

WLRM Section 7 - Model Working Land Easement Language & Process

Disclaimer: The materials produced and distributed by the Community Conservation Committee of the North Carolina Association of Soil and Water Conservation Districts area intended to serve only as general guidance for local soil and water conservation districts involved in working lands preservation. These materials, including example conservation easement documents and all support documents, should not be used in lieu of professional legal advice. The Community Conservation Committee recommends that all legal documents be reviewed by an attorney licensed to practice in the state of North Carolina.

Thousands of conservation easements have been written by hundreds of NGOs and government agencies over the past 25 years. No one ideal version of a conservation easement exists because each easement is written to protect the conservation values of a specific piece of property and to meet the needs of the current landowner. No model conservation easement is currently included in this notebook, which is discussed below. The Working Lands Conservation Easement Guidance Document (2010) was an output of the NCASWCD Community Conservation's Working Lands Subcommittee and is included on the Resource CD. The guidance document lays out specific language options for standard sections of working land easements as well as discussion on controversial topics. The guidance document is meant to service SWCD during easement drafting; however an attorney needs to be consulted as well. Easement examples are provided as appendices on the Resource CD, further easement examples can be found in WLRM Section 12 of the CD. If you need additional example easements contact appropriate staff at the Division of Soil and Water Conservation. **Warning, before any easement is used it must be reviewed by an attorney. Never use the same attorney for both the landowner and the easement holder.**

The Scope of the SWCD Working Land Manual - - - All Types of Easements

Many different kinds of easements exist and there is a big variety in the nomenclature that goes along with them. Some easement verbiage is included in the WLRM Section 10. This manual is focused on agricultural and farm related easements and land ownership. Easements held by SWCD will sometimes encompass a wide variety of land and environmental values including forestry. However, the SWCD Working Lands Manual was put together with the primary focus of providing information on working lands easements. Trying to cover all aspects of all types of easements is beyond the scope of this project. If you are interested in additional information on other types of easements and land protection there is a large variety of literature and web sites that are almost unlimited in scope. Some of these sources are detailed in Section 11 of this manual and even more can be found by doing an internet search, as well as contacting other partners who work on land protection initiatives.

Easement Drafting

Every piece of property is unique as is the case with every conservation easement that is tailored accordingly. The actual drafting of any easement should implement a unique project plan for protecting the conservation values of that specific piece of property. Easement restrictions should be clearly stated, in a manner that can be monitored and enforced to the extent necessary. The easement document is intended as a perpetually agreement that all future landowners and the easement holder will live with and be required to uphold.

Anatomy of a CREP Easement

The following section contains a series of power point slides that detail components of a CREP easement. While this document is geared towards the CREP program, it is a good teaching tool on components that can be included in easements. The information is provided by Jonathan Lanier, a CREP Attorney with DSWC.

This presentation is intended to give the anatomy of an easement, to give you a good idea of what an easement is and a tested guide for appropriate content.

This document is a CREP easement, designed to protect a riparian buffer.

By statute and by design the top of this page contains a large blank TOP margin and the side margins are narrow.

DEED OF CONSERVATION EASEMENT – this is the document title.

All courthouse documents must have a title, it is a requirement for them to be recorded.

The paragraph which follows this title is an introduction of the parties involved in the transaction and the dates of these actions.

Excise Tax \$ All transfer of property is tagged with a fee, currently the amount is a \$2.00 tax charged per \$1,000 of purchase price. This is a vehicle to re-coop cost.

DEED OF CONSERVATION EASEMENT

Tax ID/Parcel/PIN:

Excise Tax \$

NORTH CAROLINA
BEAUFORT COUNTY

Prepared by and
After Recording Return to:

N.C. Dept. of Environment & Natural Resources
Division of Soil & Water Conservation
943 Washington Square Mall
Washington, NC 27889

The term deed can scare a landowner, when they think they equate this with giving away their land. However, this document spells out this is a right on the property and not a fee simple selling.

THIS DEED OF CONSERVATION EASEMENT (“Conservation Easement”), effective as of the _____ day of _____, 2008 and given by LARRY A. LANDOWNER, and wife, LAURA A. LANDOWNER (“Grantor” or “Owner”), citizens and residents of Beaufort County, North Carolina, to the STATE OF NORTH CAROLINA (hereinafter “Grantee” or “State”) by and through the DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES (hereinafter “DENR”);

WITNESSETH:

Under the term Witnesseth: are recitals.

Recitals give historical and factual information; they are put in place to spell out facts for the reader, so that they can know the background behind this document.

The first recitals in this document spell out the legal authority of the state, in this instance the purchaser of the easement, or deed restriction. It shows the state is authorized to enter into this type of a transaction.

Now, Therefore, -

WITNESSETH:

WHEREAS, the State has established the Conservation Reserve Enhancement Program (“CREP”) pursuant to Chapter 113A, Article 16 of the North Carolina General Statutes, for the purposes of acquiring, maintaining, restoring and enhancing wetland and riparian resources that contribute to the protection and improvement of water quality, flood prevention, fisheries, wildlife habitat, and recreational opportunities; and

WHEREAS, the State is authorized by Chapter 121, Article 4 of the North Carolina General Statutes to acquire conservation easements; and

WHEREAS, Grantor owns in fee simple absolute certain real property lying and being in Chocowinity Township, Beaufort County, North Carolina (the “Property”), and more particularly described on the attached “Exhibit A” which is incorporated by reference as if fully set forth herein; and

WHEREAS, Grantor and Grantee have agreed to set aside 9.291 acres more or less of the Property (as described herein below and hereinafter referred to as the “Easement Area”), for the purpose, including but not limited to; creating a conservation easement to preserve, enhance, restore, and maintain the natural features and resources of the Easement Area, to provide habitat for native plants and animals, to improve and maintain water quality, and to control runoff of sediment (hereinafter the “Conservation Values”).

NOW, THEREFORE, in consideration of the mutual covenants, terms, conditions, and restrictions hereinafter set forth, Ten Dollars (\$10.00) and other good and valuable consideration provided pursuant to the terms of CREP, the receipt and sufficiency of which are hereby acknowledged, Grantor hereby unconditionally and irrevocably hereby grants and conveys unto Grantee, its successors and assigns, this Conservation Easement in the Easement Area, (exclusive of any area known to or later identified as containing hazardous substances or wastes) which is more particularly described on the attached “Exhibit B” incorporated by reference as if fully set forth herein.

this is the “get to the point paragraph.”

Prohibited Uses and Activities – these are things that the land owner agrees to NOT do.

Duration of Easement – here the life, or term of the easement is perpetual, some other can be time limited, or temporary, normally in terms of years, or decades.

This document states – “*enforceable by Grantee (easement holder) against Grantor*” (landowner)

THE FURTHER TERMS AND CONDITIONS OF THE CONSERVATION EASEMENT ARE AS FOLLOWS:

I. DURATION OF EASEMENT

This Conservation Easement shall remain in effect in perpetuity from the effective date. It is an easement in gross, runs with the land, and is enforceable by Grantee against Grantor, its personal representatives, heirs, successors, assigns, lessees, agents, and licensees.

II. PROHIBITED AND RESTRICTED USES AND ACTIVITIES

Any activity on, or use of, the Easement Area inconsistent with the purposes of this Conservation Easement is prohibited. The Easement Area shall be maintained in its natural and open condition and restricted from any development that would impair or interfere with the Conservation Values.

In addition to the foregoing, the following specific activities are prohibited, restricted, or reserved, as the case may be, within the Easement Area:

A. PROHIBITED USES AND ACTIVITIES

1. **Industrial Uses.** All industrial uses are prohibited.
2. **Residential Uses.** All residential uses are prohibited.
3. **Commercial Uses.** All commercial uses are prohibited.
4. **Agricultural Uses.** Agricultural uses are prohibited except for silvicultural practices as expressly allowed and described in Sections II.B.4. and II.B.5. herein-below.
5. **Dumping.** Dumping of soil, trash, ashes, garbage, waste, abandoned vehicles, appliance or machinery, or other material on the easement area is prohibited.
6. **Livestock.** There shall be no livestock grazing within the Easement Area, nor shall be allowed therein any confined animal facilities.

B. RESTRICTED USES AND ACTIVITIES

Restricted Uses and Activities – limit of use of the land that is agreed upon by the seller and the purchaser. These are activities that the landowner is permitted to do.

B. RESTRICTED USES AND ACTIVITIES

1. **New Construction.** There shall be no building, facility, mobile home, or other structure constructed o Owner, Grantee and/or DENR, and/or signs giving directions or prescribing rules and regulations for the use of the Easement Area and the Property.
2. **Signs.** No signs shall be permitted within the Easement Area except interpretative signs identifying the Conservation Values of the Easement Area, signs identifying CREP, the Owner, Grantee and/or DENR, and/or signs giving directions or prescribing rules and regulations for the use of the Easement Area and the Property.
3. **Grading, Mineral Use, Excavation, Dredging.** There shall be no grading, filling, excavating, dredging, mining, or drilling; no removal of topsoil, sand, gravel, rock, peat, minerals, or other materials; and no change in the topography of the land in any manner except as reasonably necessary for the purpose of alleviating erosion, dispersing sheet flow maintain water quality and wetland values or except as necessary for the cleanup or remediation of hazardous material or hazardous wastes on the Property.
4. **Burning, Cutting, Removal, Grazing or Destruction of Vegetation.** There shall be no burning, cutting, removal, grazing or destruction of trees, shrubs, grasses or other vegetation (collectively, "Vegetation") within the Easement Area except for: (1) practice establishment; (2) non-native, invasive or noxious Vegetation; (3) dead, insect-infested or diseased Vegetation; (4) trees impeding the flow of the Water Body; (5) removal necessary to protect rare and endangered species; (6) Vegetation for one crossing for vehicular access to the remainder of the Property; (7) burning in accordance with the established Conservation Plan and/or Forest Management Plan. Notwithstanding the previous sentence, the Grantors, beginning in year 16, may selectively harvest trees more than 50 feet from the watercourse according to an established forestry management plan.

Cutting, Haying, Mowing, Seed Harvesting, Grazing, Plowing and Tilling – keeping mind that this section and this easement applies to a riparian buffer, which can and likely will be different from a farm, or forestry easement. This being a CREP easement it is written to be environmental sensitive with a weighting towards water quality issues as a top priority of concern.

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5. **Cutting, Haying, Mowing, Seed Harvesting, Grazing, Plowing and Tilling.** There shall be no cutting, haying, mowing, seed harvesting, grazing, use of pesticides, plowing or tilling within the Easement Area except for: (1) practice establishment; (2) non-native or invasive grasses or noxious weeds; (3) dead (not dormant), insect-infested or diseased grasses; (4) removal to protect rare and endangered species; or (5) burning in accordance with the established Conservation Plan. Whenever mowing is allowed as set forth in this paragraph, it shall not take place between April 15 and September 15 of any year (or as may be otherwise determined by the State). Mowing for cosmetic purposes is not permitted under any circumstances. Any of the activities described in this section II.B.5. or in Section II.B.4. herein-above, must be conducted in strict compliance with the Conservation Plan (as defined herein-below), and in no event may vegetation be cut lower than 6 inches.

A strong promise relied upon as accurate.

III. GRANTORS' OBLIGATIONS AND WARRANTIES

A. **Establishment of Conservation Practices.** The Grantor shall establish and maintain riparian buffers, grass filter strips, wetlands, or hardwood tree plantings within the Easement Area and along the protected riparian resource in accordance with a written conservation plan (the "Conservation Plan"). If the Grantor chooses to establish a forested practice, the buffer must be consistent with a forest management plan developed for the Easement Area and approved by a forester registered by the North Carolina State Board of Registration for Foresters (the "Forest Management Plan"). The Forest Management Plan shall be prepared in conjunction with the State, the Natural Resource Conservation Service, and the local Soil and Water Conservation District. All practices established under CREP shall be maintained according to the Conservation Plan and the Forest Management Plan. A copy of the Conservation Plan shall be kept on file in the office of the local Soil and Water Conservation District.

B. **Establishment of Forest Management Plan.** Forest management practices shall be consistent

Warranty as to Environmental Conditions – the state is having the landowner warrant no knowledge of environmental hazards currently on the property. This action minimizes the state’s risk of assuming clean-up costs. In other words the state is buying an interest in the land and the intent is to not get a “pig in a poke.” as the old saying goes.

B. Establishment of Forest Management Plan. Forest management practices shall be consistent with the intent of this Easement and the water quality and wildlife habitat purposes of CREP and shall maintain the effectiveness of the CREP enrollment. Forest management practices shall be in accordance with the Forest Management Plan. Protection of water quality shall be the primary goal of the Forest Management Plan. All Forest Management Plans shall provide for diverse wildlife habitat to the maximum extent practicable, including but not limited to early successional habitat for activities. Singletree or group selection methods should be used as harvesting methods. After canopy closure, thinning shall be allowed to an average of 25 square feet basal area below the basal area recommended in the thinning guide published by the USDA Forest Service. As a general rule, enough trees should be removed to allow direct sunlight to fall on 50 percent of the forest floor at noon on a bright day. Subsequent thinning should be considered in order to maintain the tree stand in a productive early successional wildlife habitat condition. Forest Management Plans will be used during the term of this Easement to regenerate the next stand of trees by enhancing the natural regeneration processes, including ecological succession, while maintaining water quality benefits. Forest management may be used to remedy adverse stand conditions created by natural or human-induced catastrophes. Forestry activities, including harvesting, must be carried out according to all existing Federal, State and local laws, rules, regulations and guidelines, and should be limited to a time of the year when the water table is low enough that rutting and compaction will not occur to such extent that normal hydrology is interrupted or soil structure changed. A copy of the Forest Management Plan shall be kept on file in the office of the local Soil and Water Conservation District.

C. Warranty as to Environmental Conditions. The Grantor warrants that it has no actual knowledge of the existence of any hazardous substances or wastes or the release or threatened release of any hazardous substances or wastes on the Easement Area, and that no notice of a violation of any state, federal or local environmental law, ordinance, statute, treaty, decree, rule or regulation has been issued or is pending with respect to the Easement Area.

D. Indemnity. The Grantor agrees to the fullest extent permitted by law to defend, protect, indemnify and hold harmless the District from and against any and all claims, actions, liabilities, damages, fines, penalties, costs and expenses suffered as a direct or indirect result of any violation of this Conservation Easement or of any federal, state or local statute, rule, regulation or ordinance affecting the Property, the Easement Area, or this Conservation Easement.

IV. RIGHT OF ENTRY

Indemnity – to address violations of the easement.

Right of Entry – this paragraph gives the easement holder permission to enter the property for the purpose of inspection to guarantee the intent of the easement. (This clause is like a key to the lock for entry.) However, communications with the landowner is still important to keep them informed of your actions and to keep all on cooperative basis. **This paragraph does NOT grant permission to the general public to go onto the property.**

IV. RIGHT OF ENTRY

The Grantee or the Grantee's designated representatives shall have the right of ingress, egress and regress to and across the Property, Easement Area, and existing paths and farm roads, including but not limited to the lands, paths and farm roads of other property owners, required to gain access from a public road at all reasonable times for the purpose of inspecting said Easement Area to determine if Grantor is complying with the terms, conditions, restrictions, and purposes of this Conservation Easement. It shall be the responsibility of

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the Grantor to provide and ensure the above-referenced right of entry across the Property, the lands of other owners and existing paths and farm roads situated thereon, if necessary, to satisfy the terms of this Deed.

V. ENFORCEMENT AND REMEDIES

A. Enforcing Authority. Grantee or its agents, representatives or designees, shall have the right to enforce all of the terms of this Conservation Easement. In addition, this Conservation Easement may only be amended by a written document that is executed by the Grantor and the Grantee and recorded among the land records of the appropriate jurisdiction.

B. Methods of Enforcement. In the event a violation of these terms, conditions, or restrictions is found to exist, the Grantee may institute a suit to enjoin by ex parte temporary or permanent injunction such violation and to require the restoration of the Easement Area to its prior condition. Additionally, the parties hereto may agree to binding mediation before the Soil and Water Conservation Commission of any dispute regarding an alleged violation of this Conservation Easement.

C. Failure to Enforce. No failure on the part of Grantee to enforce any covenant provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right of Grantee or the State of North Carolina to enforce the same in the event of a subsequent breach or default.

VI. MISCELLANEOUS PROVISIONS

Methods of Enforcement – this paragraph gives the easement holder in this case the state, authority to get an injunction to activities of the land owner, as a tool to enforce against violation of the easement.

VI. MISCELLANEOUS PROVISIONS

A. **Entire Agreement.** This instrument sets forth the entire agreement between the parties with respect to the Conservation Easement. All prior discussions, negotiations, understandings or agreements relating to the Conservation Easement are hereby merged into this Conservation Easement.

B. **Severability.** If any provision of this Conservation Easement is found to be invalid, the remainder of the provisions of the Conservation Easement, and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

C. **Gender.** The designations Grantor, Grantee, Owner, District and State as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine, or neuter gender as required by context.

D. **Headings.** The headings of the various sections of this Conservation Easement have been inserted for convenience only and shall in no way modify, define, limit or expand the express provisions of this Conservation Easement.

E. **Notices.** Any notices shall be sent by registered or certified mail, return receipt requested, to the parties at their addresses shown below:

If to Grantee:

NCDENR

Attn: DSWC (CREP)

1614 Mail Service Center

Raleigh, NC 27699-1614

If to Owner:

F. **Transfer of the Property.** Grantor shall notify DENR in writing of the name and street address

Liability

Statement of Disclaimer: The following information was not written by a lawyer; information in this section was collected from a variety of sources and should not be considered legal advice. You should always seek consultation of a licensed attorney for all legal matters. An easement can be written with statements that minimize liability potential. It is not possible to include language in every easement document that will eliminate all possibilities of liability.

According to common law a person is said to be liable when they are financially and legally responsible for causing harm. Legal liability concerns both civil law and criminal law. Public liability is part of the tort law focusing on civil wrongs. An applicant (the injured party) usually sues the respondent (the owner or occupier) under common law based on negligence and/or damages. Claims are usually successful when it can be shown that the owner/occupier was responsible for an injury, therefore they breached their duty of care. Listed below are some liability points to consider.

Mechanisms for Decreasing Liability

- **North Carolina Law** – General Statute 139 state that a SWCD and individual Supervisors can sue and be sued. The statute further states the NC Attorney General’s Office may provide legal assistance but does not list what the legal assistance will entail. As public officials, district supervisors fall under limits established by North Carolina Tort Law. In these instances the total amount of any court judgment is limited against any public official who is carrying out their official duties in a careful and prudent manner. The same degree of protection does not extend to county and district employees.
- **Overall Legal Protection** - The County that you reside in and the state of North Carolina are in a position to provide some level of legal protection to your SWCD. Most SWCD employees are covered by a county policy whereas SWCD supervisor may be given legal representation by the North Carolina Attorney General’s Office.
- **Legal Expertise during Easement Drafting** - The easement holder has to work with a lawyer on approving all easement documents; this action affords some level of protection from liability. It is illegal to do business without a lawyer signing off on items. SWCD should never use the same lawyer as the landowner. Never use the same attorney for land owner and for the easement holder.
- **Liability Associated with the Property** - Most liability potential lies with landowner action and those of individuals who access the property. Activities that can expose a landowner to liability include; hunting, pick your own vegetable operations and agritourism.

- **Liability Insurance** – Purchasing liability insurance by the SWCD, by the county and by any individual can be interpreted in a court of law that an organization planned ahead of time to avoid damaging actions. However, staff at the Institute of Government has stated in the past that a court of law can interpret the presence of insurance as an indicator that the policy holder expected problems to occur. That expectation can equate to the burden of responsibility being with the insured person.
- **Boiler Plate Language** – Common clauses can be included in every easement that the SWCD chooses to accept. The language may keep most of the burden for potential liability with the landowner. Specifically a section on taxes and liens as well as a hold harmless clause is strongly advised.
 - **Taxes and Liens** - The grantor shall pay and discharge when due all property taxes and assessments imposed upon the Protected Property and any uses thereof and shall avoid any liens. The holder may at its discretion, pay any outstanding taxes or assessments and shall then be entitled to reimbursements by Grantor.
 - **Hold Harmless** - Grantor acknowledges that the Holder has neither possessory rights in the Protected Property, nor any responsibility or right to control, maintain or keep up the Protected Property. The Grantor shall retain all responsibilities and shall bear all costs and liabilities of any nature related to the ownership, operation, upkeep, improvement and maintenance of the Protected Property. Grantor shall indemnify, defend and hold Holder harmless from and against any and all liabilities, costs, damages, or expenses of any kind that Holder may suffer or incur as a result of or arising out of the activities of Grantor or any other person on the protected property, other than those caused by the negligent act or acts of misconduct of Holder and except those arising out of Holder's workers compensation obligations.
- **Title Insurance** – Title insurance or indemnity insurance can be an inexpensive form of protection against actions relating to who actually owns a piece of property. Guarding against future claims to ownership of a property and defining who has responsibility for the property can be clarified with title insurance.
- **Monitoring** - An easement calls for the SWCD to monitor the property on a regular basis. If the SWCD carries out the monitoring responsibility in a consistent manner and documents their findings, they are shielding themselves from blame for negative activities that occur on the property.
- **Proper Training** – SWCD staff and board members being well trained in easement monitoring and stewardship will decrease the chance of liable action being taken on behalf of the SWCD. The SWCD should consider establishing a training plan for employees and supervisors.

Site Assessment for Environmental Hazards

CERCLA Activities

The Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 states that anyone in the chain of title to a contaminated site is potentially responsible for the clean-up, regardless of fault. In 2001 standards of the law were updated. Prior to taking on an easement, a thorough inspection of the property and all adjacent properties is essential, as well as researching the past uses of the property. If contamination is suspected the SWCD would be well advised to have a professional evaluate the site and to issue a report of the existing conditions in a Phase I Environmental Site Assessment. Federal case favors easement holders as not be considered "owners" for the purposes of CERCLA liability. However, the easement holder should never become involved in clean-up of the property, including handling and disposal of the contamination. All such activities should be avoided to be considered removed from liability for the contamination.

What is a Phase 1 Environmental Site Assessment?

An Environmental Site Assessment (ESA) report adheres to ASTM Standard E-1527-05, which adheres to the All Appropriate Inquiries Rule that went into effect in November of 2005. The ESA includes a site inspection; interviews with owners, occupants, environmental agencies and neighboring properties; review of environmental databases; analysis of local geologic conditions; and review of historical records for the subject property. The purpose of the ESA is to determine if there are any known or potential significant environmental liabilities at the property. These liabilities can occur as regulatory-mandated cleanup, toxic-tort liability (civil), regulated waste, human health exposure, land-use limitations, and potential civil liability for devaluing nearby properties. The ESA should adhere to the ASTM standard in order to provide for Landowner Liability Protection and FDIC-member banks require it prior to any land transactions.

Why do I need a Phase 1 Environmental Assessment?

The main reason for ordering the ESA is to protect the SWCD from some unknown liability that may be associated with soil or groundwater contamination; which is also why lenders require an ESA. Lenders want to know the "true value" of the property before underwriting the loan. Lenders also want to make sure there is not a liability that could occur from offsite migration of contamination from an adjacent property to the property in question. An ESA includes an inspection of the property, historical use research, analysis of local groundwater conditions and review of nearby known environmental liabilities that may be impacting the value of the property, potential cleanup costs or civil or tort liability, due to offsite migration of contamination. If a potential for contamination is noted in an ESA, depending on the severity, a Phase 2 Environmental Assessment may be warranted to collect soil and/or groundwater samples to determine if significant amounts and concentrations of contaminants exist at the property.

What is a Phase 2 Environmental Site Assessment?

When a Phase 1 ESA report finds a "Recognized Environmental Condition," a Phase Two Environmental Site Assessment is typically recommended, in order to screen the soil and/or groundwater for potential significant environmental liabilities, whether they may be regulatory-mandated cleanups or toxic tort liabilities. The assessment can consist of using a drill rig or hand auger to collect shallow soil and groundwater samples to determine if previous storage and use

of chemicals at a property has released regulated substances into the ground that may be affecting the value of the property.

Additional information can be found at the following websites:

- EPA Web Site: <http://www.epa.gov/brownfields/aai/index.htm>
- EPA Fact Sheet on All Appropriate Inquires:
http://www.epa.gov/brownfields/aai/AAI_Reporting_FactSheet.pdf

Title Insurance

This is coverage that should be in place for all easement properties, both donated and purchased. It is good practice to only put an easement in place on property with clear title, which can only be assured through title insurance. Title insurance is a relatively inexpensive and unique form of insurance that provides coverage for future claims, or future losses due to title defects which are created by some past event prior to the acquisition of the property. These risks are not always obvious, but they can be devastating and result in an easement being dissolved. When purchasing property, or an interest in it such as an easement, it is important to make certain a clear title is in place. In order to do so you must first be informed of any existing rights, or claims that can threaten the title and right to possession at a future date. Title insurance provides protection against these concerns.

Real estate is a form of wealth that is protected by many laws. The owner, owner's family and heirs can have rights or claims in and to the property. Those who may have an interest in or lien upon the property can be the government, especially the IRS, contractors, lenders, or other individuals and corporations. Real estate can be sold to a purchaser without their knowledge of someone other than the noted owner having a right or claim to the property. In this event, these rights and claims remain attached to the title of the property until they are extinguished.

Title insurance means that a lawyer has taken on the obligation to do a diligent search of public records for documents associated with the property. This search is made to determine if there are any rights or claims that may have an impact upon title to the property. The title search may reveal the existence of recorded defects, liens, or encumbrances upon the title including judgments, unpaid taxes and unsatisfied mortgages against the current or past owners, easements, restrictions and court actions. Once identified these matters can be accepted, resolved, or extinguished prior to closing the transaction. In addition, protection is provided against liens, encumbrances and recorded defects upon the title that are unreported and not found.

Title insurance provides protection against hidden risks such as rights and claims that are not shown in public records and therefore not discoverable by a search and examination of public records. These matters can include forgery, incompetency or incapacity of the parties, fraudulent impersonation and unknown errors in the records. Title insurance provides coverage and peace of mind against these types of claims. More importantly title insurance eliminates for the landowner and easement holder future costs associated with defense of title. Title insurance means the company that provided coverage is responsible for defending the title at no future cost to you, in a court of law even if it proves valid. If a claim is not resolvable in the owner's favor, then the policy provides for reimbursement as detailed in the contract. Unlike other forms of insurance, the

original premium is the only cost incurred as long as the same owner at the time of the policy purchase, or their heirs has possession of the property when any challenge to clear title is posed.

Necessity of Appraisal

An independent appraisal by a qualified appraiser is most credible evidence for documenting the fair market value for land. An appraisal can stand up to legal scrutiny that will save embarrassment, time and money the first time that questions are raised by a tax agency, or a court of law. Getting a good independent appraisal is a sound way of doing business, whether an easement is donated, or purchased and regardless of funding source requirements. In addition, the appraisal for each property and easement accepted provides a quantitative measure of the success of the SWCD land protection program. An appraisal as a requirement of accepting every easement should be a part of every SWCD land protection strategy and guidelines. Please refer to WLRM Section 2 for additional information on appraisals and qualified appraisers.

Getting an appraisal is the donor's responsibility if they plan to apply for tax credits, the SWCD operating in the ethical and credible manner should inform the landowner in writing of this requirement. The SWCD can take the process a step further by providing the landowner with a list of appraisers who are experienced in working with conservation easements. The SWCD should always request a copy of the landowner's appraisal to verify that it has been done and to make certain it appears to meet IRS and funding source requirements, but should never suggest an appraised amount that will be acceptable to the IRS. The agency accepting a donated easement will be asked by the landowner to sign IRS forms 8282 and 8283. The Appraisal Summary Form 8283 should have the "Information on Donated Property" and "Declaration of Appraiser" sections completed prior to a SWCD signing and confirming acceptance of the donated gift. The Resale of Donated Property Form 8282 is a required to be filed by the SWCD if donated property is sold within two years of it being donated.

Other Considerations

- **Purpose** - Significant thought should go into exactly what the purpose of the easement is and to make certain this purpose is clearly stated. Often the grantor of the property will want the purpose of the easement to be drafted narrowly in order to maximize their enjoyment of the property. On the other hand, the easement grantee will often want the easement's purpose to be drafted broadly, in order to give the easement maximum flexibility. The end product will be a compromise of the desires of the grantor and grantee; the purpose has to work to accomplish the goals of each party.

- **Reserved Rights** - The grantor of the easement may want to reserve the right to use the easement area for a particular purpose. If that is the case, then that reserved use needs to be clearly stated in the easement document. A reserved use may affect the property value, but by being stated it is clearly an allowed activity by the landowner. The reserved use could include such things as being able to build additional housing, to allow lease hunting, etc. While it is clear who the grantor and the grantee is when the easement is finalized, the entities are subject to change over time, especially the grantor. New parties to the agreement will only be able to follow the verbiage in the agreement, not what someone thought was an okay activity at the time of the easement signing.

- **Lender/Lienholder Subordination** - A mortgage, lien, or deed of trust represents ownership in a piece of property. The grantor will have to clear the intent to secure an easement with all lender interests. Otherwise, granting of an easement by a property owner without the lender's permission will constitute an event of default and the easement may be overturned if there is a foreclosure or judicial sale. Such an action would leave the grantor with no easement and subject to repay any cash or tax benefit secured via the easement transaction.

What do you do if there is an accident or a possibility of lawsuit?

- Make notes of what happened. Save all documentation and evidence.
- If you are an employee notify your supervisor.
- Notify the county manager, county attorney and the NC Attorney General representative to the Soil and Water Conservation Commission.
- Notify your DSWC area coordinator.
- Notify your insurance provider.
- These notifications need to take place ASAP and within 24 hours.

Resources on CD Only

- Working Lands Conservation Easement Guidance Document. A Resource for Information on and Examples of Working Lands Conservation Easements. North Carolina Association of Soil and Water Conservation Districts Community Conservation Committee's Working Lands subcommittee. 2010.
- Deed of Agricultural Conservation Easement Whitmire Farm. Carolina Mountain Land Conservancy. 2009.
- Deed of Agricultural Conservation Easement Tinsley Property. Clean Water Management Trust Fund and The Land Trust for the Little Tennessee. 2008.
- Deed of Agricultural Easement Ayrshire Farm. William Anderson for Triangle Land Conservancy. 2010.
- Whitehurst Forest Legacy Conservation Easement. Camilla Herlevich for North Carolina Coastal Land Trust. 2008.
- Sample Conservation Easement. Kalen Kingsbury for Piedmont Land Conservancy. 2010.