

March 14, 2014

To: House Judiciary Committee
House Agriculture Committee
House Natural Resources Committee
Senate Natural Resources Committee
Senate Agriculture Committee

From: Crea Lintilhac

Re: S.119 Amending Perpetuity

Dear Legislators:

I'm writing to you after reading S.119 as passed by the Senate, as well as testimony related to the bill. I have also read Op Eds, and comments about this bill in various news articles. I'm attaching a link to a recent VTDigger article. <http://vtdigger.org/2014/02/23/echeverria-milne-mclaughlin-straight-talk-conservation-easements/>

The following are my concerns that I'd like to share regarding the bill.

This bill, by allowing the restrictions on one property to be lifted for the protection of another property, would fundamentally change the idea of what a conservation easement is. Although any swap authorized by the bill would presumably have to achieve a net neutral or positive degree of protection, it would only have to do so in the aggregate. This tradable approach to conservation easements runs dramatically counter to the traditional concept that each conservation easement provides protection *in perpetuity* for the particular property on which the easement was granted. Under the proposal, the perpetual protection would apply to public conservation interests in general, but not necessarily on the original property. There's a big difference between protecting a specific piece of land in perpetuity and protecting a general cause in perpetuity. This reorientation of the meaning of "in perpetuity" would unfairly upset the expectations of landowners who have granted easements in the past, and it runs the risk of discouraging landowners from granting conservation easements in the future. It also runs counter to the public rhetoric of VT land trusts that they are in the business of protecting the specific lands being donated by their easement donors.

While land trusts and landowners may need some latitude to revise the terms of conservation easements in the future to adapt to changed circumstances, courts are best suited to handle this task when easements present tough issues. Courts can apply the legal doctrines that allow for changes if the conservation purposes of an easement become impossible or impractical to achieve. S. 119 instead would allow a state administrative panel, constituted by appointment, to govern the amendment or termination process and to use a standard that is much less stringent than that which a court would apply. It would also give a land trust the option of effectively constructing its own process, the results of which would carry a presumption of correctness. Tough amendment and termination decisions should require rigorous, objective judicial review.

Allowing the amendment, termination, or swapping of easements as provided in S. 119 would put unsuspecting donors at serious risk of violating federal law and grave difficulties with the IRS. It is my understanding that a basic requirement of the tax code is that easements must be perpetual in order for the donor to be eligible for a tax deduction. S.119 could jeopardize donors' ability to claim deductions and even expose them to damaging audits and litigation because it could imply that easement donations on their land in Vermont are not perpetual. If Vermont wants to promote the voluntary protection of land through the donation of conservation easements, it should not put its landowners at risk of disputes with the IRS.

The spirit of S. 119 also runs counter to the requirements and expectations of federal funding agencies that have provided generous financing for the purchase of conservation easements on farmland and forestland on condition that the land will be protected in perpetuity. Vermont should not proceed with legislation that could render Vermont's efforts to protect open space ineligible for this generous support.

As my family considers putting some of our land under conservation easement, we now have serious concerns about moving forward with this plan if S.119 passes. We suspect that many other landowners will also be reluctant to place easements on their land if this bill were enacted. I urge the committee to think very carefully about negative unintended consequences. As a friend recently wrote,

“Through centuries of trial and error the common law has learned how to create and convey interests in real estate so that land owners can enjoy a high degree of certainty in what they own. Tampering with this system usually produces unintended and unfortunate consequences. “

Respectfully,

Crea Lintilhac