

MEMO TO: House Judiciary Committee

FROM: Darby Bradley for the Vermont Land Trust

SUBJECT: S.119 – Brief Response to Upper Valley Land Trust’s Memorandum of February 5, 2014 re “S.119 Amendments”

DATE: February 11, 2014

First, there is no consensus about the statement appearing near the beginning of UVLT’s memo: “Judicial proceedings are required for amendments that extinguish/terminate all or part of the easement.” (emphasis added) Attorneys and professors who have written law review articles on the subject are in disagreement. The Internal Revenue Code is silent. In Section 1.170A-14(g)(6) entitled “Extinguishment”, the Treasury Regulations state:

In a subsequent unexpected change in the conditions surrounding the property that is the subject of a donation under this paragraph can make impossible or impractical the continued use of the property for conservation purposes, the conservation purpose can nonetheless be treated as protected in perpetuity if the restrictions are extinguished by judicial proceeding and all of the donee’s proceeds (citation omitted) from a subsequent sale or exchange of the property are used by the donee organization in a manner consistent with the conservation purposes of the original contribution.” (emphasis added)

The Regulations are silent on the subject of amendments that maintain or enhance the conservation purposes of the easement, which is the objective of the vast majority of amendments that we have seen in Vermont.¹ Commentators even disagree on whether judicial review is a requirement or simply a “safe harbor”.

Second, S.119 is not retroactive in the sense that amendments already completed under existing law will continue in effect. S.119 establishes criteria and procedures for future amendments, and in doing so fills in a major gap in Vermont’s existing conservation easement law.

Third, S.119 does not give land trusts any new right or authority to amend conservation easements beyond what is required by the easement itself or the authority existing under current law. The effect of S.119 is to limit their existing authority by requiring notice and third-party review and approval of certain (ie, Category 2 and 3) amendments.

Fourth, if S.119 is enacted, land trusts must still comply with all applicable federal laws and regulations. At the same time, there is nothing in S.119 which will prevent land trusts from meeting that obligation.

Fifth, land trusts and owners of conserved land are free to negotiate at any time new provisions that place additional limitations on amendments, which then will be recognized in the S.119 process. If S.119 is enacted, most of those amendments should fall under Category 1 and not require any third

¹ The exceptions have been minor adjustments in the boundaries or uses of conserved properties to accommodate some other public purpose (eg, a road realignment for public safety or placing cell antennas on farm silos for public use) when those adjustments will have little or no impact on the conservation purposes of the easement.

party review. Land trusts may also document their correspondence and oral conversations with donors to ensure that future administrators of the easement are aware of those discussions.

Sixth, UVLT's request that certain types of amendments be exempt from the legislation represents a significant departure from the principle adopted by the Easement Amendment Working Group that all conservation easements, regardless of how they were created or who holds them, shall be subject to the amendment provisions in S.119. The only exemptions included in S.119 are amendments where the easement is subject to eminent domain or where the easement document requires a different amendment procedure and that procedure includes public notice and an opportunity for members of the public to state their views (eg, approval by the Legislature).

Finally, if a donor feels aggrieved that a land trust has acquired an easement through misrepresentation or has breached its contract by amending an easement, the donor may seek restitution under Section 6334 of the legislation. The fact that the Vermont Attorney General has never received a complaint about an amendment and that the Vermont Land Trust continues to receive an average of 20-30 easement donations a year suggests that amendments are being employed in a judicious and appropriate manner. S.119 will help ensure that that practice continues, but through a more open and transparent process.