To: The House Judiciary Committee
From: Geoffrey Gardner

Subject: Senate Bill 119: An act relating to amending perpetual conservation easements

To the Committee:

I have been a member of the West Fairlee Conservation Commission and the West Fairlee Planning Commission for the past four years. Before this I was a member of the Sullivan, New Hampshire Planning Board for five years. Because of this experience, I am well aware of the critical role conservation easements on ecologically valuable private lands have played and, I hope, will continue to play in our State's and the region's overall conservation planning and strategy. I am writing because Senate Bill 119, which you are now considering, should it pass into law, would place this crucial function of conservation easements in jeopardy. I am entirely opposed to this legislation, and I don't think any number of amendments, no matter how well tuned they might seem, will overcome the flaws of this wholly unnecessary legislation.

Senate Bill 119 is poorly constructed law and should not pass for the following reasons:

1. At bottom, only two arguments have been offered by the bill's proponents for why it is necessary. The first is that there presently is no single law that deals with amending conservation easements and this is inconvenient. I don't think this is true, and even if it were true I don't think mere inconvenience is ever sufficient reason for legislation to be enacted. In fact, there is a body of coherent case law which provides clear guidance for groups and individuals seeking to amend existing conservation easements. And by nearly all accounts the present system of judicial review of amendments works well and without serious problems. The second argument offered for enacting this law is that unforeseen changes in the future could mean that the terms of conservation easements might need amending. But this has always been true, and no one has shown how this law foresees the unforeseeable any more accurately than current law can or how it would accommodate change more justly and reasonably than current law does.

What S. 119 really changes is twofold: 1) this bill would change —that is, it would weaken-- the status and force of the original terms of a conservation easement when amendment is being considered, and 2) it would change the branch of government that will make determinations about amendments to conservation easements. Both changes will have the effect of weakening the guarantee that the original grantor's intentions will be protected and enforced in perpetuity. S. 119 reduces

the original grantor's wishes and intentions from their present status as the consideration that on the face of it carries the greatest weight to one among a number of other equal factors to be considered. Moving final determination out of the courts and placing it squarely in the executive branch will subject the whole matter of amending conservation easements to political —including economic— considerations, and this is precisely what people granting conservation easements are seeking to avoid for their land —forever.

2. The problems with this bill begin with its stated purpose:

§ 6301. PURPOSE

It is the purpose of this chapter to encourage and assist the maintenance of the present uses of Vermont's agricultural, forest, and other undeveloped land and to prevent the accelerated residential and commercial development thereof;
to preserve and to enhance Vermont's scenic natural resources; to strengthen the base of the recreation industry and to increase employment, income, business, and investment . . .

The trouble with this is that it puts increasing "employment, income, business, and investment" on an equal footing with the conservation purposes of conservation easements. Present law understands that land, habitat and natural resources conservation have an economic value. This is why donation of land or the development rights to land to conservation organizations counts as a tax deduction. To add further, vague and non-specific economic values beyond the very specific conservation and ecological values mentioned here muddies the conservation waters by adding potentially extraneous and non-conservation considerations to determinations about amending conservation easements.

Similarly, S. 119 continually refers to "other public values" than the conservation values specifically mentioned in the bill. For example, in § 6301a Definitions, (15), there is this language:

Protected qualities" means natural, scenic, agricultural, recreational, or cultural
qualities and resources and other public values protected by a conservation easement.

These unspecified "other public values" are mentioned throughout the definitions and elsewhere in the bill as on a par with the conservation values the bill seeks to protect. This seems to open consideration of amending conservation easements to matters beyond conservation considerations. If there is a public need that outweighs the terms of a conservation easement, it would seem that the appropriate place for

that to be decided would be in an eminent domain proceeding before a judge and not before an executive branch panel with many political appointees. In cases, where the public need does not reach this far or this deep, it has usually been possible for owners and holders of easements to agree on easement amendments that satisfy the public need with the approval of a judge.

3. People enter into conservation easement agreements with land trusts and other conservation organizations to protect their property in specifically enumerated ways from development that would encroach the conservation values they find in their land regardless of political whims or the wishes of their heirs or successor owners. Conservation organizations enter these agreements with owners because they agree with the principles underlying an easement, and they agree to uphold, enforce and monitor the terms of the easement. The State honors and enforces the terms of the easement because it recognizes the conservation values —including their economic value— embodied in the easement.

S. 119 has the effect, with respect to so-called "category 3" amendments, of opening easements to deals and bargaining among holders of easements, heirs or other successor landowners and government officials for whatever reasons they agree to and regardless of the wishes and intentions of the original grantor. This is because the original intentions of the grantor as enshrined in the easement are reduced by S. 119 to a consideration no greater than any of the others set out in § 6328,(h) 1 & 2. Under the various provisions of the bill, this can reach as far as a particular property being released entirely from all the provisions of the conservation easement originally granted by the landowner and accepted by the holder of the easement. This bill clearly would allow, and foresees, the supposed advantage of trading the conservation protections of a specific property under an easement for protection of some other property that the administrative panel, the easement holder and the present landowner agree to be of greater value —conservation value or some "other public values"-- so long as making this trade

(A) is consistent with the public conservation interest;

(B) is consistent with the purposes stated in section 6301 of this chapter

This clearly betrays the underlying intention of all landowners who have granted conservation easements. Landowners certainly do this because it is consistent with "the public conservation interest" and at least some of the purposes enumerated in 6301 of the bill. But primarily they are concerned with preserving their land and conserving the specific values mentioned in their easement, regardless of the wishes of heirs and other successor owners, the conservation organization that holds the

easement, or appointed public officials. If the guarantee that a property owner's wishes for his or her land is no longer secure in perpetuity — meaning "forever"-- under a conservation easement, there will be no reason for owners to grant conservation easements at all. And the effect of this in the long run will be that "the public conservation interest" will be less well served under S.119 than it has been till now.

4. Finally, there is no question that the market value of many properties under conservation easements would increase if these properties were released from some or, especially, from all requirements of the easement. Without imputing devious motives to any party in particular, this is a lever an easement holder or some political interest could push hard on to bring an owner into the fold to help seek amendment to accomplish some project or plan. The only stipulation to prevent this in S. 119 is the provision that the Panel will approve amendment only if it finds it "will not result in private inurement or confer impermissible private benefit under 26 U.S.C. § 501(c)(3)." And again this is far too vague and non-specific. Even if an owner made far more money selling off a property formerly protected under a conservation easement than what he or she paid for it, a defense against this provision of S. 119 could readily be that if the property sold for its market value the proceeds from such a sale do not count as windfall profits. In any case, I don't believe that members of this committee or this legislature will want to be responsible for enacting a law that could provide the financial grease that might allow interests that prefer their notions of how to advance "public conservation values" to obliterate what till now have been the legally binding wishes of owners with respect to their own land as set out in conservation easements.

Respectfully submitted,

Geoffrey Gardner