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The Honorable Edward Gordon, Chairman  
Judiciary Committee  
New Hampshire House of Representatives  
Legislative office Building Room 208  
Concord, NH 03301

February 21, 2021

Dear Mr. Chairman:

The Society for the Protection of New Hampshire Forests appreciates this opportunity to express our opposition to House Bill 82, legislation to allow for the amending of a conservation easement between a governmental body and a landowner.

As you know, a conservation easement is a voluntary, legal agreement between a private landowner and a land trust or government agency that permanently limits uses of the land in order to protect its conservation values. We believe HB 82 will undermine the integrity and benefits of these legal agreements.

We understand this legislation is attempting to address issues on a specific property involving a conservation easement purchased by the state through the Land Conservation Investment Program (LCIP). It is unclear to us that HB82 would necessarily address those issues and, further, it would appear the bill may well be in conflict with existing state law, notably RSA 162-C:10. The intent behind that statute is to protect the investments made by the state with public funds to protect natural resources in the public trust.

As you know, HB82 focuses instead on RSA 477:46 in a way that not only seems to us to be in direct conflict with the intent of RSA 162-C:10 but the spirit of that section of law. There are good reasons to uphold the restrictions agreed to by landowners through the LCIP program, and it is clear through the existence of 162 C-10 that the Legislature agrees.

We feel strongly that HB 82 would undermine the use of an important conservation tool by proposing to open the door widely to arbitrary and unregulated amendments to conservation easements, thus weakening the purposes for which a conservation easement was granted. The bill's language is vague and lacks specific criteria for such amendments. For example, it does not define the terms "the public good" and "correct an injustice".

In addition, the passage of HB 82 would result in a series of unintended outcomes. For example, if a landowner took a federal tax deduction for the donation of a conservation easement, the IRS would likely disallow the deduction and could well further assess tax penalties against the donor of the easement (the landowner) for the change of use in the land. The IRS would likely argue that the language of HB 82 defeats the perpetuity requirement for a qualified conservation contribution because the easement could be amended in this arbitrary manner.

Similarly, the USDA-Natural Resources Conservation Service currently funds the purchase of easements through its Agricultural Conservation Easement Program on working agricultural lands. In the case of working farms, this program helps farmers keep their land in an agriculture status. However, the NRCS would likely stop funding easements for this purpose if it determines that due to the passage of HB 82 easements in New Hampshire are no longer permanent and can be changed based on the vague process authorized in the bill.

While conservation easements are permanent, the New Hampshire Attorney General's office already has in place a process to amend most conservation easements. This detailed guidance document, which describes the amendment process, notes that "even the most well-drafted conservation easement may need to be amended at some point, for example, to clarify terms, add land, improve enforceability, resolve disputes, or address unanticipated land uses."

Of course, amending an easement involves multiple steps. This careful process is necessary to ensure the conservation purposes of the original easement are protected. By following the defined standards laid out in the state guidelines, amending these kinds of legal agreements is possible.

In closing, we believe that HB82 risks undermining an important conservation tool available to all private landowners, like small farmers and private forestland owners, to maintain the viability of their operations and the protection of the natural resources on their properties. We believe that HB82 would unnecessarily weaken the State's existing amendment process, which strikes the proper balance between maintaining the integrity of an existing easement while allowing for changes to that legal document if circumstances warrant such a change, subject to rigorous criteria and appropriate oversight.

Thank you again for your consideration of our concerns.

Sincerely,



Jack Savage, President  
Society for the Protection of New Hampshire Forests