MEMORANDUM

To: Members of the General Assembly
From: Robert Klein, Chair, Easement Amendment Working Group
Date: January 15, 2013
Subject: Easement Amendment Working Group (Pursuant to S.179)

**1. Introduction**

Through the passage of S.179 in 2012, the Vermont General Assembly established a "working group on perpetual conservation easements to study the issues relating to the creation of a formal and transparent public process for the amendment of perpetual conservation easements, the criteria for approving such amendments, and the entity most appropriate to review and approve such amendments."

Further, it directed that this Working Group be comprised of sixteen members, chosen to represent the most likely stakeholders affected by this issue (see **Appendix A**). The Vermont Housing and Conservation Board ("VHCB") was charged with providing this Working Group with administrative and technical assistance, and VHCB was also asked to convene the Working Group's first meeting.

Finally, the Working Group was required to report its findings, recommendations, and proposed statutory revisions to the General Assembly -- and to the House and Senate Committees on Agriculture and on Natural Resources and Energy -- on or before January 15, 2013.

This document is that report, and proposed statutory revisions which embody the Working Group's recommendations are included as Section 11 below.

**2. The Working Group Process**

The Working Group on Conservation Easement Amendments convened monthly between July and January 2013. It chose a Chair, created subcommittees, considered law journal articles, reviewed statutes of other states, heard from outside experts, drafted material between meetings, and discussed the pros and cons of assorted approaches to amending conservation easements in Vermont. Relevant reading materials were posted on VHCB's website.

**3. Conservation Easements**

Conservation easements are legal, recorded restrictions placed on real property to conserve various attributes of public value. Easements may address a wide variety of natural resources, such as farmland, working forests, natural areas, wildlife habitat, scenic views, open space, aquifer recharge areas, undeveloped shorelines, cultural and/or historic features, and more. Conservation easements typically consist of permanently enforceable rights which are deeded

to a land trust or government agency, the "easement holder." Like other interests in real estate, conservation easements are recorded in land records.

Conceptually, transferring a conservation easement is often equated with giving up "development rights," thereby defining what future development may happen on a property. In addition, easements often limit other potentially negative land uses such as mining, excavating, road building, dumping, and subdividing. Other uses, such as logging or the construction of agricultural buildings outside the designated farmstead, may be permitted with the easement holder's approval. The owners of properties subject to these arrangements still own the lands thus "restricted," but they may only use their properties in ways consistent with their particular conservation easement's covenants. These landowners may sell or otherwise convey their restricted properties, and since conservation easements run with the land in perpetuity, all future landowners must also abide by these same terms.

Land trusts and public agencies can use conservation easements to limit specific incompatible land uses without needing to own the lands involved. In many instances, this may be their best conservation option. This arrangement can work well for landowners, too, since conservation easements leave them with fee ownership and a host of desirable and/or profitable land uses. As a land conservation tool, conservation easements have proven to be a useful and cost-effective alternative to regulation, tax policies, and outright land acquisition. A sample conservation easement is included here as **Appendix B.**

The legality of conservation easements as rights in real property is governed by state law, in Vermont's case by Title 10 V.S.A. Chapters 34 and 155. This law applies to all conservation easements, though the circumstances surrounding the original conveyance of an easement may vary. For example, conservation easements can be purchased by public agencies and land trusts, can be donated (in whole or in part) by landowners to qualified tax exempt organizations, can be "extracted" when a land trust sells a property subject to a retained easement in its own name, or can be required by regulatory action where a developer is required to conserve land as part of a development project that seeks a permit. For example, Vermont's Agency of Natural Resources holds dozens of easements granted by developers who were required to conserve certain lands by Act 250 and other state-level regulations.

The federal tax deductibility of conservation easement gifts is governed by federal law, 26 U.S.C. § 170(h) (2006), and Treas. Reg. § 1.170A-14 (as amended in 2009). Generally, this law applies only to easements which are donated, in whole or in part, where the donor claims a charitable income tax deduction on his/her federal income tax return for the fair market value of the donation. Landowners who donate conservation easements have a variety of motivations, including conservation, of course. The deductibility of qualifying easement gifts against income taxes can be an important feature of these transactions. And to the extent that conservation easements reduce the value of one's estate, these transactions can reduce estate taxes and facilitate intergenerational transfers of property. The Internal Revenue Service has extremely rigorous standards for appraising the value of qualified conservation easement gifts,

and tax-exempt organizations which receive easement gifts are expected to monitor and defend them in perpetuity.

**4. Easement Amendments**

Occasionally, the parties to an existing conservation easement may wish to amend it, to revise its terms. A wide variety of reasons may trigger this. Here are some of the circumstances which have led to amendments in the past:

- A landowner and a land trust wish to correct a drafting error which has come to light, an incorrectly-described property boundary for example.

- A farmer wishes to move a reserved Farm Labor Housing site from one location to another within the easement boundaries, making no change in the net amount of acreage protected. The next site has better access and soils for septic, and doesn't adversely affect the farm's agricultural or scenic resources.

- A town would like to expand their small cemetery onto an adjacent half-acre that's now an incidental part of a state park. A sympathetic local resident is willing to donate an additional 30 acres to the state park if this can be arranged, but an easement restricting the state land would have to be amended to allow the land to be used for cemetery purposes.

- A landowner proposes adding substantially more land to an easement, in return for being allowed to build an additional house on the edge of the existing easement area.

- A landowner violates an arguably confusing easement provision, and the land trust wishes to settle the dispute by amending the easement to eliminate the ambiguity and reduce the likelihood of future violations.

- The federal government would like to add a parcel to a national wildlife refuge. They have funding, a willing landowner, and a sympathetic community. But there's an easement on the parcel in question. By federal regulation, the agency involved must always have clear title on lands it acquires, so the easement would have to be terminated before they could close the purchase.

- A land trust would like to update an "old" easement to incorporate their improved, now-current standard language. This revised language may be less restrictive in some respects, but it includes new language adopting the state's new stream buffer setbacks.

- A land trust would like to amend an easement to eliminate now-permitted agricultural uses on a section of property where a rare and endangered species has recently been documented.

- Responding to changes in the farm economy and/or in accepted farming practices, a farmer proposes dividing a large farm into several smaller units, each with a separate farmstead.
- A farmer decides that he needs to provide more housing to his employees and proposes an amendment that would allow construction of farm labor housing in the farmstead complex.
- A town has asked the landowner and easement holder to amend an existing easement to allow the realignment of a road. The change would improve public safety and reduce the town's recurring road maintenance expenses.

**5. Changing Circumstances**

These examples have something in common – they all relate to situations which were not anticipated at the time the conservation easements were originally drafted. Under given circumstances, they may be reasonable. Judging a proposed amendment may require us to balance a strict reading of an easement's terms against its broader conservation purposes, the public interest, and practicality. Although conservation easements are intended to be "perpetual," this doesn't necessarily mean that they must remain absolutely static over decades or centuries. For conservation practitioners, it's a fact of life that easements must occasionally be modified in response to changing, often unanticipated, circumstances.

The Nature Conservancy, a national conservation organization which has acquired 2,500 conservation easements since 1961, has found that over time roughly 5% of them may need amending, either to correct technical errors or in response to changing circumstances. Many of The Nature Conservancy's easements conserve "forever wild" conditions, and allow for relatively few compatible human land uses. In contrast, experience suggests that agricultural easements which involve working farms and forests may require more frequent amendments, so that landowners can better implement new technologies or respond to a changing business climate. The Vermont Land Trust, which holds more than 1,700+ conservation easements, has found that most of its significant amendments have involved working farms.

**6. Stakeholders**

Conservation easement amendments are never undertaken casually, in part because the specific terms of each easement represent an understanding that was once reached between a particular set of stakeholders. Those parties may include the original landowner; the current landowner, if the property has changed hands; the land trust and its memberships; financial contributors who supported the initial acquisition; and in many cases, neighbors and the community.

The broader public also has a stake, at least implicitly, because when conservation easement gifts are tax deductible, they represent a cost to the public – a "tax expenditure." The non-profit status of any land trust represents a tax subsidy from the public. The public has an even more explicit stake when the easement was acquired with the help of a direct grant of public funds (municipal, state, and/or federal), or when a government agency holds or co-holds the conservation easement itself.

This is common in Vermont. One of VHCB's principal mandates is to fund the purchase of conservation easements with funds appropriated by the legislature. In addition, VHCB receives Act 250 mitigation fees, and uses them to purchase conservation easements on farmland. It also invests federal Farm and Ranch Lands Protection (FRPP) funding in farmland conservation projects. VHCB currently holds over 825 conservation easements, 85% of which are co-held with land trusts. Finally, Vermont's Department of Forests, Parks, and Recreation (DFP&R) directs federal Forest Legacy Program funding into forestland conservation projects here, resulting in conservation easements held or co-held by the Department.

**7. The Need for Legislation**

In practice, amending any easement is undertaken with great caution and thought, because easement holders are entrusted with the dual responsibilities of stewarding these assets and working in the public interest. There are stakeholders to consider, there are sometimes legal issues to factor in, and there can be thorny technical issues as well. The IRS may have a role, and in some cases a decisive one. The reputations of land trusts and public agencies can be damaged if the stewardship of easements, including consideration of amendments, isn't handled with care and prudence. Proposed amendments can become contentious, confusing, and political, and the parties involved may feel "under pressure" from one quarter or another. Sometimes there is legitimate time pressure as well. The entire question is clouded by a general expectation that "easements are forever," and perhaps shouldn't ever be changed for any reason. How, when, and if to amend an easement is sometimes a difficult call to make.

Today in Vermont, these decisions are made by easement holders, working with stakeholders in their own ways and making their own judgments about what is best for everyone's interest, including the public's. Easement holders have their own rigorous procedures for addressing this, in which they endeavor to be as responsible and high-minded as possible. But under current Vermont law, we have no clear criteria or process to define when a proposed easement changes may be appropriate. There is also no opportunity for the Attorney General, public officials, or the general public to learn about a major amendment and express their views before a decision is made. The interests of the public and the land trust community would benefit, if the rules governing easement amendments were clear.

This isn't to say that our current process is flawed. So far, easement amendments haven't stirred much controversy in Vermont, and our Attorney General's office has logged no complaints about the status quo. But problems and lawsuits over easement amendments are arising in other states, and debates in the land trust community about best practices around

easement amendments have become more common and more strident. A few states, such as Maine and New Hampshire, have put in place statutory or regulatory frameworks to deal with the issue, creating objective, third-party oversight procedures, and establishing criteria to differentiate between minor easement amendments and material ones (which receive additional scrutiny).

**8. H.553 and S.179**

Companion bills to create an easement amendment framework for Vermont and to address other easement issues were introduced in the Vermont Legislature in January, 2012. Committees in both the House and Senate heard testimony from a number of conservation organizations, as well as from the Attorney General's office and State agencies. The Legislature eventually enacted the non-amendment issues in S.179, and created an external study committee, a "Working Group on Conservation Easement Amendments," to study the amendment issues and make recommendations to the Legislature by January 2013. The Working Group was also asked to examine whether Vermont should retain its requirement that easements be re-recorded every 40 years, and whether it should create a registry of easements, as has been done in some other states.

The elements of S.179 which were enacted into law in 2012 include:

- Amending the statement of policy for the Vermont Housing and Conservation Board to add language emphasizing the preservation of productive farms, farmland, and forestland for future generations.

- In the statement of purpose for land acquisition by municipalities and state agencies, adding the preservation of productive farmland, strengthening the Vermont economy, and helping to maintain historic settlement patterns.

- Establishing that an easement holder may seek damages or injunctive relief against any person who damages the easement holder's rights, regardless of whether the owner of the underlying land is a party to the proceeding.

- Creating a statutory presumption that the conveyance of an interest in real property less than fee simple is presumed to be perpetual, unless the conveyance is limited by its terms to a specific period.

- Requiring that mortgages, leases, transfers, and other conveyances of real property must reference any and all conservation rights associated with the property.

- Amending Vermont's marketable title act, so that conservation easements are not barred or extinguished due to failure to re-record a notice of the easement in the land records every 40 years.

- Allowing municipalities and state agencies to acquire and convey preemptive rights and options to purchase land or interests in land.

**9. The Working Group's Draft Bill**

The Working Group represented a broad cross-section of stakeholders. The group discussed many issues associated with easement amendments, including the three principal challenges given to us of 1) recommending a "formal and transparent process;" 2) creating "criteria for approving" easement amendments; and 3) determining the "entity most appropriate to review and approve" easement amendments. Below we describe our findings in these three key areas, and then share our thinking for a number of important associated issues. Taken together, this narrative explains the details of our legislative proposal, which is included as Section 11 below. The schematic flowcharts in **Appendix C** are included to help visualize the easement amendment process that we've proposed.

**A) The Review Process**

In general, the amendment review process consists of a voluntary public review and hearing process conducted by the easement holders followed by mandatory review of non-minor amendments. The Vermont Housing and Conservation Board ("VHCB") plans to adopt and implement an Interim Policy on Easement Amendments which calls for VHCB's Conservation Issues Committee to review and approve, approve with conditions, or deny Major Amendments. If VHCB implements this Interim Policy by Spring 2013, it is likely that VHCB, the Agency of Agriculture, Food and Markets, the Vermont Land Trust, and the Upper Valley Land Trust will begin to use this public review and hearing process and gain valuable experience while the Legislature considers the statutory language proposed by the Working Group

In addition to the voluntary public review and hearing process, the Working Group's proposed statutory language outlines a mandatory process whereby a new, 5-member panel within the Natural Resources Board will review proposed easement amendments. This language defines the panel's composition and its authority, defines which interests in land and which conservation entities are subject to this review, creates standards and criteria for conducting the reviews, and includes standards for documentation, notice, public hearings, decision making, and appeals. The panel has authority to revoke easement amendments which violate the requirements of this process. Vermont's Environmental Court is involved in certain limited circumstances. The Attorney General has the ability to petition the panel to review proposed major amendments, participate in panel or court hearings, and appeal decisions to the Vermont Supreme Court. Any amendment or termination of a conservation easement shall require written approval by both the easement holder (or holders) and the landowner.

**B) The Review Criteria**

Proposed easement amendments would be divided into three categories, depending on how material the proposed changes might be. The amendment process would vary accordingly:

Category 1 amendments clearly have a "beneficial, neutral, or not more than de minimis negative impact on the resource values protected by the existing easement." The proposed statutory language includes nine Category 1 amendments which, as a matter of law, meet this test. Category 1 amendments may be approved by the landowner and the easement holder(s), without notice to or review by the panel.

Category 2 amendments are amendments which the easement holder(s) reasonably believe will have not more than a de minimis negative impact on the resource values protected by an *existing* easement, but which are not on the list of Category 1 amendments. Proponents of these amendments must petition the panel to determine whether the panel agrees with that assessment so that no further panel review is required, or whether it will be treated as Category 3 amendments requiring full panel review.

Category 3 amendments will have more material impacts on an easement's conservation and resource values and will therefore require review and approval by the panel. The circumstances and information that the panel shall consider in determining whether to approve Category 3 amendments are spelled out. A public hearing at which people may offer opinions for or against the amendment is required, unless no request for a hearing is made and the panel decides to waive the requirement. The panel's decision must be explained in writing. A handful of parties are specifically entitled appeal the panel's decision to Vermont's Supreme Court, which may reverse the panel's decision only if it has "clearly abused its discretion"- a legal standard which gives great deference to the decision of the administrative panel.

Three thresholds common to all categories of amendments is that 1) they must be clearly in the public interest, 2) they must comply with all applicable federal, state and local laws, and 3) they may not result in private inurement or confer impermissible private benefit under 26 U.S.C. § 501(c)(3).

**C) The Reviewing Entity**

The Working Group considered the pros and cons of lodging a review panel in VHCB, in the Natural Resources Board ("NRB"), or in some independent, yet-to-be-created agency. We concluded that the NRB was the best option. The NRB is already set up to provide a review role with respect to Act 250 and to water resource regulations. Since the NRB does not hold conservation easements (as VHCB does), a panel within the NRB would not present the appearance of a conflict of interest which could reduce public confidence in its objectivity, and render its decision-making more complicated.

On the other hand, unlike VHCB, the NRB doesn't already have a depth of experience with conservation easements. But we felt that the NRB could overcome this through training, and by appointing individuals with the requisite expertise to participate in the panel.

Some thought was given to housing the review panel in Vermont's judiciary, but this seemed a cumbersome solution. Instead, we recommend giving the easement holder the option to file an amendment request with the Environmental Division of Superior Court. This will allay the concerns of some land trusts who feel that judicial review may be required by the IRS in some circumstances, or will provide a route to judicial review when an easement document itself includes language requiring this.

Wherever an easement amendment review panel is housed in state government, additional funding may be needed to support it. A fee structure for petitioners to the panel may also be appropriate. The Working Group did not investigate either of these funding questions in detail.

**D) Exemptions from Review by the Panel**

Though there are arguments for exempting various parties from this easement review process, the Working Group decided that a proliferation of automatic exemptions might weaken the effectiveness and public confidence in the review process. So, the Working Group recommends that all conservation easement holders be required to follow the same process, but that three types of amendments would be exempt:

1. An amendment which requires and receives the approval of the General Assembly either for the amendment or the underlying transaction (such as an easement involving state land);

2. An amendment of a regulatory conservation easement where both the easement and the amendment requires and receives the approval of a federal, state, or local regulatory body, including but not limited to, an Act 250 District Environmental Commission, the Public Service Board or local Development Review Board, by issuance of a land use permit, Certificate of Public Good or a zoning or other regulatory permit; and

3. An amendment that is the result of the exercise of the right of eminent domain under Chapter 1, Article 2 of the Constitution of the State of Vermont.

One question which arose during the Working Group's deliberations is what constitutes a "conservation easement." The Working Group proposes that this term exclude rights in fee simple, leases, restrictive covenants, rights of way, spring rights, timber harvesting rights and similar rights to affirmatively use or extract resources from the land. Trail

easements and other public recreational rights are included in the definition when these rights are stated as one of the conservation purposes of an easement. However, minor modifications in the location of an existing trail or other public recreational rights are included as Category 1 amendments, if the relocation of does not "materially detract from the public's access or quality of experience." This should be manageable if holders need to renegotiate their trail agreements or easements to reflect changing on-the-ground realities.

**E) IRS Issues**

The IRS grants tax-deductible status to donations of conservation easements when they protect the easement's "conservation purposes" in perpetuity. Although neither the Internal Revenue Code nor the Treasury regulations address amendments specifically, the regulations do indicate that easements may be extinguished only through judicial proceedings.

There is considerable debate within the land trust community and among legal experts as to what constitutes an easement "extinguishment." At one extreme is the contention that only the complete termination of the easement constitutes an extinguishment, and that other modifications are permitted, providing that an easement's conservation purposes continue to be upheld. The contrary view holds that changing almost any of an easement's terms constitutes at least a partial extinguishment. For adherents of this view, easements created through tax-deductible donations should only be amended by the courts.

This question continues to be debated among land trust practitioners and their legal counsels, but the Working Group takes the position that easements can be amended through a state-sanctioned process such as the one we propose, and where IRS issues are clearly involved, a pathway to Superior Court is explicitly available to the parties involved.

At some point, the IRS or the courts will clarify the law. In the meantime, the Working Group believes that the review process proposed here provides all of the fundamental elements of judicial review, including notice, opportunity for hearing, independent third-party review, a written decision based upon statutory criteria, and opportunity for appeal. The Working Group also believes that in many respects -- notably with respect to cost, timeliness, the public's right to participate in the process, and the expertise of the reviewing panel -- the process proposed here meets or exceeds the protections of judicial review.

**F) Recording**

Since title searches in Vermont need only look back 40 years, there has been a possibility that easements recorded prior to this period could be missed in title

searches, and therefore may not be understood as encumbrances when some properties are transferred. S.179 addressed this by requiring that any subsequent transfer, mortgage, lease, or other conveyance of an interest in real property must include a reference to all conservation easements which may apply.

S.179 asks the Working Group to look into "whether conservation rights and interests should be excluded from the requirements of 27 V.S.A. Sec. 603 concerning the re-recording of interests in land within a 40-year period." We have done this, and after consulting with members of the Vermont Bar and title companies, we recommend that conservation easements be exempted from Vermont's 40-year re-recording requirement. In reaching this conclusion, we noted that in Vermont, other types of easements need not be re-recorded, nor do any of our neighboring states have such a requirement.

The Working Group was also asked to investigate "whether there is an existing online or other database appropriate for the storage of information about conservation easements alongside other information relevant to a specific property or parcel of land. This database should be available to an individual completing a title search."

In 2006, the State of Maine created an easement "registry" where easement holders must file annually. At the time, there was considerable uncertainty in Maine about how many easements the state's 100+ land trusts and public agencies held and where these easements were located. In theory, the registry could offer a way to track easements and easement amendments for title search purposes, but our investigation indicated it was not intended for (or well-suited for) this purpose.

Our Working Group does not propose the creation of a similar registry for Vermont since the public already has good access to information about where easements are located. (The Vermont Land Trust, for example, provides this information on its website.) A GIS-based Conserved Lands Database already exists here. It is in the public domain, and is maintained by UVM's Spatial Analysis Lab. But since adding current datasets is difficult and expensive, this database hasn't been updated since 2004. Also, this is neither linked to land records nor designed to track conveyances, so it has limited utility for title searches.

VLT and TNC both maintain conserved land GIS coverage for their own internal purposes, but neither is entirely complete and current vis a vis easements held by other parties, especially government agencies. VLT updates Vermont's Conserved Lands Database on a regular basis, and provides this information to RPCs and other users. Going further than this for title search purposes would be quite complicated and expensive, and is perhaps unnecessary.

**G) Transparency and Public Hearings**

Currently, easement holders in Vermont are not required to share information about pending or completed easement amendments with anyone. And although prospective easement amendments are usually subject to exhaustive internal reviews by easement holders, no universal standards of transparency and public involvement are followed.

The Working Group's proposed framework would add a great deal of transparency and standardization to these matters, particularly regarding proposed Category 3 amendments. In these cases, easement holders will have the option of holding their own open evaluation process. Alternatively, they may petition the NRB's review, thus triggering an official process there. In either case, notifications are sent out to stakeholders, a public hearing is noticed, potential easement amendments are evaluated against standard criteria, and parties who are entitled to appeal these decisions (to the Vermont Supreme Court) are notified in writing.

For all categories of easement amendments, easement holders may ask the NRB to certify in writing that the process required by this statute has been duly followed, so that this fact can be recorded in land records.

**H) The Charitable Trust Doctrine**

Some proponents have argued that conservation easements are in the nature of a charitable trust or restricted gift, and may only be used in the exact manner intended by the donors. Under this analysis, an amendment can be made only if circumstances make it "impossible or impractical" to administer the easement as written, and then only if approved by a court. Vermont has a set of statutes (14A V.S.A. §401 *et seq.*) that define charitable purposes and govern charitable trusts. The Working Group recommends that this easement amendment process should supersede common law precedents and the existing statutes on charitable trusts that might otherwise apply to conservation easement amendments that undergo this third-party review.

**I) The Attorney General**

Vermont's Attorney General has statutory and common law authority to protect the public interest. *See generally* 3 V.S.A. Chapter 7. This authority extends to conservation easements when the public interest is implicated. The Attorney General has enforcement authority over tax-exempt organizations registered to do business in Vermont. In the area of conservation easement amendments, the Attorney General has the ability to challenge such amendments if they are contrary to the public interest or charitable trust requirements, where applicable. Historically, the Attorney General has not received complaints about conservation easement amendments in the state and the office has maintained a supporting enforcement role.

The Attorney General has sought to preserve the Attorney General's authority to protect the public interest in the new process recommended by the committee while

balancing the need for resources in all areas of state law enforcement. In relation to the NRB review of proposed category 3 amendments, the Attorney General has requested generally the following:

1. Receiving copies of petitions to the review panel to approve Category 3 easement amendments;

2. Exercising authority to petition the review panel to hold a public hearing and participate in such hearing with respect to a proposed Category 3 easement amendment; and

3. Exercising authority to appeal the review panel's decision regarding a Category 3 easement amendment to the Vermont Supreme Court.

### J) The Land Trust Alliance and Land Trust Accreditation Commission

The Land Trust Alliance ("LTA") is a national conservation organization of more than 1,700 land trusts across the United States. Among other things, the LTA promulgates best practices for land trust activities, and it has created an accreditation process to certify that qualifying land trusts comply with these standards. The LTA's Accreditation Commission (a separate and independent legal entity) runs a rigorous qualifying process for land trusts seeking their imprimatur, and 7 land trusts operating in Vermont are currently certified – The Vermont Land Trust, Upper Valley Land Trust, Stowe Land Trust, Greensboro Land Trust, Lake Champlain Land Trust, Northeast Wilderness Trust, and The Nature Conservancy. Since these organizations are responsible for the majority of Vermont's conservation easements, the LTA's standards for amending easements will have a bearing on how Vermont moves ahead on amendments.

In May, 2012 the LTA's Certification Commission issued revisions to its Requirements Manual. In this the commission clarified that it will view the circumstances surrounding easement amendments as "indicators" of land trust compliance with the best practices expected of them as certified organizations.

The LTA Accreditation Commission's position on easement amendments is evolving. Though it may drive how many land trusts here deal with easement amendments, the legislation proposed by the Working Group applies to a much larger universe of entities and embodies principles which make particular sense for Vermont.

## 10. Conclusions / Consensus

Because the rules governing the amendment of conservation easements are unclear in Vermont as in most states, the Working Group respectfully requests that the Vermont Legislature enact the legislation proposed in Section 11 of this report to bring more order, predictability, and transparency to this state's easement amendment

process. With about 10% of the state's landscape already protected via conservation easements, Vermont is a national leader in using this tool. Our investment of public and private funds to protect the state's working landscape, natural areas, and historic, cultural, and/or recreational resources via conservation easements has been enormous, in excess of $100 million, and we have a large stake in maintaining and continuing this important work.

Amending easements raises complex issues. We wish to honor the intent of landowners and other parties who create conservation easements, but at the same time recognize that circumstances will arise in the future that they could not possibly have anticipated. In devising an efficient and sensible easement amendment review process for Vermont, the Working Group considered many things, among them the balance between complexity and practicality; timeliness and due process; landowner and funder intent and the public interest; common law and statutory law; and the differing roles of land trusts, public agencies and boards, and the courts.

**The legislative proposal offered below represents a broad consensus within the Working Group about the general direction and structure that Vermont's easement amendment process should take.**

Nevertheless, the Working Group represents a diverse mix of stakeholders. We acknowledge that members have different views on some aspects of our proposal and that there is room for continued discussion as the bill makes its way through the legislative process.

## 11. Proposed Statutory Revisions

**PROPOSED LEGISLATION ON AMENDMENTS OF CONSERVATION EASEMENTS**
**January 15, 2015**

Subject: Conservation and development; conservation easements; modification

Statement of purpose: This bill proposes to amend the conservation easement statutes to permit modification of perpetual conservation easements. The bill establishes the criteria to be used to determine when an easement amendment would be allowed, creates a process for making that determination, and vests the holders of the easement with initial authority to make the determination. Certain amendments and terminations are subject to review and approval by an easement amendment panel created for this purpose within the natural resources board or by the environmental division of the Superior Court.

**An act relating to amending perpetual conservation easements**

It is hereby enacted by the General Assembly of the State of Vermont:

**Sec 1 10 VSA § 324. CONSERVATION EASEMENTS; STEWARDSHIP is amended to read:**

(a) The board shall amend or terminate conservation easements held pursuant to this chapter only in accordance with chapter 155, subchapter 2 of this title.

(b) If an activity funded by the board involves the acquisition by the state of an interest in real property for the purpose of conserving and protecting agricultural or forestland, important natural areas, or recreation lands, the board, in its discretion, may make a one-time grant to the appropriate state agency, qualified organization or municipality. The grant shall not exceed ten percent of the current appraised value of that property interest and shall be used to support its property management or maintenance or both.

***Sec. 2* Amend 27 V.S.A. sec. 604(a)(8)*:*** Any conservation rights or interests created pursuant to 10 V.S.A. chapters 34 or 155.

**10 V.S.A. § 823 is amended to read:**

§ 823. INTERESTS IN REAL PROPERTY

Conservation and preservation rights and interests shall be deemed to be interests in real property and shall run with the land. A document creating such a right or interest shall be deemed to be a conveyance of real property and shall be recorded under 27 V.S.A. chapter 5. **(Repeal: Such a right or interest shall be subject to the requirement of filing a notice of claim within the 40 year period as provided in 24 V.S.A Section 603.]** Such a right or interest shall be enforceable in law or in equity. Any subsequent transfer, mortgage, lease, or other conveyance of the real property or an interest in the real property shall reference the grant of conservation rights and interests in the real property, provided, however, that the failure to include a reference to the grant shall not affect the validity or enforceability of the conservation rights and interests.

10 V.S.A. § 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; to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety, and welfare; and to encourage the use of conservation and preservation easements and related instruments **[Repeal: tools]** to support farm, forest, and related enterprises, thereby strengthening Vermont's economy to improve the quality of life for Vermonters, and to maintain the historic settlement pattern of compact village and urban centers separated by rural countryside.

**Sec. 3. 10 V.S.A. § 6301a is amended to read:**

§ 6301a. DEFINITIONS

(4) "Adjoining landowner" means a person who owns land in fee simple, if that land either:

(A) shares a property boundary with a tract of land where an

easement amendment is proposed; or

(B) is adjacent to a tract of land where an easement amendment is proposed and the two properties are separated by only a river, stream, or public highway.

(5) “Amend” or “amendment” means a modification of an existing conservation easement, the substitution of a new easement for the existing easement, or the whole or partial termination of the existing easement.

(6) “Conservation easement” means 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 resources and public values. The term excludes interests in fee simple, leases, restrictive covenants not held by a qualified organization, rights of way, trail easements, spring rights, timber harvesting rights and similar rights to affirmatively use or extract resources from the land, except that this exclusion shall not apply to trail easements or other public recreational rights which are included in the stated purposes of the conservation easement.

(7) “Conservation right or interest” means a right or interest described in sections 823 and 6303 of Title 10.

(8) "Holder's public review process" means the public review process conducted by an easement holder for a proposed amendment, as set forth in sections 6331-6332 of this chapter.

(9) “Landowner” means an owner of the fee interest in land that is subject to conservation rights or interests, as authorized by this chapter.

(10) “Panel” means the easement amendment panel of the natural resources board **e**stablished by section 6323 of this title.

(11) “Person” is as defined in 1 V.S.A. § 128.

(12) “Protected property” means real property that is subject to a conservation right or interest.

(13) "Holder” or "qualified holder" means a state agency, a qualified organization, or a municipality that possesses a conservation right or interest. The terms "qualified holder" and “holder” includes all co-holders.

**Sec. 4. 10 V.S.A. chapter 155, subchapter 2 is added to read:**

**Subchapter 2. Amendment or Termination of Perpetual Conservation Easements**

**<u>Sec. 6321. PURPOSE</u>**

It is the purpose of this subchapter to set forth a process and establish the criteria for determining if an amendment of a conservation easement by the holder may be appropriate and authorized; and provide that in all cases in which an amendment would materially alter the terms of the existing easement, the proposed amendment is reviewed and approved following public notice, disclosure of the circumstances and reasons for the amendment, and an opportunity for the public to comment.

**§ 6322. CONSERVATION RIGHTS AND INTERESTS**

(a) Conservation easements shall be amended or terminated only in accordance with this subchapter.

(b) If an easement holder is or becomes the owner in fee of property subject to a conservation easement, the easement shall continue in effect and shall not be extinguished.

(c) This subchapter shall constitute the exclusive means under law pursuant to which an amendment to a conservation easement may be contested or appealed.

(d) Conservation rights and interests shall not be affected by any tax lien which attaches under 32 V.S.A. § 5601 subsequent to the recording of the rights and interest in the municipal land records.

(e) The following easement amendments shall be exempt from the requirements of this subchapter unless the holder waives the exemption for a particular easement amendment.

(i) Any amendment of a conservation easement or the underlying transaction which requires the approval of the General Assembly;

(ii) Any amendment of a regulatory conservation easement where the easement was originally required by a federal, state or local regulatory body, including, but not limited to, an Act 250 District Environmental Commission, Public Service Board or a local development review board, by issuance of a land use, Act 248, or zoning or other regulatory permit and where under the terms of the permit any amendment of the easement must be approved by the regulatory body.

(iii) Any amendment that is the result of the exercise of a right of eminent domain granted under Chapter I, Article 2 of the Constitution of the State of Vermont.

(f) Any amendment of a conservation easement shall require the written approval of each holder as well as the landowner.

**§ 6323. EASEMENT AMENDMENT PANEL**

(a) A five member easement amendment panel is created as a panel of the Vermont natural resources board established under section 6021 of this title. The panel shall consist of the following members:

(1) The chair of the natural resources board, who shall serve as chair of the easement amendment panel.

(2) Two members of the natural resources board, chosen by the governor, whose terms on this panel shall be contemporaneous with their terms on the board. Remaining board members shall serve as alternates to the easement amendment panel, and shall be designated by the chair, if a regular or alternate panel member is unable to serve.

(3) One member, and an alternate, appointed by the governor from a list of no fewer than five candidates submitted by qualified organizations. The Vermont housing and conservation board

shall provide a list of qualified organizations to the governor. Panel members appointed under this clause shall serve a term of four years.

(4) One member and an alternate, appointed by the governor from a list of five candidates submitted by the Vermont housing and conservation board. Panel members appointed under this clause shall serve for a term of four years.

(b) The governor shall seek to appoint members who are knowledgeable about agriculture, forestry, and environmental science. No person shall be eligible for appointment to this panel if that person has been employed as a staff member of or consultant to or has served on the governing board of a qualified holder or the Vermont housing and conservation board during the preceding 12 months.

(c) Other departments and agencies of state government shall cooperate with the panel and make available to the panel data, facilities, and personnel as may be needed to assist the panel in carrying out its duties and functions.

(d) A panel member shall not participate in a particular matter before the panel if he or she has a personal or financial interest in the matter, or is related to the petitioner, if a natural person, within the fourth degree of consanguinity or affinity, or, if a corporation, to any officer, director, trustee, or agent of the corporation within the same degree.

(e) Decisions by the panel shall be made as promptly as possible, consistent with the degree of review required by the proposed amendment.

(f) The panel shall keep a record of its proceedings, and any decision by the panel shall be in writing and shall provide an explanation of the reasons and bases for the decision.

(g) Members of the panel shall receive per diem pay and all necessary and actual expenses in accordance with 32 V.S.A. § 1010.

(h) Powers:

(1) The panel shall have the power, with respect to any matter within its jurisdiction, to:

(A) Allow members of the public to enter upon lands of other persons, at times designated by the panel, for the purposes of inspecting and investigating conditions related to the matter before the panel.

(B) Enter upon, or authorize others to enter upon, lands for the purpose of conducting inspections, investigations, examinations, tests, and site evaluations as it deems necessary to verify information presented in any matter within its jurisdiction.

(C) Adopt rules of procedure and adopt substantive rules, in accordance with the provisions of 3 V.S.A. chapter 25, that interpret and carry out the provisions of this subchapter that pertain to easement modifications.

(D) Establish a schedule of filing fees to be paid by petitioners.

(2) At its own initiative or at the request of a person who participated in the panel's or holder's review process, the panel may revoke easement amendments issued under this chapter. Grounds for revocation are:

(A) noncompliance with the panel's easement amendment decision or any condition of the panel's decision under this subchapter, or noncompliance with the decision of the holder following the holder's public review pursuant to sections 6331-6332 of this chapter for which the panel has issued a certificate to the holder pursuant to section 6332(5);

(B) failure to disclose all relevant and material facts in the application or during the review process;

(C) misrepresentation of any relevant and material fact at any time.

(3) The provisions of subsection 2 of this section shall not apply to a good faith purchaser who purchased the property containing the easement amendment without notice of the misrepresentation or failure to disclose and was not responsible for and had no knowledge or constructive notice of the panel's condition.

**§ 6324. CATEGORY 1 AMENDMENTS; APPROVAL BY HOLDER WITHOUT ADMINISTRATIVE REVIEW**

(a) A Category 1 amendment is an amendment that has a beneficial, neutral, or not more than a de minimis negative impact on the resource values protected by the existing easement. The easement holder and landowner may approve a Category 1 amendment without notice to or review by the attorney general or the panel. Category 1 amendments shall be limited to the following:

(1) Placing additional land under the protection of the easement;

(2) Adding, expanding, or enhancing the easement's protection of natural or cultural resources existing on the protected property;

(3) Including, for the benefit of a holder, a right of first refusal, an option to purchase at agricultural value, or another right to acquire an ownership interest in the property in the future;

(4) Amending the easement to protect areas that were excluded from the easement or to further restrict rights and uses that were retained by the landowner under the existing easement;

(5) Correcting typographical or clerical errors without altering the intent of or uses permitted under the easement;

(6) Modernizing or clarifying the language of the easement without changing the intent or permitting additional uses under the easement that will have no more than a de minimis negative impact on resource values;

(7) Merging the easements on two or more protected properties into a single easement, adjusting the boundaries between two or more protected properties, or adjusting the boundaries of areas excluded from the easement, provided that the merger does not:

(A) reduce the area covered by the easement;

(B) permit new uses under the easement that will have more than a de minimis negative impact on resource values on the property;

(C) reduce the existing protections of the resource values on the property;

(8) Modifying the legal description of the protected property to reference a subsequent survey of the area covered by or excluded from the easement; or

(9) Relocating an existing recreational trail without materially detracting from the public's access or quality of experience.

(b) Except for those amendments that are expressly exempt from the provisions of this subchapter, no other easement amendment shall be approved or permitted without: (i) notice to and review by the panel, as set forth in sections 6325–6330, or, if applicable, (ii) by a holder's public review, as set forth in sections 6331-6332 of this title. In the event the holder or the landowner of a protected property seeks a recordable document from the panel establishing that an amendment satisfies the requirements of a Category 1 amendment, the holder shall follow the procedures for a Category 2 amendment, as set forth in section 6325 of this title.

**§ 6325. CATEGORY 2 AMENDMENTS; CRITERIA; REVIEW**

(a) A Category 2 amendment is an amendment which:

(1) the holder reasonably believes will have not more than a de minimis negative impact on the resource values protected by the existing easement but which does not clearly meet the definition of a Category 1 amendment; or

(2) adjusts the boundaries of the land protected by the easement or adjusts the boundaries of areas excluded from the easement, provided that the adjustment does not reduce the area covered by the easement by more than the greater of two acres or one percent of the land protected by the easement, and provided further that the holder reasonably believes the amendment will have no more than a de minimis negative impact on the resource values protected by the existing easement.

(b) A holder seeking approval of a Category 2 amendment shall submit a request for review to the panel, together with a copy of the amendment, a description of the protected property and easement, and an explanation of the purpose and effect of the amendment. The request for review shall include the applicant’s and landowner’s names and addresses, and the address of the applicant’s principal office in this state, and, if the applicant is not a municipality or state agency, a statement of its qualifications as a holder. The request to the panel shall be signed by the holder and the landowner.

In addition, the holder shall certify and describe how the amendment:

(1) is consistent with the public conservation interest;

(2) is consistent with the conservation purpose and intent of the easement;

(3) complies with all applicable federal, state and local laws;

(4) does not result in private inurement or confer impermissible private benefit under 26 U.S.C. § 501(c)(3);

(5) has a net beneficial, neutral, or not more than a de minimis negative impact on the conservation values of the property protected by the existing easement. In determining the net beneficial, neutral, or de minimis negative impact, the holder shall consider the degree to which the amendment will balance the stated goals and purposes of the easement and shall take into consideration whether these goals and purposes are ranked by the terms of the easement; and

(6) is consistent with the documented intent of the donor, grantor, and all direct funding sources.

(b) Within a reasonable time of receipt of a request for review of a Category 2 amendment and after providing 10 days notice to all other panel members, the chair of the panel shall make a determination and promptly notify the holder and landowner that:

(1) no further review of the amendment is required;

(2) the holder must submit further information before a review can be completed; or

(3) the holder must seek the panel's approval of the amendment as a Category 3 amendment.

c) If two members of the panel believe that the proposed amendment fails to meet the requirements for a Category 2 amendment and those members notify the chair within 10 days of the date of the chair's notice to the panel members, the amendment shall be subject to review as a Category 3 amendment.

d) In the event the chair determines that no further information or approval is required, the chair shall, upon the holder's request, send a notice of this determination in a recordable form to the holder.

e) The panel may adopt rules allowing certain Category 2 amendments to proceed as Category 1 amendments, provided the panel establishes reasonable limitations to ensure that the amendment will have not more than a de minimis negative impact on the resource values protected by the easement.

(f) Any amendment which changes the conservation purposes of the easement or changes the hierarchy of the stated purposes shall be classified as a Category 3 amendment.

**§ 6326. CATEGORY 3 AMENDMENTS; PETITION**

(a) In the event an amendment does not constitute a Category 1 or 2 amendment, the holder shall not amend an easement without first: (i) filing a petition for approval and obtaining the approval of the panel for a Category 3 amendment in accordance with this section or (ii) notifying the panel that the holder will be conducting a holder's public review process. A petition to seek approval of a Category 3 amendment shall include a copy of the existing easement and proposed amendment, a map and description of the protected property and easement, an explanation of the purpose and effect of the amendment, and the certification and the description required by subdivisions 6325(a)(1)–(4) of this title. The petition also shall include the landowner's name and address, the applicant's name and address, and the address of the applicant's principal office in this state, and, if the applicant is not a municipality or state agency, a statement of its qualifications as a holder. In addition, the holder shall pay a filing fee in accordance with the schedule established by the board.

(b) The petition shall be signed by the holder, the landowner or landowner's representative, and any person who holds an executory interest that allows assumption of the ownership of the property or the easement if the amendment is approved.

(c) The petitioner shall send a copy of the petition to the Vermont Attorney General, the town selectboard, planning commission, and conservation commission, if any, of the town in which the property is located; to the executive director of the regional planning commission of the region in which the property is located; to any person holding an executory interest in the conservation easement; and to all persons who conveyed the conservation easement, unless the existing easement was conveyed or amended more than 25 years before the current amendment is proposed or the panel determines that the addresses cannot be reasonably ascertained under the circumstances or that individual notification is otherwise impracticable.

(d) In lieu of filing a petition with the panel, a holder, including any single co-holder, may elect to file a petition for approval of an easement amendment or termination with the environmental division of the Superior Court. If, by its express terms, an easement provides that it may not be amended except by court order, then a holder may seek to amend the easement only by filing a petition for approval with the division. The holder shall promptly provide the Vermont Attorney General with a copy of any petition filed with the Court.

(e) The Vermont Rules of Environmental Court Proceedings shall apply to all petitions filed with the environmental division. The court shall base its decision on the provisions in section 6329; provided, however, that if the terms of an easement provide for amendment or termination using criteria which are more stringent than those in section 6329, the court shall apply the criteria set forth in the easement in making its decision. If fewer than all co-holders seek judicial review, the holder or holders who have filed a petition for review with the environmental division of the Superior Court shall bear the costs and expenses of review. The court's decision shall be binding on all co-holders as well as all parties to the review. At its discretion, the Vermont Attorney General shall be permitted to intervene as a party in any such proceeding.

## § 6327. PUBLIC NOTICE; HEARING

(a) At the time a petition for a Category 3 amendment is filed, the holder shall place on its website, or on another website designated by the panel, a copy of the petition and accompanying materials and information required under section 6326(a) of this chapter.

(b) Upon receipt of a petition, the panel shall promptly schedule a public hearing on the amendment in not less than 25 days and not more than 40 days from the date of publication of the notice. The panel shall publish, at the expense of the petitioner, a notice summarizing the nature of the petition in at least one area newspaper, reasonably calculated to reach other members of the public in the area where the protected property is located. The panel shall also place the notice of public hearing on the natural resources board website. The panel shall send copies of the hearing notice to the persons listed in section 6326(c) of this title and to adjoining landowners who may be affected by the amendment to the easement, unless it determines that the number of adjoining landowners is so large that direct notification is not practicable.

(c) The notice shall set a date, time, and place for a proposed public hearing, and the link to the website where the petition for the amendment and accompanying materials and information may be found.

(d) The notice shall also include a statement that the panel may waive the proposed public hearing, if no request for a hearing is received by the panel within 15 days of the published notice.

(e) Any person may request that the panel hold a public hearing on the proposed amendment. The request for a hearing shall state the reasons why a hearing is warranted, and a copy shall be mailed to the current landowner and easement holder. The panel shall conduct a public hearing on the petition if it determines that a hearing is necessary or if a request for a public hearing is timely filed.

**§ 6328. PETITION; PROCESS; PUBLIC HEARING**

(a) Any petition and any hearing on a petition for amendment of an easement shall not be considered a contested case under 3 V.S.A. chapter 25.

(b) Any person may participate in any hearing on any petition for amendment of an easement and shall have an opportunity to provide written or oral testimony to the panel.

(c) The panel shall have subpoena power to compel a petitioner to make available all relevant background documents pertaining to the easement and the proposed amendment. On the request of the petitioner, the panel shall keep confidential and shall not disclose personal or confidential information that the petitioner demonstrates is not directly and substantially related to the criteria and findings included in section 6329 of this title. Any person who believes that additional information is needed from the easement holder before or during the hearing may direct a request to the panel, which may then require the petitioner to produce the requested information. If the petitioner fails to timely respond to a subpoena in a timely fashion, the board may deny the petition for amendment.

**<u>§ 6329. APPROVAL OF CATEGORY 3 AMENDMENT BY PANEL; CRITERIA</u>**

(a) In any decision on a Category 3 amendment issued pursuant to this subchapter, the panel shall consider all circumstances and information that may reasonably bear upon the public conservation interest in upholding or amending the conservation easement, including:

> (1) any material change in circumstances that has taken place since the easement was conveyed or last amended, including changes in applicable laws or regulations, in the native

flora or fauna, or in community conditions and needs, or the development of new technologies or new agricultural and forestry enterprises;

(2) whether the circumstances leading to the proposed amendment were anticipated at the time the easement was conveyed or last amended;.

(3) the existence or lack of reasonable alternatives to address the changed circumstances;.

(4) whether the amendment changes an easement's stated purpose or hierarchy of purposes;

(5) the certification requirements for Category 2 amendments listed in subdivisions 6325(a)(1)–(4) of this title;

(6) the documented intent of the donor, grantor or all direct funding sources; and

(7) any other information or issue that the panel deems important.

(b) The panel shall approve an amendment if it finds, by clear and convincing evidence, that the amendment:

(1) is consistent with the public conservation interest;

(2) is consistent with the purposes stated in section 6301 of this title;

(3) will not result in private inurement or confer impermissible private benefit under 26 U.S.C. § 501(c)(3);

(4) will result in adequate compensation to the holder, such that, if the value of the landowner's estate is increased by reason of the amendment or termination of a conservation easement, that increase must be paid over to the holder of the easement, to be used for the protection of conservation lands consistent, as nearly as possible, with the stated public beneficial conservation purposes of the easement; and

(5) meets one of the following goals:

(A) the amendment promotes or enhances the conservation purposes of the easement, even though it may be inconsistent with a strict interpretation of the terms of the existing easement;

(B) enforcement of an easement term would result in significant financial burdens to the easement holder or landowner and result in minimal conservation benefit to the public; or

(C) the amendment clearly enhances the conservation benefit to the public, even though it may allow the diminution of one or more conservation purposes on the property protected by the existing easement.

(c) In the event the conservation easement requires that amendment comply with more restrictive conditions than the criteria stated in preceding subsection (b), the panel must also find that those

conditions have been complied with in order to approve the amendment.

(d) If the amendment terminates an easement in whole or in part, the panel shall require that the holder apply any monetary compensation to achieve a conservation purpose similar to that stated in the easement.

## § 6330. DECISION OF THE PANEL; APPEAL

(a) Following the hearing, or after a determination without a hearing, the panel shall issue a written decision approving, approving with conditions, or denying the amendment request and stating the reasons for the panel's decision. The panel shall distribute its written decision on the board's website and distribute a copy to all persons listed in subdivision (b)(1) of this section and to any additional participants in the hearing:

(b)(1) Within 30 days of the issuance of the decision of the panel, any of the following persons may appeal the decision of the panel to the supreme court if that person is:

(A) the easement holder;

(B) the current landowner;

(C) the attorney general;

(2) In a co-held easement, any co-holder shall have the right to appeal. If the appeal is filed by less than all of the holders, the holder filing the appeal shall bear the cost and expenses of the appeal. However, the supreme court's decision shall be binding on all co-holders and on any other parties.

(3) The supreme court may reverse the panel's decision only if the decision is clearly erroneous or the panel has clearly abused its discretion.

(c) The panel's decision shall not affect any right of a person or organization that has personally or directly contributed to the holder's acquisition of the easement to seek restitution of the contribution based upon misrepresentation or breach of contract on the part of the easement holder. Such restitution shall be only for the amount contributed or granted, and shall not include interest, damages, attorney fees, or other costs, unless the court finds that the holder has acted in bad faith.

## §6331. HOLDER'S PUBLIC REVIEW AND HEARING PROCESS

(a) Any qualified holder may, at its option, adopt and conduct a holder's public review process for Category 3 amendments. A public review process may only be used if all co-holders agree to use the process and one of the co-holders is publicly identified in the initial notice as responsible for the publication by newspaper and on its web site of all notices and documents required under this section. A holder's public review and hearing process shall be in writing and shall be substantially consistent with the requirements set forth in §§6326- 6330 except that;

(i) a holder may not waive the requirement for a public hearing;
(ii) the holder may defer the certification requirements contained in §6329(a)(5) until after it completes the public hearing;

(iii) A holder shall not have the powers set forth in section 6323(h) or the authority to compel the production of documents by any party.

(b) So long as each co-holders' written public review process is consistent with the requirements of subsection (a) of this section, co-holders of an easement shall conduct a single, combined holder's public review and hearing process for any particular amendment which has been proposed.

(c) Each participant in the public hearing process may sign a register noting their presence at the hearing and providing their electronic or other mailing address. When a decision is issued, the holder shall notify each signatory and those entities having a statutory right to appeal that a copy of the materials required under subsection (e) of this section is available on the holder's website.

(d) If following the public review and hearing process the holder approves the amendment, the holder shall prepare a written decision explaining what changes to the easement have been approved, a summary of how the amendment complies with the findings required in Section 6329(b), and a list of all persons who submitted written or oral statements during the public review and hearing process. If any person objected to the amendment, the decision shall also summarize the nature of the objection and explain how the objection was addressed or why it was rejected.

(e) The holder shall file the decision with the panel, together with a certification that the holder has conducted a public hearing and complied with the notice and other procedural requirements of subsection (a) of this section. At the time of this filing, the holder shall place on its website:

(i) a copy of the written decision and certifications filed with the panel;
(ii) the date that the decision and certifications were filed with the panel; and
(iii) the notice described in subsection (f) of this section.

(f) In addition, the holder shall promptly send a notice of the decision to all persons listed in section 6332(1) and shall provide a link to the holder's website where the decision, certification and other information may be found. The notice shall state the date on which the decision was filed with the panel, and that the Vermont Attorney General, any landowner who conveyed the easement and received a tax deduction, the city or town in which the property is located, and any person who provided an oral or written statement during the public review and hearing process has the right to file a request for review with the panel within 30 days pursuant to section 6331 of this chapter. The notice shall also state that any eligible person who requests the review must make a prima facie showing that the holder's decision is not in the public conservation interest, state the basis for the appeal and include a statement of issues.

(g) If at any time prior to the issuance of a final decision by the holder, any co-holder or the landowner decides to terminate the public review process, the amendment shall not be approved except, at the option of the landowner and holder, the proposed amendment may be submitted and approved as a Category 3 amendment by the panel or the environmental division of the Superior Court in accordance with this chapter.

**Section 6332. PANEL REVIEW OF HOLDER'S DECISION FOLLOWING PUBLIC REVIEW**

**AND HEARING**

(1) The following persons have the right to request that the panel to review the holder's decision:

(a) the Vermont Attorney General;

(b) the landowner who conveyed the easement, if the easement was donated or provided through a bargain sale or other mechanism in which the landowner who conveyed the easement received a tax deduction;

(c) the city council or selectboard of the city or town in which the property subject to the easement is located.

(d) any person who provided an oral or written statement in the holder's public review and hearing process.

(2) A request to review must be filed with the panel within 30 days of the date the holder files the decision and certification with the panel, pursuant to section 6331(e) of this chapter.

(3) A request for review of a holder's decision must be in writing, state the bases for the request to review, contain a statement of issues, and set forth the reasons why the person requesting the review believes that the holder's decision is not in the public conservation interest. A landowner who conveyed the easement may state the reasons why the landowner believes the holder failed to comply with the easement's more restrictive conditions on amendments, as required in section 6329(c) of this chapter.

(4) The panel may, either on its own initiative or by written request of the holder, dismiss a request for review without further hearing if the person requesting the review fails to:

(i) make a prima facie showing that the holder's decision was not in the public conservation interest or does not comply with the easement's more restrictive conditions on amendments;
(ii) state the bases for appeal; or
(iii) contain a statement of issues.

As used in this subsection, the term "prima facie" means an initial showing of specific facts which, if proven, would show that the easement amendment is not in the public conservation interest or, if the request was filed by a landowner who conveyed the easement, does not comply with the easement's more restrictive conditions on amendments.

(5) In the event no request for review is filed within the time permitted, or if the panel determines that the person who requested the review is not eligible to make the request or has failed to make a prima facie showing, the panel shall, at the request of the landowner or holder, issue a certificate in recordable form that the holder has made the required certifications and that no further approval of the amendment is required.

(6) In the event the panel finds the person requesting the review has made a prima facie

showing , the panel shall review the amendment as a Category 3 amendment in accordance with the procedures and requirements of 6326-6330, provided that:

(a) The request for review shall be limited to the statement of issues raised in the notice of appeal, unless the panel determines that a request to amend the statement of issues is timely filed and will not result in prejudice to any party to the proceeding; and

(b) The decision of the holder shall be presumed to be in the public conservation interest. The panel shall deem the presumption to be rebutted if it finds that there has been as substantial violation of the procedural requirements set forth in section 6331 or if the holder's decision did not meet the applicable criteria set forth in section 6329.

**Sec. 6333. REPORT TO THE LEGISLATURE**. Each state agency shall provide to the General Assembly a report of any easement amendments made during the previous year. The report shall summarize each easement amendment and describe both the reasons for the amendment and how the amendment promotes the public interest.

Sec. ___ 4 V.S.A. § 34 is amended to read:

§ 34. JURISDICTION; ENVIRONMENTAL DIVISION

The environmental division shall have:

(4) original jurisdiction to revoke easement amendments pursuant to a petition filed by the Vermont Housing and Conservation Board under 10 V.S.A. chapter 155, subchapter 2, section 6323 (f)(2)

(5) original jurisdiction to approve amendments to conservation easements as provided in 10 V.S.A. chapter 155, subchapter 2.

Sec. ___ EASEMENT AMENDMENT PANEL; INITIAL APPOINTMENTS
By October 1, 2013, the governor shall appoint the members of the easement amendment panel under Sec. 8 of this act, 10 V.S.A. § 6323(a)(2)–(4) (members; easement amendment panel). The initial term of the member appointed under 10 V.S.A. § 6323(a)(3) shall expire on February 1, 2017. The initial term of the member appointed under 10 V.S.A. Section 6323(a)(4) shall expire on February 1, 2015.

Sec. ___ EFFECTIVE DATES
This Act shall take effect on July 1, 2014. The General Assembly shall review this Act in 2019.

## Appendix A – Members of the Working Group on Perpetual Conservation Easements

(1) The **Secretary of Agriculture**, Food and Markets or designee; (Chuck Ross)
(2) A representative of the **VHCB**; (Gus Seelig)
(3) The **Commissioner of Forests, Parks and Recreation** or designee; (Mike Fraysier)
(4) One member of the Vermont office of the **Attorney General**; (Scot Kline)
(5) A representative of **Vermont Land Trust**; (Dennis Shaffer)
(6) A representative of **Upper Valley Land Trust**; (Jeanie McIntyre)
(7) A representative of the **Vermont Federation of Sportsmen's Clubs**: (Roy Marble)
(8) A representative of the Vermont **Green Mountain Club**; (Susan Shea)
(9) A representative of **The Nature Conservancy**; (Bob Klein)
(10) A representative of a **regional or local land trust** in Vermont; (Heather Furman – Stowe Land Trust)
(11) An **attorney** licensed in Vermont and practicing in or knowledgeable about both federal tax law and real estate law, **Vermont Bar Association**; (Brian Monaghan)
(12) A representative from a **farming organization;** (Clark Hinsdale* – VT Farm Bureau)
(13) A representative of the **Vermont Association of Snow Travelers**; (Frank Stanley)
(14) A Vermont **owner of conserved land;** (Wright Preston*)
(15) A representative of the **Vermont Natural Resources Board;** (John Hasen)
(16) A land surveyor appointed by the **Vermont Society of Land Surveyors.** (Paul Hannan*)

*Owners of Conserved Land

## Appendix B – A Sample Conservation Easement

Form Last Revised: 11/10/2012
Draft Date: _________

### GRANT OF DEVELOPMENT RIGHTS AND CONSERVATION RESTRICTIONS

WHEREAS, _______ is the owner in fee of certain real property in ______, _________ County, Vermont, which has aesthetic, recreational, and natural resource values in its present state; and

WHEREAS, this property contains ____ acres (more or less) of undeveloped land in agricultural and forestry use, which provides wildlife habitat as well as recreational opportunities; and

WHEREAS, the VERMONT LAND TRUST, INC. is a publicly supported non-profit corporation incorporated under the laws of the State of Vermont, and qualified under Sections 501(c)(3) and 170(h) of the Internal Revenue Code, whose principal purpose is to preserve undeveloped and open space land in order to protect the scenic, recreational, cultural, educational, and natural resources of the State through non-regulatory means, thereby reducing the burdens on state and local governments; and

WHEREAS, the economic health of Vermont is closely linked to its agricultural and forest lands, which not only produce food products, fuel, timber and other products, but also provide much of Vermont's scenic beauty, upon which the state's tourist and recreation industries depend; and

WHEREAS, it has been the policy of the State of Vermont to foster the conservation of the State's agricultural, forest, and other natural resources through planning, regulation, land acquisition, and tax incentive programs, including, but not limited to, Title 10 V.S.A. Chapter 151 (Act 250); Title 24 V.S.A. Chapter 117 (Regional and Municipal Planning and Development Act); Title 10 V.S.A. Chapter 155 (Acquisition of Rights and Interests in Land); Title 32 V.S.A. Chapter 124 (Current Use Taxation); Title 32 V.S.A. Chapter 231 (Property Transfer Tax); Title 32 V.S.A. Chapter 235 (Land Gains Tax); Joint Resolution #43 adopted by the Vermont House and Senate in February 1982 endorsing the voluntary transfer of interests in agricultural land through agreements between farmland landowners and private land trusts; Title 10 V.S.A. Chapter 15 (Housing and Conservation Trust Fund); and Title 6 V.S.A. Chapter 207, Subchapter 2 (Working Lands Enterprise Program); and

WHEREAS, the conservation of this property as open space land is consistent with and in furtherance of the town plan adopted by the Town of ________, the regional plan adopted by the ______________ County Regional Planning Commission, and the purposes set forth in 10 V.S.A. §§ 821 and 6301;

NOW, THEREFORE,

KNOW ALL PERSONS BY THESE PRESENTS that ________**, a single person,** of ________, ______________ County, Vermont, on behalf of **himself/herself** and **his/her** heirs, executors, administrators, successors, and assigns (hereinafter "Grantor"), in consideration of Ten Dollars and other valuable consideration paid to **his/her** full satisfaction by the Vermont Land Trust, Inc., does freely give, grant, sell, convey, and confirm unto the **VERMONT LAND TRUST, INC**., a non-profit corporation with its principal offices in Montpelier, Vermont, and its successors and assigns (hereinafter "Grantee") forever, the development rights and a perpetual conservation easement and restrictions (as more particularly set forth below) in a certain tract of land situated in the Town of _________, ______ County, Vermont (hereinafter "Protected Property"), said Protected Property being more particularly described in Schedule A attached hereto and incorporated herein.

The development rights hereby conveyed to Grantee shall include all development rights except those specifically reserved by Grantor herein and those reasonably required to carry out the permitted uses of the Protected Property as herein described. The development rights hereby conveyed are rights and interests in real property pursuant to 10 V.S.A. §§ 823 and 6303. The conservation easement and restrictions hereby conveyed to Grantee consist of covenants on the part of Grantor to do or refrain from doing, severally and collectively, the various acts set forth below. It is hereby acknowledged that these covenants shall constitute a servitude upon the land and run with the land. Grantee accepts such covenants in order to achieve the Purposes set forth in Section I, below.

## I. Purposes of this Grant.

Grantor and Grantee acknowledge that the Purposes of this Grant are generally to contribute to the implementation of the policies of the State of Vermont designed to foster the conservation of the State's agricultural, forest and other natural resources through planning, regulation, land acquisition, and tax incentive programs thereby yielding a significant public benefit; and specifically the Purposes of this Grant are as follows:

1. The principal purpose of this Grant is to . . .

***Note*****:** ***One "principal purpose" clause should be selected, based upon the landowner's and VLT's conservation objectives and a resource inventory of the property. The following clauses may be modified to accommodate more specific purposes, but the essential elements of these clauses should remain uniform. (For example, management for game bird habitat could be added as a more specific primary purpose.)***

**Multiple Use Management**: . . . conserve productive agricultural and wood lands, wildlife habitats, non-commercial recreational opportunities and activities, and other natural resource and scenic values of the Protected Property. **(When selecting this purpose, change the syntax to refer to the principal purposes (plural) are…. And make a similar change in paragraph 3).**

**Habitat and Biological Diversity**: . . . to conserve biological diversity, native flora and fauna, and the environments and ecological processes which support them, forestry values, and scenic resources, as those values exist on the date of this instrument and as they may evolve in the future.

**Production of Forest Products**: . . . to conserve productive forestry resources on the Protected Property and to encourage the long-term, professional management of those resources, and to facilitate the economically sustainable production of forest resources without compromising surface water quality, scenic benefits to the public, wildlife habitat, recreational and other conservation values.

**Public recreation and/or scenic values**: . . . conserve wood lands and open lands, wildlife habitat and other natural resource values of the Protected Property for the scenic and recreational benefit of the public.

2. The secondary purpose of this Grant is to **[insert other values above not elected as primary purpose OR delete this paragraph (3) if Multiple Use Management is selected as primary purpose**]

3. Recognizing that conservation of productive forestry resources is a **[insert: secondary or primary]** purpose of this Grant, and that both the resource values of the Protected Property and responsible forest management standards will evolve over time, the forest management objectives of this Grant are to:

a) Manage forest stands for long rotations which maximize the opportunity for the production of maple sap and/or for harvesting, sustained over time, of high quality sawlogs while maintaining a healthy, and biologically diverse forest. Grantor and Grantee acknowledge that site limitations and biological factors may preclude the production of high quality sawlogs, and further that the production of a variety of forest products can be consistent with the goal of producing high quality sawlogs.

b) Conduct forest management and harvesting activities (including the establishment, maintenance and reclamation of log landings and skid roads) using the best available management practices in order to prevent soil erosion and to protect water quality.

4. To advance these purposes by conserving the Protected Property because it possesses the following attributes *[numbers may change, based on more detailed mapping by VLT staff, prior to signing of the easement]*:

a) _____ acres of prime agricultural soils and _____ acres of statewide important soils;
b) _____ acres of Site Class I forest soils and _____ acres of Site Class II soils;
c) _____ acres of managed Forest, including ____ acres of managed sugarbush;
d) is enrolled in the Vermont Current Use Appraisal Program;
e) _____ feet of frontage on ________ Road, a public highway with scenic vistas;
f) in the vicinity of ( ) other properties previously protected by Grantee;
g) scenic vistas of _________________ from ____________;
h) trails or paths used by the public;
i) historic or archeological features;
j) wetlands, wildlife habitats, and watercourses; and
k) rare and unique forest communities.

Grantor and Grantee recognize these agricultural, silvicultural, scenic, and natural values of the Protected Property and share the common purpose of conserving these values

by the conveyance of the conservation easement and restrictions and development rights, to prevent the use, fragmentation, or development of the property for any purpose or in any manner which would conflict with the maintenance of these agricultural, silvicultural, scenic, and natural resource values. Grantee accepts such conservation easement and restrictions and development rights in order to conserve these values for present and future generations.

In conveying the development rights, conservation easement, and restrictions described herein to Grantee, it is the intent of Grantor and Grantee that the interests conveyed herein may serve as the local or State contribution or match to conserve other forestlands and wildlife habitat in Vermont under the Federal "Forest Legacy Program" described in Section 1217 of Title XII of the Food, Agriculture, Conservation and Trade Act of 1990.

The purposes set forth above in this Section I are hereinafter collectively referred to as the "Purposes of this Grant."

## II. Restricted Uses of Protected Property.

The restrictions hereby imposed upon the Protected Property, and the acts which Grantor shall do or refrain from doing, are as follows:

1. The Protected Property shall be used for agricultural, forestry, educational, non-commercial recreation, and open space purposes only. No residential, commercial, industrial, motorized recreational or mining activities shall be permitted, and no building, structure or appurtenant facility or improvement shall be constructed, created, installed, erected, or moved onto the Protected Property, except as specifically permitted under this Grant. **[Additionally, the following phrase may be included: In the event the agricultural land on the Protected Property lies fallow for more than two years, Grantor shall cooperate with Grantee to ensure that the land remains in an open condition and in active agricultural use by, for example, permitting access to the Protected Property by Grantee to crop, mow or brush-hog in the event Grantor is unable to maintain the property in an open condition; however, no obligation shall be imposed upon Grantor or Grantee to maintain the land in an open condition.]**

2. No rights-of-way, easements of ingress or egress, driveways, roads, utility lines, other easements, or other use restrictions shall be constructed, developed, granted, or maintained into, on, over, under, or across the Protected Property, without the prior written permission of Grantee, except as otherwise specifically permitted under this Grant, and as appear of record prior to the date of this Grant. Grantee may grant permission for Grantor to grant any rights-of-way, easements of ingress or egress, driveways, roads, utility lines, other easements, or other use restrictions, if it determines, in its sole discretion, that any such rights-of-way, easements of ingress or egress, driveways, roads, utility lines, other easements or other use restrictions are consistent with the Purposes of this Grant.

3. There shall be no signs, billboards, or outdoor advertising of any kind erected or displayed on the Protected Property; provided, however, that Grantor may erect and maintain reasonable signs indicating the name of the Protected Property, boundary markers,

directional signs, signs regarding hunting or trespassing on the Protected Property, memorial plaques, temporary signs indicating that the Protected Property is for sale or lease, signs informing the public that any agricultural or timber products are for sale or are being grown on the premises, political or religious signs, and signs informing the public of any rural enterprise approved pursuant to Section III below. Grantee, with the permission of Grantor, may erect and maintain signs designating the Protected Property as land under the protection of Grantee.

4. The placement, collection, or storage of trash, human waste, or any other unsightly or offensive material on the Protected Property shall not be permitted except at such locations, if any, and in such a manner as shall be approved in advance in writing by Grantee. The on-site storage and spreading of agricultural inputs including, but not limited to, lime, fertilizer, pesticides, compost or manure for agricultural practices and purposes, the storage of feed, and the temporary storage of trash generated on the Protected Property in receptacles for periodic off-site disposal shall be permitted without such prior written approval.

5. There shall be no disturbance of the surface including, but not limited to, filling, excavation, removal of topsoil, sand, gravel, rocks or minerals, or change of the topography of the land in any manner, except as may be reasonably necessary to carry out the uses permitted on the Protected Property under the terms of this Grant. In no case shall surface mining of subsurface oil, gas, or other minerals be permitted.

6. Unless otherwise specifically permitted in this Grant, the Protected Property shall not be subdivided, partitioned or conveyed in separate parcels without the prior written approval of Grantee, which approval may be granted, conditioned, or denied in Grantee's sole discretion. Grantee’s right to approve a subdivision under this Section III(6) is in addition to, and is not superseded by Grantee’s rights to approve a subdivision under any other provision of this Grant permitting a subdivision of the Protected Property.

7. No use shall be made of the Protected Property, and no activity thereon shall be permitted which is or is likely to become inconsistent with the Purposes of this Grant. Grantor and Grantee acknowledge that, in view of the perpetual nature of this Grant, they are unable to foresee all potential future land uses, future technologies, and future evolution of the land and other natural resources, and other future occurrences affecting the Purposes of this Grant. Grantee, therefore, in its sole discretion, may determine whether (a) proposed uses or proposed improvements not contemplated by or addressed in this Grant, or (b) alterations in existing uses or structures are consistent with the Purposes of this Grant.

## III. Permitted Uses of the Protected Property.

Notwithstanding the foregoing, Grantor shall have the right to make the following uses of the Protected Property:

1. The right to establish, re-establish, maintain, and use cultivated fields, orchards, and pastures in accordance with generally accepted agricultural practices and sound husbandry principles, together with the right to construct, maintain, and repair gravel or other permeable surfaced access roads for these purposes; provided, however, that Grantor shall secure the written approval of Grantee prior to any clearing of forest land to

establish fields, orchards, or pastures. Grantee's approval shall not be unreasonably withheld or conditioned, provided that such clearing is consistent with (a) the Purposes of this Grant, (b) the Forest Management Plan as described in Section IV, below, and provided further that any such operation is conducted in accordance with the publication, "Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont" ("AMPs"), a Vermont Department of Forests, Parks and Recreation publication dated August 15, 1987 (or such successor standard approved by Grantee).

2. The right to conduct maple sugaring operations on the Protected Property and the right to harvest firewood for use on the Protected Property **or on the other land excluded from the Protected Property as described in Schedule A attached hereto and incorporated herein; provided the excluded land is owned by the owner of the Protected Property**.

3. The right to perform other forest management activities, and to harvest timber and other wood products in accordance with a Forestry Plan as defined in Section IV below. Nothing in this clause shall be interpreted to require Grantor to harvest a treatment unit (as defined in Section IV, below), but only to require that any such harvest be conducted in accordance with the Forestry Plan or the Amended Forestry Plan should Grantor elect to harvest. Any harvesting of wood products shall be conducted in accordance with the AMPs (or such successor standard approved by Grantee).

4. The right to construct and maintain barns, sugar houses, or similar structures or facilities, together with necessary access drives and utilities, on the Protected Property, provided that they are used exclusively for agricultural or forestry purposes, and provided further that such construction has been approved in writing in advance by Grantee. Grantee's approval may include designation of a "complex" (meaning an area or areas of the Protected Property within which certain structures are or shall be grouped together) surrounding the structures and shall not otherwise be unreasonably withheld or conditioned, provided that the structure or facility is located [***Include if the project includes a "meander belt:"*** – outside of the area consisting of approximately ___ acres in and along the ___________ (River/Creek, etc.) and designated as "Meander Belt" on the "_________ Conservation Plan" more particularly described in Schedule A attached hereto, and otherwise is located ]in a manner which is consistent with the Purposes of this Grant. [***Include if the project includes a "meander belt"*** – Structures, drives and utilities proposed to be constructed within said "Meander Belt" may be approved, conditioned or denied by Grantee in its sole discretion.] Grantor shall not deem unreasonable a condition by Grantee that certain structures must be located within **an existing complex or** *[delete bold language if no complex is designated elsewhere in the easement]* a complex which may be designated in the future as provided in this Section III.

5. The right to use, maintain, establish, construct, and improve water sources, courses, and bodies within the Protected Property for uses permitted in this Grant; provided, however, that Grantor does not unnecessarily disturb the natural course of the surface water drainage and runoff flowing over the Protected Property. Grantor may disturb the natural water flow over the Protected Property in order to improve drainage of agricultural soils, reduce soil erosion or improve the agricultural potential of areas used for agricultural purposes, but shall do so in a manner that has minimum impact on the natural water flow and is otherwise consistent with the Purposes of this Grant and complies with all applicable

laws and regulations. Prior to undertaking a streambank stabilization project or placing any structure within rivers or streams or on the banks thereof, Grantor shall provide written notice to Grantee of Grantor's intent to do so. The construction of ponds or reservoirs shall be permitted only upon the prior written approval of Grantee, which approval shall not be unreasonably withheld or conditioned; provided, however, that such pond or reservoir is located in a manner which is consistent with the Purposes of this Grant.

6. The right to clear, construct, and maintain trails for non-commercial walking, horseback riding, skiing, and other non-motorized, non-commercial recreational activities within and across the Protected Property. Non-commercial snowmobiling may be permitted at the discretion of Grantor. All-terrain vehicles may be permitted by Grantor only in those circumstances as expressly provided in Section III(8) below.

7. The right to conduct rural enterprises consistent with the Purposes of this Grant, especially the economically viable use of the Protected Property for agriculture, forestry and open space and the conservation of agriculturally and silviculturally productive land. In connection with such rural enterprises, the right to construct, maintain, repair, enlarge, replace and use permitted structures with associated utility services, drives and appurtenant improvements within a designated complex permitted by this Section III. These structures shall be non-residential and not inconsistent in number, nature, size and intensity of use of each such structure or improvement with the Purposes of this Grant. No use or structure contemplated under this Section III(7) shall be commenced, constructed or located without first securing the prior written approval of Grantee, which approval Grantee may deny or condition in its sole discretion. All structures and uses shall conform with all applicable local, state and federal ordinances, statutes and regulations. Grantee's approval may be conditioned upon, without limitation, receipt of copies of any necessary governmental permits and approvals that Grantor obtains for such use or construction. **In no event shall the Protected Property be used for more than de minimis commercial recreation activities pursuant to I.R.C. Section 2031(c)(8)(B) or any successor statute or regulation.**

**LANDOWNER NOTE:** Your property may qualify for an additional federal tax deduction. Your estate may be able to take an additional deduction after your death if you die owning this property. If you wish to take advantage of this provision in IRC Section 2031, the language in bold type above must be included in this conservation grant. The effect of this language may be to prohibit you and all successor owners from any but very limited commercial recreational uses of your property. If you wish to consider using this estate tax deduction, please consult with your tax advisor and attorney.

8. The right to use all-terrain vehicles on the Protected Property for the limited purposes of agriculture and forestry. Grantor also may permit the use of all-terrain vehicles on the Protected Property only for non-commercial recreational purposes and only by Grantor, Grantor's family (as hereinafter defined) and Grantor's employees. Notwithstanding anything to the contrary contained herein, Grantee shall have the right to prohibit the use of all-terrain vehicles on the Protected Property if such use has an undue adverse impact on the Protected Property in light of the Purposes of this Grant as determined by Grantee in its sole discretion.

**Add this paragraph if project has an excluded parcel or building complex or building envelope**

9. The right to construct, maintain, repair, replace, relocate, improve and use systems for disposal of human waste and for supply of water for human consumption (collectively "systems") on the Protected Property

for the benefit of buildings or structures permitted under this Section III within a designated building complex ("Complex") **[delete if there is no complex]** and

for not more than one single-family residence which may be located on **[add "each parcel of" if there is more than one excluded parcel owned by Grantor]** land owned by the original Grantor herein at the date of this Grant but excluded from the Protected Property under Schedule A hereto ("Exclusion") **[delete if there is no excluded parcel]** and

for not more than one single-family residence which may be located on the **[change "the" to "each of the ___parcels of" if more than one excluded parcel]** land which may be excluded from the Protected Property under Section III( ) as a Building Envelope **[delete if there is no Building Envelope]**.

Any such systems may be constructed, maintained, operated, repaired, replaced, relocated or improved on the Protected Property only if there does not exist within the designated **Complex, Building Envelope or Exclusion** any suitable location for such systems, under the Vermont Department of Environmental Conservation Wastewater System and Potable Water Supply Rules or the then applicable law or regulations governing Systems (collectively "the Rules"), as determined by a person authorized to make such determination under the Rules retained at Grantor's sole cost and expense. Grantor shall first obtain the written approval of Grantee for the location, relocation, replacement or improvement of such systems on the Protected Property, which approval shall not be unreasonably withheld nor conditioned, provided that:

a) All reasonable attempts to locate, relocate, replace or improve the systems within the **Complex, Building Envelope or Exclusion** in a manner that complies with the then current Rules are exhausted; and
b) Such systems are located in a manner consistent with the Purposes of this Grant and especially minimize the loss of agricultural soils; and,
c) Such Systems are designed by a person authorized to do so under the Rules retained at Grantor's sole cost and expense, certified by such person as complying with the Rules, installed in compliance with the Rules, certified by person authorized to do so under the Rules as being installed in accordance with the certified design and approved in accordance with all the then applicable Rules.

After Grantor has obtained Grantee's approval for systems serving any **Building Envelope or Exclusion**, Grantor shall have the right to convey legal access to the successor owners of the **Building Envelope or Exclusion** for construction, operation and maintenance of the

systems as an appurtenance only to the **Building Envelope or Exclusion**. **[Delete the entire paragraph if there is no Building Envelope or Exclusion.]**

10. The right to construct, use, maintain, repair and replace one (1) fully enclosed camp being no more than fifteen (15) feet high as measured from the average undisturbed ground level to the roof peak and having a footprint of no more than 800 square feet including decks and porches, provided, however, that any such camp shall be used exclusively for non-commercial, periodic camping, hunting and recreational purposes, and not for permanent occupancy, and shall not have commercial utility services or an access road improved beyond what is minimally required to afford reasonable vehicular access. Alternatively, Grantee may approve a camp having different dimensions; provided, however that such camp shall have an aggregate total exterior wall surface area from undisturbed ground level to stud wall height, excluding gables and roof, of no more than 800 square feet. Grantor shall notify Grantee in writing prior to commencing construction on the camp, relocating it or enlarging it so that Grantee may review and approve the proposed location, dimensions and access of the camp which approval shall not be unreasonably withheld or conditioned, provided that the dimensions and access of the camp are in compliance with this section and are located [***Include if the project includes a "meander belt:"*** – outside of the area designated as "Meander Belt" more particularly described in Section III(4) above, and otherwise is located ] in a manner consistent with the Purposes of this Grant. [***Include if the project includes a "meander belt"*** – A camp proposed to be constructed within said "Meander Belt" may be approved, conditioned or denied by Grantee in its sole discretion.]

11. The right to construct, repair, maintain, and use a minimal number of minor structures (for example: deer stands, gazebos, hunting blinds, lean-tos, Adirondack shelters, tent platforms, tree houses, children's play houses, privies, kiosks, outdoor fireplaces) on the Protected Property provided that such structures shall not have any access roads or drives, utility services or facilities, waste disposal systems, or plumbing, and shall not be used for year-round, continuous residential occupancy or for any commercial activity of any nature (except as Grantee may permit in its sole discretion pursuant to the rural enterprises clause in Section III) and shall not exceed 300 square feet of floor space and fifteen feet in height. Grantor shall secure the written approval of Grantee prior to the construction of any such minor structure, which approval shall not be unreasonably withheld or conditioned, provided that the structure complies with the requirements of this Section III**(11)** and the number and location of such structures are consistent with the Purposes of this Grant.

## IV. Forest Management Plans.

As provided in Section III(3), above, Grantor shall not harvest timber or other wood products (except for maple sugar production and the cutting of firewood for use on the Protected Property **or on the other land excluded from the Protected Property as described in Schedule A attached hereto and incorporated herein**) without first developing and submitting to Grantee for its approval, a Forest Management Plan for the Protected Property (hereinafter the "Forestry Plan"). All updates, amendments, or other

changes to the Forestry Plan shall be submitted to Grantee for its approval prior to any harvesting. The Forestry Plan as updated, amended, or changed from time-to-time is hereinafter referred to as the "Amended Forestry Plan." Grantee's approval of the Forestry Plan and any Amended Forestry Plan shall not be unreasonably withheld or conditioned, if the Forestry Plan or Amended Forestry Plan has been approved by a professional forester and if the Forestry Plan and the Amended Forestry Plan are consistent with the Purposes of this Grant, and in particular, the [**primary/secondary**] purpose set forth in Section I(**1 or 2**). Grantee may rely upon the advice and recommendations of such foresters, wildlife experts, conservation biologists, or other experts as Grantee may select to determine whether the Forestry Plan or Amended Forestry Plan would be detrimental to the values identified in Section I. The Forestry Plan and any Amended Forestry Plan shall be consistent with the Purposes of this Grant and shall include at least the following elements and notices (except that those elements of the Forestry Plan or Amended Forestry Plan which do not change need not be re-submitted in updates, amendments or changes to the Forestry Plan):

a) Grantor's forest management objectives;
b) An appropriately scaled, accurate map indicating such items as forest stands, streams, and wetlands, and major access routes (truck roads, landings and major skid trails);
c) Forest stand ("treatment unit") descriptions (forest types, stocking levels before and after harvesting, soils, topography, stand quality, site class, insect and disease occurrence, previous management history, and prescribed silvicultural treatment including harvest schedules);
d) Plant and wildlife considerations (identification of known significant habitats and management recommendations);
e) Aesthetic and recreational considerations (impact on viewsheds from public roads, trails, and places); and
f) Historic and cultural resource considerations (identification of known resources and associated management recommendations).

The Forestry Plan shall be updated at least once every ten (10) years if Grantor intends to harvest timber or other wood products. Amendments to the Forestry Plan shall be required in the event that Grantor proposes a treatment not included in the Forestry Plan, but no such amendment shall be required for any change in timing or sequence of treatments if such change does not vary more than five (5) years from the prescription schedule set forth in the Forestry Plan as approved by Grantee. In the event that any treatment unit is substantially damaged by natural causes such as insect infestation, disease, fire, or wind, Grantor may elect to conduct an alternative treatment in which event Grantor shall submit an amendment to the Forestry Plan for Grantee's approval prior to conducting any alternative treatment.

Disapproval by Grantee of a Forestry Plan or an Amended Forestry Plan proposing a heavy cut (as defined below) shall not be deemed unreasonable. Grantee, however, may approve a Forestry Plan or an Amended Forestry Plan in its discretion if consistent with the Purposes of this Grant, such as to permit the planting of different species of trees, promote natural regeneration, or establish or re-establish a field, orchard, or pasture. Grantee may rely upon the advice and recommendations of such foresters, wildlife experts, conservation biologists, or other experts as Grantee may select to determine whether the Forestry Plan or Amended Forestry Plan would be detrimental to the values identified in Section I. "Heavy cut" shall mean the harvesting of wood products below the "C-Line" or minimum stocking

level on the Protected Property as determined by applying the protocol set forth in the current U.S. Department of Agriculture, Forest Service Silvicultural Guidelines for the Northeast or by applying a similar, successor standard approved by Grantee.

## V. Enforcement of the Covenants and Restrictions.

Grantee shall make reasonable efforts from time to time to assure compliance by Grantor with all of the covenants and restrictions herein. In connection with such efforts, Grantee may make periodic inspection of all or any portion of the Protected Property, and for such inspection and enforcement purposes, Grantee shall have the right of reasonable access to the Protected Property. In the event that Grantee becomes aware of an event or circumstance of non-compliance with the terms and conditions herein set forth, Grantee shall give notice to Grantor of such event or circumstance of non-compliance via certified mail, return receipt requested, and demand corrective action sufficient to abate such event or circumstance of non-compliance and restore the Protected Property to its previous condition. If Grantee, in its sole discretion, determines that the event or circumstance of noncompliance requires immediate action to prevent or mitigate significant damage to the conservation values of the Protected Property as provided in the Purposes of this Grant, then Grantee may pursue its rights under this enforcement section without prior notice to Grantor. In the event there has been an event or circumstance of non-compliance which is corrected through negotiation and voluntary compliance, Grantor shall reimburse Grantee all reasonable costs, including staff time, incurred in investigating the non-compliance and in securing its correction.

Failure by Grantor to cause discontinuance, abatement, or such other corrective action as may be demanded by Grantee within a reasonable time after receipt of notice and reasonable opportunity to take corrective action shall entitle Grantee to bring an action in a court of competent jurisdiction to enforce the terms of this Grant and to recover any damages arising from such non-compliance. Such damages, when recovered, may be applied by Grantee to corrective action on the Protected Property. If such Court determines that Grantor has failed to comply with this Grant, Grantor shall reimburse Grantee for any reasonable costs of enforcement, including Grantee's staff time, court costs and reasonable attorneys' fees, in addition to any other payments ordered by such Court. In the event that Grantee initiates litigation and the court determines that Grantor has not failed to comply with this Grant and that Grantee has initiated litigation without reasonable cause or in bad faith, then Grantee shall reimburse Grantor for any reasonable costs of defending such action, including court costs and reasonable attorneys' fees.

Grantor is responsible for the acts and omissions of persons acting on **his/her/its** behalf, at **his/her/its** direction or with **his/her/its** permission, and Grantee shall have the right to enforce against Grantor for events or circumstances of non-compliance with this Grant resulting from such acts or omissions. However, as to the acts or omissions of third parties other than the aforesaid persons, Grantee shall not have a right to enforce this Grant against Grantor unless Grantor: (i) is complicit in said acts or omissions, (ii) fails to cooperate with Grantee in all respects to halt or abate the event or circumstance of non-compliance resulting from such acts or omissions, or (iii) fails to report such acts or omissions to Grantee promptly upon learning of them. Nor shall Grantee institute any enforcement proceeding against Grantor for any change to the Protected Property caused by natural disasters such as fire, flood, storm or earthquake.

Grantee shall have the right, but not the obligation, to pursue all legal and equitable remedies against any third party responsible for an event or circumstance of non-compliance with this Grant and Grantor shall, at Grantee's direction, assign **his/her/its** right of action against such third party to Grantee, join Grantee in any suit or action against such third party, or appoint Grantee **his/her/its** attorney in fact for the purpose of pursuing an enforcement suit or action against such third party.

The parties to this Grant specifically acknowledge that events and circumstances of non-compliance constitute immediate and irreparable injury, loss, and damage to the Protected Property and accordingly entitle Grantee to such equitable relief, including but not limited to injunctive relief, as the Court deems just and appropriate. The remedies described herein are in addition to, and not in limitation of, any other remedies available to Grantee at law, in equity, or through administrative proceedings.

No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair Grantee's rights or remedies or be construed as a waiver. Nothing in this enforcement section shall be construed as imposing a liability upon a prior owner of the Protected Property, where the event or circumstance of non-compliance shall have occurred after termination of said prior owner's ownership of the Protected Property.

## VI. Miscellaneous Provisions.

1. Where Grantor is required, as a result of this Grant, to obtain the prior written approval of Grantee before commencing an activity or act, and where Grantee has designated in writing another organization or entity which shall have the authority to grant such approval, the approval of said designee shall be deemed to be the approval of Grantee. Grantor shall reimburse Grantee or Grantee's designee for all extraordinary costs, including staff time, incurred in reviewing the proposed action requiring Grantee's approval; but not to include those costs which are expected and routine in scope. When Grantee has authorized a proposed action requiring approval under this Grant, Grantee shall, on request, provide Grantor with a written certification in recordable form memorializing said approval.

2. It is hereby agreed that the construction of any buildings, structures or improvements, or any use of the land otherwise permitted under this Grant, or the subdivision and separate conveyance of any land excluded from this Grant in Schedule A attached hereto **[delete if no exclusion or if exclusion is non-subdividable]**, shall be in accordance with all applicable ordinances, statutes, and regulations of the Town of ______ and the State of Vermont and at Grantor's sole expense.

3. Grantee shall transfer the development rights and conservation easement and restrictions conveyed by Grantor herein only to a qualified conservation organization that agrees to enforce the conservation Purposes of this Grant, in accordance with the regulations established by the Internal Revenue Service governing such transfers.

4. If circumstances arise in the future that make the achievement of the purposes of this Grant impossible or impractical to accomplish, this Grant may be extinguished or terminated by eminent domain in whole or in part only in accordance with the laws of the State of Vermont, the Internal Revenue Code, as amended, and the regulations promulgated

thereunder. In the event the development rights or conservation restrictions conveyed to Grantee herein are so extinguished or terminated by eminent domain or judicial proceedings, Grantee shall be entitled to a share of the proceeds of any sale or exchange of the Protected Property formerly subject to this Grant according to the proportional value of Grantee's rights and interests in the Protected Property. Any proceeds from extinguishment shall be allocated between Grantor and Grantee using a ratio based upon the relative value of the development rights and conservation restrictions, and the value of the fee interest in the Protected Property as a whole, as determined by a qualified appraisal performed at the direction of Grantor effective as of the date of this conveyance in accordance with the requirements for a federal income tax deduction allowable by reason of this Grant pursuant to Section 170(h) of the Internal Revenue Code. For the purposes of this paragraph, the proportionate value of Grantee's rights shall remain constant. Grantee shall use any such proceeds in a manner consistent with the conservation purposes of this Grant.

5. In any deed conveying an interest in all or part of the Protected Property, Grantor shall make reference to the conservation easement and restrictions described herein and shall indicate that said easement and restrictions are binding upon all successors in interest in the Protected Property in perpetuity. Grantor shall also notify Grantee of the name(s) and address(es) of Grantor's successor(s) in interest.

6. Grantee shall be entitled to re-record this Grant, or to record a notice making reference to the existence of this Grant, in the Town of _____ Land Records as may be necessary to satisfy the requirements of the Record Marketable Title Act, 27 V.S.A., Chapter 5, Subchapter 7, including 27 V.S.A. §§603 and 605.

7. Grantor shall pay all real estate taxes and assessments on the Protected Property and shall pay all other taxes, if any, assessed in lieu of or in substitution for real estate taxes on the Protected Property.

8. The term "Grantor" shall include the heirs, executors, administrators, successors, and assigns of the original Grantor, _______________. The term "Grantee" shall include the successors and assigns of the original Grantee, Vermont Land Trust, Inc. The term "family" includes: (a) any spouse of Grantor and any persons related to Grantor by blood to the 4th degree of kinship or by adoption, together with spouses of family members, (b) a corporation, partnership or other entity which is wholly owned and controlled by Grantor or Grantor's family (as defined herein), (c) any estate of Grantor or Grantor's family, and (d) all owners of a Grantor corporation, partnership, trust or other entity who are related to each other by blood to the 4th degree of kinship or by adoption, together with spouses of family members.

9. Grantor shall hold harmless, indemnify and defend Grantee from and against any liabilities, claims and expenses, including reasonable attorney's fees to which Grantee may be subjected, including, but not limited to, those arising from any solid or hazardous waste/hazardous substance release or disposal or hazardous waste/ hazardous substance cleanup laws or the actions or inactions of Grantor as owner or operator of the premises, or those of Grantor's agents.

10. This Grant shall be governed by and construed in accordance with the laws of the State of Vermont. In the event that any provision or clause in this Grant conflicts with applicable law, such conflict shall not affect other provisions hereof which can be given effect without the conflicting provision. To this end the provisions of this Grant are declared to be severable. Invalidation of any provision hereof shall not affect any other provision of this Grant.

TO HAVE AND TO HOLD said granted development rights, conservation easement and restrictions, with all the privileges and appurtenances thereof, to the said Grantee, **VERMONT LAND TRUST, INC.**, its successors and assigns, to their own use and behoof forever, and the said Grantor, _________________, for **himself/herself**, and **his/her** heirs, successors and assigns, does covenant with the said Grantee, its successors and assigns, that until the ensealing of these presents, **he/she** is the sole owner of the premises and has good right and title to convey the same in the manner aforesaid, that the premises are free from every encumbrance, except those of record, and **he/she** hereby engages to warrant and defend the same against all lawful claims whatever.

I set my hand at ___________, Vermont this ____ day of ___________, 201__.

GRANTOR

___________________________

STATE OF ______________
____________ COUNTY, ss.

At _________________, this _____ day of ______, 201_, ________________
_______________ personally appeared and **he/she** acknowledged this instrument, by **him/her** sealed and subscribed, to be **his/her** free act and deed, before me.

______________________________
Notary Public
My commission expires: 02/10/2015

# SCHEDULE A
# PROTECTED PROPERTY

Being all and the same lands and premises, including farm buildings, conveyed to Grantor by warranty deed of ________________________________, dated _______________, and recorded in Book ______, Page ________ of the ____________ Land Records.

**Excepted and excluded** from this description of the Protected Property are the following ____ parcels of land:

1. A one-acre parcel…, all bearings are referenced to "Grid North:"

   *[Insert metes and bounds description from the Conservation Plan]*

2. A one-acre parcel…, all bearings are referenced to "Grid North:"

   *[Insert metes and bounds description from the Conservation Plan]*

Meaning and intending to include in this description of the Protected Property all of the land with the buildings and improvements thereon lying on both sides of Town Highway #__ (also known as __________), in the Town of _____, Vermont, **except as excluded above,** and generally described as containing ___ acres, more or less.

**<u>NOTICE</u>: Unless otherwise expressly indicated, the descriptions in this Schedule A and in any subsequent Schedules are not based on a survey or subdivision plat.** The Grantor and Grantee have used their best efforts to depict the approximate boundaries of the Protected Property and any excluded parcels, complexes or special treatment areas on a plan entitled "Vermont Land Trust - _________ Property, Town of ______________, ____________ Co., VT, ____________ 201__" signed by the Grantor and Grantee (referred to throughout this Grant and its Schedules as "____________ Conservation Plan"). The ________ Conservation Plan is based upon Vermont Base Map digital orthophotos and other information available to Grantee at the time of the Plan's preparation. Any metes and bounds descriptions included in the Schedules herein are approximate only. They are computer generated and are not the result of field measurements or extensive title research. The __________ Conservation Plan and any metes and bounds descriptions herein are intended solely for the use of the Grantor and Grantee in establishing the approximate location of the areas described and for administering and interpreting the terms and conditions of this Grant. No monuments have been placed on the ground. The ______ Conservation Plan is kept by Grantee in its Stewardship Office. **The ______ Conservation Plan is not a survey and must not be used as a survey or for any conveyance or subdivision of the land depicted thereon.**

Grantor and Grantee do not intend to imply any limitation on the area of land included in this description, should a survey determine that additional land is also encumbered by the Grant. If, in the future, the Grantor or Grantee shall prepare a survey of the Protected Property, of any portion thereof, or of any excluded lands, and that survey is accepted by the other party or confirmed by a court, the descriptions in the survey shall control.

Reference may be made to the above described deed and record, and to the deeds and records referred to therein, in further aid of this description.

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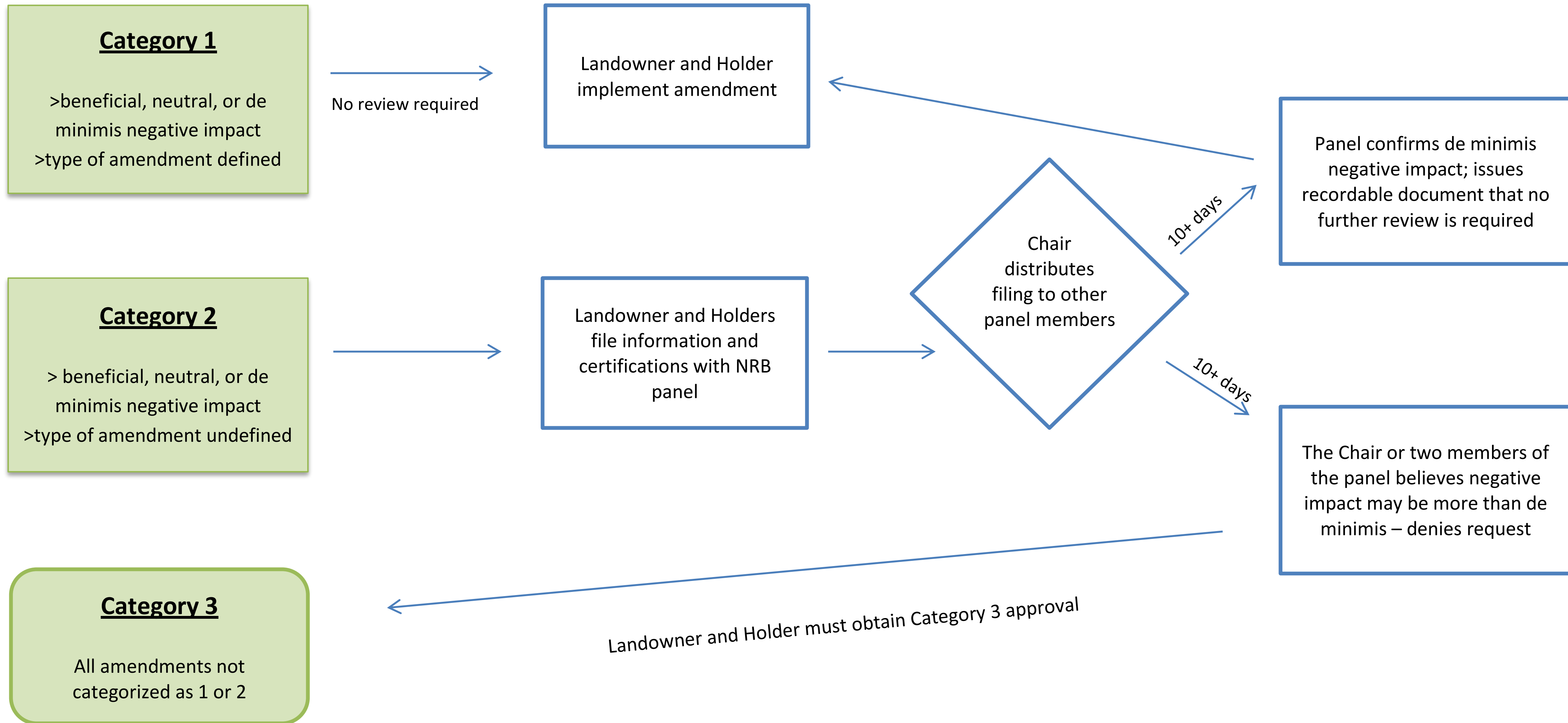
**IMPORTANT NOTICE**

In the event the Grantor intends to declare the grant of development rights and conservation restrictions as a charitable deduction for federal income tax purposes, federal laws require the Grantor to do the following:

1. Obtain a qualified appraisal report prepared by a qualified appraiser establishing the value of the contribution.
2. File a summary report (Form 8283) with Grantor's income tax return.
3. Obtain a release or subordination agreement from all parties that hold a mortgage interest, lien or similar encumbrance on the Protected Property.

Failure to meet the requirements of the Internal Revenue Code may cause the deduction to be disallowed. The staff of the Vermont Land Trust will be happy to provide further information about these requirements. However, Grantor should have all documents reviewed by **his/her** legal advisors and tax advisors before signing to ensure that **his/her** interests are fully protected.

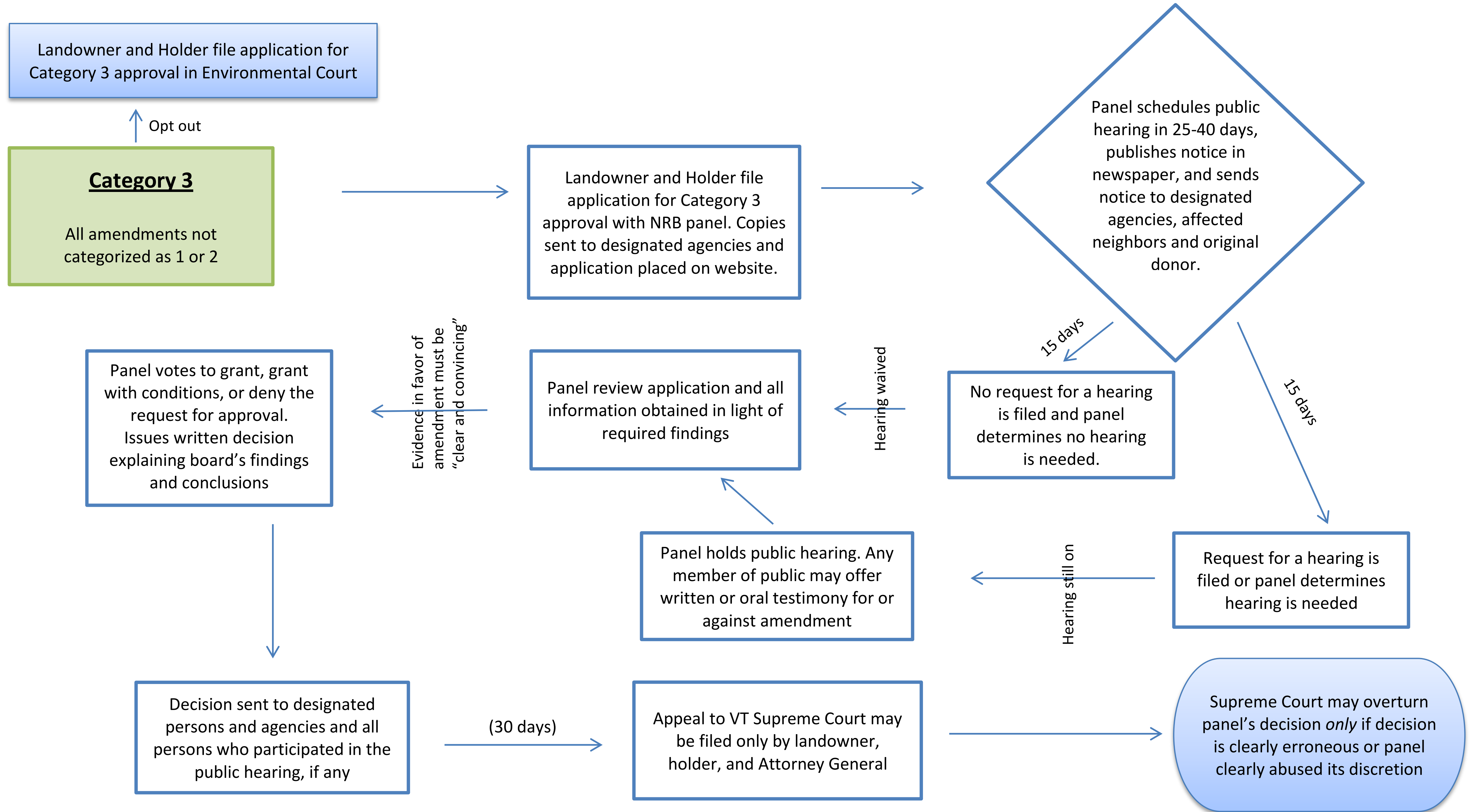
# Appendix C: Standard Easement Amendment Process for Category 1 and Category 2 Amendments




*See Category 3 flowchart*

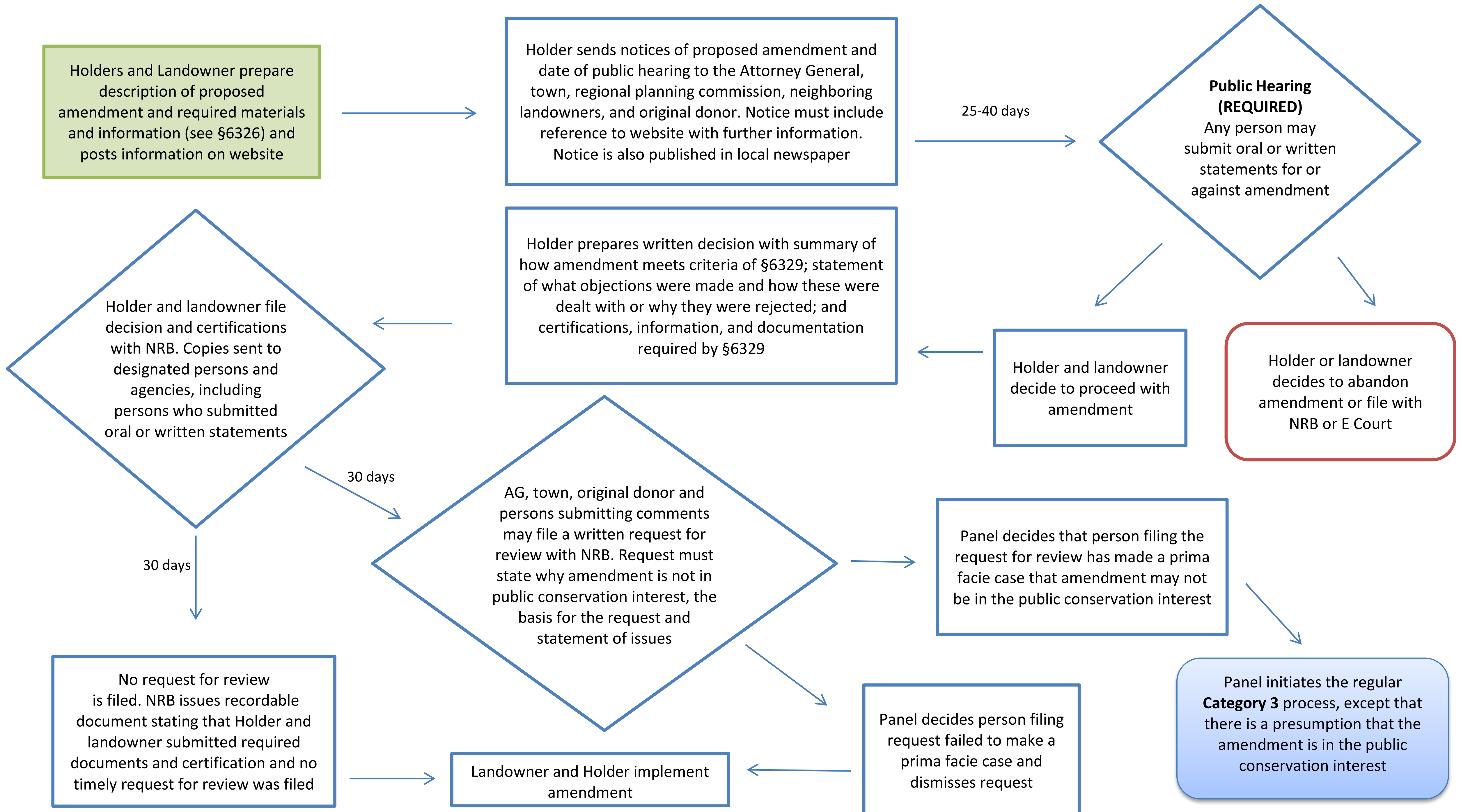
1/15/2013

# Standard Easement Amendment Process for Category 3 Amendments




1/15/2013

# Holder Internal Review Process for Category 3 Amendments (optional)




1/15/2013