

# Legal Considerations Associated with Conservation Easements

## The Land Trust Perspective



## Overview

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- ▣ Focus on Legal Responsibilities
  - selecting projects
  - landowner communications
  - ensuring sound transactions
  - monitoring and stewarding easements
- ▣ Prepare for Easement Violations
- ▣ Guiding Principles

## Selecting Projects

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- ❑ Site Inspection – Are there conservation values (public benefit). Does it meet your organization’s mission and conservation criteria.



*Gray Brothers  
Pasquotank County*

## Landowner Communications – Ask Questions Up Front!

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- ❑ When did you acquire the property?
- ❑ What names are on the title?
- ❑ Do you own the mineral/water rights?
- ❑ Are you aware of any hazardous waste sites or underground storage tanks?
- ❑ Is there a mortgage on the property?
- ❑ How do you currently use the property?
- ❑ How do you plan to use it in the future?

## More Questions for Landowners

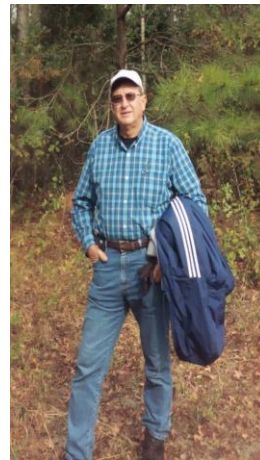
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- ❑ What do you see as the primary value of the property to you and your family?  
Economic, recreation?
- ❑ Why do you want to protect the property?
- ❑ Do you wish to donate or sell an easement?
- ❑ Have you discussed these plans with your family?
- ❑ What do you consider to be the conservation/historic values you want to protect?

## Landowner Communications - continued

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- ❑ Complex real estate transaction.
- ❑ Provide basic information on tax incentives.
- ❑ Advise landowner to seek independent tax and legal advice.
- ❑ Expenses – Who's responsible?
- ❑ Put it in writing.



*Harry Barker  
Landowner*

## Ensuring Sound Transactions

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- ❑ Staff develops a summary of the project.
- ❑ Board of Directors reviews and approves the project.
- ❑ Attorneys on staff and on the Board.
- ❑ Checks and balances are key!



## Ensuring Sound Transactions - continued

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- ❑ Title Investigation –
  - Do early!
  - Liens must be subordinated
  - Are there access issues, boundary line agreements, outstanding mineral rights
- ❑ Get title policy.



## Ensuring Sound Transactions - continued

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- ❑ Drafting conservation easement document – (attorneys, staff, landowners).
- ❑ Easement will include sections on Enforcement and Remedies, Amendment procedures, site inspection, indemnity clause.
- ❑ Draft easement with stewardship in mind!



## Ensuring Sound Transactions - continued

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- ❑ Survey and Legal Description
- ❑ Environmental Due Diligence – Phase I environmental report.
- ❑ Appraisal and Form 8283 – provide landowners with land trust policy or review expectations
- ❑ Baseline Documentation Report

## Baseline Documentation Reports

### Critical Information

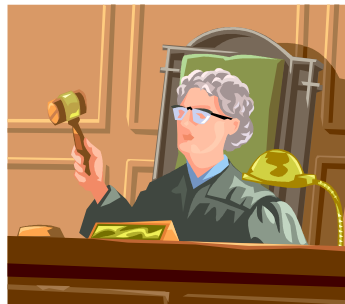
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- Photodocumentation – setting up photopoints
- Description/location of conservation values
- Maps, aerial photos highlighting human improvements, special areas, etc.
- Incorporate any Forest or Farm Management Plans as appendices.
- Signature of the landowner



## Vital Evidence!

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## The Legal Case for Stewardship

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- Legally required to uphold and defend their easements. IRS requires that “the eligible donee. . .have the resources to enforce the restrictions” of the easements.
- Legal standing in court may be weakened if Trusts have not had an ongoing record of stewardship on a property in dispute.

## Stewarding A Conservation Easement

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- A clearly drafted conservation easement
- A thorough baseline inventory
- Knowing and posting easement boundaries
- Maintaining good relationships with landowners
- Keeping annual and precise monitoring records - adopt recordkeeping policy
- Ability to respond to violations

## Prepare Now for Easement Violations

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- **TRY TO AVOID CONFLICTS IF AT ALL POSSIBLE** through good landowner relationships.
- **PREPARE NOW TO GO TO COURT TO ENFORCE THE TERMS OF AN EASEMENT** (keep thorough monitoring reports and photodocumentation records, develop a policy on how to handle a potential enforcement case).

## Guiding Principles

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- ❑ Landowner Retain Independent Legal and Financial Advice
- ❑ Up Front Landowner Communications
- ❑ Documentation, Good Recordkeeping
- ❑ Simple/Specific Easement Language
- ❑ Annual Monitoring
- ❑ Keeping Good Landowner Relationships
- ❑ Access to Financial Resources for Monitoring, Stewardship and Enforcement