Recommendations for a Vermont Policy on Conservation Easement Amendment and Termination

I. Introduction

Vermonters have devoted enormous amounts of property, money, time, and effort to creating an expansive system of conservation easements covering hundreds of thousands of acres of open space, wetlands, shorelines, wildlife habitat, farmlands, woodlands and recreation areas. Virtually all of these easements were created with a promise that the resulting restrictions on land development would be maintained "in perpetuity." Inevitably, as this system of land protection has matured and expanded, questions have arisen about what the commitment to perpetuity actually means. The need for good—and legally enforceable—answers to these questions is becomingly increasingly urgent.

For example, if a landowner donated a conservation easement to a land trust, and the land trust accepted the gift with a promise to keep the land undeveloped in perpetuity, is that promise legally enforceable? What happens when environmental, social, or economic conditions affecting the property change? If a future owner wishes to develop part of the property, does the land trust have the discretion to permit the development, notwithstanding the promise made to the original owner? Questions like these are now being posed across Vermont on a regular basis, and the volume of such questions (and the resulting disputes) may well increase in the future.

In 2013-14, the Vermont legislature considered a bill (S. 119) to establish procedures and standards governing conservation easement amendment and termination. While there was widespread agreement that *some* type of legislation was needed to clarify the manner in which conservation easements may be amended or terminated, critics (including us) contended that S. 119 represented a flawed approach. In particular, critics argued that the bill did not adequately protect easement integrity and durability and would have vested too much authority over easement amendment and termination in a new politically-appointed body and in easement holders themselves. In the face of these and other criticisms, the primary proponents of S. 119 ultimately withdrew their support for the bill and no legislation on the subject was enacted.

These Recommendations offer an alternative blueprint for reform of Vermont's governance of conservation easement amendment and termination that could be converted into legislation or administrative rules.

The basic theme of these Recommendations is that promises of conservation easement permanence should be kept to the maximum extent possible. It should be the overriding policy of Vermont to mandate and support the permanence of conservation easements, and terminations as well as amendments that undermine the conservation values protected by easements should be permitted only in extraordinary circumstances and only with court approval. More minor kinds of amendments that do not threaten the easement-protected conservation values on particular parcels should be permitted upon agreement

of the landowners and the easement holders, provided the public receives advance notice. These Recommendations propose to carry out this policy through simple, uniform procedures that are consistent with existing federal and state laws governing conservation easements and use well-established and time-tested legal mechanisms and institutions.

Part II lays out a set of General Principles that should guide the development of sound policy on the amendment and termination of perpetual conservation easements. Part III offers a set of Recommendations on procedures and substantive criteria that should govern proposed amendments and terminations. Part IV briefly outlines other closely related reform proposals (some drawn directly from S. 119) that should be considered in any comprehensive effort to reform policies governing conservation easements in Vermont.

For purposes of these Recommendations, the following terms have the following meanings:

A ***conservation easement*** is an instrument (generally a recorded deed) by which a landowner restricts the uses of a specific property in order to protect its conservation values in perpetuity. The easement is donated or sold by the landowner to a land trust or government agency holder, which in return commits to monitor and enforce the restrictions on the use of the property forever. While conservation easements may technically be for a term of years, such easements are very uncommon; these Recommendations deal only with conservation easements intended to be permanent.

A ***conservation easement amendment*** is a change in the easement's terms as applied to the specific land originally subject to the easement.

A ***conservation easement termination*** is an extinguishment of all of the easement's restrictions as applied to all or any portion of the land originally protected (i.e., a removal of all or a portion of the originally protected land from the easement).

II. General Principles

The following General Principles should steer the development of rules governing the amendment and termination of conservation easements in Vermont.

The promise of perpetuity. The essential purpose of a conservation easement is to protect the conservation values of a specific parcel of land in perpetuity. Conservation easements are designed, to the extent our legal system allows, to provide public benefit by protecting conserved areas from development and ecologically damaging activities forever. To achieve this goal, land trusts and government easement holders in Vermont explicitly or at least implicitly promise donors and other grantors of easements that the conserved lands will be protected in perpetuity. To achieve a conservation easement's basic conservation purpose, these promises must be kept.

Landowners donate and otherwise grant easements on their lands because they want to preserve places that have special meaning to them. They reasonably expect promises of permanent protection to be kept by the land trust or other eassement holder, because that is precisely the level of protection they seek for their specific lands. Landowners who obtain such promises have both a moral and a legal right to their enforcement, and easement holders have a moral and a legal duty to honor these promises. Moreover, if landowners cannot rely on promises of perpetuity, they will lose an important incentive to grant easements. For all these reasons, a central pillar of Vermont's policy on conservation easements must be to keep faith with the promise of perpetuity.

The public trust in easements. Vermont's conservation easements are held by land trusts and government agencies for the benefit of all Vermont citizens, and each easement holder has a duty to protect the conserved property according to the easement's promise forever. This duty arises from Vermont common and statutory law governing charitable assets and, more generally, from the government's duty to carry out its commitments to the people, including official promises of perpetual land protection. These Recommendations seek to enforce and build upon these principles. Conservation easements are not merely private contractual arrangements between a landowner and an easement holder. The public as a whole has a deep and abiding interest in the enforcement of these commitments to perpetual conservation.

Vermonters' financial investment in easements. The public has an enormous financial stake in conservation easements. Through the Vermont Housing and Conservation Board and other state agencies, Vermonters have expended many millions of public dollars to acquire conservation easements throughout the state. In addition, at both the federal and state levels, tax subsidies in the form of individual tax deductions and public programs providing direct acquisition funds have generously financed Vermont conservation easements. Even when conservation easements are purchased by land trusts using their own funds, there

is a heavy public investment because the dollars spent have been collected through charitable donations and grants subsidized by tax and other public programs. These investments have been made with the understanding that conservation easement protections will be perpetual. Vermonters have a right to expect a durable conservation payoff for their massive investment in land conservation.

The community stake in easements. As the most direct beneficiaries of conservation easements, communities surrounding easement-protected lands also have a substantial stake in the durability and integrity of easements. Once an easement is in place, proposed actions that would undermine easement protections can affect the plans, expectations and desires of the community. Local governments, as guardians of the community, should have notice of, and the right to be heard in, proceedings related to conservation easement termination or any amendment that might adversely affect conservation values. Neighbors of easement-protected lands likewise should have the right to be informed and heard.

The possibility of change. Despite the essential purpose of conservation easements to achieve *perpetual* protection, it is necessary to allow for the possibility of change. Over time, there may be a need to modify conservation easements to make technical corrections, update the form of an easement in a fashion not affecting the easement's conservation protection, or enhance conservation protections. In addition, in infrequent cases changed circumstances may make it impossible or impractical to carry out the intentions of the grantor and grantee of the easement. Under a well-established legal principle applicable to charitable gifts, known as the *cy pres* doctrine, a court can lift the legal restrictions on a gift in the event of impossibility or impracticality and redeploy the donated asset or the value it represents to some other, similar charitable purpose. These legal principles apply to charitable donations involving interests in land in the same fashion that they apply to any other charitable gift. Thus, the law has long allowed some flexibility in the long-term management of conservation easements, while also appropriately limiting that flexibility to safeguard the essential purpose of conservation easements to secure permanent land protection.

In addition, under the law of eminent domain, all private property in Vermont is subject to the prospect that the public may decide to condemn the property to advance some public purpose (subject, of course, to the requirement to pay "just compensation" for the interest taken). There is no principled basis for categorically exempting protected land from this burden. At the same time, undeveloped lands protected by conservation easements may be particularly vulnerable to infrastructure development projects that rely on eminent domain because they may appear to present the path of least resistance to development. Infrastructure developers should at least take into account the public value of, and the public investment in, conservation easements in their planning, and should pay compensation to the easement holder based on the current fair market value

of the condemned easement rights, so that easement-protected lands do not become "cheap" targets of condemnation. Easement holders should use the funds they receive from condemnation proceedings to invest in conservation projects consistent with the easements' original conservation purposes.

The threat to conservation easements. One of the greatest threats to conservation easements over the long term arises from requests by owners of lands subject to easements that the restrictions on development be lifted or relaxed. Landowners may have strong economic incentives to break easement restrictions because doing so can create opportunities for private profit. As lands subject to easements pass from owner to owner, the new owners may have no personal stake in upholding the easement restrictions placed on the land. The upshot is that land trusts and government agencies that hold conservation easements are and will be subject to significant, continuing pressure from landowners to be "flexible" about modifying and terminating easement restrictions. Absent rules strictly governing conservation easement amendment and termination, even the best-intentioned land trusts will have difficulty resisting this pressure over the long term, as will government agencies subject to potentially widely varying political directions over the years.

The threat to easement holders. Liberal standards governing easement amendment and termination would pose a threat not only to conservation easements but also to the land trusts and government agencies holding the easements on behalf of the public. The broader the legal discretion conferred on easement holders to agree to amendments and terminations, the larger would be the volume and intensity of requests from landowners for such amendments and terminations. Responding to these requests would impose a major work burden on the staff of easement holders, diverting them from their primary conservation missions. In addition, dealing with large volumes of amendment and termination requests would force easement holders to constantly choose between disappointing and possibly alienating landowners or allowing amendments or terminations that would erode easement protections over the long term. Finally, frequent amendments and terminations may erode the confidence of the community, including financial supporters, in easement holders. Clear, strict rules upholding easement protections in perpetuity in all but exceptional circumstances will avoid these burdens and challenges.

Complying with federal law. To ensure Vermont easement donors are eligible for federal tax benefits and to avoid actions that might violate federal law, the system governing amendment and termination of conservation easements must conform to federal tax law. Landowners who convey eligible conservation easements in whole or part as charitable gifts are entitled to claim federal income tax deductions in the amount of the appraised value of the easement or the portion that was donated as part of a "bargain sale." The Internal Revenue Code and associated regulations provide detailed rules to ensure that tax-subsidized conservation easements will protect the conservation values of the protected lands

in perpetuity. Federal law applies a regulatory version of the state law doctrine of *cy pres* to proposed easement terminations, thereby limiting when and under what circumstances easement termination may take place. The law in Vermont must do no less.

The key role of the judiciary. The courts play a critical role in providing a trusted, neutral, and independent authority that can ensure the proper enforcement of conservation easements on behalf of the public and, on rare, appropriate occasions, authorizing the termination or deleterious amendment of conservation easements. Under longstanding tradition, courts have been entrusted with determining whether the purpose of a charitable gift has become impossible or impractical to achieve due to changed circumstances and, if so, how to best manage the gifted property or its proceeds to continue to carry out the donor's charitable intent. Judges are entrusted with these decisions because they are relatively independent of the personal, political, and economic pressures that influence other public officials and non-profits. The time-tested function of the courts in protecting charitable property should equally apply to decisions affecting the durability and integrity of conservation easements. Moreover, in making these decisions, courts traditionally have been open to receiving comments from all those with a legitimate interest in the management of the gifts, and that same policy should apply in judicial proceedings addressing proposed amendments or terminations of conservation easements.

The role of the State Attorney General. The State Attorney General also has a vital role to play in maintaining the integrity and durability of conservation easements. As the ultimate guardian of all charitable assets in the state, the Attorney General should be made a party to any judicial proceeding addressing a proposed easement termination or amendment that could have an adverse impact on the encumbered property's conservation values. As a party to such a proceeding, the Attorney General can speak for the public that invested in the creation of the easement as well as for the conservation purposes of the easement and its grantor. The Attorney General can also play an important informal role by providing advice to land trusts, landowners, and local communities regarding when the courts need to be involved in reviewing proposed changes to easement restrictions.

Equal treatment of permanent conservation easements. The substantive and procedural rules governing amendment and termination of conservation easements should be uniform regardless of how or when the easements were originally created. With the passage of time, it may be difficult to determine how a particular easement came into existence, whether by gift, purchase, regulatory exaction, or some combination of these methods. Thus, as a practical matter, it would be difficult to administer a system governing easement amendment and termination that applied different rules depending on how the easement came into existence. More importantly, public expectations are, and should be, the same for all conservation easements: the easements were created to advance the public

good; they are intended to protect specific lands in perpetuity; they benefit Vermont and its communities in the same basic fashion; and they should not be amended or terminated in a way that diminishes their conservation values except in extraordinary circumstances and following a predictable and consistent set of steps than can be broadly understood by the public.

The need for a strict policy on terminations. Any proposed termination of a conservation easement, defined as an extinguishment of all of the easement's restrictions as applied to all or any portion of the land originally protected, needs to be reviewed by a court to determine whether the proposed termination is permissible and, if so, subject to what conditions. An easement termination necessarily thwarts the charitable intentions of the easement donor and, where relevant, of those who made donations to support the purchase of the easement. It also defeats the purpose for which the easement was created—the permanent protection on behalf of the public of the conservation values of the specific land subject to the easement. Under existing Vermont law, court approval is required to deviate from the purpose of a charitable gift. Federal tax law also requires that courts approve proposed easement terminations. And for the reasons discussed above, there are sound public policy reasons for applying the same process to all easement terminations, regardless of how the easements were created.

The need for a principled but nuanced approach to easement amendments. The policy on amendments to conservation easements necessarily must be more nuanced because proposed amendments can range from the technical (such as correcting a scrivener's error) to the very significant (such as an amendment to a no-development easement that would allow some development to occur). The touchstones for the policy on amendments should be the need to protect in perpetuity the fundamental integrity of the conservation easement, the grantor's intent, and the conservation values of the originally protected parcel.

In limited circumstances, it should be possible for an amendment to be made by agreement of the landowner and easement holder, without court involvement. For example, amendments correcting scrivener's errors or relinquishing some of the landowner's retained rights could be made in this fashion. However, proposed amendments that would adversely affect the conservation values of the original property protected by an easement or would conflict with the grantor's documented intent could threaten an easement's integrity and durability in a manner akin to termination. Accordingly, such proposed amendments should be reviewed in a judicial proceeding in which the Attorney General represents the public interest and other interested parties may be heard. The process and criteria used by the court in reviewing such amendments should be the same as those applied in easement termination proceedings. Any amendments should be recorded in the land records, just as the original easement should have been recorded.

III. Recommendations

Guided by the Principles above, the following Recommendations are designed to ensure that amendment and termination of conservation easements in Vermont will be undertaken pursuant to a publicly transparent system that uses existing institutions and legal structures to safeguard easement integrity and durability.

1. The same standards and procedures for amendment or termination should apply uniformly to *all* conservation easements. The standards and procedures for amendments and terminations should apply uniformly to all conservation easements, regardless of when they were created (whether before or after the adoption of new legislation or new policies reforming the management of conservation easements in Vermont), regardless of the type of holder (whether nonprofit land trust or government agency), and regardless of the means by which the easement was created (whether through gift, purchase, regulatory exaction, or some combination of these). None of these factors affects public expectations and understandings regarding the perpetual nature of conservation easements or their possible amendment or termination. In addition, to avoid circumvention of these standards and procedures, they should apply to a holder's approval of or consent to any activity, practice or use that could negatively impact the conservation purpose of the easement or the perpetual protection of the protected property's conservation values. In other words, holders should not be permitted to avoid these standards and procedures through the use of "discretionary approvals" or "discretionary consents." All concerned will benefit from rules designed to protect conservation easement integrity and durability that are uniform, simple, and readily comprehensible.

2. Any proposed easement termination should require advance court approval. Court approval should be required for the termination of an easement with regard to all or any part of the originally protected property, including any termination resulting from a "swap," "substitution," "reconfiguration," or "trade."

3. A conservation easement amendment should be allowed to proceed by agreement of a landowner and the holder if the amendment simply eliminates one or more of the landowner's reserved rights. An amendment of a conservation easement that simply eliminates one or more of the landowner's reserved rights should be allowed to proceed by agreement of the landowner and the holder. Such an amendment would only enhance the protection provided by a conservation easement, without readjusting or relocating any of the landowner's other reserved rights. It would not threaten the easement's conservation values, implementation of the grantor's conservation intent, or the perpetual nature of the easement's protection. There is no reason to subject this type of amendment to any special review process beyond that which the easement holder would undertake in making its decision about whether to approve the amendment.

4. Conservation easement amendments by agreement of the landowner and holder should only occur in two other sets of circumstances, and then only after adequate public notice. An amendment of a conservation easement by agreement of the

landowner and the holder should be allowed to proceed in two other circumstances with adequate public notice.

First, an amendment should be able to proceed by agreement of the landowner and holder when it constitutes a technical correction, such as correcting a scrivener's error, correcting a boundary line consistent with the grantor's original intent or new survey data, or improving the clarity of easement language in a way that does not affect the easement's protection of the conservation values of the property.

Second, an amendment should be able to proceed by agreement of these parties when it (1) will not adversely affect the protected conservation values of the specific land area subject to the original easement, and (2) will be consistent with the intent of the easement's original grantor. For these purposes, the best evidence of the easement's conservation values and the intent of the original easement grantor include baseline documentation regarding the land's conservation values at the time the easement was created as well as the easement's recitals, purpose clause, restrictions, and other documented manifestations of the grantor's conservation intentions. For the purpose of condition (1), the relevant conservation values will vary based on the character of the land, the terms of the easement, and the law governing the easement's creation; for example, the U.S. Department of Treasury regulations provide that easements donated in whole or in part must serve one or more conservation purposes set forth in §170(h) of the Internal Revenue Code, whereas purely purchased easements in Vermont may serve a broader set of purposes. However, even with regard to a purely purchased easement, amendments should not adversely affect the conservation values protected by the easement: the natural, scenic, open space, habitat, or ecological values of the protected property. The analysis of the effect on conservation values should consider the impact on the originally protected property without regard to any other land conservation actions the landowner might also undertake, such as protecting additional land in return for the amendment. In no event should an easement amendment confer a private benefit on the owner or user of the land subject to the easement.

To help ensure that these types of amendments only proceed when they protect the fundamental integrity of the easement, the grantor's intent and the conservation values originally protected in perpetuity, advance public notice of these proposed amendments should be provided in accordance with Recommendation 9.

Easement holders and grantors should be free to set a more stringent standard for amendments if they deem it wise to do so.

5. Other conservation easement amendments should require court approval. All other proposed easement amendments should be allowed to proceed only with advance court approval because they threaten to adversely affect all or some of the conservation values of the land originally protected by the easement or run counter to the intent of the easement's original grantor. Such amendments threaten the core values protected by easements and therefore should be considered the functional equivalent of partial terminations requiring court approval.

6. Judicial review of proposed amendments and terminations should be conducted by the Civil Division of the Vermont Superior Court. One Vermont court should be assigned jurisdiction to review proposed easement amendments and terminations. The Civil Division of the Vermont Superior Court appears to be best suited to hear these matters, because it is the court generally charged with passing upon proposed changes in uses of charitable assets held for the benefit of the public. The court's review of proposed easement amendments and terminations should be guided by the criteria stated in Recommendation 7 below. If the court approves a proposed easement amendment or termination, it should oversee the distribution of any proceeds payable to the easement holder and the holder's use of those proceeds in a manner consistent with the conservation purposes of the original easement as required under Recommendation 10 below. As is customary under Vermont procedures, the court's decisions may be subject to review by the Vermont Supreme Court. The standards governing proposed easement terminations and amendments should serve to deter routine resort to the courts, helping to control the burden on the court system.

7. The court should make affirmative findings on applicable substantive criteria for amendments and terminations. For any amendment or termination requiring court approval, that approval should be based upon affirmative findings on both the following criteria:

> (a) The amendment or termination must be consistent with *cy pres* principles applicable to changes in the use of charitable assets designated for particular purposes. That is, the court must find that changed circumstances have made it impossible or impractical for the original easement to achieve its conservation purposes. The intention here is to apply common law principles governing changes in use of charitable assets, as well as federal regulations applicable to donations of conservation easements, to *all* conservation easements.
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> (b) The amendment or termination must otherwise conform to applicable law. The purpose of this catch-all requirement is to enable the parties to present to the court, and to authorize the court to consider, any other legal infirmities of the proposed amendment or termination, so that the court is not obliged to approve such a proposal if it is determined to violate a grant agreement, a federal tax requirement, or other applicable law.

8. The State Attorney General should be made a party to any action seeking court approval for an easement amendment or termination. Any action seeking court approval for an easement amendment or termination should include the State Attorney General as a party to represent the public interest. If necessary to help cover the expense of participating in such proceedings, the Attorney General may be authorized to recover its costs of participation in such court actions.

9. The public should receive notice of proposed easement amendments and terminations. Because amendments and terminations affect assets in which the public

has made a substantial investment and has a substantial interest, effective advance notice of a proposed amendment or termination should be provided to the public and other interested parties unless the amendment falls within Recommendation 3 and only involves relinquishment of reserved rights. Notice of all other amendments and any terminations should be required to be given to the following: abutting landowners; the municipality in which the easement land is located; the original easement grantor if still in existence; any entity other than the easement holder that has an interest in the easement or protected land; the general public by publication; and the State Attorney General (who in any event would be a party in any court proceeding under Recommendation 8).

The rules should specify a minimum number of days of notice required before an amendment or termination can be approved by the court, if court approval is required, or by the holder, if no court approval is required. The advance notice should provide adequate opportunity for those receiving notice to express any concerns they may have to the holder or the Attorney General or take other appropriate action.

After easement amendments or terminations have been approved and documented, they should be recorded in the land records, just as the original easements should have been recorded, in order to give the public notice of the accurate state of the title to the land.

10. Landowners should disgorge any financial benefit resulting from a judicially approved amendment or termination. If a court-ordered amendment or termination results in increasing the value of the landowner's real estate interest, this value belongs not to the landowner but to the easement holder as representative of the public. Accordingly, if the proposed amendment or termination is approved, the court should order that this increased value, based on an appraisal, be paid by the landowner to the land trust or governmental entity holding the easement, to be used in a manner consistent with the conservation purposes of the original easement. This disgorgement requirement should help ensure that no amendment or termination results in any private benefit in violation of the Internal Revenue Code. It also should eliminate any incentive for the landowner to seek to amend or terminate the easement in order to make more profitable use of the property.

11. Non-compliant amendments and terminations should be void. The rules should be explicit in stating that any amendment or termination not in compliance with these requirements is legally void. In this way, the proposed rules will be substantially self-enforcing. Landowners and holders will be appropriately cautious about agreeing to amendments that are not clearly authorized because such amendments could later be found to be void. Landowners will want to avoid clouds on their title and holders will want to avoid sanctioning prohibited activities. The self-executing nature of the rules should engender an appropriately conservative approach by easement holders and landowners contemplating easement amendments and terminations and is vital to the efficient and effective enforcement of the system contemplated by these Recommendations.

The Vermont Attorney General's Office could offer a valuable public service by providing informal advice at the request of land trusts, landowners, and local communities as to whether proposed amendments would require court approval. This advice would allow easement parties to have reasonable confidence about whether and how to proceed. Performing this service should impose only a modest burden on the Attorney General's Office that could be absorbed within the current budget. If the Attorney General's Office requires additional resources to perform this service, it might be authorized to assess fees necessary to underwrite the additional costs.

12. Condemnation of conservation easements should require court approval. Lands subject to conservation easements are not categorically exempt from governmental authority to condemn land for public purposes. Thus, the criteria laid out in Recommendation 7 for the review of proposed amendments and terminations of easements should not apply to amendments or terminations resulting from properly authorized condemnations. However, even in the case of easement amendments or terminations caused by condemnation, explicit approval by the court with jurisdiction over the condemnation action should be required. This requirement of explicit court approval eliminates the possibility that the landowner and the easement holder might informally consent to condemnation, a prospect likely forbidden by federal tax requirements with respect to tax-deductible easement donations. In addition, to minimize the risk that lands subject to conservation easements might be targeted by infrastructure developers, the legislature may wish to require that those seeking to use eminent domain for projects that threaten the values protected by conservation easements identify and evaluate possible alternative locations that would avoid harm to conservation easements and the values they protect.

To protect the conservation values of each easement subject to condemnation, the rules should specify that the easement holder must be compensated for the current appraised value of the easement, as condemned in whole or in part, and provide that the holder must apply the proceeds in a manner consistent with the conservation purposes of the condemned easement. This accords with the requirements of Recommendation 10 above.

13. Every conservation easement should contain a clear statement of its conservation values. To facilitate effective implementation of this proposed system, the rules governing conservation easements should require future conservation easements to include a clear statement of the conservation values of the particular land that the easement is intended to protect in perpetuity. This will help establish the benchmark by which future easement amendments and terminations will be measured, although other provisions of the easement, including its recitals and restrictions, should also be considered for this purpose.

14. Vermont should seek more detailed guidance from the federal government about federal tax law governing amendments. Vermonters should seek more detailed guidance from the U.S. Department of Treasury about how federal tax rules affect the ability to amend conservation easements. The federal tax code requires that easements be "granted in perpetuity" and their conservation purposes be "protected in perpetuity" if the

donor seeks to claim federal tax benefits for the gift. But the Treasury regulations do not explicitly address when amending conservation easements (short of termination) will run afoul of the "in perpetuity" requirements, leaving some degree of uncertainty for landowners, who bear the risk of noncompliance with federal tax provisions. Clear federal guidance would aid landowners seeking to donate easements as well as the holders of easements charged with enforcing their terms. In any event, Vermont should proceed with the adoption of rules governing amendments and terminations that will serve to protect the public interest, past and future grantors of conservation easements, and holders of easements from the greatest risks.

IV. Other Topics Worthy of Consideration

The purpose of these Recommendations is to propose a blueprint for rules that should fortify the integrity and durability of conservation easements. The focus above is on the rules governing possible amendments or terminations of conservation easements because those actions pose a fundamental threat to easements' perpetual nature. However, it is worth considering other ideas that could also help protect the public's interest and investment in conservation easements over the long term. These include the following.

1. Protection of conservation easements from extinguishment by operation of law. It is important to protect conservation easements from the risk of extinguishment due to the application of broad legal doctrines that make no sense when applied to conservation easements. In 2015 the Vermont legislature added the following language to 10 V.S.A. § 6310: "If a holder of a conservation easement is or becomes the owner in fee simple of property subject to the easement, the easement shall continue in effect and shall not be extinguished." This provision safeguards conservation easements from extinguishment due to application of the common law doctrine of "merger," which would be inapt in this context. Safeguarding conservation easements from extinguishment due to application of Vermont's marketable title act (which requires periodic re-recording of certain property interests) and tax foreclosure if the landowner should fail to pay property taxes should also be considered because extinguishment of a conservation easement in these circumstances would be equally inappropriate.

2. Backup enforcement by the State Attorney General. There is substantial risk that in the future some conservation easements may be jeopardized due to holder failures, for instance if a land trust goes out of business or fails to enforce an easement entrusted to it for lack of adequate resources or some other reason. There are already a number of easements in Vermont held by organizations that no longer have easement programs, do not have sufficient endowments or enforcement capacity, and effectively have abandoned the easements. To address this problem, the Attorney General should be granted clear statutory authority to directly enforce conservation easements if the holder goes out of business, becomes bankrupt or insolvent, or fails to take enforcement action after appropriate notice. The Attorney General should be granted the authority to act

immediately and without providing advance notice to the easement holder in an emergency situation where the conservation values protected by an easement are at imminent risk of irreparable destruction. The Attorney General should also be granted the authority to intervene in any action brought by others affecting a conservation easement. None of these grants of authority should be in derogation of the Attorney General's common law and statutory powers to file an action against an easement holder for violation of its fiduciary duties.

3. Conservation easement monitoring. Conservation easements will fail to deliver their promised public benefits if they are not regularly monitored by the holder to which the easement has been entrusted to ensure continued compliance with the easement's terms. Some organizations, such as the Land Trust Alliance, believe that easement monitoring should take place at least annually. In the neighboring state of Maine, state law requires monitoring at least once every three years. Vermont should likewise create a rigorous statutory standard for regular monitoring.

4. Conservation easement registration. Conservation easements are not likely to endure over the long term if there is no way to keep track of them and their holders. A publicly accessible easement registration system maintained by a state agency would provide an efficient means to locate easements and holders. The registry would help educate the public about the locations of lands subject to easements in their communities, and thereby facilitate the identification of easement violations. The Attorney General could also rely on the registry to help protect easements that are in jeopardy for lack of adequate oversight or enforcement by the easement holder.

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November 2015

[*] We gratefully acknowledge the advice and assistance of various persons in developing these recommendations, including Jeff Pidot and Nancy McLaughlin, as well as the support of the Lintilhac Foundation.