

**THE NEW CROP GROWING ON THE HILLSIDES:<sup>1</sup>  
RETAINING LAND IN AGRICULTURAL USE THROUGH THE  
OPAV**

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1. Hayden Carruth, *Vermont*, 29 HUDSON REV. 173, 179 (1976).

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## INTRODUCTION

Thinking of Vermont evokes images of rolling hills dotted with red barns and grazing cattle, winding dirt mountain roads lined with tapped maple trees, or silos popping up along either side of Route 100, the scenic byway that weaves along nearly the length of the state. Nestled in northern New England,<sup>2</sup> this working landscape is recognized by Vermonters and tourists alike as a fundamental part of the state's identity.<sup>3</sup> As of the United States Department of Agriculture's (USDA) most recent census, the state's farmland is comprised of nearly 1.252 million acres,<sup>4</sup> about 20% of the state's total acreage.<sup>5</sup> Available and accessible farmland is central to ensuring that farmers can continue to generate this landscape and its products.<sup>6</sup> However, "Vermont's pastoral landscape and strong agricultural brand obscure the fact that the state continues to lose active farms."<sup>7</sup>

Across New England generally, farmland acreage has been dwindling.<sup>8</sup> Over the past century, the region has lost about four million acres of active agricultural land, almost 300,000 of which was converted from crop and

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2. *New England USA Quick Facts*, DISCOVER NEW ENG., <http://www.discovernewengland.org/about-new-england/new-england-usa-quick-facts-0> [https://perma.cc/GAT9-95CK] (last visited Feb. 23, 2017).

3. Matt Hongoltz-Hetling, *Fate of a Farm, Part 3: Young Farmer Invests in the Future of Farms*, VALLEY NEWS (July 3, 2016), <http://www.vnews.com/Fate-of-a-Farm-Part-3-Dairy-industry-subsidies-2917095>; Todd W. Daloz, *Farm Preservation: A Vermont Land-Use Perspective*, 12 VT. J. ENVTL. L. 427, 430 (2011); C. Clare Hinrichs, *Consuming Images: Making and Marketing Vermont as Distinctive Rural Place*, in *CREATING THE COUNTRYSIDE* 259, 259 (E. Melanie DuPuis & Peter Vandergeest eds., 1996) ("Vermont rurality is especially distinctive.").

4. U.S. DEP'T OF AGRIC., AC-12-A-51, 2012 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 252 (2014), [https://www.agcensus.usda.gov/Publications/2012/Full\\_Report/Volume\\_1,\\_Chapter\\_1\\_US/usv1.pdf](https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf) [https://perma.cc/2R53-DNVH] [hereinafter 2012 CENSUS OF AGRICULTURE]. The USDA's report defines "farm" as "any place from which \$1,000 or more of agricultural products were produced and sold, or normally would have been sold, during the census year." *Id.*

5. *Vermont Statistics, FARMLAND INFO. CTR.*, <http://www.farmlandinfo.org/statistics/vermont> [https://perma.cc/AJ65-D986] (last visited Jan. 13, 2017).

6. See Daloz, *supra* note 3, at 431–33 (describing how agricultural land is being lost due to development); Michael Hamm, *Farmland, Farms, Farming, and Farmers: The Four F's of Food Production*, 1 GASTRONIMICA 27, 27–28 (2001).

7. Katie Hannon Michel, *Landless: Legal & Policy Tools for Transferring Vermont Farmland to the Next Generation of Stewards and Food Producers*, 39 VT. L. REV. 461, 469 (2014).

8. AM. FARMLAND TR. ET AL., *NEW ENGLAND FOOD POLICY: BUILDING A SUSTAINABLE FOOD SYSTEM* 1 (2014), [http://www.clf.org/wp-content/uploads/2014/03/1.New\\_England\\_Food\\_Policy\\_FULL.pdf](http://www.clf.org/wp-content/uploads/2014/03/1.New_England_Food_Policy_FULL.pdf) [https://perma.cc/DQN5-H4Z2].

pastureland to developed property within the past 30 years.<sup>9</sup> This trend can be attributed to “the demand for good farmland that can be easily converted into residential development . . . often [exceeding] the demand for the land in its current use.”<sup>10</sup> While this “suburban sprawl” is the general trend in southern New England, northern New England faces pressure from “rural sprawl”: new landowners converting active farmland into residential or lifestyle farms, country estates, or vacation homes.<sup>11</sup> As these pressures increase, the market value, and therefore the price, of farmland has been increasing.<sup>12</sup> However, because farming has not become significantly more profitable, the farmland’s agricultural value often falls short of this price.<sup>13</sup> Thus, farmers are facing greater difficulty purchasing farmland.<sup>14</sup> States have responded by adopting a variety of tools to help ensure that farmland remains available or accessible for farmers.<sup>15</sup>

Most states have legislation enabling conservation easements to protect land from development.<sup>16</sup> Usually, the landowner grants “development rights” to an easement holder, such as her rights to build residential, commercial, or industrial structures; grant rights-of-way; or subdivide the parcel.<sup>17</sup> Although some states authorize these easements to impose both negative and affirmative obligations on the landowner, most conservation easements only impose negative obligations.<sup>18</sup> A “negative obligation” creates the duty to refrain from certain activities whereas an “affirmative obligation” creates the duty to undertake certain activities. Consequently,

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9. *Id.*

10. Daloz, *supra* note 3, at 434.

11. Michel, *supra* note 7, at 487; Kendra Johnson, *Conserving Farmland in California: For What and For Whom? How Agricultural Conservation Easements Can Keep Farmland Farmed*, 9 SUSTAINABLE DEV. L. & POL’Y 45, 46 (2008).

12. U.S. DEP’T OF AGRIC., NAT’L AGRIC. STATISTICS SERV., LAND VALUES: 2015 SUMMARY 8 (2015), <http://usda.mannlib.cornell.edu/usda/nass/AgriLandVa//2010s/2015/AgriLandVa-08-05-2015.pdf> [<https://perma.cc/6BW6-PP9M>] (noting a slight increase in the region’s average value per acre of farm real estate from 2011 to 2015); AM. FARMLAND TR. ET AL., *supra* note 8.

13. Johnson, *supra* note 11, at 46–47 (suggesting that California could use OPAVs to avoid situations where an easement only reduces a farm’s price from its hypothetical \$1 million development value to its \$700,000 rural value, still \$200,000 above the land’s agricultural value).

14. *Id.*; Daloz, *supra* note 3, at 435.

15. Michel, *supra* note 7, at 467, 480; *see* AM. FARMLAND TR. ET AL., *supra* note 8, at 7 (noting that all states implement smart growth goals or strategies differently).

16. *See* Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 2013 UTAH L. REV. 687, 696 (2013) (explaining that because most states’ common law disfavors easements held in gross, “state conservation easement ‘enabling’ statutes” are necessary to provide a legal basis for conservation easements).

17. *See, e.g.*, Privately Funded Easement Template, Vt. Land Tr., Grant of Dev. Rights, Conservation Restrictions, and Option to Purchase at Agric. Value 2 (Oct. 7, 2014) (on file with Vermont Land Trust) [hereinafter Privately Funded Easement Template].

18. Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 136 (2011); Johnson, *supra* note 11, at 47.

while a traditional conservation easement protects farmland from development, it “does not specify that it must be sold to a farmer or kept as a farm.”<sup>19</sup> Therefore, non-farmers may purchase agricultural land and convert it from working farms into non-working rural estates.<sup>20</sup> This conversion may alter the visual landscape and decrease the property’s contribution to the town’s rural economy because the property no longer requires the town’s agricultural support services.<sup>21</sup> Further, the conversion potential often raises the market value of the land beyond what many farmers can afford or are willing to pay based on the land’s expected returns.<sup>22</sup>

To increase the likelihood of farmland remaining in active agricultural use, in 2003, Vermont became the second of two states to include an “option to purchase . . . at . . . agricultural value” (OPAV) clause in many of its agricultural conservation easements.<sup>23</sup> The Vermont Land Trust (VLT), a private, nonprofit organization, is the easement holder of all Vermont easements containing the OPAV clause.<sup>24</sup> Often VLT co-holds these easements with at least one of two public state entities, the Vermont Housing and Conservation Board (VHCB) and the Vermont Agency of Agriculture, Food, and Markets (Vermont Agency of Agriculture).<sup>25</sup> If a Vermont farm is subject to an easement containing this clause and the farmer seeks to sell her farmland to someone other than a family member or “qualified farmer,” the OPAV allows any easement holder to exercise the option to purchase the farm at its agricultural value and then resell it to

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19. HOLLY RIPPON-BUTLER ET AL., NAT’L YOUNG FARMERS COAL., FINDING FARMLAND: A FARMER’S GUIDE TO WORKING WITH LAND TRUSTS 1, 6 (2015), <http://www.youngfarmers.org/wp-content/uploads/2015/01/NYFC-Finding-Affordable-Farmland.pdf> [<https://perma.cc/A8Y7-XMGX>].

20. *Id.*; BOB WAGNER ET AL., LAND FOR GOOD, U.S. DEP’T OF AGRIC., DOES THE OPTION AT AGRICULTURAL VALUE PROTECT FARMLAND FOR BEGINNING FARMERS?: A POLICY ANALYSIS 3 (2013), <http://landforgood.org/wp-content/uploads/LFG-Does-The-Option-At-Agricultural-Value.pdf> [<https://perma.cc/Z482-5CYN>].

21. Interview with Jon Ramsay, Dir., Vt. Land Tr. Farmland Access Program (May 18, 2016) [hereinafter Ramsay Interview].

22. Johnson, *supra* note 11, at 46; RIPPON-BUTLER ET AL., *supra* note 19, at 6–7.

23. RIPPON-BUTLER ET AL., *supra* note 19, at 6–7; AM. FARMLAND TR. ET AL., *supra* note 8, at 14; *The Affordability Option: Keeping Farms Affordable for Farmers*, VT. LAND TR., <http://www.vlt.org/opav> [<https://perma.cc/2JV4-NC7H>] (last visited Jan. 15, 2017) [hereinafter *The Affordability Option*]; see WAGNER ET AL., *supra* note 20, at 3 (highlighting that in 1994 Massachusetts was the first state to begin using OPAVs).

24. KELSEY WICKEL, VT. LAND TR., GREENER PASTURES FOR NEW FARMERS 2 (2016), [http://www.dvrpc.org/food/pdf/GP\\_VermontLandTrust.pdf](http://www.dvrpc.org/food/pdf/GP_VermontLandTrust.pdf) [<https://perma.cc/3S7T-ZMVG>]; Ramsay Interview, *supra* note 21.

25. Michel, *supra* note 7, at 480; Publicly Funded Easement Template, Vt. Land Tr., Grant of Dev. Rights, Conservation Restrictions, Option to Purchase, and Right of Enf’t of the U.S. (Apr. 5, 2016) (on file with Vermont Land Trust) [hereinafter Publicly Funded Easement Template].

another farmer.<sup>26</sup> The standard OPAV clause VLT inserts into its easements defines a “qualified farmer” based on the proportion of the potential buyer’s income that comes from farming.<sup>27</sup> However, even if the potential buyer satisfies this definition, because the easement does not assert an affirmative obligation to farm, VLT cannot guarantee that the property will not fall out of active agricultural use.<sup>28</sup> OPAVs strive to keep conserved farmland active by keeping farmland prices affordable for farmers.<sup>29</sup> They focus solely on the farmland’s transfer, aiming “to promote, but not require, farmer-to-farmer sales and avoid the unintended consequence of protected farms selling to non-farmers at inflated prices.”<sup>30</sup>

This dissertation primarily answers the question: what is the OPAV’s role as a legal mechanism in ensuring that Vermont’s farmland remains in active agricultural use? It focuses on how OPAVs strive to keep agricultural land affordable for farmers by targeting the land’s price rather than the farm’s financial viability. First, this dissertation provides background on agriculture’s importance in Vermont and draws attention to the significance of access to land by farmers for allowing continued farming. Then, it interprets existing Vermont land-use law to establish the OPAV’s place in the state’s legal regime and how an OPAV legally, and therefore practically, functions. Finally, it critiques Vermont’s OPAV and examines how the OPAV could expand within and beyond Vermont.

## I. THE IMPORTANCE OF PRESERVING VERMONT FARMLAND

Farmland is central to Vermont’s identity and economy because of the landscape and agricultural products that it creates.<sup>31</sup> Since the late nineteenth century, Vermont has invested in promoting the state’s rural identity.<sup>32</sup> Nearby New York, New Hampshire, and Maine had already been marketing their “daunting wilderness,” leaving Vermont to compete as a charmingly pastoral destination.<sup>33</sup> As one 1970s poet reproached,

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26. RIPPON-BUTLER ET AL., *supra* note 19, at 8; WAGNER ET AL., *supra* note 20, at 3; *Farmland Access: Connecting Farmers with Affordable Farmland*, VT. LAND TR., <http://www.vlt.org/initiatives/affordable-farmland> [<https://perma.cc/J8EZ-G83L>] (last visited Jan. 18, 2017).

27. Privately Funded Easement Template, *supra* note 17, at 13; Publicly Funded Easement Template, *supra* note 25, at 13.

28. Ramsay Interview, *supra* note 21.

29. *Id.*

30. WAGNER ET AL., *supra* note 20, at 4.

31. Daloz, *supra* note 3, at 430.

32. Hinrichs, *supra* note 3, at 264.

33. *Id.*

Down in Montpelier the state development  
commission spends a hundred grand a year—  
which is not hay, by God—in advertising  
our sleepy farmlands and our quaint[,] red barns,  
but not one cent to keep our farmers eating or those barns  
standing.<sup>34</sup>

However, “keep[ing] those farmers eating and those barns standing” relies in large part on the farmers being able to compete with the, often larger scale, agricultural producers of other regions.<sup>35</sup> Thus, while marketing Vermont’s rural image started as a method to attract property buyers and eventually tourists to the state, it has since shifted to attracting out-of-state consumers to buy Vermont-made products.<sup>36</sup>

Vermont’s marketing has been so successful that consumer research discovered that by the late 1980s, consumers were “associat[ing] the name ‘Vermont’ with ‘purity, wholesomeness, rural values, tradition, self-reliance[,] . . . hard work, environmental awareness[,] and closeness to nature.’”<sup>37</sup> In the early 1990s, “a Vermont-made product [could] easily retail for 15 to 20 percent more than a comparable product that [was] mass produced.”<sup>38</sup> In more recent years, protecting Vermont’s reputation has led to Vermont producers and consumers seeking government enforcement of branding and consumer deception laws.<sup>39</sup> Protecting Vermont’s rural image is important for marketing Vermont goods within Vermont as well. As consumers have become increasingly interested in eating locally produced food, Vermont has realized the need to ensure that its farms stay active.<sup>40</sup>

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34. Carruth, *supra* note 1.

35. Daloz, *supra* note 3, at 428; *see* Michel, *supra* note 7, at 468 (“Vermont farms are small as measured by both sales and acreage.”).

36. Hinrichs, *supra* note 3, at 268.

37. *Id.* at 269 (quoting Marialisa Calta, *Made in Vermont: Myths You Can Eat*, N.Y. TIMES, Dec. 4, 1991, at C1).

38. Marialisa Calta, *Made in Vermont: Myths You Can Eat*, N.Y. TIMES, Dec. 4, 1991, at C1.

39. Letter from Vt. Maple Sugar Makers’ Ass’n to Lynn Syzbist, Office of Nutrition, Labeling, & Dietary Supplements (Feb. 15, 2016), <https://www.consumerproductmatters.com/wp-content/uploads/sites/13/2016/04/FDA-Letter.pdf> [<https://perma.cc/VUF7-VAWL>] (“This unchecked misbranding has an adverse impact on manufacturers of products containing real maple syrup, as it allows cheaper products not containing premium ingredients to compete with those actually containing maple syrup.”); *see* Second Amended Complaint at 7, *McNaught v. Pinnacle Food Grp., L.L.C.*, No. 5:12-cv-168, (D. Vt. Feb. 14, 2013), 2013 WL 2303195 (arguing that mislabeling and incorrectly bottling imitation maple syrup “deceives customers into believing that Log Cabin Syrup is actually pure maple syrup, undercutting prices of its honest competitors”).

40. Matt Hongoltz-Hetling, *Fate of a Farm, Part 1: Thinning the Herd*, VALLEY NEWS (July 1, 2016), <http://www.vnews.com/Fate-of-a-Farm-Part-1-Joan-Wortman-Dairy-2916319> [<https://perma.cc/NEF4-X4E6>]; Ramsay Interview, *supra* note 21.

“To the extent that a particular rural image of Vermont remains critical to attract tourism and differentiate goods and services, there will be significant pressure to maintain Vermont as a kind of living rural museum.”<sup>41</sup>

Agriculture’s contribution to Vermont’s identity, in turn, contributes to the state’s economy.<sup>42</sup> Although agriculture consistently and directly contributes to less than 2% of the state’s gross domestic product, it nevertheless “remains an important component of the state’s economy and cultural image.”<sup>43</sup> At over \$776 million in 2012, agriculture’s contribution to Vermont’s gross domestic product far exceeds that of agriculture in all other New England states.<sup>44</sup> In addition to the sale of goods, agriculture plays an indirect role in Vermont towns’ local economies through the goods and services each town provides to support its farms.<sup>45</sup> Jon Ramsay, Director of VLT’s Farmland Access Program, describes farmland access’s importance as such: making land affordable for farmers to purchase provides farmers with secure land tenure; when a farmer has secure land tenure, he is more likely to invest in infrastructure, such as farm buildings or equipment, to make his farm a viable agricultural business.<sup>46</sup> Infrastructure investment allows the farmer to expand his operations, subsequently spending more on farm inputs, such as cattle feed or farm labor; these infrastructure and input expenditures fund the local rural economy and service providers, which in turn support other farmers’ businesses.<sup>47</sup> This “circle” relies on farmland not only being conserved but also being affordable so that farming remains profitable for farmers who purchase land.<sup>48</sup> While Vermont’s other legal instruments relieve development pressures on farmland, alone, they fail to keep land sufficiently affordable for farmers for it to remain in active agricultural use.

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41. Hinrichs, *supra* note 3, at 274.

42. *Vermont Farmland Conservation Program*, VT. HOUSING & CONSERVATION BOARD, <http://www.vhcb.org/farmland-conservation.html> [https://perma.cc/4FCC-P64L] (last visited July 1, 2016).

43. VICKI THOMPSON ET AL., VT. DEP’T OF LABOR, ECONOMIC-DEMOGRAPHIC PROFILE SERIES: VERMONT 2015, at 1, 5 (2015), <http://www.vtlimi.info/profile2015.pdf> [https://perma.cc/ZGS6-AEDP].

44. 2012 CENSUS OF AGRICULTURE, *supra* note 4, at 252; JAMES M. JEFFORDS, VT. LEGISLATIVE RESEARCH SERV., ECONOMIC IMPACT OF AGRICULTURE IN VERMONT 3–4 (2010), <https://www.uvm.edu/~vlrs/Agriculture/agric%20econ%20impact.pdf> [https://perma.cc/L6U2-9A54].

45. Ramsay Interview, *supra* note 21.

46. *Id.*

47. *Id.*

48. *Id.*; AM. FARMLAND TR. ET AL., *supra* note 8, at 14.

## II. THE OPAV'S PLACE IN VERMONT

### A. Laws Protecting Agricultural Land and Where They Leave Room for OPAVs

Farmers seeking to start or expand a farm may face two typical land-based obstacles: receiving permission to build farm infrastructure on farmland and finding available and affordable farmland.<sup>49</sup> Thus, Vermont implements a number of legal instruments to protect agricultural land from development so that it is available for active farming. Some of Vermont's instruments, such as Act 250 and municipal zoning, specify where and how development can happen, often creating special permitting exemptions or specified areas for agricultural operations. Other instruments, such as traditional conservation easements and the Right of First Refusal (RFR), protect land from development so that it is available for farmers to access. However, while these instruments increase farmland's availability and ease a farmer's ability to build a farm once he owns the land, alone, they do not ensure that farmland is affordable, and consequentially accessible, to farmers. OPAVs aim to bridge this gap.

#### 1. Act 250 and Local Planning

Vermont's land-use law affects whether and how a farmer can use her land.<sup>50</sup> Whereas the statewide Act 250 may require landowners to receive a permit before developing or subdividing a particular piece of land,<sup>51</sup> municipal zoning bylaws specify the types of development allowed in certain areas.<sup>52</sup> Requiring farmers to receive a permit before building farm infrastructure could be another barrier to starting or expanding a farm, which may decrease farming's viability. Likewise, allowing any development to take place likely increases the demand for, and consequentially the price of, the land. Therefore, these laws' special provisions for agriculture may increase farmland affordability by lessening permitting burdens on farmers and the demand from non-farmers for land in agricultural zones.<sup>53</sup> However, because these laws seek to achieve a variety

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49. Daloz, *supra* note 3, at 435.

50. *See id.* at 444–52 (summarizing how Vermont's Act 250 and municipal zoning protects agricultural lands).

51. VT. STAT. ANN. tit. 10, § 6081(a) (2016).

52. *See generally* VT. STAT. ANN. tit. 24, § 4414 (outlining Vermont's zoning laws).

53. *See* VT. STAT. ANN. tit. 10, § 6081(s)(1) (stating that no "permit amendment is required for farming that: will occur on primary agricultural soils preserved in accordance with section 6093 of this title; or will not conflict with any permit condition issued pursuant to this chapter").

of land-use goals, rather than solely targeting farmland's value, they do not go as far in ensuring farmland affordability as does the OPAV.

Unique to Vermont, Act 250 is a statewide statute requiring most landowners to receive a permit from one of the state's District Environmental Commissions before developing or subdividing their land.<sup>54</sup> The Act defines "development" to include such activities as commercial or industrial construction on particular land acreage<sup>55</sup> and residential construction of ten or more units.<sup>56</sup> The Act explicitly excludes farming that takes place below an elevation of 2,500 feet from this definition.<sup>57</sup> To grant a permit, the relevant commission must find that the applicant has satisfied ten statutory criteria.<sup>58</sup> Among other things, these criteria require that the project will not unduly pollute the air or water, unreasonably congest traffic or burden the municipality's educational services, or adversely affect the area's scenic or natural beauty.<sup>59</sup> Further, development or subdivision that will reduce the agricultural potential of "primary agricultural soils" may receive a permit only if the applicant suitably mitigates the development.<sup>60</sup> The applicant may satisfy this mitigation requirement with onsite mitigation, protected by conservation easements, or offsite mitigation in the form of money given to the Vermont Agency of Agriculture.<sup>61</sup> While this mitigation increases the availability of farmland, it does not necessarily increase farmland's affordability because it does not focus on farming's viability or the farmland's value.

Conversely, exempting farmers from most Act 250 permit requirements may increase farming's viability. Certain projects require hearings before the District Commission,<sup>62</sup> sometimes followed by appeals to the Environmental Division of the Superior Court and then the Vermont Supreme Court.<sup>63</sup> If Act 250 required farmers to receive permits, this permitting process could have been prohibitively expensive and lengthy for

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54. VT. STAT. ANN. tit. 10, §§ 6026, 6081(g); *see* AM. FARMLAND TR. ET AL., *supra* note 8, at 7 (noting that Act 250 makes Vermont the only New England state to have "comprehensive land use planning at the state level").

55. VT. STAT. ANN. tit. 10, § 6001(3)(A)(i).

56. *Id.* § 6001(3)(A)(iv).

57. *Id.* § 6001(3)(D)(i).

58. *Id.* § 6086.

59. *Id.*

60. *Id.* § 6086(a)(9)(B).

61. *Id.* § 6093(a)(3)(A)-(B); Ramsay Interview, *supra* note 21; *see* discussion *infra* p. 505 (noting that the Vermont Agency of Agriculture sometimes puts this mitigation money into a trust fund for VHCB, which occasionally ends up funding one of VLT's farmland programs, including the OPAV).

62. VT. STAT. ANN. tit. 10, § 6084(b).

63. *Id.* §§ 6086(f), 6089.

farmers seeking to build infrastructure.<sup>64</sup> Requiring permits could have dissuaded farmers from improving the land in ways required to make the farm economically viable, such as constructing new maple-syrup-production or livestock-feeding facilities.<sup>65</sup> This could have forced established farmers out of business and into selling their farmland, possibly to non-farmers. Similarly, a permitting requirement could have discouraged new and beginning farmers from purchasing farmland in need of improvements. Thus, these exemptions help farmland remain active by reducing the burdens on expanding or beginning farmers who otherwise have access to farmland.<sup>66</sup>

In addition to Act 250, Vermont legislation also allows regional plans and local zoning bylaws, which determine where certain types of development can happen.<sup>67</sup> Regional plans must include a land-use map indicating areas for certain uses, including “agriculture, . . . residence, commerce, industry, . . . and open spaces.”<sup>68</sup> Municipalities may implement these plans with zoning bylaws that regulate the types and sizes of structures allowed within each designated area.<sup>69</sup> Municipalities may create agricultural zones that “permit[] all types of agricultural uses and prohibit[] all other land development except low density residential development.”<sup>70</sup> Further, municipal bylaws “shall not regulate required agricultural practices, including the construction of farm structures.”<sup>71</sup> Because landowners may not develop their land without complying with these bylaws and receiving a zoning permit,<sup>72</sup> the agricultural zone and this exemption are other examples of Vermont legislation easing farmers’ ability to build or expand farming infrastructure on their land.<sup>73</sup> Similar to Act 250’s agricultural exemptions, exempting farmers from zoning regulations reduces barriers to building new farmland infrastructure. Further, zoning limits the types of development that can happen in agricultural zones, which may reduce farmland’s development value. However, because agricultural zones still allow residential development and

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64. Daloz, *supra* note 3, at 445.

65. See VT. STAT. ANN. tit. 10, § 6001(22) (defining “farming” and listing its possible activities or forms).

66. Daloz, *supra* note 3, at 446.

67. VT. STAT. ANN. tit. 24, §§ 4345a(3)(5), 4411.

68. *Id.* §§ 4348a(a)(2)(A), 4382(a)(2)(A).

69. *Id.* § 4411(a).

70. *Id.* § 4414(1)(B)(i).

71. *Id.* § 4413(d)(1)(A).

72. *Id.* §§ 4446, 4449(a)(1).

73. See Daloz, *supra* note 3, at 444, 449 (“[T]he limiting features of agricultural zones mean that property owners, at a minimum, are restricted in the size and scale of development they can pursue.”).

not all farmland falls within an agricultural zone, zoning does not in itself ensure that farmland is available or affordable for farmers. Where Vermont's public laws fail to protect farmland, the private conservation easement may step in and prevent certain activities from taking place on legally conserved land.

## 2. Traditional Conservation Easements and the Right of First Refusal

Across the United States, conservation easements have become a widespread, private legal instrument used to protect land from development.<sup>74</sup> Through these voluntary agreements, the current landowner binds herself and all future owners to avoid using the land in certain ways so as to protect the land's conservation values.<sup>75</sup> Typically, the landowner sells or donates the easement through a deed conveyed to an easement holder.<sup>76</sup> The easement holder, "usually a land trust or government entity," then agrees to enforce the easement's terms in perpetuity.<sup>77</sup> A landowner can protect any type of land with a conservation easement, provided that the easement has "a conservation purpose or yield[s] a conservation benefit" to the public.<sup>78</sup> While conservation easements often successfully protect land from development, using a traditional conservation easement to protect agricultural land may pose a number of issues.<sup>79</sup>

Conservation easements' voluntary and perpetual natures may create two such issues.<sup>80</sup> Because the parties voluntarily create a conservation easement, it may not necessarily protect prime agricultural soils or contiguous parcels of land.<sup>81</sup> In fact, conservation easements protect only about 10% of Vermont's "highest-rated agricultural soils."<sup>82</sup> This may result in conserving farmland that is not the "best" to be conserved,

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74. Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1, 1, 3 (2012).

75. Owley, *supra* note 18, at 137; *see* discussion *supra* p. 487 (noting that while conservation easements' enabling legislation sometimes authorizes conservation easements to impose affirmative obligations, they usually only impose negative obligations).

76. Owley, *supra* note 18, at 136; Jay, *supra* note 74, at 3.

77. Jay, *supra* note 74, at 3; VT. STAT. ANN. tit. 10, § 822 (enabling easement holders and their successors and assigns, to enforce easement terms against the property owner and her heirs, successors, and assigns); *see* I.R.C. § 170(f), (h) (2016) (requiring that conservation easements be donated in perpetuity for the donor to be eligible for a tax deduction from the United States Internal Revenue Service (IRS)).

78. Owley, *supra* note 18, at 136 (citing I.R.C. § 170(h) (2010)). The formulation of this requirement may vary depending on the state enabling legislation. *Id.*

79. Daloz, *supra* note 3, at 437.

80. *Id.* at 437-38.

81. *Id.*; Michel, *supra* note 7, at 481.

82. Michel, *supra* note 7, at 470.

promising future farmers the availability of only less agriculturally valuable farmland.<sup>83</sup> Moreover, although created voluntarily, conservation easements run with the land from landowner to landowner in perpetuity, often without termination or modification.<sup>84</sup> This may hinder current farmers' ability to adapt to changing circumstances.<sup>85</sup> For instance, as agricultural technology or surrounding land uses change, a farmer may wish to change development.<sup>86</sup>

If the easement forbids this type of change, the farm may cease to be economically viable, thereby reducing the farmland's affordability.<sup>87</sup> As a clause within a conservation easement, the OPAV does not directly cure this inherent weakness of conservation easements. Because Vermont does not currently have legislation or case law expressly addressing easement termination or modification, the law is uncertain on whether parties to a conservation easement can agree to a change.<sup>88</sup> Therefore, this issue may only be reduced or avoided if the easement donor and holder carefully draft the easement's language at the time of the easement's creation so as to allow subsequent farmers to react to changed circumstances.<sup>89</sup>

A third issue may arise regarding the easement's negative impact on the land's property value.<sup>90</sup> Farmland has roughly three potential values: (1) a development value, where any development is possible; (2) a rural value, where only rural uses are permitted; and (3) an agricultural value, where the land will only be used for farming.<sup>91</sup> The development rights transferred through a conservation easement reduce the property's value from its development value to its rural value. Thus, a landowner usually receives a tax deduction or direct compensation for donating or selling a conservation easement.<sup>92</sup> However, his lost development rights may still financially burden him by reducing his collateral and limiting his "future ability to

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83. *Id.* at 482; Daloz, *supra* note 3, at 438. Vermont has somewhat dealt with this issue through such laws as Act 250 and municipal zoning. *Id.* at 445–46, 449.

84. Jay, *supra* note 74, at 4–5 (introducing the four conflicting legal regimes that address easement termination and modification).

85. Daloz, *supra* note 3, at 438.

86. *Id.*; Alexis Peters, *The Long and Winding Road: Easement Modification and the Future of Long Distance Hiking Trails*, 40 VT. L. REV. 107, 112–13 (2015).

87. Peters, *supra* note 86.

88. *See id.* at 109, 119 (exploring the debate that has been running in Vermont and its General Assembly since 2012 on whether to enact legislation allowing easement termination or modification).

89. *Id.* at 119.

90. Daloz, *supra* note 3, at 438.

91. *Id.* at 437, 438. Act 250 is an example of a law that allows farmland to maintain its development value, even if the permitting burdens reduce that value. *Id.* at 445. A municipal agricultural zone is an example of a law reducing the property's value to its rural value by only allowing agricultural and residential uses. *Id.* at 450.

92. Daloz, *supra* note 3, at 437, 438.

qualify for a loan to purchase further land or needed equipment.”<sup>93</sup> Consequently, some conservation-minded landowners are hesitant to encumber their land with a conservation easement “that may reduce [the land’s] value and make it harder to sell.”<sup>94</sup> In the past, states have sought to circumvent this issue by using the first of two forms of RFR.<sup>95</sup>

In states using the RFR’s first form, instead of encumbering the property with an easement, the landowner receives a property tax deduction for granting the government the RFR, should she seek to sell her land.<sup>96</sup> The government transfers the RFR to a nonprofit organization, such as a land trust, that can place a conservation easement on the land, should it exercise its right to purchase the property.<sup>97</sup> From the land trust’s perspective, this form of RFR’s drawbacks include failing to prevent the current landowner from developing her land and driving the land trust to purchase the property at its development value. However, this form of RFR may encourage a hesitant conservation-minded landowner to plan for her land’s future, increasing the likelihood that it will someday be protected from development. This form of RFR differs from the OPAV in that the OPAV is always a clause within a conservation easement and this RFR is a step to later securing an easement, after having bought the property at its development value. This form is used less frequently than the RFR’s second form.

Through the RFR’s second form, the land trust protects the land with an easement from the start, including an RFR clause in the deed.<sup>98</sup> If the landowner seeks to sell her property, the land trust has the RFR to purchase it at its rural value. From 1988 to 2004, VLT included such an RFR clause in its agricultural easements.<sup>99</sup> This RFR differs from Vermont’s OPAV in two notable ways. First, the RFR grants the land trust the first right to purchase the property at its rural value, while the OPAV provides the first right to purchase the property at its agricultural value.<sup>100</sup> Because the land trust may be unable to purchase the land at its rural value or to resell it at its agricultural value after having purchased it at its rural value, an RFR property is more likely to land in the hands of non-farmers than an OPAV property.<sup>101</sup> Second, and relatedly, the OPAV shifts the financial burden

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93. *Id.* at 438.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*; Michel, *supra* note 7, at 482; Ramsay Interview, *supra* note 21.

98. Michel, *supra* note 7, at 482.

99. Ramsay Interview, *supra* note 21.

100. Michel, *supra* note 7, at 482.

101. WICKEL, *supra* note 24.

from the land trust to the landowner. Because the OPAV forces the landowner to sell his property to the land trust at a lower price, the landowner experiences a greater loss if his property has an OPAV rather than an RFR. Therefore, the land trust often pays the landowner more at the outset to secure an easement with an OPAV rather than one with an RFR.<sup>102</sup> Nevertheless, since 2004, the OPAV has replaced the RFR in easements created by VLT.<sup>103</sup>

The land trust likely prefers an OPAV over an RFR for three main reasons. First, the OPAV is more likely to deter non-farmers from offering to purchase the property.<sup>104</sup> A non-farmer is less likely to purchase an OPAV property because regardless of the price she pays for it, she risks only being able to resell it at its agricultural value should the land trust exercise its perpetual right. Second, because the land trust's OPAV is triggered by the landowner accepting certain offers on the property, the land trust has the opportunity to assess the potential buyer's plans before deciding whether to purchase the property.<sup>105</sup> This means that fewer instances will arise where the land trust feels the need to exercise its option to purchase, thereby keeping the land trust out of the property's title chain and reducing the administrative costs associated with purchasing land.<sup>106</sup> Third, assuming the RFR or OPAV is a clause in a perpetual conservation easement, the land trust has the option to purchase the land during each successive land conveyance.<sup>107</sup> Whereas an RFR would force the land trust to pay the land's rural value, the OPAV would only force it to pay the land's agricultural value. Over time, the land trust would spend less purchasing the property and thus be better equipped to resell the land to a farmer at its agricultural value. Therefore, the OPAV better ensures that farmers can buy farmland at affordable prices.<sup>108</sup>

### *B. OPAVs as a Legal Mechanism*

VLT's OPAV is a carefully constructed clause embedded in all new agricultural conservation easements that the land trust purchases through its Easement Purchase Program.<sup>109</sup> VLT has drafted two template easements

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102. Johnson, *supra* note 11, at 49.

103. Ramsay Interview, *supra* note 21.

104. Johnson, *supra* note 11, at 49.

105. See discussion *infra* pp. 501–02 (explaining what circumstances will trigger an OPAV).

106. Ramsay Interview, *supra* note 21.

107. Johnson, *supra* note 11, at 49.

108. Ramsay Interview, *supra* note 21.

109. *Id.*

on which it usually bases new easements:<sup>110</sup> (1) the Grant of Development Rights, Conservation Restrictions and Option to Purchase at Agricultural Value for privately funded easements<sup>111</sup> and; (2) the Grant of Development Rights, Conservation Restrictions, Option to Purchase, and Right of Enforcement of the United States for publicly funded easements.<sup>112</sup> About one-third of the OPAV easements are entirely privately funded, the remaining two-thirds being funded by government grants, sometimes mixed with private donations.<sup>113</sup> When the easement is entirely privately funded, the easement language makes VLT the sole easement holder.<sup>114</sup> When the easement has been publicly funded, VLT, VHCB, and the Vermont Agency of Agriculture have traditionally been equal co-holders of the easement.<sup>115</sup> However, over the past couple years, the Vermont Agency of Agriculture has begun to move away from being included in the easement as one of its holders.<sup>116</sup> Easement holders receive, “forever, the development rights, option to purchase at agricultural value . . . [,] and a perpetual conservation easement and restrictions.”<sup>117</sup> For publicly funded easements, the federal government, through the USDA Natural Resources Conservation Service (NRCS), does not become a holder but receives the right to enforce the easement if, but only if, the easement holders fail to do so.<sup>118</sup> Regardless of which entities hold the easement, the easements share the same enabling legislation and many of the same general clauses.

### 1. The Easement and OPAV’s Legal Bases

Separate chapters of Vermont’s legislation authorize conservation easements and the OPAV clause.<sup>119</sup> To overcome any common-law rules against perpetuities, Chapter 34 permits these agricultural conservation easements as “[c]onservation and preservation rights and interests” that are “deemed interests in real property [that] run with the land.”<sup>120</sup> The statute

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110. *Id.*

111. Privately Funded Easement Template, *supra* note 17, at 1.

112. Publicly Funded Easement Template, *supra* note 25, at 1.

113. Ramsay Interview, *supra* note 21; Michel, *supra* note 7, at 480.

114. *Id.*; Privately Funded Easement Template, *supra* note 17, at 1.

115. Ramsay Interview, *supra* note 21; Publicly Funded Easement Template, *supra* note 25, at 1.

116. Ramsay Interview, *supra* note 21; Publicly Funded Easement Template, *supra* note 25, at 1.

117. Privately Funded Easement Template, *supra* note 17, at 1; Publicly Funded Easement Template, *supra* note 25, at 1.

118. Publicly Funded Easement Template, *supra* note 25, at 15.

119. VT. STAT. ANN. tit. 10, §§ 821–23 (2016); VT. STAT. ANN. tit. 10, § 6324(a)(3).

120. VT. STAT. ANN. tit. 10, § 823. The enabling legislation also applies to conservation easements more broadly. *Id.*

deems the easement document “to be a conveyance of real property” and requires that it be recorded by the county clerk.<sup>121</sup> “Any subsequent transfer, mortgage, lease, or other conveyance of the real property or an interest in the real property shall reference the grant of conservation rights and interests in the real property.”<sup>122</sup> However, even if the subsequent transfer fails to refer to the easement, the easement remains valid and enforceable in law or in equity by the easement holders and their successors and assigns.<sup>123</sup> The statute authorizes VLT, VHCB, the Vermont Agency of Agriculture, and even the federal government to be easement holders.<sup>124</sup>

Vermont law required additional enabling legislation for the OPAV clause to be enforceable. Historically, Vermont’s common law Rule against Perpetuities could have invalidated an OPAV or RFR clause contained in a valid easement as an “improper restraint[] on alienation.”<sup>125</sup> However, since a 1987 amendment to Chapter 155 of Vermont’s statutes, easement holders may enforce an OPAV clause.<sup>126</sup> This chapter provides that “[t]he rights and interests in real property which may be acquired, used, encumbered, and conveyed by a municipality, State agency, or qualified organization shall include . . . [t]he acquisition of preemptive rights such as a right of first refusal or an option to purchase land or rights and interests therein.”<sup>127</sup> For purposes of exercising the OPAV, VLT falls within the statute’s definition of “qualified organization,” and VHCB and the Vermont Agency of Agriculture both constitute state agencies.<sup>128</sup> Notably, this chapter does not authorize the federal government to acquire preemptive rights.<sup>129</sup> This indicates that if VLT, VHCB, or the Vermont Agency of Agriculture failed to enforce the easement, the NRCS would acquire the right to enforce all of the publicly funded easement’s clauses except the OPAV clause. Only VLT and, when party to the easement, the VHCB and Vermont Agency of Agriculture can exercise the publicly funded easement’s option to purchase the property.

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121. *Id.*; VT. STAT. ANN. tit. 27, § 402.

122. VT. STAT. ANN. tit. 10, § 823.

123. *Id.* §§ 822–23.

124. *Id.* § 821(c).

125. *Burgess v. Howe*, 359 A.2d 652, 653 (Vt. 1976).

126. VT. STAT. ANN. tit. 10, § 6303(a)(7) (1987).

127. *Id.*

128. *Id.* § 6301a.

129. *Id.* §§ 6301(a), 6303(a)(7); *contra id.* § 821(c) (including the United States in its definition of “qualified holder” for purposes of holding a conservation easement).

## 2. The OPAV Language of VLT's Easements

The privately and publicly funded easement templates share many characteristics, particularly how they describe the OPAV. Both start with sections that lay out the easement's purposes, which, among other more general conservation purposes, such as maintaining "the essential characteristics of the Vermont countryside," include an OPAV-related purpose.<sup>130</sup> The privately funded easement words this purpose as "conserv[ing] productive agricultural and forestry lands in order to facilitate active and economically viable farm use of the Protected Property now and in the future."<sup>131</sup> The publicly funded easement expresses the purpose as "ensuring that working and productive agricultural lands remain available for production agriculture, affordable and owned by individuals actively engaged in farming" and states that the OPAV will be the vehicle for achieving such purpose.<sup>132</sup> Both templates next list restricted and permitted uses of the property, then specify when and how the easement holder may seek court enforcement of the easement's covenants and restrictions before finally detailing the OPAV.<sup>133</sup>

The OPAV is "perpetual in duration,"<sup>134</sup> meaning that every sale, transfer, or conveyance of the property could potentially trigger the easement holders' right to exercise the OPAV regardless of whether the current landowner is the original landowner who granted the easement.<sup>135</sup> "Triggering the OPAV" means that the potential conveyance's facts have given the easement holder the right to decide whether to purchase the property at its agricultural value.<sup>136</sup> A conveyance will not trigger the OPAV in two narrow circumstances: The landowner seeks to convey the property to a family member, "by gift, inheritance, sale or other transfer" or to a qualified farmer.<sup>137</sup> The OPAV defines a qualified farmer as

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130. Publicly Funded Easement Template, *supra* note 25, at 2; Privately Funded Easement Template, *supra* note 17, at 1.

131. Privately Funded Easement Template, *supra* note 17, at 1.

132. Publicly Funded Easement Template, *supra* note 25, at 2.

133. *Id.* at 3–23; Privately Funded Easement Template, *supra* note 17, at 11–18. Because both easements use nearly identical language in the OPAV clause, for ease of reference, except where otherwise noted, this section will hereinafter refer to the Privately Funded Easement Template's language.

134. Privately Funded Easement Template, *supra* note 17, at 12.

135. *Id.* at 13. The easement exempts leases that have a term of 15 years or less, provided that the lease terminates if the easement holder exercises the OPAV. *Id.*

136. *Id.* at 12–13.

137. *Id.*

a person who presently earns at least one-half of his or her annual gross income from the ‘business of farming’ . . . and who, in connection with the farming operations on the Protected Property, will continue to earn at least one-half of his or her annual gross income from the ‘business of farming.’<sup>138</sup>

To be in the “business of farming,” the person must “cultivate[], operate[], or manage[] a farm for . . . profit,” not “for recreation or pleasure.”<sup>139</sup> “Farm” includes such operations as dairy, poultry, or fruit farms and plantations, ranches, and orchards, but explicitly excludes forestry and timber growing.<sup>140</sup> The OPAV’s two exemptions’ purposes differ. Transfers to a qualified farmer do not trigger the OPAV because these transfers directly further the OPAV’s goal of keeping farmland active. Contradictorily, the OPAV exempts family members regardless of whether they currently farm or will farm in the future. This exemption’s purpose is to maintain the OPAV’s support within the farm community.<sup>141</sup> Yet, in all instances when the landowner accepts an offer from any potential buyer, even if the potential buyer is a family member or qualified farmer, the landowner must deliver a Notice of Intent to Sell to the easement holders.<sup>142</sup>

The Notice of Intent to Sell triggers a set of strict deadlines that, if missed, waive the easement holders’ right to purchase the property, but only for this transaction.<sup>143</sup> Upon receiving the landowner’s Notice of Intent to Sell, the easement holders have 30 days to review the notice and decide whether to exercise the option.<sup>144</sup> This notice must include: (1) a duplicate of the potential buyer’s offer; (2) either (a) a written description of the buyer’s training and experience as an agricultural producer and an agricultural business plan for the Protected Property, including a description of the agricultural activities to be conducted or facilitated by the buyer, proposed improvements to the Protected Property, and a statement of anticipated agricultural income and expenses for the three-year period following buyer’s acquisition of the Protected Property, or (b) a written statement that the potential buyer does not have “such training and experience or intention of” farming on the property; and (3) if relevant, “the

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138. *Id.*

139. Treas. Reg. § 1.175-3 (1986); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (applying *noscitur a sociis* to interpret an ambiguous statutory word consistently with the statute’s other text).

140. Treas. Reg. § 1.175-3.

141. Ramsay Interview, *supra* note 21.

142. Privately Funded Easement Template, *supra* note 17, at 13–14.

143. *Id.* at 13.

144. *Id.* at 14.

documents necessary to establish the Buyer as” a qualified farmer or family member.<sup>145</sup> If the easement holders decide to exercise the OPAV, they must deliver a written notice of intent to exercise to the landowner within this first thirty-day period.<sup>146</sup> The easement holders and landowners must then establish the property’s purchase price, either through mutual agreement or based on an independent appraisal.<sup>147</sup> Because the OPAV does not freeze farmlands’ value, its agricultural value may have appreciated since the appraisal completed when it was conserved.<sup>148</sup> Depending on the property, determining the property’s current agricultural value could take several months.<sup>149</sup>

Once the parties reach a price agreement, the easement holders will follow one of four courses of action. First, within 30 days the easement holders provide a written notice of intent to purchase to the landowner, then close on the sale within another 30 days.<sup>150</sup> Second, the easement holders do not deliver this notice, thereby waiving their right to purchase the property.<sup>151</sup> Third, the easement holders withdraw their agreement to exercise the option because the landowner cannot deliver marketable title to the easement holder, the easement holder discovers hazardous waste on the property, or any structure on the property “is substantially destroyed by fire or other casualty.”<sup>152</sup> Or fourth, the easement holders assign their right to exercise the option to a third party who, in the easement holders’ reasonable opinion, “will use or will facilitate the use of the Protected Property for commercial agricultural production.”<sup>153</sup> In practice, the OPAV has been triggered roughly 55 to 60 times; however, VLT has only ended up purchasing the property twice.<sup>154</sup> VLT considers the fact that it has felt the need to exercise the option in so few instances to be an indicator of the OPAV’s success as a tool to keep farmland actively farmed.<sup>155</sup>

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145. *Id.* at 13–14.

146. *Id.* at 14.

147. *Id.* at 14–15.

148. WAGNER ET AL., *supra* note 20, at 54; Ramsay Interview, *supra* note 21.

149. See Resource Guide: Vermont New Farmer Network Member Organization, *Vermont Housing and Conservation Board*, U. VT. (last visited Feb. 6, 2016), [http://www.uvm.edu/newfarmer/?Page=resource\\_guide/VHCB.html&SM=resource\\_guide/sub-menu.html](http://www.uvm.edu/newfarmer/?Page=resource_guide/VHCB.html&SM=resource_guide/sub-menu.html) [<https://perma.cc/YT3H-TNF6>] (discussing how appraisal determines value of the land, which can take 12–18 months to complete).

150. Privately Funded Easement Template, *supra* note 17, at 14, 16.

151. *Id.* at 14.

152. *Id.* at 16–17.

153. *Id.* at 17–18.

154. Ramsay Interview, *supra* note 21; see discussion *infra* pp. 506–07 (explaining three alternatives to VLT purchasing the property).

155. *Id.*

*C. How OPAVs Practically Operate*

## 1. Funding an OPAV Easement Purchase

In practice, VLT works closest with OPAVs. However, of the approximately 375 easements containing an OPAV clause, about two-thirds were at least partially publicly funded and therefore are co-held with VHCB and, increasingly less frequently, the Vermont Agency of Agriculture.<sup>156</sup> Despite these entities' potentially heavy involvement in securing these easements, the standard easement language provides VLT with priority over VHCB and the Vermont Agency of Agriculture in such functions as negotiating the purchase price with the landowner and determining the closing details.<sup>157</sup> Additionally, although all easement holders have the equal right to exercise the OPAV, VLT often is the only one with the capacity to actually purchase and accept the risk of owning land.<sup>158</sup> Nevertheless, VLT always tries to reach a consensus amongst the easement holders before deciding how to proceed once the OPAV has been triggered.<sup>159</sup> Still, VHCB and the Vermont Agency of Agriculture primarily interact with OPAVs by funding the original easement purchase.

An intricate web of sources fund VLT's purchase of an OPAV easement from a landowner. VLT usually must pay a landowner more for an easement with an OPAV clause than for one without.<sup>160</sup> From the landowner's perspective, the OPAV not only legally limits the property's value and type of potential buyer, but also its procedural requirements may further shrink the pool of interested buyers and hence the property's market value.<sup>161</sup> Private funding for OPAV easements often comes from individual donations to VLT as a nonprofit organization.<sup>162</sup> Public funds may come from state or federal sources, channeled through VHCB, as manager of the state's Farmland Conservation Program.<sup>163</sup> This program receives federal

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156. *Id.*; see *supra* p. 499 (noting that the Agency of Agriculture has recently begun transitioning away from being an easement holder).

157. Publicly Funded Easement Template, *supra* note 25, at 19.

158. Ramsay Interview, *supra* note 21.

159. *Id.*

160. Johnson, *supra* note 11, at 49 (“[A]n OPAV increases the original easement cost expended by the land trust.”).

161. BOB WAGNER & KATHY RUHF, FARMLAND ACCESS AND TENURE INNOVATIONS 1 (2013), <http://landforgood.org/wp-content/uploads/LFG-Farmland-Access-And-Tenure-Innovations.pdf> [<https://perma.cc/93NW-PHQ7>].

162. See generally *Funders and Partners*, VT. LAND TR., <http://www.vlt.org/about-vlt/vlt-funders> [<https://perma.cc/3AVY-KBA7>] (last visited Feb. 6, 2016) (showing a list of funders from both public and private organizations).

163. FARMLAND CONSERVATION, VT. AGENCY OF AGRIC., FOOD & MKTS. (last visited Feb. 6, 2017), [http://agriculture.vermont.gov/land-use/farmland\\_conservation](http://agriculture.vermont.gov/land-use/farmland_conservation) [<https://perma.cc/VB4X->

funds from the USDA NRCS through the Farm Bill<sup>164</sup> and state funds from the Housing and Conservation Board Trust Fund.<sup>165</sup> By statute, half this trust fund is comprised of the state's property transfer tax,<sup>166</sup> while the other half comes from sources like the payments that the Vermont Agency of Agriculture receives for Act 250's offsite mitigation.<sup>167</sup> In determining how to disburse these funds, VHCB seeks to "maintain land in active agricultural use and make reasonable efforts to assure that conserved farmland is accessible and affordable to future generations of farmers."<sup>168</sup> The OPAV is VHCB's "standard tool" for promoting this goal.<sup>169</sup> However, all VHCB grants for conservation easements, regardless of whether they contain an OPAV, are capped at \$3,500 per acre or \$500,000 for the total project.<sup>170</sup> This cap applies only to VHCB's contribution; if VLT finds additional funding elsewhere, its expenditure on the project could exceed these caps. Nevertheless, this level of state support is sufficiently high to encourage VLT to ensure that the grants are fulfilling their purpose: keeping farmland active.<sup>171</sup>

## 2. VLT's OPAV Experience

VLT's nearly 13 years of experience with OPAVs have provided it with practical insight into how an OPAV can best operate. Vermont's farming community leans toward owner-operated farms because it views land ownership—the strongest type of secure land tenure—as the best way to encourage farmers to steward their land and invest in infrastructure.<sup>172</sup> Stewardship helps protect farmland for future farmers while infrastructure investment and farm expenditures contribute to the local rural economy.<sup>173</sup> Through the OPAV, VLT does not seek to provide access to a certain type

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VYX3]; *see generally*, *VHCB Conservation Programs*, VT. HOUSING & CONSERVATION BD., <http://www.vhcb.org/conservation.html> [<https://perma.cc/N4AH-DRQX>] (last visited Feb. 6, 2017) (discussing the VHCB Conservation Program).

164. *VHCB Conservation Programs*, *supra* note 163.

165. *Id.*; VT. HOUSING & CONSERVATION BD., POLICY: FUNDING CONSERVATION OF AGRICULTURAL LAND 3 (2016), <http://www.vhcb.org/pdfs/consolicy/agriculture.pdf> [<https://perma.cc/JXU9-2QER>] [hereinafter FUNDING CONSERVATION OF AGRICULTURAL LAND].

166. VT. STAT. ANN. tit. 10, § 312 (effective June 11, 1987).

167. Ramsay Interview, *supra* note 21; VT. STAT. ANN. tit. 10, § 6093(b) (noting that Act 250 offsite mitigation fees may be paid to the Vermont Agency of Agriculture); FARMLAND CONSERVATION, *supra* note 163; AM. FARMLAND TR. ET AL., *supra* note 8, at 12 (noting that through 2010, VHCB "had used approximately \$3 million in [offsite] mitigation funds to protect farmland").

168. FUNDING CONSERVATION OF AGRICULTURAL LAND, *supra* note 165, at 1.

169. *Id.* at 6.

170. *Id.* at 7.

171. Ramsay Interview, *supra* note 21.

172. *Id.*

173. *Id.*

of farmer.<sup>174</sup> “All forms and scales of agriculture have a place” in a rural economy.<sup>175</sup> Thus, VLT supports all farmers, from the small-scale organic vegetable farmer to the large-scale conventional dairy farmer.<sup>176</sup> However, while the OPAV gives farmers the ability to purchase farmland at agricultural value, this price may still not be affordable for all farmers.<sup>177</sup> Often, the farmer expecting to receive the highest return from the land will outbid a farmer who proposes to enter a less profitable agricultural business. Similarly, a well-established farmer usually has sufficient resources and capital to outbid a new and beginning farmer on a particular piece of land.<sup>178</sup> An established farmer may be better qualified to receive a loan to purchase the land<sup>179</sup> and can spread fixed costs across a larger land area. Further, VLT has found that transferring land protected by a federally-funded easement is procedurally less complex when the buyer is a well-established farmer because of federal law’s additional requirements.<sup>180</sup> To overcome these and other obstacles to new and beginning farmers, VLT manages a separate program specifically aimed at facilitating their access to farmland: the Farmland Access Program.<sup>181</sup> Through this program, VLT connects new and beginning farmers to farmland, expands their leasing opportunities, and provides them with technical assistance.<sup>182</sup> While the OPAV is entirely separate from this program, they can work together to broaden the range of farmers able to access farmland.<sup>183</sup>

VLT seldom exercises its right to purchase a property and instead seeks to encourage direct farmer-to-farmer sales.<sup>184</sup> Because exercising the OPAV can be as costly as purchasing an entire new conservation easement,<sup>185</sup> buying a property could sacrifice VLT’s ability to conserve unprotected farmland elsewhere. Over time, VLT has experienced three scenarios that allow it to avoid the expenses and risks associated with purchasing land. First, VLT may act as a matchmaker between farm-seekers and those seeking to sell their farmland without an identified buyer.<sup>186</sup> VLT uses the Farmland Access Program’s lists of new and beginning farmers to

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *See Michel, supra note 7, at 474.*

180. Ramsay Interview, *supra note 21* (noting such additional requirements as having a succession plan, which a young, beginning farmer may not yet have thought about).

181. *Id.*; *Farmland Access: Connecting Farmers with Affordable Farmland, supra note 26.*

182. *Farmland Access: Connecting Farmers with Affordable Farmland, supra note 26.*

183. Ramsay Interview, *supra note 21.*

184. *Id.*

185. *Id.*

186. *Id.*

match buyers and sellers.<sup>187</sup> Once VLT and the landowner reach a price agreement, VLT assigns the right to purchase the property to the new and beginning farmer who then purchases the farm directly from the landowner rather than VLT purchasing and reselling the land.<sup>188</sup> A second way that VLT has avoided purchasing OPAV farmland is by waiving its right to purchase.<sup>189</sup> VLT intentionally defined “qualified farmer” to depend on an objective measure: agriculture’s contribution to the potential buyer’s income.<sup>190</sup>

When VLT reviews a notice of intent to sell and is satisfied that a potential buyer meets the definition, the OPAV is not triggered and the landowner can go ahead with the transaction absent further VLT involvement.<sup>191</sup> However, this narrow definition may exclude a potential buyer that the OPAV was not designed to exclude.<sup>192</sup> For instance, a potential buyer may fall short of the income threshold because he had been an employee on another farmer’s land.<sup>193</sup> However, he may have gained training and experience and demonstrate a sufficient business plan to satisfy VLT that he is a farmer.<sup>194</sup> In these instances, VLT will deem the landowner’s buyer to be a farmer and allow the transaction to proceed.<sup>195</sup> A third scenario that may arise where VLT does not end up exercising the OPAV is where the landowner accepts an offer from a non-farmer, VLT delivers the notice of intent to purchase to the landowner, and the landowner rescinds its contract with its non-farmer buyer and begins her own search for a farmer buyer.<sup>196</sup> However, VLT has found that an OPAV’s existence on a property dissuades landowners from accepting offers from non-farmers and non-farmers from placing offers on the property.<sup>197</sup>

Over time, VLT has slightly altered its OPAV. For instance, VLT and a landowner originally executed the OPAV separate from the conservation easement.<sup>198</sup> However, VLT has since merged the OPAV clause and conservation easement into one document, which allows landowners to more readily identify their property rights.<sup>199</sup> VLT has also increased the

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*; see discussion *supra* p. 502 (explaining that the easement template’s definition of “qualified farmer” depends on the IRS’s definition of the “business of farming”).

195. Ramsay Interview, *supra* note 21.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

“qualified farmer” definition’s objectivity to avoid confusion over what transactions trigger the OPAV.<sup>200</sup> Formerly, the definition allowed a potential buyer to be a qualified buyer if she met the income threshold or had a business plan and farming experience.<sup>201</sup> VLT has found that narrowing the “qualified farmer” definition to rely solely on the potential buyer’s income sources, provides VLT greater leeway to determine which proposed sales pose a greater risk to keeping farmland active.<sup>202</sup> Finally, in practice, VLT has extended its role as matchmaker to increase farmer-to-farmer transactions and thereby limit its involvement in the property.<sup>203</sup> VLT’s experiences can help it continue to adjust the OPAV and guide other states as they begin to create their own OPAV programs.

### III. EXPANDING OPAs WITHIN AND BEYOND VERMONT

Although Vermont has been using OPAs for nearly two decades, OPAs have been slow to spread more widely across the United States. Yet, Massachusetts has incorporated OPAs into its conservation easements since 1994,<sup>204</sup> and within the past year the Mount Grace Land Trust purchased its first OPAV in New Hampshire.<sup>205</sup> Other states, including California,<sup>206</sup> New Jersey,<sup>207</sup> Connecticut, and New York, have begun to examine Vermont’s experience to determine whether to begin implementing OPAs.<sup>208</sup> VLT has identified areas in which it could improve OPAs’ implementation within Vermont, which may provide insight to other states looking to start using OPAs.

#### *A. Improving OPAs in Vermont*

OPAs do not aim to put agricultural land into the hands of an easement holder, but rather aim to ease the transfer from one farmer to another.<sup>209</sup> VLT has purchased an OPAV property only twice over the past

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200. *Id.*

201. *The Affordability Option*, *supra* note 23.

202. Ramsay Interview, *supra* note 21.

203. *Id.*

204. WAGNER ET AL., *supra* note 20, at 3.

205. *Wingate Farm: New Hampshire’s First Affordable Farm*, MOUNT GRACE LAND CONSERVATION TR., <http://www.mountgrace.org/wingate-farm-new-hampshires-first-affordable-farm> [https://perma.cc/2M2S-KM26] (last visited June 27, 2016).

206. Johnson, *supra* note 11.

207. *Appendix – Topic 5: Programs and Models from Other States*, N.J. DEP’T AGRIC., <http://www.nj.gov/agriculture/sadc/news/hottopics/farmavailabilityopav.pdf> [https://perma.cc/F35N-ZKKJ] (last visited Jan. 18, 2017) [hereinafter *Programs and Models from Other States*].

208. Ramsay Interview, *supra* note 21.

209. *Id.*

thirteen years,<sup>210</sup> demonstrating that OPAVs have been achieving this goal.<sup>211</sup> Farmland has been either staying in the original farmer's hands or transferring to new farmers or family members without VLT entering the property's title chain. Yet, OPAVs may receive criticism for failing to ensure that farmers or family members continue to farm after the transfer. Unforeseen forces, such as "consumer trends, domestic supply, weather and regional patterns, government regulations, and foreign markets" or even the farmer's personal condition, may pressure a farmer to stop farming, but not necessarily sell, her land.<sup>212</sup> However, the OPAV's strength lies in its narrow focus on farmland transfer's role in keeping farmland active rather than attempting to combat the multitude of potential challenges to farming. Through VLT's strict definition of "qualified farmer" and careful vetting of potential farmers' business plans, VLT maximizes the extent to which it can ensure that farmland remains active without broadening the OPAV's focus beyond the land transfer. As of 2016, all but three OPAV farms remained active.<sup>213</sup> Of these three farms, one had been subdivided in such a way that one portion lay idle and the other became hay land; the other two farms became classified as low use.<sup>214</sup> While Vermont could increase the likelihood of farmland remaining active by incorporating affirmative farming requirements into its conservation easements, affirmative farming requirements may pose additional issues to the landowner and land trust.<sup>215</sup> Thus, while VLT could explore expanding OPAV easements beyond the land transfer, it should only improve the OPAV as it pertains to the transfer itself.

### 1. Affirmative Farming Requirements

VLT could accompany the OPAV clause with an affirmative farming requirement clause in its OPAV easement to further protect transferred farmland from falling out of active use. These clauses, as used outside of Vermont, usually define required agricultural uses and then establish

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210. *Id.*

211. *See Programs and Models from Other States, supra* note 207, at 2 (highlighting that Massachusetts has never exercised its option to purchase, signifying that the program has been self-regulating and thus, successful).

212. Matt Hongoltz-Hetling, *Fate of a Farm, Part 2: Out to Pasture*, VALLEY NEWS (July 3, 2016), <http://www.vnews.com/Fate-of-a-Farm-Part-2-New-Dairy-Farmer-Enters-Randolph-Ranks-2916837> [<https://perma.cc/FT5U-F5AS>].

213. E-mail from Suzanne Leiter, Fee Lands Portfolio Manager, Vt. Land Tr., to author (Nov. 15, 2016, 09:44 AM) (on file with author).

214. *Id.*

215. Johnson, *supra* note 11, at 48.

remedies and consequences for failing to fulfill those uses.<sup>216</sup> Vermont's legislation allows conservation easements to grant an easement holder the right to "require the performance of specified activities."<sup>217</sup> However, VLT's standard easement does not—and likely should not—include such a right.<sup>218</sup> Including affirmative obligations in a conservation easement further encumbers the land.<sup>219</sup> This may decrease landowners' willingness to enter these agreements, raising the price that a land trust must pay to buy the easement.<sup>220</sup> An even greater problem is that an affirmative obligation may make conservation easements unfavorable in the farming community by forcing a landowner off her land. If a farmer can no longer farm her land, an affirmative obligation to farm may force her to choose between facing the clause's penalties and renting or selling her property. Additionally, VLT must steward everything included in its easements.<sup>221</sup> Therefore, including additional rights to enforce would likely raise the cost to administer an easement. Instead of incorporating affirmative obligations, VLT could increase the interaction between the OPAV properties and the Farmland Access Program. VLT could use the list of farmers seeking farmland to match farmers who no longer farm but do not wish to sell their land with new and beginning farmers who would like to start farming but can currently only afford to rent rather than purchase land. While VLT should not change its easement language to include affirmative farming requirements, it could change its language to ease transfers in particular circumstances.

## 2. Foreseeable Issues with Partial Conservation Easements

VLT could adjust the OPAV clause for situations where the landowner only agrees to granting an easement encumbering part of her property.<sup>222</sup> The landowner may prefer such an arrangement so that she retains the ability to later sell an unencumbered parcel. VLT may agree to a partial conservation easement because it may impose less stewardship burdens than an easement to the entire property. However, conservation easements covering only part of a property may pose issues if the easement contains an OPAV. For example, assume a conservation easement only covers 190 acres of a 200-acre farm, and a potential sale of the entire 200 acres triggers

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216. *Id.* at 48–49.

217. VT. STAT. ANN. tit. 10, § 821(a).

218. Privately Funded Easement Template, *supra* note 17.

219. Johnson, *supra* note 11, at 47.

220. *Id.*

221. Ramsay Interview, *supra* note 21.

222. *Id.*

the OPAV.<sup>223</sup> The OPAV only gives the easement holder the option to purchase the 190 acres covered by the easement.<sup>224</sup> This leaves VLT with the choice between: (a) purchasing the entire tract, with the 190 acres valued at their agricultural value and the remaining ten acres valued at their development value; and (b) waiting for the landowner to receive subdivision approval from the appropriate authorities so that it can purchase only the 190 acres. VLT usually follows the second route, leaving it and the landowner scrambling to receive the proper approval within the OPAV clause's strict time limits.<sup>225</sup> However, such a scenario is reasonably foreseeable at the time VLT receives any partial easement. Therefore, if VLT and the landowner would prefer to apply the easement to only part, rather than all, of the property, the parties could subdivide the property prior to executing the easement or tailor the original easement to deal with the situation.

The more preferable solution depends in part on whether the particular farm can continue as a viable business absent the land omitted from the easement. In some cases, subdividing the parcel may be unfavorable because the portion of the tract not covered by the easement may contain land or structures necessary for practicable farming.<sup>226</sup> Likewise, subdividing the parcel before receiving an offer on the property forecloses the possibility of a qualified farmer offering to purchase the entire 200-acre tract. The longer the tract stays intact, the longer it will likely remain in active use. Thus, VLT could alternatively insist on including the entire hypothetical 200 acres in the easement, potentially exempting the remaining ten acres from all easement restrictions except the OPAV. While this would increase the costs of securing an easement on the property, it would better prevent the potential loss of agricultural land and reduce the costs associated with receiving subdivision approval. Finally, increased outreach to the agricultural community and other land-use professionals could ease VLT's ability to match uniquely encumbered farmland with the appropriate buyer.

### 3. Increased Training Sessions

VLT has been increasing OPAV training sessions with professionals who may become involved in the property's valuation or future transfers,

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223. *Id.*

224. *Id.*

225. *Id.*

226. See Daloz, *supra* note 3, at 450 (explaining the effects of having "lots [that] are 'too large to mow, but too small to plow'").

such as town appraisers and real estate agents, so that they understand the OPAV's implications on property values.<sup>227</sup> Town appraisers determine a property's value for such purposes as property taxation.<sup>228</sup> Traditional conservation easements, the RFR, and the OPAV all affect a property's value differently, an OPAV usually decreasing the value most.<sup>229</sup> If a town appraiser does not understand the difference between these three mechanisms and taxes a landowner as if the property had a traditional conservation easement or RFR, the town will likely overtax the landowner. If a landowner knows that by including an OPAV clause in her conservation easement she runs the risk of decreasing her property's future purchase price while still paying higher taxes in the meantime, she may be less willing to encumber her land with an OPAV. By better educating town appraisers, VLT could increase landowners' receptiveness toward the OPAV, thereby potentially decreasing the amount of remuneration that it must pay a landowner for including an OPAV in her conservation easement.

Another valuation issue may arise if the landowner employs a real estate agent to sell her property. When listing an OPAV property, some real estate agents do not currently understand the OPAV's implication on the property's potential purchase price and, subsequently, their commissions.<sup>230</sup> Increased training would inform the real estate agent that he cannot sell the OPAV property for a price greater than its agricultural value and that his commission will be based on that lower value.<sup>231</sup> If the real estate agent knows this from the outset, he may divert his energy and resources from trying to find the highest bidding buyer for his client's property to trying to find the highest bidding qualified farmer. While this may decrease the likelihood of a new and beginning farmer buying the property, by encouraging the landowner to only accept offers from potential buyers who are likely to fulfill the qualified-farmer requirements, the real estate agent could reduce VLT's involvement in finding buyers for OPAV properties. While VLT should focus only on improving how OPAVs legally operate in identified trouble areas and how they practically operate, other states could modify the OPAV's legal technicalities to better suit their situations by increasing the information available on OPAVs.

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227. Ramsay Interview, *supra* note 21.

228. *Assessor's Office*, DOVER VT., [www.doververmont.com/message-assessors-office](http://www.doververmont.com/message-assessors-office) [<https://perma.cc/8H8B-TWLU>] (last visited Apr. 3, 2017).

229. *Id.*

230. *Id.*

231. *Id.*

*B. Tailoring Vermont's OPAV to Other States*

Other states seeking to introduce OPAVs will have to consider the local land trusts' capabilities, farming communities' culture, and legal requirements.<sup>232</sup> Depending on a particular land trust's staff capabilities and funding available for farmland protection, it may want to modify the types of buyers that trigger an OPAV or the time restrictions included in the clause.<sup>233</sup> Similarly, while Vermont favors owner-operated farms and thus seeks to keep farmland active by increasing farmers' ability to purchase land, other states may be more receptive toward leasing private or public lands to farmers and could adjust the OPAV to achieve that outcome.<sup>234</sup> Above all else, the land trust and farming community can only use the OPAV within the confines of the state law.

Land trusts can tweak the OPAV clause's language to suit their needs and abilities.<sup>235</sup> For instance, Massachusetts only exempts sales to family members from triggering the OPAV "and reviews all other transfers," including those to farmers "for price and plans of the buyers."<sup>236</sup> Although Massachusetts has never exercised its option to purchase, because it may purchase the property even if the landowner had accepted an offer from a farmer, Massachusetts's potential oversight of its OPAV exceeds Vermont's.<sup>237</sup> Conversely, when Mount Grace Land Trust created its OPAV in New Hampshire, it reduced the potential OPAV triggers by expanding the definition of "qualified farmer" to include those who have experience and a business plan.<sup>238</sup> In this way, Mount Grace aims to make farmland more accessible to new and beginning farmers.<sup>239</sup> However, VLT has found that it can achieve the same level of accessibility to this category of potential buyers with its objective definition.<sup>240</sup> In cases where Mount Grace's OPAV would not be triggered, VLT would have the opportunity to review the potential buyer's plans and likely waive its right to purchase the property.<sup>241</sup> VLT prefers its definition because it provides the land trust with greater oversight over the property's transactions.<sup>242</sup> Further, VLT found that a similarly subjective definition left too much room for potential

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232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. WAGNER ET AL., *supra* note 20, at 3.

237. *Programs and Models from Other States*, *supra* note 207, at 2–3.

238. Ramsay Interview, *supra* note 21.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

buyers to argue that their business plan was sufficient to qualify them as a farmer.<sup>243</sup> However, land trusts that are first beginning to experiment with OPAVs may prefer Mount Grace's definition. Newer or smaller trusts may not yet have VLT's capacity to purchase and steward property and would rather not be as involved in the OPAV's implementation. Trusts that cannot or do not want to own land could also expand the time periods in their OPAVs.<sup>244</sup> Assuming that their OPAVs would still provide them with the right to assign the option, this expanded timeframe would give the land trust more time to find an alternative buyer, thus reducing pressure to purchase the land.<sup>245</sup> In addition to the land trust's circumstances, the local community will determine what type of OPAV will be most effective.

Different states may have different farming cultures and development pressures. For instance, not all states prefer owner-operated farms and accordingly, could change the OPAV language to encourage the type of tenure most common to the local community. In mid-Atlantic Maryland, with its history of farmers leasing land from private landowners,<sup>246</sup> the land trust could exempt potential buyers from triggering the OPAV if they demonstrate that they would lease the land to a qualified farmer. In states where the land trust prefers to own the land and lease it to a farmer,<sup>247</sup> the land trust may find that it can provide land at more affordable rents by purchasing farmland through an OPAV. To do so, these states likely would not need to change the OPAV's language, but only how they implement the OPAV. The land trust would likely purchase and keep the land instead of waiving the option to purchase or resell the land. Alternatively, although rare in the United States, particularly in the eastern states, the government could consider purchasing land to lease to farmers.<sup>248</sup> However, because the government likely is not interested in pursuing this alternative, it likely would not be interested in using the OPAV in this way. States may also tailor the OPAV to the types of pressures facing their farmland. For instance, Connecticut's land is already much more developed than Vermont's.<sup>249</sup> Therefore, Connecticut's farmland faces greater development pressure from urban sprawl, leaving a greater difference between Connecticut farmland's development and agricultural values.<sup>250</sup> Thus,

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243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. Owley, *supra* note 18, at 127 ("Federal land ownership accounts for nearly one-third of the nation's land, with most of it concentrated in the western United States.").

249. Ramsay Interview, *supra* note 21.

250. *Id.*

landowners may require more compensation for encumbering their land with an OPAV, which may reduce Connecticut land trusts' abilities to purchase easements or the property itself. Further, because states like Connecticut do not rely on agriculture as part of the state's identity, keeping farmland active for the sake of its image may not be as important to its landowners. If these states would, nevertheless, like to use OPAVs, they could create smaller scale programs targeted toward particularly valuable agricultural soils or areas with an established farming community, provided that the state's law allows, or can be amended to allow, this type of interest in land.

While most states have legislation allowing conservation easements, they do not all have legislation enabling easement holders or the state to have rights and interests like the OPAV. Therefore, these states would have to adopt OPAVs in a way that fits within the existing law or enact new legislation. For instance, New York has begun examining OPAVs but does not have explicit legislation allowing such an interest.<sup>251</sup> Further, New York's common law only clearly allows preemptive rights, rather than options, to purchase land.<sup>252</sup> Therefore, if New York would like to begin using OPAVs without waiting for new legislation, it may need to rename the option, which may have legal implications on how it functions. Some states' legislation allows affirmative farming covenants.<sup>253</sup> An affirmative requirement likely reduces the land's value so that it is closer to its agricultural value by eliminating other land uses.<sup>254</sup> However, the law of some states, such as California, is unclear as to whether such requirements are legally enforceable.<sup>255</sup> Therefore, without clear authorizing legislation, if a state were to rely on this approach rather than the OPAV, an OPAV could be a useful backup mechanism should the courts void the affirmative language.<sup>256</sup> Although OPAVs have been slow to spread to other states, their success within Vermont demonstrates that they could be useful for helping farmland remain active where that is a priority of the state.

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251. See generally N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to 49-0311 (McKinney 2011) (lacking an express authorization of interests similar to the OPAV).

252. See, e.g., *Metro. Transp. Auth. v. Bruken Realty Corp.*, 492 N.E.2d 379, 383 (1986) (stating that the common law allows preemptive rights instead of options).

253. *Johnson*, *supra* note 11, at 47.

254. *Id.*

255. *Id.*

256. *Id.*

## CONCLUSION

Because Vermont's identity and economy rely on agriculture and its consequent pastoral landscapes, Vermont uses the OPAV to increase the likelihood that farmland will remain in active agricultural use. A variety of factors determine whether farmland remains active, ranging from farmland's availability and consumer preferences to weather patterns and the farmer's personal circumstances. Other mechanisms, such as the traditional conservation easement, focus on keeping farmland available for farmers by protecting it from development. However, farmers may not be able to access available farmland because its price exceeds the land's expected agricultural returns, rendering the land unaffordable.

OPAVs increase the affordability of farmland for farmers by allowing the easement holder to purchase and resell farmland to farmers at its agricultural value. In practice, VLT, as Vermont's primary OPAV easement holder, rarely exercises its option to purchase the OPAV properties. Nevertheless, the OPAV increases a farmer's ability to purchase farmland by ensuring that it is available at its agricultural, rather than rural, value. While the OPAV does not ensure that farmland remains active or farmed in environmentally sound ways after the land has been transferred to a farmer, its strength lies in its narrow focus on land transfer's role in keeping farmland active. OPAVs target only one of the many factors that determine whether a farmer can continue or begin farming. Nevertheless, OPAVs have helped Vermont farmland remain active by improving farmers' access to farmland.