ECHEVERRIA, MILNE & MCLAUGHLIN: KEEP THE PERPETUAL IN PERPETUAL CONSERVATION EASEMENTS

COMMENTARY FEB. 10, 2014 17 COMMENTS DONATE

Editor's note: This commentary is by John Echeverria and Janet Milne, professors at Vermont Law School, and Nancy A. Mclaughlin, a professor at the University of Utah S.J. Quinney College of Law.

If you are lucky enough to own land in Vermont that provides a home for wildlife and contributes to the scenic beauty of the Green Mountain State, and you decide to convey a conservation easement prohibiting development of the land to your local land trust, do you expect your land to be conserved in perpetuity for generations to come?

You would if you looked at the website of the Vermont Land Trust, which says that a conservation easement "dedicate[s] your property, forever, to being a part of Vermont's rural, productive, and natural landscape," and that the "greatest reward" to families and individuals who have worked with the Vermont Land Trust "is the personal satisfaction and peace of mind that comes from knowing their land will remain forever a part of our state's unique landscape."

You also would think so if you consulted the website of Stowe Land Trust, which defines a conservation easement as "a legal agreement between a landowner and a land trust ... that permanently limits the use of the land in order to protect its conservation values" and explains that "future owners ... will be bound by the easement's terms."

Or the website of The Nature Conservancy, which explains that a conservation easement "can give peace-of-mind to current landowners worried about the future of a beloved property" and is "attractive" to landowners "because it reaches beyond their own lifetimes to ensure the conservation purposes are met forever."

But a bill now before the Vermont Legislature (S.119) would change that. The bill would allow a land trust and a future owner of your land to apply to a five-person panel in Montpelier to lift the restrictions from the land and sell the property, provided the proceeds attributable to the easement are used to conserve some other property that the land trust and the panel deem, in their view, to be a higher priority. Once your easement

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has been terminated in exchange for protecting the new property, your "conserved" land would be open to development, even though you donated the conservation easement specifically to protect your land from development. While the bill would exempt easements that contain certain specific language from this termination process, many easements do not contain this special language because landowners could not have predicted that it would be required to ensure permanent protection of their land.

The bill would also allow a land trust and a future owner of your land to modify your easement in manners contrary to its conservation purpose (such as, for example, to permit subdivision and residential or commercial development of the land), provided, again, that the land trust and the panel decide that, in their view, protection of some other land in some other location is a higher priority.

The bill does not serve the interests of landowners, taxpayers, land trusts, or the general public in Vermont. The bill, now roughly 25 pages of dense legalese, has been revised — and made more complicated — over the course of several years in response to objections to prior versions of this proposal. But the current version still has the same basic problems that have plagued the bill from the beginning.

Proponents of this legislation apparently believe that land trusts, subject to the approval of the proposed panel, should have the authority to move easements from one place to another on the landscape like so many Monopoly houses and hotels whenever such substitutions or swaps are, in their view, in the public interest.

The bill misleads the public. It uses the benign term "amendment" to refer to the changes that the five-person "Easement Amendment Panel" could make to perpetual conservation easements. But when you read the fine print, it becomes clear that the bill would authorize "the whole or partial termination of an existing conservation easement" as well as "the substitution of a new easement for an existing conservation easement."

Proponents of this legislation apparently would like conservation easements to be fungible conservation assets. They apparently believe that land trusts, subject to the approval of the proposed panel, should have the authority to move easements from one place to another on the landscape like so many Monopoly houses and hotels whenever such substitutions or swaps are, in their view, in the public interest. This theory suffers from a number of fatal defects.

First, such a swap process, if applied retroactively to existing conservation easements, would break the promises made to specific Vermont landowners. Landowners in Vermont have been promised that their land will be protected — not some other land that the land trust and the panel might later deem to be of higher priority. A system that would permit easements to be swapped to new lands would defeat the grantors' original intentions as well as their legitimate expectations about how their lands will be managed over the long term. Such a system would also be contrary to the expectations of neighbors, community members, and the general public, who also believe, in no small part due to the representations made by land trusts, that land subject to a perpetual conservation easement will be permanently protected.

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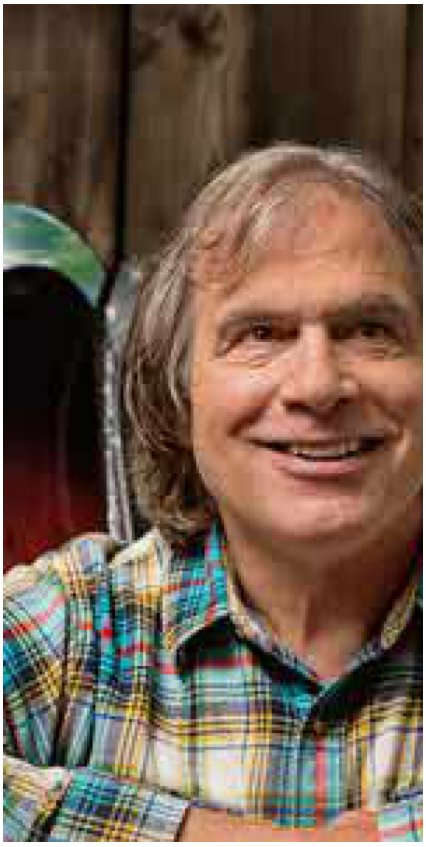

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By breaking the promises that have been made to conservation-minded landowners, the legislation would hurt the cause of land trusts, which rely on voluntary conveyances of conservation easements. Landowners are typically motivated to convey an easement to conserve a particular farm, or forest, or meadow that has special personal significance for them. If landowners lack confidence that their land will remain protected, and realize that an easement on their property could simply become currency to finance other transactions involving other lands, many would think twice (at least) about conveying an easement.

Moreover, all charities, including non-profit land trusts, have a legal duty to use the gifts they receive for the purposes for which they were given. For example, the University of Vermont cannot use a $1 million gift made to it for the purpose of providing scholarships to students studying literature and the arts to, instead, provide scholarships to students studying business administration or computer science, even if the University's Board of Trustees were to deem those latter pursuits to be a higher priority. Similarly, a land trust cannot use a conservation easement donated to it for the purpose of protecting a specific parcel of land in perpetuity to protect some other land, even if its Board of Trustees were to deem protection of that other land to be a higher priority. Under the law, a donor who gives a gift for a specific charitable purpose has the right to have her intentions enforced.

Finally, adoption of this legislative proposal would create a serious risk that future donors of conservation easements in Vermont could not take advantage of generous federal tax benefits available to easement donors in other states. Federal tax law requires that the conservation purpose of a tax-deductible easement must be "protected in perpetuity." Federal tax law also recognizes that, in rare cases, changed circumstances on or surrounding a conserved property may mean that the property can no longer serve a conservation purpose. In that event, federal law authorizes a land trust to go through a judicial process to obtain approval to extinguish the easement.

Although proponents of the legislation maintain that it complies with federal requirements, a close reading of the fine print indicates that, in some respects, it does not. Moreover, if the legislation were enacted in its current form, the risk of noncompliance with the federal requirements, as well as the emotional and financial costs of dealing with an Internal Revenue Service audit would fall, not on the proponents of the legislation, but on unsuspecting charitably-minded landowners in Vermont who were willing to make gifts of conservation easements to benefit the state and their communities.

Vermonters should reject S.119 in anything like its present form.

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Bruce Post

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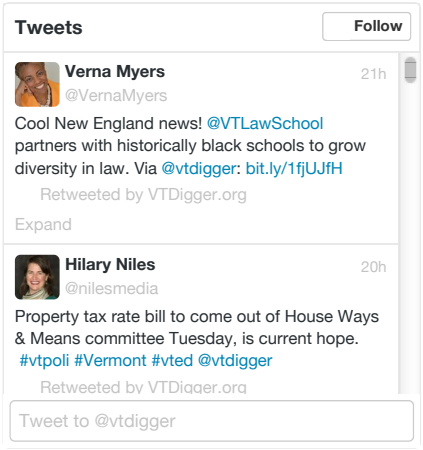

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February 11, 2014 at 6:12 am

Thank you for this thoughtful, informative piece. Looking at the Legislature's bill tracking system, I could not find any evidence of a roll call vote although it appears S. 119 passed the Senate and was sent to the House last year. Did I miss something?

Over the years, there have been some notable debates over whether recipients of land donations have honored the donors' wishes. Two examples are Joseph Battell's bequest to Middlebury College and Marshall Hapgood's gift to the State.

Also, thank you Prof. Milne for the excellent book you edited: "Mountain Resorts: Ecology and the Law." It emphasizes many of the negative – and, I believe, accelerating – effects of resort development on our mountain ecology. (One nit: the omission of the effects of infrastructure invasion on our ridgetops was unfortunate.)

To me, the highlight is the recommendation to add a new Criterion 11 to Act 250, namely ecosystem protection. I noted that the authors termed such a recommendation "whimsical." Indeed it is. Folks have been calling for Act 250 to consider cumulative effects for some time, without success. Despite all the bellyaching about Act 250's permit process and all the bragging about how Act 250 is saving Vermont, the hard reality, in my mind, is that our laws have become relatively low hurdles to cross in the race to exploit and diminish our mountains.

Reply

George Plumb

February 11, 2014 at 10:05 am

Good article and post by Post. As parts of the U.S. become uninhabitable due to climate change "environmental refugees" are going to come here in increasing numbers and the pressure to develop land and provide housing is only going to increase. We have put a conservation easement on our 140 acres and I would not want to see a future landowner being able to have it developed in order to make more money.

We need to protect our mountains and our agricultural land and we are failing to do so in sufficient quantity that will insure true sustainability for future generations. http://www.vspop.org/htm/opt_sustainable_report_vt_2013_ver3.pdf

Reply

Bruce Post

February 11, 2014 at 12:55 pm

George, your comments about "environmental refugees" are well taken. In VNRC's publication "Toward a Resilient State", planner Kevin Geiger wrote this on page 12:

"For people in the west or coast, I fear the new climate is about to ruin their lives. And then they will look at Vermont. Just like the hip new neighborhood that becomes such a great place to live the residents can't afford to stay, we have to reevaluate the proper role of the market or we may find out the Vermont was resilient but we weren't."

See: http://vnrc.org/wp-content/uploads/2012/08/VNRC-VER-draft-10-11-2013.pdf

Reply

Kathy Leonard

February 11, 2014 at 4:09 pm

It won't just be humans; other species will need to move as well – which is why we need to protect our remaining intact habitats.

Reply

Jacob Miller

February 11, 2014 at 12:59 pm

Much of the literature produced on "environmental migration" (aka: climate change refugees) assumes the nexus to be self-evident. The category is both emotive and commonsensical, and therefore has widespread currency in the media and among policy makers, non-social scientists and neo-Malthusianist social scientists.

In the European Commission funded EACH-FOR project; research conducted in areas of "environmental degradation" which attempted to demonstrate a statistically significant correlation between migration and environmental degradation (including climate change) have so far lacked falsifiability, and have been marked by an absence of counter factual evidence that has made it impossible to draw any generalizable conclusions from the findings.

http://en.wikipedia.org/wiki/Environmental_migrant

Reply

John McClaughry

February 11, 2014 at 11:09 am

The use of perpetual conservation easements in gross, heavily promoted by Vermont environmental organizations, serves their purposes well but may well turn out to be a curse. As the Restatement (Third) of Property states, "it is inevitable that, over time, changes will take place that will make it impracticable or impossible for some conservation servitudes [easements] to accomplish the purpose they were designed to serve. If no conservation or preservation purpose can be served by continuance of the servitude, the public interest requires that courts have the power to terminate the servitude so that some other productive use may be made of the land."
What we should have done 40 years ago is encourage conservation organizations to acquire development rights, which could be reunited with the residual property when years later changed circumstances made a conversion economically efficient.
Grantors weren't much interested in that because the large tax deductions available for granting a conservation easement required that the easement be "forever".
Environmental organizations weren't interested because development rights are property interests, and they were hooked on the idea that "land is not a commodity" subject to property law.
There is a case to be made for conservation of lands, but locking up land forever through agreements between tax benefit seeking grantors and favored "qualified organizations" in collusion with the state may well turn out to be a poor idea, unless one's goal is to enrich the grantors and take as much land as possible out of any market-based use – forever.

Reply

Sara Cavin

February 11, 2014 at 12:12 pm

If the public interest is already served by the court's "power to terminate the servitude [easement] so that some other productive use may be made of the land," and federal tax law also provides for easement termination in certain cases through judicial proceedings, why is it necessary to replace these legal regimes with a new (and potentially conflicting) administrative process?

Reply

Jacob Miller

February 12, 2014 at 1:02 pm

Apparently hell has frozen over as for once I agree with a comment written by John McClaughry.

It is the height of arrogance for a property owner to undertake the decision to place an encumbrance in perpetuity without regard to the unforeseen needs of a future generations of stewards. Had some previous owner had a similar vision, perhaps the grantor's peaceful enjoyment of the property would not have been possible.

Reply

Sara Cavin

February 13, 2014 at 12:00 pm

Jacob, by that reasoning, would it not also be arrogant for developers to put a string of big box stores and parking lots over some of the most productive agricultural soils in the country, thereby turning back 12,000 years of soil building and permanently removing the land's value to any future generations for growing food?

Property owners, and society as a whole, make and allow such decisions that last in perpetuity all the time, but, as a farmer told me once, "just precious few in favor of farming."

Reply

Jacob Miller

February 13, 2014 at 5:10 pm

Sixty years ago the Taft's Corner area of Williston was agricultural farm land and over the years developed into a regional commercial business destination that attracts shoppers from a large portion of the northern half of Vermont. However, you would probably agree that it would be arrogant for the current owners of the property to place an easement in perpetuity assuring the land could only be used for retail commercial activities. None of us know what the future of that land will be, it could continue to be commercial or it could

revert to another use, including agricultural, as change is the only constant in life.

Additionally, it is worth noting there is a trend, as outlined in Leigh Gallagher's recent book The End of the Suburbs, of suburban tracts reverting back to farmland.

"The conventional thinking in the planning world,... is that every time a farm goes into development, it's lost to agriculture forever. That reversal is a mind-blowing thing from a planning point of view."

Frank Popper, Professor, Edward J. Bloustein School of Planning & Public Policy at Rutgers

Reply

Randy Koch

February 11, 2014 at 12:50 pm

Isn't it kind of cynical to attribute crass motives to all landowners who conserve their land?

And are we really supposed to believe that market-based use is always the best and highest?

It's disappointing to see a rock-ribbed conservative like McLaughry go all wishy-washy on the sacred nature of contracts. I thought a deal was a deal.

Reply

Annette Smith

February 11, 2014 at 2:13 pm

A few years ago I stood at the edge of a wetlands area in Middlebury with the former landowner (a retired Middlebury College professor, an economist) who spoke passionately about the reason she and her husband had conserved that land and how outraged she was about what was planned. The context was the plan to run Omya's rail spur (about 20 feet up in the air) through the middle of the wetland and field. A Final Environmental Impact Statement had already been released, and the Record of Decision said "full steam ahead." The proposal involved lands that had either VLT or MALT conservation easements, and the plan was to use federal funding and eminent domain to take the land for a very wealthy private company. Fortunately for everyone, that project was dropped. Unfortunately, that same area is now part of Phase II of Vermont Gas Systems' pipeline to serve International Paper in New York. That rail spur project caused me to question the integrity and value of land trust easements.

Reply

Townsend Peters

February 11, 2014 at 3:07 pm

The article, though well-written, fails to acknowledge that today under state law a landowner and conservation easement holder can agree to modify an easement without

any public review if the holder is not a public entity. This bill actually requires public review for an easement change.

Reply

Kim Fried

February 11, 2014 at 3:42 pm

Here we go, how can we make more money or money on this land that is committed to a "trust". I sure hope VLT fights this bill with all they have? The industrial wind developers are already testing the very, very small print in trust deeds. Nothing appears sacred in Vermont today, not even the mountains.

Reply

Randy Koch

February 12, 2014 at 7:49 am

Kim: the joke is on you! VLT came out today with an op-ed heartily ENDORSING S. 119 which, not incidentally, gives VLT the power to participate in these legalized breaches of contract.

Reply

Jeanie McIntyre

February 11, 2014 at 4:28 pm

The Upper Valley Land Trust, a regional land conservancy serving 25 towns in Vermont (and 20 towns in New Hampshire), and stewarding 450 conservation easement deeds, does not support the S. 119 legislation as presently written.
Our comments and a summary of proposed changes are posted on our website at:
http://www.uvlt.org/2014/02/vermont-legislation-protect-easements-easement-donors/
And our written testimony to the House Judiciary Committee can be found at the legislative site:
http://www2.leg.state.vt.us/legdir/committeeinfo.cfm?CommitteeID=199&Folder=%20House%20Judiciary/Bills&Sort=Bill

Reply

Mary Gerdt

February 24, 2014 at 7:22 am

Reading this, I have an issue with "lucky enough to own property"….guess that is just overly simplistic. We live on a five generation farm and cannot afford to farm. We had in land use and the forester said, don't cut any trees for 20 years. Then the forester said why did you wait so long? They're too old. Then Monkton,Vermont tried to take my farm for paying taxes 9 months late but it was so the land trust could add to their project. They could have been "Inclusive" and asked us. Instead, their action and town's actions showed me the power a few bad people can wield that spoils the original intent….the good is spoiled.

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contact@vtdigger.org
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