

Memorandum

To: House Judiciary Committee
From: Jeanie McIntyre, Upper Valley Land Trust
Date: February 5, 2014
Re: S.119 Amendments

The following are suggested amendments to S.119:

1. Conformance with IRS Requirements

The IRS needs to know the wording it reviews is reliable. The IRS is concerned about extinguishment/termination. Judicial proceedings are required for amendments that extinguish/terminate all or part of the easement. This bill should not entangle the Environmental Court review with the fact finding process related to other types of amendments because the addition of factors outside of the easement language upon which the IRS and the taxpayer have based the treatment of the gift causes ambiguity.

Solution A: Amendments (including amendments that result in whole or partial extinguishment) that by the express terms of the easement require judicial proceedings should be exempt from the legislation.

OR

Solution B: Add a new paragraph prior to the “categories” and specify that amendments (including amendments that result in whole or partial extinguishment) that by the express terms of the easement require judicial proceedings must be petitioned to the Environmental Court. Specify that the Environmental Court should make its determination based on the guidance within the easement deed itself.

2. Donor confidence/Protection of donor intent.

Donors need to know that charities will be accountable to the representations they make at the time the gift is made. State legislation should be at least as protective of the donor’s intent as is common law at present.

Solution

- a) Require that conservation easements conveyed after the date of legislation must clearly identify whether the conveyance is (in any part) a charitable gift, and if so, acknowledge Grantee’s acceptance of the gift as *either* unrestricted to be used in furtherance of Grantee’s land conservation mission, *or* subject to a donor-imposed restriction for the purpose of protecting the particular parcel of land in perpetuity. Provide that, after the date of legislation, grants of easements which do not contain this information should be presumed to be the latter, as the majority of the representations made by land trusts imply that both parties expect a permanent commitment to the land described in the easement deed.
- b) Provide a 4th category of amendment - Amendments of conservation easements subject to donor-imposed restrictions. The standards for these amendments should be

- consistent with existing common law. If desired, S.119 could authorize the Panel could act for the court, but the level of protection for donors should be maintained. (See table in my prior testimony.) The language in the conservation easement deed should be controlling -- explicit donor intent should trump current events, neighbor/town sentiments, etc. The response to changed circumstances should be the most minimal change needed to preserve the donor/donee purposes. Note: This would resolve concerns of AG's office that the existing state law regarding restricted gifts of real property is scant.
- c) Retroactivity – The law should provide that Donees who received gifts of conservation easements prior to the date of legislation and believe they have received these gifts subject to donor-imposed restrictions, but lack explicit documentation (because the parties assumed that the easement deed would be sufficient to establish intent) may execute a recordable statement to that effect. Upon such recording, the easement deed should be treated, for amendment purposes, the same as those post-enactment deeds which contain the “donor imposed” reference (new Category 4). Note: This approach strikes a balance. It does not protect all donors who may have believed they were making such gifts, because requiring such would have potentially significant impacts on land trusts that hold many easements donated years ago. Donees that are comfortable treating their donated easement holdings as “unrestricted gifts” would not need to do anything. However, some donors might ask their donees to do so, and some donees might act preemptively.
 - d) The law should provide reasonable recourse and appeals for Donors (and their heirs) who can prove that a donee has abused donor intent (for instance, by misrepresenting the status of donor-imposed restrictions). (The existing version of S.119 provides a limited timeframe for notice and appeals and seems inconsistent with charitable giving standards.)

I would be happy to provide this Committee with specific amendment language for S119, to accomplish the changes outlined above.