

FARM PRESERVATION: A VERMONT LAND-USE PERSPECTIVE

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INTRODUCTION

Two pillars of Vermont's economy—agriculture and tourism—are inextricably linked, and the success of the first provides the foundation for the second. In addition to the picturesque ski-mountains and stunning fall foliage, visitors come to the Green Mountains for a chance to see pristine hill farms, bright red barns, and black-and-white cows. But the current state of farming in Vermont is not so rosy. While recent years have seen an upswing in new Community Supported Agriculture (CSA) projects and other small-scale, artisanal food production, the general trend over the past

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half-century has been a stunning decline in the number of active farms and operational agricultural land throughout the state.¹ Dairy farming, the primary agricultural land-use and the industry most responsible for keeping lands open, has been especially hard hit.²

The decline of the agricultural economy is the result of myriad factors, some based on the farm, others from inside the state, and still others stemming from national causes. Difficulties surrounding succession and the increasing average age of farmers place doubt as to the viability of the next generation of farmers. Nationally fluctuating commodity prices,³ specifically for milk,⁴ have severely impaired the viability of the family dairy farm as Vermont's rocky hill farms attempt to contend with mega-farms on the Midwest plains or the West Coast. Likewise, the pressures of increased debt and the lack of access to inexpensive capital have made the cost of agriculture, at times, prohibitively expensive.⁵ Challenges to farming have also come from within the state as development has oozed outside of traditional town centers and housing has begun to compete with Holsteins for prime land. It is this development pressure and the importance of protecting farmland as farmland that is the focus of this article.

As the number of active farms working the land dwindles, the state loses open pastures and productive cropland.⁶ Loss of farmland brings with

1. In 1947, Vermont had 11,206 dairy farms. By 2002, that number had fallen to 1512. Vt. Dairy Promotion Council, *Dairy Farm Numbers*, VT. DAIRY (2008), http://www.vermontdairy.com/dairy_industry/farms/numbers (last visited Jan. 28, 2011).

2. Since 2006, the state has lost ten percent of its dairy farm operations and an additional twenty-seven farms have closed since the beginning of 2009, leaving the total number of dairy farms at 1062. Peter Hirschfeld, *Economy Is Taking Its Toll on Vermont's Farmers*, TIMES-ARGUS, Apr. 26, 2009, at A1.

3. For an innovative source showing the fluctuating dairy prices see Brian Gould, *Understanding Dairy Markets*, U. WIS.-MADISON, http://future.aae.wisc.edu/data/monthly_values/by_area/10?area=US (last visited Jan. 28, 2011) (charting 2010 milk prices).

4. While prices for milk per hundredweight have increased since a generational low in 2009, the economic realities of farming remain difficult. See Brian Gould, *Milk Prices > All Milk Prices: Year on Year*, U. WIS.-MADISON, http://future.aae.wisc.edu/data/monthly_values/by_area/10?area=US&tab=prices&yoy=true (last visited Jan. 28, 2011) (displaying substantial increase in milk price from 2009 to 2010); cf. Hirschfeld, *supra* note 2, at A1 (stating prices for milk per hundredweight in April 2009 were half of what they were in September 2008).

5. *Hearing Before the Vt. House Agric. Subcomm. for Livestock, Dairy & Poultry*, 2009–2010 Legis. Sess. (Vt. 2009) [hereinafter *Allbee Testimony*] (written testimony of Roger Allbee, Secretary, Vermont Agency of Agriculture), available at www.vermontagriculture.com/news/2009/TestimonyforHouseAgSubcommitteeJuly172009.pdf.

6. Vermont farms account for more than 1.2 million acres of land—roughly twenty percent of the state—and over half of that land is open cropland or pasture. See *Data Sets: State Fact Sheets: Vermont*, ECON. RES. SERVICE, U.S. DEPARTMENT AGRIC., <http://www.ers.usda.gov/statefacts/VT.HTM> (last updated Dec. 16, 2010) (listing data from 2007 Census of Agriculture). The bulk of these lands are in dairy farming. *Id.*

it aesthetic, environmental, economic, and emotional costs. The sweeping vistas of wooded hilltops and patchwork fields are being replaced with “toadstool” developments dotting the pastures, or scrub forest overtaking the open land. As more agricultural land is lost to subdivisions, important wildlife habitat disappears and prime soils are converted away from food production.

Vermont, however, is a creative state, one capable of pragmatic Yankee ingenuity and forward-looking innovation. Rather than be idle and bemoan the decline of the state’s rural character,⁷ Vermonters have established a number of formal and informal mechanisms for protecting farmland and promoting the value of agriculture. These various tools bring differing benefits and drawbacks to the table, but each has a goal of preserving this central piece of Vermont’s heritage and protecting its future. It remains to be seen whether these initiatives, coupled with the variety of other available farm-support programs, will be enough to preserve the state’s pastoral heritage and maintain this vital economic engine.

This article gives an overview of the most prevalent of these land-preservation tools and specifically analyzes how well some of them are working in Vermont. It is not a quantitative study that attempts to numerically value the success or failure of each program. Rather, it is a summary that provides some general understanding of the land-preservation schemes in play. By focusing on the interaction of these preservation mechanisms, the hope is to show some of the conflicts that can arise with and among these strategies. The first part of the article briefly discusses the importance of preserving farmland and examines how the land is a valuable state asset. The second part introduces the basic challenges facing farmers and the forces at work that necessitate preservation. The third part provides an overview of the tools that have been developed to help farmers face such pressures and offers a critique of each set of tools. The article concludes with the recognition that land-use tools are one piece of a broader farm protection puzzle. Though they may not be a cure-all, they certainly provide a necessary boost for struggling farmers.

7. Vermont is still the most “rural” state in the nation in terms of non-urban population; roughly thirty-three percent of Vermonters live in an urban area. *See id.* (estimating Vermont’s 2009 population at 621,760 of which 208,055 is categorized as “urban” and 413,705 as “rural”). That figure belies the fact that the number of medium- and large-scale farming operations are dwindling.

I. WHY PROTECT AGRICULTURAL USE? WHY SAVE FARMLAND?

Agriculture is a central component of Vermont's economy. As a direct contributor, agriculture only provides around one percent of the state's gross domestic product each year.⁸ However, that nominal figure minimizes the much greater economic impact that the agricultural economy has in terms of jobs, value-added products, and the maintenance of a working landscape.⁹ The agricultural sector employs people in portions of the state that lack other viable job opportunities and provides for a range of support industries from veterinary services to implement mechanics to agricultural outreach workers. Some of the state's largest—or at least better known—employers are also processors of Vermont agricultural products: Cabot Creamery and Ben & Jerry's (Unilever). Adding the value of food processors "more than doubles the estimate of agriculture's economic impact on the Vermont economy."¹⁰

Putting the direct economic impact to one side, the working landscape of Vermont provides intangible benefits to citizens of the state. Many Vermonters have recognized the rural landscape as a crucial piece of what makes the state special and improves their quality of life.¹¹ Well over ninety percent of respondents in a recent survey agreed with the statement, "I value the working landscape and its heritage."¹² Beyond these possibly sentimental reasons, the Vermont landscape is a central draw for the millions of tourists who flock to the state each year. As a vital factor in this facet of the state's economy,¹³ maintenance of open vistas and hill-farm

8. See VINCE BOLDUC & HERB KESSEL, CTR. FOR SOC. SCI. RESEARCH AT SAINT MICHAEL'S COLL., VERMONT IN TRANSITION: A SUMMARY OF SOCIAL, ECONOMIC AND ENVIRONMENTAL TRENDS 69 (2008), available at http://vtrural.org/sites/default/files/library/files/futureofvermont/documents/VTTransitions_Full_noAppen.pdf. That said, by one estimate, dairy farming brings one million dollars each day into the state. *Allbee Testimony*, *supra* note 5.

9. BOLDUC & KESSEL, *supra* note 8. As used here and below, "working landscape" implies an active use of the natural resources of the state, both agricultural and silvicultural.

10. *Id.*

11. *Id.*

12. "More than 97 percent of Vermonters in the phone poll and almost 93 percent in the on-line survey agreed with [the above quoted] statement." COUNCIL ON THE FUTURE OF VT., IMAGINING VERMONT: VALUES AND VISION FOR THE FUTURE 55 (2009) [hereinafter CFVT], available at http://vtrural.org/sites/default/files/library/files/futureofvermont/documents/Imagining_Vermont_FULL_Report1.pdf.

13. "Visitors spent \$1.57 billion dollars in Vermont in 2005 . . . and provided the basis for approximately 12% or just over 36,000 jobs in the state and nearly \$200 million in tax and fee revenues." BOLDUC & KESSEL, *supra* note 8, at 46 (citing ECON. & POLICY RES. & PORTLAND RESEARCH GRP., THE TRAVEL AND TOURISM INDUSTRY IN VERMONT: A BENCHMARK STUDY OF THE ECONOMIC IMPACT OF VISITOR SPENDING ON THE VERMONT ECONOMY—2005 at 9 (2005), available at http://www.uvm.edu/tourismresearch/publications/TT_Benchmark_Report_2005_FINAL.pdf).

pastures is as important to the state's future as sizable winter snowfall. The rural character also lends itself to the Vermont "brand," an image that is key to the growth and success of many of the state's newest employers.¹⁴

Still, the amount of land in active agricultural use is shrinking in the state each year, decreasing by more than sixteen percent over the past twenty-five years.¹⁵ Of this decrease, the majority of the land has been reverting to forestland, but nearly fifteen percent of it has moved into the "developed land" category.¹⁶ "The rate and extension of land development has exceeded [the rate] of population growth resulting in pressure that spills over from urbanized areas into rural areas."¹⁷ Vermont dairy farms have been hit especially hard: "In 1947 over 11,000 dairies blanketed the fields and hills. That figure dropped to 2,370 in 1990, and by 2007 only 1,097 survive"¹⁸ As sprawl continues to flow out from cities and town centers and into surrounding farmland, the pressure to shift productive agricultural lands into developed lands also increases.

This Vermont trend is reflected nationally as every year more and more acres of agricultural land are removed from food production and "developed" into another use.¹⁹ Agricultural land provides a tempting target for developers for multiple reasons. It is generally located closer to urban boundaries and thus is readily available for conversion into commuter communities.²⁰ The features that make it prime growing soil also encourage

14. See *id.* at 44–45 (noting growth of medium-sized employers in the state, "which all play an important role in promoting the Vermont 'brand' and are at the forefront of the corporate social responsibility movement" including Ben & Jerry's (Unilever), King Arthur Flour, Burton Snowboards, and Seventh Generation).

15. *Id.* at 34.

16. *Id.* at 34 n.6 (calculating from the National Resources Inventory of the Natural Resources Conservation Service of the United States Department of Agriculture). These are based on a sampling procedure with margins of error. Ray Godfrey, of the Colchester office of the Natural Resources Conservation Service, has been of great assistance in clarifying data and providing additional interpretation. Margins of error are not reported here, but data for 2003 have higher margins of error than previous years.

17. *Id.* at 35.

18. CFVT, *supra* note 12, at 56.

19. See Luther Tweeten, *Food Security and Farmland Preservation*, 3 DRAKE J. AGRIC. L. 237, 237 (1998) (discussing the high rate of decline of acres used for agriculture and the rapid increase of lands used for urban development purposes nationwide); see also *Farming on the Edge Report: What's Happening to Our Farmland?*, AM. FARMLAND TRUST (2009), <http://www.farmland.org/resources/fote/default.asp> (last visited Feb. 27, 2011) [hereinafter *Farming on the Edge Report*] ("Between 2002 and 2007, 7,491,300 acres of rural land were converted to developed uses—an area nearly the size of Maryland. This amounts to an average annual conversion rate of 1,498,200 acres.").

20. *Farming on the Edge Report: Domestic Food in the Path of Development*, AM. FARMLAND TRUST, http://www.farmland.org/resources/fote/about/about_food.asp (last visited Jan. 28, 2011) (showing eighty-six percent of U.S. fruits and vegetables, and sixty-three percent of our dairy products, are produced in urban-influenced areas).

urbanization: “The topography of prime farmland lowers infrastructure costs for development and makes such land a tempting target for development.”²¹ Its generally level grade, good drainage, and open expanse simplify the transition from amber waves to asphalt cul-de-sacs.

An early survey on the subject of agricultural land preservation recognized five key values in preserving and protecting lands in active cultivation:

property taxes increase to pay for the increased cost of servicing scattered rural subdivisions;

the destruction of fragile lands and the pollution of air and water as farmlands are replaced by suburban developments;

a shift in the local economic base as agricultural jobs are replaced by manufacturing and service jobs;

the decline of the political power of agriculture as suburban votes supplant agricultural votes; and,

the loss of the rural landscape as farmhouses and fields are bulldozed for shopping centers, highways and subdivisions.²²

Protection of prime agricultural soils also prevents such lands from being removed from the food-production cycle and irreparably damaged through the building and maintenance of housing.²³ Restoration of such lands can

21. Tweeten, *supra* note 19, at 241.

22. WILLIAM TONER, ZONING TO PROTECT FARMING: A CITIZENS' GUIDEBOOK 6 (1981); see also Sean F. Nolon & Cozata Solloway, *Preserving Our Heritage: Tools to Cultivate Agricultural Preservation in New York State*, 17 PACE L. REV. 591, 593–94 (1997) (citing AM. FARMLAND TRUST, AGRICULTURAL AND FARMLAND PROTECTION FOR NEW YORK 6 (1993) (discussing how agricultural lands provide a generous portion of property taxes, relative to the services they require; this portion is all the more extreme in light of the payment-to-services ratio of most suburban developments, which often replace active farms).

23. AM. FARMLAND TRUST, PLANNING AND ZONING FOR FARMLAND PROTECTION: A COMMUNITY BASED APPROACH 3, 19–21 (1987) [hereinafter PLANNING & ZONING]. Vermont has long valued “prime agricultural soils” and made their preservation a central criterion in permitting large-scale development. See VT. STAT. ANN. tit. 10, § 6086(a)(9)(B) (including as a criterion for granting a permit to develop or subdivide land characterized as “primary agricultural soils” the requirement that the activity “will not result in any reduction in the agricultural potential of the primary agricultural soils,” or, if it does, requiring the applicant to mitigate the impacts); see also *infra* part III.E (discussing the pros and cons of the Act 250 process).

involve costs far higher than the original value of the land,²⁴ and it is precisely this land that we are losing the fastest.²⁵

The environmental and aesthetic benefits of preserving agricultural land are also myriad. As illustrated above,

Society has long recognized that agricultural land has value for the following environmental uses in addition to crop and livestock production: ecological services, such as water quality; habitat services, such as wildlife for species preservation, hunting, or bird watching; and amenity services, such as a bucolic scene of grazing livestock, quilted crop rotations, or contoured hills.²⁶

These additional values show that, beyond economic benefits, open lands and working landscapes have positive externalities for the surrounding landowners and the community at large.

II. PRESSURES FACING FARMERS

In a recent study examining the future of Vermont through the eyes of its citizens, one participant noted that “[t]he farm and forest economy is in many ways Vermont’s best tool to prevent the loss of the land.”²⁷ While this statement resonates with a desire to protect the working landscape, it also seems circular. The preservation of the land may rely on a robust agricultural economy, but the availability of suitable agricultural land is vital to sustaining these same sectors. With prime farmland under tremendous internal and external pressures, the tools that state and local governments have to promote and protect such lands for use as farmland become all the more important.

24. Tweeten, *supra* note 19, at 238 (citing S. Fred Singer, Comm. on Soil as a Res. in Relation to Surface Mining for Coal, Nat’l Research Council, *Surface Mining: Soil, Coal, and Society*, 10 ENVTL. CONSERVATION 182–83 (1983)) (“Costs of private back-filling and revegetation mandated by government to restore basic topography and productivity for agriculture in the late 1970s averaged over \$18,000 per acre in Appalachia, \$16,000 per acre in the Midwest, and \$17,000 per acre in the West. These costs, over twenty times the value of land for agricultural production, imply huge environmental benefits from land.”).

25. See generally *Farming on the Edge Report*, *supra* note 19, (providing information on widespread loss of agricultural land).

26. Tweeten, *supra* note 19, at 238.

27. CFVT, *supra* note 12, at 59. Presumably, the participant was referring to “loss of the land” to development; see also Tweeten, *supra* note 19, at 238 (“Society has long recognized that agricultural land has value for . . . environmental uses in addition to crop and livestock production.”).

Broadly speaking, two main forces interact to lead to the conversion of agricultural lands into urban or “developed” lands.²⁸ The first is expansion of development out from existing urban centers. As cities have decayed over the past half-century,²⁹ the demand for good land within commuting distance of job centers has increased. Accordingly, the bulk of recent development has occurred at the urban fringe, where residential areas often meet agricultural land.³⁰ Prime agricultural soils also have many of the features desired by developers: proximity to population centers, relatively level topography, and good drainage.³¹ Thus, the demand for good farmland that can be easily converted into residential development is often higher than the demand for the land in its current use.

This is the second challenge: the lack of demand for farmland *as* farmland. With the growth of large-scale farming and agribusiness following the “green revolution” and the proliferation of fossil-fuel-based fertilizers, smaller-scale farms, particularly those closer to population centers, have begun to lose viability.³² Technological advances and economies of scale have cut production and transportation costs and have forced many smaller farmers to grow big or get out. Along with the shrinking profit margins, these same lands also face pressure from the encroaching development. As residential development has drawn near, the value of the undeveloped farmlands has increased and with it, the local property taxes. Faced with shrinking profits and higher overhead expenses, many farmers simply have not been able to continue.³³ These economic

28. A related concept is laid-out in Tweeten, *supra* note 19, at 242.

29. While the new urbanist movement suggests that a return to city centers is currently underway, since the early 1950s the general population flow has been outward from urban centers. *See generally* John D. Kasarda, Stephen J. Appold, Stuart H. Sweeney & Elaine Sieff, *Central-City and Suburban Migration Patterns: Is a Turnaround on the Horizon?*, 8 HOUSING POL’Y DEBATE 307 (1997) (using census data to analyze metropolitan household migration patterns); *see also* Matt Sutkoski, *Data Show Vermonters Moving Back Toward the City*, BURLINGTON FREE PRESS, Feb. 20, 2011, at B1 (relying on 2010 U.S. census data to show increased growth in established urban centers and suggesting that land-use tools may be shifting population growth back to villages and towns).

30. *Farming on the Edge Report*, *supra* note 19.

31. Tweeten, *supra* note 19, at 241 (“The topography of prime farmland lowers infrastructure costs for development and makes such land a tempting target for development.”).

32. *See generally* DOUGLAS TOMPKINS ET AL., *THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE* (Andrew Kimbrell ed., Island Press 2002) (collecting writings on industrial agriculture). Even in Vermont, which prides itself on small-scale operations, the number of dairy farms continues to shrink, while their size increases—currently the top 1.2% of dairy farms produces 28% of the total farm income for the state. Hirschfeld, *supra* note 2, at A1; Vt. Dairy Promotion Council, *supra* note 1; *see* CFVT, *supra* note 12, at 56 (pointing out that the number of smaller, non-dairy farms has increased in the state, but of these operations, 41% had an income of less than \$2500 per year in 2002).

33. For an engaging illustration of the mounting pressures suburban development places on small farmers *see* TONER, *supra* note 22, at 7–8.

pressures, coupled with the increasing average age of farmers,³⁴ have decreased the internal—or farmer-based—demand for farmland. Even for would-be farmers, the cost of entry into the marketplace has simply become too high.³⁵ When looking to purchase a piece of prime farmland, a young farmer may have to compete economically with large-scale development interests.

III. OVERVIEW OF THE TOOLS

Given the multifaceted pressures facing farmers today, how can local or state governments best work to preserve farmland and keep farms successful? There are almost as many ideas as there are crops and soil types to protect. Each form of protection or incentive offers a different model, focusing on one or more of the pressures impacting local farmlands. One subset of tools attempts to protect farms by protecting farmland. These tools strive to (1) lower costs faced by farmers (e.g., developing local markets for products, decreasing farmland taxes, increasing land-based payments to farmers), (2) hinder or prohibit development pressures on certain lands (e.g., right-to-farm laws, environmental or aesthetic regulatory laws, agricultural protection zoning), or (3) expressly highlight and promote the value of active farmland in regional and local planning. Each of these various tools provides different benefits to farmers. While no single measure is a complete guarantee that farming will continue throughout the state, they do lessen the growing burden on farmers, enabling new individuals to enter the market and allowing others to continue working the land.

*A. Informal Tools: Farmers' Markets, CSAs, and Local Food Networks*³⁶

One vital support for small- and medium-scale farms is direct marketing to consumers. Farmers' Markets and CSAs can provide important revenue streams for farmers who might otherwise be unable to

34. See BOLDUC & KESSEL, *supra* note 8, at 71 (“In 2002, the average age of principal operators of Vermont farms was 54 years, up from 49 in 1978 This raises a question of whether there will be a sufficient number of younger Vermonters willing and able to maintain Vermont farms in the future.”). Such figures also suggest that fewer children are taking over family farms, especially in the face of mounting financial pressure and the lure of a more urban lifestyle.

35. CFVT, *supra* note 12, at 57.

36. While not land-protection tools, no discussion of farm preservation would be adequate without some mention of the growth and importance of direct market connections between farmers and consumers.

enter larger markets. The growing numbers of such initiatives show their increasing popularity.³⁷ These avenues of direct-to-consumer contact, small though they may be, have been successful in increasing both agricultural production and agricultural profits in the state.³⁸ As one recent Vermont study noted, “When products are grown and consumed locally, farms can emphasize the uniqueness of their community connections and the freshness of their products. Vermont farms are making connections to local schools, hospitals, and other large organizations; they are finding in-state markets that can help increase and promote direct farm sales.”³⁹ Such initiatives can lower overhead costs, provide farmers with much-needed capital and link neighboring communities directly to the success of their local farms.⁴⁰

While many such initiatives are farmer driven, others are specifically supported through formal governmental action. The zoning ordinance in Vermont’s capital, Montpelier, for example, permits growers to erect farmstands on their property and sell produce grown there without acquiring any permits from the city.⁴¹ Local government also enables farmers’ markets by providing public space or specifically promoting the markets.⁴² Beyond these fairly regular practices, there is a significant initiative underway to provide town schools, hospitals, and other institutions with locally grown produce for their cafeterias.⁴³ If successful,

37. Vermont had ninety-three separate farmers’ markets in 2008, up from three in 1986. BOLDUC & KESSEL, *supra* note 8, at 76–77. The state also had 185 farm stands and sixty-nine CSAs. *Id.*

38. In 1982, \$3.8 million of farm output was sold directly to consumers in Vermont; twenty years later that number had almost tripled and now accounts for four percent of Vermont’s agricultural earnings. CFVT, *supra* note 12, at 59.

39. *Id.*

40. The Vermont Legislature recently directed the creation of a “Farm to Plate” initiative aimed at increasing statewide access to local foods. The draft plan, released to the Legislature in January 2011, highlights the importance of increasing local demand for local products along with growing the capacity of Vermont farmers and producers. *Farm to Plate Initiative*, VT. SUSTAINABLE JOBS FUND (2009–2010), <http://www.vsjf.org/project-details/5/farm-to-plate-initiative> (last visited Feb. 27, 2011).

41. MONTPELIER, VT., CITY OF MONTPELIER ZONING AND SUBDIVISION REGULATIONS § 605.I(3) (2008). This regulation does impose certain set-back and parking requirements.

42. For example, the town of St. Johnsbury traditionally held its summer farmers’ market in the parking lot of the town middle school and advertised it on the school’s announcement board located adjacent to a main town street.

43. While these initiatives are in the early stages of development, momentum is building. *See, e.g., Programs: Farm to School Network*, GREEN MOUNTAIN FARM-TO-SCH. (2009), <http://greenmountainfarmtoschool.org/ftsnetwork.php> (Green Mountain Farm-to-School provides education programs for students, fresh food for cafeterias, and community building activities); *What Is Vermont FEED?*, VT. FEED, <http://www.vtfeed.org/about> (last visited Jan. 28, 2011) (describing Vermont Food Education Every Day (FEED), which is a comprehensive education, nutrition, and waste management program that brings local farm foods to schools); *What We Do*, RUTLAND AREA FARM & FOOD LINK, http://www.rutlandfarmandfood.org/what_we_do.html (last visited Jan. 28, 2011) (noting

such institutional links with local agriculture could go a long way toward providing a steady market for small- and medium-scale producers.

B. Conservation Easements and Land Trusts

A preservation or conservation easement is a relatively simple and flexible means for keeping lands in cultivation by limiting the possibility of their development for a long period of time—potentially perpetually. It is also a good tool for making prime agricultural land affordable for new farmers and providing income for existing farmers. The general concept of these easements is that farmers grant some portion of the development rights to their land to the state or a designated trust and receive tax benefits in return.⁴⁴ The state or trust then prevents development of the land or, in some cases, requires the owners to keep the land in active agricultural production. Such mechanisms for conserving land have become extremely popular in the past twenty years, and nationally the use of such easements more than doubled between 1998 and 2003.⁴⁵

In 1987, the Vermont Legislature established the Vermont Housing and Conservation Board (VHCB). This new body began to administer the state's farmland conservation program.⁴⁶ Working with local towns, state agencies, and others, the VHCB provides funds and technical assistance to help in conservation efforts. By 2000, this program had put 260 farms and 43,000 acres of land into conservation.⁴⁷

While the general structure of a conservation easement is fairly straightforward, problems can arise and criticism is rife.⁴⁸ The perpetual

that the Rutland Area Farm and Food Link promotes consumption of local produce by producing a “locally grown guide,” operating a new farmer initiative, and running a Workplace Farm-Share Delivery Program, and it plans to build a Community Farm and Agricultural Resource Center).

44. The IRS grants a tax break for real property donations to conservation organizations. IRS Qualified Conservation Contributions, Treas. Reg. § 1.170-A14(a) (2010). Vermont provides limited exemption from taxation. VT. STAT. ANN. tit. 10, § 6306 (2006).

45. See Anna Vinson, *Re-Allocating the Conservation Landscape: Conservation Easements and Regulation Working in Concert*, 18 FORDHAM ENVTL. L. REV. 273, 275 (2006–2007) (quantifying the rise in conservation easements “from 7,392 in 1998 to 17,847 in 2003”) (citations omitted).

46. See 1988 Vt. Acts & Resolves 168 (establishing municipal regional planning fund). See also VT. STAT. ANN. tit. 10, §§ 6301–6309 (2006) (mirroring the 1969 Vt. Acts & Resolves language and stating the purpose is to “encourage and assist the maintenance of the present uses of Vermont’s agricultural, forest, and other undeveloped land and to prevent the accelerated residential and commercial development thereof”); 1969 Vt. Acts & Resolves 180 (same).

47. KIRSTEN FERGUSON & JEREMIAH COSGROVE, FROM THE FIELD: WHAT FARMERS HAVE TO SAY ABOUT VERMONT’S FARMLAND CONSERVATION PROGRAM 5 (2000), available at http://www.farmlandinfo.org/documents/29389/From_The_Field.pdf.

48. See Vinson, *supra* note 45, at 277–82 (setting out a comprehensive overview of the criticism of conservation easements).

nature of such easements makes them a target for narrow interpretation by courts. While one property owner may place his or her land in an agricultural easement in perpetuity, the surrounding lands may develop over time and make farming the conserved land untenable. Such “changed conditions” can weaken the staying power of the easement and lead to courts altering its terms, and thus its protection of the land, in the face of a challenge. Additionally, the voluntary nature of such devices means that the lands conserved are neither necessarily prime agricultural soils nor the most aesthetically or environmentally sensitive.⁴⁹ The owner of a prominent hill farm with a stunning view shed, or a farmer who owns flat, well-drained bottom land with good highway access may ignore easements and eventually sell out to a developer.

The sale of development rights can also injure a farmer’s bottom line more directly. With the sale or transfer of these rights, a landowner’s equity stake in their property is reduced as the resale value of the land consequently shrinks. While the farmer usually receives some direct compensation for the sale of the development rights, the decrease in equity can limit a farmer’s future ability to qualify for a loan to purchase further land or needed equipment.⁵⁰

A related mechanism, based more directly on free-market principles, and side-stepping some of the legal difficulties encountered in drafting and conferring easements and the resulting encumbrance on the property, is the state-sponsored Right of First Refusal (RFR).⁵¹ This strategy essentially enables agricultural landowners to exchange a RFR with their local municipality in lieu of some portion of their property taxes.⁵² The local government then transfers the RFR to the state, which in turn reimburses the locality for the waived taxes and passes the RFR on to a nonprofit to administer and oversee.⁵³ When the landowner later wishes to sell the land, the nonprofit can exercise the RFR and purchase the land, placing any desired easements or conditions upon it at that time.⁵⁴ In this way, the individual landowner need not risk burdening the property with an easement that may reduce its value and make it harder to sell. The clear challenge with such legislation is in convincing the state to spend its money

49. Nolon & Solloway, *supra* note 22, at 608.

50. *Id.*

51. See generally Lawrence D. Spears & Karen Paige Hunt, *Protecting Rural Lands: A Market-Based, Efficient and Culturally Appropriate Strategy Using Rights of First Refusal and the Nonprofit Sector*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 235 (2002) (strategizing use of Rights of First Refusal).

52. *Id.* at 236.

53. *Id.*

54. *Id.* at 236–37.

to develop and fund such a program, rather than the other tax-based strategies, which may remove income from the state coffers, but do not require spending taxpayer dollars. Regardless of the precise mechanism employed, unlike direct regulation, easements provide a mechanism for private landowners to conserve their agricultural lands and attempt to maintain the productivity of their farms in the face of development pressures.

C. Tax Incentives and Current Use

As relayed above, encroaching development is one of the major challenges facing farmers today. Beyond pressuring struggling farmers to sell their pastures, urbanization drives up local property taxes as neighboring lands shift to residential use. This increase in land value, through no action of the farmer, can ratchet a tax rate up to the point of making agricultural production on the land untenable. The increased tax rate, after all, has virtually nothing to do with the productivity or profitability of the farm—let alone the market for a farmer’s product; it acts as an additional, burdensome expense. Agricultural easements provide one means of realizing tax breaks based on farming the land, albeit through a permanent designation of the land. States also provide other tax incentives for keeping lands in active use as agricultural lands.

Vermont has a model tax incentive, or “Current Use” program, called the Land Use Value Appraisal Program, which taxes property based on its current use as agricultural or forest land, rather than its market-based development potential.⁵⁵ Like similar laws in many other states, its purpose is to promote the maintenance of farm and forestland in the face of development pressure by decreasing the property tax rate if the land is actively in use for agricultural or silvicultural purposes. Passed in 1978, the Land Use Appraisal Law set out to: (1) keep Vermont farm and forest land in active production; (2) slow the development of such lands; and (3) equalize the property tax burden of undeveloped lands.⁵⁶ Since its initial passage, the Legislature has amended the law to include penalties for exiting the program in an attempt to halt abuse of the tax benefits by developers who purchase land and wish to limit their tax liability until the market is ripe to sell.⁵⁷

55. VT. STAT. ANN. tit. 32, §§ 3751–3776 (2008).

56. *Id.* § 3751.

57. *Id.* § 3757. Such penalties apply if the land is “developed.” *See id.* § 3752(5) (defining “development” as “construction of any building, road or other structure, or any mining, excavation or landfill activity” but not including construction of farm structures). In 2010, then-governor Jim Douglas

In practice, any land or structures that are owned or leased by a farmer or achieve a minimum income threshold⁵⁸ are granted a presumption of eligibility for the program⁵⁹ and may be enrolled.⁶⁰ The definition for “farmer” is also income constrained, requiring any person seeking the designation to earn at least half of his or her income from the sale of products grown on the specified land.⁶¹ A landowner who wishes to enter the program can apply and, if accepted, have his or her land assessed at the agriculture use value for such lands.⁶² Any farm structures are assessed at zero percent of market value, and this can include any building on enrolled land valued up to \$100,000.⁶³ The program can also apply to certain portions of a property tract, even if the whole tract is not eligible.⁶⁴ If a farmer disagrees with the program administrator’s assessment of his or her land value or its rejection from the program, he or she has the right to appeal.⁶⁵

The program attempts to create an incentive for active use of farmland and maintenance and use of farm structures, either by the property owner or through lease to an active farmer.⁶⁶ This enables some farming operations to lease additional land from non-farming landowners as pasture or cropland and thus increase their productivity at a lower operational cost, without forcing them to purchase more land. Landowners, in turn, enjoy the applicable tax break along with the benefit of keeping their land open and in active use. The success of this program is shown through its widespread use. It is one of the most widely used preservation tools in the state as twelve thousand land owners had placed fifty-nine percent of eligible

vetoed a proposed amendment to the program, which would have significantly increased the withdrawal penalties and transfer taxes. *See Current Status of a Specific Bill or Resolution 2009-2010 Legislative Session*, VT. LEGIS. BILL TRACKING SYS. (May 27, 2010), <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=H.0485&Session=2010> (listing the legislative history of the vetoed bill).

58. VT. STAT. ANN. tit. 32, § 3752(1) (for parcels under twenty-five acres, the total gross earnings must be more than \$2000).

59. *Id.*

60. *Id.* § 3755(a).

61. *Id.* § 3752(7).

62. *Id.* § 3756(a).

63. *Id.* § 3752(12), (14).

64. *Id.* § 3752(15).

65. *Id.* § 3758.

66. *See*, Jesse J. Richardson, Jr., *Beyond Fairness: What Really Works to Protect Farmland*, 12 DRAKE J. AGRIC. L. 163, 169 (2007) (explaining the function of “use-value assessment” as a “practice of valuing the property for local real property tax purposes upon the basis of its value in a particular (current) use, rather than upon the basis of its market value”).

agricultural land and forty percent of forest land—more than a third of the total land in the state—in the program by 2007.⁶⁷

One potential downside to such tax relief measures is that they can drive down local property tax revenues. As a state program, local municipalities have little control over what land is placed in the current use program or over the applicable tax rate.⁶⁸ Accordingly, landowners can opt to designate their land as current use (assuming they meet the minimum requirements) and effectively remove land that may have never been agricultural from the tax rolls of the town. Towns are then forced to cope with falling property tax revenues with very little recourse. Vermont combats this potential problem paying municipalities for the revenue lost when lands enter the current use program.⁶⁹ Much like preservation easements, however, another challenge with current use incentives is the voluntary nature of the scheme; it can produce a patchwork of enrolled land. Moreover, the decrease in tax burden is often not sufficient to enable the farming operation to remain profitable if other costs arise and lands encumbered by the potential penalties for exiting the program early may be more difficult to sell.

D. Right-to-Farm (Nuisance Protection) Laws

Much as it can inflate property tax rates, encroaching urbanization can also bring in neighbors unused to the day-to-day sights, sounds, and smells of a working farm. Whether it's the tractors slowing traffic, escaped chickens running amok, or simply the odor of manure, many new farm neighbors often protest some of the necessary facets of farm life. In talking at a recent public forum about some of the challenges facing Vermont farmers today, several farmers noted the direct tension between Vermonters valuing the scenic beauty of a working landscape, while at the same time rejecting some of the practices necessary for making farms economically viable.⁷⁰ Environmental regulations around non-point source water pollution have also increased neighbors' complaints as more manure must

67. BOLDUC & KESSEL, *supra* note 8, at 38–39. See also VT. DEP'T OF TAXES, CURRENT USE APPRAISAL PROGRAM PARTICIPANT TAX SAVINGS - TAX YEAR 2005, at 8 (2005), available at www.state.vt.us/tax/pdf.word.excel/pvr/reports/2006/CurrentUse_TaxSavingsReport.pdf (listing land in Current Use program in 2005).

68. VT. STAT. ANN. tit. 32, § 3756 (detailing the municipality's passive role in the process).

69. *Id.* § 3760(a)(1).

70. CFVT, *supra* note 12, at 58.

be stored on-site and spread at certain times of the year.⁷¹ In some instances, face-to-face complaints can evolve into legal complaints and lawsuits.⁷²

To protect farmers from just this type of nuisance suit, Vermont, along with other states, has adopted a “right-to-farm” law.⁷³ This law shields farmers from suits arising from activities that might otherwise substantially impact a neighbor’s peaceful enjoyment of his or her property.⁷⁴ It enumerates protected farming activities, including large-scale feeding operations, on-site processing, sale of farm products, and even on-site power generation from agricultural products or wastes.⁷⁵ So long as such activities are in line with applicable laws, were “established prior to surrounding nonagricultural activities,” and have “not significantly changed since the commencement of the prior surrounding nonagricultural activity,” they are entitled to some measure of protection from suit.⁷⁶ The statute does not define “significantly changed,” but case law suggests that expanded operations can lead to valid suits, money damages, and injunctions against growing agricultural operations.⁷⁷

Unlike other right-to-farm laws, which have faced constitutional challenges for being overbroad,⁷⁸ the Vermont law does not provide

71. *Id.* Environmental regulations surrounding farms present an array of challenges and an additional realm of farm-protection exemptions.

72. See Sky Barsch Gleiner, *Neighbors Seek Voice in Vermont Compost’s Growing Operation*, TIMES-ARGUS (Barre-Montpelier), Oct. 1, 2010, <http://www.timesargus.com> (exemplifying a conflict created by a growing business built around a farm in which a nuisance suit has been threatened but not pursued t).

73. VT. STAT. ANN. tit. 12, §§ 5751–5754 (2009).

74. The law technically establishes a rebuttable presumption that specific agricultural activities are not common law nuisances. *Id.* § 5753.

75. *Id.* § 5752. The inclusion of “power generation” as a protected practice was presumably meant to enable the capture and combustion of methane gas. See generally JEFFERY W. FORWARD, VERMONT FARM METHANE PROJECT QUARTERLY REPORT (2001), available at http://publicservice.vermont.gov/energy-efficiency/ee_files/methane/4th2000.pdf (reporting on methane recovery on Vermont farms). It is unclear if a large scale bio-fuels plant, growing its own switchgrass, would qualify for this protection though it would presumably fall afoul of other requirements of the law. VT. STAT. ANN. tit. 12, § 5753(a)(1) (requiring compliance with applicable laws and “consistent with good agricultural practices”).

76. VT. STAT. ANN. tit. 12, § 5753(a).

77. See *Trickett v. Ochs*, 2003 VT 91, ¶¶ 3, 8, 25–26, 176 Vt. 89, 838 A.2d 66 (holding that the Vermont right-to-farm law did not apply because defendant’s business expansion was a “significant change” in their business activities).

78. See, e.g., *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321–22 (Iowa 1998) (striking down a broad right-to-farm law as an unconstitutional “taking” not providing property owners with just compensation). See generally Adam Van Buskirk, *Right-to-Farm Laws as “Takings” in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 ALB. L. ENVTL. OUTLOOK 169 (2006) (comparing an Iowa Supreme Court decision holding an Iowa right-to-farm law unconstitutional with Idaho Supreme Court decision that held an Idaho right-to-farm law did not violate the Fifth Amendment).

absolute protection for farm activities. Rather, it presumes specific farming activities are protected so long as they do not have “a substantial adverse effect on health, safety, or welfare, or ha[ve] a noxious and significant interference with the use and enjoyment of the neighboring property.”⁷⁹ Though the statute does not define “substantial adverse effect” or “significant interference,” the addition of “substantial” and “significant,” as used in these standards and supported through legislative testimony,⁸⁰ seems to heighten the level of nuisance required to maintain a suit.

In passing this law, the Vermont Legislature specifically highlighted the importance of agricultural production in the state’s economy and the “unique and irreplaceable” nature of agricultural lands and their contribution to tourism in the state.⁸¹ Recognizing that “agricultural activities conducted on farmland in urbanizing areas are potentially subject to lawsuits based on the theory of nuisance,” and that such suits “encourage and could force the premature removal of the farm lands . . . from agricultural use,” the Legislature enacted a nuanced system of protections.⁸² Notably, however, this structure was meant “to protect *reasonable* agricultural activities conducted *on the farm*” and not all colorable “agricultural activities.”⁸³

Beyond the overbroad protections that some right-to-farm laws can create, one weakness of Vermont’s statute and others like it is that it can act as a limit on a farmer’s ability to diversify and expand operations once the surrounding properties shift toward residential use. In order to enjoy the protections afforded under the nuisance protection law, a farmer’s operations must pre-date the complaining neighbor’s arrival and cannot have “significantly changed” since the arrival. This means that many farms are potentially handcuffed as they attempt to respond to market changes or even when they desire to expand their operations.⁸⁴ In one recent decision, the Vermont Supreme Court highlighted the fact that right-to-farm laws were meant to protect existing uses from the pressures of urbanization, not

79. VT. STAT. ANN. tit. 12, § 5753(a)(2).

80. See Samuel Krasnow, *Farm Wars: Can “Right to Farm” Laws Resolve Growing Land Use Conflicts?*, NEXT AM. CITY (Apr. 2005), <http://americancity.org/magazine/article/farm-wars-krasnow/> (tracing the evolution of Vermont’s Right-to-Farm law and the shift from an absolute protection of farming activities to a rebuttable presumption in their favor, including excerpts from legislative hearings).

81. VT. STAT. ANN. tit. 12, § 5751.

82. *Id.*

83. *Id.* (emphases added).

84. See ROBERT ANDREW BRANAN, ZONING LIMITATIONS AND OPPORTUNITIES FOR FARM ENTERPRISE DIVERSIFICATION: SEARCHING FOR NEW MEANING IN OLD DEFINITIONS 3 (2004), available at http://www.nationalaglawcenter.org/assets/articles/branan_zoninglimitations.pdf.

to permit the increase in size and scope of an existing farming operation such that it impacts rural neighbors.⁸⁵ Such a ruling effectively ossifies the scale and manner of operations of the farm at the time the first shovel-full of dirt from a neighboring development is dug.⁸⁶ Still, the right-to-farm law in Vermont provides a measure of protection for farmers facing encroaching urbanization and, perhaps equally as important, shows the legislative recognition of this challenge facing farmers.

E. Statutory Exceptions from Environmental Review (Act 250)

Act 250 is Vermont's preeminent development review standard and is recognized as a major reason the state has maintained its rural character and avoided many of the pitfalls of widespread "sprawl" development.⁸⁷ Act 250 review is a lengthy process and one that can result in drawn out litigation with various appeals before the state Environmental Court.⁸⁸ Before commencing development, a property owner must obtain a permit.⁸⁹ This permit requirement is waived for farming activities that occur on properly conserved land or that do not conflict with any previously issued Act 250 permit.⁹⁰ Thus, farmers working on conservation easements can sidestep some of the permitting requirements imposed by Act 250.

"Development," under Act 250, is broadly defined as "[t]he construction of improvements . . . for commercial or industrial purposes" on lots larger than one acre if the municipality does not have permanent zoning laws, or on more than ten acres if it does.⁹¹ This definition places any new construction on preserved land outside the protective scope noted above. Accordingly, such expansive language could provide a significant economic hurdle for farmers intending to build a new barn or modify a manure lagoon

85. See *Trickett v. Ochs*, 2003 VT 91, ¶¶ 23–24, 176 Vt. 89, 838 A.2d 66 (holding that expansion of defendant's business was not protected by Vermont's right-to-farm law).

86. One could argue that *Trickett* is limited to its facts as it dealt with a suit by neighbors who had purchased the defendant-farm's original farmhouse and thus, as successors-in-interest, "existed" prior to any substantial changes in the farm's operations. *Id.*

87. See Sandy Levine, *Efficient Land Use Lessens Sprawl*, BURLINGTON FREE PRESS, Apr. 30, 2003, at 15A (advocating continued use of Act 250).

88. In fairness, only about two percent of Act 250 project proposals result in legal appeals. See *Just the Facts on Act 250*, VT. NAT. RESOURCES COUNCIL (2008), <http://www.vnrc.org/article/articleview/24232/> (reviewing disposition of all Act 250 applications in 2007).

89. VT. STAT. ANN. tit. 10, § 6081(a) (2006).

90. *Id.* § 6081(s).

91. *Id.* § 6001(3).

to comply with environmental regulations. However, the law carves out a specific exception for “[t]he construction of improvements for farming.”⁹²

This exemption allows farmers to avoid the potentially significant expense (in time and money) of applying for and obtaining⁹³ an Act 250 permit. To meet this exception, the activities in question must fall into the definition of “farming.” This definition includes such broad categories as “the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural and orchard crops” and “the on-site storage, preparation and sale of agricultural products principally produced on the farm” as well as the raising of livestock and horses.⁹⁴ While the phrase “other use of land” is not defined clearly and could provide a significant loophole, and the definition as written has no requirement that such cultivation be “active,” Vermont courts read this exemption narrowly and place the burden of proof squarely on the farmers’ shoulders.⁹⁵

Along with easing the regulatory burden on farmers, Act 250 also demands that proposed developments take into account the impact a proposed project will have on primary agricultural soils.⁹⁶ As one of the ten criteria considered in the Act 250 permit application process, an applicant must demonstrate that “the subdivision or development will not result in *any* reduction in the agricultural potential of the primary agricultural soils.”⁹⁷ If the development will necessarily impact such soils, the proposed developer must show the development “will not significantly interfere with or jeopardize the continuation of agriculture . . . on adjoining lands or reduce their agricultural . . . potential,” and that the proposed project tract is the only suitable piece of land the developer owns.⁹⁸ The developer must also show that all reasonable mitigating steps have been or will be taken to protect neighboring agricultural land.⁹⁹ These mitigating steps generally¹⁰⁰

92. *Id.* § 6001(3)(D)(i). The statute goes on to define “farming” in greater detail. *Id.* § 6001(22).

93. Part of the reason the Act 250 permitting process is so costly is because of the ease with which third parties can join in the proceedings. *See id.* § 6085 (providing criteria for establishing party status); *see also* *In re Killington, Ltd.*, 159 Vt. 206, 213, 616 A.2d 241, 245 (1992) (recognizing the impact on the affected party, not just the physical site of development, when determining party status).

94. VT. STAT. ANN. tit. 10, § 6001(22).

95. *See In re Ochs*, 2006 VT 122, ¶ 12, 181 Vt. 541, 915 A.2d 780 (2006) (“The farming exemption, like all exemptions, is to be read narrowly and only applied when the facts clearly support the exemption’s application.”).

96. VT. STAT. ANN. tit. 10, § 6086(a)(9)(B).

97. *Id.* (emphasis added).

98. *Id.* § 6086(a)(9)(B)(i).

99. *See id.* § 6093(a) (providing necessary mitigation steps).

100. The actions required depend on the location of the project tract; if it is within a designated growth area, then the burden on the developer is lower than if the proposed project is outside such an

involve preserving a like or greater quantity of prime agricultural lands in the same geographic region, either through purchasing conservation easements or conserving adjoining land on the same project tract.¹⁰¹ All lands preserved through mitigating measures are placed under a conservation easement and protected under the same rubric laid out above.¹⁰² Lands so preserved are exempt from the need for future Act 250 permits.¹⁰³

The Vermont Supreme Court recently weighed in on this criterion, noting that one key inquiry into its application is the definition of “primary agricultural soils.”¹⁰⁴ The Court noted that for lands to be considered primary agricultural soils, there must be “few limitations for cultivation or limitations which may be easily overcome.”¹⁰⁵ In ruling on whether a parcel of land slated for development contained primary agricultural soils, the Court held that the cost of converting the land to a farm—in this case from a forested property—was significant in determining whether the land had limitations that may be easily overcome.¹⁰⁶ It remains to be seen how the inclusion of any farmland-development costs into the determination of whether primary agricultural soils exist on a property may hinder the purpose of Act 250’s specific protection of potential or primary farmland.

On balance, Act 250 supports farming in Vermont by relieving farmers of some of its regulatory burden and requiring additional conservation by developers aiming to convert active agricultural land into developments. In this way, the environmental review structure of the state carves out an exception for activities that maintain the rural character and ideals of the state.

F. Regional and Municipal Planning

Beyond its regulatory review of proposed development, Act 250, as originally passed, also contained a statewide planning element. Though the planning requirement never came to fruition as the law intended, in the late

area. *Compare id.* § 6093(a)(1) (providing for projects located in growth centers), *with id.* § 6093(a)(2) (providing for projects located outside growth centers). This distinction is part of Vermont’s “Smart Growth” initiative to create incentives for placing more development in compact “growth centers.”

101. *Id.* § 6093. Development on agricultural soils in a designated growth area requires a one-to-one ratio of preservation, *id.* § 6093(a)(1)(B)(ii), whereas development outside such areas can require a two-to-one or three-to-one ratio, *id.* § 6093(a)(2)(B).

102. *Id.* § 6093(b). *See supra* part III.B (explaining conservation easements and land trusts).

103. *Id.* § 6081(s)(1)(A).

104. *In re Village Assocs.* Act 250 Land Use Permit, 2010 VT 42A, 21 Vt. L. Week 127, 998 A.2d 712; *see also* VT. STAT. ANN. tit. 10, § 6001(15) (defining primary agricultural soils).

105. *Village Assocs.*, 2010 VT 42A, ¶ 12 (quoting VT. STAT. ANN. tit. 10, § 6001(15)).

106. *Id.*, at ¶ 15.

1980s the Vermont Legislature passed Act 200, which provides a state-level framework for Vermont towns to undertake comprehensive development planning.¹⁰⁷ Act 200 specifically developed statewide guidelines for planning, enabling local governments to draft municipal plans,¹⁰⁸ and requiring such a plan if the town wished to enact zoning regulations.¹⁰⁹ Any plan thus enacted had to be in accordance with the policies set forth by the Act.¹¹⁰ Agricultural land preservation and protection are among the policies that are a required component of a duly adopted town plan. Specifically, plans are expected to:

[E]ncourage and strengthen agricultural and forest industries.

- (A) Strategies to protect long-term viability of agricultural and forest lands should be encouraged and should include maintaining low overall density.
- (B) The manufacture and marketing of value-added agricultural and forest products should be encouraged.
- (C) The use of locally-grown food products should be encouraged.
- (D) Sound forest and agricultural management practices should be encouraged.
- (E) Public investment should be planned so as to minimize development pressure on agricultural and forest land.¹¹¹

To implement these goals, every local plan must include a land-use component that identifies agricultural land in the town.¹¹² This land is properly defined under regulations set forth by the Secretary of

107. Passed in 1987, Act 200, 1988 Vt. Acts & Resolves 167, is codified at VT. STAT. ANN. tit. 24, §§ 4301–4498 (2007).

108. VT. STAT. ANN. tit. 24, § 4384 (2007).

109. *Id.* § 4401.

110. *Id.* § 4302.

111. *Id.* § 4302(c)(9).

112. *Id.* § 4382.

Agriculture.¹¹³ In identifying such lands, a development plan defines the foundation for future zoning and other land-use control measures.

In practice, town plans in Vermont recognize and attempt to promote open space and working landscapes.¹¹⁴ By stating policies and expressing aspirational goals, town plans lay the groundwork for future development bylaws, as any enacted bylaws must be “in conformance with the plan.”¹¹⁵ While plans still lack any regulatory force, as policy statements they provide a blueprint for future development and a vision for the municipality’s future. Even in some of the most sprawl-prone areas of the state—areas also rich in agricultural soils—the local plans recognize the value of maintaining patterns of rural development.¹¹⁶

One other central value of comprehensive development planning—and a driving purpose behind Act 200¹¹⁷—is the involvement of the local community in the drafting and approval of the municipal plan itself.¹¹⁸ The broader the public involvement in the planning process, the more investment the local community will have in the plan’s goals for protecting agricultural land and the more information will be available for the planners.¹¹⁹ In these ways, an active planning process can create the framework for broader farmland protections and increase public investment in supporting working landscapes. Still, no matter how much community support a plan receives, it lacks direct regulatory force.

113. *Id.* § 4382(a)(2) (referring to guidelines for defining agricultural land adopted under VT. STAT. ANN. tit. 6, § 8).

114. *See, e.g.*, SELECTBOARD, RANDOLPH TOWN PLAN: OUR TOWN IN THE HEART OF VERMONT 36, 40 (2010), available at <http://randolphvt.govoffice2.com> (follow “Ordinances, Plans & Policies” hyperlink; then follow “Plans” hyperlink; then follow “Town Plan” hyperlink) (outlining goals and policies for future land use and zoning); TOWN OF WILLISTON, COMPREHENSIVE PLAN 19–22 (2006) [hereinafter WILLISTON PLAN], available at <http://willistonvt.govoffice3.com> (follow “Public Records and Documents” hyperlink; then follow “Index” hyperlink; then follow “C” hyperlink; then follow “Comprehensive Plan” hyperlink) (outlining goals and policies in preserving open space).

115. *See* VT. STAT. ANN. tit. 24, § 4401 (providing conformance of regulatory and non-regulatory tools with municipal plans).

116. *See, e.g.*, WILLISTON PLAN, *supra* note 114, at 20 (extolling requirement of open space development patterns).

117. VT. STAT. ANN. tit. 24, § 4302(b)(2) (“To encourage citizen participation at all levels of the planning process, and to assure that decisions shall be made at the most local level possible commensurate with their impact.”).

118. *See id.* § 4384 (permitting public amendment of plan); *id.* § 4385 (requiring public hearings prior to adoption of plan).

119. *See* PLANNING & ZONING, *supra* note 23, at 10 (discussing need for effective community planning for agricultural protection).

*G. Municipal Zoning Bylaws:
Protecting Land and Preventing Over-Regulation*

The final tool for protecting agricultural lands is through municipal zoning bylaws: the laws that regulate the manner in which property owners can use their land. The main zoning tool for protecting farmlands is restrictive agricultural zoning.

A carefully written agricultural zoning ordinance can prevent farmland from being converted to nonfarm uses, can prevent the fragmentation of farms, prevent land-use conflicts, and protect agricultural producers from nonfarm intrusion into agricultural areas as well and as vigorously as residential zoning can protect housing areas from commercial or industrial intrusions.¹²⁰

Such zoning “prohibit[s] uses that are inconsistent with farming and limit[s] the allowed density of residential development. Lot sizes are usually anywhere from 20 to 640 acres, depending on the location.”¹²¹ By controlling building density and minimum lot size, agricultural zones limit large-scale development or piecemeal sprawl.

Some agricultural zones are expressly created to “protect and encourage farming of all kinds, as an important part of the Town’s *economic* base.”¹²² Much like unifying a commercial or industrial district, such zoning keeps farms from becoming isolated islands.¹²³ Maintaining a “critical mass” provides a buffer between farmlands and the pressures that encroaching urbanization can bring in terms of increased property taxes, nuisance suits, changed circumstances, and other challenges.¹²⁴ While such zones do not require that the land be used for farming,¹²⁵ the limiting features of agricultural zones mean that property owners, at a minimum, are restricted in the size and scale of development they can pursue.

120. Stephen J. Hudkins, *Agricultural Zoning*, OHIO ST. U. FACT SHEET, <http://ohioline.osu.edu/cd-fact/1266.html> (last visited Nov. 20, 2010).

121. Richardson, Jr., *supra* note 66, at 167. In Vermont, the average agricultural zone limits minimum lot size to two acres.

122. RANDOLPH, VT., ZONING ORDINANCE § 6.4 (1998) (emphasis added).

123. FARMLAND INFO. CTR., AM. FARMLAND TRUST, FACT SHEET: AGRICULTURAL PROTECTION ZONING 2 (1998), available at www.farmlandinfo.org/documents/29478/FS_APZ_9-98.pdf.

124. *Id.*

125. Doing so would violate fundamental property rights.

In Vermont, the zoning enabling statute¹²⁶ specifically identifies agricultural zones as a permissible form of land-use regulation.¹²⁷ It notes that such zones should “permit[] all types of agricultural uses and prohibit[] all other land development except low density residential development.”¹²⁸ Still, regulations in the state come in many different styles and with many different limitations. In some municipalities, agricultural/rural residential zones permit planned unit developments, inns, and mobile home parks.¹²⁹ Other municipalities limit the maximum building coverage on a lot in a rural zone, while ensuring that buildings remain small and overall development compact.¹³⁰ Still others maintain the same lot size and setback standards for all zones, but limit the permitted uses of the rural residential zone to those most amenable to agricultural or low-density use.¹³¹

Criticism over such zoning schemes arises directly from the lot-size and density limitations that municipalities put in place in hopes of supporting agricultural use. If lots are the minimum allowable size (e.g., in Barnard, Vermont, two acres) they may be too small to function as productive farms.¹³² Thus, as one author puts it, “by spreading out homes in such a way that the land is not practically useable for farming or forestry, the practice [of restrictive agricultural zoning] could also accurately be referred to as ‘rural sprawl.’ The resulting lots are ‘too large to mow, but too small to plow.’”¹³³ In so doing, agricultural zoning can unintentionally “result in the exclusion of low- to moderate-income families, and in forcing development further out from job and population centers (sprawl).”¹³⁴

Beyond this concern over “rural sprawl,” agricultural zoning, like conservations easements, can hurt farmers’ equity in their land.¹³⁵ As the permissible use of farmers’ land is constrained, the fair market value of their property can also fall.¹³⁶ This loss in market value can injure a

126. VT. STAT. ANN. tit. 24, §§ 4301–4498 (2007).

127. *Id.* § 4414(1)(B).

128. *Id.* § 4414(1)(B)(i).

129. *See, e.g.*, WILLISTON, VT. ZONING ORDINANCE § 3.3 (2004), available at http://resources.vlct.org/u/Williston_ZO_2004.pdf.

130. *See, e.g.*, BERLIN, VT. ZONING ORDINANCE TABLE 2.02 & 2.03 (2010 ed.) (limiting lot coverage to fifteen percent of property and building height to thirty-five feet).

131. *See, e.g.*, BARNARD, VT. ZONING ORDINANCE §§ 3.1, 4.1 (2003) (providing Rural Residential zone uses and lot requirements, respectively).

132. *Id.* § 4.1.1(A)(a).

133. Richardson, Jr., *supra* note 66, at 167.

134. *Id.* at 166–67.

135. *See generally* AM. FARMLAND TRUST, WHAT ABOUT MY EQUITY? THE IMPACTS OF ZONING ON FARM BUSINESS (2004), available at www.farmlandinfo.org/documents/30864/AFT_What_About_My_Equity.pdf (exploring impacts of zoning on equity).

136. *See id.* at 2 (suggesting other factors that can play into lower farm property values).

farmer's access to credit and increase interest rates on previously incurred debt. These dangers are most prevalent in areas with relatively small rural lots and a high rate of development.¹³⁷ Still, the economic benefits of protecting and unifying agricultural land can, if properly recognized, outweigh the potential impacts of restrictive zoning on property values.

Along with permitting municipalities to enact zoning ordinances, the Vermont zoning enabling statute also provides a measure of protection for farmers by limiting what a municipality can regulate.¹³⁸ Under state law, municipalities are expressly prevented from regulating the construction of agricultural structures.¹³⁹ Such structures can include "a building, enclosure, or fence for housing livestock, raising horticultural or agronomic plants, or carrying out other practices associated with accepted agricultural or farming practices."¹⁴⁰ Besides denying municipal jurisdiction over the construction of loosely defined "farm structures," the enabling statute also vests the Secretary of Agriculture with the ability to define "agricultural practices."¹⁴¹ Any practice so defined is also outside the control of local governments.¹⁴² This statutory scheme suggests support for agriculture by removing certain farming regulations from local administrative bodies and vesting the control in a state agency specifically focused on supporting and enhancing agriculture.¹⁴³

Such a regulatory exemption can provide greater freedom for local farmers to build on their land, much like the above noted Act 250 exception, yet it does not provide such a loophole that any arguable agricultural project is free from regulation. Vermont courts have held that undertaking activities that are generally done for agricultural purposes does not make the specific work "agricultural" and thus exempt for local zoning

137. *Id.* at 4.

138. VT. STAT. ANN. tit. 24, §§ 4301–4498 (2007).

139. *Id.* § 4413(d).

140. *Id.* § 4413(d)(1).

141. *Id.* § 4413(d).

142. *Id.*

143. The bulk of these regulations are incorporated in the Accepted Agricultural Practices, a set of rules promulgated "to protect and improve water quality through improved agricultural practices." Accepted Agricultural Practices, chapter 008, § i, 1A Code of Vt. Rules 20 010 008-1, available at <http://www.michie.com/vermont/lpext.dll?f=templates&fn=main-h.htm&cp=vtadmin>. See *id.* § iii, at 20 010 008-2 (requiring approval from the Vermont Agency of Natural Resources before constructing a "new farm structure"); *id.* § 2.06, at 20 010 008-3 (broadly defining "farm structure" to include "a structure or structures . . . that is used by a person for agricultural production" and meets other criteria); *id.* 2.18, at 20 010 008-4 (defining "structure" to exclude "dwelling[s] for human habitation" but to include other buildings used for a wide range of agricultural pursuits from maple sugaring to housing livestock); *id.* § 4.07, at 20 010 008-6 (laying out regulations on construction of farm structures).

regulation.¹⁴⁴ Indeed, the purpose of the work must be for an agricultural or silvicultural end.¹⁴⁵ Likewise, the Secretary of Agriculture's control over "farming structures" can have a significant impact on a farm's ability to build structures, even if the local municipality supports their construction.¹⁴⁶ The state-level oversight of a small, local project can cut against the ideal of local control that governs much of land-use regulation.

While zoning provides an important tool in protecting agricultural uses of land, it similarly can provoke many of the same pressures that it was meant to alleviate. In an effort to carve out zones for agriculture, municipalities can end up welcoming in scattered development and expansive homes.

CONCLUSION

Preserving the agricultural history and ethic of the state is important for Vermont's present and future. An active, working landscape is a value shared by its residents as much as it is appreciated by the tourists who come to the state each year. Protecting working farms and open pastures provides economic, environmental, and aesthetic benefits to the state and is a central goal in the state's regulatory structure, as well as in local municipalities' development plans. In an effort to protect this resource, Vermont has undertaken many different initiatives: informally, legislatively, and through various incentive and regulatory programs.

While the current slate of preservation and protection tools can work in concert to help Vermonters continue to farm the land, they are but one form of protection and support for an embattled way of life and provide mixed results. It is true that restrictive zoning can decrease the possibility that a new development will "change the conditions" upon which a conservation easement relies, just as the protections that Right-to-Farm laws provide may make a home buyer think twice before purchasing a building lot next to a hog farm. Nonetheless, many of these same tools that are put in place to protect farmers can also constrain their activities, impact their financial foundations, and welcome in the type of development pressures they were drafted to avoid. The threats of decreased land equity, increased rural

144. See *Sunset Cliff Homeowners Ass'n v. City of Burlington*, 2008 VT 56, ¶ 11 n.2, 184 Vt. 533, 955 A.2d 524 (finding developer incorrect in attempt to avoid local zoning by characterizing tree cutting, land clearing, and ditch work as "agricultural" in nature).

145. *Id.*

146. See *In re Petition of the Interval Ctr., Inc.*, No. 89-5-08 Vtec, 2009 WL 4623532 (Vt. Envtl. Ct., Feb. 24, 2009) (rejecting, in dictum, the Agency of Agriculture's conditioning of permit to build hoop houses in floodway based on VT. STAT. ANN. tit. 24, § 4413 as beyond its scope of authority).

sprawl, and encumbered land can also work to grind down a farmer's reserves and push them out of business. This is not to suggest that more regulation or land-use tools are needed. To the contrary, wiser policy and additional techniques are vital to farming's long-term sustainability. The challenge that many of these land-protection programs face in preserving farms in the state is that they are only able to address some of the pressures facing farmers today. As one scholar put it:

The availability of land does not by itself ensure the continuation of farming. Programs that impose substantial measures to protect not just land, but agricultural operations themselves represent a step forward. Whatever the level of sophistication, however, these programs share a common denominator: they treat the protection of agricultural land, even the protection of agriculture itself, as a land use issue. This focus is far too narrow. Land is but one input in the agricultural production process. Farm production needs other resources¹⁴⁷

Fortunately for Vermont's farmers, the above-described tools are only part of the state's efforts to protect its heritage. As flawed as some of these tools may be, their intent to promote agriculture is clear, and there is little doubt that they do relieve some of the pressures facing farmers today. That said, the importance of farming in Vermont and *to* Vermont cannot be understated and in the face of increasing financial, development, and succession pressure, farms need all the help they can get. Focusing on land-preservation tools is but one avenue for protecting the future.

147. Richardson, Jr., *supra* note 66, at 165 (internal quotations and citations omitted).

