NC STATE UNIVERSITY

Conservation Easements: Valuation, Modification, and Sample Federal and State Case Law Concerning Deductions and Enforcement

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Introduction

Family land legacies often involve conservation planning and enrollment in state and federal conservation and land protection programs. Such programs - and the funds distributed - are authorized by various state and federal laws and regulations, largely under public policies of natural resources protection for a variety of purposes (e.g. wildlife conservation, flood control, protection of soils), and historic and cultural preservation. The heart of such programs is an agreement whereby a landowner executes an agreement to either implement conservation practices or preserve the land in its present (natural or managed farm) state. Such conservation agreements can take the form of a contract with affirmative obligations; others involve passive restraint from changing the status quo. When the landowner transfers an actual "right to develop" in the form of a negative easement - i.e. places a restriction on their land use, enforceable by a third party often in perpetuity - such agreements are known as **conservation easements**. All such programs are considered beneficial to the public at large.[2]

The varying conservation and protection programs offer perpetual restriction with no enrollment expiration, as well as term-limited enrollment, whereby any restrictions on use are lifted at the expiration of the agreement. Program funds may accompany such agreements for implementation of conservation and production improvement practices, as well as payment for

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[2] For example, see N.C.G.S. § 113A-230: *The [North Carolina] General Assembly finds that a statewide network of protected natural areas, riparian buffers, and greenways can best be accomplished through a conservation easements program… [and]... further finds that other public conservation and use programs, such as natural area protection, beach access, trail systems, historic landscape protection, and agricultural preservation, can benefit from increased conservation tools.*

the transfer of the real property "right" to subdivide and otherwise develop (e.g. increase number of structures on the parcel). Programs also vary in funding and accompanying restrictions and landowner responsibilities, as well as tax treatment of donations of property interest. While term-limited contracts and conservation agreements often run their term, evidence suggests early terminations are not uncommon with some cost-share programs.[3] Some are terminated prematurely for a variety of reasons, with varying rules for repayment of monies paid in exchange for the conservation agreement. Though permanent conservation easements are generally considered inviolable, there is sometimes a pathway for termination and recompense of monies paid and tax deductions taken.[4]

This manuscript provides a cursory overview of federal and state court cases concerning **conservation easements**. As for federal cases, these concern IRS challenges to deductions taken under Internal Revenue Code (IRC) §170(h) and its regulatory interpretations. State cases discussed primarily concern defense of conservation easement integrity in the face of landowner efforts at modification.

PART 1. Perpetual Protection: Agricultural Conservation Easements

A conservation easement is a land protection mechanism authorized by state law[5] and recognized by the federal Internal Revenue Code[6] and intended to prevent residential or non-agricultural or non-forest commercial development of real property. Conservation easements must serve a conservation purpose - stated as policy in a statute authorizing their creation - and involve a variety of landscapes for purposes of beach access, wetlands and water quality protection and conservation, and wildlife habitat protection.[7] Conservation *easements* are "perpetual" with no mechanism for non-judicial relief of restrictions upon the property.[8] Referred to in the latter as a "qualified real property interest" for tax deduction purposes, perpetuity is a key requirement for taking tax deduction.[9] A parcel in farm or forest use under permanent conservation easement may be further

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[3] Pathak, Santosh, Wang, Hua, Adusumilli, Naveen, *Contract noncompliance in agricultural conservation programs: Panel evidence from Louisiana, USA*, Agricultural and Resource Economics Review / Volume 53 / Issue 2 / August 2024.

[4] See N.C.G.S. § 106-744(b)(2) and § 121-39.1. Discussion of conservation easement modification appears later in this manuscript.

[5] (North Carolina) N.C.G.S. §113A-230 concerning development of programs for purchase of conservation easements related to resources protection by the Department of Environmental Quality; (Virginia) Virginia Conservation Easement Act (§§ 10.1-1009 through 10.1-1016.1); (Maryland) Maryland Real Property Code, Title 2, Section 2-118; (Ohio) Ohio Revised Code Title LIII §§ 5301.67 through 5301.70; (West Virginia) West Virginia Code, Chapter 20, Article 12, § 8A-12; (Pennsylvania) Pennsylvania Statutes Title 3 P.S. Agriculture, §914.2 and §914.5

[6] 26 U.S. Code §170(h)

[7] For example, see N.C.G.S. §113A-235's list of purposes.

[8] 26 U.S.C. §170(h).

[9] 26 CFR § 1.170A-14

specified as an Agricultural Conservation Easement (sometimes referred to as an Agricultural Land Easement [ALE]).[10]

At its most basic level - and in the analogy taught to all first year law students - a conservation easement is the removal of a number of “sticks” from the property rights bundle. These sticks are primarily 1) the right to subdivide the parcel, 2) the right to impervious the impervious surface ratio (i.e. between structures/pavement and open ground), and 3) the right to prohibit the entry of certain parties, in this case the monitoring and enforcement of such restrictions by a third party (to whom this right of entry is thus transferred). When funded with public monies or tax benefits, the language of the conservation easement restricts other rights, particularly extraction of resources, removal of timber, and other major land disturbance activities. (See Conservation Easement Deed, Appendix A, Article 2) The landowner continues to hold the majority of the property rights of the land while placing certain voluntary restrictions on its current and future use.

In exchange for these voluntary restrictions, landowners can receive payment or income tax deduction for a donation (often a combination of the two), as well as possible federal estate tax[11] and property tax benefits (see below). Though the restrictions are considered a matter of public benefit, conservation easements on private lands do not ordinarily require public access unless acquired for such purpose, such as a beach access.

A conservation easement has two essential elements. First, the landowner (as grantor or donor of the development rights) agrees to not further subdivide the parcel and otherwise use it in a manner to protect certain conservation values on the land, such as agricultural values (soil and water sources), open space, scenic and historic resources, water quality, and wildlife habitat. As explored below, subdivision is often prohibited outright without qualification, though state funding sources may contemplate subdivision;[12] and the Natural Resources Conservation Service (NRCS, the federal entity through which most funding for purchases flows) contemplate subdivision (the extent of such flexibility is explored further below).

Second, a conservation organization or public body (as grantee of the development) is granted the “conferred right” of access to the property to monitor the property and enforce the restrictions in perpetuity (forever) against the grantor and all successor title holders. (Such access right is not unlimited, and usually requires landowner notice.) While the landowner may sell the land, the restrictions run with the land and apply to all future owners of the parcel under

[10] For example, see N.C.G.S. §106-744 et seq.
[11] 26 U.S. Code § 2031(c)
[12] For example, see both North Carolina state law and the regulations of the North Carolina Agricultural Development and Farmland Preservation Trust Fund (a source of state funding for conservation easement purchases)

conservation easement. In most states, the primary grantees of development rights are non-profit (501[c][3] organizations called "land trusts" and government entities (municipal and county), such as a division of soil and water district (county) office.

These rights are transferred by a deed of conservation easement, and the transaction is often called a sale or grant of development rights. The deed is recorded in the chain of title, and the restrictions run with the land. Where a subject parcel serves as collateral for a loan, lenders are requested to subordinate their deeds of trust in the chain of title to the conservation easement; such subordination is a requirement to meet the standards of perpetuity.[13] (As explored below, subordination is critical to the determination of whether an easement is "permanent" as required by federal tax law.) The deed language and its restrictions are governed - in the case of a conservation easement involving federal payment - by regulation.[14]

A sample of a full deed of conservation easement is attached as **Appendix A.**

1.1 Valuation of the Conservation Easement

As noted above, development rights may be donated or sold, and in common practice both in the same transaction. The valuation of the development rights is normally established by two appraisals "before and after" the removal of development rights. The first appraisal is the fair market value (FMV) of the parcel of real property, which must take into account likelihood that the property will be developed if no restrictions are placed on the property, as well as the applicable zoning allowing for density of development (an indicator of greater return).[15] The second appraisal predicts the valuation of the real property after the rights to subdivide and develop have been severed.[16]

The difference between the appraisals is the development value, which will be paid in cash in the case of a sale. Most often, such sales are not 100% cash for the value of the development rights,

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[13] See Reg. 1.170A-14(g)(2). This principle was confirmed in *RP Golf LLC et al. v. Commissioner, No. 16-3277 (8th Cir, 2017).* [Note this rule has been upheld in the 8th, 9th and 10th Circuits, See *Minnick v. Comm'r, 2015 U.S. App. LEXIS 14097 (9 h Cir. 2015)*] As a practical matter, a landowner should not execute an option to purchase a conservation easement without pre-subordination of a lender. Note that in the Farm Act of 2022, the North Carolina General Assembly declared that conservation easement restrictions shall survive property tax foreclosure actions. See NC SL 2022-55.
[14] 7 CFR §1468.25
[15] 26 CFR § 1.170A-14(h)(3)(i)
[16] For detailed appraisal and appraiser qualifications for easements involving federal funds, see USDA NRCS *Specifications for Appraisals of Real Property for the ACEP - Agricultural Land Easement Component and Scope of Work*, available at https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1260325.pdf. For conservation easements involving state Agricultural Development and Farmland Preservation Trust Fund monies, see See NC Agricultural Development and Farmland Preservation Trust Fund Policies and Guidelines, available at https://ncadfp.org/documents/ADFPPoliciesandGuidellines-2-18-2021.pdf

and any non-cash transfer of these rights is considered a charitable donation to the entity acquiring the interest (i.e. the land trust or county). For example, beginning at the period of the time leading to the transfer transaction, the acquiring land trust or other entity may execute an option to purchase the development rights, upon a contractual commitment to raise enough funds to meet a certain percentage of the appraised development value. (In these instances, both parties are contemplating that the parcel will achieve a desired appraisal, which in author's observation does not always happen.) These purchase funds come - upon application - from a state and federal source, and perhaps private cash donations available to the land trust for such purchases (in pursuit of its non-profit mission). For example, if the land trust executes an option to purchase the development rights, and secures 60% of the appraisal in the form of cash payment from various sources, the landowner is contractually obligated to proceed with the project.

The balance of the value on the parcel where cash target has been achieved - say 40% in this example - is considered a charitable contribution and is tax deductible to the landowner/taxpayer up to 50% of their adjusted gross income. However, for qualified farmers, the deduction may be taken against 100% of adjusted gross income (a benefit that is an expression of public policy favoring working lands protection).[17] For all such donations of conservation real property interest, the taxpayer may carry forward unused tax deductions and apply it to the adjusted gross income for 15 years.[18] However, the deduction does not survive the last income tax year of the taxpayer if the property was individually owned, or the surviving taxpayer (surviving spouse) if property was jointly owned.[19]

To use an example from the author's home state, most working farm and forest land conservation easement purchases in North Carolina are funded at least in part by the North Carolina Agricultural Development and Farmland Preservation Program (ADFPTF) administered by the NC Department of Agriculture and Consumer Services (NCDA&CS).[20] The ADFPTF is advised by an advisory board established by statute, which advises on program rules and applications for funding.[21] The ADFPTF will fund no more than 50% of the conservation easement value, and allows a match of funds or in-kind donation. Other sources of funding must have restriction requirements at least to the level of ADFPTF requirements.[22] Other funding is normally supplied (upon simultaneous application) by the Natural Resources Conservation Service (NRCS) through the Agricultural Conservation Easement Program (ACEP) (formerly the Farm and Ranchlands Protection Program [FRPP]) as authorized by the federal 2018 Farm Bill.[23] The ACEP program,

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[17] 26 U.S.C § 170(b)(1)(E)
[18] 26 U.S.C. §170(b)(1)(E)(ii)
[19] Anecdotally, such proceeds are used to pay down (or off) debt on the property or other financial obligations. Other uses have been purchase of life insurance, or other real property.
[20] N.C.G.S. §106-744
[21] N.C.G.S. §106-744(g)
[22] See ADFPTF Policies and Guidelines (2008) (hereafter "ADFPTF"), available at https://ncadfp.org/documents/ADFPPoliciesandGuidellines-2-18-2021.pdf
[23] PUBLIC LAW 115–334

along with other Farm Bill programs, receives mandatory funding during the period of authorization.[24] Some purchase funds may come from private donors to the acquiring land trust.

(Note that in North Carolina, note that ADFPTF allows for term-limited conservation easements, whereby the development rights are essentially leased to the exclusive holding of the grantee (land trust or county). Such easements are compensated based on percentages established by the ADFPTF depending on length of term. For example, a 50-year conservation easement pays out at 60% of the appraised easement value, and a 10 year easement pays out at 10% of the value.[25] Note that such term easements are not eligible for the charitable donation deduction under IRC 170(h) given they are not in perpetuity. The author is not personally aware if such term easements have been truncated, or what the financial penalty would be; there would be no adverse tax consequence because the term agreement is not permanent as required by IRC 170(h).

1.2 Modification and Revocation of Perpetual Conservation Easements

Grantors of conservation easements should never make their decision based on the possibility that the conservation easement will be terminated or otherwise modified from its baseline. Because conservation easements are compensated at public expense (with cash or tax deduction), amendment can be difficult and extinguishment is a high bar. However, agricultural conservation easements in North Carolina do have a statutory recognition of modification in the form of subdivision. Likewise, NRCS guidelines also leave open a door for post-grant modification in the form of subdivision, provided the subdivision is outlined prior to approval and conveyance.

Reconveyance of development rights (revocation) does remain a possibility, though still subject to statutory inconsistency. Below are the relevant state statutory provisions concerning modification of conservation easements:

1.2.1 **North Carolina. The Agricultural Development and Farmland Preservation Enabling Act (G.S. 106, Article 61).** The relevant statutory provision in N.C.G.S. §106-744(b)(2) states that a conservation easement "shall be perpetual in duration, provided that, at least 20 years after the purchase of an easement, a county may agree to reconvey the easement to the owner of the land for **consideration**, if the landowner can demonstrate to the satisfaction of the county that commercial agriculture is no longer practicable on the land in question." Such termination provision arguably only applies when a unit of county government holds or is the grantee (or perhaps successor grantee) of the conservation easement in question. The statute is silent as to proof of impracticability, it would appear that the burden lies on the landowner to prove that "commercial agriculture" is impracticable. Given the broad definition of agriculture in

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[24] Congressional Research Service, *Agricultural Conservation in the 2018 Farm Bill* (April 18, 2019), No. R45698. Available at https://crsreports.congress.gov/product/pdf/R/R45698.
[25] See ADFPTF

the general statutes,[26] making even small landholdings available for agricultural commercial production (e.g. truck farm or horticulture operation), this may be a high bar.[27]

1.2.2 **Virginia.** The **Virginia Conservation Easement Act**, codified in **Va. Code Ann. § 10.1-1009 et seq.** explicitly acknowledges that conservation easements can be terminated, but only through a judicial process. **§ 10.1-1010(F)** states: "This chapter does not affect the power of the court to modify or terminate a conservation easement in accordance with the principles of law and equity... In any such proceeding the holder of the conservation easement shall be compensated for the value of the easement." This provision allows a court to apply equitable principles (such as the doctrine of changed circumstances or impracticality) to terminate an easement. However, the statute also ensures that the holder of the easement is compensated for its value, which reflects the public trust nature of these agreements. The law also acknowledges the power of eminent domain, stating that it does not affect the power of "any public body" to condemn a conservation easement.

1.2.3 **Ohio.** The **Ohio Revised Code Title 53, Chapter 5301**, particularly **§ 5301.67 through § 5301.70**. The Ohio law does not address termination, but rather **§ 5301.70** notes that conservation easements are enforceable by injunction or other civil actions.

1.2.4 **West Virginia.** The **West Virginia Conservation and Preservation Easements Act**, codified in **W. Va. Code § 20-12-1 et seq.** authorizes the creation of conservation easements, and provides a clear framework for judicial termination. **§ 20-12-5(b)** states that the law "does not affect the power of a court to modify or terminate a conservation or preservation easement in accordance with the principles of law and equity consistent with the public policy of this article." Like Virginia, this provision empowers a court to use equitable principles to terminate an easement if its purpose is no longer viable.

Additionally, **§ 8A-12-16(e)** acknowledges the power of eminent domain, stating that the law "neither abrogates nor creates any rights inconsistent with state or federal law respecting the power of condemnation of private property for public use." This allows a government to condemn a property with a conservation easement for a public purpose.

1.2.5 **Pennsylvania.** The **Pennsylvania Conservation and Preservation Easements Act**, codified in **32 P.S. § 5051 et seq.**, and provides for judicial termination of conservation easements. **32 P.S. § 5055** states: "This act does not affect the power of a court to modify or terminate a conservation easement or a preservation easement in accordance with the principles of law and equity." This provision reinforces the court's role as the final arbiter in determining if the purpose of an easement has become impossible to achieve. It also requires that the easement

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[26] See N.C.G.S. §106-581.1.

[27] Issues of modification and termination raise issues of standing. For example, a complicit county and landowner seeking to make a conserved area available for commercial use, who has standing to challenge the decision to terminate the easement?

holder be compensated if a court terminates the easement. This authorizing statute also acknowledges the ability of a government entity to condemn property subject to an easement for a public use.

1.2.6 **Maryland.** The **Maryland Real Property Article, § 2-118**, and the **Maryland Agriculture Code, § 2-514**, specifically address agricultural easements. Maryland may be unique in that it has a very specific, statutory process for the termination of agricultural easements purchased by the Maryland Agricultural Land Preservation Foundation (MALPF). **§ 2-514(c)(1)** states: "after 25 years from the date of purchase of an easement, a landowner may request that the easement be reviewed for possible termination." The process is as follows:

a) A request from the landowner.
b) Review and approval by the county governing body, which must hold a public hearing.
c) Approval by the board of trustees of the MALPF.
d) Final approval by the Secretary of Agriculture and the State Treasurer.

If the request is approved, the landowner must **repurchase the easement** at its fair market value, as determined by an appraisal, and the funds are deposited back into the state's preservation fund. For other types of conservation easements (not under the MALPF program), **§ 2-118(d)** states that a "restriction provided for by this section may be extinguished or released, in whole or in part, in the same manner as other easements," which likely requires a judicial process.

1.3 Subdivision of a Conservation Easement

If the conservation easement is extinguished or a portion condemned (see below), the interest in the land (or the proceeds from any sale) is allocated to the grantee and grantor, respectively, in proportion to the value of the agreement and the value of the land.[28] State authorizing statutes may provide a process for subdivision (whereby no sale income is created), though arguably the conservation values may be impacted and the result regarding retroactive disallowance of tax deductions is a question for further research. Below are state-specific statutory authorizations for subdivision, as well as the NRCS rules concerning such. Note that Virginia, Pennsylvania and Ohio authorizing statutes do not explicitly address a process or potential for subdivision.[29]

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[28] Treas. Reg. § 1.170A-14(g)(6)(i)-(ii). This allocation requirement is known as the "proceeds regulation." For a thorough discussion, see McLaughlin, N., *Conservation Easements and the Proceeds Regulation*, Utah Law Faculty Scholarship (2021). (Draft for future publication at 56 Real Prop. Tr. & Est. L.J. 1 (2021). Available at https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1253&context=scholarship.

[29] See respectively Va. Code Ann. § 10.1-1009 et seq. and Ohio Revised Code Title 53, Chapter 5301, §§ 5301.67 et seq.; Pennsylvania Conservation and Preservation Easements Act, 32 P.S. § 5051 et seq.

1.3.1 **Federal Subdivision Rules (and sample deed language)**

For conservation easements partially funded by NRCS, the Conservation Program Manual provides guidance for decisions regarding subdivision. If a landowner has in mind a proposed subdivision for property disposition purposes (e.g. to divide one parcel among several devisees in a will or beneficiaries to a trust), the program manual requires that:

> *The individual parcels resulting from the proposed subdivision of the protected property must each meet the ACEP-ALE land eligibility requirements and program purposes, as determined by NRCS. Both the approved number and boundaries of the proposed subdivided parcels as approved by the State conservationist prior to closing must be identified in the agricultural land easement deed. No further NRCS review is required at the time of future conveyance of the parcels as identified in the deed.*[30]

It is possible that a conservation easement can be amended by agreement of the owner and the holder of the easement after the conveyance. Such agreements can clarify an ambiguity in the easement, but cannot in any way diminish the conservation values or agricultural production purposes upon which any tax deductions were calculated.[31] If a landowner wishes to subdivide a property following the closing of a conservation easement, the decision is subject to the discretion of the NRCS state director, per the following process provided in the NRCS State Programs Manual as follows:

> *The eligible entity must submit a request to the State conservationist for approval prior to authorizing a subdivision. The eligible entity must certify that the requested subdivision is required to keep all resulting farm or ranch parcels in production and viable for agricultural use. The State conservationist must determine that—*
>
> - *Parcels resulting from the subdivision of the protected property will meet ACEP land eligibility requirements of 16 U.S.C. Section 3865 et seq. as enacted on the date the original parcel was enrolled in ACEP, including the allocation of the impervious surface limitation between the subdivided parcels.*
> - *The resulting parcels will not be below the median size of farms in the county or parish as determined by USDA's most recent National Agricultural Statistical Survey (NASS).*[32]

Amendments also can add acreage to an easement or add further to the protection of the property. For example, an increase in the conservation value of the easement, such as adding acres or relinquishing a parcel right that was retained in the original easement could generate an additional gift value for tax purposes. Modification of a perpetual easement must be analyzed so

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[30] See NRCS Conservation Programs Manual, Part 528(H)(4)(i), available at https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=44646.wba (hereafter "NRCS Programs Manual)

[31] See NRCS Conservation Programs Manual.

[32] NRCS Programs Manual, 527(H)(4)(ii)

as not to run afoul of the "private benefit rule," which considers easement modification benefiting the landowner only as a frustration of the investment the public has made in the purchase or tax deduction associated with the conservation easement.[33] Under this rule, the non-profit land trust risks losing their 501(c)(3) status should they consent to an impermissible modification.

1.3.2 **North Carolina.** Regarding subdivision, an agricultural conservation easement may be subdivided into no more than three parcels.[34] If the conservation easement was funded by ADFPTF, no resulting parcel may be more than 20 acres.[35] However, such subdivision may be prohibited or further limited by the terms of the deed of conservation easement. For example, the deed may contain the following prohibition:

> *Separate conveyance of a portion of the Protected Property or division or subdivision of the Protected Property is prohibited. Grantor hereby waives any right to subdivide the protected property pursuant to North Carolina General Statute 106-744(b)(1).*

Such language is negotiable before the execution of the conservation easement (arguably before execution of an option to purchase a conservation easement), but in no event may the conservation easement be subdivided to more than three parcels.

Under North Carolina law, there is a blanket prohibition on agricultural conservation easement modification or termination for purposes of "economic development" where the state is at party to the transaction.[36]

1.3.4 **Maryland.** Maryland's code is the most specific in its regulation of subdivision, particularly for easements held by the Maryland Agricultural Land Preservation Foundation (MALPF).

The Code of Maryland Regulations (COMAR) 15.15.12.04 generally prohibits subdivision of land with a MALPF easement.[37] However - and unique among all authorizations reviewed by the author - it provides for an agricultural exception for case-by-case approval by the Foundation

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[33] See Gentry, Paige M., *Applying the Private Benefit Doctrine to Agricultural Conservation Easements*, Duke Law Journal, Vol. 62:1387 (2013). Available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3384&context=dlj

[34] N.C.G.S. §106-744(b)(1). Though unclear, it is arguable that this subdivision allowance applies only to easements held by a county.

[35] From the author's conversation with NCDA&CS staff on this matter, this language does not preclude funding and placement of an easement on a single parcel less than 20 acres.

[36] N.C.G.S. §121-39.1. The author is not personally aware of whether or how the term "economic development" has been interpreted to allow a modification or termination. Such prohibition arguably only applies if the conservation easement has been secured with state funding (e.g. North Carolina ADFPT) or a unit of state or local government is the holder of the easement.

[37] COMAR 15.15.12.04(A)

under specific circumstances. A landowner can request an "agricultural subdivision" if owner can demonstrate that:

> (1) The proposed agricultural subdivision serves an agricultural purpose;
>
> (2) The proposed agricultural subdivision will enhance or have no effect upon the agricultural operations being conducted upon the land; and
>
> (3) The resulting divided parcels from the agricultural subdivision are able to sustain long-term agricultural production, independent of each other.[38]

Approval of the subdivision requires a waiver of any request to later terminate the easement.[39] Each subdivided parcel may be no less than 50 acres.[40] However, a further exception is available for a subdivided parcel of less than 50 acres if one of the following conditions apply (produced here in full given the uniqueness of the provision):

> (1) The resulting parcel of less than 50 acres continues to meet minimum soil requirements as provided by COMAR 15.15.01.03D independently of the original farm and one of the following conditions exists for the resulting divided parcel comprised of less than 50 acres:
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> (a) The Foundation determines that there exists a physical separation of land, created by:
>
> (i) Bodies of water;
>
> (ii) Public roads; or
>
> (iii) Features that significantly restrict the movement of agricultural equipment from one portion of the land to another;
>
> (b) The resulting divided parcel comprised of less than 50 acres is conveyed to owners of adjoining land encumbered by an easement in favor of the Foundation, and both of the following occur:
>
> (i) The owner amends the easement encumbering the adjoining land to encumber the resulting divided parcel, or an overlay easement in favor of the Foundation is placed over the entire acreage constituting the resulting divided parcel and the adjoining land; and
>
> (ii) The resulting divided parcel and the adjoining land together meet minimum soils requirements as provided by COMAR 15.15.01.03D ; or
>
> (c) The resulting divided parcel comprised of less than 50 acres:

[38] COMAR 15.15.12.04(B)
[39] COMAR 15.15.12.04(D)
[40] COMAR 15.15.12.04(E)

(i) Is conveyed to owners of adjoining land encumbered by an easement containing terms which are acceptable to the Foundation; and

(ii) An overlay easement in favor of the Foundation is placed over the entire acreage constituting the resulting divided parcel and the adjoining land.

1.3.3 **West Virginia**. While the West Virginia authorizing statute does not provide a subdivision process, W. Va. Code § 20-12-6(d) states: "The granting of a conservation or preservation easement shall not subsequently restrict the right of the fee owner to further grant any other interest in real property to any person or entity when the grant does not materially impair the prior conservation or preservation easement." While this provision does not create an automatic right to subdivide, it allows for it as long as the subdivision "does not materially impair" the conservation purpose.

1.4 Condemnation of Property Encumbered by a Conservation Easement

Though voluntary subdivision of a parcel under conservation easement is generally prohibited by the conservation easement restrictions, and it is unclear whether a co-tenant interest owner has a right of partition, the parcel or a portion thereof is nonetheless subject to eminent domain by a public condemnor.[41] There may be policy in place to require examinations of alternatives. For example in North Carolina, the condemnor must proceed through an examination of alternatives to condemning the parcel, and in the eminent domain filing must lay out facts to show "no prudent and feasible alternative to condemnation of the property encumbered by the conservation easement."[42] Further, if the landowner has the opportunity to demonstrate to the court that there is at least one alternative, the burden shifts to the condemnor to demonstrate that it is not a prudent and feasible alternative, and if the condemnor fails to carry that burden, the eminent domain action is dismissed and costs (except attorneys' fees) are awarded to the landowner.[43] However, projects by the NC Department of Transportation that have had a prior review of alternatives and mitigation measures, and that have undergone statutory environmental impact review, are exempt from such challenges.[44]

In the event conservation easement property is "taken" in a successful eminent domain action, the division of proceeds is determined by the conservation easement deed as negotiated by the parties. Subsequent owners of the property are subject to the apportionment language as a condition of their interest in the property. The proceeds are generally divided between the

[41] N.C.G.S. §40A-80
[42] N.C.G.S. §40A-81
[43] N.C.G.S. §40A-82(b)
[44] N.C.G.S. §40A-82(c)

landowner and the conservation easement holder based on their relative interest in the value of the conservation easement (development rights).[45]

Below is an example of such condemnation language in the deed of conservation easement funded by state and federal sources:

> *Procedure in the Event of Condemnation or Eminent Domain.* *Grantor and Grantee recognize that the sale of this Easement, or any part thereof, gives rise to a property right, immediately vested in the Grantee and the United States, with a fair market value equal to the proportionate value that the Easement bears to the value of the Protected Property prior to the restrictions imposed by the Easement. Accordingly, if any condemnation or eminent domain action shall be taken, on all or part of the Protected Property, by any authorized public authority, said authority shall be liable to the Grantee for the value of the property right vested in the Grantee at the time of the signing of this Easement. Due to the federal interest in this Deed, the United States must consent to any such condemnation action.*
>
> *If condemnation or a taking by eminent domain of a part of the Protected Property or the entire Protected Property by a public authority renders it impossible to fulfill any of the conservation purposes of this Easement on all or part of the Protected Property, the Easement may be terminated through condemnation proceedings. If the Easement is terminated and any or all of the Protected Property is sold or taken for public use, then, as required by Section 1 of 170A-14(g) (6) of the IRS regulations, the Grantee shall be entitled to the proportionate value of the Easement, which has been predetermined as the Protected Property's unrestricted value, subject to any applicable law which expressly requires for a different disposition of the proceeds. The Grantee shall use its proceeds consistently with the general conservation purposes of this Easement.*
>
> *If this Easement is extinguished or terminated, the United States and the Grantee shall receive their proportional share of the Easement value at the time of termination. Those proportional shares of the Easement are as follows: ___% to Grantee and ___% to the United States of America.*
>
> *All termination-related or condemnation-related expenses incurred by the Grantor and the Grantee shall be paid out of any recovered proceeds prior to distribution of the net proceeds as described herein.*

[45] Treas. Reg. § 1.170A-14(g)(6)(ii)

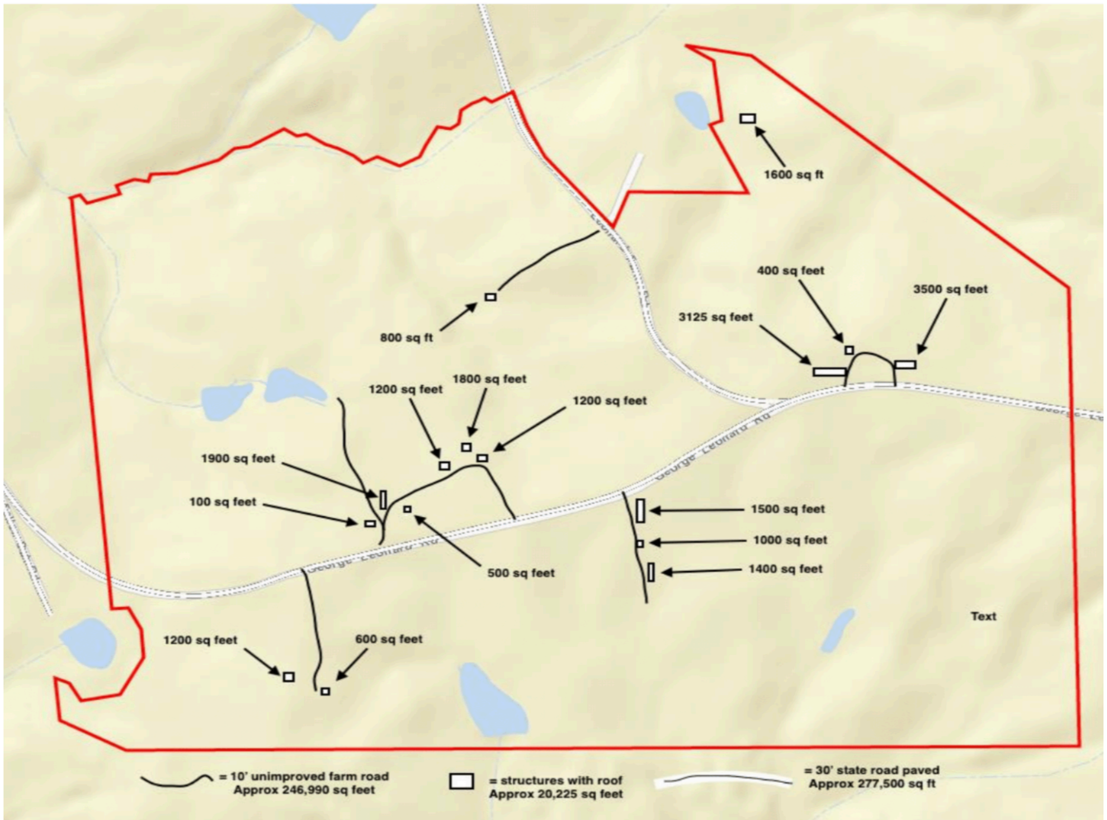
1.5 General Rights, Restrictions and Allowable Uses

A conservation easement's restrictions are tailored to the particular conservation values of the land, the goals of preservation of the landowner and grantee, and those determined by the particular funder of the purchase of development rights. Examples of activities that may be prohibited or restricted in a conservation easement include industrial use, mineral exploration or soil excavation, subdivision into smaller tracts, residential development, road and infrastructure expansion, and extensive timbering.

The condition of the property (i.e. in its natural state) prior to the transfer of development rights is captured in a **baseline report**. Continuous monitoring of conservation easement is based on the baseline report. A key measurement in the baseline report is the percentage of impervious surfaces on the property (usually in the form of roof tops and paved surfaces) relative to water permeable surface area. For example, impervious surfaces (non-water permeable) are limited to 2% under funding rules for the ACEP program, though such coverage may be negotiated to 10% maximum impervious surface coverage.[46] Such coverage determines the flexibility for "building envelopes" whereby new construction may take place, say around an existing farmstead of barns, shops and other facilities. ADPTF rules limit such construction to those supporting the agricultural use of the property.[47] Below is an example of an impervious surface declaration in a baseline report:

[46] See 7 CFR Part 1491

[47] See NC Agricultural Development and Farmland Preservation Trust Fund Policies and Guidelines, available at https://ncadfp.org/documents/ADFPPoliciesandGuidellines-2-18-2021.pdf



Depending on the size and character of the land, conservation agreements may allow timbering, forest management and agricultural use. The conservation easement might also allow wildlife management, hunting and fishing, or even the construction and maintenance of a limited number of new homes or other infrastructure necessary to produce income from the property.

1.6 Estate Planning Challenges of Conservation Easements

The utility of the agricultural conservation easement as a tool in farm transfer planning stems from a landowner's legacy preservation goals and financial needs, but is not itself a real property title or business interest transfer planning tool, such as a trust or business entity. The conservation easement itself does not dictate succession of title, as would a will (testate) or by state statute (intestate). The conservation easement is rather the disposition of an interest in real property to a qualified third party - often in return for cash and tax benefit - but does not determine who will own the property as a matter of the conservation easement grantor's legacy. At its core, it is the disposition of the landowner's right to subdivide the parcel of land into smaller parcels (with some exceptions), and otherwise use it in a manner that negatively impacts its conservation values. Therefore, it is possible that multiple individuals may own a protected parcel in co-tenancy, with no mechanism for partition.

PART II: Tax Litigation Concerning Qualification for Tax Deductions

2.1 **Internal Revenue Scrutiny in General**

As landowners and investors have made use of the conservation easement tax deduction under IRC §170(h), the IRS from time to time scrutinizes them. Over the last several decades, federal tax enforcement cases have offered a number of lessons in drafting to ensure qualification for the §170 deduction. The Internal Revenue Service (IRS) has targeted what it has labeled as "abusive" or "syndicated" transactions.[48] The IRS has included these transactions on its annual "Dirty Dozen" list of tax scams, a clear signal of its enforcement priority.[49] This has led to a number of cases in the U.S. Tax Court and various Circuit Courts of Appeals.[50] While most state court cases have dealt with questions of easement enforcement and interpretation, some have denied claim of state tax credits for conservation easements (see below).

While figures on conservation easement deduction reviews are not publicly available, one source notes that in 2022 there were 425 active tax court cases; this figure jumped to 750 in 2023, and in 2024 the IRS announced an audit goal of 80% for conservation easement donation transactions.[51] (The National Taxpayers Union Foundation alleged an IRS intent to audit 100% of all conservation easement transactions involving partnerships.)[52]

(Note that regulations concerning syndicated transitions were issued in the waning months of the Biden Administration. While a review of the Federal Register reveals no direct revision of this rule, Congress has proposed funding cuts to the IRS which would likely curtail enforcement efforts.) (CITATION)

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[48] 89 FR 81341

[49] *Dirty Dozen: Beware of abusive tax avoidance schemes*, IRS, at https://www.irs.gov/newsroom/dirty-dozen-beware-of-abusive-tax-avoidance-schemes#:~:text=Whether%20anchored%20offshore%20or%20in,micro%2Dcaptive%20transactions%20and%20others.

[50] For example, see *Equity Inv. Assocs. v. United States, 2021 U.S. Dist. LEXIS 236245*. This is federal district court case that addresses a motion to quash a summons issued by the IRS in a syndicated conservation easement tax enforcement action. The case is a procedural step in a much larger federal investigation into a syndicated conservation easement tax scheme.

[51] Johnson, Christopher and Kavanaugh, John P., *Tax Court Invalidates Conservation Easement Regulation*, PFK, April 25, 2024, at https://www.pkfod.com/insights/tax-court-invalidates-conservation-easement-regulation/#:~:text=Active%20cases%20in%20the%20Tax,conservation%20easement%20deductions%20to%2080%25.

[52] Jennings, D. and Bishop-Henchman, J., *Ten Crucial Reforms the Next Administration Should Demand of the IRS Commissioner,* National Taxpayers Union Foundation, November 26, 2024 at https://www.ntu.org/foundation/detail/ten-crucial-reforms-the-next-administration-should-demand-of-the-irs-commissioner

2.2 Select Tax Enforcement Cases

Below are several cases brought by the IRS challenging conservation easement tax deductions and their disposition in the Circuit Courts of Appeals. Each rests on various matters of drafting and negotiation.

2.2.1 Parcel Size.

Glass v. Commissioner, 471 F.3d 698 (6th Cir. 2006): This case was a win for the taxpayer. The IRS challenged an easement on a small 10-acre parcel of land, arguing it was not for a valid conservation purpose due to its size. The court disagreed, holding that the size of the easement is not the determining factor. Instead, the court emphasized that the key is whether the easement's retained uses undermine the stated conservation purpose.

2.2.2 Easement Amendment Powers.

In ***Belk v. Commissioner***, 774 F.3d 221 (4th Cir. 2014), the Fourth Circuit addressed the "perpetuity" requirement of a conservation easement in relation to an amendment clause. The easement in question contained a provision that allowed the parties to amend the easement to substitute the encumbered land with a different parcel. The court ruled that this provision violated the "perpetuity" requirement because it allowed for the possible termination of the original easement and its conservation protections. The court confirmed that a savings clause, which purports to prevent an amendment from causing a loss of the tax deduction, is a "condition subsequent" that cannot be enforced and is to be disregarded for tax purposes.

2.2.3 Easement Termination (reserved)

2.2.4 Mortgage Subordination.

The 10th Circuit in ***Mitchell v. Commissioner*****,** 775 F.3d 1243 (10th Cir. 2014) addressed the requirement that a mortgage on the property must be subordinated to the rights of the easement donee at the time of the donation. The court confirmed that this subordination must be in place at the time of the contribution, regardless of the risk of foreclosure. **See also** *RP Golf LLC et al. v. Commissioner, No. 16-3277 (8th Cir, 2017)*

Minnick v. Commissioner of Internal Revenue**, T.C. Memo. 2012-345** Walter C. Minnick, a former U.S. Congressman, and his wife donated a conservation easement on their property in Idaho. The property was subject to a mortgage from U.S. Bank at the time of the donation. The easement deed was signed in December 2006, and the taxpayers claimed a charitable deduction. However, they did not obtain a formal subordination agreement from U.S. Bank until September 2011, almost five years later.

The IRS disallowed the deduction, arguing that the easement was not "protected in perpetuity" as required by Internal Revenue Code § 170(h)(5)(A) and its corresponding Treasury Regulations. Specifically, **Treas. Reg. § 1.170A-14(g)(2)** states that if a property is subject to a mortgage, no deduction will be permitted unless the mortgagee subordinates its rights in the property to the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity.

The U.S. Tax Court sided with the Commissioner, holding that the taxpayers failed to meet the "in perpetuity" requirement. The court reasoned that the mortgage was a prior lien on the property, and in the event of a foreclosure, the bank's rights would be superior to those of the land trust, thus potentially extinguishing the conservation easement. The court determined that the subordination agreement was required **at the time of the donation** and that a subsequent, retroactive agreement did not cure the defect.

2.2.5 Valuation and Consideration

Jackson Crossroads LLC v. Commissioner, T.C. Memo. 2024-111 (2024)**:** This case is a recent example of the ongoing battle over valuation and other technical requirements. The Tax Court rejected the IRS's argument that the properties were "inventory" and therefore limited the deduction to the taxpayer's basis. However, the court ultimately found that the taxpayers had grossly overvalued the easements and imposed significant penalties. This outcome reflects the IRS's continued success in challenging the appraisals in syndicated transactions, even when it loses on other legal arguments.

In ***Brooks v. Comm'r, 109 F.4th 205 (2024)***, the United States Court of Appeals for the Fourth Circuit affirmed the U.S. Tax Court's decision to disallow a charitable tax deduction for a conservation easement and to impose significant penalties on the taxpayers. The taxpayers purchased a large parcel of vacant land in Georgia for $1.35 million. They subdivided the property into two parcels and, a year later, donated a conservation easement on one of the parcels (41 acres) to a local government entity, Liberty County. On their tax returns, they claimed a charitable deduction of over **$5.1 million** for the donation. The IRS disallowed the deduction and imposed a 40% gross valuation misstatement penalty.

The court affirmed the disallowance of the deduction and the penalty on several grounds, primarily focusing on the taxpayers' failure to comply with crucial procedural and substantiation requirements of the IRC.

- **Lack of Contemporaneous Written Acknowledgement:** The court found that the Brooks's failed to provide a proper **contemporaneous written acknowledgment** (CWA) for their donation as required by law. The deed of easement they provided was insufficient because it contained boilerplate language about "ten dollars ($10.00) and other good and valuable consideration" but failed to explicitly state whether the donee (Liberty County) provided any goods or services in exchange for the easement. The court rejected the taxpayers' argument that this was a technicality.

- **Gross Valuation Misstatement:** The court upheld the 40% penalty for gross valuation misstatement. The taxpayers had initially claimed a $5.1 million deduction for a property they had purchased just a year earlier for $1.35 million. At trial, they abandoned this valuation and presented a new appraisal of $3.63 million, which the Tax Court also found to be speculative and unreliable. The court found that the value of the easement was actually much lower than even the revised appraisal, which justified the penalty.
- **Inadequate Baseline Report:** While not the primary reason for the disallowance, the court noted that the baseline report provided with the easement was "woefully inadequate." It failed to properly document the condition of the property at the time of the donation or to clearly delineate the rights retained by the landowners versus the rights given up, which is a key requirement for a valid conservation easement donation.

2.2.6 Extinguishment (Eminent Domain Proceeds) (Regulation Vacated).

Oakbrook Land Holdings, LLC v. Commissioner, 154 T.C. 180 (2020), aff'd, 28 F.4th 700 (6th Cir. 2022): This case, along with others, has brought the "Proceeds Regulation" to the forefront. This regulation, Treas. Reg. § 1.170A-14(g)(6)(ii), dictates how the proceeds from an easement's extinguishment (e.g., through condemnation) must be allocated. The Tax Court initially upheld the regulation's validity, but the Eleventh Circuit in a later, unrelated case, ***Hewitt v. Commissioner***, 21 F.4th 1336 (11th Cir. 2021), found the regulation to be procedurally invalid under the Administrative Procedure Act (APA). (The IRS did not petition the US Supreme Court for certiorari.) Likewise, the Tax Court in ***Valley Park Ranch, LLC v. Commissioner***, 162 T.C. No. 6 (2024) - concerning a donation from a conservation easement in Oklahoma - held that a specific IRS regulation regarding the allocation of extinguishment proceeds was procedurally invalid, in line with the 11th Circuit *Hewitt* decision.

This line of cases highlights a common issue of the "extinguishment clause" in an easement deed. Many state tax credit programs require deeds to comply with these federal regulations. The *Valley Park Ranch* decision, while favorable to the taxpayer on a procedural point, emphasizes how the language of the deed can be a key point of failure in relation to state tax credits and deductions. For example, the **Virginia Department of Taxation** has issued private rulings that clarify its position on conservation easement tax credits. For example, Public Document 05-122 from the Virginia Tax Commissioner states that if the IRS disallows a charitable deduction for a conservation easement under IRC § 170(h), the Virginia Department of Taxation is required to make a corresponding adjustment and disallow the Virginia Land Preservation Tax Credit.[53]

[53] Public Document 05-122, accessed at https://www.tax.virginia.gov/laws-rules-decisions/rulings-tax-commissioner/05-122

2.2.7 Failure of Perpetuity Requirement

Green Valley Investors, LLC v. Commissioner, T.C. Memo. 2025-15 (U.S. Tax Court). This federal tax case involves easements in Chatham County, North Carolina, and an NC land trust (Triangle Land Conservancy). The court disallowed a tax deduction for a conservation easement donation because it found the easement deed did not comply with federal tax law requirements, particularly the requirement that the conservation purpose be protected "in perpetuity." The case highlights the strict legal standards for drafting conservation easements. It also underscores that the enforceability of the easement is a core tenet that a court, even in a tax context, will scrutinize. A poorly drafted easement that fails to meet federal standards for perpetuity could face significant challenges in a state court enforcement action, as its fundamental validity would be in question.

PART III. Sample State Litigation Use Restrictions

3.1 Virginia

3.1.1 ***Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.P.*** (Va. Sup. Ct., Feb. 12, 2016) — The Supreme Court held that conservation easements are to be interpreted under the same principles that govern restrictive covenants; where language in an easement is ambiguous, courts must construe the ambiguity *against* restrictions and *in favor of* the landowner's free use of land.

3.1.2 ***Mount Aldie, LLC v. Land Trust of Virginia, Inc.***, 293 Va. 190 (2017) The Virginia Supreme Court reversed a summary judgment for the land trust and emphasized context-sensitive construction of easement language (the whole deed must be considered), showing the court will scrutinize factual records before finding an easement breach. This is another decision that highlights both the importance of clear drafting and the willingness of courts to protect landowners where ambiguities exist.

3.2 Maryland

3.2.1 ***Smith v. Montgomery County Planning Board*** **(Md. Ct. Spec. App. 2013) (unreported):** This case involved a dispute over a forest conservation easement. The landowner was cited for building a shed and mowing grass in an area designated as a protected forest. The landowner argued that the easement boundaries were improperly marked by the developer. While the court did not report on the final outcome, the case highlights the critical importance of a clear and accurate baseline report and boundary survey to establish the legal limits of the easement. Without this documentation, enforcement actions can become difficult and protracted.

3.3 Pennsylvania

3.3.1 **New Farming Practices**. *Lancaster Cty. Agric. Pres. Bd. v. Fryberger, 257 A.3d 192 (Pa. Cmwlth. 2021)* involved a 120-acre farm in Lancaster County that was protected by a perpetual agricultural conservation easement which was held by the Lancaster County Agricultural Preserve Board and intended to keep the land in agricultural production. The landowner, Fryberger, entered into a new easement agreement with a municipal authority, Quarryville Borough, to allow for the discharge of treated wastewater onto the farmland through a new irrigation system. This was proposed as a way to dispose of the treated wastewater while also providing fertilizer for the crops.

The Lancaster County Agricultural Preserve Board objected to this new agreement, arguing that the treated wastewater irrigation system was not a "normal agricultural operation" permitted by the original conservation easement. The Board sought an injunction to prevent the new irrigation system from being installed.

The Court ruled that the proposed use of the treated wastewater as fertilizer, through an irrigation system, did constitute a "normal agricultural operation" under the terms of the easement. The court adopted a broad and modern interpretation of "normal agricultural operations," finding that the use of treated wastewater as a fertilizer was a technologically advanced farming practice that was consistent with the goal of long-term agricultural production. The court relied on evidence showing this practice was permitted by state law and used elsewhere. The court also applied standard principles of contract law, noting that if there is any doubt as to the meaning of a term in the easement, it should be construed in a way that aligns with the parties' intent and the reasonable purpose of the agreement.

3.3.2 **Standing to Sue.** *Schwartz v. Chester County Agricultural Land Preservation Board*, 180 A.3d 510 (Pa. Cmwlth. 2018) involved a property in Chester County, Pennsylvania, that was subject to an agricultural conservation easement. The owner of a neighboring property believed that the use of the property for a composting business violated the terms of the easement and filed a formal complaint with the Chester County Agricultural Land Preservation Board, requesting that they enforce the terms of the easement. When the Board did not take the action she wanted, Schwartz appealed their decision to the court, which ruled that Schwartz **did not have standing** to bring the enforcement action. The court's decision rested on the terms of the conservation easement itself, which did not grant a third party the right to enforce the easement. (The right to enforce the easement was specifically given to the Chester County Agricultural Land Preservation Board.)

The court reviewed the relevant state laws, including the Pennsylvania Agricultural Area Security Law (AASL) and the Conservation and Preservation Easements Act (CPEA) and held that neither of these statutes provided for a private right of action for a third-party neighbor. The court noted that in order to have standing, a person must show a "direct, immediate, and substantial interest" that is greater than the interest of the general public.

3.4 Ohio

3.4.1 **Vague Deed Description Renders Conservation Easement Unenforceable.** In *Zagrans v. Elek, 2009-Ohio-2942 (2009),* the Ohio Court of Appeals held that a conservation easement was unenforceable because of the defective legal description. In 2001 landowner granted a conservation easement on a 42-acre parcel of land in Summit County, Ohio, to the Summit County Land Conservancy (later known as the Western Reserve Land Conservancy), which was recorded. Years later, when the landowner contracted to sell a portion of the land, it was discovered that the legal description in the original conservation easement deed was not a metes and bounds description but rather a "narrative description" that failed to accurately define the boundaries of the easement. The court found that the description was so vague and defective that it failed to provide adequate notice to a third-party purchaser or to the public, and was thus unenforceable.

3.4.2 **Eminent Domain and Prior Public Use Doctrine**. In ***Colum. Gas of Ohio, Inc. v. Bailey, 2023-Ohio-1245*** the Ohio Court of Appeals dealt with the conflict between a public utility's authority to use eminent domain and the public purpose served by a farmland preservation easement. The case involved an eminent domain action brought by Columbia Gas of Ohio, Inc., a public utility, to acquire an easement for a natural gas pipeline. The proposed pipeline route crossed a parcel in Union County that was subject to a permanent agricultural conservation easement held by the state of Ohio. The easement was designed to protect the land from development in perpetuity. The landowners opposed the pipeline, arguing that it would violate the terms of the agricultural easement and interfere with the public purpose of farmland preservation.

The Ohio Court of Appeals affirmed a lower court's dismissal of Columbia Gas's eminent domain petition. The court held that the agricultural conservation easement, which protects farmland for the public good and is a "prior public use". As such, under Ohio law, a new public use (like a pipeline) generally cannot be established if it will destroy or significantly interfere with an existing public use (like a conservation easement).

PART IV. Term-Limited Programs and Contract Termination

4.1 Revocability of Conservation Contracts

Though conservation easements face high hurdles for modification and revocation, conservation contracts (by definition term-limited) are more easily canceled. However, the landowner must pay back the annual payments made to him plus interest, plus liquidated damages.[54] As noted above, other term-limited programs – including Conservation Security Program (CSP) and Wildlife Habitat Improvement Program (WHIP) – though eliminated in the 2018 Farm Bill, may still have live contracts with similar repayment schemes to CRP. Note that early termination payments are not considered fines or penalties and may thus be capitalized.[55]

Apart from ACEP, the federal Farm Bill authorizes a number of other programs - administered by NRCS - which take the nature of a contract rather than a transfer of rights in real property. The 2018 Farm Bill eliminated certain programs, though contracts on those programs may not have expired. Current authorized programs are:

4.1.1 *Conservation Reserve Program (CRP)*

The Conservation Reserve Program aims to enroll ecologically sensitive acreages in conservation practices to reduce soil erosion, improve water and soil quality, and provide wildlife habitat and food sources. CRP allows eligible landowners to enter into 10 to 15 year contracts that provide annual rental payments and reimburse the cost of establishing conservation features. Such features may include longleaf pine, riparian forest buffers, and wetland restoration.

4.1.2 *Environmental Quality Incentive Program (EQIP)*

EQIP focuses on agricultural production practices that protect ecological benefits, offering financial and technical assistance for installing conservation practices on eligible agricultural land. EQIP may pay up to 75% (or more for historically underserved groups) of the costs of certain practices if the stand and practices qualify. EQIP activities must be carried out according to a developed comprehensive nutrient management plan approved by a Natural Resource Conservation Service (NRCS) agent in the conservation district where the land is located.[56]

PART V Conservation Agreements: Voluntary Agricultural District and Enhanced Voluntary Agricultural District (The North Carolina Example)

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[54] 7 CFR § 1410.52

[55] See McEowen, R., Early Termination of Conservation Reserve Program (CRP) Contracts [Referring to I.R.C. §162 or Treas. Reg. §1.162-21(b)(2)], Iowa State, at https://www.calt.iastate.edu/early-termination-conservation-reserve-program-crp-contracts

[56] These three program vignettes were adapted from NC Cooperative Extension Fact Sheet # WON-31. For more detailed information on federal land protection opportunities, see Megalos, M., Chizmar, S., Parjuli, R., *Voluntary Conservation Options for Land Protection in North Carolina* (NC State Cooperative Extension Fact Sheet #WON-31). Available at https://content.ces.ncsu.edu/voluntary-conservation-options-for-land-protection-in-north-carolina

North Carolina offers ordinance authority to counties for the shorter term protection of farm and forest land from non-agricultural of forest use development. Voluntary Agricultural Districts (VADs) and Enhanced Voluntary Agricultural Districts (EVADs) are programs created by county ordinance as authorized under the Agricultural Development and Farmland Preservation Enabling Act.[57] Both VADs and EVADs are term-limited and renewable, and offer a parcel-owner certain benefits in exchange for the landowner's abstention from using the parcel for non-agricultural or forest purposes. The distinction between the VAD and the EVAD is primarily one of revocability, though EVADs offer the landowner some extra benefits. The program is managed by a "farmland advisory board" (called different names in different counties). As of 2022, 91 of North Carolina's 100 counties have a VAD or EVAD (or both) ordinance.

For both VAD and EVAD ordinances, the county is authorized - but not obligated - to extend certain benefits by the ordinance to the owner of an enrolled parcel. One benefit is the right of a landowner to receive a public hearing before a public agency may file a condemnation action under its eminent domain power to take land enrolled as a VAD[58] Another possible benefit is the waiver of water and sewer assessments otherwise required under another county ordinance.[59] Another benefit - this one required - is that a "proximity notice" be placed in the land records system to warn purchasers of adjacent properties within half a mile of the VAD/EVAD-enrolled parcel's boundary that a farm is operating nearby. (This last benefit is considered a nuisance-warning mechanism to reduce conflicts between neighbors.) Again, the public hearing requirement and water/sewer assessment waiver are optional benefits; the proximity warning is mandatory.

Two benefits unique to the EVAD-enrolled parcel are: 1) an operator on the parcel (owner or tenant/lessee) may receive up to 25% of their gross sales from the sale of nonfarm products and still qualify as a bona fide farm that is exempt from zoning regulations under G.S. 153A-340(b); and 2) may receive a higher share of funds from the Agricultural Cost Share Program (established to minimize nutrient pollution).[60]

With the passage of the NC Farm Act of 2021[61] there are three basic requirements for enrollment of a parcel in a VAD or EVAD: 1) that the parcel be used and thus qualify as a Bona Fide Farm[62] for zoning purposes; 2) that the parcel be managed under an erosion control plan if the parcel is considered highly erodible land (HEL) as determined by the federal Natural Resources Conservation Service (NRCS); and 3) is subject to a "conservation agreement."

57 N.C.G.S. §106-735 through § 106-743.5
58 N.C.G.S. §106-742
59 N.C.G.S. §106-741
60 See N.C.G.S. §106-850
61 Senate Bill 605 / SL 2021-78
62 N.C.G.S. §G.S. 106-743.4(a) and G.S. 160D-903

The form of conservation agreement is not specific to the VAD ordinance and generally describes an agreement by the landowner to restrict certain activities on the land for a term. The conservation agreement is defined by statute as:

> *"[A] right, whether or not stated in the form of a restriction, reservation, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of land or improvement thereon or in any order of taking, appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, horticultural, farming or forest use…"*[63]

Such conservation agreements are distinguished from conservation easements, which under NC statute[64] mirror the federal definition in the Internal Revenue Code, which requires perpetuity.[65] (The concept of "perpetuity" means that there is no current legal avenue whereby the parcel becomes free of the restrictions imposed by the conservation easement.)

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[63] N.C.G.S. §121-35. The definition continues to further describe in detail various prohibited activities.
[64] N.C.G.S. §40A-80(b). Note that the NC statute refers to a "qualified real property interest" which is defined in the federal code as perpetual.
[65] 26 U.S. Code §170(h)(2)

APPENDIX A

This instrument prepared by and return to:

STATE OF NORTH CAROLINA
COUNTY OF ______________________

WARRANTY
DEED OF CONSERVATION EASEMENT

This Deed of Conservation Easement ("Easement") is granted on this ___day of _____________, 20__, by ____ having and address of ____(“GRANTOR”), to ____, having an address of ____ (“GRANTEE”), and the United States of America ("United States") acting by and through the United States Department of Agriculture, Natural Resources Conservation Service **(**hereinafter "USDA", "United States", or **"**NRCS**")**, acting on behalf of the Commodity Credit Corporation as its interest appears herein, for the purpose of forever conserving the agricultural productivity of the Protected Property and its value for resource preservation and as open space. The Grantor, Grantee, and the United States are collectively referred to as **"The Parties"**.

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successor and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

The United States is providing $_________ towards the purchase of this Conservation Easement; which amount represents ___% of the appraised fair market value of the rights conveyed by this Conservation Easement ("Easement Value"). Grantor is donating ___% of the Easement Value and the remaining ___% of the Easement Value is provided by the Grantee in the amount of $__________; for a total cash consideration of $____________.

RECITALS

WHEREAS, Grantor is the sole owner in fee simple, of a certain farm property identified in Exhibit A located in __________ Township, _________ County, North Carolina and identified on the plat of property entitled "________________________________ Conservation Easement" prepared by ____________________________________ which plat is recorded at Plat Book _____ Page ______, _______________ County Registry with said farm property totaling _____ acres covered by this Conservation Easement (the "Protected Property").

WHEREAS, the Protected Property consists primarily of productive agricultural land. The Protected Property also contains within its boundary buildings and/or improvements as shown on Exhibit ___ attached hereto and incorporated herein. The majority of the soils on the Protected Property have been classified as "prime" or "statewide important" soils by NRCS. It is the primary purpose of this Easement to protect the agricultural soils and agricultural viability and productivity by limiting nonagricultural uses of the Protected Property.

WHEREAS, the Protected Property also includes outstanding woodland and riparian habitats for a variety of wildlife species of importance to the Grantor, the people of __________County and the people of North Carolina.

WHEREAS, The Protected Property contains numerous tributaries that flow into the Flat River which flows south into Lake Michie, a source of drinking water for residents of __________ County, and where the Protected Property is within the Flat River Protected Watershed and the Flat River Agricultural Priority Area. It is a secondary purpose of this Easement to protect the natural wildlife habitat, historical, and scenic resources. To the East, the overall farm property is bordered by North Carolina State University Hill forest, portions of which are permanently protected. The agricultural, natural, wildlife habitat and scenic resources of the Protected Property are collectively referred to as the "Conservation Values" of the Protected Property.

WHEREAS, the specific Conservation Values of the Protected Property and its current use and state of improvement are described in a Baseline Documentation Report ("Report") prepared by the Grantee with the cooperation of the Grantor, and acknowledged by both parties to be accurate as of the date of his Easement. This Report may be used by the Grantee to document any future changes in the use or character of the Protected Property in order to ensure the terms and condition of the Easement are fulfilled. This Report, however, is not intended to preclude the use of other evidence to establish the present condition of the Protected Property if there is a controversy over its use. The Grantor and Grantee have copies of this Report, and said Report will remain on file at the office of the Grantee.

WHEREAS, the Grantor and Grantee agree that the current agricultural use of, and improvements to, the Protected Property are consistent with the conservation purposes of this Easement.

WHEREAS, the Grantor intends that the Conservation Values of the Protected Property be preserved and maintained, and further, Grantor intends to convey to the Grantee the right to preserve and protect the agricultural and other Conservation Values of the Protected Property in perpetuity.

WHEREAS, the Conservation Purposes of the Easement are recognized by, and the grant of this Easement will serve, the following clearly delineated governmental conservation policies:

(1) Section 1238 H and 1238 I of the Food Security Act of 1985, as amended, which authorizes the Farm and Ranch Lands Protection Program (FRPP), administered through the NRCS which provides funds for the acquisition of Conservation Easements or other interests in prime, unique, or other productive soils for the purpose of limiting conversion to nonagricultural uses of the land;

(2) The purpose of the FRPP, 16 U.S.C. 3838h and 3838i, is to protect the agricultural use and related conservation values of eligible land by limiting nonagricultural uses of the Protected Property in perpetuity;

(3) North Carolina General Statute 139-2 et seq., which provides that "it is hereby declared…that the farm, forest and grazing lands of the State of North Carolina are among the basic assets of the State and the preservation of these lands is necessary to protect and promote the health, safety and general welfare of its people… It is hereby declared to be the policy of the legislature to provide for the conservation of the soil and resources of this State;"

(4) North Carolina General Statute 106-583 et seq., which states that "It is declared to be the policy of the State of North Carolina to promote the efficient production and utilization of the products of the soil as essential to the health and welfare of our people and to promote a sound and prosperous agriculture and rural life as indispensable to the maintenance of maximum prosperity;"

(5) The Uniform North Carolina Conservation and Historic Preservation Agreements Act, North Carolina General Statute 121-34 et seq., which provides for the enforceability of restrictions, easements, covenants or conditions "appropriate for retaining in land or water areas predominantly in their natural, scenic, or open condition or in agricultural, horticultural, farming or forest use," and which provides for tax assessment of lands subject to such agreements "on the basis of the true value of the land and improvement less any reduction in value caused by the agreement;"

(6) The North Carolina Conservation Tax Credit Program, North Carolina General Statute 105-130.34 and 105-151.12 et seq., which provides for state income tax credits for donation of land that are useful for fish and wildlife and wildlife conservation and other similar land conservation purposes;

(7) The special use assessment of farm and forest land as set forth in North Carolina General Statute 105-277.2 et seq.

WHEREAS, Grantor and Grantee have the common purpose of protecting the above described Conservation Values and current condition of the Protected Property and preventing conversion of the Protected Property to non-agricultural uses and Grantor agrees to create and implement a conservation plan (hereinafter the "Conservation Plan") that is developed utilizing the standards and specifications of the NRCS Field Office Technical Guide and 7 CFR Part 12, and is approved by the Grantee

WHEREAS, the Grantee is a body politic existing under Chapter 153A of the North Carolina General Statutes, and is qualified to hold Easements under the applicable laws of the State of North Carolina and is a qualified organization under I.R.C. section 170(h).

NOW, THEREFORE, for ____________________Dollars ($___________) and for the reasons given and other good and valuable consideration and in consideration of their mutual covenants, terms, conditions and restrictions contained herein, the Grantor hereby voluntarily grants and conveys to the Grantee, and the Grantee hereby voluntarily accepts, a perpetual Conservation Easement in the Protected Property, which Easement is an immediately vested interest in real property of the nature and character described herein. Grantor promises that he will not perform, nor knowingly allow others to perform, any act on or affecting the Protected Property that is inconsistent with the covenants contained herein. Grantor authorizes the Grantee to enforce these Covenants in the manner described below.

ARTICLE I. GENERAL

1.1. <u>Statement of Purpose.</u> It is the primary purpose of this Agricultural Conservation Easement to enable the Protected Property to remain in agricultural use by preserving and protecting its agricultural soils and agricultural viability and productivity by limiting nonagricultural uses of the Protected Property. No activity that would significantly impair the actual or potential agricultural use of the Protected Property shall be permitted. To the extent that the preservation and protection of the natural, historic, recreational, habitat or scenic values referenced in this Easement are consistent with the primary purposes stated above, it is within the purpose of this Easement to also protect those values, and no activity that would significantly impair those values shall be permitted.

1.2. <u>Perpetual Duration.</u> This Conservation Easement over the Protected Property as further described in <u>Exhibit A</u>, shall be perpetual. It is an easement in gross, runs with the land and is enforceable by Grantee against Grantor as provided herein, and against Grantor's representatives, successors, assigns, leases, agents and licensees.

1.3. <u>Extinguishment of Development Rights</u>. Except as otherwise reserved to the Grantor in this Easement, the parties agree that all development rights appurtenant to the Protected Property are hereby released, terminated and extinguished, and may not be used on or transferred to any portion of the Protected Property as it now or hereafter may be bounded or described, or used or transferred to any other property adjacent or otherwise, nor used for the purpose of calculating permissible lot yield of the Protected Property or any other property by anyone including the Grantor and Grantee.

1.4. <u>Compliance with other Regulatory Requirements</u>. The Grantor is responsible for complying with any and all additional permits or regulation to use or develop the Protected Property under the terms of this Easement, including ___________ City or County, State of North Carolina or Federal requirements, regardless of any reserved rights or permissions contained in this Easement Document.

ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

2.1. Subdivision. Further subdivision, partitioning or dividing the Protected Property is prohibited.

2.2. Industrial and Commercial Use. Industrial and commercial use of the Protected Property and access therefore is prohibited. This restriction does not prohibit the use of the Protected Property or construction of improvements primarily for agricultural, horticultural, forestry, silvicultural and non-developed recreational purposes as more specifically defined herein.

2.3. Mining. There shall be no filling, excavation, dredging, mining or drilling, removal of topsoil, sand, gravel, rock, peat, minerals, hydrocarbons or other materials, and no change in the topography of the land in any manner except as necessary for the purpose of farming operations or combating erosion of flooding and as reasonably necessary for any permitted maintenance, construction or reconstruction on the Protected Property. Disturbed areas for the purpose of removing topsoil, sand, gravel, rock, peat, minerals, or other materials shall be limited to one (1) acre in total surface area and will be restored as soon as practicable after the disturbance. Any removal of material as provided for in this subsection shall be solely for the purposes of the Protected Property and shall not be removed and sold to a third party. Under no circumstances is the exploration, exploitation and/or drilling for oil, natural gas, coal and/or other hydrocarbons permitted in, on or to the Protected Property.

2.4 Motorized Vehicle Use. Grantor shall not use motor vehicles on the Protected Property or grant permission for such use except as necessary in the accomplishment of the agricultural, forestry, habitat management, law enforcement and public safety, or conservation uses of the Protected Property, provided that no use of motorized vehicles shall create impacts that are detrimental to the productivity of the soils on the Protected Property and the Purposes of the Conservation Easement; however, notwithstanding the foregoing, use of snowmobiles on snow is allowed on the Protected Property.

2.5. Dumping and Trash. Dumping or storage of soil, trash, refuse, debris, ashes, garbage, waste, abandoned vehicles or parts, appliances, machinery, or hazardous substances, or toxic or hazardous waste, is prohibited with the exception of agricultural products, byproducts (including the composting of biodegradable materials for on-farm use) and agricultural equipment used on the Protected Property, so long as such storage is done in accordance with all applicable government laws and regulations and in such a manner so as to not impair the Conservation Values of the Protected Property.

2.6. Structures and Improvements. There shall be no building, tower, facility, mobile home, or other structure constructed or placed on the Protected Property, not otherwise specifically authorized herein, unless related specifically to a right reserved to the Grantor in Article III. Any structures permitted or reserved by Grantor shall be of such reasonable size, proportion, height and character so as not to significantly detract from the open space and agricultural purposes of this Easement. Under no circumstances shall recreational fields, golf courses or ranges, airstrips or helicopter pads be constructed or permitted on the Protected Property.

2.7. Signage. Display to the public of billboards, signs or advertisements is prohibited on or over the Protected Property, except to state the name of the property and its farmland status, including its easement status, the name and address of the occupant, to advertise an on-site activity, and to advertise the property for sale or rent, as allowed by the Sign Ordinance set forth in the City-County Unified Development Ordinance. Grantor shall be permitted to erect no trespassing signs, traffic or directional signs or warning signs as may be expedient and to post the property.

2.8. Impervious Surface. Under the policy restrictions of the USDA, impervious surfaces within the overall Protected Property shall be limited to a maximum amount of two percent (2%) of the total acreage of the Protected Property under this Easement. For this restriction, impervious surface shall include roof tops, asphalt, and concrete surfaces to include buildings, driveways, walkways and farm roads. Excluded from this definition are compacted dirt and gravel surfaces, including farm roads, driveways and other surfaces that do not fully restrict the percolation of water into the soil. This restriction shall apply to permanent and temporary structures and facilities, both existing and proposed.

ARTICLE III. RIGHTS AND RESPONSIBILITIES RETAINED BY GRANTOR

Notwithstanding any provisions of this Easement to the contrary, the Grantor reserves to and for themselves and their successors all customary rights and privileges of ownership, including the rights to sell, lease, and devise the Protected Property, together with any rights not specifically prohibited by or limited by this Easement, and consistent with the section 1.1., "Statement of Purpose". Unless otherwise specified below, nothing in this Easement shall require the Grantor to take any action to restore the condition of the Protected Property after any Act of God or other event over which they have no control. Grantor understands that nothing in this Easement relieves them of any obligation or restriction on the use of the Protected Property imposed by law.

3.1. Right to Farm. Grantor retains the right to farm, or to permit others to farm the Protected Property, consistent with the Conservation Values of the Protected Property and in accordance with applicable local, state and federal laws and regulations and in accordance with the NRCS Conservation Plan. Subject to any prohibitions stated herein, farming, grazing, horticultural (provided such activity does not remove topsoil from the Protected Property) and animal husbandry operations are permitted only if conducted consistent with Best Management Practices promulgated by the State of North Carolina and in conformity with a Conservation Plan as required in Section 4.5 hereafter.

3.2. Right to Privacy. Grantor retains the right to privacy and the right to exclude any member of the public from trespassing on the Protected Property. This Easement is not intended to create any rights of the public in, on or to the Protected Property.

3.3. Right to Use the Protected Property for Customary Rural Enterprises. Grantor retains the right to use the Protected Property, for otherwise lawful and customary rural enterprises, such as, but not limited to, farm machinery repair, sawmills, firewood distribution, for nature and historic tours, equestrian activities, and other passive or "Ecotourism", "Agritourism" and "Special Events" as defined herein, educational programs or farm meetings and like activities, so long as such activities are consistent with __________ County zoning regulations and permits required by and issued by __________ County under its laws and ordinances. Any structures required for permitted purposes shall be located only within the Farmstead Areas, as shown on Exhibit __. Any permanent or temporary structure or otherwise addition to the impervious surface shall not cause the total impervious surface restriction of the Protected Property to exceed two percent.

Grantor has the right to establish and carry out customary rural enterprises provided said activities are compatible with the Conservation Purposes of this Conservation Easement and agriculture and forestry uses of the Protected Property, and are subordinate to the agricultural and residential use of the Protected Property. The enterprises shall be conducted in the buildings required for the agricultural use of the Protected Property or the residences in which full time employees of the farm reside. Enterprises which market petroleum or chemical products are prohibited.

For purposes herein, the term "Ecotourism" shall be broadly defined to mean tourism and activities that are carried out in a relatively undisturbed natural area that serves as a tool for the education, appreciation, and promotion of natural and cultural heritage that has minimal negative impacts on the environment and farming resources of the Protected Property and promotes conservation and best management practices and provides constructive ongoing contributions to and for the local community.

The term "Agritourism" shall be broadly defined to mean those farming activities and traditional rural activities that are carried out on any agricultural location, including horticultural and agribusiness operations, that allow members of the general public, for recreational, entertainment, active involvement, or educational purposes, to view or enjoy rural activities, including farming, ranching, historic, cultural, harvest-your-own activities, or natural activities and attractions, or "Special Events" as defined herein, that have minimal negative impacts upon the environment and the Conservation Values of the Protected Property and are limited to "de minimis" access to and uses of the Protected Property. An activity is an agritourism activity whether or not the participant paid to participate in the activity.

The term "Special Events" shall be broadly defined to mean a one-time or infrequently occurring event outside normal "Agrituourism" programs or activities that provides for an agriculturally based leisure, social or cultural experience outside the normal range of agritourism choices or beyond the everyday agricultural experience such as but not limited to: seasonal festivals, harvest celebrations, field days, square dances and the like. In no event shall "Special Events" exist on the Protected Property for more than seven (7) days per twelve (12) month period nor exist in a manner that negatively impacts the soils or Conservation Values. Any parking associated with such events shall be located within the Farmstead Areas and/or existing farm roads as depicted in Exhibit __.

3.4. Procedure to Construct Buildings and Other Improvements. The Grantor's rights to construct or reconstruct/repair buildings and other improvements are described in subparagraphs (a) through (e) below. Any construction or reconstruction not permitted below is prohibited. Before undertaking any construction or reconstruction that requires advance permission, the Grantor shall notify the Grantee and obtain written permission. All construction or reconstruction is subject to ____________ City-County zoning regulations and must be consistent with permits required by and issued by the City and/or County of __________ under applicable laws and ordinances for such construction activities. Any building may be constructed under applicable laws and ordinances for such construction activities. Any building that may be constructed under this section may be repaired and replaced.

Grantor further understands that the two (2) percent maximum impervious surface limit set by the USDA, FRPP disallows the construction of any new structures or impervious roads or other improvements to the Protected Property or replacement of said structures that would increase the total impervious surface area above the two percent maximum. All permanent construction and/or placement upon the Protected Property of any impervious surface must be approved in writing by the Grantee to ensure the maximum impervious limit is not exceeded.

a) **Fences** – Existing fences may be repaired and replaced, and new fences may be built on the Protected Property for purposes of reasonable and customary management of livestock and wildlife or to fence off the perimeter of the Protected Property without any further permission of the Grantee.

b) **Paving and Road Construction** – Construction and maintenance of unpaved farm roads that may be reasonably necessary and incidental to carrying out the improvements and uses permitted on the Protected Property by this Easement are permitted. Such roads shall be located so as to minimize impact to prime and unique soils on the Protected Property. No portion of the Protected Property shall be paved or otherwise covered with concrete, asphalt, or any other impervious paving material, without the advance written permission of the Grantee.

c) **Farm Structures & Improvements** – New buildings, barns, sheds and other structures and improvements to be used primarily for agricultural purposes, including the processing or sale of farm products predominantly grown or raised on the Protected Property may be built within the "Farmstead Area" as shown on Exhibit __, after written approval from the Grantee is obtained. The Grantee shall give such approval within a reasonable time, unless it determines that the proposed building, structure or improvement would exceed the total maximum impervious surface restriction by the USDA, FRPP, significantly diminish or impair the Conservation Values of the Protected Property or otherwise be inconsistent with the purposes of this Easement. Existing buildings/barns/sheds and greenhouses as depicted in Exhibit __, may be repaired or reconstructed in accordance with all other Easement provisions.

Any temporary structures proposed for locations outside the Farmstead Areas shall be for agricultural purposes only and may only be erected with the advance written permission of the Grantee. The Grantee shall give such permission within a reasonable time and ensure the proposed temporary structure is erected in a way that minimizes any negative impact to the soils, diminishes and/or in any way is inconsistent with the Conservation Values of the Conservation Easement Deed.

d) **Farm Support Housing** – No more than a total of one (1) new single or multi-family dwelling to house farm tenants, employees or others engaged in agricultural production or other farm support uses on the Protected Property may be built on the Protected Property. The dwelling must be not greater than 1,500 square feet in floor size and shall be located within that area identified and marked as the "Farmstead Area" identified on Exhibit __.

e) **Single Family Residential Dwellings** – The Easement includes one (1) existing single family residential dwelling within the 3 acre Farmstead Area envelope shown on the Exhibit __. This residence may be renovated or enlarged so long as the construction is first approved by the Local Grantee to determine that it does not exceed the maximum impervious surface restriction designated by the USDA, FRPP. The residential dwelling shall be no greater than four thousand (4,000) square feet, including heated and unheated space. All residential structures and appurtenant structures such as garages and sheds shall be contained in the farmstead area.

No additional single family residential dwelling may be built anywhere on the Protected Property.

3.5. Recreational Improvements. Grantor expressly reserves the right to engage in low impact non-developed recreational activities such as hunting, fishing, hiking, bird watching, etc. and to control access of all persons for the purpose of hunting and fishing, hiking, bird watching, etc. and to control access of all persons for the purpose of hunting and fishing; provided that these activities do not impact the protection and conservation of any animal habitat or other Conservation Values of the Protected Property.

3.6. Utility Services, Septic Systems, and Fuel Storage. Installation, maintenance, repair, replacement, removal and relocation of electric, gas, and water facilities, sewer lines and/or other public or private utilities, including telephone or other communication services over or under the Protected Property for the purpose of providing electrical, gas, water, sewer, or other utilities to serve improvements permitted herein, and the right to grant easements over and under the Protected Property for such purposes, is permitted. Installation, maintenance, repair or improvement of a septic system or other underground sanitary system for the benefit of any of the improvements permitted herein, is permitted. Above ground storage tanks for fuels or any other materials for residential or on-site agricultural use are permitted up to a maximum size of one thousand (1000) gallons. Any such tanks are required to be located within the Farmstead Envelopes, shall be constructed to minimize any pollution to land or water, and in accordance with applicable local, state and federal laws and regulations. All other utilities are prohibited on the Protected Property including, but not limited to, communication towers or structures. Notwithstanding the previous sentence, with advance written permission from Grantee, Grantor retains the right to construct a wind turbine or similar device for the purpose of generating electricity to be used for the permitted improvements and farming operations occurring on the Protected Property.

3.7. Forest Management. Pursuant to a forest management plan trees may be removed, cut and otherwise managed (to control insects, for pasture restoration, for firewood and other non-commercial uses, including construction of permitted improvements and fences) on the Protected Property. Trees may be planted, harvested and removed within the areas identified and marked as "Farmstead Area" on Exhibit __ without the advance written permission of the Grantee.

Any other cutting, removal or harvesting of trees may be undertaken within the areas identified and marked as "Forest" on Exhibit __ only under one or both of the following conditions:

a) The purpose is for clearing land for cultivation or use by livestock, and it occurs outside of a 50-foot buffer along both sides of any intermittent streams which run through the Protected Property and are identified on Exhibit __ . These steam buffer areas are excluded from this provision unless the buffer area becomes re-vegetated for a period of 10 years or more in which case this provision shall apply.

b) The purpose is for commercial harvesting of trees if in accordance with the Conservation Plan referenced in Section 4.5 herein and a forest management plan that is consistent with the above-referenced Conservation Plan and prepared by a professional forester approved by Grantee, such approval to not be unreasonably withheld.

3.8. Water Rights. Grantor shall retain and reserve the right to use any appurtenant water rights sufficient to maintain the agricultural productivity of the Protected Property. Grantor shall not transfer, encumber, lease, sell or otherwise separate such water rights from title to the Protected Property itself.

3.9. Land Application. The land application, storage and placement on the Protected Property of domestic septic effluent and municipal, commercial or industrial sewage sludge or liquid generated from such sources for agricultural purposes may be undertaken only if in accordance with all applicable federal, state and local laws and regulations and in accordance with the NRCS Conservation Plan. Spray irrigation of domestic septic effluent to serve the Protected Property's dwelling(s) is prohibited.

3.10. Natural Resource Restoration and Enhancement Activities. Notwithstanding any terms contained within this Easement, Grantor may engage or contract others to engage in any activity designed to repair, restore, or otherwise enhance the natural resources found or once present on the Protected Property, that are consistent with the Conservation Values of this Easement and the Conservation Plan and subject to the written approval of Grantee.

3.11. Pond Creation and Wetland Restoration. The Grantor is permitted to construct ponds and restore wetlands in accordance with an NRCS Conservation Plan and NRCS standards and specifications. Ponds must support agricultural operations such as irrigation, livestock water supplies, or fire control. Wetlands must be either used to treat agricultural waste or support critical habitat needs for wildlife species. The size of ponds and wetlands must be supported by appropriate documentation in the NRCS Conservation Plan case file.

ARTICLE IV. ONGOING RESPONSIBILITY OF GRANTOR AND GRANTEE

Other than as specified herein, this Easement is not intended to impose any legal or other responsibility on the Grantee or the United States, or in any way to affect any existing obligation of the Grantor as owners of the Protected Property.

Among other things, this shall apply to:

4.1. Taxes. The Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the Protected Property. If the Grantee is ever required to pay any taxes or assessments on their interest in the Protected Property, the Grantor shall upon demand reimburse the Grantee for the same.

4.2. Upkeep and Maintenance. The Grantor shall continue to be solely responsible for the upkeep and maintenance of the Protected Property, to the extent it may be required by law. The Grantee and the United States shall have no obligation for the upkeep or maintenance of the Protected Property.

4.3. Transfer of Protected Property. The Grantor agrees to incorporate by reference the terms of this Easement in any deed or other legal instrument by which they transfer or divest themselves of any interest, including leasehold interests, in the Protected Property. The Grantor shall notify the Grantee in writing at least thirty (30) days before conveying the Protected Property, or interest therein. Failure of Grantor to do so shall not impair the validity of the Easement or limit its enforceability in any way.

4.4. Transfer of Easement. Subject to the right of enforcement of the United States as specified in Section 4.8. and other pertinent paragraphs herein, and with timely written notice to and prior written approval of the United States, the Grantee shall have the right to transfer the Easement created by this Easement to any public agency or to any private nonprofit organization approved by Grantor, such approval to not be unreasonably withheld, that, at the time of transfer, is a qualified organization under Section 170(h) of the U.S. Internal Revenue Code, as amended and under N.C.G.S. 121-34 et seq., provided the agency or organization expressly agrees to assume the responsibility imposed on the Grantee by this Deed. If the Grantee ever ceases to exist or no longer qualifies under Section 170(h) of the U.S. Internal Revenue Code, or applicable state law, and the United States declines to exercise its contingent rights, a court with jurisdiction may transfer this easement to another qualified organization having similar purposes that agrees to assume the responsibility imposed by this easement.

4.5. Conservation Practices. As required by Section 1238I of the Food Security Act of 1985, as amended, the Grantors, their heirs, successors, or assigns, shall conduct agricultural operations on the Protected Property in a manner consistent with a Conservation Plan prepared by Grantor in consultation with NRCS and approved by the Soil and Water Conservation district. This Conservation Plan shall be developed using the standards and specifications of the NRCS Field

Office Technical Guide and 7 CFR Part 12 that are in effect on the date of execution of this Easement Deed. However the Grantor may develop and implement a Conservation Plan that proposes a higher level of conservation and is consistent with the NRCS Field Office Technical Guide standards and specifications. NRCS shall have the right to enter upon the Protected Property, with advance notice to the Grantor, in order to monitor compliance with the Conservation Plan.

In the event of noncompliance with the Conservation Plan, NRCS shall work with the Grantor to explore methods of compliance and give the Grantor a reasonable amount of time, not to exceed twelve months, to take corrective action. If the Grantor does not comply with the Conservation Plan, NRCS will inform the Grantee of the Grantor's non-compliance. The Grantee shall take all reasonable steps (including efforts at securing voluntary compliance and, if necessary, appropriate legal action) to secure compliance with the Conservation Plan following written notification from NRCS that (a) there is a substantial, ongoing event or circumstance of non-compliance with the Conservation Plan, (b) NRCS has worked with the Grantor to correct such noncompliance, and (c) Grantor has exhausted their appeal rights under applicable NRCS regulations.

Grantor shall be liable for any costs incurred by NRCS its successors or assigns as a result of Grantor's negligence and/or failure to comply with the requirements of this easement as it relates to the conservation plan referenced herein.

If the NRCS standards and specifications for highly erodible land are revised after the date of this Easement Deed based on an Act of Congress, NRCS will work cooperatively with the Grantor to develop and implement a revised Conservation Plan. The provisions of this section apply to the highly erodible land conservation requirement of the FRPP and are not intended to affect any other natural resources conservation requirements to which the Grantor may be or become subject.

4.6. Inspection and Access. With reasonable advance notice to the Grantor or with the Grantor's prior verbal consent, Grantee, its employees and agents and its successors and assigns, shall have the right to enter the Protected Property for the purpose of inspecting the Protected Property to determine whether the Grantor, its successors or assigns are complying with the terms, conditions and restrictions of this Easement.

The United States, acting by and through the Natural Resources Conservation Service its successors or assigns, shall have the right to enter the Protected Property after notifying Grantor for the purposes of ensuring that the Conservation Plan is being implemented appropriately. All notices to the Grantor under this Section may be made either in writing or verbally, at the discretion of the party providing the notice.

4.7. Enforcement. The Grantee shall have the primary responsibility for management and enforcement of the terms of this Conservation Easement, subject to the rights of the United States.

Grantee shall have the right to prevent violations and remedy violations of the terms of this Easement through judicial action, which shall include, without limitation, the right to being proceedings in law or in equity against any party or parties attempting to violate the terms of this

Easement. Except when an ongoing or imminent violation could irreversibly diminish or impair the Conservation Values of the Protected Property, the Grantee shall give the Grantor written notice of the violation and thirty (30) days to cure the violation, before commencing any legal proceedings. If a court with jurisdiction determines that a violation may exist or has occurred, the Grantee may obtain an injunction to stop the violation, temporarily or permanently. The parties agree that a court may issue an injunction or order requiring the Grantor to restore the Protected Property to its condition prior to the violation, as restoration of the Protected Property may be the only appropriate remedy. The failure of the Grantee to discover a violation or to take immediate legal action shall not bar it from doing so at a later time. In any case where a court finds no such violation has occurred, each party shall bear it own costs.

4.8. Rights of the United States. In the event that the Grantee fails to enforce any of the terms of this Conservation Easement, as determined in the sole discretion of the Secretary of the United States Department of Agriculture, the said Secretary of Agriculture and his or her successors and assigns shall have the right to enforce the terms of this Conservation Easement through any and all authorities available under federal or state law.

4.9. Rights of Enforcement. Under this Conservation Easement, the United States is granted the right of enforcement in order to protect the public investment. The Secretary of the United States Department of Agriculture (the Secretary) or his or her assigns, on behalf of the United States, may exercise this right of enforcement under any authority available under State or Federal law if Grantee fails to enforce any of the terms of this Conservation Easement, as determined in the sole discretion of the Secretary.

The United States shall have the right to recover any and all administrative and legal costs from the Grantee, including attorney's fees or expenses associated with any enforcement or remedial action as it relates to the enforcement of this Conservation Easement.

In the event the Grantee attempts to terminate, transfer, or otherwise divest itself of any rights, title, or interests of this Easement without the prior written consent of the Secretary of the USDA and payment of consideration to the United States, then, at the option of such Secretary, all right, title, and interest in this Easement shall become vested in the UNITED STATES OF AMERICA.

In the event NRCS determines it must exercise its Right of Enforcement, NRCS will provide written notice, by certified mail, return receipt requested, to Grantee or Grantee's successors and/or assigns last known address. The notice will set forth the nature of the noncompliance by the Grantee and a 60-day period to cure. If Grantee fails to cure within the 60-day period, NRCS will take the action specified under the notice. NRCS reserves the right to decline to provide a period to cure if NRCS determines that imminent harm may result to the conservation values or other interest in the land it seeks to protect.

ARTICLE V. REPRESENTATIONS OF THE PARTIES

5.1. Grantor's Title Warranty. The Grantor covenants and represents that the Grantor is the sole owner and is seized of the Protected Property in fee simple and has good right to grant and convey the Easement; that the Protected Property is free and clear of any and all encumbrances, including but not limited to, any mortgages not subordinated to this Easement, and that the Grantee shall have the use of and enjoy all the benefits derived from and arising out of his Easement subject to existing easements for roads and public and private utilities.

5.2. Grantor's Environmental Warranty. Grantor warrants that Grantor is in compliance with and shall remain in compliance with, all applicable Environmental Laws. Grantor warrants that there are no notices by any governmental authority of any violation or alleged violation of any and all encumbrances, including but not limited to, any mortgages not subordinated to this Easement, and that the Grantee shall have the use of and enjoy all the benefits derived from and arising out of this Easement subject to existing easements for roads and public and private utilities.

Grantor further warrants that Grantor has no actual knowledge of a release or threatened release of Hazardous Materials on, at, beneath or from the Protected Property. Moreover Grantor hereby promises to hold harmless and indemnify the Grantee and the United States against all litigation, claims, demands, penalties and damages, including reasonable attorneys' fees, arising from or connected with the release or threatened release of any Hazardous Materials, on, at, beneath or from the Protected Property, or arising from or connected with a violation of any Environmental Law by Grantor or any other prior owner of the Protected Property. Grantor's indemnification obligation shall not be affected by any authorizations provided by Grantee to Grantor with respect to the Protected Property or any restoration activities carried out by Grantee to Grantor with respect to the Protected Property or any restoration activities carried out by Grantee at the Protected Property; provided, however that Grantee shall be responsible for any Hazardous Materials contributed after this date to the Protected Property, respectively by Grantee.

"Environmental Law" or "Environmental Laws" means any and all Federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, hazardous materials, worker and community right-to-know, hazard communication noise, radioactive material, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building and land use as may now or at any time hereafter be in effect.

"Hazardous Materials" means any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infections materials and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment.

5.3. Liability and Indemnification. Grantor agrees to indemnify and hold the Grantee, and the United States harmless from any and all cost, claims or liability, including but not limited to reasonable attorneys' fees arising from any personal injury, accidents, negligence or damage relating to the Protected Property, or any claim thereof, unless due to the negligence of Grantee or its agents, in which case liability shall be apportioned accordingly. Grantor is responsible for obtaining liability insurance covering the Property with limits deemed necessary by Grantor, in its sole discretion.

Grantor shall indemnify and hold harmless the United States, its employees, agents, and assigns for any and all liabilities, claims, demands, losses, expenses, damages, fines, fees, penalties, suites, proceedings, actions, and costs of actions, sanctions asserted by or on behalf of any person or governmental authority, and other liabilities (whether legal or equitable in nature and including, without limitation, court costs, and reasonable attorneys' fees on appeal) to which Grantee may be subject or incur relating to the Protected Property, which may arise from, but are not limited to, Grantor's negligent acts or omissions or Grantor's breach of any representation, warranty, covenant agreements contained in this Conservation Easement Deed, or violations of any Federal, State, or local laws, including all Environmental Laws. Grantor is responsible for obtaining liability insurance covering the Property with limits deemed necessary by Grantor, in its sole discretion.

ARTICLE VI. MISCELLANEOUS

6.1. <u>Recording</u>. Grantee shall record this instrument in a timely fashion in the official record of ___________ County, North Carolina, and may re-record it at any time as may be required to preserve the rights of the Grantee, and the United States under this Easement.

6.2. <u>Survival of Terms/Merger of Fee and Easement</u>. The Grantor and Grantee agree that the terms of this Easement shall survive any merger of this fee and easement interest in the Protected Property. In the event the Grantee becomes owner of the Protected Property, or any portion thereof, Grantee shall transfer any right title and interest in this Easement to a third party in accordance with sections 4.4.

6.3. <u>Amendment of Easement</u>. This easement may be amended only with the prior written consent of the Grantee and the Grantor and approved by the Commissioner of Agriculture and the Secretary of the USDA. Any such amendment shall be consistent with section 1.1, "Statement of Purpose" and with the Grantee's easement amendment policies, and shall comply with Section 170(h) of the Internal Revenue Code or any regulations promulgated in accordance with that section. Any such amendment shall be duly recorded without the express written approval of NRCS.

6.4. <u>Boundary Line Adjustments</u>. Boundary line adjustments are permitted only in the case of technical errors made in the survey or legal description. In such cases, boundary line adjustments cannot exceed two acres for the entire Protected Property. A correction deed containing the revised legal description shall be properly executed and duly recorded.

6.5. <u>Procedure in the Event of Termination of Easement</u>. If it is determined that conditions on or surrounding the Protected Property change so much that it becomes impossible to fulfill the conservation purposes of this Easement, a court with jurisdiction may, at the joint request of both the Grantor and the Grantee and with prior written consent of the United States, as provided herein, terminate or modify the Easement created by this Easement in accordance with applicable State law. Any action in condemnation shall require the written approval of the United States of America.

If the Easement is terminated and the Protected Property is sold then as required by Section 1 of 170A-14(g) (6) of the IRS regulations, the Grantee, shall be entitled to recover the proceeds of the conservation easement based on the appraised fair market value of the conservation easement at the time the easement is extinguished or terminated, subject to any applicable law which expressly provides for a different disposition of the proceeds. The United States shall receive, at the time the Conservation Easement is extinguished or terminated, its share of the Conservation Easement based on the appraised fair market value of the Conservation Easement at the time the Conservation Easement is extinguished or terminated. The United States' share shall be proportionate to its percentage of its original investment. The Grantee and the United States of American shall divide their proportionate share as follows: __% to Grantee, ___% to the United States.

6.6. Procedure in the Event of Condemnation or Eminent Domain. Grantor and Grantee recognize that the sale of this Easement, or any part thereof, gives rise to a property right, immediately vested in the Grantee and the United States, with a fair market value equal to the proportionate value that the Easement bears to the value of the Protected Property prior to the restrictions imposed by the Easement. Accordingly, if any condemnation or eminent domain action shall be taken, on all or part of the Protected Property, by any authorized public authority, said authority shall be liable to the Grantee for the value of the property right vested in the Grantee at the time of the signing of this Easement. Due to the federal interest in this Deed, the United States must consent to any such condemnation action.

If condemnation or a taking by eminent domain of a part of the Protected Property or the entire Protected Property by a public authority renders it impossible to fulfill any of the conservation purposes of this Easement on all or part of the Protected Property, the Easement may be terminated through condemnation proceedings. If the Easement is terminated and any or all of the Protected Property is sold or taken for public use, then, as required by Section 1 of 170A-14(g) (6) of the IRS regulations, the Grantee shall be entitled to the proportionate value of the Easement, which has been predetermined as the Protected Property's unrestricted value, subject to any applicable law which expressly requires for a different disposition of the proceeds. The Grantee shall use its proceeds consistently with the general conservation purposes of this Easement.

If this Easement is extinguished or terminated, the United States and the Grantee shall receive their proportional share of the Easement value at the time of termination. Those proportional shares of the Easement are as follows: ___% to Grantee and ___% to the United States of America.

All termination-related or condemnation-related expenses incurred by the Grantor and the Grantee shall be paid out of any recovered proceeds prior to distribution of the net proceeds as described herein.

6.7. Interpretation. This Easement shall be interpreted under the laws of the State of North Carolina and the United States of America, resolving any ambiguities and questions of the validity of specific provisions so as to give maximum effect to its conservation purposes.

6.8. Perpetual Duration; Severability. The Easement created by this Deed shall be a servitude running with the land in perpetuity. Every provision of this Deed that applies to the Grantor or the Grantee shall also apply to their respective agents, heirs, executors, administrators, assigns, and all other successors as their interests may appear. Invalidity of any of the covenants, terms or conditions of this Easement, or any part thereof by court order or judgment shall in no way affect the validity of any of the other provisions hereof which shall remain in full force and effect.

6.9. Subsequent Liens on Protected Property. No provision of this Easement should be construed as impairing the ability of Grantor to use the Protected Property as collateral for subsequent borrowing. Any such liens shall be and remain subordinate to this Easement.

6.10. Subsequent Easements/Restrictions on the Protected Property. The grant of any easements or use restrictions that might diminish or impair the agricultural viability or productivity of the Protected Property or otherwise diminish or impair the Conservation Values of the Protected Property is prohibited. Any such easements or restrictions shall be subordinated to this Easement.

6.11. Notices. Any notices required by this Easement shall be in writing and shall be personally delivered or sent by first class mail to the Grantor, Grantee, and the United States, respectively, at the following address, unless a party has been notified in writing by the other of a change of address

To the Grantor:	To the Grantee:	To the United States:
		State Conservationist 4407 Bland Rd., Suite 117 Raleigh, NC 27609

6.12. Approval by Grantee. In any case where the terms of this Easement require the approval of the Grantee, unless otherwise stated herein, such approval shall be requested in writing to the Grantee, and the United States if required, in accordance with section 6.11. In any provision of this Easement in which the Grantor is required to provide advance notice to the Grantee of any activity on the Protected Property, such notice shall be given not less than thirty (30) calendar days prior to the planned commencement of the activity. If the Grantee's approval is required, such approval shall be deemed withheld/disapproved unless Grantee provides to the Grantor written notice of approval within 30 calendar days of receipt of said request. If Grantor has received no response after said 30 calendar days, Grantor may send a second written notice to Grantee requesting a statement of the reasons for the disapproval and the Grantee shall respond within 30 calendar days with an explanation for the specific reasons and basis for its decision to disapprove.

6.12. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Easement. If any provision is found to be invalid, the remainder of the provisions of this Easement, and the application of such provision to persons of circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

TO HAVE AND TO HOLD this Deed of Conservation Easement unto Grantee, their successors and assigns, forever.

IN WITNESS WHEREOF, the Grantor and Grantee, intending to legally bind themselves, have set their hands on the date first written above.

GRANTOR:

By: ____ By: ______________________________________

____ : ______________________________________

Printed Name Printed Name

Date: _______________

ACKNOWLEDGEMENT OF GRANTOR:

STATE OF NORTH CAROLINA
COUNTY OF _________________

I, ____________________________________, a Notary Public in and for the aforesaid County and State, do hereby certify that ____ personally appeared before me this day and acknowledge the due execution of the foregoing instrument.

Witness my hand and official stamp or seal this ____ day of _____________, 20___.

_____________________________ (stamp)
Notary Public

My commission expires: __________________

Accepted:

GRANTEE: ____

By: _______________________________________

Name and Title

ATTEST:

By: ____
Name and Title

STATE OF NORTH CAROLINA
COUNTY OF __________________

I, _____________________________________, a Notary Public in and for the aforesaid County and State, do hereby certify that ____ personally appeared before me this day and acknowledge the due execution of the foregoing instrument.

Witness my hand and official stamp or seal this ____ day of _____________, 20___.

______________________________ (stamp)
Notary Public

My commission expires: ___________________

ACCEPTANCE OF PROPERTY INTEREST BY THE NATURAL RESOURCES CONSERVATION SERVICE ON BEHALF OF THE UNITED STATES OF AMERICA

The Natural Resources Conservation Service, an agency of the United States Government, hereby accepts and approves the foregoing Conservation Easement, and the rights conveyed therein, on behalf of the United States of America.

By: ______________________________
State Conservationist

NORTH CAROLINA
COUNTY OF ________________

I, ______________________________________, Notary Public of _____________ County, North Carolina, do hereby certify that ________________________________, personally appeared before me and acknowledged that due execution of the foregoing instrument on behalf of the Natural Resources Conservation Service.

Witness my hand and official stamp or seal this ____day of _____________, 20___.

________________________________ (Official Seal)
Notary Public

My commission expires: _________________

List of Exhibits

EXHIBIT A – Legal Description of the Protected Property

EXHIBIT B – Overview Maps
Exhibit B-1: Regional Context Map
Exhibit B-2: Multi-Easement Context Map
Exhibit B3: Easement Area Context Map

EXHIBIT C – Current Conditions and Description Map
Exhibit C-1: Easement Area Description Map
Exhibit C-2: Easement Area Soils Map
Exhibit C-3: Current Conditions & Natural Resources Inventory Certification

EXHIBIT D – Easement Farmstead Locations
Exhibit D-1 Easement Area Farmstead 1 Map

EXHIBIT E – Easement Existing Impervious Surfaces
Exhibit E-1: Easement Existing Impervious Surface Map
Exhibit E-2: Easement Impervious Surface Calculations

Appendix B: Conservation Easement Option Agreement

STATE OF NORTH CAROLINA

COUNTY OF ORANGE

Prepared by and return after recording to:

CONSERVATION EASEMENT OPTION AGREEMENT

THIS OPTION AGREEMENT, hereinafter referred to as Option, made and entered into this ________ day of July, 20__________by and between ________________________ and ______ hereinafter referred to as the **Grantors**, and **ASSOCIATION FOR THE PRESERVATION OF THE ENO RIVER VALLEY, INC.** a North Carolina Nonprofit Corporation**,** having an address of 4404 Guess Road, Durham, NC 27712, also known as the Eno River Association, (referred to herein as "Grantee") and its successors and assigns, hereinafter referred to as the **Grantee.**

<u>WITNESSETH</u>

In consideration of $10.00 and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, and of the agreements contained in this Option, **Grantors** hereby grant to the **Grantee**, its successors and assigns, the exclusive right and option to acquire a **Conservation Easement** over agreed upon portions of that certain parcel of land, located in Orange County, North Carolina, containing 43 acres, more or less. The property which will be subject to the **Conservation Easement** is more particularly described as follows:

> BEING the entirety of the real property known as the 43-acre ______ property (aka "__________________Tract") located south of State Road ______ (__________________Road), and described in the deed recorded in Book ______, Page _______, __________________ County Registry. The **Easement Area** is shown on the Exhibit map attached hereto, to which reference is hereby

made. The parties acknowledge that the acreage specified herein is approximate, and subject to survey.

The Easement Rights which will be acquired under the Conservation Easement will consist of a perpetual **Conservation Easement** that will permanently protect the restoration, enhancement or preservation of ________________________ Creek located off of ___________________ Road, directly adjacent to the Eno River State Park, and will include:

- All development will be extinguished within the **Easement Area,** which will protect approximately 4,700 feet of stream frontage on Buckquarter Creek and two of its tributaries.
- Forest Management will be permitted in accordance with an approved Forest Management Plan outside the protected riparian buffer.
- A "forever wild" protected riparian buffer on the property's streams will be established as shown in the attached Exhibit map attached hereto for illustration of the Conservation Easement.

The following terms, provisions, and conditions are further agreed to:

1. **OPTION PERIOD**. This option shall remain in effect from the date that this Option has been executed by the **Grantors** until the **1st day of October 2013.** This Option shall be exercised upon posting, by certified mail, fax or other delivery of written notice to the **Grantors** at the following address: **_____________________________ Road**. Exercise shall be deemed timely if such written notice is mailed on or before the date first set forth in this paragraph.

2. **PURCHASE PRICE**. The total purchase price for the **Easement Area** shall be the sum of **$______________________________, (_____________________________)** per acre subject to final survey.

3. **CLOSING**. A closing of the sale of this property under this Option shall be held within **90 days** of the exercise of this Option; provided, however, in the event of objections to title or condition of land at closing, and diligent efforts on the **Grantors** part to cure said objections, a closing shall be held within a reasonable time following the removal of said objections.

4. **EVIDENCE OF TITLE**. Upon receipt of this signed Option, the **Grantee** will have title to the property examined, and if applicable, obtain a preliminary title insurance commitment on the Property. The title examination and/or commitment must evidence the **Grantors** ability to deliver title at closing as set forth below. All costs necessary to procure the title examination and, if applicable, the title commitment and final title insurance policy to be issued at closing, shall be the responsibility of the **Grantee**.

5. **TITLE**. At closing, the **Grantors** shall convey good, insurable and marketable title to the property together with all rights necessary to protect the **Easement Area** in perpetuity, including legal access, all mineral rights and all development rights, to the **Grantee** free and clear of all mortgagees, liens, encumbrances, restrictions, rights, or exceptions unless exceptions of record which are acceptable to the **Grantee**.

6. **TITLE DEFECTS**. If for any reason the **Grantors** cannot deliver title at closing as required by Paragraph 5 of this Option, the **Grantee** may elect to a) accept the **Easement Area** with title as is; b) refuse to accept the Property; or c) allow the **Grantee** additional time to pursue reasonable efforts to correct the problem, including bringing any necessary quiet title actions or other lawsuits.

7. **SUBJECT TO SURVEY**. It is understood and intended that the final **Easement Area** under this option is subject to final survey.

8. **DOCUMENTS FOR CLOSING**. The **Grantors** shall execute and deliver at closing a **Conservation Easement** document acceptable to **Grantee**, any owner's affidavits or documents required by a title insurance company to remove the standard title policy exceptions, and any other documents necessary to close in accordance with the terms of this Option. **Grantee** will have the easement document and owner's affidavits prepared at its expense, but each party will be responsible for their respective attorney's fees incurred for review and negotiation of the terms of such documents.

9. **PROPERTY TAXES.** Any delinquent real estate taxes and all levied assessments are the **Grantors** responsibility and should be satisfied of record by the **Grantors** at or before closing. Any deferred taxes on the **Easement Area**, which become due as a result of this conveyance, shall be the responsibility of the **Grantors**. As the **Grantors** will retain fee simple title to the easement property, all real estate taxes assessed against the property in this and future years will remain the responsibility of the **Grantors**.

10. **MISCELLANEOUS CLOSING EXPENSES.** The **Grantors** will pay any documentary stamp tax, real estate transfer fee or any similar charge due upon conveyance of title to the **Grantee,** if any. The **Grantee** will pay recording fees.

11. **POSSESSION. Grantors** will retain possession of the Conservation Easement property, but the terms of the easement will specify **Grantee's** rights to regularly monitor the condition of the property and enforce the terms of the easement.

12. **CONDITION OF PROPERTY/ RISK OF LOSS.** The **Grantors** shall not transfer or encumber any interests in the **Easement Area** prior to closing. The **Grantors** shall keep the **Easement Area** in its current condition until closing and shall prevent and refrain from any

use of the **Easement Area**, for any purpose or in any manner that would diminish its value or adversely affect the **Grantee's** intended use of the **Easement Area**.

In the event of any adverse change in the condition of the **Easement Area**, whether said change is caused by **Grantors** or by forces beyond **Grantors** control, the **Grantee** may elect to a) refuse to accept the **Easement Area**; b) accept the **Easement Area**, or a portion thereof, in which case there may be an equitable adjustment of the purchase price based on a change in circumstances; or c) require restoration of the **Easement Area** to its condition at the time this Option was granted.

13. **RIGHT OF ENTRY AND INSPECTION.** The **Grantee** and its agents shall have the right to enter upon the Property at reasonable times for surveying, engineering, conducting environmental inspections and assessments to detect hazardous or toxic substances, and other reasonable purposes related to this transaction. Based upon the results of the environmental inspections and assessments, or upon other conditions revealed to be unsuitable to the **Grantee**, the **Grantee** may elect to refuse to accept the **Easement Area**.

14. **REMEDIES.** In addition to any other remedy specifically set forth in this Option, the **Grantee** has the right to enforce the provisions of this Option through an action for specific performance, injunctive relief, damages, contribution or any other available proceedings in law or equity. The election of any one remedy available under this Option shall not constitute a waiver of any other available remedies.

15. **BINDING EFFECT.** This Option becomes effective when signed by the **Grantors** and shall then apply to and bind the **Grantors** and **Grantors** heirs, executors, administrators, successors, and assigns.

16. **COMPLETE AGREEMENT.** This Option constitutes the sole and complete agreement between the parties and cannot be changed except by written agreement.

17. **NO WAIVER.** No provision of the Option shall be deemed amended or waived unless such amendment or waiver is set forth in a writing signed by the **Grantee**. No act or failure to act by the **Grantee** shall be deemed a waiver of its rights hereunder, and no waiver in any one circumstance or of any one provision shall be deemed a waiver in other circumstances or of other provisions.

IN TESTIMONY THEREOF, the parties have hereunto set their hands and seals, or if corporate have caused this instrument to be executed in their corporate names by their duly authorized representatives the day and year first above written.

[SIGNATURE LINES OMITTED]