

WLRM Section 2 - General Easement Information for Landowners

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.

Section 2 provides some general information regarding easements that Soil and Water Conservation Districts (SWCD) can use to educate a landowner who is interested in placing a working lands conservation easement on their property. The information is applicable whether your SWCD is holding the easement or only trying to provide basic knowledge to the landowner. For the purposes of this section the discussion will be limited to perpetual easements, although term easements exist and can be a valuable tool in working lands preservation. For information on a SWCD holding an easement, please refer to Section 6.

Conservation easements are being utilized in all fifty states to protect millions of acres from development, and will likely continue to be one of the tools of choice for allowing sustainable growth. States such as North Carolina that are experiencing a rapid increase in population also contain citizenry which want the government and agencies to protect open space in the form of parks, farms and forest lands. Higher fuel costs and an increased demand for locally grown food will only increase the public support for a local farming network. In recent years the federal government has given additional tax benefits to permanently protected lands. Funding for the purchase of lands and easements continues to be increased with the exception of the recent economic downturn. SWCD have a role to play by staying educated on the issue or even holding easements, offering more conservation tools to their local landowners.

What is an Easement?

An easement is a legal document restricting agreed upon property rights between a landowner (grantor) and a qualified conservation organization or public agency (grantee) to protect the conservation values of the property. The easement is considered a deed restriction that runs with the land title, thereby informing current and future owners that activities on the property must fall within specific guidelines as defined in the easement. The grantor agrees to maintain the property by following certain stipulations and the grantee agrees to monitor the property and enforce the binding requirements within the easement. Qualified grantees for federal and state tax incentive purposes include, but are not limited to, a SWCD or a land trust. Most SWCD acting as a grantee will limit their easement programs to working land easements allowing the grantor to utilize the property for agricultural and forestry purposes, including preservation of wildlife habitat as desired. Some exceptions include highly urbanized SWCD wishing to play a role in wildlife preservation or passive recreation management easements often referred to as

Open Space easements. During the process of easement development, both the grantor and grantee need to seek separate legal and financial counsel.

A conservation easement contains standard sections as further described in WLMR Section 7, below is some information on what those sections may include. One way to visualize restricted property uses as defined in an easement is to think of all the landowner rights associated with a property as a bundle of sticks. Each stick represents a right such as commercial or industrial development, subdivision of the property, hunting, mineral excavation, water usage, logging, construction of roadways and houses, etc. Placing an easement on a piece of property removes one or more of the sticks, while the remaining sticks in the bundle remain with the landowner. For instance a conservation easement might remove the sticks that allow construction of new buildings, roads, mining and landfills. A working lands easement should also require development and maintenance of an agricultural or forestry management plan for properly taking care of and protecting the natural resources. It is recommended to leave out any areas designated for any future home site placement. Having an easement placed on a property does not mean that the general public has the right to go onto the land, but it will result in annual monitoring visits by a representative grantee. Since easements are legally binding documents, amendments or revocation are difficult and is usually handled by the court systems. Prior to closing on an easement, lengthy discussions between the landowner and the easement holder should take place to ensure that the document meets the needs of both groups.

The Forest Education and Conservation Foundation, established by the North Carolina Forestry Association, has developed resource material regarding working forest conservation easements. Project outputs include a landowner reference manual for working forest protection and an outreach DVD. For further information contact the North Carolina Forestry Association or visit <http://www.ncforestry.org/WEBPAGES/PUBS%20AND%20VIDEOS/WORKING%20FOREST%20EASEMENT%20WEB.pdf>.

History of Easements

The first easements were written to protect adjacent property owners in the late 1800s in the Boston area. During the Depression easements were used by the federal government to establish the Blue Ridge Parkway. In the 1980s public agencies and nonprofit organizations started using easements to protect conservation lands. Every state except for Wyoming has adopted legislation governing the use of easements. A little more than half of the current state easement laws came as a result of the 1981 Uniform Conservation Easement Act developed by the National Conference of Commissioners.

In 1976 the federal government adopted the Tax Reform Act, which was the first act to recognize a conservation easement as a tax deductible charitable gift. North Carolina was the first state to enable state conservation tax credit legislation similar to the Tax Reform Act. One of the great benefits for the grantor is that in exchange for a permanent easement, state and federal income taxes are lowered. An easement donation that meets specific criteria and follows federal as well as state guidelines can qualify for tax credits and deductions at the federal and state level. Other easements are exchanged for funding, or simply donated to protect the land for future generations.

Types of Easements

Easements as defined by the Internal Revenue Service

For a conservation easement to qualify as a charitable contribution for federal tax purposes, it must be a permanent easement, have a qualified easement holder (nonprofit organization or public agency) and meet one of the six conservation purposes;

- Protection of relatively natural habitats of fish, wildlife, or plants
- Preservation of open space including working lands
- Preservation of land for public outdoor recreation or education
- Preservation of historically important land or buildings
- Scenic enjoyment of the general public
- Land that will yield a significant public benefit as defined by Federal, State, or local government conservation policies

A baseline documentation report also referred to as a natural resource inventory will determine if the property meets criteria for habitat protection or open space preservation. Refer to WLRM Sections 6 and 8 for more information on baseline reports.

Donated verses Monetary Compensation

A grantor has many options for how they receive compensation for a conservation easement on their property. Some options include;

- Sale of full value of the development potential as determined by an appraiser
- Bargain sale for less than the full development value
- Donation for state and federal tax benefits
- Combination of bargain sale and partial donation
- Tax deduction with no financial compensation
- Resale of Land
- Donation with lifetime income

A grantor can only apply for tax incentives on the donated portion of an easement. It is up to the grantor and grantee to find the best solution for all parties involved. It is the responsibility of the grantor to use an independent appraiser to determine the value of the conservation easement. The grantee can help secure funds to pay for an appraisal, but should not be involved beyond that. Please refer to Section 4 for a listing of potential funding agencies for easements.

Other Tools

Required Documents

For federal tax purposes and to ensure a strong conservation easement is in place, the following documents are required;

- Conservation Easement Document
- Baseline Documentation Report
- Appraisal
- Title work
- Survey and legal description
- Federal Tax Form 8283
- Acceptance of donation letter from grantee

Tax Incentives

A landowner should seek the counsel of a financial planner; the information provided below is only a brief overview of tax incentives offered at the state and federal level. To obtain a charitable donation reduction, it is the responsibility of the donor to obtain a written acknowledgement of the donation from the donee. The written statement, at a minimum, must include the following information;

- Name of organization
- Amount of cash contribution
- Description (but not the value) of non-cash contributions
- Statement that no goods or services were provided in return for the contribution
- Description of the value of goods or services, if any, that organization provided in return for contribution

Other legal considerations should be evaluated for how the issues may affect tax deductibility such as state laws, charitable gift laws, gifts of appreciated value, subordination of current mortgages on the property, and completion of the baseline documentation report.

Federal Tax Code Information

The Federal Government allows for an income tax deduction for the full fair market value of an easement donated to a qualifying holder (IRS Code 170 (h)). A “qualified conservation contribution” is defined in the Internal Revenue Service Code (IRS) as a contribution of a qualified real property interest to a qualified organization exclusively for conservation purposes. If you want to make sure your project qualifies for deductions, you can request a private letter ruling and the IRS will make a determination on if the project meets qualifications. Keep in mind the private letter ruling will not inform you of the amount of tax deductions you may receive, only that your project qualifies. Additional guidelines are listed for “certified historic structures”, although many farmsteads will contain a structure that may qualify, it is beyond the resources of this manual to further define such preservation guidelines. The IRS further prohibits any surface mining reserved rights with some special provisions for exceptions.

The tax deductions are based on the fair market value of the property before and after the placement of the conservation easement. In most cases, by placing restrictions to development for example, the fair market value of your property will decrease and that net loss is what qualifies for a tax deduction. To prove a net loss, the services of an appraiser are required and will be determined by the comparable sales method or the before and after method. A qualified appraiser is defined as;

- Person has appraisal designation from a professional organization for demonstrated competency in valuing your type of property or the person has met minimum education and experience requirements
- The person regularly prepares appraisals for payment
- The person demonstrates verifiable education and experience in valuing your type of property and includes a declaration as part of the appraisal
- The person is not prohibited from practices under IRS Code Title 31 section 330(c)

The Land Trust Alliance recommends using an appraiser that is state licensed and who follows the Uniform Standards of Professional Appraisal Practice. However, choice of the appraiser

when working with a donated easement is the right of the landowner. The timing of the appraisal related to when closing occurring on the conservation easement is very important. For tax deduction purposes, the appraisal cannot not be dated earlier than sixty days before the gift is made, but it can be completed after the gift is made.

The IRS caps the amount that can be claimed in a year based on the donator's adjusted growth income (AGI), usually 30% of the AGI. Unused portions of the donation can be deducted for the next five years. Until December 31, 2011 landowners can deduct the value of an easement up to 50% of their AGI. Qualified farmers can deduct up to 100% of their AGI. The unused portions of deductions could be carried forward for up to 15 years. Efforts are underway to extend this legislation but as of July 2011 the extension has not been enacted, a good update source is Land Trust Alliance at <http://www.landtrustalliance.org/policy>.

State Tax Code Information

The North Carolina Conservation Tax Credit Program was the first such program in the nation, and was established by GS 113A-231, 150-130.34, and 151.12 to allow for a landowner to receive a tax credit on their state income tax for donating a conservation easement or a fee simple deed to a qualified recipient. The state defines a qualified grantee as state or local government as well as a non-profit organization incorporated to receive and administer land for conservation purposes. Applications are reviewed to determine if the donation provides one or more of the public benefits listed below and if the conservation easement adequately protects said public benefits. Donations must serve a public benefit under the following categories;

- Public beach access or use
- Public access to public waters or trails
- Fish and wildlife conservation
- Forestland or farmland conservation
- Watershed protection
- Conservation of natural areas as defined in GS113A-164.3(3) – ““Natural area" means an area of land, water, or both land and water, whether publicly or privately owned, that (i) retains or has reestablished its natural character, (ii) provides habitat for rare or endangered species of plants or animals, (iii) or has biotic, geological, scenic, or paleontological features of scientific or educational value.”
- Conservation of natural or scenic river areas as defined in GS113A-34 – “The following types of rivers are eligible for inclusion in the North Carolina natural and scenic rivers system:
 - Class I. Natural river areas. Those free-flowing rivers or segments of rivers and adjacent lands existing in a natural condition. Those rivers or segments of rivers that are free of man-made impoundments and generally inaccessible except by trail, with the lands within the boundaries essentially primitive and the waters essentially unpolluted. These represent vestiges of primitive America.
 - Class II. Scenic river areas. Those rivers or segments of rivers that are largely free of impoundments, with the lands within the boundaries largely primitive and largely undeveloped, but accessible in places by roads.
 - Class III. Recreational river areas. Those rivers or segments of rivers that offer outstanding recreation and scenic values and that are largely free of impoundments. They may have some development along their shorelines and have more extensive public

access than natural or scenic river segments. Recreational river segments may also link two or more natural and/or scenic river segments to provide a contiguous designated river area. No provision of this section shall interfere with flood control measures; provided that recreational river users can continue to travel the river. (1971, c. 1167, s. 2; 1989, c. 752, s. 156(a).)”

- Conservation of predominantly natural parkland
- Historic landscape conservation

The tax credit is equal to 25% of the fair market value of the easement with the following qualifiers;

- Up to \$250,000 for individuals
- Up to \$500,000 for corporations, pass-through entities, or married couples filing jointly
- It can be carried forward for up to five years
- Tax credit is non-transferable
- Land dedicated under local government regulations or ordinances, or dedications made to increase building density levels are not eligible
- Qualifying for federal deductions or receiving funds from grants does not automatically qualify a donor

Please refer to <http://www.onencnaturally.org/pages/ConservationTaxCredit.html> for additional information and downloadable applications. Each contribution is reviewed by specific divisions within the Department of Environment and Natural Resources, dependent upon the primary purpose of the conservation easement. Please refer to the website for updated Reviewers Guidelines.

How to Get Started

This list is a general guide and is not intended to replace the advice of an attorney, or other tax professional. You should always consult with a tax professional when working with easements, land donations and tax guidelines.

- Talk to a representative with the NC Tax Credit Program, secure an application and ask about current program guidelines. You can request a pre-review to see if your conservation easement will meet the minimum requirements.
- Consult with your own attorney and accountant.
- Decide what you want to maintain on the property (future vision), split property, leave option for future change/development, etc.
- Documents that will be needed in the course of completing the easement and applying for a federal tax deduction and a state tax credit.
 - Conservation Easement/Agreement Document. An attorney should either develop and/or review your final easement document.
 - Baseline Document – an inventory of conservation values on the property prepared by an environmental professional.
 - Appraisal (attorney)
 - Title Work (attorney)
 - Survey & Description (surveyor)
 - IRS Form 8283 for donation of > \$5,000.00 worth of donated value.
- Apply for NC DENR tax credit certification.

Estate Planning

Most conservation easements are permanent in nature; it is recommended that future generations who will have an economic interest in the property be consulted prior to easement closing. One process to consider is estate planning, where the landowner develops a plan for future management and disposition of the property. It is beyond the scope of this resource manual to provide more details as well as being beyond the ability of a SWCD to provide advice in the arena of estate planning. One nonprofit organization that a landowner can be directed to is the North Carolina Farm Transition Network, whose mission statement is "... to ensure that working farms remain in agricultural production by assisting retiring and aspiring farmers in the effective transition of farm businesses." The organization is in a period of flux right now and has no staff to offer direct assistance, but they have a web presence on Facebook.

According to the American Farmland Trust an estate plan should accomplish four main goals:

- Transfer ownership and management of the agricultural operation, land and other assets
- Avoid unnecessary transfer taxes (income, gift and estate)
- Ensure financial security and peace of mind for all generations
- Develop the next generation's management capacity

They further recommend the plan be flexible and updated regularly as laws change.

Current legislation allows for the exclusion of up to \$5 million for an estate and unused portions of the spouse's estate exemption are portable for the surviving spouse. It is critical that an estate tax form be submitted to document the excess so it can be utilized by the surviving spouse at a later date. A point brought up at the 2011 Department of Agriculture and Consumer Services' (NCDACS) Voluntary Agriculture District workshops was for a landowner to consider giving an executor of a will the authority to place an easement on the property, but not necessarily require it. By conducting proper estate planning, a landowner can protect their property's natural resources without greatly restricting agricultural operation choices.

Farm Management Plan

A farm management plan will incorporate a business plan as well as including sound conservation measures to protect the natural resources of the property. A business plan will allow the landowner to consider a range of strategies to increase profits; whereas protecting the property's natural resources ensures that farming can continue for generations to come. SWCD as well as the USDA Natural Resource Conservation Service can provide technical assistance for planning and development of the agricultural conservation practices. The NCDACS Division of Forest Resources offers technical assistance for planning and development of sound forestry management practices. Other commercial organizations can also offer similar services for agricultural and forestry operations. The NCDACS Marketing Division is a great resource for programs such as Got To Be NC Agriculture or Goodness Grows in North Carolina. Please refer to <http://www.ncagr.gov/markets/> for more information on existing statewide programs.

Related NC Property Conservation Laws - <http://www.ncga.state.nc.us/>

GS 38A-1	Landowner Liability
GS 105-151.12	Conservation Tax Credits for Individuals
GS105-130.34	Conservation Tax Credits for Corporations
GS105-287(a)	Real Property Reappraisal for Ad Valorem Tax Purposes
GS105-317(a)	Real Property Appraisal for Ad Valorem Tax Purposes
GS113A-230	Conservation Easement Program
GS113A-164.1	Nature Preserves Act
GS121-341	Uniform Conservation and Historic Preservation Agreements
GS143-214.8	Wetland Restoration Program
GS105-277.15	Wildlife Conservation Land Present Use Value

Questions Landowners Should Evaluate Prior to Easement Drafting

- Do I want to sell my land or keep it? How long of a time frame do these plans cover?
- Do I have heirs who will inherit or purchase my land?
- What are the plans and needs of my heirs?
- Do I trust my heirs to manage and take care of this land?
- Do we want to farm the land or develop it?
- Do I have a plan in writing for my farm, forest and land?
- Do I need extra income now?
- Do I know what an easement is?
- Have I talked to anyone who has an easement?
- What are the tax implications of making an easement or land donation?
- Have I talked to an attorney or accountant?
- What are the legal steps that I can take for a tax break?
- What is my land worth, with and without an easement?
- Should I donate or sell my development rights?
- What is right for me temporary, permanent, or no easements?

Common Questions and Answers for Landowners

Landowners who get interested in protecting their land always start out with a lot of questions. Below is a list of commonly heard questions and answers that your SWCD can use in giving responses to landowner inquiries.

Why should I grant a conservation easement to a SWCD?

A landowner will execute a conservation easement because of their love for the land and interest in protecting it from future development, while keeping it privately owned. Granting an easement to a SWCD qualifies under the Internal Revenue Code as contributing to a "public charity." This action can yield income tax savings at both the state and federal level. SWCDs have expertise to work with landowners and ensure that the land will remain protected as deemed in the easement.

Are conservation easements a popular form of land protection?

Since the year 2000 the amount of land in the U.S. protected with permanent easements increased by millions of acres. Many landowners have learned that a conservation easement is a flexible tool that provides a permanent guarantee that the land will never be developed. Conservation easements are used to protect all kinds of land, including; coastlines, farm and ranchland, historical or cultural landscapes, scenic views, streams, rivers, trails, wetlands, wildlife areas, and working forests.

Can a conservation easement be tailored to my needs and desires?

An easement is written to limit future development to the degree that it is necessary to protect the significant conservation values of that particular property. An easement can either prohibit or limit the amount of activity that can occur. The greater the land disturbing limitations put in place the greater the value of the easement. Any landowner and SWCD can work together in writing a conservation easement that reflects both the landowner's desires and the need to protect conservation values. Even the most restrictive easements typically permit landowners to continue such traditional uses of the land as farming, hunting and general recreational enjoyment of the property. Keep in mind that each easement is custom designed and written for a specific piece of property. Both the landowner and the proposed easement holder should employ the services of separate licensed attorneys before any easement is finalized.

What steps do I take in writing a conservation easement?

The first step is to contact your local SWCD to become acquainted with them and the services that they can provide. You should explore with them the conservation values that you want to protect on your land. Discuss with the SWCD what you want to accomplish, and the rights you may want to retain. For example, you may already have one home on your property and want to preserve the right to build a second home for a child. The one provision of a home addition must be specifically written into an easement agreement to protect that option or the housing footprint should be excluded from the easement. Always consult with other family members ahead of time regarding any easement, and remember that you should also consult with your own attorney and/or financial advisor regarding such a substantial decision. In the end, it is the your responsibility to protect your interests by making certain that the easement addresses the interests and that it qualifies for tax benefits or other financial compensation.

How long does a conservation easement last?

Easements "run with the land," binding the original owner and all subsequent owners to the easement's restrictions. While there are temporary easements, none of those qualify for tax breaks and they protect the land for only a limited amount of time. A permanent easement is recorded at the county register of deeds, so that all future owners and lenders will be made aware of the restrictions when they obtain a title report.

What implications will a conservation easement have on back taxes or mortgages?

For some conservation easement projects, the grantor and grantee can work together to obtain funds to implement the project through various grant funds. The grantor may receive compensation for placing restrictions on the property. If the grants permits it, the funds can be used to pay back taxes but this may not be true in all cases. It is important to ask this question at the beginning of the project. For a conservation easement to be placed on a property, a mortgage will need to be subordinate to the easement document. The lender holding the mortgage will have to agree to the subordination. It is recommended that all mortgages be paid off during the easement process if funds are available. If this is not possible, or you foresee a need to obtain a mortgage at a future date to construct an additional home, consider excluding some acreage for the future home from the conservation easement. A lender is more likely to accept a mortgage on a smaller tract of land than considering the larger tract especially if the land is under an easement. These are very important questions to ask at the beginning of the project and reflect the need to seek recommendations from heirs and financial planners.

What are the SWCD responsibilities regarding conservation easements?

For any easement that a SWCD holds, they are legally responsible for enforcing all restrictions that the easement document spells out. Therefore, the SWCD monitors the property on a regular basis, typically once a year, to determine that the property remains in the condition prescribed by the easement document. The SWCD must maintain written records of these monitoring visits and contact the landowner at the time of the site visit. Both actions provide the landowner with a chance to keep in touch with the SWCD. The expense of easement monitoring is the responsibility of the SWCD as the easement holder.

What are the economic impacts to my community of conserving open space?

Many reports have shown that conserving open space impacts an area by attracting jobs, enhancing property values, and savings in governmental costs.

Are tax benefits always associated with land protection?

Income and property tax benefits do exist in exchange for donating land, a conservation easement, or selling the property as a "bargain sale" below market value. The amount and type of tax benefits depends on a variety of factors, including the legal tool used to protect the land, the value of the donation, your income level and the total value of your estate. You should always consult with a financial advisor and/or an attorney to fully understand the tax implications. The SWCD can direct you to publications that provide information on this topic as well.

Further Information Sources

- Voluntary Conservation Agreements: An Introduction for North Carolina Landowners. Conservation Trust for North Carolina. 2006.
<http://www.coastallandtrust.org/media/pdf/VoluntaryConservationAgreements.pdf>
- Conservation and Historic Preservation Easements: To Preserve North Carolina's Heritage. Charles E. Roe, Camilla M. Herlevich, and Lee Lewis Leidy. North Carolina Coastal Land Trust & Conservation Trust for North Carolina. 2004.
<http://www.coastallandtrust.org/media/images/homepage/EasemFNL.pdf>
- Planning the Future of Your Farm: A Workbook on Farm Transfer Decisions. The North Carolina Farm Transition Network, Inc. 2006.
<http://www.rollinghillsrcd.org/planning%20the%20future%20of%20your%20farm%20workbook.pdf>
- Farm Transfer and Estate Planning Fact Sheet. American Farmland Trust, 2004.
http://www.farmlandinfo.org/documents/27981/estate_planning_07-2008.pdf
- Agricultural Economic Development Fact Sheet. American Farmland Trust. 1998.
http://www.farmlandinfo.org/documents/29476/FS_AED_9-98.pdf
- North Carolina Conservation Tax Credit Program. NC Department of Environment and Natural Resources. <http://www.onencnaturally.org/pages/ConservationTaxCredit.html>
- A Landowner's Guide to Forestry in North Carolina. The North Carolina Sustainable Forestry Initiative Implementation Committee & the North Carolina Forestry Association. 2008.
<http://www.ncforestry.org/WEBPAGES/Landowners/2010%20LANDOWNER%20GUIDE%20WEB.pdf>
- Determining the Value of Donated Property. Department of the Treasury, Internal Revenue Service. Publication 561. 2007. <http://www.irs.gov/pub/irs-pdf/p561.pdf>
- Internal Revenue Bulletin: 2004-28. Notice: 2004-41. Charitable Contributions and Conservation Easements. http://www.irs.gov/irb/2004-28_IRB/ar09.html#d0e1585
- Charitable Contributions: Substantiation and Disclosure Requirements. Internal Revenue Service. Publication 1771. Rev. 3-2008. Catalog Number 20054Q. <http://www.irs.gov/pub/irs-pdf/p1771.pdf>
- Instructions for Form 8283 (Rev. Dec 2006). Noncash Charitable Contributions. Catalog Number 62730R. <http://www.irs.gov/pub/irs-pdf/i8283.pdf>.
- Working Forest Conservation Easements in North Carolina, North Carolina Forestry Association's Forest Education and Conservation Foundation. 2010.
- Internal Revenue Service Code Title 26 Section 170.
<http://www.irs.gov/taxpros/article/0,,id=98137,00.html>
- Using the Conservation Tax Incentive. Land Trust Alliance. 2010.
<http://www.state.nj.us/gsp/pdf/Conservation%20Tax%20Benefits%20Brochure%2012-2010.pdf>.
- Your Land, Your Legacy: Deciding the Future of Your Land to Meet the Needs of You and Your Family. The University of Massachusetts Amherst, Highland Communities Initiative, North Quabbin Regional Landscape Partnership. http://www.masswoods.net/images/stories/pdf/ylyl_web.pdf
- Working Forest Conservation Easements in North Carolina. North Carolina Forestry Association's Forest Education and Conservation Foundation. 2010.
<http://www.ncforestry.org/WEBPAGES/PUBS%20AND%20VIDEOS/WORKING%20FOREST%20EASEMENT%20WEB.pdf>