DARBY BRADLEY: SETTING THE RECORD STRAIGHT ABOUT S.119

COMMENTARY MAR. 12, 2014 11 COMMENTS DONATE

Editor's note: This commentary is by Darby Bradley, the former president of Vermont Land Trust.

There has been a lot of misinformation about S.119, a bill governing the amendment of conservation easements. Perhaps I can set the record straight and put people's minds at ease about the purpose of this legislation:

This bill is not opening a new door to conservation easement amendments: land trusts in Vermont already have the authority to amend easements, and have used it on occasion to maintain and enhance conservation values. Rather, the bill establishes clear criteria for amendments, requires review and approval by the Natural Resources Board, and invites public participation. None of these elements exist in current law.

No land trust in Vermont has ever sold an easement, nor will they. It would be suicidal behavior even to propose the idea, especially if S.119 is enacted, because of the public outrage that would follow.

Vermont's legislation will place limitations on all easement amendments. Before any significant amendment can go forward, the town, governmental agencies, neighboring landowners and the general public must receive notice of the proposal; any person can request a public hearing, and the proposal must be reviewed and approved under strict standards either by the Environmental Court or by a special administrative panel of the Vermont Natural Resources Board.

This legislation will strengthen the public's role in future decisions and ensure that land trusts today and in the future will continue to uphold the

The legislation was developed by a 16-member working group, which included representatives from the Attorney General's office, four state agencies and boards, land trusts of all sizes, the Vermont Bar Association, the Vermont Farm Bureau, and recreational and sporting groups. It passed the Senate last year on a voice vote, after being reviewed by four separate committees. Four committees of the House

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values and benefits that come with conservation easements.

have heard testimony on the bill to date.

Maine adopted similar legislation governing amendments of easements in 2007. None of the horrible outcomes predicted by a few people for S.119 have occurred in Maine. No land trust has sold an easement. Landowners are still donating easements and receiving federal income tax deductions. Land trusts are still receiving federal grants for land conservation projects. In fact, Maine has protected over 500,000 acres of land since the amendment bill was adopted.

Here are some examples of easement amendments done by the Vermont Land Trust: 1) a house site was moved to a less intrusive location; 2) a farmstead was reconfigured to accommodate a new dairy barn; and 3) a farm had had its boundaries redrawn (without reducing conserved acreage) to incorporate more prime agricultural soils into the easement.

We have also made minor boundary adjustments to benefit several communities in cases where doing so didn't adversely affect the conservation purposes. The benefits have included straightening a dangerous curve in the highway and enlarging a volunteer fire station. These decisions are made thoughtfully and judiciously. The Vermont Attorney General has never received a complaint about an amendment.

Two things are true: the characteristics and the use of conserved land in Vermont will evolve over time and easement amendments are a complicated subject. That is why we need to increase the scrutiny by which we evaluate change in the context of the original intent of the easement. This legislation will strengthen the public's role in future decisions and ensure that land trusts today and in the future will continue to uphold the values and benefits that come with conservation easements.

More information about the bill and the thinking behind it can be found on the Vermont Land Trust's website www.vlt.org/amendment.

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Kim Fried

March 13, 2014 at 8:06 am

Trust in Montpelier and our governing agencies is at an all time low. Don't do the same thing to our Land Trusts.

Reply

Steven Young

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March 13, 2014 at 9:02 am

We can, of course, only look so far into the future, but we can be sure that there will be many pressures to modify important easements. I wonder, for example, if anyone could have envisioned massive wind turbine developments even 50 years ago, and I wonder what the State and the wind industry would have done if there had been conservation easements on the Lowell Mountains. It would be awfully easy for a particular concept of the 'public good' to undercut the wishes of conservation easement donors who had been dead for generations, and whose land was now owned by people who didn't share their commitment to land preservation. Add up the various pressures and we can see the need for very strong, carefully constructed legal protection of observation easements. The current legislation seems to be working in the right direction, but there are some loopholes that need to be filled before we can feel really safe over the long haul.

Reply

Randy Koch

March 13, 2014 at 9:04 am

The legislation does allow for selling easements no matter how "suicidal" that would be for the land trust. People would have to find out about such a sale in the first place if there is to be a public outcry.

And by the way, can't curves always be made less "dangerous" by driving slowly rather than chawing up conserved land?

Reply

Jeanie McIntyre

March 13, 2014 at 10:20 am

Darby Bradley's reference to Maine's law about amending conservation easements is ironic... and misleading. Two months ago, Darby testified to the House Judiciary Committee that the Maine law, which requires judicial approval of any amendment that materially detracts from the conservation values of the easement, would not suit Vermont's needs. He stated that in more than six years since Maine's law took effect, "not a single significant easement amendment has occurred in that state." He surmised that Maine's law was stifling amendments that would be in the public interest.

Following Darby's testimony, I contacted Jeff Pidot, who served for many years as chief of the Natural Resources Division of the Maine Attorney General's Office. During 2004-2005 he was a Visiting Fellow at the Lincoln Institute of Land Policy. His paper on conservation easement reform, which examined the Maine experience, was published in the Duke Law Review.

Here is what he wrote when I asked him about Darby's testimony:

"The fact is that the vast majority of land trusts in Maine, and certainly all those I've spoken to, do not have an interest in amending easements in a way that would undermine conservation of the land they protect. It is only amendments that reduce conservation values of their protected lands that require court approval under our law. In my survey, land trusts reported that they like the law precisely because it deters landowners from trying to amend easements in destructive ways. "

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"I believe that the major difference that separates Maine from Vermont cultures on this is simply the proclivity that VLT has shown over the years (and apparently wants to preserve) for trading easements, something that Maine land trusts, like most others around the country, have shown no interest in doing. This is partly explained by the fact that the IRS disallows tax deductions for easement gifts where the easement allows for trades. Most land trusts want nothing to do with offending the IRS, not to mention the wishes of their easement donors, for whom the idea of easement trades is anathema. "

Now Darby is pointing out that the Maine law has not stopped landowners from making gifts of conservation easements or led to IRS scrutiny. Of course it hasn't! The Maine law protects the interests of donors and the role of the judiciary and is compatible with the IRS requirements. It's a law Darby has said would not work for Vermont.

Incidentally, the Maine law is also only a few pages long. Maine land trusts and landowners appear to be getting along fine with it. According to Darby's remarks in this commentary, the public good doesn't seem to be suffering either.

Reply

Mark Whitworth

March 13, 2014 at 11:37 am

I appreciate Mr. Bradley's clarification.

I would like Mr. Bradley, Mr. Livingston, and VLT's board to know that my wife and I will find an organization other than VLT to preserve our land.

I am certain that we are not the only landowners who have lost faith in the Vermont Land Trust.

Reply

walter moses

March 13, 2014 at 12:12 pm

Ditto with Mr. Whitworth, I will also find another organization. A preservation society I am a board member and officer of donated a large acreage to VLT and we will be discussing this in our next meeting. My farm will go elsewhere.

Reply

Kim Fried

March 13, 2014 at 12:42 pm

"Public Good" has become a disgrace in Vermont recently. It's typically used to serve political agendas. Is this what the Land Trusts are looking to serve also???

Reply

Noreen Hession

March 13, 2014 at 3:15 pm

This sounds similar to the PSB approval process which works in favor of well financed developers. Small towns and Vermont citizens are at a profound

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disadvantage.

Read the fine print: some neighbors {not all: developers only have to make a "reasonable" effort} receive notice, public hearings prove to be meaningless theater {at the Newark hearing 53 out of 54 citizens spoke against MET tower approval. 53 were ignored by the PSB} and review under "strict standards" is by politically motivated state agencies like the ANR (who approve take/kill permits for large businesses to kill threatened species like the little brown bat);

What kind of leadership is being offered by the Vermont Land Trust? This amendment is big business and developer friendly and weakens land conservation in Vermont at a time when we are in desperate need of courageous environmental leadership. This amendment is pro-business and anti-Vermont.

I, too, am profoundly disappointed in VLT. My husband and I will find an organization other than VLT to help preserve our land for future generations of Vermonters. We'll look for an organization that will never compromise our mountains, streams and woodlands which we intend to preserve forever.

Reply

Jim Walsh

March 13, 2014 at 2:46 pm

Dear Mr. Bradley,
You state Natural Resources Board would review these requested changes. My question or questions are: before these requested changes go to this board will the local town or village Planning Commission, and select board be notified? Will these changes be required by law to meet local zoning regulations, setbacks and what all other developments require? Will this process more closely resemble a Public Service Board 248 process?

Reply

Annette Smith

March 13, 2014 at 8:48 pm

That is a good question. This is the second piece of legislation I have seen that seeks to expand the current function of the Natural Resources Board into something that holds hearings and issues decisions, yet I have not seen how this new process will work.

I am aware of the larger goal of this administration to have the NRB hear large cases, taking them out of the District Commission process. Seems like instead of trying to have a conversation about whether or not it is a good idea to create this "uber board" and diminish the role of the more citizen-friendly process at the district commissions, it is being done piecemeal in different bills, and they'll work out the details privately later on.

Before we know it, we will have an NRB that is, as you suggest, more like the PSB. And that is a disaster.

Reply

Karl Riemer

March 14, 2014 at 11:07 am

More of the same.

No one doubts the *purpose* of the legislation. No one doubts the sincerity of the promoters. Those are not the issue so putting our minds at ease about them accomplishes nothing. Nor does testifying that similar legislation elsewhere hasn't yet let slip the dogs of war. If you read the objections, they have to do with the *effect* enabled by the proposed legislation, in the future. Not inevitably, not tomorrow, not by you or anybody you know, but likely by people who are now in grade school or not yet conceived.

Creating a process of usurpation and promising to use it sparingly presupposes the integrity and motivation of all future actors and a constant definition of sparing. That's an absurd promise, particularly in light of the fact that what you're promising to do only sparingly is break your promises.

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