Questions and Answers about Conservation Easement Amendment and Termination

This document serves as a companion to the *Recommendations for a Vermont Policy on Conservation Easement Amendment and Termination*. The *Recommendations* provide a blueprint to safeguard the durability and integrity of perpetual conservation easements by addressing the manner in which they can be altered or terminated in the future. The purpose of this companion document—organized in a question and answer format—is to provide background information on the subject of conservation easement amendment and termination.

Why Should Conservation Easements be Permanent?

For a host of practical, legal, policy, and ethical reasons, it should be the policy of the State of Vermont to uphold the permanence of conservation easements to the maximum extent possible.

First, it is the universal public understanding and expectation that conservation easements will ensure the permanent protection of lands that have been identified as having unique or otherwise significant conservation values for the benefit of present and future generations. If conservation easements were readily subject to termination or destructive amendment, they would fail to accomplish their essential purpose.

Second, federal tax law requires that donated conservation easements be granted, and their conservation purposes be protected, in perpetuity. Under federal tax law, persons who donate conservation easements to land trusts and public entities receive generous federal tax benefits in return. In 2012 alone, the latest year for which data are available, landowners claimed almost $1 billion in federal income tax deductions for their gifts of easements. As a condition of offering this public subsidy, Congress requires that easement protections be permanent. This requirement helps ensure that the public investment in easements will provide a genuine public benefit over the long term, rather than a public subsidy for speculative investment in real estate.

Federal law specifically prohibits whole or partial termination of tax-subsidized easements except with the approval of a court based upon a finding that an unexpected change in conditions has rendered continued protection of the property for conservation purposes impossible or impractical. On those extraordinary occasions when a court authorizes termination of a tax-subsidized conservation easement, federal law requires that proceeds from the property's sale allocable to the easement must be paid to the holder to be used in a manner consistent with the conservation purposes of the original gift. For easement donors in Vermont to be eligible for these federal tax incentives, and for Vermont to maintain its system of conservation that relies so heavily on donated easements, Vermonters must follow these procedures and standards.

Third, landowners granting conservation easements generally do so based on a promise that their particular lands, which have special significance to them, their families, and their communities, will be permanently protected. Landowners look to and depend upon the representations and commitments of land trusts and other holders to protect these specific properties in perpetuity according to the easements' terms. Ensuring the permanence of conservation easements is

essential to give landowners an incentive to grant easements; if landowners could not rely on the promises made that their lands will be protected in perpetuity, they would donate easements less frequently, if at all. And land trusts and public entities that solicit and accept easement donations have both a legal and a moral obligation to uphold the promises they have made to donors.

Fourth, the general public also has a stake in seeing that the commitments embodied in conservation easements are carried out in perpetuity. Conservation easements are held by government agencies or land trusts, but the public is the ultimate intended beneficiary of conservation easement protections. To ensure that the public interest in easement restrictions is upheld, easement holders must enforce easements according to their terms for the benefit of the public. There is no expiration date on this duty owed to the public.

Fifth, all taxpayers have a financial interest in the perpetual enforcement of every conservation easement. There is virtually always a public financial investment in conservation easements. This can take the form of income tax subsidies for charitable gifts of easements, local property tax benefits, direct public or nonprofit financing of easement purchases, or some combination of these. For example, the Vermont Housing and Conservation Board has spent many millions of public dollars to acquire conservation easements. The public invests in conservation easements for the purpose of ensuring the permanent protection of specific lands that have been identified as having significant conservation values. This public investment gives all citizens the right to expect that easements' protections will be durable.

Finally, robust commitment to perpetuity is also good for conservation easement holders. The use of the word "trust" in the name "land trust" represents a statement to the organization's supporters and partners, as well as to landowners, communities, and the general public, that the organization's commitment to conservation can be trusted over the long-term. Upholding explicit and implicit promises to maintain the conservation values of properties entrusted to them in perpetuity is essential for land trusts to live up to their name. Likewise, government agencies that have acquired conservation easements on the understanding that they will permanently protect specific lands have a duty to keep faith with the promise of perpetuity.

A robust commitment to perpetuity will also help easement holders at an important practical level. Properties subject to conservation easements eventually will be transferred to new owners, who often will have strong economic or personal incentives to seek to alter the easement restrictions. As a result, we can expect that land trusts and government agencies will come under increasing pressure to agree to easement amendments or terminations. Responding to large volumes of such requests would impose a major work burden on easement holders, diverting them from their primary conservation mission. In addition, addressing these requests would force easement holders to constantly choose between disappointing and possibly alienating their landowner partners or agreeing to modifications and terminations that would erode easement protections. Clear rules on easement amendment and termination designed to ensure the integrity and durability of easements will protect land trusts and other holders from this dilemma.

Are Land Trusts Legally Obligated to Honor Promises Made to Conservation Easement Donors?

In Vermont, as in all other states, if a person makes a charitable gift, whether of financial assets or property, and the person specifies that the gift is to be used for a particular charitable purpose, the government entity or charity acquiring the gift is legally obligated to use the gift for the specified purpose. The practical justification for this legal rule is that people would make fewer charitable gifts if they could not be sure that their gifts will be used for their specified charitable purposes. This rule also reflects the basic moral understanding that promises made by government entities and charities that solicit and accept charitable gifts should be kept, even if the persons to whom the promises were made are dead and gone.

Vermont history is rich with charitable gifts made by generous donors to be used for a wide variety of charitable purposes, including to support specific schools, libraries, hospitals, and universities. The Vermont Supreme Court has long exercised its equitable powers to enforce the terms of these gifts in accordance with the intent of the donors. *See, e.g., Burr's Ex'rs v. Smith*, 7 Vt. 241 (1835) (explaining the authority of the former court of chancery to administer charitable gifts and bequests to give effect to the intent of donors); *Destitute of Bennington County v. Putnam Memorial Hospital*, 125 Vt. 289 (1965) ("The controlling fact in the interpretation of trusts is the expressed intent of the settlor as disclosed by the language of the trust instrument…. The court…may not read into the trust instrument a provision contrary to the settlor's wishes"); *Application of Jones*, 138 Vt. 223 (1980) (refusing to allow trustees to use trust funds for purposes other than those specified by the donor—*i.e.*, to purchase books for and repair the building of a public library; and explaining "[t]he trust instrument is not a complicated one, and the unambiguous, expressed intent of the settlor must be given effect.").

The legal principles recognized in these cases apply with full force to charitable gifts of interests in land, such as conservation easements. Charitable gifts of interests in land are no different from any other charitable gifts. No distinctions are drawn in the case law involving the enforcement of charitable gifts based on the type of property involved. Nor do the court decisions attach any significance to whether the gift was expressly made "in trust." A leading state court case addressing this issue explains:

> At common law, it was established that "equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation." … "The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the attorney general…. It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift." … "The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have is intention enforced."

Carl J. Herzog Found. v. Univ. of Bridgeport, 243 Conn. 1, 6-7 (1997) (quoting *Lefkowitz v. Lebensfeld*, 68 N.Y.App.Div.2d 488, 494–95 (1979)).

Furthermore, the drafters of the Uniform Conservation Easement Act, the Restatement (Third) of Property: Servitudes, the Uniform Trust Code (the latter of which was adopted in Vermont in 2009), and the Model Protection of Charitable Assets Act all have recommended the application of restricted charitable gift principles to conservation easements, including the doctrine of *cy pres*. The federal Treasury Regulations governing tax-deductible easements similarly provide for the termination of easements pursuant to a regulatory version of the doctrine of *cy pres*. Under this doctrine, if changed circumstances make it impossible or impractical to carry out the intentions of the donor of a charitable gift, the court can lift the restrictions on the gift and redeploy the gift or the value of the asset to some other, similar charitable purpose. In addition, the federal Tax Court has expressly recognized that the federally deductible conservation easements at issue were restricted charitable gifts under state law, or "contributions conditioned on the use of a gift in accordance with the donors' precise directions and limitations." *Carpenter v. Commissioner*, T.C. Memo. 2012-1 (quoting Schmidt, *Modern Tomb Raiders: Nonprofit Organizations' Impermissible Use of Restricted Funds*, 31 Colo. Law. 57, 58 (2002)).

The Vermont Attorney General has the power to maintain a suit to compel a charity that has received a gift to use the gift for the purpose and in accordance with the terms for which it was given. *See* Vt. Stat. Ann. tit. 3. §§ 152, 157; Vt. Stat. Ann. tit. 1, § 217. *See also, e.g.*, *Wilbur v. University of Vermont*, 129 Vt. 33, 44 (1970) ("the remedy for a breach of trust is by suit at the instance of the attorney general of the state to compel compliance"). If the Attorney General has a conflict of interest (e.g., serves as legal counsel to the donee, such as a state agency) or declines to file suit due to lack of resources or other reasons, interested citizens may seek leave from the Governor to file suit to enforce the gift. Vt. Stat. Ann. tit. 14, § 2401.

The enforceability of promises made to conservation easement donors is reinforced by Vermont laws regulating charitable solicitations. Those laws mandate that "[n]o…charitable organization shall misrepresent, directly or indirectly, to a contributor or potential contributor any fact relating to the solicitation, including…the purpose for which the contribution will be used." Vt. Stat. Ann. tit. 9, §2475(b). Accordingly, charities that misrepresent to prospective funders or grantors of perpetual conservation easements the purposes for which their contributions will be used, or the purposes for which past, similar contributions have been used, may be found to be engaged in unfair and deceptive trade acts and practices and sanctioned accordingly.

Can Permanent Conservation Easements Ever be Amended or Terminated?

Yes, but only in limited circumstances. In the real world, permanent conservation easements must sometimes be subject to modification and even, in extreme cases, termination as circumstances change in the future. But the law imposes major constraints on the amendment and termination process in order to uphold donors' intentions and avoid abuses.

Both federal tax rules and state common law governing donations of conservation easements allow for easement amendment and termination, but only in limited circumstances. Easement holders can seek to lift or substantially modify easement restrictions only when rare and unforeseen changes in circumstances have made it impossible or impractical for the easement's purposes to be achieved. To safeguard the public interest in conservation easements, advance court approval is required for an easement termination or a conservation-undermining

amendment. When a court authorizes the substantial amendment or termination of a donated conservation easement, the holder must be appropriately compensated and must use that compensation in a manner consistent with the conservation purposes of the original contribution.

In addition, easement restrictions are subject to amendment or termination through exercise of the eminent domain power. Every property owner holds his or her land subject to the condition that the government may need to condemn the property for some legitimate public purpose upon payment of "just compensation" for the interest taken. There is no principled basis for categorically exempting lands voluntarily placed under easement protection from this overriding governmental authority to meet public needs. When land subject to an easement is condemned, the proceeds should be divided equitably between the holder of the easement and the owner of the underlying fee interest, and the holder should use its share of the proceeds to accomplish similar conservation purposes in some other location.

Finally, limited, modest adjustments to easement terms may be possible without resorting to the judicial review process. Thus, easement holders and landowners may have discretion to enter into amendments that correct scriveners' errors and update easement terms without affecting the conservation protection, as well as amendments that do not adversely affect the protected conservation values and are consistent with the grantor's intent.

Why is Uniformity Important in Laws Governing Conservation Easement Amendment and Termination?

The *Recommendations* for amendment and termination suggest that all conservation easements should be treated alike when considering a change in their terms. Thus, the proposed policies and procedures would apply in the same fashion regardless of whether the easements were acquired by gift, purchase, exaction, or some combination thereof. Lawyers can debate whether different, legally nuanced doctrines might apply to the amendment and termination of conservation easements depending on a multiplicity of factors, including how, when, and by whom a particular easement was created. These legal conflicts cause unnecessary confusion, undermine public expectations, and jeopardize conservation easement durability and integrity.

The public's reasonable understanding and expectation is that *all* conservation easements will do exactly as their terms and their proponents promise: protect the subject lands *in perpetuity*. Conservation easement durability should not depend upon an analysis of extrinsic circumstances concerning an easement's creation years after the fact. Indeed, with the passage of time, these circumstances may no longer be known; and to the public, they have no importance to the promise of permanent protection of specific land that each conservation easement embodies. Accordingly, as contemplated in the *Recommendations*, all conservation easements should be subject to the same legal safeguards, regardless of how they were created.

What Can We Learn from the Failure of S. 119?

In 2013-2014, the Vermont legislature considered a bill (S.119) to create a new system to address conservation easement amendments and terminations. A number of Vermont citizens, landowners, easement donors, land trusts, editorial writers, and members of the academic

community expressed concerns that S. 119 represented a flawed approach. In the face of opposition, the bill's primary proponents ultimately withdrew their support for the bill. In order to develop a better legislative solution that can command broader public support, we should learn from S.119's deficiencies.

S.119 would have established a new, politically-appointed board to review proposed conservation easement amendments and terminations under vague standards that did not adequately protect easement durability and integrity. In addition, the bill would have authorized land trusts to amend and terminate easements under certain circumstances without *any* public review. Terminations and amendments allowed under the bill would also have conflicted with promises of easement permanence made to easement donors, funders, and the public, and would have potentially violated federal tax and state common law requirements designed to assure that conservation easements are perpetual. As the Valley News editorialized on March 14, 2014, "Whatever the seemingly benign intent of this bill…, its likely effect would be to scare off donors and thwart conservation efforts…. By breaking promises to donors, land trusts would undermine their mission and make a mockery of the 'trust' in their name."

Specifically, S.119 included the following flaws:

1. The bill would have broken promises made to Vermont landowners, communities, and the public by allowing amendments and terminations of conservation easements that had been promoted as permanent.

2. The bill's system for the review of proposed amendments and terminations would have been unwieldy. The 41-page legislation envisioned complex layers of bureaucratic oversight of conservation easements subject to vague and malleable standards.

3. The bill would have relied too heavily on land trusts to make unilateral decisions about easement amendment and termination without sufficient public oversight.

4. The bill would not have conformed to procedures mandated by the federal government to safeguard the integrity and durability tax-subsidized conservation easements.

5. The bill would have put conservation easement donors at risk by exposing them to potential IRS audits, litigation, loss of tax benefits, and penalties.

6. By breaking promises to landowners that conservation easements on their land will be permanent, the bill would have discouraged future easement donations and grants.

Why Does Vermont Need Legislation?

Vermont would benefit from a simple, clear, statutory statement of the standards and procedures that govern the amendment and termination of conservation easements. The rules governing conservation easements currently derive from a number of different sources of federal and state law. They draw in part on a variety of statutes, but they are also built on court decisions interpreting the statutes and uncodified common law. It is often difficult and costly for land trusts, state agencies, landowners, and their lawyers to decipher all the rules from these multiple

sources and determine how they apply to a particular situation; and debates often arise as to which rules should apply in different situations. It would be helpful to have clear state rules on amendments and terminations that would protect the public interest and investment in conservation easements and ensure that the intent of Vermont easement grantors is honored. In short, to facilitate land conservation, protect the long-term integrity of conservation easements, and minimize controversies, Vermont should adopt legislation that creates clear substantive and procedural rules governing amendments and termination.

Federal tax law is explicit on the requirements for terminating easements but it does not expressly address amendments, creating the potential for controversies with the IRS. The public would benefit from an official explanation from the U.S. Department of Treasury about how the federal tax rules affect the ability to amend easements. However, in the absence of Treasury guidance, Vermont should adopt its own set of rules to protect landowners from the greatest risks.

What Can We Learn from Maine's and New Hampshire's Experience?

The three northern New England states stand at the forefront in the use of conservation easements nationally. However, in terms of clarifying the legal protections afforded to conservation easements, Vermont lags behind Maine and New Hampshire. Both of these states have adopted relatively rigorous, detailed procedures for addressing easement terminations and amendments. In charting its own course to deal with these challenges, Vermont can learn from the experience of its sister states.

In 2007, after a year of study by a group of land trusts and public agencies, Maine (which has more land under conservation easement than any other state) enacted legislation implementing comprehensive reforms of its conservation easement laws. These reforms include uniform requirements calling for independent court review and approval of any conservation easement termination and any amendment that would materially detract from an easement's protected conservation values. In such proceedings, the Attorney General must be made a party to represent the public interest in the easement. If the landowner's estate increases in value due to a conservation easement amendment or termination, it must pay the amount of financial benefit over to the easement holder to be used for a similar conservation project. Any termination or amendment that does not follow the required procedures is void. *See* 33 M.R.S.A. §476 et seq.

In 2010, the New Hampshire Attorney General adopted Guidelines to help land trusts and other conservation easement holders understand and follow proper procedures for conservation easement amendment and termination. While the New Hampshire Attorney General's Guidelines are discretionary and do not have statutory effect, they provide detailed guidance concerning the types of major easement amendments and terminations that require court approval under that state's common law. The Guidelines articulate the New Hampshire Attorney General's role, as supervisor of assets held for the benefit of the public, in reviewing proposed easement amendments and terminations and advising holders on the appropriate legal process. The New Hampshire's Guidelines are available at http://doj.nh.gov/charitable-trusts/documents/conservation-easements-guidelines.pdf.

In both New Hampshire and Maine, the Office of the Attorney General absorbs within available budgets the modest work involved in reviewing proposed easement amendments and terminations (reported by those offices to be, on average, less than 10% of one staff lawyer's time). While there is no reason to believe that the Vermont Attorney General's Office would face a greater work load if the legal reforms contemplated by the *Recommendations* were adopted, the *Recommendations* suggest enabling the Attorney General to charge fees if necessary to meet budgetary requirements.

No matter what particular course is chosen in Vermont, the Green Mountain State should ensure that it protects the public's investment and expectation in the permanence of conservation easements.

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John D. Echeverria[*] Janet E. Milne[*]

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