

Memorandum

To: House Judiciary Committee  
From: Jeanie McIntyre, Upper Valley Land Trust  
Date: February 10, 2014  
Re: S.119 Amendments

The following are suggested amendments to S.119. I prepared these (and the attached notes and comments) for discussion with Aaron Adler, however I understand that he has been unavailable the past several days. To accommodate the approach laid out herein, there are other minor modifications required within the body of the bill, however for simplicity and ease of reading, I have not included each of those. (I do have complete revisions prepared.)

I. Donor confidence/Protection of donor intent.

- A. Establish requirement that gifted easements specify whether donee accepts subject to donor-imposed restriction.

*New section inserted as 824: specifies requirement, provides for after-the-fact certification by donee.*

**See Attachment 1.**

- B. Establish 4th category of amendment for conservation easements subject to donor-imposed restrictions.

*The standards for these amendments should be consistent with existing common law.*

*New Section to be inserted after Category 3. Panel process is same as category 2 and 3 except criteria are more limited and allowable response to changed circumstances is only the most minimal change needed to preserve the donor/donee purposes.*

**See Attachment 2.**

- C. Appeal period extended to 60 days.

II. Conformance with IRS Requirements:

- A. Establish a 5<sup>th</sup> category of amendment for those amendments where the terms of the easement specify that judicial approval is required.

*Allow a judge to determine whether a petitioner's certifications are sufficient to avoid all the notice requirements of category 3. Limit consideration to the criteria specified in the conservation easement.*

**See Attachment 3.**

**Attachment 1.**

**§ 824. Gifts of Conservation Rights and Interests (effective from date of S.119)**

If a conservation right or interest is conveyed as a gift, the deed restriction, right, easement, covenant or condition shall include a statement identifying the agreement of the Donor and Donee that the conveyance is intended as either: 1) unrestricted, to be used in furtherance of Grantee's land conservation mission and purposes or 2) subject to a donor-imposed restriction for the purpose of protecting the particular parcel of land in perpetuity, as specifically set forth in the deed restriction, right, easement, covenant or condition.

(a) Gifts executed after (the effective date of the legislation) which do not contain such a statement will be treated as subject to donor-imposed restrictions for the purpose of 10 V.S.A. chapter 155, subchapter 2.

(b) Donees who hold a conservation right or interest accepted as a gift prior to (the date of legislation) and believe they have received the gift subject to donor-imposed restrictions may execute a recordable statement to that effect. Upon such recording, the conveyance will be treated, under 10 V.S.A. chapter 155, subchapter 2, the same as gifts which contain the "donor imposed" reference within the conveyance instrument.

**Comment [jm1]:** Does "gift" need to be defined as conveyance for less than fair market compensation? Is this tracked on transfer tax returns?

**Comment [jm2]:** Terminology preferred by Todd Daloz last spring...

**Comment [jm3]:** Because the preponderance of information about conservation easements suggests that the property will be preserved forever, so it is reasonable to assume that is the default.

**Comment [jm4]:** This statement is effectively an amendment. It could have a special name, a special format could be identified, or the law could just refer to "an amendment for the purpose of stating the donee's intention that the easement should be treated as a gift subject to donor imposed restrictions."

**Comment [jm5]:** Create a time limit for this kind of amendment? Like a year from the date that S119 become effective?

## Attachment 2.

### § 632x. CATEGORY 4 AMENDMENTS; REVIEW OPTIONS

### § 632x. CATEGORY 4 AMENDMENTS; PROCEDURES, CRITERIA

(insert)

(a) A Category 4 amendment is an amendment to a conservation easement that (i) was conveyed to the holder(s) as a gift, and (ii) accepted by the holder subject to donor imposed restrictions, and (iii) is not a Category 5 amendment.

(b) The holder and landowner may approve a Category 4 amendment without notice to or review by an independent entity, provided that the amendment

(1) is not inconsistent with the donor's intent to permanently conserve the Protected Property as described in the conservation easement deed, and

(2) is an amendment listed in § 6325 (a) (1)-(10).

(c) If the amendment meets the requirements of § 6326 (a) and the holder reasonably believes that the amendment is consistent with the donor's intent to permanently conserve the Protected Property as described in the conservation easement deed, the holder 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.

(1) 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 each holder and the landowner or the landowner's representative. In addition, the holder shall certify and demonstrate that the amendment:

(A) is consistent with the donor- imposed restrictions accepted by the Grantee at the time of the gift;

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

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

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

(E) has a net beneficial, neutral, or not more than a de minimis negative impact on the protected qualities under the existing easement. In determining such net beneficial, neutral, or de minimis negative impact, the holder shall address the degree to which the amendment will balance the stated goals and purposes of the easement and shall identify whether these

**Comment [jm6]:** Don't know what title of this section should be or if it should be more than one section...

**Comment [jm7]:** Make sure this term is defined to include bargain sales (should be done in 823/824?)

**Comment [jm8]:** This allows amendments that would otherwise be Category 1 to proceed without review if not inconsistent with Donor intent.

**Comment [jm9]:** This allows a process similar to Category 2 but adding the requirement re donor intent.

goals and purposes are ranked by the terms of the easement and demonstrate that the proposed amendment is consistent with that ranking; and

(F) is consistent with the documented intent of all persons that directly funded the acquisition of the easement.

(2) Within a reasonable time after receiving 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 of the subject easement that:

(A) no further review of the amendment is required because it satisfies all of the criteria listed under subsection (1) of this section;

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

(C) the holder must seek approval of the amendment under subsection 632x (d) because the amendment fails one or more of the criteria listed under subsection (1) of this section.

(3) If two or more members of the Panel believe that the proposed amendment fails one or more of the criteria listed under subsection (1) of this section and those members notify the Chair either individually or collectively within 10 days of the date of the Chair's notice to the Panel members, the amendment shall be subject to review under subsection 632x (d) .

(4) If the determination under this section is 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.

(d) If (a) the holder reasonably believes that the amendment is not consistent with the donor's intent to permanently conserve the Protected Property as described in the conservation easement deed, or (b) the Panel determines that the amendment fails one or more of the criteria listed under subsection (c) (1) of this section, the holder shall file a petition to the Panel to seek approval of the amendment.

(1) The petition shall include:

(A) All of the documents and certifications required under § 6328(a)(1) (A), (B), (C), (E), (F), and (G), and

(B) Documentation of the changes to the Protected Property and surrounding lands that have made it impossible or impractical to accomplish the conservation purposes intended by Donor's gift to permanently conserve the Protected Property as described in the conservation easement deed.

(C) Summary of the rationale as to why the proposed amendment is the minimal change needed to most closely adhere to the intent of the donor to permanently protect the

**Comment [jm10]:** This "bumps the amendment down" to what would have been Category 3. See next section.

**Comment [jm11]:** This is a modification of Category 3, with a more narrow set of criteria, but same provisions for notice etc.

conservation values of the Protected Property as expressed in the conservation easement.  
(2) The petition shall be signed by each holder of the subject easement, 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.

(3) ~~Service of petition, posting, notice, hearing, subpoena authority.~~ The procedures shall be as described in § 6328 (b), (c), (d), (e) and (f) .

**Comment [jm12]:** Same public notice as for Category 3

(4) Information considered. In any proceeding under this section, the Panel shall consider the following

(A) all circumstances and information that may reasonably bear upon whether material changes to the Protected Property and surrounding lands have made it impossible or impractical to accomplish the conservation purposes intended by Donor's gift to permanently conserve the Protected Property as described in the conservation easement deed.  
(B) whether the conservation easement language provides guidance for resolving the change in circumstances;

(C) the existence or lack of reasonable alternatives to address the changed circumstances and why the proposed amendment is the most minimal change needed to adapt the easement to changed conditions while continuing to adhere, as near as possible, to the intent of the donor to permanently conserve the Protected Property as described in the conservation easement deed;

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

(E) the certification requirements for Category 2 amendments listed in subdivisions 6326(b)(1)–(4) of this title;

(5) Criteria for approval.

The Panel shall approve an amendment if it finds, by clear and convincing evidence, that:

(A) continuing to conserve the conservation values of the Protected Property has become impossible or impractical due to changed conditions on the Protected Property or surrounding properties, and (B) there are no feasible alternatives to the amendment, and (C) the amendment is the most minimal change needed to adapt the easement to the changed conditions while continuing to adhere, as near as possible, to the intent of the donor to permanently conserve the Protected Property as described in the conservation easement

deed, and

(D) the amendment will not result in private inurement or confer impermissible private benefit under 26 U.S.C. § 501(c)(3), and

(E) the amendment will result in adequate compensation to the holder. Any such compensation shall be paid to the holder of the easement and shall be used by the holder for the conservation of lands in a manner consistent, as nearly as possible, with the conservation purpose of the easement.

(6) Decision. 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.

**Comment [jm13]:** Same as Category 3, could just be cross-referenced.

(A) The Panel shall post its written decision on the Board's website and shall distribute a copy to each holder of the subject easement, the landowner, the Attorney General, and to any other person who participated in the public hearing, if one was held.

(B) If the decision approves an amendment that terminates an easement in whole or in part, the Panel shall require that the holder apply any monetary compensation to achieve a conservation purpose similar to that stated in the easement and shall require, as a condition of approval, the holder to identify such purpose and provide documentation proving that the compensation has been applied in accordance with this subdivision (B).

(7) The Attorney General may request reconsideration of a decision by the Panel. Such a request shall be filed within 60 days of the decision and shall identify each specific issue to be reconsidered. The request shall not be governed by the Vermont Rules of Civil Procedure and shall address the merits of each specific issue. In its decision, the Panel shall address the merits of each such issue under subsection (9) of this section.

**Comment [jm14]:** Same as category 3 except 60 day appeal period.

### Attachment 3.

#### § 6329. CATEGORY 5 AMENDMENTS. PETITION TO ENVIRONMENTAL DIVISION

(a) A holder must file a petition for approval of a Category 5 amendment with the Environmental Division of the Superior Court. ~~A holder shall file a petition for approval of an easement amendment with the Environmental Division of the Superior Court, pursuant to the requirements of this section, if, by its express terms, an easement provides that the proposed amendment may only be approved by court order.~~

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

(2) petitioner shall serve the petition on the persons described in subdivisions 6328(b)(1)–(5) of this title.

(A) As to a petition under this section, the Division shall determine which persons who originally conveyed or amended the easement shall be notified under subdivision 6328(b)(5) of this title.

(B) The petitioner shall serve the petition on adjoining landowners who may be affected by the amendment to the easement, unless on motion of the petitioner the Division determines that the number of adjoining landowners is so large that such service is not practicable. The Division may direct the petitioner to provide a list of adjoining landowners.

(b) A petition under this section shall be a matter of original jurisdiction before the Environmental Division. The Division shall provide notice of the first status conference or hearing, whichever is earlier, to the persons signing the petition and the persons on whom service of the petition is required. The Vermont Rules of Environmental Court Proceedings shall apply to petitions under this section. The Attorney General shall have a statutory right to intervene in a petition under this section and may appear at his or her discretion.

(c) If the proposed amendment would change a conservation easement conveyed the holder(s) as a gift and accepted by the holder subject to donor-imposed restrictions, the Division shall consider the information described under subsection 632xx (see insert) of this title and apply the criteria

**Comment [jm15]:** Title changed to be a category of its own.

**Comment [jm16]:** This kind of notice wouldn't normally be required for a category 2. I tried to clean this up a bit in Category 4. Will a judge be able to discern what level of notice is appropriate? Could this section be deleted and replaces with references occur within c) and d)

**Comment [jm17]:** This addresses the situation where a donor-restricted easement also contains judicial requirement, and donor intention must be respected.

enumerated under subdivision 632xx (see insert) of this title.

(d) If the proposed amendment would change a conservation easement that not was not conveyed as a gift or was conveyed as an unrestricted gift under section 824, the Division shall consider the information described under subsection 6328(g) of this title and apply the criteria enumerated under subdivision 6328(h) of this title. ~~However, if the terms of the conservation easement proposed for an amendment provide one or more conditions for amendment that are more restrictive than or different from those applied by the Panel, the Division shall also apply those conditions set forth in the easement in making its decision.~~ If a requirement of the conservation easement subject to the petition conflicts with a requirement of a criterion listed in the subsection, the Panel shall apply the requirement that is more restrictive.

**Comment [jm18]:** Language preferred by Darby. I'm not sure any of this is needed if the CE is not donor-restricted.