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January 28, 2013

House Judiciary Committee  
Room 30  
115 State Street  
Montpelier, VT 05633-5401

Re: S. 119

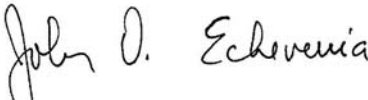
Dear Committee Members,

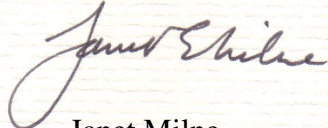
Please accept these comments on the above-referenced legislative proposal. We live and/or work in Vermont. In addition, we each teach environmental law, natural resources law and land use law. We also have written numerous books and scholarly articles on these topics, including on the subject of conservation easements.

Attached to this letter are detailed comments on the bill prepared by Nancy A. McLaughlin, Professor of Law at the University of Utah S.J. Quinney College of Law. Professor McLaughlin teaches tax law, trusts and estate law and the law of non-profit organizations. She also has made a particular specialty of the study of conservation easements. Indeed, we regard Professor McLaughlin as the leading scholar in the United States on the subject of conservation easements. Last year, Professor McLaughlin gave a lecture at Vermont Law School on the topic of conservation easement amendments and terminations. By way of follow up to her lecture, she has prepared at our request the attached detailed analysis of the pending bill from both the legal and public policy perspectives. Professor McLaughlin raises a number of serious concerns about the bill, and identifies possible ameliorative amendments. We urge you to give her analysis and recommendations careful attention.

We understand that Professor McLaughlin would be able and willing to answer any questions that members of the committee might have about her analysis. We also stand ready to assist the committee although, as suggested by our own reliance on Professor McLaughlin, she brings greater technical expertise to this subject, particularly with regard to interpretation of the Internal Revenue Code provisions and Treasury Regulations governing conservation easements.

Respectfully submitted,

  
John D. Echeverria

  
Janet Milne

# Memorandum

To: John D. Echeverria

From: Nancy A. McLaughlin

Date: January 27, 2014

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## Analysis of S.119 (Conservation Easements)

This memorandum discusses proposed legislation S. 119. The proposed legislation is valuable, particularly as it relates to the amendment of perpetual conservation easements in manners consistent with their conservation purposes where the easements do not expressly grant the holder the discretion to agree to such amendments (as I understand is the case with regard to many older conservation easements in Vermont). However, the legislation as currently drafted raises a number of legal and policy concerns.

- As discussed in more detail below, while nominally addressing the “amendment” of perpetual conservation easements, the proposed legislation would permit land trust and government holders of easements, with the approval of a 5-member administrative panel, to terminate perpetual conservation easements in whole or in part, including, for example, by lifting easements off existing protected properties in exchange for protecting other properties elsewhere.<sup>1</sup>
- Such terminations would conflict with the expectations of donors of perpetual conservation easements, the communities in which the protected lands are located, and the public at large regarding what it means to protect land in perpetuity with a conservation easement.
- Courts may find that such terminations conflict with the legal protections afforded to charitable donors.
- The legislation also would establish a process for the amendment and termination of perpetual conservation easements that conflicts with the legal requirements for federal tax incentives offered to conservation easement donors, potentially rendering charitably-minded landowners in Vermont unable to benefit from generous federal tax incentives available to landowners in other states.

This memorandum concludes by recommending several possible revisions that would address the problems noted above and ensure transparency so that conservation easement grantors and the public are fully informed of the impact of the legislation.

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<sup>1</sup> See proposed § 6301a(6), defining “amend” or “amendment” to include not only the modification of an existing conservation easement, but also “the whole or partial termination of an existing conservation easement” and “the substitution of a new easement for an existing conservation easement.”

## **I. Representations of Land Trusts and Legal Obligations to Donors**

Land trusts routinely solicit conservation easement donations by promising landowners that they will protect their particular lands “in perpetuity” or “forever” with a conservation easement. For example, for many years, as part of its “Landowner Information Series,” the Vermont Land Trust made the following representations to easement donors:

A donation of a conservation easement protects your land from development for all future generations. The land continues to be privately owned but it carries with it protective restrictions that limit some future uses. These protections are forever upheld by the Vermont Land Trust through its stewardship staff.

Easements are permanent. Conservation easements remain in force even after the land changes hands. Unlike deed restrictions, a conservation easement is forever upheld by VLT as an interested party whose goal is to protect the easement.

[U]nanticipated future uses that are inconsistent with the original owner’s conservation goals are prohibited. This ensures that VLT has the ability to carry out the original landowner’s intent in perpetuity.<sup>2</sup>

On its website, the Vermont Land Trust currently represents, among other things:

### **What does it mean to “conserve your land,” or “put your land in the land trust”?**

These terms are used to describe how landowners act to permanently protect their land from development. When you conserve your land, you sign a legal document called a conservation easement and dedicate your property, forever, to being a part of Vermont’s rural, productive, and natural landscape.  
(<http://www.vlt.org/land-protection/frequently-asked-questions>)

### **What are the benefits of conserving my land?**

The hundreds of families and individuals who have worked with us to conserve their land tell us that their greatest reward is the personal satisfaction and peace of mind that comes from knowing their land will remain forever a part of our state’s unique landscape.  
(<http://www.vlt.org/land-protection/frequently-asked-questions>)

### **Stewardship: A Perpetual Commitment to Conservation**

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<sup>2</sup> See *VLT Landowner Information Series: Conservation Easement Donations* (a copy of which is attached).

The Vermont Land Trust has been very successful at conserving some of the most productive and diverse land in the state. In over three decades, we have protected more than a half million acres of farmland and forestland using conservation easements.

With each conservation success comes a deep and permanent responsibility: we have promised to look after, or steward, the conservation protections placed on this land forever.

<http://www.vlt.org/land-stewardship>)

These representations are typical of the kinds of representations made to prospective easement grantors and the public by other land trusts in Vermont and in other regions of the country.

It is unlikely that landowners who donated conservation easements in response to these representations anticipated that the Vermont Land Trust and a state panel would later be authorized by statute to terminate the easements if, for example, in the view of such entities, some higher priority conservation project comes along. Landowners who donate conservation easements as charitable gifts often do so at great personal economic sacrifice to themselves and their heirs. They are willing to do this because of the promise that their particular beloved lands will be protected “in perpetuity” or “forever,” or for as long as continuing to protect such lands remains possible. Funders of easement acquisition projects, landowners who purchase properties adjacent to or near easement-protected properties, and localities within which such properties are located similarly expect that perpetual conservation easements will permanently protect the lands they encumber.

In addition to conflicting with the legitimate expectations of easement donors, the proposed legislation might be found by the courts to conflict with the legal protections afforded charitable donors. Representations by charities such as those noted above can create binding restrictions on the gifts received. Restrictions can also be created when gift instruments indicate that the property is to be used for a specific charitable purpose, as conservation easement deeds do.

The law in the United States provides significant protection to charitable donors. The donee of a charitable gift made for a specific purpose (a “restricted gift”) must administer the gift consistent with the charitable purpose for which it was given. If the donee uses or threatens to use a restricted gift in a manner contrary to the purpose for which it was given, state law generally empowers the state attorney general to sue the donee for a breach of its fiduciary duties. Absent a provision in the instrument of conveyance addressing the issue, a donee is generally permitted to deviate from the charitable purpose of a restricted gift only with court approval obtained in a *cy pres* or similar equitable proceeding, in which it would have to be shown that continued use of the gift for the donor’s specified charitable purpose has become impossible or impractical.

A leading case in this context explains:

equity will afford protection to a donor to a charitable corporation in that the attorney general may maintain a suit to compel the property to be held for the charitable purpose for which it was given to the corporation.

The general rule is that charitable trusts or gifts to charitable corporations for stated purposes are [enforceable] at the instance of the attorney general. . . . It matters not whether the gift is absolute or in trust or whether a technical condition is attached to the gift.

The theory underlying the power of the attorney general to enforce gifts for a stated purpose is that a donor who attaches conditions to his gift has a right to have his intention enforced.<sup>3</sup>

It is at best debatable whether a statute authorizing the amendment and termination of conservation easements can make lawful what might otherwise constitute a breach of fiduciary duty.

In a recent case, the Tax Court held that the conservation easements at issue, which had been conveyed as tax-deductible charitable gifts to a nonprofit land trust, constituted “restricted charitable gifts” or “contributions conditioned on the use of a gift in accordance with the donor’s precise directions and limitations.”<sup>4</sup> The drafters of the Uniform Conservation Easement Act, the Uniform Trust Code, and the Restatement (Third) of Property: Servitudes similarly adopted the view that charitable principles apply to perpetual conservation easements in appropriate circumstances.<sup>5</sup>

There also are constitutional limitations on the ability of state legislatures to alter the terms or purposes of existing charitable gifts. For example, in *Cohen v. City of Lynn*, a Massachusetts Appellate Court held that, when a City acquired land by deeds stating that the land was to be used “forever for park purposes,” the City assumed certain contractual obligations that could not be impaired by state legislation authorizing the City’s sale of the land to a private developer, the “sanctity of such a contract” being “under the protection of art. 1, § 10, of the Constitution of the United States.”<sup>6</sup> Similarly, in *Kapiolani Park Preservation Society v. Honolulu*, citing to one of “the most famous case[s] in American judicial history,” *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), the Supreme Court of Hawaii held that the state legislature was prohibited by the U.S. Constitution’s prohibition on the impairment of private contracts from authorizing the City of Honolulu to lease a portion of land it held in trust for park

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<sup>3</sup> *Herzog Foundation v. University of Bridgeport*, 699 A.2d 995 (Conn. 1997).

<sup>4</sup> *Carpenter v. Comm’r*, T.C. Memo. 2012-1, motion for reconsideration denied and opinion supplemented in *Carpenter v. Comm’r*, T.C. Memo. 2013-172 (citing to Schmidt, *Modern Tomb Raiders: Nonprofit Organizations’ Impermissible Use of Restricted Funds*, 31 Colo. Law. 57, 58 (2002)).

<sup>5</sup> See Uniform Conservation Easement Act § 3 cmt; Uniform Trust Code § 414(d) cmt; Restatement (Third) of Property: Servitudes § 7.11.

<sup>6</sup> *Cohen v. City of Lynn*, 598 N.E.2d 682 (Mass. App. 1992).

purposes to a concessionaire for restaurant purposes.<sup>7</sup> The court also explained that, even more fundamentally, such legislation would have been beyond the legislature's power because it violated basic principles of equity by defrauding the donors.

In general, there is no question about the constitutionality of statutes that apply to all charitable gifts and are intended to increase the efficiency of their administration and ensure that the public will obtain the benefits prescribed by the donors. But the proposed legislation relating to conservation easements, while valuable in some respects, goes beyond this purpose. It authorizes holders, with the approval of the state panel, to terminate existing perpetual conservation easements when, for example, the holder and the state panel decide that, in their opinion, the donor's easement has low value and they would prefer to protect more high priority areas elsewhere. To the extent such legislation were to apply retroactively to existing conservation easements that were donated in whole or in part as charitable gifts, it may be subject to constitutional challenge on the grounds discussed in the cases above. It also could be viewed as violating basic principles of equity by effectively defrauding donors who were told that *their* land—not some other land the holder might later deem to have a higher priority—would “remain forever a part of [the] state's unique landscape.”

This does not mean that existing perpetual conservation easements conveyed as charitable gifts lock up the properties they encumber forever in the face of inevitably changing circumstances and priorities. The legislation could, in accord with the legal principles discussed above, authorize holders to agree to amend these easements in manners consistent with their conservation purposes, which would cover the vast majority of amendments that typically are needed to responsibly manage conservation easements over time (in some cases, the legislation would be unnecessary because the conservation easement deeds themselves expressly grant the holder the discretion to agree to such amendments). The legislation could also authorize *de minimis* or minor partial terminations of conservation easements that have no or minimal impact on the conservation purposes of the easements to, for example, resolve boundary line disputes or minor encroachment problems, or allow for settlements in lieu of condemnation. There also are three unquestionably lawful options for terminating charitably donated easements:

- (i) condemnation, when the easement, despite continuing to protect conservation values, stands in the way of necessary public projects,
- (ii) court approval of termination when continuing to protect the land's conservation values has become impossible or impractical, and
- (iii) termination according to the terms of the deed, if the deed specifies how the easement can be terminated.

While these rules limit an easement holder's ability to engage in substantial or wholesale substitutions (or “swaps”) of perpetual conservation easements that were donated as charitable gifts, charities accept certain obligations when they acquire charitable gifts to

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<sup>7</sup> *Kapiolani Park Preservation Society v. Honolulu*, 751 P.2d 1022 (Haw. 1988).

be used for specific purposes. This is not unique to land trusts. All charities are subject to such obligations.

## II. Federal Tax Law Requirements

To obtain a federal charitable income tax deduction under Internal Revenue Code §170(h) for the donation of a conservation easement, the conservation easement must, among many other things, be “granted in perpetuity” and its conservation purposes must be “protected in perpetuity.”

It has long been assumed by tax professionals that the following amendment provision can be included in a conservation easement deed without violating the federal perpetuity requirements:

Amendment. If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including [state statute] or Section 170(h) of the Internal Revenue Code . . . and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded in the official records of \_\_\_\_\_ County, [State].<sup>8</sup>

Because this provision authorizes only those amendments that are consistent with the conservation purposes of the easement, the provision is consistent with the federal requirement that the conservation purposes of an easement be “protected in perpetuity.” Consistent with best practices, most contemporary conservation easements contain such an amendment provision, providing the holder with significant discretion to agree to amendments necessary to responsibly administer the conservation easement over time.

With regard to termination, the Tax Court has held that tax-deductible conservation easements must be extinguishable only in a judicial proceeding upon a finding that continued use of the property for conservation purposes has become impossible or impractical as specified in Treasury Regulation § 1.170A-14(g)(6).<sup>9</sup> The court was very clear that there is no acceptable alternative to a judicial proceeding to terminate tax-deductible perpetual conservation easements. In two other cases, the Tax Court was similarly emphatic that landowners are not eligible for federal tax incentives for the donation of conservation easements that protect conservation purposes generally, rather than specific identified parcels of land.<sup>10</sup>

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<sup>8</sup> THE CONSERVATION EASEMENT HANDBOOK: MANAGING LAND CONSERVATION AND HISTORIC PRESERVATION EASEMENT PROGRAMS 164 (Janet Diehl & Thomas S. Barrett eds., 1988).

<sup>9</sup> *Carpenter v. Comm’r*, T.C. Memo. 2013-172, denying reconsideration of and supplementing *Carpenter v. Comm’r*, T.C. Memo. 2012-1. The time period for appeal of the *Carpenter* decisions has passed.

<sup>10</sup> *Belk v. Comm’r*, T.C. Memo 2013-154, denying reconsideration of and supplementing *Belk v. Comm’r*, 140 T.C. No. 1 (2013); *Mitchell v. Comm’r*, T.C. Memo. 2013-204, denying reconsideration and supplementing *Mitchell v. Comm’r*, 138 T.C. No. 16 (2012). Although the *Belk* and *Mitchell* decisions have

Although S. 119 attempts to comply with federal requirements and, thus, enable landowners in Vermont to continue to take advantage the federal tax incentives offered to easement donors, the legislation in its current form does not accomplish that objective.

First, the proposed legislation confusingly exempts from the statutory amendment process “amendments” that, by the express terms of an easement, require court approval. The problem is that few (if any) conservation easements expressly require court approval of amendments. Most well-drafted tax-deductible easements contain an amendment provision substantially similar to the provision set forth above (authorizing the parties to agree to amendments that are consistent with the purposes of the easement), and further state that they may be extinguished or terminated in a judicial proceeding upon a finding that continued use of the property for conservation purposes has become impossible or impractical. Although the proposed legislation defines amendment to include terminations, the confusing terminology raises potential interpretative issues that are best avoided when dealing with the IRS.

Second, existing and future conservation easements donated in whole or in part as charitable gifts that are silent with regard to termination (i.e., that do not specifically state that court approval is required for termination) would, under the proposed legislation, be terminable outside of a judicial proceeding and, thus, in violation of federal tax law requirements.

Third, it appears that existing and future conservation easements donated in whole or in part as charitable gifts would, under the proposed legislation, be subject to Category 3 amendments that do not constitute terminations but nonetheless would be inconsistent with the conservation purposes of the easement, thus violating the federal “protected in perpetuity” requirement.

Accordingly, if the proposed legislation is enacted in its current form, it may render conservation easement donations in Vermont ineligible for federal tax incentives. Moreover, the cost of negotiating with the IRS on audit and the risk of noncompliance with federal requirements would fall, not on the proponents of the legislation, but on the landowners making charitable gifts of conservation easements and their advisors.

It would be inadvisable for Vermont to pass legislation that is contrary to existing federal tax law requirements in the hope that Congress will change the law. Congress is unpredictable, and it seems unlikely that Congress would revise the deduction requirements to delegate to individual states the method of terminating federally deductible conservation easements. The deduction provision is already subject to substantial abuse, as evidenced by increased IRS scrutiny of conservation easement donation transactions and litigation over the last decade. Moreover, federal tax laws must apply uniformly to taxpayers, and there would be little protection of the federal investment in tax-deductible conservation easements if they could be terminated pursuant

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been appealed, the Tax Court holdings are consistent with the IRS’s current position on the issue of “swaps.”



to fifty different state standards and processes, with those standards and processes subject to change with each new state legislative session.

### **III. Proposed Revisions to the Legislation**

Below are a few suggested revisions to the proposed legislation designed to address the issues discussed above.

A. Clearly State that Statute Governs Terminations. Consider revising the legislation to:

(i) Separately define the terms “amendment” and “termination” and clarify that a “substitution” of a new easement for an existing easement necessarily involves termination of the existing easement.

(ii) Change the title of Subchapter 2 from “Amendment of Perpetual Conservation Easements” to “Amendment and Termination of Perpetual Conservation Easements.”

(iii) Change the name of the Panel from the “Easement Amendment Panel” to the “Easement Amendment and Termination Panel.”

(iv) Make corresponding changes to the substantive provisions of the legislation.

These changes would reduce the interpretive difficulties discussed above. Just as importantly, these changes would alert the public and existing and prospective easement grantors as well as funders as to the manner in which the proposed legislation would operate. By referring only to “amendments,” the proposed legislation as currently drafted obscures the fact that it authorizes holders, with the approval of the state panel, to approve the outright termination of existing perpetual conservation easements in a variety of circumstances, including to terminate what the holder and the state panel consider to be low value easements in favor of what they consider to be more high priority projects.

It may be useful to hold a series of public hearings at which public comments on the proposed legislation as it relates to termination are solicited. It may be that there is little public support for the termination of existing perpetual conservation easements as provided in the proposed legislation, or for the constraints imposed by the proposed legislation on judicial review of the panel’s decisions to terminate easements—i.e., the public may prefer *de novo* review of such decisions.

B. Address Charitably Donated Easements Differently. Consider revising proposed §6322 to exempt from the statute any amendment or termination of a conservation easement conveyed in whole or in part as a charitable gift before or after the effective date of the statute, except for amendments (defined to exclude

terminations) that are consistent with the purpose of the easement. To ensure that landowners in Vermont do not become embroiled in time-consuming controversies with the IRS, the exemption provision should ideally appear once, at the beginning of the statute, so anyone reviewing the statute for compliance with federal requirements can easily understand the exemption (the exemption provisions in the current proposed legislation are difficult to understand and appear in a number of different locations throughout the statute).

Holders may be able to identify existing conservation easements conveyed in whole or part as charitable gifts through, for example, their signing of an IRS Form 8283 acknowledging the donation, notes in their files, or institutional memory. If the manner of conveyance of certain conservation easements cannot be identified, the most prudent approach would be to assume that the easements were conveyed in whole or in part as charitable gifts and, thus, are subject to the exemption recommended above.

The legislation could also provide that it is applicable to amendments or terminations of conservation easements that are conveyed in whole or in part as charitable gifts after the effective date of the statute if the easements expressly provide that they may be amended or terminated as provided in the statute. In other words, conservation easement donors could be permitted to “opt in” to the full statutory process for amendments and terminations. Such easements would not, however, be eligible for federal tax incentives for the reasons noted above, and it is not clear whether landowners would be willing to make charitable gifts of easements that could be terminated as provided in the legislation.

C. Address Potential Constitutional Limitations. Consider the constitutional or other barriers that may prevent the application of the proposed legislation to existing perpetual conservation easements that are not exempted from its application as recommended in B above—i.e., easements that were acquired by purchase or in other nondonative transactions. Would the legislation, if applied retroactively to such existing easements, impair vested rights? Given the varied circumstances in which conservation easements are acquired and the varied provisions of easements, it may be impossible to determine whether or the extent to which the proposed legislation may impair vested rights. Accordingly, it may be advisable to include a provision in the statute similar to that found in § 5(b) of the Uniform Conservation Easement Act—e.g., “This statute does not apply to conservation easements created before its effective date if retroactive application would contravene the constitution or laws of this State or the United States.”

D. Ensure Transparency. To ensure transparency, consideration should be given to mandating in the legislation that conservation easements conveyed after its effective date and intended to be subject to its terms include a provision stating that the easement can be amended and terminated pursuant to the provisions of the statute, as the statute may be amended from time to time. This would ensure that all parties are on notice of the manner in which the easements may be

amended and terminated and that such rules may change over time, thus precluding any possible claims of misrepresentation.



## CONSERVATION EASEMENT DONATIONS

A donation of a conservation easement protects your land from development for all future generations. The land continues to be privately owned but it carries with it protective restrictions that limit some future uses. These protections are forever upheld by the Vermont Land Trust through its stewardship staff.

A conservation easement is a voluntary legal agreement entered into between a landowner and a qualified conservation organization such as the Vermont Land Trust (VLT), or a government entity. In order to protect the land's natural resource values, each easement permanently limits a property's uses.

Easements accepted by VLT are perpetual. An easement "runs" with the land—it is recorded in the local land records and is binding on both the present and future owners of that property.

Conservation easements offer several advantages to landowners:

- They leave the property in private ownership. Owners may continue to live on the land, may sell it, or leave it to their heirs.
- Most management decisions that usually fall to landowners continue to do so; for example the decision whether to allow hunting, farming, forestry, and public access.
- Easements can reduce income and estate taxes. A conservation easement gift is considered a charitable donation and may provide an income tax deduction. In restricting the overall value of the land through a conservation easement, the landowner also reduces the total value of his or her estate. For some, this can make the difference between having the land sold to pay estate taxes and being able to leave the property to children.
- Easements are flexible and easily tailored to a family's needs. Conservation easements can be written to reflect the special needs and vision of each landowner, as well as the unique features of the land.
- Easements are permanent. Conservation easements remain in force even after the land changes hands. Unlike deed restrictions, a conservation easement is forever upheld by VLT as an interested party whose goal is to protect the easement.

### **LANDS PROTECTED THROUGH A CONSERVATION EASEMENT**

Most of the easements that the Vermont Land Trust accepts cover farmland, managed forestland, recreational land, natural habitat, and open land with substantial scenic or community value. Occasionally VLT also accepts easements on lands with primarily historic value. VLT's decision to accept a conservation easement is guided by a set of project selection criteria.

### **RIGHTS RETAINED BY THE LANDOWNER WITH A CONSERVATION EASEMENT**

The landowner continues to own the property conserved by an easement and retains certain rights of use that the easement specifies. Examples of retained rights include the right to:

- Engage in agricultural pursuits;
- Manage woodlands and conduct maple sugaring operations;
- Build and maintain barns and other farm structures;
- Clear, construct, and maintain trails for non-commercial recreational activities;

- Construct a seasonal camp for personal use;
- The easement may allow a pre-determined number of future residential subdivisions, provided the land's conservation values can be protected.

### **RESTRICTIONS PLACED ON THE LANDOWNER BY A CONSERVATION EASEMENT**

The landowner's use of property conserved by an easement is generally subject to these provisions:

- Uses are commonly limited to those that involve agriculture, forestry, education, non-commercial recreation, and open space;
- Commercial, industrial, and mining activities are prohibited;
- New buildings are prohibited, except those constructed for agricultural or forestry purposes, or house sites specifically negotiated in advance;
- Signs are generally prohibited, except for informational and directional signs related to the property; e.g. "Posted" signs, if desired, by the owner.
- Excavation or any change of topography is not allowed, except when necessary to carry out a permitted use;
- With limited exceptions, subdivisions are generally prohibited; and
- Other unanticipated future uses that are inconsistent with the original owner's conservation goals are prohibited. This ensures that VLT has the ability to carry out the original landowner's intent in perpetuity.

### **CONSERVATION EASEMENTS AND PUBLIC ACCESS**

Conservation easements require the landowner to allow VLT staff reasonable access in order to perform regular monitoring visits, but does not give the general public the right to use the property. However, the landowner may wish to include a specific public access provision in the easement. Examples might include a trail easement for hikers, snowmobilers, and cross country skiers, or fishing access along a river or shoreline.

### **HOW EASEMENTS ARE MONITORED AND ENFORCED**

Recognizing how important it is that all our easements are monitored and enforced over the long term, VLT's Conservation Stewardship Program performs both educating and monitoring functions.

For every easement a baseline documentation report is created before closing describing the land's physical and resource attributes. After the project has closed, the Stewardship staff will annually schedule appointments to visit each property and discuss any changes or future plans with the landowner. VLT also supplements its ground monitoring efforts with aerial monitoring. If a violation is discovered, the stewardship staff will attempt to personally contact the landowner in an effort to correct the problem. If this is unsuccessful, VLT will file a court enforcement action. So far, the few violations of VLT's easements that have been discovered have all been corrected voluntarily.

### **TAX BENEFITS OF DONATING CONSERVATION EASEMENTS**

A charitable income tax deduction may be available for a gift of a conservation easement to a qualified organization like the Vermont Land Trust. Under Internal Revenue Code Section 170(h), deductions may be taken for perpetual conservation easements if they are given "exclusively for conservation purposes."

This requirement can be met if the easement conserves land that:

- Involves significant farmland, forestland and open space that either provides scenic enjoyment for the public, furthers public conservation policies, or includes historical important land or buildings.
- Includes relatively natural habitats for fish, wildlife, plants, or similar ecosystems; or
- Is used by the public for outdoor recreation or education.

The donor may take a charitable income tax deduction for the easement's value, which is determined by a qualified appraisal. A qualified appraiser must prepare the appraisal, and the document must fulfill certain regulatory standards. To secure a deduction, a summary of this appraisal must be submitted on IRS Form 8283 with the donor's income tax return for the year of the gift. For donations valued in excess of \$500,000, the complete qualified appraisal report must be appended to the tax return. The deduction may not exceed 30 percent of the donor's adjusted gross income, but any unused portion can be carried over for up to five more years. Vermont's income tax is a percentage of the federal tax, so an easement donation may also reduce state income taxes.

**Special Incentive for 2006-07 easements. As part of the 2006 Pension Protection Act, Congress created an additional incentive for conservation easements donated in 2006 or 2007. Donors are allowed to deduct up to 50% (instead of 30%) of their adjusted gross income in the year of the gift, and may carry over any unused deduction for up to 15 (instead of 5) years. For more information, contact VLT and consult with your financial or legal advisor.**

Finally, a conservation easement can reduce potential estate tax liability. The value of conserved property for estate tax purposes must take into consideration any reduction in property value resulting from the donation of an easement.

#### **ADVICE LANDOWNERS SHOULD SEEK BEFORE DONATING A CONSERVATION EASEMENT**

The Vermont Land Trust can provide a wide range of information about conservation easements, other conservation options, and the effects of conservation easements on taxes. However, a land trust cannot provide legal or financial advice, nor can it guarantee that a deduction will be realized.

Conservation easements are perpetual and involve a technical area of the law. Each landowner should consult with his or her own attorney to review the conservation easement in detail. If income or estate tax benefits are important, the landowner may also wish to consult with an accountant or tax planner. VLT does not recommend specific advisors but can provide donors with a list of attorneys and accountants who have expertise in the area.

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