

TAXATION OF PRESERVATION INTERESTS AS PROPERTY IN VERMONT

INTRODUCTION

Conservation of open space and preservation of historic structures in the state of Vermont can be accomplished through two statutory devices of recent origin. Each approach is based on the idea of splitting the fee simple ownership of the property between the fee simple owner and a grantee of a specified less-than-fee interest. The less-than-fee interest conveyed away by the owner is in the nature of rights to develop or alter the property. As a result, the fee owner retains title to the land, but potential uses of the property are restricted, as though a common law easement or covenant were created.

Of Vermont's two statutes, one provides for the acquisition of less-than-fee interests by governmental agencies for the purpose of preserving open space.¹ The other statute creates a class of less-than-fee rights and interests without restriction on who may hold the interest.² This statute is limited to use for preservation of his-

1. VT. STAT. ANN. tit. 10, §§ 6301-6308 (1973 & Cum. Supp. 1979).

2. VT. STAT. ANN. tit. 10, §§ 821-823 (Cum. Supp. 1979), provide:

§ 821. Definitions

"Preservation rights and interests" mean rights to restrict or condition the use, modification or subdivision of a structure or site, and rights to perform, or require the performance of, specified activities with respect thereto. Such rights and interests shall be for the purpose of preserving, rehabilitating, or restoring a structure or site having significant historical, architectural, cultural or archaeological characteristics. Such rights or interests may, but need not be, stated in the form of a restriction, right, easement, covenant or condition.

§ 822. Rights and interests

Preservation rights and interests shall be valid, exercisable, and enforceable by the grantee thereof and by the grantee's heirs, successors and assigns, against the grantor thereof and the grantor's heirs, successors and assigns, whether or not such rights or interests are appurtenant to or benefit a specific parcel of real property, and regardless of privity of contract, or lack thereof, between the holder of such rights or interests and the owner of the encumbered property.

§ 823. Interests in real property

Preservation rights and interests shall be deemed to be interests in real property and shall run with the land. A document creating such a right or

toric sites.

Each law affects the local tax base by burdening land with restrictions that may alter the fair market value of the property from which the property tax is assessed. This note will examine the impact of preservation rights created by the second statute on local property taxation by reviewing the tax status of the burdened property and by examining the possibility of separately taxing or exempting the newly created interest in land.

A town's ability to tax these severed interests is open to question. Because both statutory and case law give no clear answer, and because there are many policy issues related to the tax status of preservation rights, this note proposes that the Vermont General Assembly act to define clearly the taxability of preservation rights. A review of the competing public policies will indicate that the problem's most equitable solution may lie in exempting preservation interests from taxation and limiting the types of organizations capable of holding them.

I. VERMONT'S PRESERVATION RIGHTS STATUTE

Title 10, section 821 of the Vermont Statutes Annotated,³ entitled "Conservation and Preservation Rights and Interests," creates a new kind of property interest very similar in concept to common law easements or covenants.⁴ By obtaining such an inter-

interest shall be deemed to be a conveyance of real property and may be recorded under chapter 5 of Title 27. Such a right or interest shall be subject to the requirement of filing a notice of claim within the forty year period as provided in section 603 of Title 27. Such a right or interest shall be enforceable in law or in equity.

3. (Cum. Supp. 1979). The text of section 821 is provided in note 2 *supra*.

4. Common law and statutory schemes for preservation through using a less-than-fee technique are well documented. See generally R. BRENNEMAN, *PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND* (1967); J. COSTONIS, *SPACE ADRIFT* (1974); W. WHYTE, *SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS*, URBAN LAND INSTITUTE TECHNICAL BULLETIN No. 36 (1959) [hereinafter cited as WHYTE, *SECURING OPEN SPACE*]; W. WHYTE, *THE LAST LANDSCAPE* (Anchor Books ed. 1970); N. WILLIAMS, *LAND ACQUISITION FOR OUTDOOR RECREATION*, OUTDOOR RECREATION REVIEW COMMISSION STUDY REPORT No. 16 (1962); Brenneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976); Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 LAW & CONTEMP. PROB. 416 (1971); Roe, *Innovative Techniques to Preserve*

est through purchase or gift from the fee simple property owner, preservationists can exercise long-lasting⁵ and effective control over a parcel without the necessity of an outright acquisition of the land or building.⁶ For example, a preservation organization may bargain with the owner of an architecturally significant building in order to control the changes that can be made to the building's exterior. The right that the organization receives is a preservation restriction. The document creating the right, which must be recorded in the land records,⁷ would allocate specific responsibility for the preservation of architectural details and environmental amenities between the fee owner and the holder of the restriction.⁸

Rural Land Resources, 5 ENVT'L AFF. 419 (1976); Note, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611 (1970); Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, 4 ENVT'L AFF. 481 (1975). Comprehensive digests and summaries of statutes creating less-than-fee interests are contained in: Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP., PROB. & TR. J. 540 (1979); Note, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383 (1976).

5. *E.g.*, VT. STAT. ANN. tit. 10, § 823 (Cum. Supp. 1979), places no restriction on the length of time a preservation restriction is valid. This interest is subject to recordation in the land records every forty years to remain enforceable, however.

6. Gitelman, *Preserving Arkansas Architectural and Archeological History: Act 882 of 1975*, 28 ARK. L. REV. 373, 379-80 (1974). Some have argued that the cost of acquiring a less-than-fee interest in property subject to strong development pressures can almost equal the cost of an outright purchase. See Hagman, *Open Space Planning and Property Taxation—Some Suggestions*, 1964 WIS. L. REV. 628, 630; Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 195 (1961). But see WHYTE, SECURING OPEN SPACE, *supra* note 4, at 30-35; Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622, 1637 (1962). The cost of an easement may in fact be minimal for nonprofit charities acting as recipients of donated interests for which the donor is seeking favorable federal tax treatment. The tax benefits accorded such charitable contributions are one of the advantages of the restriction technique. See 1 R. BRENNEMAN, SHOULD "EASEMENTS" BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS? A STUDY FOR THE NATIONAL PARK SERVICE 88-95 (1975); NEW ENGLAND NATURAL RESOURCES CENTER, CASE STUDIES IN LAND CONSERVATION, Case No. 4, 7-10 (K. Browne ed. 1977); Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334, 336-40 (1976).

7. VT. STAT. ANN. tit. 10, § 823 (Cum. Supp. 1979).

8. MASS. ANN. LAWS ch. 184, § 31 (Michie/Law. Co-op 1977), defines the scope of a preservation restriction as follows:

A preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land or in any order of taking, appropriate to preservation of a structure or site historically significant for its architecture, archeology or associations, to forbid or limit

A typical agreement would give the holder of the severed preservation interest control over a structure's exterior and prohibit the original title holder from demolishing or altering the building without the consent of the holder of the preservation interest.⁹ Ideally, the content of such restrictions will vary with the particular property burdened and the preservation goals of the organization acquiring the interest.¹⁰

Although it is possible to accomplish the same result through the use of the common law system of easements and covenants,¹¹ such an approach is often thought to be too inflexible or too technically complicated for use on a frequent and universal basis.¹² Two typical obstacles to using the common law approach are the questions whether highly technical architectural restrictions phrased in the form of common law covenants would "run with the land"¹³ and whether common law easements in gross may be freely assigned.¹⁴

any or all (a) alterations in exterior or interior features of the structure, (b) changes in appearance or condition of the site, (c) uses not historically appropriate, (d) field investigation, . . . or (e) other acts or uses detrimental to appropriate preservation of the structure or site.

9. Jahns, *Preservation Restrictions*, in *HISTORIC PRESERVATION LAW* 343-73 (N. Robinson ed. 1979), contains an explanation of the function of preservation restrictions with sample documents for reference.

10. 1 R. BRENNEMAN, *SHOULD "EASEMENTS" BE USED TO PROTECT NATIONAL HISTORIC LANDMARKS? A STUDY FOR THE NATIONAL PARK SERVICE* 72 (1975).

11. See N. WILLIAMS, *supra* note 4, at 47.

12. *Id.* at 48. See also J. COSTONIS, *supra* note 4, at 152-59; Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 *HARV. L. REV.* 574, 613-15 (1972).

13. If a covenant runs with the land, future owners of the burdened property other than the original parties to the covenant are bound by its terms. For a covenant to run with the land, there must be a connection between the use of the land and the terms of the covenant, and the types of uses recognized by the common law are usually restricted. Further, for a subsequent owner to be bound, he must stand in a specific relationship—mutual or successive—with the original covenantor, as a grantee or tenant, for example. See 2 *AMERICAN LAW OF PROPERTY* §§ 9.8, .11, .13, .16 (A.J. Casner ed. 1952).

14. Easements in gross are generally thought to be personal rights unconnected with any parcel of land and under the common law are not assignable to third parties. Appurtenant easements, which involve restrictions or obligations placed on a servient tenement for the benefit of a dominant tenement, can generally be conveyed to grantees of the original owner. See 2 *AMERICAN LAW OF PROPERTY* §§ 8.6, .9 (A.J. Casner ed. 1952).

Each question has received different treatment from state to state.¹⁶ A number of states have created *statutory* interests free from the legendary legal difficulties associated with the common law system in order to encourage historic preservation by the use of preservation restrictions. By January 1980, thirty-five states had enacted legislation facilitating preservation and conservation through the less-than-fee approach.¹⁶

Vermont's statute is phrased broadly to include restrictions or conditions on the "use, modification or subdivision of a structure or site, and rights to perform, or require the performance of, specified activities with respect thereto."¹⁷ The statute limits the use of

15. Netherton, *supra* note 4, at 545-53.

16. ARK. STAT. ANN. §§ 50-1201 to -1206 (Cum. Supp. 1979); CAL. GOV'T CODE §§ 50280-50290, 6950-6954 (West Supp. 1980); CAL. REV. & TAX CODE §§ 439-439.4 (West Supp. 1980); CAL. PUB. RES. CODE §§ 5031-5033 (Cum. Supp. 1980); COLO. REV. STAT. §§ 38-30.5-101 to -110 (Cum. Supp. 1978); CONN. GEN. STAT. ANN. §§ 47-42a to -42c (West 1972); DEL. CODE ANN. tit. 7, §§ 6811-6815 (Cum. Supp. 1978); FLA. STAT. ANN. § 704.06 (West Cum. Supp. 1979); GA. CODE ANN. §§ 85-1407 to -1410 (1978 & Cum. Supp. 1979); IDAHO CODE § 67-46-13 (Cum. Supp. 1979); ILL. ANN. STAT. ch. 85, §§ 2101-2111, ch. 24, §§ 11.48.2-2 to -7 (Smith-Hurd Supp. 1979); IND. CODE ANN. §§ 14-4-5.5-1 to -4 (Burns 1973 & Cum. Supp. 1979); IOWA CODE ANN. §§ 111D.1-5 (West Cum. Supp. 1980); KY. REV. STAT. ANN. §§ 65.420-.480 (Baldwin 1979); LA. REV. STAT. ANN. § 9:1252 (West Supp. 1980); ME. REV. STAT. ANN. tit. 33, §§ 667-668; tit. 36, § 701A (1964); MD. REAL PROP. CODE ANN. § 2-118 (1974 & Cum. Supp. 1979); MD. ANN. CODE art. 81, §§ 12E to 12E-1 (1957); MASS. ANN. LAWS ch. 184, §§ 31-33 (Michie/Law. Co-op 1977 & Cum. Supp. 1979); MICH. COMP. LAWS §§ 554-705 to -719 (MICH. STAT. ANN. §§ 26.1287(1)-(19) (Callaghan Supp. 1980)); MINN. STAT. ANN. §§ 84.64-.65 (West Cum. Supp. 1980); MO. ANN. STAT. §§ 67-870 to -910 (Vernon Cum. Supp. 1980); MONT. REV. CODES ANN. §§ 76-6-210 to -211 (1979); N.H. REV. STAT. ANN. §§ 477:45-.47 (Cum. Supp. 1979); N.J. STAT. ANN. §§ 13:8A-30 to -46 (West 1979); N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Cum. Supp. 1980); N.C. GEN. STAT. §§ 160A-401 to -407 (1976); OR. REV. STAT. §§ 271.710-.740 (Replacement 1978); PA. STAT. ANN. tit. 16, §§ 11941-11947; tit. 32, §§ 5001-5013 (Purdon Supp. 1980); R.I. GEN. LAWS §§ 34-39-1 to -6 (Cum. Supp. 1979); S.C. CODE §§ 27-9-10 to -20 (1976 & Cum. Supp. 1979); S.D. CODIFIED LAWS ANN. § 1-19B-16 (1974); TENN. CODE ANN. §§ 11-15-101 to -108 (1980); UTAH CODE ANN. §§ 63-18A-1 to -6 (1953); VT. STAT. ANN. tit. 10, §§ 6301-6308, 821-823 (1973 & Cum. Supp. 1979); VA. CODE §§ 10-151 to -158 (1978); WASH. REV. CODE ANN. §§ 84.34.200-.921 (Supp. 1978); WIS. STAT. ANN. § 61.34(3m) (West Supp. 1979). For a detailed analysis of the purpose and scope of these statutes, see, e.g., Netherton, *supra* note 4; and Note, *Conservation Restrictions: A Survey*, *supra* note 4. R.I. GEN. LAWS § 34-39-1 (Cum. Supp. 1979) provides a concise statement of purpose shared by many of the statutes: "The purpose of this chapter is to grant a special legal status to conservation restrictions and preservation restrictions so that landowners wishing to protect and preserve real property may do so without uncertainty as to the legal effect and enforceability of such restrictions."

17. VT. STAT. ANN. tit. 10, § 821 (Cum. Supp. 1979). See text of section 821 at note 2

these rights and interests to "the purpose of preserving, rehabilitating, or restoring a structure or site having significant historical, architectural, cultural or archaeological characteristics."¹⁸ The statute, however, provides no standards for judging historical, architectural, cultural, or archaeological significance.¹⁹

Subsequent sections of Vermont's preservation rights statute remove the common law requirements of appurtenancy for easements²⁰ and of privity of estate associated with covenants that run with the land.²¹ The duration of the interest is unlimited; it may be for a term of years or in perpetuity, although as an interest in property it must be reentered in the land records every forty years.²²

Although Vermont's statute resolves many of the troublesome aspects of the common law approach, there are several issues with which the statute does not deal. One important issue involves the property tax treatment of land encumbered with preservation restrictions.

If a property owner decides to place a preservation restriction on his land or buildings, which may reduce the parcel's value because it can no longer be fully developed, the owner may be entitled to a reduced property tax assessment. The extent of the reduction will vary from case to case, depending on the kind of restriction created and the location of the property. Perhaps in some cases where the fee is split to preserve historic property, the character of the property will be enhanced, and the loss in value may be nominal. The reduction in value caused by imposition of restrictions will be greatest where pressures for development of the land and alternative uses for the restricted property are high.²³

supra.

18. *Id.*

19. See Gitelman, *supra* note 6, at 378.

20. VT. STAT. ANN. tit. 10, § 822 (Cum. Supp. 1979).

21. *Id.* § 823.

22. *Id.*

23. See Note, *Easements to Preserve Open Space Land*, 1 *ECOLOGY L.Q.* 728, 740-41 (1971).

Imagine a situation where the restrictions may lower the fair market value of the property (perhaps restrictions placed on a historic building where adjacent buildings are being bought and razed to accommodate new commercial uses). The fee owner cannot sell his property at a price equal to that received by owners of adjacent lots because the restrictions make the parcel unattractive to the would-be developers. The claim for a reduced property tax assessment is merited; the fair market value of the property is reduced from a higher value, (x), before the property was restricted, to a lower value, (y), reflecting the limited demand for the restricted building. The town, assessing taxes based on fair market value of property, has also suffered a loss ($x - y$) in taxable value from which its revenues are derived. Two questions arise here. First, is the tax assessor or lister bound to recognize this claim for reducing the assessed value? And, second, because the statute creating the preservation rights declares that they are "interests in real property,"²⁴ is the holder of the severed preservation interest obligated to pay taxes on the balance of the value of the land—($x - y$)—not assessed to the fee owner? The statute under consideration leaves these questions unanswered. Vermont's other statute that allows less-than-fee acquisitions by governmental units specifically addresses these problems.²⁵

II. THE FEE OWNER'S CLAIM FOR A REDUCED ASSESSMENT

Vermont law requires that property be appraised at fair mar-

24. VT. STAT. ANN. tit. 10, § 823 (Cum. Supp. 1979).

25. *Id.* § 6306 (1973) provides:

(a) The rights and interests in real property acquired under the authority of this chapter shall be considered as all other state-owned land with respect to taxation and state reimbursement in lieu of taxes.

(b) After acquisition by a municipality or a department 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. A department, and the department of taxes, shall cooperate with that owner, and with the town assessing such tax, in the determination of the fair market value of any such remaining right or interest.

ket value for property tax purposes.²⁶ The term "fair market value" has received much attention in the Vermont courts in the recent past.²⁷ The Vermont Supreme Court's clearest holdings on the meaning of fair market value are reflected in the 1977 legislative redefinition of "appraisal value."²⁸ Both the legislative enactment and the judicial formulation stress that for assessment purposes value is equivalent to "the judgment of the free market place."²⁹

While no Vermont case deals directly with the impact of restrictive covenants or easements on the appraised value of property, the Vermont Supreme Court has held that publicly imposed restrictions on the use of land that have a negative effect on land values must be reflected in the property appraisal.³⁰ Additionally, the court has held that *privately* imposed restrictions must also be reflected in the fair market value. For example, in *Townsend v. Town of Middlebury*,³¹ a service station owner contested the reappraised valuation of his property. The owner asserted that the new assessment did not reflect the fact that a twenty-year lease-purchase option was held by an oil company. Recognizing that the agreement between the owner and the gasoline company had a detrimental effect on the property's value, the court stated:

Although we are concerned here with a privately imposed restraint on land, it is clear that the Legislature intended that bona fide restraints affecting property, at least those governmental in origin, should be a factor in determining fair market value. The extension of this practice to situations such as that posed here is not contrary to the logic of the statute and is consistent with prior Vermont case law. (Citations omitted).

It is obvious that the presence of a lease/option agreement concerning a parcel of property is an element which en-

26. *Id.* tit. 32, § 4041 (1970).

27. *See, e.g.*, *Welch v. Town of Ludlow*, 136 Vt. 83, 385 A.2d 1105 (1978); *Bloomer v. Town of Danby*, 135 Vt. 56, 370 A.2d 194 (1977).

28. VT. STAT. ANN. tit. 32, § 3481(1) (Cum. Supp. 1979).

29. *Id.* and *In re Montpelier & B.R.R.*, 135 Vt. 102, 104, 369 A.2d 1379, 1381 (1977).

30. *Welch v. Town of Ludlow*, 136 Vt. 83, 88, 385 A.2d 1105, 1108 (1978).

31. 134 Vt. 438, 365 A.2d 515 (1976).

ters into giving a saleable or market value to the property. . . . A buyer, confronted with the presence of a lease/option involving a parcel of property which he was interested in purchasing, would certainly take such agreement into account in determining what price he would find acceptable for the parcel desired since any such agreement would affect both the use and future alienability of the property.³²

A buyer considering the purchase of property burdened with a preservation restriction that affects the use of the property in some cases would likewise seek a reduced purchase price. *Townsend* indicates that the owner of property so burdened has a valid claim for a tax assessment reflecting the decrease in value caused by the restriction.³³

The result in *Townsend* is supported by title 10, section 6306 of Vermont Statutes Annotated which allows for governmental acquisition of less-than-fee interests to preserve open space. That law, in contrast to the preservation rights statute under consideration, specifically provides that the local assessor take into account the reduced property valuation.³⁴ The major difference between the two statutes is that one statute allows *only* governmental bodies to hold the interests, while the preservation rights statute allows anyone to receive the interest. Other states have specially authorized reduced property valuations in their statutes creating the preservation restrictions.³⁵

32. *Id.* at 440, 365 A.2d at 516-17.

33. The potential property tax reduction is often cited as an advantage of placing a preservation restriction on property. See J. COSTONIS, *SPACE ADRIPT*, *supra* note 4, at 194-97; NEW ENGLAND NATURAL RESOURCES CENTER, *supra* note 4, at 10; Shull, *The Use of Tax Incentives for Historic Preservation*, 8 CONN. L. REV. 334, 340-46 (1976); Note, *Acquisition of Public Recreational Access to Privately-Owned Property: Devices, Problems, and Incentives*, 29 ARK. L. REV. 514, 530 (1976); Note, *Conservation Restrictions: A Survey*, *supra* note 4, at 399; Note, *Easements to Preserve Open Space Land*, 1 ECOLOGY L.Q. 728, 736 (1971); Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, *supra* note 4, at 495-501.

34. VT. STAT. ANN. tit. 10, § 6306 (1973). See text accompanying note 25 *supra*.

35. See CAL. REV. & TAX CODE §§ 439-439.4 (West Supp. 1980); COLO. REV. STAT. § 38.3.5-109 (Cum. Supp. 1978); CONN. GEN. STAT. ANN. § 7-131b(b) (West 1972); GA. CODE ANN. § 85-1409 (1978); ILL. ANN. STAT. ch. 24, § 11.48.2-6 (Smith-Hurd Supp. 1979); IND. CODE ANN. § 14-4-5.5-3 (Burns Cum. Supp. 1979); KY. REV. STAT. ANN. § 65.450 (Baldwin 1979); MICH. COMP. LAWS § 554.706(3) (MICH. STAT. ANN. § 26.1287(6)(3) (Callaghan Supp.

III. TAXATION OF THE LESS-THAN-FEE INTEREST

If it is assumed that the property owner may be entitled to a reduced appraisal valuation,³⁶ the question arises whether a town can somehow recapture the lost revenue that results from the lower assessment. In short, are holders of the *severed* preservation interests in property subject to taxation on the value of the interest they own?

The problem is a relatively new one because preservation restrictions in Vermont are barely four years old and are not yet in common use.³⁷ Previously, restrictions on land use had to conform with common law requirements for covenants or easements. Under the common law approach, the full value of the property was usually accounted for. For example, courts justified lower property tax assessments on land burdened by common law easements by suggesting that the diminished value of the servient tenement was offset by the increased value of the dominant tenement.³⁸

Preservation rights and interests created under the Vermont statute operate in a way that makes the common law solution unworkable. Unlike an appurtenant easement, the creation of a pres-

1980)); MO. ANN. STAT. § 67-895 (Vernon Cum. Supp. 1980); MONT. REV. CODES ANN. § 76-6-208 (1979); N.Y. GEN. MUN. LAW § 247(3) (McKinney 1974); OR. REV. STAT. § 271.740 (Replacement 1978); PA. STAT. ANN. tit. 32, § 5009 (Purdon Supp. 1980); TENN. CODE ANN. § 11-15-105 (1980); VA. CODE § 10-155 (1978).

36. Computation of the reduced valuation and cost attributed to the restriction has been analyzed. The most common measure of value appears to be a simple "before and after" approach where market value is appraised before and after the imposition of the restriction, attributing the reduction in value (if any) directly to the severed preservation restriction. See J. COSTONIS, *supra* note 4, at 69-78; Schlaes, *Transferable Development Rights: Impact on Real Property Tax Assessments*, STUDIES IN PROPERTY TAXATION 108, 116-19 (1975); Note, *Easements to Preserve Open Space Land*, *supra* note 33, at 742-44; Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, *supra* note 4, at 497-98.

37. In addition, Vermont courts have not dealt with tax valuation problems associated with common law easements, covenants, or equitable servitudes.

38. Good examples of this sort of judicial reasoning used by courts outside of Vermont are: *Supervisor of Assessments of Anne Arundel County v. Bay Ridge Properties, Inc.*, 270 Md. 216, 219, 310 A.2d 773, 776 (1973); *Macht v. Department of Assessments of Baltimore City*, 266 Md. 602, 608, 296 A.2d 162, 168-69 (1972); and *Borough of Englewood Cliffs v. Estate of Allison*, 69 N.J. Super. 514, 526, 174 A.2d 631, 638 (Super. Ct. App. Div. 1961). See also 1 J. BONBRIGHT, VALUATION OF PROPERTY 496-97 (1937).

ervation interest contains no requirement that a dominant tenement be benefited.³⁹ The interest has the durability and transferability of an interest in land, but it may be held by anyone and need not be used in connection with another piece of land.⁴⁰ Without the existence of a dominant tenement, the common law solution of shifting the tax burden to the benefited parcel is impossible. The prospect that a source of tax revenue, however small, may permanently escape the property tax system may result in an effort to tax the interests independently.⁴¹

The tax liability of these severed interests is unclear.⁴² Three questions are raised. First, are the holders of the severed preservation rights able to be classified as property owners under Vermont

39. VT. STAT. ANN. tit. 10, § 822 (Cum. Supp. 1979).

40. *Id.* §§ 821-823. The statute is almost unique in not placing some limit on who is entitled to hold a preservation restriction. In contrast, most other states limit acquisition to some combination of state or local governmental bodies, or restricted nonprofit corporations and trusts. *See, e.g.*, CONN. GEN. STAT. ANN. § 47-42c (West 1972); ILL. ANN. STAT. ch. 24, § 11.48.2-1 (Smith-Hurd Supp. 1979); IND. CODE ANN. § 14-4-5.5-2 (Burns 1973); KY. REV. STAT. ANN. § 65.420 (Baldwin 1979); MASS. ANN. LAWS ch. 184, § 32 (Michie/Law. Co-op 1977); ME. REV. STAT. ANN. tit. 33, § 668 (1964); MONT. REV. CODES ANN. § 76-6-204 (1979); N.H. REV. STAT. ANN. § 477:46 (Cum. Supp. 1979); N.Y. GEN. MUN. LAW § 247(2) (McKinney 1974); OR. REV. STAT. § 271.720 (Replacement 1978); R.I. GEN. LAWS § 34-39-3 (Cum. Supp. 1979); TENN. CODE ANN. § 11-15-103 (1980); VT. STAT. ANN. tit. 10, § 630 (1973).

Only Maryland and Utah have statutes that appear to be as open-ended as Vermont's law. MD. REAL PROP. CODE ANN. § 2-118 (1974 & Cum. Supp. 1979); UTAH CODE ANN. § 63-18A-3 (1953) (Utah does not alter common law doctrines affecting the easements created by the statute).

41. Telephone interview with Darby Bradley of the Vermont Natural Resources Council (May 22, 1980). A locality should attempt to tax a preservation interest only where the difference in taxable value caused by the creation of the restriction is great. The impact of preservation restrictions on the tax base will vary from case to case. See text accompanying notes 23-25 *supra*. In Vermont, only the more densely populated and heavily developed communities would face the loss of enough revenue to make taxation of the preservation interest an issue.

42. Some other states have approached the problem by expressly declaring the status of the interests. *See, e.g.*, COLO. REV. STAT. § 38-30.5-109 (Cum. Supp. 1978) (interest declared *not* exempt from taxation); KY. REV. STAT. ANN. § 65.450 (Baldwin 1979) (interest exempt to the extent of other public property); MONT. REV. CODES ANN. § 76-6-208 (1979) (interest fully exempt from taxation). Section 6306 of title 10 of the Vermont Statutes Annotated treats state-owned less-than-fee interests "as all other state-owned land with respect to taxation and state reimbursement in lieu of taxes." In turn, section 3656 of title 32 of the Vermont Statutes Annotated exempts state held land from property taxation where the total amount of land owned by the state is less than ten percent of the town's listed value.

law? Second, are the preservation interests either specifically exempted from taxation or specifically included as taxable interests under Vermont law? Third, if neither exempted nor included, are these severed interests nevertheless subject to taxation?

IV. HOLDERS OF PRESERVATION RESTRICTIONS AS OWNERS OF PROPERTY

In the past, in determining whether an individual is a property owner, the Vermont Supreme Court has given the term "owner" a liberal interpretation in order to facilitate the job of the local listers. In *Town of Brattleboro v. Smith*,⁴³ where a life tenant could not be found in order to pay his property taxes, the court approved assessment against a known vested remainderman. Noting the listers' statutory duty to assess the "owner," the Vermont Supreme Court, quoting *Guild v. Prentis*, said:

[T]he word owner as applied to real estate may designate the owner of the fee or the owner of a less estate as a lessee for a term of years or any rightful proprietor and its meaning is to be gathered from the connection in which it is used and from the subject matter to which it is applied, and when used in a statute the obvious nature and purpose of the statute may indicate its meaning.⁴⁴

Smith indicates that holders of less-than-fee interests may be treated as taxable owners. The preservation rights statute further provides that the rights are interests in land and thus supplies further authority to treat the interests as taxable.⁴⁵

V. AUTHORITY TO TAX THE PRESERVATION RESTRICTION

If it is assumed that the holder of a preservation interest is an owner of property, there is still the second—and more basic—question of whether taxation of this less-than-fee interest needs statutory authorization. The statutory definition of taxable property offers little aid, because it simply includes "taxable es-

43. 117 Vt. 425, 94 A.2d 407 (1953).

44. *Id.* at 426, 94 A.2d at 408 (citations omitted).

45. VT. STAT. ANN. tit. 10, § 823 (Cum. Supp. 1979).

tate, both real and personal.”⁴⁶ In spite of the failure to adequately define “taxable property,” the legislature has at times used its power to specifically define the tax treatment of unusual property interests. Specific sections provide for the taxation of machinery,⁴⁷ construction equipment,⁴⁸ interests in mines or quarries severed from surface ownership,⁴⁹ water rights severed from fee ownership,⁵⁰ standing timber,⁵¹ and state-held easements for flood control programs,⁵² among others. Additionally, taxation of orchard lands is specially provided for,⁵³ and the taxation of perpetually leased lands is dealt with at length.⁵⁴

In addition to the attempt to make specific provision for several unusual interests in property, the Vermont tax statutes contain an extensive list of types of property that are or may be exempted from taxation.⁵⁵ In this latticework of exemptions⁵⁶ and special provisions, preservation rights are nowhere to be found.⁵⁷ Similarly, the statute that creates the preservation rights is silent on the question of taxation, although it does state that the rights are to be considered interests in land.⁵⁸

VI. TAXATION OF INTERESTS IN THE ABSENCE OF SPECIFIC LEGISLATIVE AUTHORIZATION

One can easily construct arguments both for and against preservation interests' being subject to property taxation. Supporting the position that preservation rights are exempt from taxation is

46. *Id.* tit. 32, § 3002 (1970).

47. *Id.* § 3602.

48. *Id.* § 3603 (Cum. Supp. 1979).

49. *Id.* § 3604 (1970).

50. *Id.* § 3605.

51. *Id.* § 3606.

52. *Id.* § 3611.

53. *Id.* § 3607.

54. *Id.* § 3610.

55. *Id.* §§ 3802-3843 (1970 & Cum. Supp. 1979).

56. For the significance of property tax exemptions on the tax base, see Keene, *The Impact of Differential Assessment Programs on the Tax Base*, STUDIES IN PROPERTY TAXATION 40 (1975).

57. For the response of some of the other states, see note 39 *supra*.

58. VT. STAT. ANN. tit. 10, § 823 (Cum. Supp. 1979).

the idea that similar special interests are taxed under special legislative provisions. Title 32 of the Vermont Statutes Annotated provides examples of specific authority used to tax interests in real property other than fee simple ownership.⁵⁹ Some sections in this title, particularly those dealing with water rights, standing timber, mine and quarry interests, and easements for flood control, deal with property interests that are strikingly similar to the kind of interests that preservation rights seem to be. In these cases, a distinction is made between ownership of fee simple title and ownership of a specific less-than-fee right or interest in the property. The statutes usually provide for taxation of the less-than-fee right or interest apart from the tax levied against the fee owner.

Against this position it can be argued that all property interests are subject to taxation unless specifically exempted⁶⁰ or taxed in a special way provided for by statute. The detailed enumeration of exemptions contained in title 32⁶¹ shows a legislative intent to limit strictly exemptions to those areas specifically enumerated. This argument gains further support from Vermont's other less-than-fee interest law, which, in granting governmental bodies the power to hold such interests, specifically provides for the tax treatment of the interest.⁶²

Support for both these positions can be found in the case law. A 1921 case, *City of St. Albans v. Avery*,⁶³ squarely held that all property interests are subject to taxation unless specifically exempted.⁶⁴ The case involved taxation of the personal property interest of out-of-state beneficiaries of a decedent's trust. After reviewing the statutes conferring the taxation power and the statutory exemptions from taxation, the Vermont Supreme Court concluded "[i]t is apparent from these provisions of the statute that the Legislature intended that *all* property within the State,

59. *Id.* tit. 32, §§ 3602-3616 (1970).

60. See text accompanying note 64 *infra*.

61. VT. STAT. ANN. tit. 32, §§ 3802-3840 (1970 & Cum. Supp. 1979).

62. *Id.* tit. 10, § 6306(a) (1973). See also *id.* tit. 32, §§ 3615, 3656, 3802 (1970).

63. 95 Vt. 249, 114 A. 31 (1921).

64. *Id.* at 260, 114 A. at 36.

not declared to be exempt, should be subject to taxation.”⁶⁵ The court rejected the idea that every type of property subject to taxation must be enumerated and concluded that “[g]eneral words of description are sufficient, as the question is one of determining the legislative intent by the ordinary rules of statutory construction. General words in any instrument or statute are strengthened by exceptions, and weakened by enumerations.”⁶⁶

In a 1976 case, however, involving a real property interest analogous to preservation rights, the Vermont Supreme Court indicated that taxation of some interests in land may require legislative action to fall within the scope of authorized taxation. In *Townsend v. Town of Middlebury*,⁶⁷ the court recognized that the market value of a property was lowered by a lease-purchase option on that property and that the assessed value should reflect this fact. The town argued that some owners of property would contrive to encumber their land with such options in order to claim a decrease in the assessed value of their property.⁶⁸ As to the possibility of this action by “unscrupulous owners,” the court noted, in dicta,

[W]e believe that any attempted fraud of this nature would be readily discoverable through resort to the judicial process. . . . [S]hould reductions in appraised values be regarded as the creation of tax inequities, the situation would be easily remedied by statute taxing those interests to the holder.⁶⁹

The court’s apparent deference to legislative action in determining the tax status of the encumbrance found in the *Townsend* case stands in apparent contrast to the holding in *St. Albans*. *St. Albans* involved the inheritance taxation of personal property and generally held that all property is taxable unless it is exempted. In the option-on-land situation presented in *Townsend*, which involves a restriction on the alienability of land more closely resem-

65. *Id.*

66. *Id.*

67. 134 Vt. 438, 365 A.2d 515 (1976).

68. *Id.* at 440-41, 365 A.2d at 517.

69. *Id.*

bling the effect and operation of a preservation restriction, the court indicates in dicta that special legislation may be needed to tax this kind of interest in land. It should be remembered, however, that the interest involved in the *Townsend* case was a contract right, not an interest in land. Further, the court's dicta does not appear to be direct enough to overturn the general rule that all property is taxable unless specifically exempted. Nonetheless, the two cases illustrate that the tax status of preservation interests is far from certain.

VII. LEGISLATIVE ALTERNATIVES

The uncertainty about the tax status of preservation interests suggests that the General Assembly ought to act to solve the problem. Legislative action is appropriate because, in contrast to the established common law forms of less-than-fee interests, preservation interests were initially created by the legislature. Thus that body, and not the judiciary, should resolve the tax status of the interests that it has created.

Several alternatives are open to the legislature and each choice affects several important policies in different ways. First among the policies is the encouragement of preservation of historic structures or open land. Enactment of the preservation interests legislation shows the legislative intent to implement this policy. In light of this intent, it may be that the tax question should be resolved in a way that encourages preservation by awarding tax-exempt status to preservation restrictions. This policy is strengthened by the special tax status already enjoyed by less-than-fee interests held by state and local governments.⁷⁰

A conflicting consideration is any locality's desire to maximize assessed property valuation. A property interest that is declared tax-exempt depletes the tax base and, in turn, places a greater burden on nonexempt properties.⁷¹ Existing property tax exemptions⁷² and the recently enacted use-value assessment of agricultural

70. VT. STAT. ANN. tit. 10, § 6306 (1973). See also *id.* tit. 32, §§ 3615, 3656, 3802 (1970).

71. See note 56 *supra*.

72. VT. STAT. ANN. tit. 32, §§ 3802-3840 (1970 & Cum. Supp. 1979).

lands⁷³ are already drains on the tax bases in Vermont towns. When the financial pressures faced by every town are considered, it is unlikely that localities will want to further reduce their tax bases with preservation exemptions.

A third important policy concerns the operation of the tax assessment system free of intricate and complicated procedures.⁷⁴ Separate taxation of preservation rights entails added work in recording and assessing the new interests. Difficult problems may arise in placing values upon unique interests severed from the land.

Against these specific policies of encouraging preservation, of maintaining a broad property tax base, and of preferring uncomplicated assessment procedures, one must weigh the consequences of either including preservation interests in the tax base or of excluding them from the tax base.

Payment of property tax on a preservation restriction is a cost to be associated with the interest. The most basic question is, therefore, who should bear this cost of preservation activity. If the interest is taxed, the cost must be borne either by those who now own the severed interest or by those who still retain the underlying fee. If the interests are made tax exempt, the cost is either absorbed by the locality through a lowered tax base, or paid by the taxpayers statewide under a state reimbursement system.⁷⁵

There is much to suggest that the cost in terms of a weakened tax base may not be as great as expected. One plausible formulation of this argument is based on a "betterment" theory.⁷⁶ The theory suggests that taxable value lost due to the imposition of preservation restrictions is reflected in increased taxable values of

73. *Id.* §§ 3751-3760 (Cum. Supp. 1979).

74. See *Town of Brattleboro v. Smith*, 117 Vt. 425, 428, 94 A.2d 407, 410 (1953). See also Nichols, *Real Property Taxation of Divided Interests in Land*, 11 KAN. L. REV. 309, 321 (1963).

75. Statewide reimbursement of revenue lost to localities as a result of reduced property valuations is evidenced in Vermont's Use Value Assessment statute. VT. STAT. ANN. tit. 32, § 3759 (Cum. Supp. 1979).

76. Note, *Pursuing Open Space Preservation: The Massachusetts Conservation Restriction*, *supra* note 4, at 499.

adjacent properties. These properties enjoy the benefits of proximity to an architecturally important building or border on land that is protected from future development.⁷⁷ It can be argued that these benefits accrue to the neighboring parcels regardless of who actually owns the severed interest.

With these factors in mind, possible legislative resolutions of the problem can be considered.

A. *Providing that the owner of fee simple title pays the tax on the severed interest.* Under this alternative the property tax base is fully protected because the owner of the fee simple still pays taxes on the full value of the property as if no preservation restriction had been created. Such an arrangement, however, would directly frustrate the creation of preservation interests by requiring the fee owner to pay taxes on an interest in property he no longer owns. A major incentive to part with such an interest—a property tax reduction—disappears. More simply, such a system contradicts consistent legislative and judicial pronouncements that property shall be assessed at fair market value.⁷⁸ This is so because the fair market value of an encumbered property is generally less than the fair market value of the property without any such encumbrance.⁷⁹ A scheme that would require the fee owner to pay taxes on a parcel as if no encumbrance existed would violate the fair market value concept.⁸⁰ In sum, this alternative protects the tax base and requires no disruption of the assessment system. It is legally questionable, however, because it would violate the fair market value concept and would operate at the expense of rendering the preservation rights legislation so unattractive as to be prac-

77. WHYTE, *SECURING OPEN SPACE*, *supra* note 4, at 42-43. Whyte argues that studies need to be done to determine whether proximity to open space makes adjacent land more valuable as commercial or residential property. He also suggests that lessened demands on municipal services that result from land being kept in its undeveloped state may justify a lessened property tax assessment. See also W. WHYTE, *THE LAST LANDSCAPE*, *supra* note 4, at 93; Note, *Easements to Preserve Open Space Land*, *supra* note 23, at 737.

78. See *Welch v. Town of Ludlow*, 136 Vt. 83, 385 A.2d 1105 (1978), and VT. STAT. ANN. tit. 32, § 4041 (1970).

79. See text accompanying notes 23-25 *supra*.

80. See text accompanying notes 26-33 *supra*.

tically useless.⁸¹

B. *Providing that the organization or individual holding the severed preservation interest pays the tax.* Like the first proposal, this alternative would account for the full value of the property in the tax base, but significant problems in the administration of the tax assessment system might arise. The number of separate parcels that assessors must appraise and enter in the grand list would automatically increase, creating an administrative burden. In addition, the job of valuation would be complicated because a building's value must be apportioned between the fee owner and the holder of the restriction. More importantly, if the tax cost is shifted to the owner of the severed interest, many organizations that would be best suited to acquire such interests would be discouraged from purchasing or accepting them. Most preservation organizations are nonprofit groups operating on tight budgets. The yearly taxes on preservation restrictions might preclude their being acquired.⁸² Thus, the second alternative would neither encourage the use of preservation restrictions nor result in an easily workable assessment system, although it would not adversely affect the local tax base.

C. *Exempting the preservation interest from taxation.* This approach actively encourages the use of preservation restrictions by not placing tax costs on the fee owner or holder of the severed interest. Yet, as noted, one might argue that total exemption is subsidized by the remaining property owners. If this argument were correct,⁸³ imposing the cost of preservation on the other property owners would defeat the policy of maintaining a broad tax base. Further, the restrictions could be created indiscriminately since the Vermont statute places no limitations on who may

81. In some cases, the lack of a local property tax incentive should not discourage donation of an interest where the principal object is to realize the benefit of a federal tax deduction in the form of a charitable gift. For a detailed discussion of the federal tax question, see R. BRENNEMAN, *supra* note 10, at 88-95; J. COSTONIS, *supra* note 4, at 191-93; NEW ENGLAND NATURAL RESOURCES CENTER, *supra* note 6, at 6-10; Shull, *supra* note 6, at 336-40.

82. NEW ENGLAND NATURAL RESOURCES CENTER, *supra* note 6, at 10.

83. Some doubt has been cast on this assumption. See text accompanying notes 76-77 *supra*.

purchase or acquire the preservation restriction.⁸⁴ It is this feature—the fact that *anyone* may hold the interest—which distinguishes preservation rights from Vermont's less-than-fee interests which governmental bodies are authorized to hold under a favorable property tax scheme.⁸⁵ The costs to the community created by tax exemption may become especially high if individuals employ the preservation rights device to reduce their property taxes rather than for true historic preservation purposes.⁸⁶ While this third option encourages preservation and does not complicate the assessment system, it may be abused and may consequently dilute a locality's tax base. Because these costs may be unreasonably high, an intermediate position is needed.

D. *Restricting the types of organizations that can hold preservation restrictions and, at the same time, exempting the interests from taxation.* Statutes limiting those able to hold restrictions exist in other states.⁸⁷ For example, Maine's legislation limits potential holders to "a nonprofit preservation or historical organization whose purposes include preservation of historic property or a governmental body."⁸⁸ Coupled with a tax exemption, the resulting plan would satisfy most of the policies outlined in this note.⁸⁹ First, this solution would foster a climate favorable to the use of preservation restrictions by not imposing a property tax cost on the fee owner or holder of the severed interest. Second, the number of organizations capable of holding the restrictions would be

84. See note 40 *supra*.

85. VT. STAT. ANN. tit. 10, §§ 6301-6308 (1973 & Cum. Supp. 1979).

86. This was the fear expressed in *Townsend v. Town of Middlebury*, 134 Vt. 438, 440-43, 365 A.2d 515, 517 (1976).

87. See note 40 *supra*.

88. ME. REV. STAT. ANN. tit. 33, § 1551(4) (Cum. Supp. 1980).

89. See, e.g., MONT. REV. CODES ANN. § 76-6-208 (1979); OR. REV. STAT. § 271.740 (Replacement 1978); PA. STAT. ANN. tit. 32, § 5009 (Purdon Cum. Supp. 1979); TENN. CODE ANN. § 11-15-105 (Cum. Supp. 1979). These statutes specifically define the tax status of the severed interest. Each statute declares them to be tax exempt, although Tennessee and Pennsylvania limit the exemption to governmental units; and Pennsylvania's law does not appear to alter the common law doctrines applicable to the easements. Oregon's statute allows easements to be acquired by nonprofit organizations under OR. REV. STAT. § 271.720(2) (Replacement 1978) but states at OR. REV. STAT. § 271.740 (Replacement 1978) that "[t]he easements shall be exempt from assessment and taxation the same as any other property owned by the state, a county, city or park and recreation district."

limited to those groups best suited to hold the restrictions, because preservation organizations are well equipped to evaluate issues of historical or architectural merit and to decide which structures in an area deserve protection.⁹⁰ By allowing these organizations to decide whether a restriction will be acquired, internal criteria would be generated by the organizations and the indiscriminate use of restrictions would be checked. Selective holding of preservation interests would also act as a check against potential abuse of the restrictions because preservation organizations would be unlikely to cooperate with a property owner who merely wished to reduce his property tax costs by placing restrictions on property of questionable merit. Third, it can be argued that because preservation organizations are better attuned to the regional and state-wide impact of the restrictions, an excessive number of preservation interests in one locality would be unlikely. Thus, distortion of any one community's tax base would be guarded against.

Although such a plan would complicate the assessment system, the burden would be relatively small because a limited number of groups would be acquiring and holding the restrictions.

This intermediate solution satisfies most policy interests. It would encourage the use of preservation restrictions with only a slight complication of the assessment system. Most importantly, potential erosion of the local tax base would be limited, and the restrictions would be shielded from possible abuse.

The elements of such a scheme already exist. As mentioned in the Introduction, Vermont has two laws governing the acquisition of conservation and preservation restrictions. The first statute⁹¹ allows only governmental units to acquire less-than-fee interests and exempts those interests to the same extent that other publicly held lands are free from local taxation.⁹² The Vermont General Assembly recently considered—and finally rejected—a bill that proposed to extend the scope of this law to include qualified nonprofit

90. For a criticism of the Arkansas preservation interest statute because of its failure to adequately define standards, see Gitelman, *supra* note 6, at 378.

91. VT. STAT. ANN. tit. 10, §§ 6301-6308 (1973 & Cum. Supp. 1979).

92. *Id.* § 6306. See text accompanying note 25 *supra*.

organizations.⁹³

The second statute governing conservation and preservation through use of a less-than-fee purchase technique is the statute that has been the focus of this note.⁹⁴ Its terms are broad enough to allow anyone to hold a restriction, yet the law is silent on the question whether these interests are tax exempt. The statute is possibly too broad in scope, because it allows indiscriminate creation of the interests, and it is deficient in not clearly addressing the tax question. The first statute, by restricting holders to governmental units, appears too narrow in scope. The most logical move would be for the legislature to combine the desirable features of each statute into a single law that clearly identifies the parties capable of holding the interests and that settles the tax status of the interest. With the local property tax question, it is suggested that if a limitation is placed on the kinds of parties capable of holding the restriction, a satisfactory statute might declare the severed interests held under its terms to be tax exempt.⁹⁵

93. S. 87, Vt. Gen. Assembly, 55th Bien. Sess. (1979). The bill sought to amend sections 6302(a), 6303, 6306, and 6307 of title 10 of the Vermont Statutes Annotated. The bill included any "charitable, educational or other organization having been qualified under section 501(c)(3) of the Internal Revenue Code of 1954, as amended" as qualified organizations capable of holding conservation interests. Further, the bill divided responsibility for payment of property taxes on restricted land between the owner of the fee and the holder of the less-than-fee interest. The legislation refused to alter the tax treatment of the severed interest. "The rights and interests in real property acquired by a qualified organization under the authority of this chapter shall be subject to assessment, taxation, or exemption from taxation in accordance with general law applicable to the assessment and taxation of real property." *Id.* § 3.

94. VT. STAT. ANN. tit. 10, §§ 821-823 (Cum. Supp. 1979). See text accompanying note 2 *supra*.

95. Consider MONT. REV. CODES ANN. § 76-6-208 (1979):

(1) Assessments made for taxation on property subject to a conservation easement either in perpetuity or for a term of years, where a public body or a qualifying private organization holds the conservation easement, shall be determined on the basis of the restricted purposes for which the property may be used. The minimum assessed value for land subject to an easement conveyed under this chapter may not be less than the actual assessed value of such land in calendar year 1973. Any land subject to such easement may not be classified into a class affording a lesser assessed valuation solely by reason of the creation of the easement. The value of the interest held by a public body or qualifying private organization shall be exempt from property taxation.

CONCLUSION

A locality's ability to levy taxes against preservation interests is unclear under Vermont law. Unlike its companion statute, no provision for taxation is included in the statute creating the interests, nor are the interests specifically exempted or subjected to taxation in the relevant tax code sections. Case law indicates that plausible arguments exist both for and against including the interests under the existing property tax provisions. Each locality, largely dependent on property taxation for revenue, is likely to object to the potentially lower tax yields (no matter how insignificant) caused by the application of preservation restrictions on property. In times of fiscal constraint, localities may seek to tax the severed interests rather than lose tax revenue.

The question whether the interests ought to be taxed is one the legislature ought to address. Evaluation of conflicting policy interests indicates that the most attractive solution is to limit the kinds of organizations able to acquire the interests and, at the same time, to exempt specifically the interests from property taxation. Such a solution might also achieve the desirable goal of locating all of the state's less-than-fee interest legislation in a single statute that provides clear answers to the troubling tax questions. In making the preservation interests a more reliable tool, preservation of Vermont's scenic environment, and the architecture uniquely associated with it, will be enhanced.

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(2) Expiration of an easement granted for a term of years shall not result in a reassessment of the land for property tax purposes if the easement is renewed and the granting instrument reflecting the renewed easement is executed and properly filed not later than 15 days after the date of expiration.

