen,” *Capital Times* (Madison, Wis.), Oct. 4, 2004, p. 4A.

<sup>79</sup>594 Wis. Admin. Register 7 (June 30, 2005).

<sup>80</sup>“Wisconsin DOR Proposes Amendment of Rules on Use-Value Assessment of Agricultural Property,” *Doc 2005-15833* or *2005 STT 145-18* (notice of hearing with analysis); Amy Rinard, “Farm Taxes May No Longer Be Dirt Cheap,” *Milwaukee Journal Sentinel*, June 25, 2005.

<sup>81</sup>Amy Rinard, “Property Values in Area Jump 8.9 Percent for 2004,” *Milwaukee Journal Sentinel*, Apr. 1, 2005.

use valuation, by itself, has done little to stem the conversion of farmland on the urban fringe.<sup>82</sup>

That sobering assessment provides cause for reflection on a half-century's experience with use valuation. A program commanding enormous political support as a means of aiding needy farm families, preserving agricultural land, and preventing unchecked urban growth can lead to the unintended consequences of subsidizing development, encouraging "leapfrog" sprawl, and raising the price of farmland.<sup>83</sup> A valuation designed to reflect actual use rather than hypothetical highest and best use can produce arbitrary assessments unrelated to either value to the owner or value to the market. Wisconsin's proud progressive heritage was consistent with its initial adoption of what many analysts would consider the "right" method for reducing the burden of agricultural property taxes: targeted state-funded credits tied to long-term contractual agreements for land preservation and countywide land use planning. The failure of that approach speaks to the gravity of the political challenges in competing with the predominant use value model, limiting benefits to areas under the greatest development pressure, and adequately funding such a program.

The Wisconsin experience also illustrates the difficulty of achieving land policy goals through tax

reduction alone. Without assurance of long-term preservation, use value assessment can become simply a method of untaxing open space, with all its concomitant potential for perverse land use and distributional consequences. The tremendous nationwide support for use value assessment challenges policy analysts to identify politically feasible methods for targeting its benefits and achieving its goals. Concretely, that means a legislative definition of eligibility that addresses the status of hobby farmers, developers, and agribusiness; an appropriate combination of incentives for covenants to retain land in agricultural use and penalties for withdrawal from the program; and a role for regional planning in identifying land whose long-term preservation offers the greatest public benefit.

**Without assurance of long-term preservation, use value assessment can become simply a method of untaxing open space, with all its concomitant potential for perverse land use and distributional consequences.**

Reform of current use assessment depends critically on the willingness of policy analysts to focus attention on its unintended consequences and excess costs, and to recommend specific improvements. Neither the importance nor the difficulty of these tasks should be underestimated, as the Wisconsin example demonstrates. A tax preference commanding popular support and strong political momentum can defy analytic objections, at least in the short run. However, this inescapable reality also offers an opportunity. Because political support for use value assessment has been the direct result of its promise to assist family farmers, preserve agricultural land, and prevent urban sprawl, future efforts to achieve this promise through policy reform may be able to draw on that support as well. ☆

<sup>82</sup>Rebecca Boldt, note 28, above.

<sup>83</sup>Capitalized tax savings that raise the sale price of farmland need not increase the total payment required of purchasers; they may simply shift the balance from tax payments to mortgage payments. See William A. Fischel, *The Homevoter Hypothesis* at 40-42 (2002). A significant difference between the two is the lack of any down payment or financial qualification requirement for the property tax payment, which may be especially significant for low-income purchasers. "If low-income groups cannot buy land because they lack liquidity and access to capital markets, property taxation may be one of the policy instruments to improve their access to landownership." Roy W. Bahl and Johannes F. Linn, *Urban Public Finance in Developing Countries* 168 (1992).