Testimony – VT Digger Commentary
John Echeverria
February 20, 2014

I would appreciate it if you could put on the committee testimony site this posting to VT Digger from myself, Janet Milne, and Nancy McLaughlin relating to S. 119. If possible, I would also appreciate it if you could distribute this to the chairman and the other members of the committee

Thank you.

John Echeverria

http://vtdigger.org/2014/02/11/gil-livingston-careful-public-review-will-allow-conservation-easements-evolve/#comments

Vermont Digger, February 20, 2014

In response to our commentary in VT Digger on February 10 addressing S. 119, Gil Livingston, President of the Vermont Land Trust, provided his own commentary in rebuttal on February 11. Mr. Livingston has offered various bromides apparently designed to allay concerns that legislators, easement donors, land trust supporters, and members of the general public may have about S. 119 as a result of reading our criticisms. With all due respect, we think Vermonters deserve more direct responses to the serious concerns we have raised about the bill.

First, Mr. Livingston repeatedly refers to the bill as involving "amendments" to conservation easements, implying that the bill only permits modifications to individual easements that would not destroy the easements or alter their fundamental character. But the bill specifically defines "amendments" to include "the whole or partial termination of an existing conservation easement" and "the substitution of a new easement for an existing conservation easement."

Thus, S. 119 would allow a land trust to use the process established by the bill to terminate an easement that a conservation donor gave to the land trust to permanently protect his or her land, provided the land trust gets paid and uses the money to conserve other land somewhere else. This would defeat the objectives of individual easement donors who intended to permanently protect specific lands that have special significance to them and their communities. Mr. Livingston needs to own up to the fact that the bill he supports involves much more than the benign easement "amendments" he alludes to in his commentary.

Second, Mr. Livingston does not respond to our objection that the bill would represent a breach of the fiduciary duty a land trust owes to its conservation easement donors when the land trust accepts easement gifts. Based on his silence, we understand Mr. Livingston to take the position, expressly adopted by other supporters of this bill, that a land trust has no legal duty to uphold a conservation easement donor's goals once the land trust has secured the easement gift from the

donor and, instead, can seek to terminate the donor's easement so that it can pursue the protection of other lands.

We think that position is wrong as a matter of law – not to mention disheartening to the many easement donors who think they can rely on a land trust to uphold their conservation objectives. In contrast with Mr. Livingston's position, other leaders in the land trust community recognize that land trusts do owe a fiduciary duty to donors of conservation easements. Legislators, the general public as well as prospective future donors of conservation easements need to understand that this bill is built on the problematic premise that land trusts have no legal duty to uphold the wishes of easement donors.

Third, Mr. Livingston does not respond to our concern that passage of this legislation would raise a serious risk of rendering easement donations in Vermont ineligible for the favorable federal tax incentives available to easement donors in other states. Nor does he acknowledge that the risk of noncompliance with federal tax rules and the emotional and financial costs of dealing with the Internal Revenue Service on audit would fall, not on him or the Vermont Land Trust, but on unsuspecting Vermont landowners making easement donations.

A few years back, in response to reports of abuse in Colorado of the federal incentives available to conservation easement donors, the Internal Revenue Service audited the tax returns of hundreds of individual landowners in that state who had made charitable donations of easements. The fallout from those audits and subsequent litigation is still being felt by many Colorado landowners. Enactment of S. 119, which we believe does not comply with the federal tax law's perpetuity requirements, could bring similar devastating IRS scrutiny to easement donors in Vermont.

We think the federal tax rules are clear and that the proposed legislation does not comply with those rules. Mr. Livingston and others may disagree. But they at least need to acknowledge that there is a serious risk that the bill does not comply with federal law and demonstrate why Vermont landowners should be subjected to such a risk when it is so easy to avoid.

Fourth, Mr. Livingston is, at best, only half right in asserting that current law contains "vague standards" for reviewing potential easement amendments and that the proposed bill would establish "clear, rigorous standards." We agree that the Vermont legislature could usefully improve the process and standards governing certain easement amendments. But with respect to easement termination, the bill would replace the clear process and standards provided in both federal and state law (judicial proceeding and a finding of impossibility or impracticality, with a great deal of precedent defining this venerable standard) with loose, vague standards, just the opposite of what Mr. Livingston asserts.

Fifth, Mr. Livingston cites various standards in the bill that he suggests would limit the type and number of easement amendments and terminations, but those standards are so vague (for example, "consistent with the public conservation

interest") that they impose no real constraints. Advocates for the bill suggest that the kind of destructive easement terminations and swaps the bill expressly authorizes would "never happen." But the personal assurances of individuals who will inevitably retire, change jobs, or otherwise pass the baton of land trust leadership to others is cold comfort in light of the fact that the bill would expressly authorize such terminations and swaps.

Finally, it is nonsensical for Mr. Livingston to describe the proposed process for addressing easement swaps, terminations, and amendments as being "in the spirit of our town meeting form of democracy." Under S. 119, a 5-person state panel would be responsible for reviewing land trust proposals to terminate or amend conservation easements, with a portion of the membership of that panel nominated by the same land trusts submitting the applications to terminate or amend easements. Local towns and individual citizens could voice their opinions, but they would have no vote on whether easements should be transferred from their communities to other parts of the state.

To make matters worse, land trusts could routinely circumvent the state panel process. Under the bill, the land trust itself could run a "public process" to approve the termination or amendment of an easement on conserved land. While the land trust's decision could subsequently be appealed to the 5-person panel, S. 119 would require the panel to apply a "presumption" that the land trust's decision was in the broadly defined "public conservation interest" and should be upheld. This is the worst kind of insider process – the very antithesis of an open, democratic Vermont town meeting.

We recognize and agree with Mr. Livingston that conditions change and there needs to be a rigorous, transparent process by which conservation easements can be amended over time in light of changing circumstances. But S. 119 would go far beyond those objectives. Vermonters deserve more limited, carefully crafted legislation that will allow conservation easements to adapt over time and at the same time comply with applicable federal and state laws and honor the promises that have been made to conservation donors.

We acknowledge that our words in response to Mr. Livingston's commentary may seem harsh to some. But we believe the serious flaws in the bill and the lack of clarity in the public discussion surrounding it warrant some straight talk.

John Echeverria
Janet Milne
Nancy A. McLaughlin