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VLS Professors Propose Shift for Conservation Easements

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South Royalton — Disagreements about who should be allowed to change conservation easements, and under what circumstances, may once again be coming to the Vermont Statehouse, two years after a previous effort to legislate a solution was scuttled amid public outcry.

A pair of Vermont Law School professors are recommending that lawmakers take the power to change or terminate easements out of the hands of land trusts, and instead put it into the hands of a superior court judge.

With a new generation of landowners inheriting conservation easements, the pair said, it's important for the state to establish a system under which a judge guided by unambiguous language can make decisions that will be vital to protect Vermont's landscape.

The suggestion drew mixed reactions from Upper Valley residents who have conservation easements, and was criticized by the Vermont Land Trust, which controls the easements of more than a half-million acres of Vermont land.

Vermont Land Trust President Gil Livingston said his group believes conservation easements in the state may be terminated only after being reviewed by a judge. However, such easements may be amended with the consent of the landowner and the entity holding the conservation easement, Livingston said.

Livingston said he needed more time to review the recommendations put forth by professors Janet Milne and John Echeverria, but his initial reaction was that the professors should have worked more closely with stakeholders to develop the recommendations.

"A collegial process with the airing of disagreement is likely to be more effective than this kind of closed-door thing," Livingston said.

Livingston said that a 2013 bill meant to address the same issue (which Milne and Echeverria opposed) was arrived at as a consensus among 14 organizations. That bill, which would have granted a panel appointed by the state Natural Resources Board the power to change easements, died in 2014 after criticism caused even the Vermont Land Trust to

withdraw its support.

Livingston said that the recommendations, which Milne and Echeverria have encoded on the website vtperpetualeasements.org, imply that land trusts aren't good stewards of the easement contracts.

"I would like them to identify the termination of a conservation easement that has happened in Vermont. I am not aware of a single case that's happened," Livingston said. "I'm not worried about the rigor of my organization or other land trusts in Vermont."

Milne said that a superior court judge would be insulated from the kind of political considerations that might influence the thinking of a panel appointed by elected officials.

"We think it's really the courts who are better positioned to make the decision of when it's really necessary to change an easement," she said.

Milne said state law is largely mum on easements, leaving land trusts to develop their own management policies, while the federal Internal Revenue Service enforces its own standards when easements impact a person's tax filings, such as when they're used as a tax-exempt donation.

Echeverria said most easements in Vermont have been created over the last three or four decades, and that the bonds between the individuals or families that created the easements, and the land, is still strong.

But, he said, things change.

"As land changes hands and new owners acquire the land, they may have less interest in conservation," he said. "They may be tempted to try to get out from under the easement restrictions."

Echeverria said that leaving the matter up to land trusts and private owners is simply too big of a risk.

"That flexibility would have undoubtedly been convenient for the land trusts," he said. "But our way of thinking, it would have developed too many opportunities for easements to be lost or destroyed."

Changes in Forever

There is wide agreement that, despite their reputation for being iron-clad and inflexible, there are certain narrow circumstances in which easements should be altered or terminated.

For example, a landowner might craft an easement and reserve the right to build two houses on the property, but then decide to build only one. If an easement can't be amended, the landowner is prevented from strengthening the easement by giving up the right to build the second house. Other examples include the ability to fix typographical errors, or the ability to revise boundary lines when more accurate land surveys become available.

But establishing standards that allow for easement changes can be tricky — while complete rigidity causes problems, opening the door to change also opens the door to abuse by those who might want to subvert an easement for their own gain.

Hartford resident Chuck Wooster, who has a conservation easement that promotes perpetual agricultural use on much of his land at Sunrise Farm, expressed concern about the idea of having a judge be the sole arbiter of whether to undo an easement.

"I think there's two dangers out there. One is, of course, the risk of fraud and people trying to cheat on their easements. I think a lot of what the professors wrote is really great in making sure that doesn't happen," Wooster, who also is chairman of the Hartford Selectboard, said. "The other danger is that we have easements that can't respond to changing circumstances. As a farmer, I feel that acutely. I want people reviewing them who understand conservation, and agriculture, and Vermont, so we don't have a lawyer in Washington, D.C., deciding what's right for Vermont farmers."

Wooster said that he supports the idea of a judicial component of the decision to eliminate or amend an easement, but that he would also want someone with expert knowledge — such as someone from the state Agency of Natural Resources — to inform the process.

Wooster said the easement on his own land, for example, prevents him from significantly altering the landscape. But if climate change causes more rain, he said, it's conceivable that the only way to save the farm would be by terracing the land to prevent erosion — an act that would be prevented by the easement.

A judge might not appreciate that issue in the same way that an agricultural expert would, Wooster said.

Milne said that the recommendations would provide a judge guidance in state law.

"Our recommendations, to some extent, are designed to embody the requirements that one sees in the federal tax codes," she said. "The IRS rules for that provision make clear that you can't terminate a conservation easement unless you show that there has been a level of impossibility or impracticality in achieving that protection."

On Nov. 5, Hartford resident John Wiggin put 60 acres of land into a conservation easement with the Upper Valley Land Trust, which has worked with several of Wiggins' neighbors in the Jericho Hill area to conserve more than 1,200 acres in the area in the viewshed of the Appalachian Trail.

Wiggin said his family had discussed making the move for decades before he was ready to give up his property rights.

Wiggin said his expectation is that the land will be protected forever. But he also said that he would be open to certain exceptions, if some future society changed in a way that made the conservation impossible — as in the case of an environmental change that made conserving the land impossible.

When it comes to whether he'd rather have that decision in the hands of a judge or a panel of citizens, he said it all depends.

"Everyone has their biases I suppose," he said. "Who is the judge? Who are the citizens?"

Future Review Possible

The timing of the recommendations make it unlikely a bill to change easement law will be taken up this session, but it could come up in the next session, according to Senate President Pro Tempore John Campbell, D-Quechee.

"I appreciate the fact that they are bringing this back for discussion," he said. "I think it's one that needs to be fully vetted."

Campbell said that he would be reluctant to tinker with a system that, for now, seems to be working.

As evidence of their efficacy, he points to the effort from the Vermont Land Trust to change the law a few years ago.

"They were looking for flexibility," Campbell said. "That says to me that the current law is one that, while it may not be perfect, it certainly provides protection to conservation easements."

Campbell said that he would worry that the unpredictability inherent in the legislative process could worsen, rather than improve, the situation.

"Once that bill comes before the committee, it can be opened to any type of amendments," he said. "I've always been a big believer in that if you are going to seek change in a statute that you do so very carefully and realize all of the collateral issues that might come about from seeking change."

Echeverria said he welcomed the discussion being prompted by the recommendations he and Milne released.

"I think the next step is just to see what kind of a reaction our recommendations receive," he said. "We'll see if people have an interest in picking up on them and turning them into legislation."

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Correction

Vermont Land Trust President Gil Livingston said his group believes conservation easements in the state may be terminated only after being reviewed by a judge. However, such easements may be amended with the consent of the landowner and the entity holding the conservation easement, Livingston said. An earlier version of this story mischaracterized his statement.

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