GIL LIVINGSTON: CAREFUL PUBLIC REVIEW WILL ALLOW CONSERVATION EASEMENTS TO EVOLVE

COMMENTARY FEB. 11, 2014 9 COMMENTS DONATE

Editor's note: This commentary is by Gil Livingston, who is the president of the Vermont Land Trust.

The Feb. 10 commentary by three law school professors does not provide a complete picture of a new law that would create a transparent, rigorous process through which conservation easements could evolve over time:

• The commentators fail to confront the reality that the characteristics and the use of conserved land in Vermont evolve over time. For example, the needs of family farms change as farming practices evolve, and Vermont needs a rigorous system to evaluate whether and how conservation easements should change too.

• The legislation was drafted by a 16-member working group, established by the Legislature, which included representatives from the Attorney General, four state agencies and boards, land trusts of all sizes, Vermont Bar Association, Vermont Farm Bureau, sportsmen and recreation organizations, and owners of conserved land.

• Vermont law currently permits easement amendments, but there are only vague standards and the amendment process is not accessible to the public. The new law would create an open, public process and would impose clear, rigorous standards.

• The new law would permit an easement amendment only if approved by a special panel of the Vermont Natural Resources Board or, alternatively, by the Vermont Environmental Court. This ensures that the decision makers will have expertise in issues relating to the use and management of the land and waters of our state.

• No significant amendment to an easement is allowed unless the panel first concludes, based on clear and convincing evidence, that the change would:

- Be consistent with the public conservation interest;
- Be consistent with the conservation purposes and intent expressed in the easement;

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- Not result in any impermissible private financial gain.

• The new law requires notice to and the right to participate by the Attorney General, the Agency of Natural Resources, the Agency of Agriculture, town officials, the regional planning commission, neighboring landowners and the person who originally conveyed the conservation easement. In addition, members of the public will have an opportunity to voice their support or opposition to major amendments without first having to establish legal "standing."

In short, the new law creates a Vermont solution in the spirit of our town meeting form of democracy, that would honor the original objectives of conservation easements while creating a rigorous, accessible process to decide if and how easements should evolve over time. Vermonters who conserve their land should have confidence that their conservation goals will be honored forever, but they will not be handcuffed by legal instruments fixed in one point in time. More information can be found on this topic at VLT's website www.vlt.org by clicking on "New Initiatives" at the top of the home page.

Filed Under: Commentary
Tagged With: conservation easements, Gil Livingston, Vermont Land Trust

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COMMENTS

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Randy Koch

February 12, 2014 at 7:40 am

This debate seems pretty abstract so far. Maybe Gil and the other conservation honchos should come right out and inform us: what conserved land have they slated for development, for breaking the contract?

It sounds to me like not just the confidence of the grantor, perhaps long since dead and gone, will be betrayed: what about those in a community who have invested financially and emotionally based exactly on the permanence of these agreements? Doesn't it discredit the Land Trust to support a process for breaking faith—oh so sensitively?

Reply

walter moses

February 12, 2014 at 12:00 pm

After watching the PSB and Miller work with the Governor on wind power permits and the destruction of mountain ridges by cronyism at the highest levels of Vermont state government, who may I ask will trust more appointed committees and agencies?

Reply

Annette Smith

February 12, 2014 at 5:39 pm

SENATE OKS NEW CRIME OF AGGRAVATED DISORDERLY CONDUCT

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Beyond the wind projects, the NRB has been a political tool for whatever governor is serving, and Environmental Court judges have no particular expertise. I take no solace in having those folks be "the deciders".

And oh lookie they're going to allow public input, including from the person who conveyed the original easement. How generous of them. Then they can flush the comments the way we have come to expect from state regulators.

Government officials and the members of the private clubs who are running this state need to take a serious look at how much public trust has eroded.

How about coming up with a plan to rebuild trust before heading further down this slippery slope.

Reply

Paul Normandeau

February 12, 2014 at 12:02 pm

As the owner and grantor of conservation easements on our land, and a frequent contributor to the Vermont Land Trust, I am dismayed and feel betrayed by this recent quest to modify conservation easements that were donated in good faith with the intent that our land would forever remain undeveloped. I understand that things change and that is precisely why we donated the conservation easement so that the land that we love so dearly would remain in its natural state. I hope that this undertaking does not gain any momentum.

Reply

walter moses

February 12, 2014 at 6:17 pm

this bill was introduced by senator robert hartwell of bennington county. email him your concerns.

Reply

Grant Reynolds

February 12, 2014 at 6:30 pm

Amendments to a perpetual easement should be available only through the court system – and not the environmental court. Changes should be permitted by the court only if consistent with the intent of the grantor, but the grant is impossible, not inconvenient, to maintain. I don't distrust VLT, but I think they are too swayed by a few instances where changes would be convenient – not essential.
Impossible? The grant limits the tract to forestry, and pine bark beetles kill all the trees. A change to cattle or sheep grazing once the dead trees are removed might be reasonable – though I would expect most courts will shrug and say, start planting trees.

Reply

John Echeverria, Janet Milne & Nancy A. McLaughlin

February 20, 2014 at 12:17 pm

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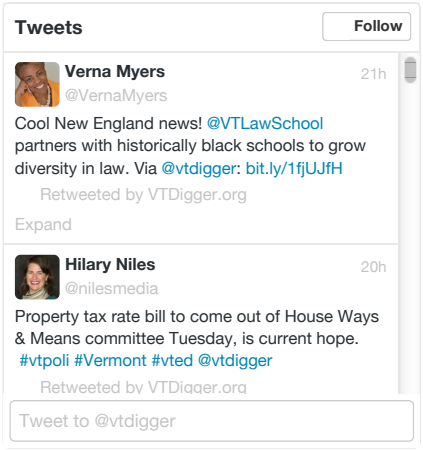

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In response to our commentary in VT Digger on February 10 addressing S. 119, Gil Livingston, President of the Vermont Land Trust, provided his own commentary in rebuttal on February 11. Mr. Livingston has offered various bromides apparently designed to allay concerns that legislators, easement donors, land trust supporters, and members of the general public may have about S. 119 as a result of reading our criticisms. With all due respect, we think Vermonters deserve more direct responses to the serious concerns we have raised about the bill.

First, Mr. Livingston repeatedly refers to the bill as involving "amendments" to conservation easements, implying that the bill only permits modifications to individual easements that would not destroy the easements or alter their fundamental character. But the bill specifically defines "amendments" to include "the whole or partial termination of an existing conservation easement" and "the substitution of a new easement for an existing conservation easement."

Thus, S. 119 would allow a land trust to use the process established by the bill to terminate an easement that a conservation donor gave to the land trust to permanently protect his or her land, provided the land trust gets paid and uses the money to conserve other land somewhere else. This would defeat the objectives of individual easement donors who intended to permanently protect specific lands that have special significance to them and their communities. Mr. Livingston needs to own up to the fact that the bill he supports involves much more than the benign easement "amendments" he alludes to in his commentary.

Second, Mr. Livingston does not respond to our objection that the bill would represent a breach of the fiduciary duty a land trust owes to its conservation easement donors when the land trust accepts easement gifts. Based on his silence, we understand Mr. Livingston to take the position, expressly adopted by other supporters of this bill, that a land trust has no legal duty to uphold a conservation easement donor's goals once the land trust has secured the easement gift from the donor and, instead, can seek to terminate the donor's easement so that it can pursue the protection of other lands.

We think that position is wrong as a matter of law – not to mention disheartening to the many easement donors who think they can rely on a land trust to uphold their conservation objectives. In contrast with Mr. Livingston's position, other leaders in the land trust community recognize that land trusts do owe a fiduciary duty to donors of conservation easements. Legislators, the general public as well as prospective future donors of conservation easements need to understand that this bill is built on the problematic premise that land trusts have no legal duty to uphold the wishes of easement donors.

Third, Mr. Livingston does not respond to our concern that passage of this legislation would raise a serious risk of rendering easement donations in Vermont ineligible for the favorable federal tax incentives available to easement donors in other states. Nor does he acknowledge that the risk of noncompliance with federal tax rules and the emotional and financial costs of dealing with the Internal Revenue Service on audit would fall, not on him or the Vermont Land Trust, but on unsuspecting Vermont landowners making easement donations.

A few years back, in response to reports of abuse in Colorado of the federal incentives available to conservation easement donors, the Internal Revenue Service audited the tax returns of hundreds of individual landowners in that state who had made charitable donations of easements. The fallout from those audits and subsequent litigation is still being felt by many Colorado landowners. Enactment of S. 119, which we believe does not

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comply with the federal tax law's perpetuity requirements, could bring similar devastating IRS scrutiny to easement donors in Vermont.

We think the federal tax rules are clear and that the proposed legislation does not comply with those rules. Mr. Livingston and others may disagree. But they at least need to acknowledge that there is a serious risk that the bill does not comply with federal law and demonstrate why Vermont landowners should be subjected to such a risk when it is so easy to avoid.

Fourth, Mr. Livingston is, at best, only half right in asserting that current law contains "vague standards" for reviewing potential easement amendments and that the proposed bill would establish "clear, rigorous standards." We agree that the Vermont legislature could usefully improve the process and standards governing certain easement amendments. But with respect to easement termination, the bill would replace the clear process and standards provided in both federal and state law (judicial proceeding and a finding of impossibility or impracticality, with a great deal of precedent defining this venerable standard) with loose, vague standards, just the opposite of what Mr. Livingston asserts.

Fifth, Mr. Livingston cites various standards in the bill that he suggests would limit the type and number of easement amendments and terminations, but those standards are so vague (for example, "consistent with the public conservation interest") that they impose no real constraints. Advocates for the bill suggest that the kind of destructive easement terminations and swaps the bill expressly authorizes would "never happen." But the personal assurances of individuals who will inevitably retire, change jobs, or otherwise pass the baton of land trust leadership to others is cold comfort in light of the fact that the bill would expressly authorize such terminations and swaps.

Finally, it is nonsensical for Mr. Livingston to describe the proposed process for addressing easement swaps, terminations, and amendments as being "in the spirit of our town meeting form of democracy." Under S. 119, a 5-person state panel would be responsible for reviewing land trust proposals to terminate or amend conservation easements, with a portion of the membership of that panel nominated by the same land trusts submitting the applications to terminate or amend easements. Local towns and individual citizens could voice their opinions, but they would have no vote on whether easements should be transferred from their communities to other parts of the state.

To make matters worse, land trusts could routinely circumvent the state panel process. Under the bill, the land trust itself could run a "public process" to approve the termination or amendment of an easement on conserved land. While the land trust's decision could subsequently be appealed to the 5-person panel, S. 119 would require the panel to apply a "presumption" that the land trust's decision was in the broadly defined "public conservation interest" and should be upheld. This is the worst kind of insider process – the very antithesis of an open, democratic Vermont town meeting.

We recognize and agree with Mr. Livingston that conditions change and there needs to be a rigorous, transparent process by which conservation easements can be amended over time in light of changing circumstances. But S. 119 would go far beyond those objectives. Vermonters deserve more limited, carefully crafted legislation that will allow conservation easements to adapt over time and at the same time comply with applicable federal and state laws and honor the promises that have been made to conservation donors.

We acknowledge that our words in response to Mr. Livingston's commentary may seem

harsh to some. But we believe the serious flaws in the bill and the lack of clarity in the public discussion surrounding it warrant some straight talk.

John Echeverria
Janet Milne
Nancy A. McLaughlin

Reply

James Maroney

February 21, 2014 at 8:37 pm

Even having carefully read S.119, and Professors Echeverria, Milne and McLaughlin's exquisite objections to it, followed by Gil Livingston's response in support of it, I am still unclear as to the purpose of the bill, unless it is to give a panel of five persons who are knowledgeable about agriculture, forestry and environmental science, appointed by the governor, the expedient power to amend or vacate a conservation easement entered into by a grantor, who believed at the time of the transfer that the state would protect his or her wish that a parcel of land was to be preserved in perpetuity. We all understand that forever is a very long time and that things can and often do change, with the unintended result that land once protected for one very good purpose may at some time in the distant future, be needed for another equally good purpose. But the law already provides for this eventuality. The doctrine of cy pres gives the court the power to amend covenants when, in its judgment, the original purposes for which the land was encumbered are no longer possible to accomplish. Still, in such a case, the court must choose among all those plans submitted for amendment, the one plan that comes as close as possible (cy pres) to the donor's original purpose.

Professors Echeverria, Milne and McLaughlin's position is that S.119 gives adventurous applicants the opportunity to attenuate the meaning of forever whenever and however it suits them. That is why the existing process is cumbersome: the intention was that when the situation merits the effort, the court, and only the court has the power to amend or vacate a covenant. The existing process accentuates the ever in forever. Neither those who seek to change the process nor Mr. Livingston provides any explanation for why it is now necessary to quicken the process for those seeking amendments, leaving me to believe that the authors would have covenants become a travesty and amendments a commonplace.

I have my own objection to the bill, which provides that "The Governor shall seek to appoint members to the Panel who are knowledgeable about agriculture, forestry and environmental science." § 6323 (a)(3)(b).

Surely, the bill's authors know — perhaps they too well know — that those who are knowledgeable about agriculture, forestry and environmental science come in two guises: those who would protect the soil, the water and the environment from those who would despoil it and those who wish to exploit it for personal gain without regard to consequences wreaked on exogenous systems, like communities.

My objection goes three levels lower down:

One, Vermont's Land Use Regulations (1967) and Act 250 (1971) both provide a broad exemption to agriculture and silviculture, far and away Vermont's two largest land uses, giving farmers and loggers freedom to do what is most expeditious, which includes applying 80M lbs of artificial fertilizer to corn land in the annual floodplains or skidding

logs across streams and wetlands, polluting the lake as a consequence.

Two, Vermont's Accepted Agricultural Practices rules (1995) were not promulgated, as the legislature intended, to save agriculture and protect water quality; they were conceived and written to shield the industry so that it could grow unimpeded by intrusive environmental regulation. If this imprecation seems overly harsh, why, since the rules have been in effect for nineteen years, is Lake Champlain showing increasing concentrations of phosphorus in all sections during the period 1993-2011 in spite of state expenditures amounting to $140M over the same period?

And three, the purchase of conservation easements bought with private and taxpayer dollars by the Vermont Land Trust and the Vermont Housing and Conservation Board; and Current Use, Vermont Sustainable Jobs Fund, Farm to Plate, the Save the Working Landscape Enterprise Investment Fund and the Accepted Agricultural Practices are all agnostic on the difference between conventional agriculture, which is predicated upon importing as many nutrients and petroleum-based, artificial fertilizers onto the farm as are required to continually boost production, on housing as many animals under one roof as access to land and capital will allow and on externalizing its wastes into the environment; and organic, which was invented as an antidote to these very same practices. The Land Trust, Current Use, The Vermont Housing and Conservation Board, Farm to Plate, Save the Working Landscape are all quasi governmental agencies and/or they draw their resources partly or wholly from Vermont taxpayers. These institutions/agencies all claim that part of their mission is to "save agriculture and/or protect water quality." Yet, none of these agencies/institutions requires that landowners farm sustainably as a condition of eligibility to receive benefits. The largest part (82%) of Vermont agriculture is conventional dairy; empirically, conventional dairy is a proximate, i.e., preventable cause of pollution in the lake. The upshot is that the legislature is, with one hand, funding the problem it believes itself to be legislating with the other to fix. S.119 continues this disastrous failure to distinguish between the two groups who are "knowledgeable about farming, forestry and environmental science," such that those least interested in conservation for its own sake will be those most eager to seek amendments in the state's permanent land use covenants. That this group might comprise the Vermont Land Trust, the Vermont Housing and Conservation Board, the Vermont Sustainable Jobs Fund, Farm to Plate and the Save the Working Landscape Enterprise Investment Fund, might be an indication of how the legislature can inadvertently work at cross purposes, unless it is rent seeking, plain and simple.

Reply

Chris Lang

February 25, 2014 at 1:20 pm

Some years ago during a town hearing, I was told that zoning is only as good as the economic forces that define it. Shortly there after, I conserved a highly developable parcel that is a valuable hay field to a local farmer. Now, after reading this proposed bill, I feel as if I am back to square one and if this becomes law, I will never again conserve a parcel of land in Vermont. By replacing permanence with a process for change, Bill 119 shatters the essence of conservation and makes a joke of protection in perpetuity.

Reply

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