



Vermont Land Trust

CONSERVING LAND FOR THE FUTURE OF VERMONT

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LAND CONSERVATION THE CASE FOR PERPETUAL EASEMENTS

Over the years, there have been recurring proposals to limit conservation easements to terms of 20 or 30 years, after which they could be renewed only if the landowner consents. Although Vermont law allows the use of “term” easements and various arguments have been advanced in their favor, the Vermont Land Trust (VLT), Vermont Housing and Conservation Board (VHCB), and most other land conservation organizations across the nation have elected to acquire only perpetual conservation easements. Here are VLT's reasons for this policy.

1. Term easements do not accomplish the goals of most landowners who conserve their land.

VLT now holds conservation easements on more than 1,560 parcels of land. Half of the landowners donated their conservation easements. The remainder sold either their development rights or the land outright. Although the tax and financial benefits were usually important considerations, the owner's primary motivation for conserving the property was to ensure that the land would be protected and cared for, even after their own ownership ends. Many were motivated by the desire to give something back to their communities and the belief that future generations will need open space. In 1999, the American Farmland Trust commissioned an independent survey of 130 owners of conserved farms in Vermont. Over half of the farmers responded that their primary motivation was to protect the land for farming in the future. Easements that would allow the land to be developed after 20 or 30 years would not meet the objectives of these owners.

2. For landowners who donate conservation easements, term easements do not qualify for federal income and estate tax deductions.

If an easement meets the requirements of Internal Revenue Code Section 170(h), the donor may claim a charitable deduction for the value of the conservation easement. This value, which must be established by a qualified appraisal, is the difference between the property's value before and after the easement goes into effect. For example, if a property has a fair market value of \$250,000 before it is conserved, and a value of \$150,000 afterwards, the donor may deduct (subject to certain limitations) \$100,000 as a charitable contribution for income tax purposes. If the easement is created by will or living trust, the person's taxable estate may be reduced by the value of the easement. However, these tax benefits are available only if the conservation easement is perpetual. Term easements are not eligible for federal income or estate tax benefits. According to some tax advisors, the gift of a term easement may even trigger a federal gift tax liability. Term easements will not meet the financial objectives of easement donors.

3. In cases where easements are purchased, term easements would save relatively little money at the front end, and cost far more in the long run.

One argument made in favor of term easements is that they would be less costly, thereby allowing more land to be conserved at the same cost. This may be true, but only in the short run. If we use the IRS tables to establish present values, a 20-year easement would cost approximately two-thirds of a perpetual easement. A 30-year easement would cost about 75%. However, because of increasing land values, the cost of renewing the easement at the end of the 20- or 30-year term would be far higher, if indeed the landowner is even interested in doing so.

Take the example of a property worth \$250,000 today. Assume that the easement value is 40% (\$100,000) and that the 40% ratio remains constant throughout a 20-year term. Using the assumptions in Appendix A (attached), if property values rise at a modest average rate of **5% per year**, the farm will be worth \$663,324 at the end of 20 years. The easement value (40%) would be worth \$265,330, and the cost of renewing the 20-year easement (67%) would be \$177,771.

If, on the other hand, property values rose on average at the rate of **10% per year**, the farm would be worth \$1,681,874 after 20 years. The easement value (40%) would be \$672,750, and the cost of renewal (67%) would be \$450,742. Even assuming that the landowner will be willing to renew the easement after 20 years, it seems unlikely that the State of Vermont or other funding sources would be willing to raise the extra millions of dollars required to continue a temporary holding action.

In the 1960s and 1970s, hundreds of units of affordable housing were constructed in Vermont with federal housing tax credits. Developers were required to rent to eligible tenants under "affordability" guidelines for a period of 15-20 years. By the late 1980s, when the affordability covenants were about to expire, hundreds of Vermont families who could not afford the sharp increase in rents were faced with the prospect of losing their homes. Through the Vermont Housing and Conservation Board (VHCB), the State of Vermont managed to avoid this outcome, but only by spending millions of dollars to purchase perpetual affordable covenants. If the federal program had been established with long-term affordability in mind, a little extra cost up front would have saved enormous expenditures later.

For the land trust, which negotiates and holds conservation easements, term easements offer no savings in transactional or administrative costs. The effort and cost of landowner conversations, resource analysis, appraisals, legal drafting, title searches, mapping, and monitoring the easements are virtually the same, whether the easement is perpetual or for a specific term.

4. If VHCB adopted a policy of purchasing term easements, it would lose most of the available leverage from other public and private funding sources.

During its fiscal year 2005-2006, VHCB provided grant funds to conserve 45 farms. Of the \$10.7 million in funds expended on these grants, nearly half (\$5.3 million) came from the federal Farm and Ranchland Protection Program. (Far more than \$10.7 million in farmland easement value will be protected in Vermont because some easements are “bargain-sold” at less than full value, foundations like the Freeman Foundation provide farmland protection grants, and individual contributions are made by Vermonters to protect treasured farms.)

Should the State of Vermont decide to shift to a program of term easements, these other funding sources would no longer be available. The federal Farm and Ranchland Protection Program, which requires a 1:1 match, is available only for perpetual easements. All of the foundation grants and probably most individual contributions are available only for perpetual easements. Although 20- or 30-year easements may seem less costly, at least in the short run, they would still be more expensive for the State, because it would pay 100% of the cost.

5. What is the goal? If the goal is to preserve farmland, forests, wildlife habitat, and recreation areas for future generations, term easements fall short.

When the Vermont Legislature created the Vermont Housing and Conservation Board in 1987, it was seeking to create permanent solutions to the loss of affordable housing and farm and forestland, not to merely postpone the problem for 20 or 30 years. At the same time, landowners who conserve their properties do so in part to strengthen and perpetuate Vermont’s agricultural and forest products industries and to ensure that future generations will also enjoy Vermont’s rural character. Term easements will not meet the objectives of either group.

In a recent submission to the federal Natural Resources Conservation Service, VHCB included the following reasons for acquiring perpetual easements:

- Protect agricultural land for growing food and harvesting timber
- Stabilize agricultural communities and promote reinvestment
- Restore public and commercial confidence in the future of agriculture
- Provide multiple community values -- natural areas, historic, scenic, public access
- Complement community planning efforts
- Leverage substantial funds from conservation land trusts and foundations
- Reflect long term commitment by the State of Vermont to support agriculture
- Have a fair market value established by appraisal
- Promote the legislative goal of protecting farm and forestland for future generations of Vermonters
- Consistency with state law defining "conservation rights and interests"

Some of VLT's easements are now 25 years old. VHCB's first farm easements were acquired in 1987. If 20-year easements had been employed, VLT would already be trying to re-convert its lands. In five years, VHCB would start trading water just to stay even, at an ever-increasing cost.

6. Term Easements Would Eviscerate Farm Affordability

Access to affordable farmland is the primary barrier facing new farmers. Recognizing this barrier, the great majority of farms protected by VHCB over the last two years (and those conserved by VLT with Freeman Foundation support) include a new mechanism: the Option to Purchase at Agricultural Value (OPAV). The OPAV effectively limits the conserved farm resale price to its farm production value, not what an “estate” or second home buyer might pay for a conserved farm. At the time of the farmland easement purchase, farmers are paid for this additional right. There would be little sense in buying this OPAV with a term easement: temporary affordability would have little meaning if the farm will return to fair market value in 20 or 30 years. Further, as the end of the easement term nears, the primary market for conserved farms will shift from operating farmer-buyers to real estate speculators.

7. Acquiring perpetual easements is the fiscally conservative policy to pursue.

VLT's first farm easement is now 27 years old. It protects a 200-acre dairy farm located near the Village of South Woodstock. At the time, there were no public funds for farmland conservation, so the project was accomplished only through a massive community effort to protect open space that local residents felt was essential to preserving the character of the village.

If VLT had adopted a policy of acquiring 25-year term easement at that time, could it still protect the farm today? First, any agreement to renew the easement would require a willing landowner. Second, it would probably require significant funding. A local realtor estimated that the value of the development rights today would be worth at least \$1 million. This is 25% of the State and federal funds which the Vermont Housing and Conservation Board has to allocate to farmland conservation this year. Given the many other farm projects now in the hopper it is a safe assumption that this easement could not be renewed and the land would be available for subdivision and development.

8. Does any generation have the right to tie the hands of future generations through conservation easements and other restrictions?

Some proponents of term easements question the policy of perpetual easements on ethical grounds. But, of course, every generation ties the hands of succeeding generations. If we construct a shopping center or residential development in a corn field, that is what the next generation gets. The key for each generation is to try to make intelligent choices about what future generations will need for both conservation and development.

The Vermont Land Trust thinks a lot about what land it should not conserve, because that land is where future growth should logically be channeled. In Hancock, VLT held a strategic 27-acre parcel out of a farm conservation project, and subsequently transferred the land to the town for future development and public recreation. In Swanton, we consulted with local officials before conserving a farm located adjacent to the village. In Newport Center, we negotiated an agreement that would allow the town to acquire a key parcel next to the town center for future growth. In East Craftsbury, VLT transferred a parcel to a community organization to build a 24-unit senior assisted-living center. In Enosburg, we declined to purchase an easement on a working farm, because the town had zoned the land for future industrial development. Also, in the towns of Bridport and Whiting, we excluded land from a farm easement that the community had zoned for commercial development.

VLT encourages communities to plan for conservation as well as for development. By expressing where the community wants to encourage agriculture, forestry, and public recreation, and where it wants to encourage development, towns will guide VLT's decisions about where to focus its efforts. In Newport Center, Benson, Dummerston and Putney, VLT has invested in such planning. In this way, VLT can ensure that its work will support community objectives, and not work against them.

9. If VLT or VHCB conserves land in the wrong place, society can correct the “error.”

It is impossible for any generation to foresee all the circumstances and choices that will confront future generations. We can only make our best judgment. Sometimes our judgment will be wrong. However, society can correct our “errors,” either by negotiation or eminent domain. If, for example, VHCB and VLT acquire an easement on a property that, generations from now, becomes the perfect site for the new school or landfill, the Legislature has the authority to condemn both the underlying land and the conservation easement. And if public funds had been used to acquire the easement, the public would have to pay only the restricted value of the condemned land, not the full development value.

In many cases, condemnation will not be required. VLT has amended a number of its easements, without cost, to allow a road to be straightened or a power line to be moved. VLT also amended one of its earliest conservation easements, the farm described in Question 6, so the South Woodstock fire department could expand its facilities on adjacent, conserved land. After investigation and discussion, the parties agreed that the site was an appropriate location for the new building, and that a change in the easement was in the public interest. However, even if VLT had not agreed, the town had the power of eminent domain to condemn the land for public use.

One final note: Although it was not a reason for VLT's policy of acquiring only permanent easements, more than one farmer has reported that once the farm had been conserved, the relationship between the owner and the land changed. When an owner assumes that he or she will be the last generation to farm the land and that the next owner will develop it, there is little incentive to maintain the buildings, keep up fertility of the soil, and keep the farm infrastructure up to date. On the other hand, when subdivision and development is no longer a possibility, these investments do make sense.

These are the reasons VLT has chosen to acquire and hold only perpetual easements. Land conservation must be viewed as a long-term investment, not a temporary solution to short-term problems. Done thoughtfully, and with the involvement of local communities, land conservation can not only support the goals of the current generation, but will benefit future generations of Vermonters in ways we can barely imagine.

Vermont Land Trust
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Appendix A

COST OF RENEWING A 20-YEAR TERM EASEMENT AT THE END OF THE INITIAL 20-YEAR TERM

Assumptions

- Initial Fair Market Value of the farm (unrestricted) - \$250,000
- Restricted value of farm - 60% of unrestricted value
 - ❖ Initial restricted value - \$150,000
- Value of perpetual easement - 40% of unrestricted value
 - ❖ Initial value of perpetual easement - \$100,000
- Cost of 20-year term easement - 67% of perpetual easement value

Result: The cost of purchasing a 20-year term easement is \$67,000.

Example 1: If property values rise an average of 5% per year over 20 years, the cost of renewing the 20-year easement would be almost three times higher:

- Fair Market Value of the farm (unrestricted) after 20 years - \$663,324
- Value of perpetual easement (40%) after 20 years - \$265,330
- Cost of renewing 20-year term easement - 67% of perpetual easement value

Result: The cost of renewing the easement for a second 20-year term would be \$177,771.

Example 2: On the other hand, if property values raise an average of 10% per year over 20 years, the cost of renewing the 20-year easement would be even higher:

- Fair Market Value of the farm (unrestricted) after 20 years - \$1,681,874
- Value of perpetual value (40%) after 20 years - \$672,750
- Cost of renewing 20-year term easement - 67% of perpetual easement value

Result: The cost of renewing the easement for a second 20-year term would be \$450,742.