

1 State of Vermont, Property Valuation & Review

2 Gillian Franks v. Town of Essex

3 Docket No. PVR 2010-71

4  
5 PRE-FILED TESTIMONY OF JOHN EMMEUS DAVIS

6  
7 **Q.1 What is your name?**

8 A. John Emmeus Davis.

9  
10 **Q.2 Where do you work?**

11 A. I am a partner at Burlington Associates in Community Development, a Vermont  
12 limited liability company.

13  
14 **Q.3 What does Burlington Associates in Community Development do?**

15 A. Burlington Associates in Community Development is a national consulting  
16 cooperative that I co-founded in 1993. Nearly all of our work is with municipal  
17 governments or nonprofit organizations like the Champlain Housing Trust (“CHT”).

18 We specialize in the development and evaluation of affordable housing policies  
19 and programs that: (1) Enhance security of tenure for lower-income households by  
20 expanding access to various forms of shared equity homeownership; (2) Protect the  
21 community’s investment in affordable housing by preventing the removal of public or  
22 private subsidies; and (3) Preserve the long-term affordability of privately-owned  
23 housing created either through the investment of public dollars or through the exercise  
24 of public powers.

25 Community land trusts (“CLTs”) have been a focus of our work since we began.  
26 My partners and I have assisted over 100 CLTs in the United States, either helping them  
27 to get started, helping them to grow, or helping them to improve.

28

1 **Q.4 Do you recognize Exhibit 1?**

2 A. Yes. It is my CV.

3

4 **Q.5 Are you familiar with the issue in this case?**

5 A. Yes.

6 **Q.6 Describe what about your current work, including consulting, teaching, and**  
7 **writing, is most relevant to this case.**

8 A. As a practitioner, I have been advising and evaluating CLTs such as CHT for  
9 nearly 30 years. I have provided assistance to CLTs in approximately 25 states. I have  
10 also assisted CLT start-ups in Puerto Rico, Canada, England, Belgium, and Australia.

11 As a teacher, I am on the faculty of the National Community Land Trust  
12 Academy and have served for the past five years as the Academy's dean. Part of the  
13 Academy's charge is to research and to teach "best practices," including the equitable  
14 taxation of the resale-restricted, owner-occupied housing being developed and managed  
15 by CLTs. I have also taught housing policy, neighborhood planning, and urban  
16 sociology at the undergraduate and graduate level at the University of Vermont, Tufts  
17 University, New Hampshire College, and MIT.

18 As a writer, I have published five books, eleven research reports and training  
19 manuals, and a dozen articles, nearly all on the subject of shared equity homeownership  
20 in general and CLTs in particular.

21

22 **Q.7 Describe what about your prior work experience is most relevant to this case.**

23 A. Prior to co-founding Burlington Associates in Community Development, I was  
24 director of housing in the Community and Economic Development Office ("CEDO") for  
25 the City of Burlington, Vermont. The City has prioritized permanently affordable  
26 housing since the mid-1980s, so much of the policy development and program  
27 administration that I did for CEDO was aimed at expanding Burlington's supply of  
28 resale-restricted housing, including that developed by CHT.

29

1 **Q.8 Describe what about your educational background is most relevant to this**  
2 **case.**

3 A. I earned a Ph.D. from Cornell in the fields of Community Development Planning  
4 and Community and Regional Sociology in 1986.

5  
6 **Q.9 Please explain your experience working with data and studies involving the**  
7 **value of shared equity properties.**

8 A. In my work with Burlington Associates and the National CLT Academy, I often  
9 advise community land trusts on the collection, analysis, and presentation of data,  
10 evaluating the effectiveness of the CLT model; that is, does the CLT's portfolio of resale-  
11 restricted, owner-occupied housing perform as promised? Does it hold the resale price  
12 of owner-owner housing below the appraised, unrestricted market value of those  
13 homes. Does it keep those homes affordable, one resale after another?

14 Most recently, I advised a team of researchers from the Urban Institute on the  
15 design of a national study of shared equity homeownership programs in seven  
16 communities, including CHT in Burlington. That study was published in October 2010.

17 Previously, I personally conducted two performance evaluations for CHT, using  
18 post-purchase, post-appraisal data to examine CHT's effectiveness in preserving the  
19 affordability of its portfolio of resale-restricted, owner-occupied houses and  
20 condominiums. The first of these evaluations was published in 2003; the second was  
21 published in 2009.

22 The other study of relevance is a policy focus report that a colleague and I  
23 prepared for the Lincoln Institute of Land Policy in 2008, entitled the *City-CLT*  
24 *Partnership*. We examined municipal support for CLTs in 17 jurisdictions in 21 states.  
25 One of the issues we examined was the property tax treatment of resale-restricted,  
26 owner-occupied housing by assessors within these jurisdictions. In sum, I am  
27 personally familiar with most, perhaps all, of the studies that have been done to date in  
28 the United States which evaluate whether affordability covenants, such as the one at

1 issue in this case, have an impact on the fair market value of a property, along with the  
2 methodologies used to conduct these studies or evaluations.

3

4 **Q.10 Are you an appraiser?**

5 A. No.

6

7 **Q.11 Are you an assessor?**

8 A. No.

9

10 **Q.12 Are you familiar with the subject property in this case?**

11 A. I am generally familiar with the residential complex on Dalton Drive that  
12 includes Officer's Row and the Parade Ground.

13

14 **Q.13 Have you viewed the property in question?**

15 A. I have not been inside this condominium, but I don't believe that an on-site  
16 inspection of the Property is necessary to determine if a covenant has the characteristics  
17 that would require a conclusion that it reduces the fair market value of a particular  
18 property.

19

20 **Q.14 Are you on the Board of CHT?**

21 A. Yes.

22

23 **Q.15 Are you paid for that work?**

24 A. No. I am not paid for my service as a CHT board member. Nor was I paid by  
25 CHT for the two performance evaluations I did for them. I did this work *pro bono*.

26

27 **Q.16 Do you have a financial stake in the outcome of this case?**

28 A. No.

29

1 **Q.17 Have you reviewed the Housing Subsidy Covenant on Ms. Franks' property?**

2 A. Yes.

3

4 **Q.18 Is this a typical type of covenant nationwide?**

5 A. This type of affordability covenant is in wide use throughout the United States.

6 There are dozens of housing trust funds and hundreds of inclusionary housing  
7 programs being administered by cities and counties, many of which use covenants of  
8 this sort to preserve the on-going occupancy and affordability of the homes their dollars  
9 and powers helped to create. There are over 240 CLTs and hundreds of community  
10 development corporations ("CDCs"). Many of these CLTs and CDCs use affordability  
11 covenants like the one at Dalton Drive.

12 Across the country, there is much variation in the terms and conditions  
13 contained in these covenants. Nevertheless, there are certain characteristics that such  
14 covenants share. They impose restrictions on the use and resale of the property that  
15 endure across multiple transfers, often lasting for many years: they "run with the  
16 premises." The covenants require owner-occupancy of the property. They set a  
17 maximum price for which the property may change hands. They define the income  
18 eligibility of future buyers. They give an outside party a preemptive right to re-  
19 purchase the property when it comes up for sale. These common characteristics are  
20 found in the Dalton Drive covenant as well. So, yes, it is fair to say that this covenant is  
21 "typical" of the affordability covenants that are being used nationwide. It is also fair to  
22 say that the covenant on the Property is typical of those covenants that are evaluated in  
23 each of the studies that I have conducted or am otherwise familiar with.

24

25 **Q.19 You said that you have designed and conducted post-purchase, post-appraisal**  
26 **data analysis on CHT's properties. Can you describe those studies?**

27 A. The 2003 performance evaluation examined 97 owner-occupied houses and  
28 condominiums in CHT's portfolio that had resold one or more times. The 2009  
29 evaluation examined 205 resales. In both studies, I documented a significant difference

1 between the *selling price* at which these covenant-restricted properties changed hands  
2 between the homeowners vis-à-vis the *unrestricted appraised value* of those properties –  
3 the latter being the price that would have been paid for those homes *without* the resale  
4 restriction. A similar analysis of CHT’s portfolio of resale-restricted, owner-occupied  
5 housing was conducted by the Urban Institute in 2010, looking at 233 resales. Like the  
6 earlier evaluations I had done, the Urban Institute looked at every resale of a CHT home  
7 over a long period of time, comparing the restricted price at which these properties  
8 change hands from a willing seller to a willing buyer and unrestricted value. The Urban  
9 Institute study was a case-by-case analysis of every resale-restricted, owner-occupied  
10 house or condominium under CHT’s control that had been resold one or more times  
11 from 1984 through the end of 2009, a 27-year period spanning both hot real estate  
12 markets and cold.

13

14 **Q.20 What have those studies concluded?**

15 A. All three of these studies found that a covenant such as CHT’s has the effect of  
16 lowering the price and preserving the affordability of publicly subsidized, privately  
17 owned homes as they change hands from one low-income homebuyer to another. The  
18 covenant prevents the sellers from pocketing the public subsidy and most of the capital  
19 gains when reselling their property. In the study done by the Urban Institute, in  
20 particular, the researchers placed a dollar figure on the amount of value that remains in  
21 the property on resale. Across all resales, they found an average difference of \$37,860  
22 between the restricted sale prices of CHT homes when they changed hands and the  
23 unrestricted values of those same homes. In short, the resale restrictions imposed by  
24 CHT constituted a “patent burden on the value of the property” to the tune of \$37,860.

25

26 **Q.21 When you say “a patent burden on the value of the property,” what do you**  
27 **mean?**

28 A. This a phrase used by the New Jersey Appellate Court in the *Prowitz* case back in  
29 1989. The court was asked to determine whether durable deed restrictions limiting the

1 resale price of owner-occupied homes, restrictions similar to the covenant used by CHT,  
2 have an impact on the “fair market value” of such homes. The New Jersey Court found  
3 that these resale restrictions do, indeed, impose a “patent burden” on a property’s value,  
4 requiring municipal assessors to assess such property at a value lower than its  
5 unrestricted appraised value.

6 In a growing number of jurisdictions, the conclusion of courts, state boards of tax  
7 equalization, legislatures, and local assessors is that covenants like the one used by CHT  
8 *do* lower the fair market value of encumbered properties. There are variations in the  
9 rationale employed by these authorities in coming to this conclusion, but there are  
10 several “tests” that in my research I have seen applied again and again. These are not  
11 codified anywhere, but when a public body or a public official concludes that resale  
12 restrictions constitute a “patent burden” on value it is usually because of some  
13 combination of six different factors or tests that indicate when a covenant is “strong  
14 enough” to impact fair market value.

15

16 **Q.22 Please describe those “tests” and indicate whether CHT’s covenant meets each**  
17 **one.**

18 A. There are six tests.

19 1. Diminished return. Is the resale price lower than the unrestricted value, such  
20 that the monetary return that the property’s owner can derive from selling his/her home  
21 is significantly reduced because of the contractual controls that encumber the property?  
22 In CHT’s case, the performance evaluations that I have conducted and the performance  
23 evaluation conducted by the Urban Institute have documented that there does exist a  
24 substantial difference between the *price* of the property when encumbered by CHT’s  
25 covenant (or ground lease) and the *value* of the property if that encumbrance were to be  
26 removed – or ignored.

27 2. Irrevocability. Affordability controls must irrevocably bind current and future  
28 owners. These controls cannot be easily removed or unilaterally removed by the  
29 property’s owner. In CHT’s case, not only is the owner bound by the affordability

1 covenant, but so is CHT. There is a public funder – VHCB – that has enforcement rights  
2 under the covenant, making doubly sure that neither the homeowner nor CHT can  
3 simply remove the contractually imposed cap on the home’s resale price.

4 3. Duration. The controls cannot be impermanent. They must last a long time,  
5 across multiple transfers of the property. Different states have adopted different  
6 standards for the durability of these controls. In New Jersey, for example, 30 years is  
7 “long enough.” In Vermont, we have embraced a longer standard, where “permanent  
8 affordability” is the state’s policy goal and programmatic goal for privately owned  
9 homes that are publicly subsidized. In the words of the covenant used by CHT, the  
10 controls over use and resale “shall run with the premises and shall be perpetual.”

11 Exhibit #4 at 1.

12 4. Disclosure. Prospective buyers must understand and accept the controls being  
13 placed on their property. In particular, the seller must fully disclose the ceiling imposed  
14 on the property’s resale price, which is also a ceiling on the amount of equity that an  
15 owner may remove from the property on resale. In CHT’s case, these prospective  
16 homebuyers go through an intense process of education and orientation aimed, in part,  
17 at disclosing what a buyer is getting – and what she is giving up. After meeting with an  
18 attorney, they are also required to sign a stipulation letter – attached to the covenant –  
19 that says they understand and accept the conditions that accompany their property.  
20 This puts the buyer on full notice of the nature of this transaction.

21 5. Recording. Controls must be embedded in a deed covenant, ground lease, or  
22 some other contract that is recorded in a city’s or county’s land records. This is  
23 standard practice in Vermont. CHT records its covenants.

24 6. Public benefit. Finally, do these affordability controls serve a public purpose?  
25 Do they reflect and further a governmental interest in preserving the affordability of  
26 privately owned housing, especially when such housing has been brought into being by  
27 public dollars and/or by public powers (like inclusionary zoning)? In Vermont, the state  
28 legislature and a series of gubernatorial administrations have made a commitment to  
29 long-term affordability a centerpiece of the state’s housing policy since the mid-1980s,



1 declaring, in effect, that resale controls like those contained in the CHT covenant do,  
2 indeed, serve a public purpose. This commitment can be found in the state’s  
3 Consolidated Plan, in the enabling statute for cooperative housing, and in the statute  
4 that created the Vermont Housing and Conservation Board. There is also 27 V.S.A. §  
5 610, which essentially sanctions long-term resale controls in order to “encourage the  
6 development and continued affordability” of publicly assisted, privately owned  
7 housing.

8

9 **Q.23 Does the Covenant on the Property in question conform to each of these six**  
10 **tests?**

11 A. Yes it does.

12 **Q.24 Are you aware of any study that has reviewed the issue and concluded there is**  
13 **no impact?**

14 A. I am not aware of any study that has examined the sale and resale of properties  
15 encumbered with the sort of durable controls contained in the covenant used by CHT  
16 and concluded that they have NO impact on value. There are certainly many assessors  
17 across the country who choose to *ignore* the impact of affordability restrictions that  
18 encumber shared equity housing. But every study that I have seen has found that year  
19 after year, there is a significant gap – often a growing gap – between the unrestricted  
20 appraised value of these shared equity homes and the restricted price at which these  
21 properties change hands from a willing seller to a willing buyer. The amount of this  
22 difference may be large or small, depending on the resale formula that is used by a  
23 particular program, but there is always a difference; there is always an impact. That’s  
24 the whole point; that’s what a shared equity homeownership program like CHT’s is  
25 *designed* to do.

26

1 **Q.25 What methods are used to quantify the impact?**

2 A. Across the country, there is considerable variation and debate about how best to  
3 quantify the impact of covenants on value. There are a handful of methodologies that  
4 have been used, including three that were mentioned by William Johnson in his 2008  
5 memo.

- 6 1. Johnson’s memo recommends a subtractive approach, which “strips away  
7 those elements of value that reside with the property . . . in order to derive a  
8 final listed value that reflects only the seller’s equity in the property upon  
9 sale.” Exhibit #3 at p. 5.
- 10 2. There is an alternative suggested in Footnote 3 of his memo: Conduct a  
11 market study of all resale-restricted homes in a particular jurisdiction and  
12 compare their selling prices to the appraised value of similar homes,  
13 calculating an average “percentage reduction” in the fair market value (FMV)  
14 of homes encumbered by a covenant. Exhibit #3 at p. 2, n.3. The City of  
15 Burlington has used this approach; the assessor determined there was a 37%  
16 reduction in the FMV of CHT homes because of the resale controls  
17 encumbering these privately owned homes. Assessors in Madison,  
18 Wisconsin and King County, Washington have also used variations of this  
19 approach.
- 20 3. Mr. Johnson mentions in passing another possible approach: Have VHCB  
21 and the Department of Taxes maintain a state-wide listing of all resale-  
22 restricted properties and use that inventory to calculate a percentage  
23 reduction in FMV that is attributable to the covenants used by VHCB.
- 24 4. Outside of Vermont, there are a number of jurisdictions that use what might  
25 be called an “additive approach.” Assessors enter resale-restricted properties  
26 on the tax roll at the purchase price paid by the first homebuyer. Every year  
27 thereafter, they calculate the maximum price for which these homes could  
28 change hands, were they to be resold that year. That maximum resale price,  
29 determined by applying the resale formula embedded in an affordability

1 covenant or ground lease, becomes the basis for any upward adjustments in  
2 the listed value of these homes. Boulder County, CO, Highland Park, IL,  
3 Boston, and Los Angeles are all places where assessors are using some  
4 variation in this approach. It only works well, however, where CLTs use a  
5 resale formula that is tied to an index like the Area Median Income or the  
6 Consumer Price Index that makes it easy to calculate the resale price of every  
7 home, every year. That becomes more difficult in a state like Vermont, where  
8 most of our CLTs use a shared appreciation formula.

- 9 5. Then, of course, there are lots of jurisdictions where there is no systematic  
10 “approach” at all, beyond mediated settlements between the local assessor  
11 and individual owners of resale-restricted homes.  
12

13 **Q.26 Can you please explain the benefits of the first method described in the Tax**  
14 **Department Memorandum?**

15 A. Certainly. One benefit to this method is that it is fairly simple to apply. It uses  
16 the unrestricted value as a starting point and then basically subtracts the value of the  
17 grants made to the property according to a simple formula; grants that will  
18 contractually, durably *remain* in the property across multiple resales. The second benefit  
19 would be greater uniformity of shared-equity property taxation statewide, which would  
20 likely result in fewer tax appeals. Third, it provides a method that smaller towns can  
21 apply. Many Vermont municipalities do not have enough shared equity homes to do  
22 what Burlington did (described in the second option above).

23 **Q.27 Have you reviewed the exhibits offered by the Town in this case?**

24 A. Yes.  
25

26 **Q.28 Did you find any evidence that the Town used any of those methodologies?**

27 A. No.  
28

1 **Q. 29 Can you please describe Town’s Exhibit E?**

2 A. It is a list of recent sales of condos in a different complex. The sale prices are  
3 gathered from the Property Transfer Tax Returns (“PTTRs”), which are also a part of  
4 Exhibit E.

6 **Q. 30 What is the problem with this Exhibit?**

7 A. It is based only on the Property Transfer Tax Returns, which are not the best  
8 evidence of fair market value in a covenant-restricted home. PTTRs show only the  
9 property’s *unrestricted* value – that is, the property’s value if an affordability covenant is  
10 not present. But a covenant IS present, restricting the use and resale of Ms. Franks’  
11 home. It is permanently, irrevocably THERE, a “patent burden” on the property’s value  
12 that durably prevents either the homeowner or CHT from pocketing a significant  
13 portion of the equity contained in the property. It is simply not true that “100% of any  
14 increased equity will accrue to the benefit of Appellant and CHT,” as the Town’s  
15 attorney, William Ellis, has written. A bunch of that equity, including both a grant and  
16 75% of the property’s appreciation, will *not* be available to either Ms. Franks or CHT. It  
17 is locked into the property by the covenant: Ms. Franks will secure only the equity she  
18 invested and 25% of the appreciation. The grants and the remaining 75% of appreciation  
19 (minus any transfer fee collected by CHT) stay with the property, reducing its price and  
20 preserving its affordability for the next buyer.

21 According to the Tax Department Memo on page 7, “You have to be careful  
22 when reviewing Property Transfer Tax Returns (PTTRs) for covenant restricted  
23 properties. Legally the full consideration for the real property shown on Line O must  
24 reflect all sources of consideration involved in the purchase. Therefore the total price  
25 paid will exceed the restricted value because the grant funds that came through the  
26 Nonprofit will be included in Line O. Remember, the value of the grant will run with  
27 the property and not accrue to the owner’s equity in the property.” Exhibit #3 at p. 7.  
28 That is something the Town failed to “remember” – or decided to ignore.

29

1 **Q.31 Does Exhibit E present evidence demonstrating there is no impact of the**  
2 **covenant on fair market value?**

3 A. It does not.  
4

5 **Q.32 Where should the Town look for the best evidence of fair market value?**

6 A. The Town should look beyond the PTTR to the Purchase and Sales Agreement  
7 between CHT and the homebuyer. The Purchase and Sales Agreement shows the  
8 condominium's purchase price, minus the grants brought to the deal by CHT.  
9

10 **Q.33 So you are saying that two identical houses right next to each other should be**  
11 **assessed differently if one of them is encumbered by an affordability covenant?**

12 A. Yes. It is an apples-to-oranges comparison. One of the houses is encumbered by  
13 use and resale restrictions that impact the property's value in all the ways I just  
14 described. The house next door is NOT encumbered by a covenant. These houses are  
15 not "identical," therefore, when it comes to the amount of money an informed buyer  
16 would be willing to pay to acquire each house. The appraised value of the  
17 unencumbered home may be a good *starting* point to figure out the fair market value of  
18 the restricted property – as William Johnson's memo suggests – but the covenant  
19 imposes a "patent burden" that must be stripped away if the true value of the restricted  
20 property is to be determined.  
21

22 **Q. 34 Is there any risk to taxing publicly subsidized, resale-restricted housing at a**  
23 **rate higher than the net purchase price?**

24 A. Yes. It will eventually undermine the State of Vermont's declared policy goal of  
25 keeping these homes permanently affordable. This is a special category of homes,  
26 subject to restrictions created by state law, that reflect a well-established state policy of  
27 perpetuating the affordability of homes assisted with public dollars.

28 There is also a basic question of fairness. People shouldn't be taxed on the basis  
29 of governmental grants and capital gains that stay with the property, equity that can

- 1 never accrue to the benefit of them or their heirs. Paying taxes on equity you own is fair.
- 2 Paying taxes on equity you *don't* own and will never realize is not.
- 3