"Breaking New Ground" with the Williamson Act?

The Potential Application of the Williamson Act in Promoting Urban Agriculture

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Introduction

Increasingly, I worry about where my food is going to come from. The latest news that honey bees are dying only adds to other fears arising from a pending ecological crisis due to global warming, potential for drought or flood, the looming failure of the Delta's levee system, and the potential for an energy crisis. With a massive industrial agriculture system that is seemingly unsustainable, I am wondering what we can do at the policy level to protect our food security.

After WWII, the state of CA began to worry about food security, in light of the rapid conversion of rich agricultural land into residential subdivisions. Their strongest response to those worries was the Williamson Act, otherwise known as the California Land Conservation Act. Enacted in 1965, the Williamson Act provides major tax incentives to those who maintain the agricultural use of their land, rather than selling it to developers.

The question I am asking in this paper is: how could the Williamson Act be used to promote urban agriculture? Installing gardens in vacant urban parcels is not what the Williamson Act originally envisioned. However, in the spirit of ensuring a secure food source, it might make sense to adapt the Act to this purpose.

Why Urban Agriculture?

During past food shortages, the U.S. government has encouraged people to take advantage of every unused plot of land to cultivate food. During WWI and WWII, up to 44% of the country's vegetables were produced in so-called "victory gardens," which were small-scale gardens planted by individuals/families in yards and vacant lots.[1] I have not turned up any evidence that citizens were provided tax incentives for cultivating the land; rather, the incentive was something to the effect of: "Plant a victory garden and help the U.S. win the war!"

In various other countries, people have responded to food crises by implementing programs of urban agriculture. Following trade embargos in the early 1990s, Cuba's large-scale industrial agriculture system encountered a crisis. Food could no longer be produced on an industrial scale, and could no longer be transported long distances. As a result, people began to plant food gardens in every plot of available land in urban areas. Cuba was able to avert a crisis by taking advantage of land resources, quite literally, in its backyard.[2]

With or without a crisis, it makes sense to grow food as close as possible to consumers. This saves the energy needed to transport food, ensures a fresher food supply, and cuts down on waste, because we will need fewer packaged foods. Beyond providing food security, urban agriculture provides habitats for birds, bugs, and native plants, adds to the aesthetics of a city, provides local jobs, and helps to build community.

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[1] Victory Gardens Handbook of the Victory Garden Committee, War Services, Pennsylvania State Council of Defense, April, 1944, available at http://www.earthlypursuits.com/VictoryGardHandbook/VGHv.htm.

[2] *See* Fernando Funes, et. al., *Sustainable Agriculture and Resistance: Transforming Food Production in Cuba.* Oakland, CA: Food First Books, 2002.

On the other hand, advocating for increased urban agriculture may come into conflict with other principles of urban "smart growth." Many smart growth models envision compact cities. Putting new buildings on urban infill land is, indeed, a smart way to keep cities from expanding into peripheral agricultural areas.

Nevertheless, I believe that there is a balance to strike between development of urban infill and promotion of urban open space. I will not delve too deeply into such a debate, because the purpose of this paper is not so much to ask *whether* we should encourage urban agriculture, but rather, *how* we could encourage it. And more specifically: would using the Williamson Act be a practical way to do this?

The Need for Statewide Tax Incentives for Urban Agriculture

The CA legislature has shown some interest in promoting urban agriculture. The Streets and Highways Code provides that unoccupied land held for future highways should be leased "first for agricultural and community garden purposes, and second for recreational purposes." [3] In addition, the legislature has enacted grant programs to encourage educational gardens at CA public schools.[4]

Nevertheless, the movement to promote urban agriculture is largely happening at the grassroots level, with small non-profits cutting through red tape to buy or lease the necessary land. Anecdotal conversations I've had with Bay Area urban garden non-profits[5] have revealed that almost all of the land these organizations use is leased from the city or county. Using such land requires the hard work of obtaining permits, licenses, approvals, etc. Some organizations are also planting raised beds on former gas stations and other "brownfields," which certainly doesn't sound appetizing. All of this led me to wonder: is there any way to let such organizations use privately-owned lots, and would there be incentives for the land-owners to make this possible?

It seems like there are few or no financial incentives for people to put urban vacant lots to agricultural use. Someone who owns a vacant lot cannot obtain a tax benefit if they temporarily donate the land to a non-profit. There is no federal income tax deduction for letting a non-profit use property temporarily, nor for any revocable donation.[6] People can of course donate their land in the form of a conservation easement, and the non-profit, in turn, will not have to pay property taxes. Unfortunately, there is no such thing as a tax-deductible temporary conservation easement; the donation must be made in perpetuity.[7] This limits the potential to temporarily cultivate a vacant lot that may eventually be developed.

It is possible that there are local jurisdictions that provide property tax breaks for privately owned land used as urban gardens, but I haven't run across any examples. For local governments to discourage development and provide tax breaks for agricultural plots would

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[3] Cal. Streets and Highways Code §104.7

[4] Cal. Educ. Code §9000.

[5] Spiral Gardens, http://www.spiralgardens.org/; People's Grocery, http://www.peoplesgrocery.org/.

[6] Income Tax Regulations (Reg.) §1.170A-7(a)(1).

[7] Reg. §170(h)(5)(A); Reg. §1.170A-14(a).

probably put a strain on already limited resources.[8] Reimbursement by the state, through the Williamson Act or something similar to it might make such incentives more viable.

The Williamson Act and Preservation of Rural Land

The Williamson Act provides for the preservation of agricultural land in two steps. The first step occurs when local cities/counties pass resolutions creating "agricultural preserves." These preserves are areas of land of 100 or more acres, which are to be dedicated to agricultural and related uses. Once land has been designated part of an agricultural preserve, the owner of land within a preserve can then voluntarily enter into a contract with the local government, promising to preserve that land as agricultural for 10 or more years. In return, the local government assesses the value of the land based on the actual use of the land as agricultural, rather than assessing it based on the potential value of the land if developed. The result is that landowners pay anywhere between 20% and 75% of the taxes they would otherwise have had to pay.[9] In return, the state reimburses the local governments based on the amount of land enrolled in the Williamson Act Program.[10]

Key Provisions of the Williamson Act

I will focus on five key aspects of the Williamson Act and how they currently function: 1) land use planning, 2) tax assessments, 3) parcel size, 4) duration of contracts, and 5) cancellation of contracts. Later in this paper, I will re-examine the same five aspects and question how they might change if applied to urban agriculture.

1. **Land use planning.** The Williamson Act is intended to be used, in part, as a planning tool by local governments. Those agencies select large areas of land (generally 100 or more acres) and designate them "agricultural preserves."[11] These agricultural preserves can be made up of multiple parcels with different owners. The purpose of the preserves is to protect large areas for agricultural use and to discourage discontiguous development. The land within the preserve which is not under a Williamson Act contract is still subject to restrictions. Those non-contracted lands cannot be subdivided into parcels smaller than 5 acres, and cannot be sold unless they are adjacent to areas zoned residential, commercial, or industrial. When sold, their development must be restricted to uses compatible with agriculture (such as agricultural laborers' housing).[12]
2. **Tax assessment.** Once under a contract, the land is assessed based on the actual use as agricultural, rather than based on the potential value of the land if sold to a developer. This method of assessment is supported by a the California Constitution, which provides:

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[8] We can all thank Proposition 13 for that.

[9] Department of Conservation, *Williamson Act Questions and Answers,* http://www.conservation.ca.gov/dlrp/lca/pubs/WA%20fact%20sheet%2006.pdf

[10] Department of Conservation, Williamson Act/Open Space Subvention Act Program: *Questions and Answers,* http://conservation.ca.gov/DLRP/lca/ossp/questions_anwers.htm.

[11] Cal. Gov. Code §51230.

[12] Cal. Gov. Code 51230.2.

> To promote the conservation, preservation and continued existence of open space lands, the Legislature may define open space land and shall provide that when this land is enforceably restricted, in a manner specified by the Legislature, to recreation, enjoyment of scenic beauty, use or conservation of natural resources, or production of food or fiber, it shall be valued for property tax purposes only on a basis that is consistent with its restrictions and uses.[13]

3. **Parcel size.** The size of parcels must be "large enough to sustain their agricultural use." The law creates a presumption that to sustain agricultural use, the parcel must be at least 10 acres if it is prime[14] (high yielding) agricultural land, and must be 40 acres if it is non-prime agricultural land. [15]
4. **Duration of contracts.** A contract under the Act must last for a minimum of 10 years.[16] The land could also be placed under a Farmland Security Zone contract, which lasts for 20 years and provides for greater tax benefits.[17]
5. **Cancellation of contracts.** To cancel a contract before its term is up, a local government must restrict the use of the land to "compatible uses," find that the cancellation is consistent with the purposes of the Act and is in the public interest, and provide notice to and receive comment from the Department of Conservation.[18] To find that cancellation is consistent with the Act, the local agency must conclude, among other things, that cancellation will not likely cause adjacent lands to be removed from agricultural use, that the new use will be consistent with the county/city plan, and that cancellation will not lead to discontiguous patterns of urban development.[19] For cancellation to take effect before the 10-year period is up, the landowner may have to pay a fee of 12.5% of the property value.[20] The cancellation of contracts is also subject to litigation under the

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[13] Cal.Const. Art. 13, § 8.

[14] Cal. Gov. Code §51201(c): "Prime agricultural land" means any of the following: (1) All land that qualifies for rating as class I or class II in the Natural Resource Conservation Service land use capability classifications. (2) Land which qualifies for rating 80 through 100 in the Storie Index Rating.(3) Land which supports livestock used for the production of food and fiber and which has an annual carrying capacity equivalent to at least one animal unit per acre as defined by the United States Department of Agriculture. (4) Land planted with fruit- or nut-bearing trees, vines, bushes or crops which have a nonbearing period of less than five years and which will normally return during the commercial bearing period on an annual basis from the production of unprocessed agricultural plant production not less than two hundred dollars ($200) per acre. (5) 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.

[15] §51222.

[16] §51244.

[17] §51296.1.

[18] §51283.3.

[19] §51282.

[20] §51283(b).

California Environmental Quality Act (CEQA).[21] These many hurdles to cancellation lend to the goals of long-term land preservation.

How it Works: *Preserving* Agricultural Land in *Large* Blocks for a *Long* Time

In sum, the means by which the Act seeks to achieve its goals is: (1) *preserving* preexisting agricultural land in (2) *large* blocks for a (3) *long* time. By preserving land in large blocks, rather than scattered plots, the intent is to create a "buffer from urban development."[22] The hope is to avoid a snowball effect whereby one small development becomes a magnet for other developments, and so on.

Recent amendments to the Williamson Act further demonstrate the legislature's sense of urgency about preserving *large* areas for a *long* time:

- The legislature created the "Farmland Security Zones" (FSZ, also known as the Super-Williamson Act) in 1998 to provide for heightened tax benefits for parcels that are preserved for 20 years or more. The FSZ statute states that "the intent of the Legislature in enacting this article is to encourage the creation of longer term voluntary enforceable restrictions within agricultural preserves."[23]
- AB 1944, enacted in 2000, made cancellation of contracts more difficult.[24]
- SB 985 (in 2000) made it more difficult to subdivide parcels in non-contracted agricultural preserve land, and also expanded the definition of "recreational use" in the statute to include leaving the land in its natural state. [25]

Courts have also emphasized the need to ensure that the Act preserves land in the long-term. One court denied cancellation of a Williamson contract, stating:

> The act is intended to preserve open space land. But if those with an eye toward developing such land within a few years are allowed to enroll in contracts, enjoy the tax benefits during their short holding period, then cancel and commence construction on a showing that the land is ripe for needed housing, the act would simply function as a tax shelter for real estate speculators.[26]

In fact, it has been argued that the preferential tax assessments under the Williamson Act are constitutional only if applied to land that will be preserved as agricultural for a *long* time. One court rejected a cancellation, explaining:

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[21] *See Sierra Club v. City of Hayward*, 28 Cal.3d 840 (1981).

[22] Christopher J. Butcher, *The Forgotten Intent of the Williamson Act: The Regulation of Non-Contracted Lands Within Agricultural Preserves,* 12 Hastings W.-N.W. J. Envtl. L. & Pol'y 37, 44 (Fall 2005).

[23] §51296.

[24] CA Assembly Bill 1944 (2000) http://leginfo.ca.gov/pub/99-00/bill/asm/ab_1901-1950/ab_1944_bill_20000929_chaptered.html.

[25] CA Senate Bill 985 (1999), http://leginfo.ca.gov/pub/99-00/bill/sen/sb_0951-1000/sb_985_bill_19991010_chaptered.html.

[26] Sierra Club v. City of Hayward , 28 Cal.3d 840, 853 (1981).

> Even if Section 8 [of the CA Constitution] allows the Legislature to define restrictions, it does not permit a definition which renders such restrictions ineffective for land conservation purposes. We are of the opinion that to pass constitutional muster, a restriction must be enforceable in the face of imminent urban development, and may not be terminable merely because such development is desirable or profitable to the landowner. [27]

The default rule is that land value is to be assessed at its "potential development value."[28] Article 13 created the exception: land can be assessed at a lower rate for the purposes of "conservation, preservation and continued existence of open space lands." [29] Thus, while the court is not clear on what duration is necessary, it seems as if temporary protection of lands is not considered "conservation" if the duration is too short, or if the "enforceable restriction" is too easy to evade.

Using the Williamson Act to Promote Urban Agriculture: *Creating* Gardens on *Small* Parcels on a more *Temporary* Basis

Given the overwhelming focus of the Act on preserving preexisting land in the long term, it is questionable whether the Williamson Act could or should be adapted to the urban setting. However, while applying the act to urban agriculture requires changing the *means* by which the Act works, the overall *goals* of the Act would remain largely unchanged. The California Department of Conservation lists the following five goals of the Williamson Act:

1. To preserve farmland for a secure food supply for the state, nation and future generations.
2. To maintain agriculture's contribution to local and state economic health.
3. To provide a tax incentive to farmers and ranchers who restrict their land to long-term contracts.
4. To promote orderly city growth and to discourage leapfrog development and the premature loss of farmland.
5. To preserve open space for its scenic, social, aesthetic and wildlife values. [30]

Promoting urban agriculture is in line with each of these goals, except for number four, which relates to discouraging leapfrog development, a problem less applicable in an already-urbanized area. Our predicament is that we already have urban sprawl; the question is: how do we take advantage of the remaining in-between land and continue to promote the overall goals of promoting food security, economic health, and "scenic, social, aesthetic, and wildlife values?"

To encourage urban agriculture would mean taking an approach different from the Williamson Act's focus on preserving *preexisting* areas of land in *large* parcels for a *long* time. Urban agriculture is an approach of *innovation*, rather than *preservation*. It happens on a necessarily smaller scale, and there is less urgency about ensuring long-term agricultural use of land (especially when there are other potential smart-growth uses of urban infill).

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[27] *Lewis v. Hayward*, 177 Cal.App.3d 103, 113 (Ct. App. 1986).

[28] Dale Will, *The Land Conservation Act at the 32 Year Mark: Enforcement, Reform, and Innovation.* 9 San Joaquin Agric. L. Rev. 1, 3 (1999).

[29] Cal.Const. Art. 13, § 8.

[30] CALIFORNIA DEPARTMENT OF CONSERVATION CELEBRATES 40 YEARS OF THE WILLIAMSON ACT, (July 15, 2005) http://www.consrv.ca.gov/index/news/2005%20News%20Releases/NR2005-12_Williamson_Act_at_40.htm.

This begs the question: is this "conservation?" Will a preferential assessment program like the Williamson Act be in line with the CA Constitution if applied to smaller and temporary agricultural uses in urban areas? As noted above, courts have suggested that relaxing cancellation and duration requirements of the Williamson Act would mean that land isn't actually being "conserved."[31] If the Act is to be applied to urban land, this is a question that will eventually need to be answered by the courts or through a constitutional amendment.

Adapting the Williamson Act to Urban Agriculture

Each of the following provisions of the Act would have to be adapted to apply to the urban context:

1. **Land use planning.** The planning tools inherent in the Act will be less applicable to the urban setting. It makes less sense for localities to plan "agricultural preserves" in urban areas, since there will likely be fewer contiguous areas of open space land. The planning agency can, however, designate areas as high-priority for promoting urban gardens and open space. The agency could then notify land-owners about the potential for obtaining reduced taxes for turning their land into gardens.
2. **Tax Assessment.** The assessment of urban land used for gardens should be contingent on the duration of the contract. We do not want to turn the Act into a welfare program for real estate speculators, by giving significant tax benefits to landowners who want to hold the land in agricultural use for three years, benefit from the tax break, and then develop it later. Thus, the incentive system should reward more to those who commit to longer-term contracts.
3. **Parcel size.** The Williamson Act currently requires that land be preserved in large parcels, which is effective in deterring leapfrog development and in creating a "buffer" to development. However, the statute's minimum size requirements are explained in a rather vague way: agricultural parcels must be big enough to "sustain agricultural use." A parcel will be presumed too small to sustain agricultural use if it is less than 10 acres (for prime land) or less than 40 acres (for non-prime land).[32] This is a strange presumption, mainly because agricultural can certainly be sustained on a much smaller scale.

   This minimum size requirement makes sense when gauging a parcel's capacity for grazing animals. In one unpublished case, a court refused to subdivide land in an agricultural preserve, despite the subdivider's mitigated negative declaration claiming that each of the small parcels could still sustain agricultural use. The court rejected it based on the fact that the land had historically been used for grazing and that it does not make sense to graze animals on such small parcels.[33] The court quotes the County's General Plan: "'agricultural lands that are divided over time into smaller and smaller parcels reach a point where the use of an individual parcel for agriculture is not economically viable.'" [34] While this assumption works when applied to animal grazing,

[31] *Lewis v. Hayward*, 177 Cal.App.3d 103, 113 (Ct. App. 1986).

[32] §51222.

[33] *Barnes v. Tehama County Bd. of Supervisors*, Not Reported in Cal.Rptr.3d, 2005 WL 2746767, 6 (Cal.App. 3 Dist.).

it makes less sense when applied to land that grows vegetables, since even a 200 square foot parcel could sustain agricultural use and yield a significant amount of food.

Under the current Act, local planning agencies have the option of establishing agricultural preserves smaller than 100 acres "if it finds that smaller preserves are necessary due to the unique characteristics of the agricultural enterprises in the area and that the establishment of preserves of less than 100 acres is consistent with the general plan of the county or city."[35] It could, therefore, be argued that the "unique characteristics" of urban gardens should allow cities/counties to designate preserves as small one acre, or even less.

4. **Duration of contracts.** In the case of urban agriculture, it is not as urgent to establish long-term preserves. This is because there is less of a need to deter growth and prevent the snowball effect of development. Contracts should last long enough (perhaps five or more years) to make it viable to install a garden, and as noted above, there should be additional tax breaks for contracts that last longer.
5. **Cancellation.** Cancellation of urban contracts should simply be allowed when a local government determines that it is in the public interest, a decision that should still be subject to challenge under CEQA. The decision should be somewhat more straight-forward, because, unlike in rural areas, local governments should not have to base a cancellation decision on whether cancellation will negatively affect neighboring agricultural land. To clarify what is meant by "public interest," the local planning agency could create a list of potential developments that could be in the public interest, such as community centers, schools, or low-income housing. If an urban parcel has been cultivated for four years and someone wants to turn it into a youth community center, it may very well be in the public interest to allow cancellation. Ultimately, even if the tax-incentives are only prolonging inevitable urban development, the public was still able to benefit from a local food source during the interim.

Other Ways of Promoting Urban Agriculture

There are other ways for the state to provide incentives for developing agriculture in urban areas. It has been beyond the scope of this paper to examine the roles of restrictive zoning and regulatory takings as means of promoting agriculture. I have focused mainly on the potential to create incentives at the statewide level in ways that do not interfere with the police power of local governments.

Other ways of creating incentives include establishing a grant program for urban agriculture. Such a program would function in a similar fashion to the California Farmland Conservancy Program (CFCP)[36] or the Rangeland, Grazing Land, and Grassland Protection Act[37] which provide money to local governments or non-profit organizations to purchase conservation

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[34] *Barnes v. Tehama County Bd. of Supervisors*, Not Reported in Cal.Rptr.3d, 2005 WL 2746767, 6 (Cal.App. 3 Dist.).

[35]Cal. Gov. Code §51230.

[36] Pub.Res.C. 10200 et seq. (California Farmland Conservancy Program Act).

[37] Pub.Res.C. 10330 et seq. (Rangeland, Grazing Land, and Grassland Protection Act).

easements. Purchasing development rights is another option that could work to preserve open space in urban areas.[38]

Conclusion

Ultimately, it might make sense to leave the Williamson Act intact and let it focus on what it does best: preserve existing agricultural areas on a large and long-term scale. It is possible that amending the Act in the ways I suggested above would just create confusion and could undermine the efficacy of the Act in protecting rural areas. At the same time, I believe that a tax-incentive model similar to the Williamson Act could be applied to urban agriculture, provided it could overcome the constitutional hurdle. Such a program would be crafted to take into account the unique context of urban agriculture, which includes the creation of new agricultural plots, on a small scale, and on a more temporary basis to accommodate the dynamic nature of cities.

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[38] Elisa Paster, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 Nat. Resources J. 283, 305 (Winter 2004).