

Open-Space Valuation Redefined

By Judon Fambrough

Texas landowners who maintain indigenous game species may qualify for open-space valuation for ad valorem tax purposes under a new state law. Prior to January 1, 1992, the effective date of the new law, the only animal-care programs that qualified were the raising or keeping of livestock or exotic animals or both. (The term *exotic animal* means a species of game not indigenous to this state, including axis deer, nilga antelope, red sheep or other cloven-hoofed ruminant mammals. Nonindigenous game birds such as ostriches and emus are ineligible.)

Initially, the new law appears to offer a viable alternative for receiving open-space valuation without raising or keeping cattle. (Most Texas Agricultural Extension Service budgets for 1990 show a negative return to cow-calf operations and no return to owners.) Landowners can now minimize losses from cattle operations and possibly receive a positive return from wildlife management. However, if the enabling legislation (SB 1298) is construed literally, few, if any, landowners may qualify.

First, the newly created Section 23.51(7) of the Texas Property Tax Code (the code) stipulates land use. The land must have been used so that on January 1, 1992, it either appraised or was eligible to be appraised as qualified open-space land under the code.

Second, according to Section 23.51(1) of the code, the land must have a history of agricultural use in five of the preceding seven years to qualify for open-space valuation.

But not just any agricultural use qualifies under the new law. Both the present and prior use of the land must have been "... to

propagate a sustaining breeding population of indigenous wild animals to produce a harvestable surplus for human use, including food, medicine or recreation."

Opinion is split on this issue, however. Some believe that any prior qualified open-space use under the code, such as raising livestock, is sufficient if the property were dedicated to wildlife management on January 1, 1992.

Third, on January 1, 1992, the landowner must be eligible or qualify for open-space land valuation for propagating a sustaining breeding population of indigenous wild animals in at least two of the following seven ways: (1) habitat control, (2) erosion control, (3) predator control, (4) providing supplemental supplies of water, (5) providing supplemental supplies of food, (6) providing shelters and (7) making of census counts to determine population.

Obviously, the definition of what constitutes each practice is debatable. For instance, does cruising the pasture once a month to count deer qualify as a census count?

Both the code and local guidelines are relevant in making such determinations. The code provides that the owner *currently* must devote the land to an agricultural use (here a designated wildlife management practice) to the degree and intensity generally accepted in the area. The degree and intensity tests do not apply to prior usage. The code further authorizes the chief appraiser to judge each property individually.

A weak argument can be made that the new law is unconstitutional. Open-space valuation is sanctioned under Article 8, Section 1-d-1 of the Texas Constitution. Here it states that "the legislature shall provide by general law for taxation of open-space land

devoted to farm or ranch purposes. . . ." Opponents of the law argue that wildlife management is not a function devoted to farm or ranch purposes. Obviously, the same argument can be made against raising exotics.

Aside from the constitutional question, another issue concerns the definition of *recreation*. It is not defined in the code, but Chapter 75 of the Texas Civil Practice and Remedies Code defines *recreation* as hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, cave exploration, water-skiing and other water sports. If such a definition is adopted, wildlife management for fish and bats would be a possibility.

Finally, the new law does not allow part of the owner's land to qualify for open-space valuation. *All* the land must qualify. Thus, landowners cannot receive the open-space valuation only for land lying along waterways, gullies, green belts or in other locations presently suited to wildlife.

Obviously, these and other questions ultimately will be resolved by the courts, new legislation and chief appraisers. In the meantime, the property tax code requires an owner to file a valid application with the chief appraiser between January 1 and April 30.

This column is for information only; it is not a substitute for legal counsel. ☐

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