

PROPERTY TAX EXEMPTIONS FOR NONPROFIT ORGANIZATIONS IN VERMONT

INTRODUCTION

Vermont exempts property from the burden of local taxation in a number of circumstances based on use or ownership. In determining whether a particular use of property will be tax exempt the Vermont Supreme Court has historically relied on what is known as the "primary use" test.¹ The primary use test developed under title 32, section 3802(4) of Vermont Statutes Annotated,² which provides a general exemption for charitable, public, and pious uses of property.³

In 1967, title 32, section 3802(2) of Vermont Statutes Annotated was amended by the Vermont Legislature to exempt property owned by nonprofit organizations chartered by an act of the United States Congress and used for the purposes of their work.⁴ In *Governor Clinton Council, Inc. v. Koslowski*⁵ the Vermont Supreme Court fashioned a different test to determine whether property qualifies for exemption from taxation under the amended section 3802(2). The new test requires exempt property to be "directly and substantially utilized in furtherance of [the organization's] purposes."⁶

1. *Brattleboro Child Dev., Inc. v. Town of Brattleboro*, 138 Vt. 402, 416 A.2d 152 (1980); *Trustees of Vermont Wild Land Found. v. Town of Pittsford*, 137 Vt. 439, 407 A.2d 174 (1979); *English Language Center, Inc. v. Town of Wallingford*, 132 Vt. 327, 318 A.2d 180 (1974); *Shelburne Museum, Inc. v. Town of Shelburne*, 129 Vt. 341, 278 A.2d 719 (1971); *New York Inst. for the Educ. of the Blind v. Town of Wolcott*, 128 Vt. 280, 262 A.2d 451 (1970); *The Experiment in Int'l Living, Inc. v. Town of Brattleboro*, 127 Vt. 41, 238 A.2d 782 (1968); *Gifford Memorial Hosp. v. Town of Randolph*, 119 Vt. 66, 118 A.2d 480 (1955); *Middlebury College v. Town of Hancock*, 115 Vt. 157, 55 A.2d 194 (1947); *Grand Lodge of Masons v. City of Burlington*, 84 Vt. 202, 78 A. 973 (1911).

2. VT. STAT. ANN. tit. 32, § 3802(4) (1970).

3. Section 3802(4) exempts "[r]eal and personal estate granted, sequestered or used for public, pious or charitable uses." *Id.* § 3802(4).

4. The amendment added a clause exempting "real and personal property owned by and used for the purpose of its work by a nonprofit organization chartered by act of the Congress of the United States, such as a Red Cross, boy scout, girl scout, boy or girl organization." *Id.* § 3802(2).

5. 137 Vt. 240, 403 A.2d 689 (1979).

6. *Id.* at 248, 403 A.2d at 694.

This "substantial use" test marks a departure from the primary use test which had developed under the section 3802(4) charitable use exemption. The purpose of this comment is to analyze the decision in *Governor Clinton Council* to determine why the Vermont Supreme Court created a different test for tax exemption under section 3802(2), and to suggest the possible ramifications of this decision on the tax exempt status of other land in Vermont.

I. LEGAL BACKGROUND

Title 32, section 3802 of Vermont Statutes Annotated contains a wide variety of property tax exemptions. Section 3802(4) provides a general exemption for property put to public, pious or charitable use. Several more specific provisions are found in other sections of the statute, including section 3802(2), which provides an exemption for property used by boy scout organizations such as the Governor Clinton Council.⁷ Before section 3802(2) was amended specifically to exclude from taxation property owned and used by the boy scouts and similar organizations, these groups sought exemption under the charitable use provision of section 3802(4).⁸

Section 3802(4) has long been construed under the primary use test.⁹ For property to be exempt from taxation as a charitable use under the primary use decisions, the direct and immediate tangible use of the property must be for charitable purposes.¹⁰ For example, if an organization leases a building to a commercial enterprise, but uses the rental income for charitable purposes, there will be no exemption as this would be an indirect rather than a direct charitable use.¹¹ In addition, the charitable use of the prop-

7. These exemptions are directed toward property owned by particular organizations or put to a particular use as opposed to a general exemption for charitable or public use. *E.g.*, VT. STAT. ANN. tit. 32, § 3802(2) (1970) (owned by veterans' organizations); *id.* § 3802(5) (owned by college fraternities); *id.* § 3802(6) (owned by Y.M.C.A. or Y.W.C.A.); *id.* § 3802(7) (used for cemetery purposes).

8. *See Fort Orange Council, Inc. v. French*, 119 Vt. 378, 125 A.2d 835 (1956).

9. *See note 1 supra.*

10. *Grand Lodge of Masons v. City of Burlington*, 84 Vt. 202, 78 A. 973 (1911).

11. *Id.* at 208-10, 78 A. at 975-76.

erty must be the primary use, not an incidental one.¹² Thus, if the property can be characterized as being used for two purposes, one charitable and the other noncharitable, the charitable use must predominate in order to qualify for exemption.¹³ As long as the primary use of the property would qualify for exemption as a charitable use, an incidental use that does not qualify will not deprive the property of its exemption.¹⁴ For instance, if land is primarily used as a public park, but timber is sold from the property as part of a plan to manage the park, the incidental income will not disqualify the owner from the tax exemption.¹⁵

In addition to distinguishing whether a use is primary or incidental, cases turn on whether a use fits the definition of public or charitable. The case of *Boyce v. Sumner*¹⁶ adopted a definition of public charity which requires that there "must appear to be some benefit to be conferred upon, or duty to be performed toward, either the public at large or some part thereof, or an indefinite class of persons."¹⁷ Recent cases also indicate that for a use to be public or charitable it must confer a benefit on an indefinite class of the public or assume a share of the public burden.¹⁸ There seems to be some confusion as to what constitutes an indefinite class of the public, but "[t]he distinction is between a private or limited, and a general or indefinite, benefit."¹⁹ A class is considered private or limited if it is determined by choice or selection.²⁰ "Assuming the public burden" has been interpreted as the performance of services that are normally provided by local government or that are essen-

12. *Gifford Memorial Hosp. v. Town of Randolph*, 119 Vt. 66, 118 A.2d 480 (1955).

13. *Middlebury College v. Town of Hancock*, 115 Vt. 157, 55 A.2d 194 (1947).

14. *Id.* at 164, 55 A.2d at 198-99.

15. *Id.*

16. 97 Vt. 473, 124 A. 853 (1924).

17. *Id.* at 478, 124 A. at 854 (quoting *Old South Society v. Crocker*, 119 Mass. 1 (1875)).

18. *Trustees of Vermont Wild Land Found. v. Town of Pittsford*, 137 Vt. 439, 407 A.2d 174 (1979); *English Language Center, Inc. v. Town of Wallingford*, 132 Vt. 327, 318 A.2d 180 (1974); *New York Inst. for the Educ. of the Blind v. Town of Wolcott*, 128 Vt. 280, 262 A.2d 451 (1970).

19. *Trustees of Vermont Wild Land Found. v. Town of Pittsford*, 137 Vt. 439, 443, 407 A.2d 174, 176 (1979).

20. *New York Inst. for the Educ. of the Blind v. Town of Wolcott*, 128 Vt. 280, 286, 262 A.2d 451, 455 (1970).

tially public in nature.²¹

An exemption for property under the general charitable use provisions of section 3802(4) is subject to the restrictions of section 3840.²² If applicable, section 3840 requires a vote of approval for exemption by the town in which the property is situated.²³ Section 3840 only applies when a charitable organization uses its property exclusively for its own private purposes, instead of holding it open to the general public.²⁴

Section 3840 was applied to require a town vote for approval of a tax exemption in *Fort Orange Council, Inc. v. French*,²⁵ which involved the same boy scout owned property²⁶ as in *Governor Clinton Council*. After *Fort Orange*, the Vermont Legislature amended section 3802(2) specifically to exempt the property of the boy scouts and similar organizations from taxation, thus removing the exemption from the application of section 3840 and the whim of the town vote.²⁷

Because of the individualistic, parochial nature of property tax exemptions, a wide variety of statutory language and judicial construction exists in other states. A majority of the states employ a

21. *Brattleboro Child Dev., Inc. v. Town of Brattleboro*, 138 Vt. 402, 405, 416 A.2d 152, 154 (1980). See also *New York Inst. for the Educ. of the Blind v. Town of Wolcott*, 128 Vt. 280, 262 A.2d 451 (1970).

22. VT. STAT. ANN. tit. 32, § 3840 (Supp. 1980).

23. *Id.* See also *Fort Orange Council, Inc. v. French*, 119 Vt. 378, 382, 125 A.2d 835, 838 (1956).

24. Section 3840 states: "When a society or body of persons associated for a charitable purpose, in whole or in part, . . . owns real estate used exclusively for the purposes of such society, body or organization, such real estate may be exempted from taxation . . . if the town so votes." VT. STAT. ANN. tit. 32, § 3840 (Supp. 1980).

25. 119 Vt. 378, 125 A.2d 835 (1956).

26. Brief of Appellant at 2, *Governor Clinton Council, Inc. v. Koslowski*, 137 Vt. 240, 403 A.2d 689 (1979) [hereinafter Brief of Appellant]. See text accompanying note 52 *infra*.

27. Although the issue was not raised by the parties in *Governor Clinton Council*, the trial court considered whether VT. STAT. ANN. tit. 32, § 3832(7) (1970) would apply to require a town vote. Section 3832(7) requires that the town approve an exemption when the property is used primarily for health and recreational purposes. *In re Aloha Foundation, Inc.*, 134 Vt. 239, 241-42, 360 A.2d 74, 76-77 (1976). The trial court held that it did not apply, distinguishing between a specific exemption (§ 3802(2)) and a general exemption (§ 3802(4)). Trial Court Record at 2.

“primary use” test or its functional equivalent.²⁸ A few states require that the property be used exclusively for the exempt purposes.²⁹ Some states require the property’s use be reasonably necessary to achieve the purposes of a charitable organization,³⁰ and at least one state requires a substantial use of the property.³¹ As a matter of tax policy, property tax exemptions are almost universally strictly construed because they are an exception to the normal tax obligation of property owners.³²

II. SUMMARY OF THE CASE

Governor Clinton Council, Inc. (the Council) is a local chapter of the Boy Scouts of America, a nonprofit organization chartered by an act of the Congress of the United States. The Council owns a camping reservation consisting of approximately 1,700 acres of land in the town of Stratton, Vermont. The reservation includes two tracts of land which are involved in the case: a timberland tract consisting of 500-600 acres and a “forever wild” tract consisting of approximately 340 acres.³³

Selective timber cutting was allowed on the timberland tract, producing \$55,291.66 in income during the period between 1948 and 1977.³⁴ The income was used to help defray operating and maintenance expenses of the reservation. The tract was also used by the scouts for hiking, camping, educational purposes, and merit

28. See, e.g., *San Francisco Boys' Club, Inc. v. Mendocino County*, 254 Cal. App. 2d 548, 62 Cal. Rptr. 294 (1967); *Children's Hosp. Medical Center v. Board of Assessors*, 353 Mass. 35, 227 N.E.2d 908 (1967).

29. See, e.g., *Wildlife Preserves Inc. v. Scopelliti*, 66 Misc. 2d 611, 321 N.Y.S.2d 1004 (Sup. Ct. 1971).

30. See, e.g., *City of Long Branch v. Monmouth Medical Center*, 138 N.J. Super. 524, 351 A.2d 756 (Super. Ct. App. Div. 1976). Cf. *Massachusetts Gen. Hosp. v. Somerville*, 101 Mass. 319 (1869); *Young Men's Christian Ass'n v. Department of Revenue*, 268 Or. 633, 522 P.2d 464 (1974). This view was extensively argued by the town of Stratton in *Governor Clinton Council* but ignored in the opinion of the court. Brief of Appellant at 11.

31. *United Veterans Organization v. New Mexico Property Appraisal Dept.*, 84 N.M. 114, 500 P.2d 199 (1972).

32. E.g., *San Francisco Boys' Club, Inc. v. Mendocino County*, 254 Cal. App. 2d 548, 62 Cal. Rptr. 294 (1967); *English Language Center, Inc. v. Town of Wallingford*, 132 Vt. 327, 329, 318 A.2d 180, 182 (1974).

33. 137 Vt. at 242-43, 403 A.2d at 691.

34. *Id.* at 242, 403 A.2d at 691.

badge programs.³⁵

The forever wild tract was left intentionally undeveloped. The tract was used by the scouts for educational purposes, such as observing wildlife and comparing land in its natural state to the managed forest of the timberland tract.³⁶ While the evidence indicated that the tract was infrequently used by the scouts, the trial court found that the area was used for no purposes other than scouting.³⁷

In 1974 the town of Stratton notified the Council that all but the most intensely used part of the reservation would be taxed.³⁸ The Council brought suit in 1976 requesting that their land be removed from the grand list and be declared tax exempt under the provisions of section 3802(2).³⁹ The Vermont Superior Court held that all of the Council's real property was exempt from taxation.⁴⁰

The town appealed the decision to the Vermont Supreme Court arguing: 1) that the exemption statute violated the equal protection clause of the fourteenth amendment to the United States Constitution, 2) that the statute violated article nine of the Vermont Constitution, and 3) that the Council's use of the timberland and forever wild tracts did not satisfy the requirements of the exemption statute.⁴¹ The first two arguments were rejected by the court with brief explanations and will not be developed further.⁴²

35. *Id.* at 248, 403 A.2d at 694-95.

36. *Id.* at 251, 403 A.2d at 696 (Hill, J., dissenting).

37. The evidence indicated that the tract may only have been visited about once a summer for observation. *Id.* at 249, 403 A.2d at 695.

38. The town left 184 acres untaxed, reasoning that this amount of land was all that was reasonably necessary for the boy scouts' purposes. *Id.* at 243, 403 A.2d at 692; Brief for Appellant at 6-11.

39. 137 Vt. at 243, 403 A.2d at 692.

40. *Id.* at 243-44, 403 A.2d at 692.

41. *Id.* at 244-46, 403 A.2d at 692-93.

42. Article nine of the Vermont Constitution provides in relevant part that "no part of any person's property can be justly taken from him, or applied to public uses, without his own consent, or that of the Representative Body of the freemen." VT. CONST. ch. I, art. 9. The town argued that the legislature could not provide an exemption without being subject to the town's vote of approval because it would constitute a taking of property for public uses without consent. The court dispensed with this argument by noting the extent of the lawmaking power of the sovereign state. 137 Vt. at 244-45, 403 A.2d at 692-93 (citing *Colton & More v. City of Montpelier*, 71 Vt. 413, 45 A. 1039 (1899)).

The third argument provides the basis for this comment and will be explored in detail.

After rejecting the constitutional challenges, the court had to determine whether the Council's use of the two tracts of land met the qualifications for tax exemption under section 3802(2). In particular, the court was faced with the question of whether the property had met the statutory requirement of being "used for the purpose of [the organization's] work."⁴³ In order to qualify, the court required a demonstration that the Council's property was "directly and substantially utilized in furtherance of its organizational purposes."⁴⁴ The timberland tract met this test and was granted tax exempt status.⁴⁵ The forever wild tract, though held to have been directly used for the Council's organizational purposes, did not meet the requirements of substantial use.⁴⁶

III. ANALYSIS

The result reached in *Governor Clinton Council* through the court's application of a new use requirement for section 3802(2) exemptions does not appear to be consistent with the legislative history of the amendment. The policies associated with property tax exemptions, however, may help to explain the basis for creating this new substantial use test for section 3802(2). These policies may also indicate how property tax exemptions under section 3802(4) will be handled in the future by the Vermont Supreme Court.

In construing "use" under section 3802(2), the Vermont Supreme Court first concluded that the primary use test, which had evolved through a line of decisions under the general exemption section 3802(4), did not apply.⁴⁷ Beginning with the presumption

The court disposed of the equal protection challenge by finding that assisting the groups is a legitimate state interest furthered by the statute in a rational manner. 137 Vt. at 246, 403 A.2d at 693.

43. VT. STAT. ANN. tit. 32, § 3802(2) (1970).

44. 137 Vt. at 248, 403 A.2d at 694.

45. *Id.* at 249, 403 A.2d at 695.

46. *Id.* at 250, 403 A.2d at 694.

47. *Id.* at 247, 403 A.2d at 694. For a listing of these primary cases, see note 1 *supra*.

that an amendatory enactment is made with the Legislature's knowledge of the existing law and judicial construction, and that a change in existing law was therefore intended, the court concluded that the Legislature did not intend to incorporate the primary use test into section 3802(2).⁴⁸ The court then created a new test to gauge the use that an organization must make of its property to qualify for exemption.⁴⁹

The Vermont Supreme Court offers no reasoning or support for its conclusion that the Legislature intended to avoid the application of the primary use test, other than the presumption that a change in the law was intended by the amendment. Both the circumstances surrounding the amendment and the amendment itself suggest a different interpretation.

A. *Legislative purpose in enacting section 3802(2)*

In *Fort Orange*⁵⁰ the use of the boy scout reservation was limited to members of the boy scout organization and not open to the general public. Therefore the tax exemption sought under the charitable use provision of section 3802(4) was held to be subject to the town vote for approval pursuant to section 3840.⁵¹ In the *Fort Orange* opinion the Vermont Supreme Court suggested that the Legislature act if they desired to exempt such property without a town's vote.⁵² After a lobbying effort by the Council and several Vermont boy scout councils,⁵³ the Legislature amended section 3802(2) specifically to exempt the property of the boy scouts and other similar organizations if used for the purposes of their work, thus removing the exemption from the control of the town under section 3840.⁵⁴ The Vermont Supreme Court in *Governor Clinton Council* does not mention the effect of avoiding section 3840 as a

48. *Id.* at 247, 403 A.2d at 694 (citing *State v. Anair*, 123 Vt. 80, 81, 181 A.2d 61, 63 (1962), and *Scott v. St. Johnsbury Academy*, 86 Vt. 172, 175, 84 A. 567, 568 (1912)).

49. *Id.* at 248, 403 A.2d at 694.

50. *Fort Orange Council, Inc. v. French*, 119 Vt. 378, 125 A.2d 835 (1956).

51. *Id.* at 382, 125 A.2d at 838; VT. STAT. ANN. tit. 32, § 3840 (1980).

52. 119 Vt. 378, 384, 125 A.2d 835, 839 (1956).

53. Brief of Appellant at 2.

54. There is no record of any legislative discussion on the amendment.

possible purpose for specifically exempting the boy scouts' property. Rather than accept this apparent legislative intent, the supreme court instead took the opportunity to read in a stricter standard of use under section 3802(2) than was required under the primary use test.

B. *Wording of section 3802(2) as compared to 3802(4)*

The choice of the phrase "used for the purpose of its work" in section 3802(2), as compared to the phrase "used for . . . charitable uses" in section 3802(4), seems in no way indicative of an intent to alter or remove the application of the primary use test in the way the supreme court suggests. It is even less of an indication that the Legislature intended to require a more substantial or particular level of use to qualify for exemption. If the Legislature had intended more stringent use requirements in section 3802(2) than under section 3802(4), it could have expressly provided for them as it has in other enactments.⁵⁵ As Justice Hill stated in his dissent in *Governor Clinton Council*:

[N]o authority supports [the majority's] proposition that the Legislature intended the exemption to be conditioned on the quantum of use. On the contrary, where the Legislature intended to more narrowly restrict [*sic*] exemptions, it explicitly did so. It should be noted, for example, that in order to be tax exempt, the real and personal property owned by a post of any veterans' organization must be used as the *principal meeting place* of the post . . . , Young Men's Christian Association building must *contain a free public reading room* . . . , and the grounds and property owned and occupied by agricultural societies must be *used annually for agricultural fairs*.⁵⁶

There is no satisfactory explanation expressed in *Governor Clinton Council* as to why the primary use test could not have been applied.⁵⁷ But the facts in *Governor Clinton Council*

55. 137 Vt. at 251, 403 A.2d at 696 (Hill, J., dissenting).

56. *Id.* (citations omitted).

57. The trial court and both parties were under the assumption that the primary use test controlled the decision. Brief of Appellee at 14, *Governor Clinton Council, Inc. v. Kos-*

presented the Vermont Supreme Court with a problem: a large amount of land, seemingly falling under the express exemption provisions of the statute, was not being used to any significant extent by the boy scout Council. The primary use test, however, as previously applied, would have resulted in an exemption for a very large tract of land in the town of Stratton. In rejecting the primary use test, it appears that the court was looking for a test that could be applied to limit the extent of a tax exemption in accordance with the policies germane to allowing seldom used land to be held tax free.

C. *Property tax exemption policies*

To understand the decision in *Governor Clinton Council*, it may be helpful to look at the policy concerns associated with granting property tax exemptions. A policy generally attributed to property tax exemptions is the desire to help subsidize services that might otherwise be provided by the state.⁵⁸ By encouraging private organizations to provide public or charitable services, the state's burden to provide those services is diminished. Charitable exemptions have also been used, however, to benefit organizations and activities that would normally not be provided by the state, but which the legislature nevertheless feels are worthy of support.⁵⁹ In some instances the use of an indirect subsidy through a property tax exemption allows the state to assist organizations, such as religious groups, that it could not assist by direct subsidy.⁶⁰

The use of property tax exemptions to subsidize charitable activities has long been criticized for a number of reasons. The primary argument against their use is that the cost of the exemption falls on the individual town where the property is located instead

lowski, 137 Vt. 240, 403 A.2d 689 (1979); Brief of Appellant at 2, 3; Trial Court Record at 28.

58. Trustees of Vermont Wild Land Found. v. Town of Pittsford, 137 Vt. 439, 443, 407 A.2d 174, 177 (1979). Warren, Krattenmaker & Snyder, *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 287-88 (1971) [hereinafter cited as Warren].

59. Warren, *supra* note 58, at 299.

60. Walz v. Tax Commission, 397 U.S. 664 (1970) (exemption for property used for religious purposes).

of being spread equitably over the state.⁶¹ A large concentration of tax exempt property undermines the tax base of local governments, thus increasing the burden on local taxpayers.⁶² When the organization owning or using property is not from the locality, such as in *Governor Clinton Council*, the beneficiaries of the exemption are often not the same people who are forced to bear the cost. Because these subsidies have no obvious effect on the state budget, legislators can acquiesce to demands from lobbying groups without worrying about coming up with the funds to support their benevolence.⁶³

Various commentators have suggested that the best way to address the policy concerns would be to abolish property tax exemptions and adopt a direct subsidy system.⁶⁴ A direct subsidy could be adjusted yearly to relate to the needs of the organization instead of to the amount of property owned. The weakness in this procedure would be the potential for political abuse in the yearly allocation of funds.⁶⁵ A better method would have the state reimburse the local government for its lost tax revenue.⁶⁶

Additional policy considerations arise when the land exempted from taxation is vacant or seldom used. Allowing an organization to hold land tax free, without requiring a minimum threshold of use, encourages the holding of land for investment purposes rather than for actual use.⁶⁷ Because the amount of subsidization varies with the extent of property holdings, the exemption provides a benefit to the owner of the property that is not necessarily associated with the financial needs of the organization. Thus, when the

61. Warren, *supra* note 58, at 299.

62. It has been estimated that, nationally, exempt property constitutes one-third of the potential tax base. Hilbert, *Illinois Property Tax Exemptions: A Call for Reform*, 25 DEPAUL L. REV. 585, 586 (1976) [hereinafter cited as Hilbert]; Warren, *supra* note 58, at 299.

63. Warren, *supra* note 58, at 298-99. See generally Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 423 (1934) [hereinafter cited as Stimson].

64. Hilbert, *supra* note 62, at 587; Stimson, *supra* note 63, at 423-24.

65. Stimson, *supra* note 63, at 423-34.

66. Hilbert, *supra* note 62, at 587.

67. See generally *Governor Clinton Council, Inc. v. Koslowski*, 137 Vt. at 247, 249, 403 A.2d at 689, 694-95 (1979).

exemption is extended to unused land, the local government and taxpayers are burdened while the purpose of the exemption (such as giving scouts a place to camp) is not being achieved.

A conflicting policy which has become more apparent in recent years encourages preservation of parcels of land in a natural wilderness state for educational and recreational use.⁶⁸ A few states have enacted legislation providing special tax treatment for undeveloped land.⁶⁹ Preserved wild areas are recognized as providing the same type of public benefits as those fostered by charitable and public use exemptions.⁷⁰ Inherent in the concept of a forever wild area is the necessity for restrictions on the access and physical use of the property.⁷¹ Thus, restricting the physical use of the land may be significant in achieving the goals fostered by a charitable or public use exemption.

These policy concerns should be addressed by the legislature when a property tax exemption is drafted.⁷² Various requirements and limitations are used by Vermont and other states to insure that tax exemption subsidies result in a benefit where needed and to prevent abuse of the right to hold land tax free.⁷³ These controls, if they exist at all, may be ineffective when applied to the facts of a particular case. When the Vermont Legislature amended section 3802(2), removing the tax exemption for property held by certain organizations from the control of the town vote, the only limitation other than ownership was that the property be "used for the purpose of [the organization's] work."⁷⁴ The interpretation of this broad language was left to the courts.

68. See, e.g., *In re Wildlife Preserves Inc. v. Scopelliti*, 66 Misc. 2d 611, 321 N.Y.S.2d 1004 (Sup. Ct. 1971).

69. See, e.g., CONN. GEN. STAT. ANN. § 12-107f (West Supp. 1980).

70. *Id.*

71. See generally *Trustees of Vermont Wild Land Found. v. Town of Pittsford*, 137 Vt. 439, 441-42, 407 A.2d 174, 176 (1979).

72. See *Governor Clinton Council, Inc. v. Koslowski*, 137 Vt. at 251, 403 A.2d at 696 (Hill, J., dissenting).

73. E.g., land "necessary for the fair enjoyment [of the exempt buildings] . . . which is devoted to the [exempt] purposes . . . and to no other purpose and does not exceed 5 acres in extent." N.J. STAT. ANN. § 54:4-3.6 (West 1960 & Supp. 1980). See also text accompanying note 54 *supra*.

74. VT. STAT. ANN. tit. 32, § 3802(2) (1970).

D. *Holding in Governor Clinton Council*

In *Governor Clinton Council* the Vermont Supreme Court purports to be following legislative intent when it rejects the application of the primary use test under section 3802(2).⁷⁵ A more plausible explanation for the rejection of the test is that the court found it unresponsive to the above outlined policies associated with exempting idle or seldom used land. The court may also have found that the primary use test did not adequately or effectively limit tax exemptions to property worthy of that subsidization.⁷⁶ The primary use test could not have been used to restrict the exemption in *Governor Clinton Council* for several reasons. The trial court expressly found that the forever wild tract was used for no purposes other than scouting.⁷⁷ Under the trial court's application of the primary use test, this finding resulted in an exemption. Since the scouting use was the only use found by the trial court, it was necessarily the primary and direct use.

The wording of section 3802(2), requiring only that the property be used for the boy scouts' purposes, may also have frustrated the application of the primary use test. This wording obviates the need for a showing by the property owner that the public receives a benefit from the property. In comparison, primary use decisions under the section 3802(4) charitable use exemption have sometimes denied an exemption where a clear public benefit has not been shown.⁷⁸ The Vermont Supreme Court has interpreted section 3802(4) to require a demonstrated benefit to an indefinite class of persons to satisfy the charitable or public purpose.⁷⁹ In the

75. See text accompanying notes 45-47 *supra*.

76. Courts of other states have not all been willing to assume the responsibility for limiting the exemption. See *San Francisco Boys' Club, Inc. v. Mendocino County* where the court states:

The Legislature unquestionably has power under the constitutional provision to limit the exemption to "any portion" of the property it may designate. Until it acts, and in the absence of any showing of subterfuge or fraud, the determination of those responsible for carrying out the eleemosynary purposes of the club should be respected.

254 Cal. App. 2d 548, 553, 62 Cal. Rptr. 294, 298 (1967).

77. 137 Vt. at 249, 403 A.2d at 695.

78. See text accompanying notes 15-20 *supra*.

79. Trustees of Vermont Wild Land Found. v. Town of Pittsford, 137 Vt. 439, 443, 407

situation where property is seldom used, the court could deny the exemption by finding that the primary use was not public or charitable because it was not providing the necessary benefit to the public that the exemption seeks to foster.⁸⁰

The wording of section 3802(2) would seem to make this type of limitation more difficult to apply. The exemption is directed toward a private organization instead of an indefinite class of persons who are members of the general public. The court seems to acknowledge this when it states that "[t]he purpose behind the tax exemption contained in [section] 3802(2) is to assist the specified groups in promoting their organizational purposes."⁸¹ The stated purpose of a qualified organization could easily encompass land that is kept in an undeveloped state, thus making it difficult to say that the use did not meet the purpose of the statute.

The Vermont Supreme Court could have limited the tax exemption under section 3802(2) by altering its interpretation of the primary use test to reflect the substantial use requirement; but to do so might have caused a disruption of property tax exemptions presently established under section 3802(4)—a disruption that the courts may have been unwilling to create. Since section 3802(2) had not previously been construed under the primary use test, the court was free to fashion a new test that would be more responsive to the policy concerns involved in granting tax exemption to seldom used property.

The test that the Vermont Supreme Court adopted for section 3802(2) requires an organization to demonstrate that the property to be exempted "is directly and substantially utilized in furtherance of its organizational purposes. While the generation of income will not defeat exemption, the lands must be put to some other use that directly serves the goals sought to be fostered by the exemp-

A.2d 174, 176-77 (1979); *English Language Center, Inc. v. Town of Wallingford*, 132 Vt. 327, 329, 318 A.2d 180, 182 (1974).

80. *Trustees of Vermont Wild Land Found. v. Town of Pittsford*, 137 Vt. 439, 444, 407 A.2d 174, 177 (1979).

81. *Governor Clinton Council, Inc. v. Koslowski*, 137 Vt. at 246, 403 A.2d at 693 (1979).

tion."⁸² On its face this test is similar to the primary use test, with the added requirement of a minimum threshold of use. The application of the new test, however, has been left in a state of uncertainty by confusing language in the opinion.

Justice Hill's dissent argues that the court, by creating a substantial use requirement, "substitutes its judgment for the Legislature's in an area of uniquely legislative concern."⁸³ Justice Hill argues further that the court is demanding a demonstration of a substantial use or benefit when the legislature merely intended that the private organization derive a use from the property.⁸⁴

IV. APPLICATION OF THE SUBSTANTIAL USE TEST

In applying the new test in *Governor Clinton Council*, the Vermont Supreme Court distinguishes between the timberland and forever wild tracts. First the court upholds the exemption for the timberland tract. After reciting the uses made of the timberland tract as found by the trial court, the court simply holds that the appellants had not shown these findings to be clearly erroneous.⁸⁵

In evaluating the forever wild tract, however, the court finds that the substantial use test has not been met. The court first addresses the superior court's specific finding that "the 'forever wild' tract is not used for purposes unrelated to scouting."⁸⁶ This finding by the lower court was apparently intended to satisfy the primary use requirement by showing that there was no conflicting use which would render the scouting use incidental.⁸⁷ The court then notes that "[t]here is no finding that the use is substantial, and the evidence in the case is quite to the contrary, indicating that the area is visited only about once a summer for observation."⁸⁸ Of course it is not surprising that the trial court made no mention of substantiality, since the test had never been applied before. At this

82. *Id.* at 248, 403 A.2d at 694.

83. *Id.* at 251, 403 A.2d at 696 (Hill, J., dissenting).

84. *Id.* See text accompanying notes 51-53, 80 *supra*.

85. *Id.* at 248-49, 403 A.2d at 694-95.

86. *Id.* at 249, 403 A.2d at 695.

87. See text accompanying notes 12-15, 76 *supra*.

88. 137 Vt. at 249, 403 A.2d at 695.

point the Vermont Supreme Court could have remanded the case for new findings or concluded that the use was simply not substantial. It goes on, however, to muddy the waters with a number of additional considerations. The court attacks the trial court's primary use finding, stating:

The [trial] court apparently grounded its conclusion on the lack of a showing of any use of the tract other than its educational use. This ignores the plain fact that the mere holding of land constitutes a use. It would, for instance, be competent for a court to conclude, in a case arising under 32 V.S.A. § 3802(4), that the holding of a school building for investment purposes outweighed any direct use for educational purposes, thus rendering the former the primary use, although the latter was the only visible use. It would be similarly competent for a court to conclude in a case arising under 32 V.S.A. § 3802(2), the provision here in issue, that the mere holding so predominated as to render the immediate and tangible use of the property insubstantial.⁸⁹

This language is confusing in several respects. First, the court's parallel comparison of the substantial use test with the primary use test makes it difficult to discern a concrete difference in approach between the two tests. The examples given by the court merely indicate the "primary versus incidental use" comparison that had been made under the primary use test.⁹⁰ Concededly, if the boy scouts had been using the forever wild tract primarily for investment purposes, it would have failed even under the primary use test. However, the trial court made no such finding.

By stating that "the mere holding" of land may predominate over the immediate and tangible use of the property, the court introduces another uncertain element into the opinion. Clearly investment is a tangible use of property that is capable of being compared to a competing use to determine which predominates. However, by saying that the mere holding of land constitutes a "use," the court introduces a new concept. The court compares the holding "use" against the boy scouts' educational use in a primary

89. *Id.*

90. See text accompanying notes 12-15 *supra*.

use type analysis. If the holding that the court refers to is merely the fact of ownership, it is difficult to see how it can be said to render the educational use of the property insubstantial in a primary use sense. It would seem easier to avoid the primary use comparison and to say simply that the educational use did not reach the minimum threshold level of use required. This could be done by concluding that boy scout purposes were not being furthered in the same manner that it is said that a use is not public under the primary use test.⁹¹ Without further definition of what the court means by "holding," it is uncertain what the educational use of the property is being compared to, if anything.

The court does discuss the holding use further, but without adding definition. It states:

Since we must always look to the practical consequences of the statutory scheme in construing legislation, . . . we note that the right to hold land without being subject to taxation may constitute a substantial detriment to the affected locality and a significant advantage to the landowner. We construe "use" to reach such holding. Such use ought not to result in exemption from taxation absent the conferral of a substantial public benefit such as the tax exemption law was designed to foster.⁹²

This language can be interpreted in different ways. The court may simply be referring to the effects associated with a tax exemption as a defense of its creation of a new and stricter test. As a general policy statement, this would aid very little in defining what a holding actually consists of or in determining how a holding can render the actual use insubstantial.

Another possibility is that the court is stating that the holding use actually consists of the deleterious effects created by a tax exemption. These adverse effects may then be weighed against the benefits derived from the tangible use of the property to determine whether exemption is merited. In this sense the substantial use test may just be a balancing test to determine whether exemption

91. See text accompanying notes 16-21 *supra*.

92. 137 Vt. at 249, 403 A.2d at 695.

would be equitable in a given situation. While this is a laudable goal, it tends to ignore the prior legislative balancing of benefits and detriments and the plain wording of the statute.

V. IMPLICATIONS FOR OTHER PROPERTY TAX EXEMPTIONS

The ramifications of the substantial use test are presently unclear. The test created in *Governor Clinton Council* could easily be extended to other sections of the tax exemption statute that have not been construed under the primary use test.⁹³ In addition, the case may signal an intent on the part of the Vermont Supreme Court to scrutinize future property tax exemptions under the section 3802(4) primary use rule to find evidence of concrete public benefits flowing from the right to hold land tax free. The recent trend in primary use decisions has been to look at more factors to determine if a burden on the town is warranted. In *Trustees of Vermont Wild Land Foundation v. Town of Pittsford*,⁹⁴ the court disallowed an exemption for property held in trust as a sanctuary for wildlife and scientific study. Although this was a primary use decision under section 3802(4), the court noted the burden on the town of Pittsford vis-a-vis the benefit the public derived from the exemption.⁹⁵ The court held that the sanctuary did not benefit a substantial class of the public so as to be charitable or public in nature.⁹⁶

The court reaffirmed the approach of balancing the economic interests of the town and the property owner in *Brattleboro Child Development, Inc. v. Town of Brattleboro*.⁹⁷ In *Brattleboro Child* (another section 3802(4) exemption), a nonprofit organization was operating a child day care center used primarily by the children of single working parents. The trial court, in denying the center an

93. Such as VT. STAT. ANN. tit. 32, § 3802(2) (1970) (veterans' organizations); *id.* § 3802(6) (Y.M.C.A. and Y.W.C.A.); *id.* § 3802(7) (cemeteries); *id.* § 3802(9) (agricultural societies).

94. 137 Vt. 439, 407 A.2d 174 (1979).

95. *Id.* at 444, 407 A.2d at 177.

96. *Id.* The court stated that the benefit to the public was "too tangential to require the support . . . of Pittsford." *Id.*

97. 138 Vt. at 402, 416 A.2d 152 (1980).

exemption, found that the services that were provided were of the type normally provided in the home.⁹⁸ The Vermont Supreme Court held that the use was not public within the meaning of section 3802(4) because it was not assuming a burden of the community that was governmental in nature.⁹⁹ The court relied on the fact that the services were "not of the sort the legislature has made obligatory on an agency of government."¹⁰⁰ The unmistakable lesson to be learned from the Vermont Supreme Court's recent decisions is that a substantial demonstrated public benefit is necessary to justify burdening a town with a tax exemption.

Although *Trustees* and *Brattleboro Child* may represent a stricter requirement for public benefit than previously required, this type of economic balancing is to be expected under the section 3802(4) public or charitable use exemption. The general concept of "public" or "charitable" use implies it. In *Governor Clinton Council* the court seems to extend this economic balancing approach to specific property tax exemptions, where, arguably, a determination of public benefit was already made by the legislature.

Exemptions that are most vulnerable to the substantial use standards will be those on land that is intentionally left undeveloped, such as the forever wild tract in *Governor Clinton Council*. The conflicting policy that encourages the preservation of land in its natural state should be considered. In certain circumstances leaving land undeveloped and with restricted access may be a significant and substantial use of benefit to the public.

The Vermont Supreme Court has apparently rejected this concept in *Governor Clinton Council* and *Trustees*. In *Trustees* the property owners had restricted access to the property by requiring those engaged in science, education, or research to file an application for access to the sanctuary.¹⁰¹ The court listed as examples of the limitations on use the fact that publicity for the area had been "restricted" to articles appearing in periodicals and to 250 pam-

98. *Id.* at 406, 416 A.2d at 155.

99. *Id.*

100. *Id.* at 407, 416 A.2d at 155.

101. 137 Vt. at 441-42, 407 A.2d at 176.

phlets sent to regional colleges, that the entrance to the preserve was on private property, and that the owner's telephone number was unlisted.¹⁰² The owners justified the restriction as "essential in order to maintain the value of the property as a scientific 'laboratory'."¹⁰³ In the case of preserving wilderness areas, the Vermont Supreme Court clearly rejects the notion that use by a restricted group of the public can sufficiently benefit the public at large to merit a tax exemption.¹⁰⁴

CONCLUSION

Because of the significant burden that property tax exemptions place on local governments and taxpayers through the erosion of the tax base, tax exemptions have come under criticism and should probably be limited by some method. The problem becomes more acute when the exempt property is not put to a significant use.

If the legislature does not limit the scope of the exemption in a manner that will effectively protect the interest of the local government, the court will impose qualifications of its own. The legislature's wording of section 3802(2) did not provide the necessary limitations on the exemption. Possibly this was an intentional construction designed to give the court the widest latitude in interpreting the statute. Whether or not it was intended by the legislature, the court has taken the initiative of creating a test that will limit the exemption to property that is substantially used in a physical, visible, or tangible manner. Substantial public benefits must flow from the tax free use of the property for the exemption to stand. In the case of a public use exemption under section 3802(4), the benefits may need to be such that would relieve the local community from providing services that it would otherwise be obligated to finance on its own.

Thomas N. Cooper

102. *Id.* at 442, 407 A.2d at 176.

103. *Id.* at 441, 407 A.2d at 176.

104. *Id.* at 444, 407 A.2d at 177.