

**THE LONG AND WINDING ROAD:¹ EASEMENT
MODIFICATION AND THE FUTURE OF LONG DISTANCE
HIKING TRAILS**

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INTRODUCTION

Vermont’s Long Trail is the oldest long-distance hiking trail in the country, but it may be lost because of an amendment to the State’s conservation easement statute.² While hiking in Vermont’s Green Mountains in 1909, James P. Taylor formulated the idea of creating a trail

1. THE BEATLES, *The Long and Winding Road*, on LET IT BE (Apple Records 2009).

2. *The Long Trail*, GREEN MOUNTAIN CLUB,
<http://www.greenmountainclub.org/page.php?id=2> (last visited Nov. 2, 2015).

that would link the mountain range.³ The following year he founded the Green Mountain Club (GMC), an organization that spent the next twenty years cutting trails and building shelters from Massachusetts to the Canadian border.⁴ Since 1930, the Trail has run nearly 273 continuous miles through Vermont.⁵ In 1986, GMC recognized the pressing need to protect the land through which the Trail runs.⁶ At that time, thirty miles of the Trail were for sale, thirty miles had no guaranteed public use, and two parts were completely shut down—causing hikers to walk along the road for 3.5 miles.⁷ In order to preserve the Trail for future generations, the Long Trail Protection Program was born.⁸ Through this program, GMC has purchased land or acquired easements surrounding 60 miles of the Trail, conserving approximately 25,000 acres of land.⁹

A conservation easement is a private land use mechanism consisting of an agreement between a landowner and a land trust or government agency.¹⁰ The landowner retains ownership of the property while agreeing to refrain from using it in specific ways in order to “conserve” the land.¹¹ Conservation easements are negative easements, meaning they prohibit the landowner from using the land in certain ways.¹² For example, a landowner may agree to give up her right to develop the land or farm it in a certain way so that the public can enjoy the benefit of open space.¹³ Conservation easements are also “in gross” rather than “appurtenant,” since they benefit the “holder whether or not the holder owns or possesses other land.”¹⁴ Conservation easements have a “conservation purpose” or create a

3. GREEN MOUNTAIN CLUB, *A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT'S LONG TRAIL* 13 (Tom Slayton ed., 2009).

4. *Id.* at 14, 45.

5. *The Long Trail*, *supra* note 2.

6. A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT'S LONG TRAIL, *supra* note 3, at 165; *Long Trail Protection*, GREEN MOUNTAIN CLUB, <http://www.greenmountainclub.org/page.php?id=16> (last visited Nov. 2, 2015).

7. *Long Trail Protection*, *supra* note 6.

8. *Id.*; A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT'S LONG TRAIL, *supra* note 3, at 165.

9. A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT'S LONG TRAIL, *supra* note 3, at 166; *Long Trail Protection*, *supra* note 6.

10. JEFF PIDOT, LINCOLN INST. OF LAND POLICY, *REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM* 3 (2005).

11. *Id.*; Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 137 (2011).

12. C. Timothy Lindstrom, *Hicks v. Dowd: The End of Perpetuity?*, 8 WYO. L. REV. 25, 37 (2008).

13. Owley, *supra* note 11, at 136.

14. Lindstrom, *supra* note 12, at 37.

“conservation benefit,” and are held in perpetuity.¹⁵ Being held in perpetuity means that “they allow easement donors to direct land uses for all time.”¹⁶ Because of the difficulties the common law presents to long-term easements in gross, conservation easements are a statutory, rather than common law, creation.¹⁷ While use of conservation easements has grown as a land management tool in recent decades, their enabling statutes still have room for improvement.¹⁸ For instance, many states’ conservation easement statutes remain unclear as to whether and how a conservation easement may be amended or terminated.¹⁹ Over the past few years, Vermont has begun to consider whether and how to change its statute to provide clearer amendment criteria and procedure.²⁰ Examining Vermont’s experience could be helpful for other states wishing to change their statutes.

Vermont has examined whether amendments can be necessary and desirable. In 2012, the Vermont General Assembly passed S. 179.²¹ This 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.”²² The working group subsequently generated a report outlining what it viewed as the need for legislation regulating conservation easement amendments.²³ For example, parties may wish to amend a conservation easement because of unforeseen circumstances. These include changes in accepted farming practices, the federal government wishing to add a piece of property to a national wildlife refuge,²⁴ or a land trust seeking to eliminate ambiguity from an easement

15. *Id.*; Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment, and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1, 3 (2012).

16. Jay, *supra* note 15, at 3.

17. Owley, *supra* note 11, at 135–36; see also Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go from Here?*, 2013 UTAH L. REV. 687, 696 (2013) (“Because most conservation easements are held in gross, state conservation easement ‘enabling’ statutes were deemed necessary to sweep away the common law impediments to the long-term validity of such in gross restrictions.”).

18. DANIEL P. SELMI ET AL., LAND USE REGULATION 781 (4th ed. 2012).

19. Jay, *supra* note 15, at 3–4.

20. *Id.* at 53.

21. S. 179, 2012 Gen. Assemb. (Vt. 2012).

22. *Id.* § 9(a).

23. Memorandum from Robert Klein, Chair, Easement Amendment Working Group to Members of the General Assembly (Jan. 15, 2013), http://www.vlt.org/images/0_PDFs/Easement_amendment_working_group_final.pdf.

24. *Id.* at 3 (explaining that the government “must always have clear title on lands it acquires, so the easement would have to be terminated before they could close the purchase”).

provision.²⁵ A state statute laying out the amendment process could provide more uniform guidance for those seeking to amend easements, allow public participation in the process, and ensure that the easement and its purposes are preserved.²⁶ Regardless of whether Vermont enacts a statute elaborating the revision process, conservation easements can be amended under Vermont statutory law.²⁷ However, a revised statute would help ensure that such amendments are subject to a fairer process that is more likely to preserve the original parties' intent.²⁸

During the 2013–2014 Legislative Session, the Vermont Senate passed S. 119, which provided criteria and procedures for amending conservation easements.²⁹ The House ultimately abandoned the Bill, but the topic will likely rise again. This is due, at least in part, to tension between Vermont's two major land trusts: Vermont Land Trust (VLT) and Upper Valley Land Trust (UVLT).³⁰ VLT was concerned that the State lacked guidance in this area and advocated for the Bill in hopes of attaining more oversight of conservation easement amendments than is currently present.³¹ UVLT, on the other hand, found that S. 119 would replace more stringent common law conservation easement modification requirements and opposed such added flexibility.³²

This Note critiques Vermont's current conservation easement law, and recommends revisions. Using the Long Trail as a case study, the Note examines how a new law would affect already-existing easements. Part I provides an overview of Vermont's conservation easement statutory and common law, including a brief history of the Long Trail's easements. Part II compares S. 119 with Vermont's current conservation easement law, critiques the Bill, and discusses potential effects of a similar bill on the Long Trail. Part III then compares Maine's conservation easement law to S. 119 and discusses how it would affect the Long Trail if adopted in

25. *Id.*

26. Jay, *supra* note 15, at 71, 76.

27. VT. STAT. ANN. tit. 10, §§ 821–23, 6301–09 (West 2014).

28. Memorandum from Robert Klein to Members of the General Assembly, *supra* note 23, at 5; see also *Conservation Easements: Perpetual and Flexible*, VT. LAND TRUST, <http://www.vlt.org/land-stewardship/amendment> (last visited Nov. 2, 2015) (“Current law allows a land trust and the owner of conserved land to amend or terminate a conservation easement, with no public notice, no clear criteria, and no third-party approval.”).

29. S. 119, 2013 Gen. Assemb. (Vt. 2013).

30. Anne Galloway, *Vermont Land Trust Ends Work on Conservation Easement Bill*, VT. DIGGER (Apr. 2, 2014, 4:46 AM), <http://vtdigger.org/2014/04/02/vermont-land-trust-ends-work-conservation-easement-bill/>; *Proposed Vermont Legislation Will Not Protect Easements and Easement Donors*, UPPER VALLEY LAND TR. (Feb. 11, 2015), <http://www.uvlt.org/2014/02/vermont-legislation-protect-easements-easement-donors/>.

31. Galloway, *supra* note 30.

32. UPPER VALLEY LAND TR., *supra* note 30.

Vermont. Finally, Part IV uses the analyses provided in Parts I–III to propose recommendations for Vermont’s potential bill.

I. VERMONT’S CURRENT COMMON AND STATUTORY LAW DOES NOT
PROVIDE ADEQUATE GUIDANCE FOR CONSERVATION EASEMENT
AMENDMENT

*A. The Stakes of Allowing or Disallowing Conservation Easement
Amendment*

Land trusts seek conservation easements because they wish to conserve land.³³ Private landowners may be motivated by similar desires or by the tax benefits associated with such easements.³⁴ Land trusts choose conservation easements over other land conservation tools for a variety of reasons.³⁵ Conservation easements are often cheaper than conserving property by purchasing it outright.³⁶ Additionally, compared to environmental regulations, conservation easements may protect land more quickly and are more likely to protect it in perpetuity.³⁷ However, despite their seemingly perpetual nature, the easement donor, landowner, or land trust may sometimes wish to amend or terminate a conservation easement.

A land trust or landowner may seek to amend or terminate a conservation easement for a variety of reasons beyond those articulated by Vermont’s working group.³⁸ Because a conservation easement detracts from the value of the land, the landowner may wish to amend or terminate the easement in order to make the land more marketable.³⁹ Also, a party may wish to amend an easement because of a changed understanding of conservation needs from an ecological perspective.⁴⁰ For instance, a conservation easement restricting the introduction of a new species of vegetation may conflict with climate change mitigation and adaptation.⁴¹ In

33. Owley, *supra* note 11, at 137–38.

34. *Id.* at 141; *see also* 26 U.S.C. § 170(h) (2012) (allowing conservation easement donors to receive charitable income, gift, and estate tax deductions provided the donation meets certain conditions).

35. Owley, *supra* note 11, at 137–39.

36. *Id.* at 137.

37. *Id.* at 138.

38. Memorandum from Robert Klein to Members of the General Assembly, *supra* note 23, at 3–4.

39. *See* McLaughlin, *supra* note 17, at 696 (“Land use restrictions held in gross were generally disfavored under the common law because they reduce the marketability of land. . . . [And] most conservation easements are held in gross . . .”).

40. *See supra* text accompanying notes 20–21; Owley, *supra* note 11, at 151.

41. Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROBS. 199, 207 (2011).

such a situation, although the original donor may have intended to protect the land, subsequent landowners may not be able to take further steps to protect the land without amending the easement.

Easements run with the land, meaning that the easement will continue to exist even as people buy or inherit the property over time.⁴² However, few states have procedures in place for when a land trust (as easement holder) dissolves or, for that matter, easement amendment or termination in general.⁴³ Other situations include ambiguous or incorrect easement language, a landowner seeking to add land to the easement in exchange for being allowed to build an additional structure on the land, or the town seeking to realign a road.⁴⁴ Amendments affect the interests of the landowner whose property is subject to the easement, the easement donor who had goals for the easement when he or she created it, the land trust or government agency that is responsible for stewarding the land, and the public that may be benefitted by protected land.⁴⁵

The interests conservation easements implicate often create a tension between the reasons that weigh for and those that weigh against amendments. Donors often donate easements to protect a specific parcel that they love.⁴⁶ They are personally attached to the land and hope that it will continue to exist in the way that they specified.⁴⁷ The land trust or government agency stewarding the land accepted the duty to protect that land on behalf of the donor.⁴⁸ The Government provided a charitable tax deduction for the donation, subsidized by other taxpayers.⁴⁹ If the conservation easement provided new recreation opportunities or protected scenic views, the other taxpayers would like to continue to benefit from the easement.⁵⁰ However, countervailing circumstances may make amendment desirable. For instance, a conservation easement protecting a parcel as farmland may require amendment to allow new farming practices so that

42. Lindstrom, *supra* note 12, at 45.

43. PIDOT, *supra* note 10, at 22.

44. Memorandum from Robert Klein to Members of the General Assembly, *supra* note 23, at 3–4.

45. *Id.* at 4–5.

46. Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why It Is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217, 237–38 (2013).

47. Nancy A. McLaughlin & W. William Weeks, *In Defense of Conservation Easements: A Response to the End of Perpetuity*, 9 WYO. L. REV. 1, 82 (2009).

48. See Schwing, *supra* note 46, at 238–39 (noting that land trusts acquire easements “based on promises of perpetuity . . . [and] are obligated to fulfill those promises by federal tax law, by charitable trust principles, by fiduciary duty to donors, by the terms of the conservation easement, and by practical reality that future donations will dry up if promises are known to be breached”).

49. *Id.* at 239.

50. See *id.* (“[A]ll taxpayers bear a financial burden in the creation of easements.”).

farming can continue to be an economically viable use of the land. Conservation easements are not two-party contracts.⁵¹ Therefore, changes to conservation easement amendment law should be carefully constructed with all affected parties in mind.⁵²

B. Vermont's Conservation Easement Amendment Law Today

Conservation easements are governed predominantly by statutory, rather than common, law.⁵³ In fact, few cases have dealt specifically with conservation easement amendments.⁵⁴ Yet, the UVLT opposed S. 119, arguing that if enacted it would “replace common law protections for donors and their heirs (post mortem easements) that exist today.”⁵⁵ It is therefore important to understand what does exist in Vermont’s current common and statutory laws.

Conservation easement amendments are guided by four non-binding authorities: the Restatement (Third) of Property: Servitudes, the Uniform Conservation Easement Act (UCEA), the Internal Revenue Code (I.R.C.) and its Treasury Regulations, and the Land Trust Alliance Standards and Practices.⁵⁶ Each approaches conservation easement modification from a different perspective and suggests a different method of dealing with the issue.⁵⁷ The Restatement (Third) of Property: Servitudes summarizes and guides easement common law; the UCEA guides the statutory law in this area.⁵⁸ The I.R.C. and the associated regulations govern when an easement donor’s gift is eligible for a tax deduction.⁵⁹ The Land Trust Alliance Standards and Practices are outside the scope of this Note.

The Restatement provides more guidance for conservation easement amendments than does the UCEA.⁶⁰ The Restatement only allows modification or termination of a conservation easement due to changed circumstances when certain conditions are met.⁶¹ For instance, if the easement’s purpose becomes impracticable, the easement may be modified

51. McLaughlin, *supra* note 17, at 36.

52. Memorandum from Robert Klein to Members of the General Assembly, *supra* note 23, at 5.

53. Owley, *supra* note 11, at 143–44.

54. Jay, *supra* note 15, at 34.

55. UPPER VALLEY LAND TR., *supra* note 30.

56. Jay, *supra* note 15, at 4–5.

57. *Id.*

58. *Id.* at 5.

59. *Id.* at 6.

60. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11 (AM. LAW INST. 2000); UNIF. CONSERVATION EASEMENT ACT § 2(a), 12 U.L.A. 179 (1981).

61. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.11.

to accomplish other conservation purposes, so long as the easement's language did not forbid that new purpose.⁶² If the easement cannot accomplish any conservation purpose, it may be terminated so long as damages and restitution are paid.⁶³ The UCEA, on the other hand, merely provides that "a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements," and that the UCEA "does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity."⁶⁴

Although the Restatement and UCEA allow easement amendment in specific instances, under the I.R.C., the amendment is not "allowed" if the easement donor would still like to receive her tax deduction.⁶⁵ Generally speaking, the I.R.C. provides that a conservation easement donor will receive a tax deduction only if the easement is donated in perpetuity.⁶⁶ In other words, if an easement donor wishes to receive a tax deduction, the easement must not be amended or terminated. This drafting decision reflects the extent to which the Internal Revenue Service (IRS) values perpetuity. By providing a tax incentive for conservation easements, the IRS recognizes that this donation will benefit the public as a whole. However, the IRS will only provide this incentive if the gift lasts forever. The landowner cannot donate some of her property rights in return for a monetary benefit from the IRS and then later decide that she would rather exercise all of her property rights. Doing so would deprive the public of the open space, recreational opportunities, or scenic views to which it had grown accustomed. Nevertheless, a landowner may be willing to forego her tax deduction in exchange for amending her easement. In such instances, the Restatement and UCEA will still guide the state's common and statutory law.⁶⁷

Vermont courts have not determined specific guidelines for conservation easement amendments. However, they have discussed interpreting ambiguous language, explaining, "[t]he character of an easement depends on the intent of the parties, as drawn from the language

62. *Id.* § 7.11(1).

63. *See id.* § 7.11(2)–(3) ("Restitution may include expenditures made to acquire or improve the servitude and the value of tax and other government benefits received on account of the servitude. . . . If the changed conditions are attributable to the holder of the servient estate, appropriate damages may include the amount necessary to replace the servitude, or the increase in value of the servient estate resulting from the modification or termination.").

64. UNIF. CONSERVATION EASEMENT ACT § 3(b), 12 U.L.A. 184 (1981).

65. 26 U.S.C. § 170(a) (2014).

66. 26 U.S.C. § 170(h)(2)(C) (2014).

67. UNIF. CONSERVATION EASEMENT ACT § 2, 12 U.L.A. 179 (1981).

of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement.”⁶⁸ The Court emphasizes honoring the intent of the original parties.⁶⁹ Therefore, while changes in ownership of the property may increase the desire to amend an easement, the original intent of the parties is something to consider when determining whether to allow easement amendments.

Vermont’s current easement statute and common law do not provide criteria or procedures for amending easements.⁷⁰ The Statute deems “[c]onservation and preservation rights and interests . . . to be interests in real property and shall run with the land . . . enforceable in law or in equity.”⁷¹ If a municipality’s legislative body or a state agency finds that the easement is no longer necessary to carry out its conservation purposes, the rights or interests may be released and conveyed to another.⁷² Further, “[t]he conveyance of rights or interests in real property less than fee simple made under the authority of this chapter shall be perpetual, except if the conveyance is limited by its terms to a specific period.”⁷³ In order to provide future guidance, the Vermont General Assembly sought to clarify the conservation easement amendment process through S. 119.⁷⁴

II. PASSAGE OF S. 119 WOULD HAVE PERMITTED CONSERVATION EASEMENT AMENDMENTS

A. *If the House Had Passed S. 119, Vermont’s Conservation Easement Law Would Have Changed in Several Ways*

Beginning in February 2013, Vermont’s Senate spent two months drafting, reviewing, and editing S. 119: An Act Relating to Amending Perpetual Conservation Easements.⁷⁵ Several Senate committees—primarily those on Natural Resources and Energy, Agriculture, Finance, and Appropriations—reviewed the Bill and recommended changes.⁷⁶ In April, the Senate read the third edition of the Bill containing the recommended

68. *Barrett v. Kunz*, 158 Vt. 15, 19, 604 A.2d 1278, 1280 (1992) (citing *Griffith v. Nielsen*, 449 A.2d 965, 968 (Vt. 1982)); *Hunsdon v. Farrar*, 128 Vt. 809, 813, 264 A.2d 809, 813 (1970); *Sabins v. McAllister*, 116 Vt. 302, 305, 76 A.2d 106, 108 (1950), *overruled by* *Lague, Inc. v. Royea*, 152 Vt. 499, 503, 568 A.2d 357, 359 (1989).

69. *Rowe v. Lavanway*, 904 A.2d 78, 82 (Vt. 2006).

70. VT. STAT. ANN. tit. 10, §§ 821–23, 6301–09 (West 2014).

71. *Id.* § 823.

72. *Id.* § 6308.

73. *Id.* § 6308(b).

74. S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013).

75. *Id.*

76. *Id.*

changes, and passed it.⁷⁷ The Vermont House reviewed the Bill, entitled H. 185, the following day and recommended it to its Committee on Natural Resources and Energy.⁷⁸ The House abandoned the Bill in January 2014.⁷⁹

For the most part, S. 119 would have modified 10 V.S.A. chapter 155 through changed language and the addition of a subchapter.⁸⁰ The addition of the subchapter would have necessitated additional changes to 10 V.S.A. as well as 27 V.S.A.⁸¹ If the Bill had passed, this subchapter would have become 10 V.S.A. §§ 6321–6335.⁸² These sections created most of the controversy surrounding the Bill.

Of these new sections, 10 V.S.A. § 6321 would have stated:

The purpose of this subchapter is to set forth a process and establish the criteria for determining if an amendment of a conservation easement may be appropriate and authorized and to provide that in all cases in which an amendment would materially alter the terms of an existing conservation 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.⁸³

The remainder of the subchapter would have attempted to fulfill this purpose through several means.⁸⁴ Sections 6324–6328 would have divided amendments into three categories and specified the level of review and procedures required for amending a conservation easement within each category.⁸⁵ Category 1 amendments required the least amount of involvement from an independent entity or the public, whereas Category 3 required the most.⁸⁶ Section 6323 would have created the Easement Amendment Panel, which would have overseen the entire amendment process for Category 2 and 3 amendments.⁸⁷ Sections 6332–6334 would have provided guidance for revoking conservation easement amendments, appealing an amendment, and awarding restitution or damages.⁸⁸ Lastly,

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

section 6335 would have held state agencies accountable to the General Assembly by requiring that they provide annual reports on the year's conservation easement amendments, including why the easement was amended and how it "promotes the public conservation interest."⁸⁹

Under sections 6324–6325, Category 1 amendments are those that would have "a beneficial, neutral, or not more than a de minimis negative impact on the protected qualities under the existing easement" and whose terms do not expressly require court approval.⁹⁰ Therefore, the easement holder may amend Category 1 easements "without a public review process."⁹¹ Section 6325 would have then created an exclusive list of amendments falling within Category 1. These amendments would have included adding land to an easement and correcting typographical errors in the easement's language.⁹²

Under section 6326, Category 2 amendments are made to easements that do not expressly require court approval and that "the holder reasonably believes will not have more than a de minimis negative impact."⁹³ An amendment that adjusts the easement's existing boundaries but does not fall clearly within the types of amendments listed by section 6325 may also be a Category 2 amendment.⁹⁴ Under section 6324, Category 2 amendments would have required that an independent entity determine "whether they may be made without a public review process . . ."⁹⁵ The easement holder would be required to provide the Easement Amendment Panel 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."⁹⁶ This would allow the Easement Amendment Panel to determine whether they should approve the amendment, require more information before deciding on it, or treat it as a Category 3 amendment.⁹⁷

Section 6327 would have defined a Category 3 amendment as one that "removes a protected quality from the easement" or "materially reduces the safeguards . . . under the easement."⁹⁸ These amendments could follow one of three different sets of procedures.⁹⁹ First, the Easement Amendment

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

Panel could follow the procedures laid out in section 6328 to review and approve or deny the amendment.¹⁰⁰ Second, under section 6329, the Environmental Division of the Superior Court (“Environmental Court”) could review the amendment proposal if the holder filed a petition for approval.¹⁰¹ A landowner must file such a petition if the easement expressly requires court approval under Section 6329.¹⁰² Third, an easement holder could conduct a “holder’s public review process,” as described by section 6330.¹⁰³

If the easement holder chose the first option, the amendment would have only required a public review process if either a public hearing was requested within the statutory time limit or the Easement Amendment Panel determined that a hearing was necessary.¹⁰⁴ The Panel would then approve the amendment only if a series of conditions are met, as listed in section 6328(h).¹⁰⁵ Section 6328(g) listed seven criteria for the Panel to apply when determining whether the amendment meets those conditions.¹⁰⁶ These included any changes in circumstances, whether those changes had been foreseeable at the time the easement was granted, and whether there are any reasonable alternatives to address those changes.¹⁰⁷ Most notably, the Panel will ask whether the amendment would result in impermissible private benefit, as defined by I.R.C. § 501(c)(3).¹⁰⁸ Interestingly, this is the only mention of the I.R.C. in S. 119, and it refers to the section that determines which organizations are exempt from taxation, not the section that deals with conservation easements.¹⁰⁹

If the second option—court approval—was appropriate for a proposed amendment, the Environmental Court would have been required to follow the Vermont Rules of Environmental Court Proceedings, thus applying the seven factors as laid out in section 6328(g).¹¹⁰ This process does not lend

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (A holder’s public review process requires the holder to post an easement amendment proposal on its website, publish notice of the proposal in a newspaper and on its website, and send the proposal to adjoining landowners. Anybody can participate in the process by submitting written comments or speaking at the public hearing. If the holder approves the amendment, it must prepare a written decision and file it with the Easement Amendment Panel.)

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*; see also 26 U.S.C. § 501(c)(3) (2014) (defining impermissible private benefit as when “part of the net earnings of [the foundation] inures to the benefit of any private shareholder or individual”).

109. 26 U.S.C. §§ 170(h), 501(c).

110. S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013).

itself to public involvement. However, if the easement holder chose the third procedure for easement amendment, the organization holder could conduct its own public review and hearing process.¹¹¹ This process would provide ample public participation, only requiring use of the Easement Amendment Panel or Environmental Court if the landowner and easement holder agreed to seek it.¹¹² Public participation is important in the easement amendment process because easement amendments may affect the interests of more than just the landowner and easement holder. For instance, if an easement conserved a trail for public use, the public may wish to voice its opinion on decisions that would affect its use of the trail. Without public participation, the Easement Amendment Panel or Environmental Court would only be able to speculate on the public's interest when determining whether and how to amend an easement.

B. Criticisms of Permitting Amendment Through S. 119

While a strong case exists for enacting conservation easement amendment legislation, S. 119 can be criticized generally for allowing amendments and specifically for how it was drafted.¹¹³ Critics of amendment allowance have pointed out that easement donors are often encouraged by tax deductions and the fact that “[f]ederal law mandates that there shall be no deductions for non-perpetual easements and that land trusts shall ensure the perpetual existence of donated conservation easements.”¹¹⁴ Some donors are “motivated by a desire to protect the specific land they love” and amendments would diminish permanent protection of the land.¹¹⁵ These critics also argue that easement amendments can be avoided through careful drafting of the original easement, anticipating changed circumstances, and eliminating the need for later easement amendment.¹¹⁶ Further, critics emphasize that many changed circumstances are insufficient to warrant an amendment to the easement since they “could and should have been foreseen.”¹¹⁷ However, such concerns will not likely dissuade the Vermont General Assembly from pursuing legislation allowing easement amendment. Although “easement amendments haven’t stirred much controversy in Vermont . . . problems

111. *Id.*

112. *Id.*

113. This subsection criticizes easement amendment and S. 119 generally; specific criticism of S. 119’s language appears in Part IV below.

114. Schwing, *supra* note 46, at 230.

115. *Id.* at 237.

116. *Id.* at 242.

117. *Id.* at 243.

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.”¹¹⁸ Therefore, it is important to focus on how S. 119 could have been *better* drafted, rather than why it should *not* have been drafted.

Critics of S. 119 echoed the concerns voiced by those generally opposed to amendments and raised others. Some thought the Bill could hinder conservation easement donation.¹¹⁹ Others argued that the Bill overemphasized the Easement Amendment Panel’s role in the process instead of focusing on the public’s role.¹²⁰ The Bill was also deemed to be overly vague.¹²¹ For instance, section 4 of the Bill included “the whole or partial termination of an existing conservation easement” and “the substitution of a new easement for an existing conservation easement” in its definition of “amendment.”¹²² This broad definition could have resulted in more than a slight easement change.¹²³ Furthermore, the new statute could have invalidated the associated tax incentives or made land trusts breach their fiduciary duty to easement donors.¹²⁴ The critics argued that land trusts have a “legal duty to uphold a conservation easement donor’s goals once the land trust [secures] the easement gift from the donor”¹²⁵ For instance, if an easement donor conserves their land so that a longstanding trail can continue to run through it, the land trust ought to ensure that an amendment does not cause the trail to be relocated.

C. S. 119 May Have Affected the Long Trail’s Easements

1. S. 119’s Potential General Effects on the Long Trail

Long Trail conservation easements differ from other conservation easements in that the GMC seeks to acquire easements to ensure public

118. Memorandum from Robert Klein to Members of the General Assembly, *supra* note 23, at 5–6.

119. John Dillon, *Is Forever Always Forever? Bill to Alter Conservation Easements Divides Advocates*, VT. PUB. RADIO (Mar. 10, 2014), <http://digital.vpr.net/post/forever-always-forever-bill-alter-conservation-easements-divides-advocates>.

120. John Echeverria et al., *Echeverria, Milne & McLaughlin: Straight Talk on Conservation Easements*, VT. DIGGER (Feb. 23, 2014, 9:30 PM), http://vtdigger.org/2014/02/23/echeverria-milne-mclaughlin-straight-talk-conservation-easements/?utm_source=rss&utm_medium=rss&utm_campaign=echeverria-milne-mclaughlin-straight-talk-conservation-easements.

121. *Id.*

122. S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013).

123. Echeverria, *supra* note 120.

124. *Id.*

125. *Id.*

access to the Trail and to protect the recreational benefits of the surrounding Green Mountains. “The GMC owns over 3,000 acres and holds easements on over 1,000 acres of private land and 20,000 acres of state forest.”¹²⁶ Because the GMC seeks to preserve hikers’ ability to use a particular trail, the Club targets landowners to donate or sell specific pieces of property.¹²⁷ The GMC wants “to acquire a minimum of a thousand-foot-wide buffer centered on the trail. In many places the club [purchases] additional land to protect side trails, wildlife habitat, rare plant species, or other trails”¹²⁸ Most of this land is “transferred to state ownership, with the club retaining a trail right-of-way and conservation restrictions”¹²⁹ If the landowner wishes to retain ownership of the property, the GMC obtains “conservation easements or simple trail easements to ensure the right of passage.”¹³⁰

Landowners typically donate conservation easements outside of this context because they wish to protect an attribute of their land and enlist a land trust to help them achieve that goal.¹³¹ Therefore, those easements’ creation and continuance are often motivated by different desires than the Long Trail’s. As described above, the Long Trail’s conservation easements are often created to assist the GMC in protecting the Trail. As such, the Trail’s easements would have been affected differently by S. 119 than other conservation easements. Whereas conservation goals may have motivated other easement donors, tax incentives may have encouraged the Long Trail easement donors. Therefore, other easement donors may be more amenable to easement amendment since they are not as concerned about retaining tax deductions. While Long Trail easement donors may be less likely to amend easements, various pressures still weigh on them to amend the easements, foregoing tax deductions.

The GMC has identified pressures that may be placed on the Long Trail and potentially affect its easements.¹³² For instance, “[c]ompeting land uses along Vermont’s ridgelines will become more intense. Communications, wind energy, water supply, ecosystem services . . . and demand for residential properties will all stake powerful claims to specific

126. A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT’S LONG TRAIL, *supra* note 6, at 174–76.

127. *See id.* at 172 (“The club has bid for land at auction, at a tax sale, swapped land parcels, rescued land that was to be developed, and even buried a donor’s ashes on land he donated. Anything to protect the Long Trail!”).

128. *Id.* at 173.

129. *Id.*

130. *Id.* at 174.

131. Schwing, *supra* note 46, at 237.

132. A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT’S LONG TRAIL, *supra* note 6, at 182–83.

portions of the Long Trail corridor.”¹³³ To ensure that “the romantic appeal of walking Vermont’s ridgeline . . . last[s] as long as the mountains,”¹³⁴ the GMC must ensure that it acquires rights to hiking on the land in perpetuity.

For the most part, S. 119 would have only affected Long Trail easements that are classified as conservation easements, not those considered “trail easements.” Had S. 119 been enacted, the new 10 V.S.A. § 6301a(7) would have defined “[c]onservation easement” as:

[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, scenic, agricultural, recreational, or cultural qualities or resources or other public values. . . . The term . . . excludes trail easements and other public recreational rights unless those easements or rights are included in the stated purposes of a conservation easement.¹³⁵

Therefore, trail easements would have only fallen within the scope of S. 119 if they were incorporated into “the stated purposes of a conservation easement.”¹³⁶ As for the Long Trail conservation easements, a variety of S. 119’s sections would have applied to their amendment.

Had S. 119 passed, the new 10 V.S.A. § 6325(a)(10) would have categorized “relocating an existing recreational trail without materially detracting from the public’s access or quality of experience,” as a Category 1 amendment.¹³⁷ Therefore, if the landowner and the GMC, as the easement holder, sought to amend an easement in order to have “beneficial, neutral, or not more than a de minimis negative impact on the protected qualities under the existing easement,” they could relocate the trail “without notice to or review by an independent entity.”¹³⁸ Under 10 V.S.A. § 6325(a), other amendments including “placing additional land under the protection of the easement; . . . [granting the holder a] right to acquire an ownership interest in the property in the future; . . . [or] merging conservation easements on two or more protected properties into a single easement,” would also have been considered Category 1 and thus not required participation of an independent entity or the public.¹³⁹ Without S. 119, easement amendments do not require such participation. Therefore, S. 119 would not have affected

133. *Id.* at 183.

134. *Id.* at 185.

135. S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013).

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

Long Trail easement amendment so long as they were classified as Category 1.

An easement amendment that is not clearly within the confines of Categories 1 or 3 is classified as Category 2.¹⁴⁰ These amendments require that the easement holder submit a petition to the Easement Amendment Panel so that it can determine whether to approve the amendment, request more information before deciding, or treat the amendment as Category 3.¹⁴¹ If a proposed Long Trail easement amendment was classified as Category 2, the process would have been different under S. 119. Under S. 119, the proposed amendment would be reviewed by an independent entity before becoming an amendment. The Easement Amendment Panel would ensure that the amendment satisfies a number of conditions, including being consistent with the public conservation interest and the easement's conservation purpose and original intent.¹⁴² If the proposed amendment met the listed conditions, the Easement Amendment Panel would approve it.¹⁴³ Alternatively, the Easement Amendment Panel could request more information or require that the amendment proceed as Category 3.¹⁴⁴

A Category 3 amendment is one that “removes a protected quality from the easement” or “materially reduces the safeguards . . . under the easement[.]”¹⁴⁵ S. 119 would have required the GMC to obtain approval from the Environmental Court or the Easement Amendment Panel, or to conduct a holder's public review process.¹⁴⁶ Under S. 119, if the GMC filed a petition for approval by the Environmental Court, the court would have gotten involved in the amendment process by applying certain criteria to the proposed amendment.¹⁴⁷ This would have differed from the amendment process without S. 119. Without S. 119, the Environmental Court would have only reviewed the amendment if the easement expressed that review

140. *Id.*

141. *Id.*

142. *Id.* To amend a Category 2 amendment, the holder must demonstrate that 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 protected qualities under the existing easement . . . ; and (6) is consistent with the documented intent of the donor, grantor, and all persons that directly funded the acquisition of the easement.

Id.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

was required or if a controversy arose. Likewise, the review process conducted by the Easement Amendment Panel or by the easement holder would have differed from how a Long Trail easement would have been amended without S. 119. These procedures, the seven factors applied during the Easement Amendment Panel review,¹⁴⁸ and the opportunity for public participation would have increased the protection of the Long Trail.

2. Hypothetical: How S. 119 May Have Affected Proposed Amendments to a Long Trail Conservation Easement

The GMC identified an increased intensity of “[c]ompeting land uses along Vermont’s ridgelines,” including wind energy.¹⁴⁹ Assume the GMC held an easement prohibiting the construction of energy facilities in a particular area.¹⁵⁰ If the Club was pressured to amend the easement to allow wind turbine development along part of the area’s ridgeline, the reviewing body would have applied the seven factors in order to determine whether to allow the proposed amendment. Either the Easement Amendment Panel or the Environmental Court, depending on where the GMC filed their petition, would consider the nature of the potentially changed circumstances, whether these changes were foreseeable, and if any reasonable alternatives to amendment exist.¹⁵¹ These factors would have assisted the reviewing body’s determination of whether to allow the amendment to the Long Trail easement. Depending on the facts of the case, the proposal may have been denied.

148. *Id.* The Easement Amendment Panel must consider:

(1) any material change in circumstances that has taken place since the easement was conveyed or last amended . . . ; (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 6326(b)(1)–(4) of this title; (6) the documented intent of the donor, grantor, and all direct funding sources and any donor-imposed restrictions accepted by the holder in exchange for the easement, if applicable; and (7) any other information or issue that the Panel considers relevant.

Id.

149. A CENTURY IN THE MOUNTAINS: CELEBRATING VERMONT’S LONG TRAIL, *supra* note 3, at 183.

150. Wind turbine development could be exempt from S. 119 by the proposed Section 6322(d). S. 119, 2013 Vt. Gen. Assemb. (Vt. 2013). However, this hypothetical assumes that it would not be an amendment exemption for the sake of argument.

151. *Id.* § 6328(g)(1)–(7).

The Panel or court would have started by weighing the “change in circumstances . . . since the easement was conveyed . . . including . . . the development of new technologies” with whether the new technology was foreseeable at the time the easement was conveyed.¹⁵² If the competing land use was foreseeable, the reviewing body would have likely rejected the amendment. Likewise, the Panel or the court may have reached the same result if the wind turbine could reasonably be placed in a location not covered by the easement—thus serving as a reasonable alternative to the amendment—or if the easement’s stated purpose or the documented intent of the donor included protecting the ridgeline from such development. Lastly, the Panel or the court would have considered whether the amendment was consistent with the public conservation interest; complied with federal, state, and local law; required Category 2 review; and any other issues deemed relevant.

The processes S. 119 imposes are much more detailed than the process without this Statute. Enacting S. 119 would likely have made it more difficult to amend the Long Trail’s easements. This is desirable if the true purpose of S. 119 was to lay out procedures and criteria for determining whether an amendment is appropriate. However, critics could argue that these procedures and criteria would still insufficiently protect the public’s interest in hiking in an unblemished landscape, the inherent value of the land as open space or habitat, and the donor’s original intent. Such critics could argue that the General Assembly either should not have allowed amendment or should have enacted other procedures and criteria.

III. HOW WOULD ANOTHER STATE’S CONSERVATION EASEMENT STATUTE AFFECT THE LONG TRAIL?

A. Maine and Conservation Easement Amendment

Maine has a relatively short conservation easement amendment statute compared to that proposed by Vermont. Since 2007, all conservation easements are amended following the procedures laid out in 33 M.R.S.A. § 477-A.¹⁵³ The statute requires new conservation easements to “include a statement of the conservation purposes of the easement, the conservation attributes associated with the real property and the benefit to the general public intended to be served by the restriction on uses of the real property subject to the conservation easement,” and “a statement of the holder’s power to agree to amendments to the terms of the conservation

152. *Id.* § 6328(g)(1)–(2).

153. ME. REV. STAT. tit. 33, §§ 477(1), 477-A(2) (2015).

easement”¹⁵⁴ Similar to Vermont’s current statute, Maine holds that conservation easements are perpetual unless the easement’s language specifies otherwise or the court determines that a “[c]hange of circumstances renders the easement no longer in the public interest”¹⁵⁵ Easement amendment or termination requires court approval if either action will “materially detract from the conservation values intended for protection”¹⁵⁶ The statute provides a nonexclusive list of factors for the court to consider, including “the purposes expressed by the parties in the easement and the public interest.”¹⁵⁷

Maine’s statute differs from Vermont’s proposed statute in many respects. First, Maine allows the Attorney General to represent the public’s interests when a party seeks court approval.¹⁵⁸ In Vermont, the public would have had the opportunity to directly participate in the amendment process.¹⁵⁹ Second, Maine provides more of a safeguard for the original donor’s intent than Vermont’s proposed statute by attempting to ensure that the holder’s intent was clear. Maine’s process emphasizes that new easements must include clear language on the purposes of the easement, what the easement will conserve, and how the public will benefit.¹⁶⁰ Unlike in Vermont, easements created after the Maine statute was enacted would provide a baseline for the court to consider when determining whether to approve an amendment. However, the Maine legislature did not provide as many factors for the court to consider as did Vermont’s.¹⁶¹ The seven factors listed in Vermont’s statute would have ensured a much more thorough review of the proposed amendment than Maine’s statute. Lastly, Vermont’s statute would have provided for review by the Easement Amendment Panel, an independent specialized entity.¹⁶² The Maine statute does not create such a body.¹⁶³

Vermont should build on Maine’s statute to ensure that conservation easement amendments undergo a thorough review that honors the original donor’s intent and preserves the easement’s conservation value perceived at

154. *Id.* § 477-A(1)–(2)(A).

155. *Id.* § 477(3)(B); VT. STAT. ANN. tit. 10, § 6308(a)–(b) (2011). Maine’s statute does not mention the I.R.C. and how it would interact with non-perpetual conservation easements.

156. ME. REV. STAT. tit. 33, § 477-A(2)(B).

157. *Id.*

158. *Id.*

159. S. 119, 2013 Gen. Assemb. (Vt. 2013).

160. ME. REV. STAT. tit. 33, § 477-A(1) (Maine conservation easements “must include a statement of the conservation purposes of the easement, the conservation attributes associated with the real property and the benefit to the general public intended to be served . . .”).

161. *See* ME. REV. STAT. tit. 33, § 477-A. *See also* S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013).

162. S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013).

163. ME. REV. STAT. tit. 33, § 477-A.

the time of its creation. By incorporating some of the concepts found within Maine's statute, Vermont can substantially improve the amendment process while retaining some of S. 119's original procedures.

B. If Vermont Adopted Maine's Easement Amendment Law, How Would This Affect the Long Trail?

Consider the hypothetical laid out in Part II.C.2. Had Vermont adopted Maine's statute, the Environmental Court or Easement Amendment Panel may have reached different results than they would have had S. 119 been adopted. For example, if the GMC sought to amend a conservation easement prohibiting energy facilities to allow a new wind turbine, the court would have followed a different procedure.¹⁶⁴ Instead of taking into account the seven factors laid out in S. 119, the court would have first determined whether the “[c]hange of circumstances render[ed] the easement no longer in the public interest”¹⁶⁵ If the court made such a finding, the easement would not have been considered perpetual and would likely be terminated. In the instance of the wind turbine, the easement that restricted energy facilities may not have served the public interest. The new energy source could have been vital to the public welfare and the wind turbine and the easement may not be able to coexist on the property. However, a Long Trail easement does not merely seek to serve the public interest by ensuring that wind turbines do not “blemish” the skyline. These easements exist to provide the public with access to recreation, and achieve that end by ensuring development does not interrupt the path of the Trail or detract from the quality of the hiking experience. Therefore, the court would likely find that the easement is unlimited in duration and would either deny an amendment or propose an amendment balancing both land uses.

When applying the Maine statute to this situation, the court would look to the donor's intent.¹⁶⁶ Assuming that the conservation easement had been executed after the statute went into effect, the easement would have included statements about the easement's conservation purposes, the property's conservation attributes, the public benefit served by the easement, and the “holder's power to agree to amendments”¹⁶⁷ The court would weigh this with the public's interest, as represented by the

164. *See supra* Part II.C.2. (laying out the facts of this hypothetical).

165. ME. REV. STAT. tit. 33, § 477(3)(B).

166. *Barrett v. Kunz*, 158 Vt. 15, 19, 604 A.2d 1278, 1280 (1992) (citing *Griffith v. Nielsen*, 449 A.2d 965, 968 (Vt. 1982)) (“The character of an easement depends on the intent of the parties, as drawn from the language of the deed, the circumstances existing at the time of execution, and the object and purpose to be accomplished by the easement.”).

167. ME. REV. STAT. tit. 33, § 477-A(2)(A).

Attorney General, and determine if and how to amend the easement.¹⁶⁸ With respect to determining the easement creators' purposes, this process would likely be clearer than Vermont's procedures. However, this is not the case when determining the public's interest. For example, the Attorney General has the responsibility to represent the state's interest, which may or may not encompass the public's interest.¹⁶⁹ Therefore, Vermont could improve upon S. 119 by adopting some of Maine's statute to the framework already put forth in S. 119 while retaining its measures for analyzing the public's interest.

IV. THE NEED FOR SAFEGUARDS AGAINST ABUSE OF THE EASEMENT AMENDMENT PROCESS AND FOR CLARIFICATION OF S. 119'S LANGUAGE

If Vermont's General Assembly tries to pass another bill allowing conservation easement amendment, it could improve its proposed bill in several respects. The General Assembly could build off the basic framework laid out in S. 119 or incorporate some of S. 119's procedural safeguards into the Maine statute's much simpler scheme. The new bill should ensure the opportunity for public participation because of the potentially large impacts an amendment may have on its interests. If the General Assembly chooses to build on S. 119, it should adopt some of Maine's ideas to S. 119's framework, rework the procedures followed for the different amendment categories, and clarify the bill's language.

First, Vermont could adopt some of Maine's language¹⁷⁰ to allow a decision-maker to more easily ascertain whether the seven factors laid out in section 6328(g) have been met.¹⁷¹ The factors laid out in S. 119 are

168. *Id.* § 477-A(2)(B).

169. OFFICE OF THE ATTORNEY GENERAL WILLIAM H. SORRELL, <http://www.atg.state.vt.us/> (last visited Oct. 30, 2015).

170. Maine's statute requires new conservation easements to "include a statement of the conservation purposes of the easement, the conservation attributes associated with the real property and the benefit to the general public intended to be served by the restriction on uses of the real property subject to the conservation easement," and "a statement of the holder's power to agree to amendments to the terms of the conservation easement . . ." ME. REV. STAT. tit. 33, §§ 477-A(1), 477-A(2)(A).

171. S. 119, 2013 Gen. Assemb. § 7 (Vt. 2013). When determining whether to grant an easement amendment, the Easement Amendment Panel assesses whether the amendment is in the public conservation interest by considering:

- (1) any material change in circumstances that has taken place since the easement was conveyed or last amended . . . ;
- (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 6326(b)(1)–(4) of this title;
- (6) the

important for determining whether to allow an easement amendment. Among these factors are “whether the amendment changes an easement’s stated purpose or hierarchy of purposes” and “the documented intent of the donor”¹⁷² However, not all easements include such language. By including a clause similar to Maine’s, requiring a statement about the easement’s purposes or the donor’s intent, the General Assembly would ensure that this information is readily available in case someone seeks to amend the easement.

Second, the General Assembly could improve S. 119 by reworking how it splits amendments into categories and the procedures each category requires. Instead of only Categories 2 and 3 requiring the Easement Amendment Panel’s involvement, all amendments should be subject to review by the Panel. A better bill would split amendments into two types: one requiring a formal process and the other allowing a formal process but only requiring an informal process. The current language allows Category 1 amendments without any review by, or even notice to, the Panel.¹⁷³ A better bill would treat all Category 1 and 2 amendments the same—requiring the holder to submit a petition. The Panel would then determine whether the amendment must follow the formal process required by S. 119 for Category 3 amendments or whether the determination could be made without it. This would ensure that amendments that ought to be taken more seriously are not snuck in as Category 1 amendments.

Finally, if the General Assembly chooses to retain parts of S. 119, it should clarify the Bill’s language. S. 119 is lengthy and unnecessarily separates some topics into sections that should have been left together. For instance, section 6323 would have created the Easement Amendment Panel.¹⁷⁴ It proscribes, among other things, how members of the Panel would have been chosen and the Panel’s powers.¹⁷⁵ Among these powers, it only lists the power to adopt rules and to enter, and “allow members of the public to enter upon the lands under or proposed to be under the conservation easement,” for purposes of investigating the proposed amendment.¹⁷⁶ The Bill would have been easier to understand if it had

documented intent of the donor, grantor, and all direct funding sources and any donor-imposed restrictions accepted by the holder in exchange for the easement, if applicable; and (7) any other information or issue that the Panel considers relevant.

Id.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

either described or mentioned the Panel's authority with respect to approving the proposed amendment. It should have either moved the existing sections covering this topic to section 6323 or referred the reader to the existing sections. The Bill could have also been less confusing if it linked section 6327 to sections 6328–6330. Section 6327 says that a Category 3 amendment may be made by following one of three procedures, which are each explained in turn in the Statute's following three sections.¹⁷⁷ However, section 6327's language does not clearly demonstrate that this is the relationship between the four sections. If the General Assembly chooses to retain the easement holder's ability to choose between the three procedures, it should change this language.

CONCLUSION

Vermont has demonstrated an interest in enacting a statute that would govern conservation easement amendment. Absent such a statute, easement holders are allowed to amend easements but are not required to follow any specific procedures or meet any criteria. Easement amendments could affect the interests of the landowner whose property is subject to the easement, the easement donor, the land trust or government agency responsible for stewarding the land, and the public. If Vermont would like to ensure that amendments account for those interests, the General Assembly should enact a statute that allows those interests to be represented in the amendment process. S. 119 provided a foundation for such a statute. This foundation can be built upon and improved to ensure that the landscape Vermonters have come to love remains intact.

—Alexis Peters^{*†}

177. *Id.*

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