

NOTES

CHANGING VERMONT'S CURRENT USE APPRAISAL PROGRAM TO PROVIDE PROPERTY TAX INCENTIVES FOR CONSERVATION EASEMENTS

INTRODUCTION

Many Vermont landowners have placed conservation easements on land that has significant agricultural, forest, scenic, and historic value. A conservation easement is a legal agreement that property owners may use to restrict the type and amount of development on their property.¹ The easement concept is based on property owners' bundles of rights; these rights may include the right to subdivide land, to construct buildings, to harvest timber, and to farm the land.² Property owners may sell or give away the whole bundle of rights, or may give away certain rights while retaining others.³ To sell or give away some rights while retaining others, property owners may grant easements to appropriate third parties.⁴ Property owners may grant conservation easements to qualified organizations such as public agencies or private land trusts.⁵

1. JANET DIEHL & THOMAS S. BARRETT, *THE CONSERVATION EASEMENT HANDBOOK* 5 (1988). Conservation easements also are referred to as conservation restrictions. *Id.* at 6.

2. *Id.* at 5.

3. *Id.*

4. *Id.*

5. *Id.* In Vermont, a "qualified organization" is:

(A) an organization qualifying under section 501(c)(3) of the Internal Revenue Code of 1986, as amended, which is not a private foundation as defined in section 509(a) of the Code, and which has been certified by the commissioner of taxes as being principally engaged in the preservation of undeveloped land for the purposes expressed in section 6301 of this title.

(B) an organization qualifying under section 501(c)(2) of the Internal Revenue Code of 1986, as amended, provided such organization is controlled exclusively by an organization or organizations described in subdivision (2)(A) of this section.

VT. STAT. ANN. tit. 10, § 6301a(2) (Supp. 1992). Section 501(c)(3) of the Internal Revenue Code includes:

[C]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit

Easement documents define the specific rights a property owner has conveyed and identify the restrictions on use that are necessary to protect the property.⁶ These rights and restrictions vary according to the type of property to be protected and the objectives of the landowner.⁷ For example, a property owner who wishes to preserve farmland may grant a conservation easement to a land trust. By so doing, the owner may relinquish the rights to subdivide and to develop the property but retain the rights to farm the land and to build structures necessary for the agricultural operation.⁸ The conservation easement, which is usually perpetual⁹ and runs with the land, protects the land from unwanted development while enabling the landowner to retain private ownership.¹⁰

Vermont has legislation that specifically sanctions the granting of fee simple and less than fee interests in real property for conservation, scenic, or historic purposes.¹¹ The statute allows landowners to grant conservation easements to Vermont municipalities, state agencies, and qualified organizations.¹²

of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3) (1988). Section 501(c)(2) of the Internal Revenue Code includes "[c]orporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section." *Id.* § 501(c)(2).

6. DIEHL & BARRETT, *supra* note 1, at 5.

7. *See id.*

8. *Id.* at 5, 7.

9. A perpetual easement is written so that it lasts forever. State law may allow an easement to be written for a specified period of years, but only perpetual easements qualify the donor for income and estate tax reductions. *Id.* at 7.

10. *Id.* at 6-7.

11. VT. STAT. ANN. tit. 10, §§ 6301-09 (1984 & Supp. 1992).

12. *Id.* § 6302.

In order to carry out the purposes set forth in section 6301 of this title any owner of real property located within this state or of any right or interest therein may sell, donate, devise, exchange or transfer that real property or any right or interest therein to a municipality of this state, a state agency or a qualified organization. A municipality of this state by the action of its legislative body or a state agency may acquire such real property or any right and interest therein by purchase with any authorized funds, or by donation, devise, exchange, or transfer, all as herein provided.

Over 31,000 acres have been protected permanently in Vermont by the Vermont Land Trust, one such qualified organization.¹³

Although donation of a conservation easement to a government agency or private conservation organization may reap income and estate tax savings for the Vermont property owner, it may not reap property tax savings. The easement is a tax deductible charitable gift under the Internal Revenue Code (the "Code") only if the easement is perpetual and is donated solely for conservation purposes to a qualified organization.¹⁴ In addition, a property owner's estate taxes may be reduced significantly by donating an easement during her lifetime or in a will.¹⁵ A Vermont landowner, however, cannot rely on receiving a property tax reduction when donating a conservation easement.

This note proposes the development of a property tax incentive program expressly designed for conservation easements by amending Vermont's Current Use Appraisal Program.¹⁶ Part I examines the three approaches to property tax assessment and the methods of appraisal used by Vermont towns. Part II considers the effect of conservation easements on tax assessments. Part III discusses how federal tax incentives for conservation purposes operate and how other states provide property tax incentives for conservation easement grantors. Part IV examines the Current Use Appraisal Program, which provides tax incentives for conservation in Vermont. Finally, part V proposes that Vermont amend its Current Use Appraisal Program to provide a property tax incentive expressly designed for conservation easements that would promote both land preservation and a strong community tax base.

Id. § 6302(a).

13. VERMONT LAND TRUST, JOIN THE VERMONT LAND TRUST 2 (undated informational brochure, distributed 1990).

14. DIEHL & BARRETT, *supra* note 1, at 12-13. Under the Code, conservation purposes include preservation of land for outdoor recreation or education, protection of natural habitats and ecosystems, preservation of open space (including farmland and forestland) for scenic enjoyment, and preservation of historically important land and buildings. I.R.C. § 170(h)(4)(A) (1988).

15. See DIEHL & BARRETT, *supra* note 1, at 55-56.

16. See *infra* notes 160-70 and accompanying text.

I. APPROACHES TO PROPERTY TAX ASSESSMENT

A. In General

Assessors generally calculate local property taxes based on the fair market value or a percentage of the fair market value of the property.¹⁷ Fair market value is equivalent to the price a willing buyer would pay to a willing seller for property if neither is under any compulsion to buy or sell and both have reasonable knowledge of the relevant facts.¹⁸ The fair market value of property may reflect the value of the property for its "highest and best use" regardless of its present use.¹⁹ The highest and best use of property is the most likely, profitable, and legal use of that property.²⁰ Assessors and appraisers use three approaches to determine fair market value of property for taxation purposes. These professionally accepted methods are the market data, the cost, and the income approaches.

The market data approach entails calculation of fair market value by comparing similar properties that were recently sold in the same (or a similar) market as the property being appraised.²¹ This approach assumes that the typical buyer will compare sale prices to get the best possible purchase price and that the seller

17. See Joan M. Youngman, *Defining and Valuing the Base of the Property Tax*, 58 WASH. L. REV. 713, 715 (1983); see, e.g., VT. STAT. ANN. tit. 32, § 3481(1) (1981) (appraisal value means the estimated fair market value); ME. CONST. art. IX, § 8 (requiring "just value" as basis of assessment).

18. *Bookstaver v. Town of Westminster*, 131 Vt. 133, 136-37, 300 A.2d 891, 893 (1973). *Bookstaver* defines fair market value as:

[T]he price which the property will bring in the market when offered for sale and purchased by another, taking into consideration all the elements of the availability of the property, its use both potential and prospective, any functional deficiencies, and all other elements such as age and condition which combine to give property a market value.

Id.; see also INTERNATIONAL ASS'N OF ASSESSING OFFICERS, *ASSESSING AND THE APPRAISAL PROCESS* 32 (1968) [hereinafter *ASSESSING AND THE APPRAISAL PROCESS*].

19. Daniel C. Stockford, Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. ENVTL. AFF. L. REV. 823, 827 (1990).

20. M. Eugene Hoffman, *Appraising Deductible Restrictions*, in *LAND SAVING ACTION* 202 (Russell L. Breneman & Sarah M. Bates eds., 1984).

21. *ASSESSING AND THE APPRAISAL PROCESS*, *supra* note 18, at 31-49; Stockford, *supra* note 19, at 828. The market data approach is also referred to as the comparable sales approach. NATIONAL TRUST FOR HISTORIC PRESERVATION AND THE LAND TRUST EXCHANGE, *APPRAISING EASEMENTS: GUIDELINES FOR VALUATION OF HISTORIC PRESERVATION AND LAND CONSERVATION EASEMENTS* 24 (1984) [hereinafter *APPRAISING EASEMENTS*].

will attempt to get the best possible sale price for the property.²² To obtain a valid estimate of the fair market value of a property under the market data approach, properties in the comparison process must have the potential of similar, if not identical, highest and best uses.²³ The market data approach is considered to be most reliable when there is an active market for the type of property being appraised.²⁴

Assessors use the cost approach to determine fair market value by estimating reproduction or replacement costs of improvements on the property, deducting the accrued depreciation of those improvements, and adding the market value of the land to the depreciated cost of improvements.²⁵ The theory behind the cost approach is that an improved property will sell at a price reasonably similar to the depreciated cost of a newly constructed version of the property.²⁶ This approach is most accurate when applied to improved properties with new buildings, and is generally not used to appraise vacant land.²⁷

Assessors use the income approach to estimate fair market value by reducing the expected future income of the property to its present value.²⁸ This method is most reliable when applied to properties which are sold on the basis of their income-producing potential, such as commercial and agricultural properties.²⁹ The income approach is not reliable when used to appraise properties purchased for personal use because such properties do not generate income.³⁰

Assessors normally use all three approaches to determine the fair market value of real property.³¹ However, the values derived from the three approaches usually differ. Therefore, the

22. APPRAISING EASEMENTS, *supra* note 21, at 32.

23. *Id.* at 33.

24. *Id.* at 24.

25. *Id.* at 26.

26. *Id.*

27. *Id.*

28. *See id.* at 27.

29. *See* Stockford, *supra* note 19, at 829.

30. *See* APPRAISING EASEMENTS, *supra* note 21, at 27.

31. *See* ASSESSING AND THE APPRAISAL PROCESS, *supra* note 18, at 64-65.

assessor must consider the reliability of information collected under each approach and its relevance to the property assessed.³² Rather than being an averaging process, the appraisal involves determining which one of the three approaches is most accurate and should be weighted the most heavily in the final estimate of fair market value.³³

B. Vermont's Approach

Vermont towns have only those powers specifically delegated to them by the legislature.³⁴ The state, which ultimately controls the methods used for local taxation, requires town listers³⁵ to appraise and list each property at its estimated fair market value.³⁶ The fair market value is the price which the property will bring in the market, taking into consideration its highest and best use, functional deficiencies, age, and condition.³⁷ The town listers must determine fair market value in accordance with statutory requirements³⁸ and must take into account the listed values of comparable properties. A landowner may challenge the listed value if it is inconsistent with the appraised values of comparable listed properties.³⁹ The listers have a duty to explore all methods that will help in determining

32. See *id.*

33. See *id.*; see also Stockford, *supra* note 19, at 830.

34. Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 486, 380 A.2d 64, 66 (1977).

35. Vermont listers are town officers who are elected to appraise all personal and real property subject to taxation in their respective towns. VT. STAT. ANN. tit. 32, § 3431 (1981). Listers are elected to serve a term of three years. VT. STAT. ANN. tit. 17, § 2646 (Supp. 1992).

36. VT. STAT. ANN. tit. 32, § 3481(1) (1981). Appraisal value is:

[T]he price which the property will bring in the market when offered for sale and purchased by another, taking into consideration all the elements of the availability of the property, its use both potential and prospective, any functional deficiencies, and all other elements such as age and condition which combine to give property a market value. Those elements shall include a consideration of the effect of any state or local law or regulation affecting the use of land, including but not limited to chapter 151 of Title 10 or any land capability plan established in furtherance or implementation thereof, rules adopted by the state board of health and any local or regional zoning ordinances or development plans.

Id. Listed value is "an amount equal to 100 percent of the appraisal value." *Id.* § 3481(2).

37. See *supra* note 18 and accompanying text.

38. See VT. STAT. ANN. tit. 32, § 3431 (1981).

39. VT. STAT. ANN. tit. 32, § 4467 (Supp. 1992).

fair market value.⁴⁰ If a town's appraisal formula includes factors such as location, use, access, road frontage, view, size, type, and sales of comparable properties, it generally will be in accordance with statutory requirements.⁴¹

The Vermont Supreme Court has acknowledged the three basic methods of appraising property for fair market value—the market data approach, the cost approach, and the income approach.⁴² The three methods may be used alone or in conjunction with each other, depending upon the characteristics of the property being appraised.⁴³

II. THE EFFECT OF CONSERVATION EASEMENTS ON TAX ASSESSMENTS

A. *Problems With Traditional Appraisal Methods*

Applying the three traditional appraisal methods to land protected by conservation easements is difficult. The market data approach generally is not used to value conservation easements because conservation easements are usually transferred by deed or gift rather than by sale on the open market.⁴⁴ Moreover, the market data approach commonly is not available to appraise properties protected by conservation easements because there is insufficient sales data to allow comparison of restricted properties sold in the same or a similar market.⁴⁵ Even when sales data is available, direct comparison of properties subject to conservation easements is difficult because the terms of the easements differ.⁴⁶

40. *In re Montpelier & Barre R.R. Corp.*, 135 Vt. 102, 105, 369 A.2d 1379, 1381-82 (1977).

41. *See Welch v. Town of Ludlow*, 136 Vt. 83, 89, 385 A.2d 1105, 1109 (1978). An inflexible appraisal formula which fails to take the various statutory factors into account cannot be employed as the sole basis for appraisal. *Id.* at 88, 385 A.2d at 1108. In addition, a sliding scale appraisal formula which places a decreasing value per acre on land as the number of acres increases cannot be used as the sole basis of appraisal. *Id.* at 89, 385 A.2d at 1108-09.

42. *Town of Barnet v. New England Power Co.*, 130 Vt. 407, 412, 296 A.2d 228, 231 (1972).

43. *See id.*

44. APPRAISING EASEMENTS, *supra* note 21, at 24.

45. *Id.*

46. *Stockford*, *supra* note 19, at 838.

In the unusual circumstance where assessors use the market data approach to appraise land protected by conservation easements, they make adjustments by comparing the subject property to other properties that are burdened by natural or governmental restrictions, not conservation easements.⁴⁷ For example, in valuing agricultural land that is suitable for development but is restricted by a conservation easement, the appraiser may compare the property to similar agricultural land that is restricted in use because it is located in a floodplain.⁴⁸ The utility of such comparisons is limited, however, by the fact that natural restrictions on property may be so different from the easement restrictions that comparison is inappropriate. The assessor also may compare the land protected by conservation easement to properties zoned in a manner that restricts uses similar to those prohibited by the easement.⁴⁹ The negligible impact of zoning restrictions on market value limits this method of comparison.⁵⁰ Therefore, the market data approach to valuation is difficult to apply to conservation easement land.

Similarly, the cost approach is difficult to apply to land protected by conservation easements. The cost approach is most accurate when applied to improved properties with new buildings; usually, it is inappropriate for appraising vacant land.⁵¹ Conservation easements often restrict the use of land to preserve it as unimproved, open space. The cost approach fails to take into account the value of such property which, although vacant, has special scenic or ecological characteristics.

The income approach to valuation also is unreliable when applied to properties protected by conservation easements. The income approach applies to income-producing properties, such as retail stores and office buildings, while properties protected by conservation easements often may be economically unproductive.⁵² In addition, conservation easements may permanently

47. APPRAISING EASEMENTS, *supra* note 21, at 25.

48. *Id.*

49. Stockford, *supra* note 19, at 838.

50. *Id.* (zoning legislation is easily amended; its impact on market value is often negligible).

51. APPRAISING EASEMENTS, *supra* note 21, at 26.

52. *See id.* at 27-29.

limit properties in ways that affect income. These limitations include prohibitions against conversion of agricultural land to residential sites, draining of wetlands, subdivision of property, alterations in historic properties, and other limitations on changes in use of the land and the buildings.⁵³ The future income-producing capability of such properties is uncertain and, therefore, use of the income approach is not reliable.

Conservation easements that restrict the uses of property are likely to alter the highest and best use of property, thereby reducing the fair market value of property.⁵⁴ Because the grantor of a conservation easement gives up one or more of the bundle of rights associated with ownership of land, the land value decreases through the loss of development potential.⁵⁵ Traditional appraisal methods, however, fail to account for the loss in development value which accompanies conservation easements. Consequently, owners of conservation easement land are not assured a reduction in their local property taxes.

B. Federal Approach

Valuation of property for federal tax purposes uses the same approaches as those used for local property tax purposes. Federal tax appraisals are based on the highest and best use of the property; they estimate fair market value using the market data, the cost, and the income approaches.⁵⁶ Valuation of conservation easements for federal tax appraisals promotes the theory that a conservation easement is likely to reduce the fair market value of the property it protects.

Donors of conservation easements can deduct the fair market value of the easement from their taxable income under federal tax law.⁵⁷ Thus, federal tax appraisals must estimate the fair market value of the actual easement to determine the amount that the landowner may deduct. This process differs from the

53. *Id.* at 28.

54. Robert Suminsby, *Appraising Deductible Restrictions, in LAND SAVING ACTION 198, 198-99* (Russell L. Brenneman & Sarah M. Bates eds., 1984).

55. *Id.*

56. *Id.*; see also Stockford, *supra* note 19, at 833.

57. See I.R.C. § 170 (1988).

property tax appraisal, which estimates the fair market value of an entire piece of property after it is protected by a conservation easement.⁵⁸

Where there are no comparable sales of easements to determine value, the Internal Revenue Service uses a "before-and-after" method of appraising conservation easements.⁵⁹ The before-and-after method acknowledges that conservation easements decrease the value of the property they protect.⁶⁰ Under this approach, the Internal Revenue Service calculates the difference between the fair market value of the entire property before donation of the easement, and the fair market value of the property after donation of the easement, to arrive at the fair market value of the easement.⁶¹ The before-and-after approach is necessary to determine the value of conservation easements because lands burdened with this type of easement are not normally sold on the open market. Therefore, there is an insufficient basis for comparing burdened properties against unrestricted properties.⁶²

For example, the United States Tax Court applied the before-and-after approach in *Thayer v. Commissioner*⁶³ to calculate the value of a conservation easement donated to the Virginia Outdoors Foundation. The easement donator (taxpayer) and the Internal Revenue Service disagreed about the value of the conservation easement, which prohibited further development on a sixty-acre farm.⁶⁴ The parties' appraisal experts differed over what the highest and best use of the farm was before the easement was donated.⁶⁵ The taxpayer's expert testified that the highest and best use before the easement was to subdivide the property into five to eight homesites, and that the highest and

58. Stockford, *supra* note 19, at 833.

59. Rev. Rul. 73-339, 1973-2 C.B. 68.

60. Akers v. Commissioner, 48 T.C.M. (CCH) 1113, 1120 (1984), *aff'd*, 799 F.2d 243 (6th Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987); *see also* Thayer v. Commissioner, 36 T.C.M. (CCH) 1504 (1977); Rev. Rul. 76-376, 1976-2 C.B. 53; Rev. Rul. 73-339, 1973-2 C.B. 68.

61. Rev. Rul. 76-376, 1976-2 C.B. 53, 54.

62. *See supra* note 44 and accompanying text.

63. Thayer, 36 T.C.M. (CCH) at 1510.

64. *Id.* at 1506.

65. *Id.* at 1508.

best use after the easement was as a country estate.⁶⁶ The Internal Revenue Service's expert asserted that because the property had always been unsuitable for development (based on its topography and unavailability of water and sewage facilities), the highest and best use both before and after the easement was as a country estate.⁶⁷

The court in *Thayer* held that the conservation easement diminished the fair market value of the farm by approximately one-third.⁶⁸ Finding that subdivision into two to four homesites was the highest and best use of the property prior to the easement, the court used the before-and-after approach to determine the fair market value of the easement. The court deducted the fair market value of the property as a country estate from the fair market value of the property as a subdivision.⁶⁹ The conservation easement decreased the value of the property by approximately one-third, therefore, the taxpayer received an income tax deduction in that amount.⁷⁰ This federal tax case, as well as other federal tax cases, demonstrates that conservation easements may reduce the fair market value of the property they protect.⁷¹

C. State Approaches

1. State Court Decisions

Decisions of state courts also acknowledge that conservation easements decrease the fair market value of the land they protect.

66. *Id.* Using the before-and-after approach, the taxpayer's appraiser argued that the easement decreased the value of the property by almost \$150,000. *Id.*

67. *Id.* at 1508-09. The I.R.S. appraiser found that the easement decreased the property value by \$60,000. *Id.*

68. *Id.* at 1510. The court reached this decision based on zoning restrictions and local opposition to development. *Id.* at 1509.

69. *Id.* at 1509-10.

70. *See id.*

71. These cases also demonstrate the potential for disagreement among appraisers about the effect of conservation easements on the value of property. *See, e.g., Griffin v. Commissioner*, 56 T.C.M. (CCH) 1560 (1989) (taxpayer's expert argued that easement was worth \$195,000 while I.R.S. expert contended that it was worth \$35,000); *Higgins v. Commissioner*, 60 T.C.M. (CCH) 1314 (1990) (taxpayer's appraiser estimated market value of easement to be \$95,460 while I.R.S. determined that easement was worth \$22,000); *Schapiro v. Commissioner*, 61 T.C.M. (CCH) 2215 (1991) (valuations of two appraisers were \$94,000 apart on an easement covering a 165-acre parcel and slightly more than \$113,000 apart on an easement covering a 30-acre parcel).

In *Village of Ridgewood v. Bolger Foundation*,⁷² a landowner donated a conservation easement to the New Jersey Conservation Foundation to preserve the land in its natural state.⁷³ The New Jersey Supreme Court found that the easement decreased the property's fair market value by limiting the uses of the property to those that kept it in its natural state.⁷⁴ The court held that property tax assessors must account for this decrease in the market value of the land when appraising the property.⁷⁵

Similarly, the Massachusetts Supreme Judicial Court held that a local board of assessors erred in neglecting to account for conservation easements when determining the value of the plaintiff's land.⁷⁶ The plaintiff granted conservation easements on three pieces of land to a Massachusetts charitable corporation.⁷⁷ The easements, which prohibited development of the land, only allowed the plaintiff to have a single family residence with "usual appurtenant outbuildings and structures."⁷⁸ The defendant municipality argued that the plaintiff's easements were invalid.⁷⁹ The court found that the easements were valid and held that the plaintiff was entitled to an assessment that accounted for the impact of the easements on the property's fair market value.⁸⁰

The Michigan Court of Appeals also held that the impact of easements on property values must be considered in the assessment process. In *Lochmoor Club v. City of Grosse Point Woods*,⁸¹ a country club appealed a State Tax Commission decision. The Commission held that easements limiting use of the country club property to club and park purposes should be ignored in assessing property value. The Commission found that the property should be assessed upon its value as a residential subdivision because

72. *Village of Ridgewood v. Bolger Found.*, 517 A.2d 135 (N.J. 1986).

73. *Id.* at 136.

74. *Id.* at 138.

75. *Id.*

76. *Parkinson v. Board of Assessors*, 495 N.E.2d 294 (Mass. 1986).

77. *Id.* at 295.

78. *Id.*

79. *Id.*

80. *Id.* at 296-97.

81. *Lochmoor Club v. City of Grosse Point Woods*, 143 N.W.2d 177 (Mich. Ct. App. 1966).

that constituted the property's highest and best use.⁸² In disagreement, the Lochmoor Club argued that because the easements prohibited the property's conveyance or use as a residential subdivision, a residential subdivision could not constitute the property's highest and best use.⁸³ In agreement with the Club, the Michigan Court of Appeals found that the easements were an "indispensable factor" for proper assessment of the property and that the Commission had utilized "wrong principles" by ignoring the easements when appraising the property.⁸⁴

When easements do not diminish the highest and best use of property, courts have held that they do not decrease the value of the property they protect. For example, in *Adirondack Mountain Reserve v. Board of Assessors*,⁸⁵ the Adirondack Mountain Reserve granted the state a conservation easement prohibiting real estate development, mining, logging, and other uses of the property. The grant further established rights of ingress and egress along the trails, paths, and roadways of the restricted property. State conservation laws limited development of the property, although the Adirondack Mountain Reserve retained ownership of the protected property.⁸⁶ The appellate division held that the easements did not diminish the value of the protected property because the highest and best use of the property prior to the easement was "seasonal recreation" and easements "do not affect recreational use."⁸⁷ In addition, the court noted that the easements benefited the Adirondack Mountain Reserve's adjoining property and concluded that the overall burden on petitioner's land was slight.⁸⁸

In *Adirondack Mountain Reserve*, the easements in question imposed permanent limits on land that was already protected by state laws limiting development on the property. Since most land

82. *Id.* at 179.

83. *Id.* at 179-80.

84. *Id.* at 181.

85. *Adirondack Mountain Reserve v. Board of Assessors*, 471 N.Y.S.2d 703 (N.Y. App. Div.), *aff'd mem.*, 475 N.E.2d 115 (N.Y. 1984).

86. *See id.* at 704.

87. *See id.* at 705.

88. *Id.*

trusts and governmental agencies are unwilling to devote scarce resources to acquiring this type of conservation easement,⁸⁹ this case represents the exception to the rule that conservation easements decrease property value by diminishing the highest and best use of the property.

2. State Studies

State studies also support the proposition that conservation easements decrease the fair market value of the land they protect. Although there have not been studies on this subject in Vermont, a Massachusetts study found that assessors decreased assessments from thirteen percent to ninety-five percent of the properties' pre-easement value when assessing conservation easement land.⁹⁰ Similarly, a Maine Coast Heritage Trust statistical analysis of thirty-six federal tax appraisals of conservation easements showed reductions ranging from five percent to ninety percent in fair market value of restricted land.⁹¹

The variation in the degree to which easements decrease the value of the property they protect can be attributed to differences in the terms of the easements and the characteristics of the individual properties.⁹² The Maine Coast Heritage Trust study acknowledged these differences by dividing the easements into three categories according to the extent of development limitation on the subject property.⁹³ "Forever wild" easements are the most restrictive because they keep properties in their natural state.⁹⁴ "Resource protection" easements decrease potential for development because they focus on the protection of natural resources.⁹⁵ "Limited development" easements are the least restrictive because

89. MAINE COAST HERITAGE TRUST, TECHNICAL BULLETIN NO. 104: PROPERTY TAX ASSESSMENT OF CONSERVATION EASEMENT LAND 3 (June 1991) [hereinafter MAINE BULLETIN].

90. Russell R. Sicard, Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENVTL. AFF. 481, 497 (1975) (now B.C. ENVTL. AFF. L. REV.).

91. MAINE BULLETIN, *supra* note 89, at 4-5.

92. Stockford, *supra* note 19, at 836.

93. MAINE BULLETIN, *supra* note 89, at 3-4.

94. *Id.* at 3. "Forever wild" easements often prohibit commercial exploitation of the land, while permitting stewardship. *Id.*

95. *Id.* "Resource protection" easements prohibit buildings or allow only those buildings necessary to support the land's productivity. *Id.*

they allow some development on properties but restrict the amount or the type of development.⁹⁶

The Maine Coast Heritage study showed that the most restrictive forever wild easements reduced the fair market values of properties by an average of seventy-seven percent.⁹⁷ Resource protection easements reduced fair market value by fifty-three percent, and limited development easements diminished fair market value by an average of twenty-two percent.⁹⁸ Although the most restrictive easements resulted in the greatest average reduction in value, this study demonstrates that there can be wide variations in the appraisal of similarly restrictive easements. For example, forever wild easements resulted in reductions in value between sixty-four and ninety percent.⁹⁹ Resource protection easements resulted in a range of reductions between twenty-one percent and eighty-five percent, and the range for limited development easements was between five percent and thirty-nine percent.¹⁰⁰

The variation in valuations of similarly restrictive easements in the Maine and Massachusetts studies illustrates that it is difficult to predict the fair market value of land protected by easements. The federal tax cases and state court decisions involving disputes over appraisal of conservation easements also demonstrate the unpredictable nature of the assessment process.

96. *Id.* "Limited development" easements are more restrictive than state and local zoning. *Id.* They may require lower residential density or prohibit condominium, multi-unit, and commercial uses to protect important scenic or ecological resources. *Id.*

97. *Id.* at 5.

98. *Id.*

99. *Id.*

100. *Id.* The broad range of reductions in fair market value of resource protection easements was consistent with the broad variety of land types and locations represented in the sample. For example, a timber management easement on land not suitable for development will have less impact on market value than the same easement on coastal land with development potential. *Id.* The range of reductions in fair market value of limited development easements reflected differences in the number of house lots ceded, the demand for housing in the area, and whether the protected land increased the value of any unrestricted land owned by the donor of the easement. *Id.*

*D. Effect of Conservation Easements
on Tax Assessments in Vermont*

Vermont has established that land protected by conservation easements must be assessed with regard to the effect of the restriction on the value of the property.¹⁰¹ Despite Vermont's statutory recognition that conservation easements should decrease property values, owners of Vermont property protected by conservation easements are not guaranteed property tax assessments that accurately reflect the impact of the easements on their property.¹⁰²

In Vermont, town listers do not acknowledge the impact of easements on fair market value in their assessments of conservation easement property.¹⁰³ This is partly because they fear loss of local revenue.¹⁰⁴ Vermont towns rely almost entirely on property taxes to fund local services, such as education, police protection, and highway maintenance.¹⁰⁵ Listers realize that reductions in the taxable value of one property shift the tax burden to other properties in town.¹⁰⁶

101. VT. STAT. ANN. tit. 10, § 6306 (1984 & Supp. 1992).

After acquisition by a municipality, state agency or qualified organization of a right or interest in real property under the authority of this chapter, the owner of any remaining right or interest therein not so acquired shall be taxed, under the applicable provisions of chapter 123 of Title 32, only upon the value of those remaining rights or interests to which he retains title. The state agency or qualified organization, and the department of taxes, shall cooperate with the owner, and with the town assessing such tax, in the determination of the fair market value of any such remaining right or interest.

Id. § 6306(c).

102. Telephone Interview with Darby Bradley, President, Vermont Land Trust (Oct. 3, 1991). Although there are no studies on this subject in Vermont, studies conducted in Massachusetts and Maine support the proposition that conservation easements do not guarantee downward reassessment of property taxes. *See supra* text accompanying notes 90-100.

103. Telephone Interview with Daphne Gratiot, Lister, Town of Pomfret, Vt. (Jan. 6, 1992).

104. Deborah Brighton, Property Tax Implications of Farmland Conservation Easements: The Town's Perspective 1 (prepared for the Vermont Housing and Conservation Board, Mar. 1991); Interview with Ruth Kirchner, former Lister, Town of Rupert, Vt., in Rupert, Vt. (Dec. 30, 1991).

105. Brighton, *supra* note 104, at 1.

106. *Id.*

In addition, listers find it difficult to apply traditional property appraisal methods to land protected by conservation easements.¹⁰⁷ Because conservation easements are uncommon, there are few sales of conservation easements within each town.¹⁰⁸ Therefore, sales of property protected by similar easements are unavailable as a source of comparison.¹⁰⁹

Furthermore, Vermont statutes do not specifically direct town listers to decrease the listed value of property subject to conservation easements. Under Vermont law, town listers must appraise and list properties at their estimated fair market value.¹¹⁰ Although Vermont law requires listers to consider factors that may restrict the use of property in their estimation of fair market value,¹¹¹ the Vermont Lister's Handbook distinguishes between public restrictions imposed by statutes and regulations, such as zoning, and private restrictions imposed by agreements between individuals, such as conservation easements.¹¹² The handbook states: "In general, when you appraise a parcel, we recommend that you assign all rights of ownership to the fee owner, except for those rights precluded by governmental restrictions or those specifically mentioned in the statutes."¹¹³ However, Vermont statutes specifically direct town listers to decrease the listed value of property subject to conservation easements when: (1) state agencies or municipalities hold the easements,¹¹⁴ or (2) when qualifying non-profit conservation organizations hold the easements, and the Division of Property Valuation and Review has certified the transfers as meeting the conservation purposes

107. Telephone Interview with Daphne Gratiot, Lister, Town of Pomfret, Vt. (Jan. 6, 1992).

108. *Id.*

109. *Id.*

110. VT. STAT. ANN. tit. 32, § 3431(a) (1981); *see also id.* § 3481(1).

111. *See* VT. STAT. ANN. tit. 10, § 6306(c) (1984 & Supp. 1992).

112. DIVISION OF PROPERTY VALUATION AND REVIEW, VERMONT DEPARTMENT OF TAXES, VERMONT LISTER'S HANDBOOK 27 (1987).

113. *Id.*

114. VT. STAT. ANN. tit. 10, § 6306(b) (1984 & Supp. 1992); VT. STAT. ANN. tit. 6, § 33 (1988). State agencies referred to are the Agency of Natural Resources or any of its departments; the Agency of Transportation; the Department of Agriculture, Food and Markets; and the Vermont Housing and Conservation Board. VT. STAT. ANN. tit. 10, § 6301a(1) (Supp. 1992).

outlined in the statute.¹¹⁵ Because few landowners complete the certification procedure, town listers do not reduce the taxable value of properties when private, non-profit organizations hold the conservation easements.¹¹⁶ As of February, 1992, the Division of Property Valuation and Review, which handles the certification process, had certified twenty-three properties.¹¹⁷

In many cases, conservation easements are jointly held by a state agency and a private non-profit organization.¹¹⁸ The taxable value of many of these properties has not been reduced even though the Division of Property Valuation and Review recommends that the owner be taxed only on the basis of the value of the remaining rights.¹¹⁹

Some listers do not reassess conservation easement land because they believe that such land has an increased value based on the greater desirability of the protected property.¹²⁰ Although a home may be desirable because it is situated on undeveloped land, an owner can achieve the same scenic environment by refraining from developing the land.¹²¹ The owner of conservation easement land has relinquished the right to develop the land.¹²² This right is part of the land's value; removing the right to develop will significantly erode the pool of potential buyers and may reduce the ultimate selling price.¹²³ Therefore,

115. VT. STAT. ANN. tit. 10, § 6306(b) (1984 & Supp. 1992); see also Brighton, *supra* note 104, at 6.

116. Brighton, *supra* note 104, at 6.

117. Telephone Interview with Mary Jane Grace, Administrative Assistant, Vermont Department of Taxes, Division of Property Valuation and Review (Feb. 19, 1992). The total number of properties that could be certified is unavailable because there are a number of land trusts and state agencies in Vermont that accept conservation easements.

118. Brighton, *supra* note 104, at 6. Where conservation easements are jointly held by state and private entities, the applicable state agency is either the Vermont Housing and Conservation Board or the Department of Agriculture, Food and Markets. *Id.*

119. *Id.*

120. Telephone Interview with Daphne Gratiot, Lister, Town of Pomfret, Vt. (Jan. 6, 1992).

121. MAINE BULLETIN, *supra* note 89, at 3.

122. *Id.*

123. *Id.*

the decreased value of such land should be reflected in property tax assessments.¹²⁴

III. TAX INCENTIVES FOR CONSERVATION

A. Federal Tax Incentives

Donation of a conservation easement will qualify the donor for a federal income tax deduction if the easement grant meets Internal Revenue Service deductibility criteria. First, the easement must be donated in perpetuity to a qualified organization, such as a land trust or a state agency.¹²⁵ Second, it must be donated "exclusively for conservation purposes."¹²⁶ The Internal Revenue Code defines conservation purposes as:

- (i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland and forest land) where such preservation is—
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or
- (iv) the preservation of an historically important land area or a certified historic structure.¹²⁷

In addition to these criteria, the appraisal of the easement must meet stringent standards set by the Internal Revenue Service.¹²⁸ The deduction a property owner can claim usually equals the difference between the value of the property before the

124. But where a landowner owns two adjacent lots and only places a conservation easement on one lot, the easement, by ensuring scenic views and privacy, might increase the value of the unrestricted lot. *Id.*

125. DIEHL & BARRETT, *supra* note 1, at 12.

126. *Id.* at 12-13.

127. I.R.C. § 170(h)(4)(A) (1988); see also DIEHL & BARRETT, *supra* note 1, at 12-21 (explaining the I.R.S. tax deductibility criteria and providing examples of easements that fit the conservation purposes).

128. DIEHL & BARRETT, *supra* note 1, at 51.

easement was granted and the value after the easement was granted.¹²⁹ Taxpayers who make large donations cannot deduct all of their taxable income by granting conservation easements.¹³⁰ Generally, the deduction cannot exceed thirty percent of the taxpayer's adjusted gross income, but any excess amount may be carried forward and deducted over the next five years.¹³¹ Because each donor's tax situation is unique, however, each donor should seek professional counsel before taking advantage of this federal tax incentive program.¹³²

B. Tax Incentives for Conservation in Other States

Although many states have developed property tax incentive programs to encourage conservation, very few of these programs apply specifically to land protected by conservation easements.¹³³ Traditionally, property tax appraisals have been based upon the highest and best use of a property, rather than on its present use. This system encourages conversion of property to its highest and best use as determined by the assessor.¹³⁴

States have enacted legislation designed to discourage the development-inducing pressures of the assessment process. These statutes generally provide for tax assessment based on a property's current use, rather than its highest and best use.¹³⁵ This methodology is referred to as differential taxation or use-value assessment.¹³⁶ The types of land which qualify for these programs vary between the states. Agricultural land is eligible for assessment at its present use in all states that have differen-

129. *Id.*; see also *supra* text accompanying notes 59-62.

130. DIEHL & BARRETT, *supra* note 1, at 51.

131. *Id.*

132. *Id.* at 52. For example, some donors may be subject to the alternative minimum tax, an alternate income tax for taxpayers whose deductions and tax shelters might otherwise eliminate or reduce their tax obligation. *Id.*

133. Stockford, *supra* note 19, at 842.

134. John B. Dean, Note, *The California Land Conservation Act of 1965 and the Fight to Save California's Prime Agricultural Lands*, 30 HASTINGS L.J. 1859, 1863-64 (1979).

135. See generally Barry A. Currier, *An Analysis of Differential Taxation as a Method of Maintaining Agricultural and Open Space Land Uses*, 30 U. FLA. L. REV. 821 (1978); see also Stockford, *supra* note 19, at 843.

136. Stockford, *supra* note 19, at 843.

tial taxation programs.¹³⁷ Forestland, open space, and scenic, historical, or ecologically significant properties also are eligible under some state programs.¹³⁸ There are only a few states, however, that have programs applying specifically to properties protected by conservation easements.¹³⁹

New Hampshire's Current Use Taxation program expressly includes properties protected by conservation easements.¹⁴⁰ The Conservation Restriction Assessment provisions were added to the state's existing Current Use Taxation program in 1990 to provide equitable assessments of conservation easement land and to promote the preservation of open space in New Hampshire.¹⁴¹ New Hampshire assessing officials now are required to "assess restricted land for general property tax purposes at values based upon permanent restrictions, and in no case greater than those determined to be the fair market value for open space land" by the Current Use Advisory Board.¹⁴² If the current use program ceases to exist, assessment of land protected by easements must account for the permanent restrictions on the land.¹⁴³

Because New Hampshire's Conservation Restriction Assessment provision only recently was enacted, it is difficult to gauge its effectiveness.¹⁴⁴ Some landowners have attempted to take advantage of the program by granting easements on small parcels of land with little conservation value to reduce their property taxes.¹⁴⁵ In response, the New Hampshire Legislature amended the Conservation Restriction Assessment program in 1991 to

137. Dean T. Massey & Margaret B. Silver, *Property Tax Incentives for Implementing Soil Conservation Programs Under Constitutional Taxing Limitations*, 59 *DENV. L.J.* 485, 499 (1982).

138. *Id.* at 499-500 & nn.96-100.

139. See CAL. REV. & TAX. CODE §§ 421-430.5 (West 1987 & Supp. 1992); FLA. STAT. ANN. § 193.501 (West 1989); N.H. REV. STAT. ANN. §§ 79-A:1 to A:26, 79-B:1 to B:11 (1991 & Supp. 1991).

140. N.H. REV. STAT. ANN. §§ 79-A:1 to A:26, 79-B:1 to B:11 (1991 & Supp. 1991).

141. *Id.* § 79-B:1.

142. *Id.* § 79-B:3. Assessing officials must appraise open space land at valuations based upon the current use values established by the Current Use Advisory Board. *Id.* § 79-A:5.

143. *Id.* § 79-B:3.

144. Telephone Interview with Sylvia Bates, Land Protection Specialist, Society for the Protection of New Hampshire Forests (Jan. 9, 1992).

145. *Id.*

ensure that only "those conservation restriction lands which provide for a demonstrated public benefit" will receive special property tax assessment.¹⁴⁶ The New Hampshire program, unlike many state current use programs, covers conservation easements granted to both state agencies and qualified non-profit conservation organizations.

In contrast, the current use programs in many other states apply only to agreements between property owners and state agencies; they do not apply to agreements between property owners and conservation organizations, such as land trusts.¹⁴⁷ Therefore, the conservation easements granted to private land trusts are not eligible for differential taxation even though the particular properties would qualify under the programs if the easements were held by state agencies.¹⁴⁸

146. N.H. REV. STAT. ANN. § 79-B:4 (V) (Supp. 1991).

A permanent conservation restriction on open space land shall be considered to provide a demonstrated public benefit if it protects, in perpetuity, at least one of the following values:

- (a) The preservation of land for outdoor recreation by, or the education of, the general public, whereby:
 - (1) The general public must have the regular opportunity for access to and use of the land for pedestrian purposes; and
 - (2) The land has conservation and recreational values which make it attractive for public use.
- (b) A relatively natural habitat for fish, wildlife, or plants, or similar ecosystem, whereby:
 - (1) The property must be in a relatively natural state; and
 - (2) Rare or endangered or threatened species must be present; or the property must contribute to the ecological viability of a park or other conservation area; or it must otherwise represent a high quality native terrestrial or aquatic ecosystem.
- (c) The preservation of open space land, whereby:
 - (1) There is scenic enjoyment by the general public from a public way or from public waters; or
 - (2) The open space protection is pursuant to a clearly delineated federal, state, or local government conservation policy.
- (d) The preservation of a historically important land area, whereby:
 - (1) The property is either independently significant due to recorded local, regional or state history, or is within a historic district; or
 - (2) The property is immediately adjacent to a historic district; or
 - (3) The land's physical or environmental features contribute to the historic or cultural integrity of a property listed on the National Register of Historic Places.

Id. § 79-B:4 (VI).

147. Stockford, *supra* note 19, at 845.

148. *Id.*

IV. TAX INCENTIVES FOR CONSERVATION IN VERMONT

Vermont's Current Use Appraisal program provides for assessment of eligible property based on its current use, rather than the property's highest and best use.¹⁴⁹ However, Vermont does not provide property tax incentives to landowners who grant conservation easements that do not meet the statutory requirements of the state's current use program. The current use program provides property tax relief to individual landowners who actively manage twenty-five acres or more of agricultural land or forestland.¹⁵⁰ The property is taxed at its agricultural or forestland use value as set annually by the Current Use Advisory Board ("board").¹⁵¹ Every August, the board holds a public hearing to receive testimony regarding use value appraisals for the coming year.¹⁵² Before February fifteenth each year, the board must submit its recommended schedule of criteria and values for the current tax year to the board's director.¹⁵³ The director then distributes the valuations to the towns, and listers are required to appraise eligible properties at those use values.¹⁵⁴

To ensure that Vermont towns will not have an "unreasonable reduction" in revenue raised through property taxes, the program provides a use tax reimbursement fund.¹⁵⁵ The town receives state reimbursement for the difference between the amount of taxes it would have received at fair market value and the amount of taxes paid by the landowner under the current use program.¹⁵⁶

149. VT. STAT. ANN. tit. 32, §§ 3751-3763 (1981 & Supp. 1992).

150. *Id.* §§ 3752(1), (9), 3755.

151. *Id.* § 3754(a)-(c). The board meets annually to review all current use land values from prior years, and to establish new criteria and values to be recommended for the current tax year. The board's criteria and recommended values may be based on the class, type, grade, productive capacity, income producing capability, and location of the land. *Id.* § 3754(a).

152. *Id.* § 3754(b).

153. *Id.* § 3754(c).

154. *Id.*

155. *Id.* § 3759.

156. *Id.* §§ 3759-3760.

Landowners may withdraw property from the Current Use Appraisal program by petitioning for a determination of the fair market value of the land.¹⁵⁷ Although there is no penalty for selling property or withdrawing property from the program, an owner who develops land enrolled in the program must pay a land use change tax equal to ten percent of the full fair market value of the changed land, in addition to the annual property tax.¹⁵⁸

Because landowners are allowed to withdraw their property from the program, Vermont's Current Use Appraisal program grants property tax relief to landowners who temporarily protect their property from development. Ironically, owners who permanently protect their property by granting conservation easements are not always eligible for the current use program. For example, properties that are used for recreation, or those that are primarily wetlands, are not eligible for the Current Use Appraisal program because they are not productive agricultural land or forestland. The absence of property tax incentives to permanently protect land effectively contradicts Vermont's policy of conserving its valuable scenic and natural resources.¹⁵⁹ To remedy this situation, Vermont should expand its current use program to expressly provide property tax incentives for all landowners who permanently protect their land with conservation easements.

V. PROPOSAL

A. *Components of Current Use Amendment*

Vermont should amend its Current Use Appraisal program to provide property tax incentives specifically designed for conserva-

157. *Id.* § 3757(b).

158. *Id.* § 3757(a).

159. VT. STAT. ANN. tit. 10, § 6301 (1984). "It is the purpose of this chapter to encourage and assist the maintenance of the present uses of Vermont's agricultural, forest, and other undeveloped land and to prevent the accelerated residential and commercial development thereof; to preserve and to enhance Vermont's scenic natural resources" *Id.*

The purpose of this subchapter is . . . to achieve more equitable taxation for undeveloped lands; to encourage and assist in the preservation and enhancement of Vermont's scenic natural resources; and to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety and welfare.

VT. STAT. ANN. tit. 32, § 3751 (1981 & Supp. 1992).

tion easements.¹⁶⁰ New Hampshire's Conservation Restriction Assessment program could be used as a model for expanding Vermont's current use program.¹⁶¹ Under the amendment, the Vermont Current Use Advisory Board would submit an annual schedule of criteria and values for conservation easement land to the director of the current use program.¹⁶² The director would then distribute the valuations to the towns, and listers would appraise eligible properties at those values. Ideally, the towns would receive state reimbursement for the difference between the amount of taxes they would have received at fair market value and the amount of taxes actually paid by conservation easement landowners. The Vermont Legislature, however, is considering changing the current use program because the state can no longer afford to fully reimburse the towns.¹⁶³ Realistically, Vermont may be able to reimburse the towns only for a percentage of the tax revenues lost through the downward reassessment of conservation easement properties.

Because the state will be unable to fund an expanded current use program fully, towns will want to ensure that only land with authentic conservation value is given preferential property tax treatment. To that end, Vermont could require that potentially eligible land possess a "demonstrated public benefit." Vermont could define demonstrated public benefit as permanent protection of specific values, similar to those enumerated in the New Hampshire statute.¹⁶⁴ Additionally, the program could require Vermont towns to decide whether eligible land possesses a demonstrated public benefit to qualify for the current use program. This requirement would ensure that the protected property is important to the community, thereby meriting special

160. The amendment should apply to conservation easements granted to municipalities, state agencies, and qualified conservation organizations. Vermont has additional tax reform options which are beyond the scope of this note, such as implementing a statewide nonresidential property tax system where money goes into a general state fund and is reallocated to towns based on need. See generally Linda D. Duva, Note, *Taxing Vermonters for Education: Reform of the Property Tax*, 15 VT. L. REV. 479 (1991).

161. See *supra* notes 140-46 and accompanying text.

162. This procedure would fit into the present Current Use Appraisal program in which the Current Use Advisory Board sets annual "use values" for agricultural and forestland. See *supra* notes 149-56 and accompanying text.

163. See Susan Allen, *Wealthy Landowners Will Continue to Reap Tax Break*, VALLEY NEWS (West Lebanon, N.H.), Nov. 21, 1991, at 2.

164. See *supra* note 146 and accompanying text.

property tax treatment. As a result, listers might be more amenable to downward reassessment of conservation easement land.

As an alternative to town listers, Vermont could employ professional regional appraisers to assess property for taxation purposes. Because there are relatively few properties covered by conservation easements in each town, comparison of such properties on a local level is difficult. For this reason, regional appraisers could base their assessments on comparisons of a larger pool of regional fair market value data, and they could effectively employ the market data approach to the valuation of conservation easement land.¹⁶⁵ Some listers argue, however, that property values vary significantly from town to town and that comparison on a regional basis would not be equitable.¹⁶⁶ In addition, Vermonters may object to relinquishing local control of property assessment to state regional appraisers.

A provision that guarantees downward reassessment of conservation easement land, by taxing it at a lower rate or at a lower percentage of fair market value than unprotected land, is another important component of this proposed conservation easement assessment program.¹⁶⁷ This guarantee would provide an incentive for Vermont landowners to grant conservation easements on their property.¹⁶⁸

165. See *supra* text accompanying notes 21-24 (explaining the market data approach which calculates the fair market value of property through comparison of similar properties that were recently sold in the same market).

166. Telephone Interview with Daphne Gratiot, Lister, Town of Pomfret, Vt. (Jan. 6, 1992).

167. See Stockford, *supra* note 19, at 850.

168. *Id.* Stockford states:

A property owner would be guaranteed a lower tax burden regardless of an assessor's subjective appraisal of the effect of the easement on fair market value. For example, if property in a locality is normally assessed at fifty percent of fair market value, a statute providing that property burdened with conservation easements be assessed at forty percent of fair market value would give an automatic tax break to the owner. Similarly, a statute allowing easement-burdened property to be taxed at two and a half percent of assessed value in a locality where the normal tax rate is four percent would provide easement donors with tangible, automatic benefits not subject to an assessor's discretion.

Id.

In the event that landowners violate their conservation easements, the conservation easement assessment program could provide for penalties or rollback taxes.¹⁶⁹ Similar to the land use change tax of Vermont's Current Use Appraisal program,¹⁷⁰ these penalties could allow Vermont towns to recover a percentage of the tax benefits conferred on landowners, under the assumption that the conservation easements were permanent.

B. Benefits of Current Use Amendment

Amending Vermont's Current Use Appraisal program to provide property tax incentives for conservation easements would advance Vermont's policy of conserving its scenic and natural resources. By providing town listers with consistent guidelines,¹⁷¹ the program would promote uniform assessment of conservation easement property and ensure definite tax benefits for granting conservation easements. These tax benefits, coupled with income and estate tax incentives,¹⁷² may encourage some Vermonters to permanently protect their land.

Private protection of undeveloped land will provide environmental benefits to Vermont towns by preserving more of the rural character and the natural resources of a community than a town acquisition program could afford.¹⁷³ A public acquisition program would require a sizable expenditure of tax revenue to

169. *Id.* at 851. For example, New Hampshire's Conservation Restriction Assessment program provides:

In addition to any civil penalties assessed against the landowner, open space land which has been classified as restricted land pursuant to this chapter but which has been developed or put to a use violating its restricted classification shall be subjected to a penalty in addition to the annual real estate tax imposed upon such property of 10 percent of the full and true value of the portion of said land on which an inconsistent use has occurred as prescribed by RSA 75:1 without regard to the restriction. The penalty shall become due and payable to the municipality as of the date of the inconsistent use. Such developed land shall no longer qualify for assessment as restricted land under this chapter.

N.H. REV. STAT. ANN. § 79-B:6 (1991).

170. See *supra* notes 157-58 and accompanying text.

171. See *supra* notes 166-68 and accompanying text.

172. See *supra* text accompanying notes 14-15.

173. MAINE COAST HERITAGE TRUST, TECHNICAL BULLETIN NO. 112: THE POSITIVE ECONOMICS OF CONSERVATION 4 (1991) [hereinafter TECHNICAL BULLETIN].

purchase property that would then be removed from the tax rolls.¹⁷⁴ In contrast, private ownership of conservation easement land enables towns to preserve their natural resources without purchasing property and without losing all tax revenues from the property.¹⁷⁵

In addition to promoting Vermont's conservation policy, private ownership of undeveloped land would provide economic benefits to Vermont towns by protecting the local tax base. According to the betterment theory, property that is adjacent to land protected by a conservation easement has an increased market value.¹⁷⁶ The betterment theory provides that buyers will pay more for property that is adjacent to conservation easement land because the easement ensures that the land will never be developed.¹⁷⁷ The increased market value of surrounding properties will result in higher tax assessments that will help counterbalance the decreased tax contribution from conservation easement land.

Furthermore, undeveloped land preserves the local tax base by producing more in tax income than it costs in services.¹⁷⁸ Residential development, on the other hand, often increases taxes because it requires costly services such as education costs, waste disposal, road maintenance, and police protection that may not be fully funded from the property's tax revenues.¹⁷⁹ A recent Vermont study on property taxes and growth revealed that the

174. Stockford, *supra* note 19, at 847.

175. *Id.*

176. *Id.* at 847, 851.

177. *Id.* at 847 (stating that areas of limited development are usually the most desirable and costly places to live).

178. *See, e.g.*, TECHNICAL BULLETIN, *supra* note 173, at 2.

179. *Id.* For example, Scenic Hudson, a New York land trust, conducted research on the fiscal impact of development on three Dutchess County towns. For every \$1.00 of revenue generated by residential development, the average cost to the community was \$1.19. In contrast, undeveloped land cost an average of \$.38 for every \$1.00 of revenue it generated. *Id.* at 4. American Farmland Trust has conducted a number of studies that confirm Scenic Hudson's findings that the increased public costs of residential development exceed the public revenues generated. *Id.* at 5.

average property tax bill on a Vermont house increased as the town's population grew through residential development.¹⁸⁰

Residential growth, however, is not the only type of development that causes an increase in property taxes. The same study indicated a general trend of increased property taxes as a result of commercial and industrial growth in Vermont towns.¹⁸¹ There are several possible explanations for this trend. Like residential developments, commercial and industrial developments often require expanded municipal services for road maintenance, traffic control, waste disposal, and police protection.¹⁸² In addition, the tax benefits of commercial and industrial property decline each year because such property does not appreciate as rapidly as other property.¹⁸³ Finally, commercial and industrial developments spur costly growth because they create jobs, which increases the need for residential housing and attendant municipal services as people relocate.¹⁸⁴ Because research shows that residential, commercial, and industrial growth tends to increase municipal costs, Vermont should encourage the preservation of undeveloped land. Undeveloped land protects the local tax base by producing more in tax income than it costs in municipal services.¹⁸⁵

CONCLUSION

Vermonters who place conservation easements on their property permanently relinquish their right to develop that land. Removal of development rights significantly decreases the value of land by narrowing the pool of potential buyers and by reducing the amount potential buyers will pay. Although federal tax decisions, other state court decisions, and state studies all recognize a reduction in fair market value of conservation

180. DEB BRIGHTON & JIM NORTHUP, *THE TAX BASE AND THE TAX BILL* ii tbl. 2 (1990) (sponsored by Vermont League of Cities and Towns and Vermont Natural Resources Council).

181. *Id.* at iii tbl. 4.

182. *Id.* at v.

183. *Id.*

184. *Id.*

185. *See supra* notes 178-79 and accompanying text.

easement land, Vermont landowners who grant such easements are not guaranteed a reduction in their local property taxes.

Inclusion of conservation easements in Vermont's Current Use Appraisal program would guarantee property tax reductions for Vermonters who place this type of restriction on their property. The suggested amendment to the program would protect Vermont's scenic and natural resources while maintaining the local tax base. After meeting with over two thousand Vermonters to discuss their concerns about the state's future, Douglas Costle¹⁸⁶ observed:

The people of Vermont care deeply about the future of their state; and, while they are very proud of what it is today, they are also very troubled about what it may become. Put most simply, they see changes occurring at an accelerating pace, and they fear that what makes Vermont so special to them may get lost in the shuffle of those changes. They worry that the Vermont of the future will not look familiar to them—that we will have lost the special sense of community and natural beauty that are the essence of Vermont.

Vermonters are not afraid of change, but they want to shape it.¹⁸⁷

Providing property tax incentives for conservation easements will help Vermonters shape change in their communities so that what makes Vermont special will not be lost.

Susan M. Ceglowski

186. Chairman of the Governor's Commission on Vermont's Future and former Dean of Vermont Law School.

187. REPORT OF THE GOVERNOR'S COMMISSION ON VERMONT'S FUTURE: GUIDELINES FOR GROWTH, at 3 (1988).