

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 1

Sec.	As Passed by the Senate
1	This section would redesignate chapter 155 of title 10 to read: Acquisition of Interests in Land by Public Agencies <i>and Qualified Organizations</i> .
2	This section would designate sections 6301 through 6311 of title 10 as: Subchapter 1. General Provisions.
3	This section would amend the purpose section of chapter 155 of title 10 “to encourage the use of conservation and preservation easements” as a means to support farm, forest, and related enterprises.
4	<p>This section would amend the definitions section of chapter 155 of title 10 by adding definitions, including the following:</p> <ul style="list-style-type: none">• “Amend” or “amendment” would mean a modification of an existing conservation easement, the substitution of a new easement for an existing conservation easement, or the whole or partial termination of an existing conservation easement.• “Conservation easement” would mean a conservation right or interest that is less than a fee simple interest and that restricts the landowner’s use or development of land in order to protect the land’s natural, scenic, agricultural, recreational, or cultural qualities or resources or other public values. The term excludes interests in fee simple, leases, restrictive covenants not held by a qualified organization, rights-of-way, spring rights, timber harvesting rights, and similar affirmative rights to use or extract resources from the land. The term also excludes trail easements and other public recreational rights unless those easements or rights are included in the stated purposes of a conservation easement.• “Holder” would mean a state agency, a qualified organization, or a municipality that possesses a conservation right or interest, and the term includes all coholders of a conservation right or interest.• “Protected property” would mean real property that is subject to a conservation right or interest.• “Protected qualities” would mean natural, scenic, agricultural, recreational, or cultural qualities and resources and other public values protected by a conservation easement.• “Public conservation interest” would mean the benefits to the public, the environment, and Vermont’s working landscape afforded by conserving land for its natural, scenic, or agricultural qualities, its recreational or cultural resources, or other public values, and also includes investments in a conservation easement made by a state agency, a municipality, and a qualified organization.

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 2

Sec.	As Passed by the Senate
5	This section would provide that if a holder of a conservation easement is or becomes the owner in fee simple of property subject to the easement, the easement shall continue in effect and shall not be extinguished.
6	This section would provide that conservation rights and interests shall not be affected by any tax lien which attaches to the property subsequent to the recording of the conservation rights and interests in the municipal land records.
7	<p>This section would create processes for amending conservation easements.</p> <p><u>§ 6321:</u></p> <p>This section would state that the purpose of subchapter 2 of chapter 155 of title 10 is to create a process for amending conservation easements.</p> <p><u>§ 6322:</u></p> <p>This section would provide that conservation easements shall not be amended without the written approval of the landowner and each holder and that conservation easements shall only be amended in accordance with this chapter, however, the following easement amendments would be exempt from this chapter:</p> <ul style="list-style-type: none">• any amendment of a conservation easement that requires the approval of the General Assembly or is part of a land transaction that requires such approval;• any amendment of a conservation easement that was originally required by a federal, state, or local regulatory body; and• any amendment that is the result of the exercise of a right of eminent domain granted under the Vermont Constitution. <p><u>§ 6323:</u></p> <p>This section would establish an Easement Amendment Panel as a panel of the Vermont Natural Resources Board (VNRB). The Panel would consist of 5 members, including the Chair of the VNRB, 2 members of the VNRB chosen by the Governor (terms contemporaneous with terms on Board), 1 member appointed by the Governor from a list of candidates provided by qualified organizations (4 year term), and 1 member appointed by the Governor from a list of candidates provided by the Vermont Housing and Conservation Board (4 year term). There would also be 2 alternates appointed by the Governor to the Panel. Additionally, each member</p>

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 3

Sec.	As Passed by the Senate
	<p>of the VNRB not appointed to the Panel would serve as an alternate to the Panel.</p> <p>The section would require that the Governor seek to appoint members to the Panel who are knowledgeable about agriculture, forestry, and environmental science.</p> <p>The section would prohibit a person from serving on the Panel if that person was employed by a holder during the 12 months preceding appointment. The section would also prohibit a Panel member from participating in a matter before the Panel if the member had a conflict of interest.</p> <p>The section would require that Panel decisions be made promptly in writing and that the Panel keep a recording of its proceedings.</p> <p>The section would provide for per diem compensation to Panel members in accordance with section 1010 of title 32 (\$50.00 per day).</p> <p>The section would state the Panel’s powers to:</p> <ul style="list-style-type: none">• allow entry upon lands under or proposed to be under the conservation easement for the purposes of investigation;• adopt rules of procedure and substantive rules, and interpret and carry out the easement amendment subchapter. <p>This section establishes the following filing fees:</p> <ul style="list-style-type: none">• \$100.00 for a request for review of a Category 2 amendment; and• \$250.00 for a petition for approval of a Category 3 amendment; a request for review of a holder’s decision; and a request to revoke an easement amendment. <p>The section would also grant the Panel the power to assess costs to persons before the Panel to cover the Panel’s costs related to the filing including per diems, providing notice, holding hearings, etc. Persons assessed costs by the Panel could petition the Environmental Division to review the costs. The filing fees and costs would be deposited in the Act 250 Permit Fund.</p>

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 4

Sec.	As Passed by the Senate
	<p><u>§ 6324:</u></p> <p>This section would summarize the 3 types of conservation easement amendments: Category 1, 2, and 3 amendments.</p> <p><u>§ 6325:</u></p> <p>This section would define a Category 1 amendment as an amendment to an existing conservation easement that has a beneficial, neutral, or not more than a de minimis negative impact on the protected qualities under the existing easement. Such an amendment may be approved by the holder and landowner without notice to or review by an independent entity. Category 1 includes amendments such as:</p> <ul style="list-style-type: none">• placing additional land under the easement;• enhancing the protected qualities under the easement; and• correcting typographical or clerical errors in the easement without altering the intent of the easement. <p>This section would exclude from the definition of Category 1 amendments, those amendments that by the express terms of the conservation easement require approval by court order.</p> <p><u>§ 6326:</u></p> <p>This section would define a Category 2 amendment as an amendment that the holder reasonably believes will have not more than a de minimis negative impact on the protected qualities under an existing easement but that does not clearly meet the definition of a Category 1 amendment.</p> <p>This section would exclude from the definition of Category 2 amendments, those amendments that by the express terms of the conservation easement require approval by court order.</p> <p>The section would require a holder seeking a Category 2 amendment to submit a request for review to the Panel. In the request the holder would have to certify that the amendment:</p> <ul style="list-style-type: none">• is consistent with the public conservation interest and the conservation purpose and intent of the easement;• complies with all applicable federal, state, and local laws;

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 5

Sec.	As Passed by the Senate
	<ul style="list-style-type: none">• does not result in private inurement or confer impermissible private benefit;• has a net beneficial, neutral, or not more than a de minimis negative impact on the protected qualities under the existing easement; and• is consistent with the documented intent of the donor and grantor. <p>The section would require the Chair to review the request and notify the holder and landowner that either:</p> <ul style="list-style-type: none">• no further review by the Panel is required;• more information is needed to complete review; or• the holder must seek approval of the amendment as a Category 3 amendment. <p>The section would allow the Panel to adopt rules allowing certain Category 2 amendments to proceed as Category 1 amendments.</p> <p><u>§ 6327:</u></p> <p>This section would define a Category 3 amendment as an amendment that removes a protected quality from the easement, changes the hierarchy of the easement’s stated purpose; or materially reduces the safeguards afforded to the protected qualities under the easement.</p> <p>A holder has three options to seek a Category 3 amendment. The holder may:</p> <ul style="list-style-type: none">• file a petition for approval and obtain the approval of the Panel;• file a petition for approval and obtain the approval of the Environmental Division; or• notify the Panel that the holder will be conducting a holder’s public review process and completing that review process and any review by the Panel. <p><u>§ 6328:</u></p> <p>This section would create the process for petitioning the Panel for approval of a Category 3 amendment. The petition to the Panel would need to include a copy of the existing easement and proposed amendment, an explanation of the purpose and effect of the amendment, and other pertinent information, and the petition would need to be signed by each holder and the landowner.</p>

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 6

Sec.	As Passed by the Senate
	<p>The section would require the petitioner to send copies of the petition to additional individuals and entities including the Attorney General, the Vermont Housing and Conservation Board, the Agency of Agriculture, the Agency of Natural Resources, the local legislative body and planning commission, and all persons who originally conveyed the easement.</p> <p>The section would require the petition to be posted on the Internet and for the Panel to publish notice of the petition in at least one area newspaper. The section would list what must be included in the Panel’s notice, including: a description of the property; a summary of the proposed amendment; and the date, time, and place of the public hearing that the Panel proposes to hold.</p> <p>The section would require the Panel to hold a public hearing, which would not be considered a contested case, if any person requested a public hearing or if the Panel determines that a hearing is necessary. Any person would be permitted to participate in this hearing. The Panel would have the power to issue a subpoena to compel a petitioner to make available relevant records pertaining to the conservation easement and the proposed amendment.</p> <p>In proceedings under this section, the Panel would have to consider all circumstances and information that may reasonably bear upon the public conservation interest in upholding or amending the conservation easement, such as: whether a material change in circumstances has taken place since the easement was conveyed or last amended, the existence or lack of reasonable alternatives to address the changed circumstances, and the documented intent of the donor or grantor.</p> <p>The Panel would approve an amendment if it found, by clear and convincing evidence that the amendment:</p> <ul style="list-style-type: none">• is consistent with the public conservation interest;• is consistent with the purposes of this chapter;• will not result in private inurement or confer impermissible private benefit;• will result in adequate compensation to the holder;• meets at least one of three subcriteria; and• complies with more restrictive conditions contained in the conservation easement. <p>After the hearing, or after a determination without a hearing, the Panel would issue its written decision. The Attorney General would be permitted to request reconsideration of the Panel’s decision.</p>

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 7

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	<p>This section would require the Panel, when reviewing an amendment to a conservation easement, to apply conditions included in the express terms of the conservation easement that are more restrictive than or different from the criteria included in this chapter.</p> <p>The section would require that if a decision approves an amendment that terminates an easement in whole or in part, the Panel shall require that the holder apply any monetary compensation to achieve a similar conservation purpose.</p> <p><u>§ 6329:</u></p> <p>This section would allow a holder to file a petition for approval of a Category 3 amendment with the Environmental Division of the Superior Court. The section would also require a holder to file a petition for approval of an easement amendment with the Environmental Division, if, by its express terms, the easement provides that the proposed amendment may only be approved by court order.</p> <p>Under the section, the petition would be required to include the same information and be served on the same persons as required for a petition to the Easement Amendment Panel. Notice would also have to be provided to adjoining landowners. Additionally, when deciding whether or not to approve an amendment, the Environmental Division would consider the same information and apply the same criteria enumerated under the previous section regarding petitions to the Panel.</p> <p>This section would require the Environmental Division, when reviewing an amendment to a conservation easement, to apply conditions included in the express terms of the conservation easement that are more restrictive than or different from the criteria included in this chapter.</p> <p><u>§ 6330:</u></p> <p>This section would establish a public review process conducted by the holder for Category 3 amendments. Such process would be conducted in lieu of a public review process conducted by the Panel and only if all holders agreed to use such process.</p> <p>Under the section, the easement amendment proposal would be required to include basically the same information as required for a</p>

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 8

Sec.	As Passed by the Senate
	<p>petition to the Easement Amendment Panel. The holder would have to provide public notice of the proposal and the public hearing on such proposal. The holder would have to send copies of the easement amendment proposal to the same persons that must be sent notice of a petition to the Panel. Notice would also have to be provided to adjoining landowners. Any person would be permitted to participate in the holder's public review process.</p> <p>The section would require that if all of the holders approve the amendment, the holders shall prepare a written decision that:</p> <ul style="list-style-type: none">• explains the changes that have been approved;• considers the same information that the Panel must consider;• applies the same criteria that the Panel must apply;• lists all the persons who participated in the public review process; and• summarizes any objections to the amendment and how they were addressed. <p>The holder would have to file its decision with the Panel with a certification that the holder has complied with this section. The holder would have to send notice of its decision to the same persons that must be sent notice of a petition to the Panel.</p> <p><u>§ 6331:</u></p> <p>This section would grant the following persons the right to appeal a holder's decision:</p> <ul style="list-style-type: none">• the Attorney General;• the person who originally conveyed the easement if the person received a tax deduction;• the legislative body of the municipality where the property subject to the easement is located; and• any person who participated in the holder's public review process. <p>A request for review of the holder's decision would have to make a prima facie showing that the holder's decision is not in the public conservation interest. If the Panel reviews the amendment, it shall review the amendment as a Category 3 amendment.</p>

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 9

Sec.	As Passed by the Senate
	<p>The section would allow a holder to request a written certification from the Panel that the holder complied with the required certifications.</p> <p><u>§ 6332:</u></p> <p>This section would give the Panel the power, on its own initiative or by request, to revoke amendments approved by the Panel or through a holder’s public review process.</p> <p>The Panel would be permitted to revoke an amendment if it found:</p> <ul style="list-style-type: none">• noncompliance with the easement amendment decision of the Panel;• noncompliance with the holder’s decision following a holder’s public review process;• failure of a holder to disclose all relevant and material facts during the review process;• misrepresentation by a holder of any relevant and material fact; <p>The section would also give the Attorney General and the Panel the power to petition the Environmental Division to revoke an amendment approved by the Division. The Division would be permitted to revoke an amendment if it found any of the issues listed above in relation to an amendment approved by the Division.</p> <p><u>§ 6333:</u></p> <p>This section would allow a final decision of the Panel or the Environmental Division to be appealed to the Vermont Supreme Court within 30 days of the decision’s issuance.</p> <p>The following persons would be eligible to appeal such decision:</p> <ul style="list-style-type: none">• the holder;• the landowner;

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 10

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	<ul style="list-style-type: none">• the Attorney General;• the Panel (in certain situations); and• the persons who originally conveyed the easement if the easement contained any accepted donor-imposed restrictions. <p>This section would prohibit the Supreme Court from considering any objections not raised before the Panel or Environmental Division except in extraordinary circumstances.</p> <p>The Supreme Court would only be able to reverse a decision if it was clearly erroneous or if there was a clear abuse of discretion.</p> <p><u>§ 6334:</u></p> <p>This section would state that a decision by the Panel or the Environmental Division on an amendment shall not affect any right of a person who has personally or directly contributed to the holder’s acquisition of the easement to seek restitution in a court of competent jurisdiction of the contribution based upon misrepresentation or breach of contract on the part of the easement holder.</p> <p><u>§ 6335:</u></p> <p>This section would require each state agency to provide the General Assembly with a report of any easement amendments made during the previous year.</p>
8	This section would give the Environmental Division of the Superior Court original jurisdiction to approve, revoke, and deny easement amendments made pursuant to chapter 155 of title 10.
9	This section would require the Vermont Housing and Conservation Board to amend and terminate easements only in accordance with chapter 155 of title 10.
10	This section would get rid of the requirement to rerecord conservation and preservation rights and interests every 40 years.

S.119 – An Act Relating to Amending Perpetual Conservation Easements

Elizabeth McDonald, Law Clerk, April 25, 2013

page 11

Sec.	As Passed by the Senate
11	This section would amend a cross reference to include additional references to conservation rights and interests in the Vermont statutes.
12	This section would direct the Governor to appoint the members of the Easement Amendment Panel by October 1, 2013.
12a	This section would amend the Act 250 Permit Fund to allow it to receive the filing fees and costs collected by the Easement Amendment Panel.
13	The sections of this act governing the appointment and powers of the Easement Amendment Panel would take effect on passage. The remainder of the act would take effect on January 1, 2014.