

Conservation Easements and Agreements: Obligations, Modification and Termination

NC STATE EXTENSION

Farm Law for Operators and Landowners

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 a contract to either implement conservation practices or preserve the land in its present (natural) 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 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.

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 practices, as well as payment for the transfer of the real property right to subdivide and develop. Programs also vary in funding and accompanying restrictions and landowner responsibilities, as well as tax treatment. Most term-limited contracts and conservation agreements often run their term. However, 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 unbreakable, there is a pathway for termination and recompense of monies paid and tax deductions taken.

This narrative provides a cursory overview of two types of land protection available to owners of working farm and forest land in North Carolina - the Agricultural Conservation Easement and the Voluntary Agricultural District - in terms of funding, term and revocability. A brief note on federal

conservation contract termination if included. (The detailed treatment of valuation, transaction and tax benefits of the conservation easement are outside the scope of this narrative.)

Perpetual Protection: Agricultural Conservation Easements

A conservation easement is a land protection mechanism authorized by North Carolina state law¹ and recognized by the federal Internal Revenue Code² and intended to prevent residential or non-agricultural commercial development of real property. Conservation easements protect a variety of landscapes for purposes of beach access, wetlands and water quality protection and conservation, and wildlife habitat protection.³ By definition, conservation easements are “perpetual” with no mechanism for relief of restrictions upon the property.⁴ A farm or forest land tract under permanent conservation easement is further specified as an Agricultural Conservation Easement (sometimes referred to as an Agricultural Land Easement [ALE]).⁵

At its most basic level, a conservation easement is the removal of a few “sticks” from the property rights bundle. These sticks are primarily the right to subdivide, the right to reduce the impervious surface ratio (i.e. between structures/pavement and open ground), and the right to prohibit the entry for monitoring and enforcement of such restrictions by a third party (to whom this right of entry is thus transferred). 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 tax benefits (often a combination of the two). Though a matter of public benefit, many conservation easements on private lands do not require public access.

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

exceptions⁶), 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.

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.

Second, a conservation organization or public body (as grantee of the development) is granted the right to monitor the property and enforce the restrictions in perpetuity (forever) against the grantor and all successor title holders. While the landowner may sell the land, the restrictions run with the land and apply to all future owners of the parcel under conservation easement. In North Carolina, the two primary grantees of development rights are non-profit (501[c][3] organizations called "land trusts" and counties, primarily administered by the NC 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.

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 (i.e. conservation values destroyed), as well as the applicable zoning allowing for density of development (an indicator of greater return).⁷ The second appraisal predicts the valuation of the real property after the rights to subdivide and develop have been severed.

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 interest, and any non-cash transfer of interest 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 committed to raise enough funds to meet 60% of the appraised development value. In North Carolina these 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).

The balance of the value - 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).⁸ 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.⁹ 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.¹⁰

Most working farm and forest land conservation easement purchases 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).¹¹ The ADFPTF is advised by an advisory board established by statute, which advises on program rules.¹² The ADFPTF requires a match of funds from applicants (land trusts and counties) which 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.¹³ Some purchase funds may come from private donors to the acquiring land trust.

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.¹⁴ Note that such term easements are not eligible for the charitable donation deduction under IRC 170(h) given they are not in perpetuity.

Rights, Restrictions and Allowable Uses of Conservation Easements

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 Agricultural Conservation Easement Program (the federal program administered by NRCS, see below), though such coverage may be negotiated to 10% maximum impervious surface coverage.¹⁵ 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.

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. Such improvements will often be limited to certain well delineated areas called “envelopes” which can be strictly enforced. (Note: moving building sites or amending the size of the parcel is very difficult later).

Property Tax Treatment of (Permanent) Conservation Easements

Though county tax appraisals are normally made on an octennial cycle (i.e. review of appraisals for one-eighth of county properties occurs in any given year), a parcel of real property whose development rights have been severed qualifies for an off-cycle re-appraisal to reflect a reduction in fair market value.¹⁶

The county does its own appraisal to establish a highest and best use, as well as the “damage” done to that highest use by the restrictions of the conservation easement. However, it is not a given that the county will appraise a value significantly lowered by the conservation easement.¹⁷

If a parcel of land is enrolled in North Carolina’s Present Use Value (PUV) agriculture, horticulture or forest use program, a conservation easement may lock in PUV enrollment without regard for the income requirements associated with agricultural and horticultural use classifications (i.e. continued showing of annual production income of \$1000). To qualify for this continued treatment, the conservation easement must be in perpetuity and the landowner (grantor/donor) cannot have received more than 75% in compensation for the value of the conservation easement (development rights).¹⁸ The language of the statute is unclear whether the attendant federal tax deduction for the non-cash balance is considered “compensation.” This continued PUV enrollment without regard to income continues so long as the property is under conservation easement. However, one should infer that if a future transferee fails to meet the “individual ownership” requirement, PUV enrollment might fail.¹⁹

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 revoked or able to be modified. 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.

Regarding subdivision, an agricultural conservation easement may be subdivided into no more than three parcels.²⁰ If the conservation easement was funded by ADFPTF, no resulting parcel may be more than 20 acres.²¹ 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, but in no event may the conservation easement be subdivided to more than three parcels.

The statute authorizing counties to hold conservation easements provides a further permissive modification for agricultural conservation easements held by a county (as opposed to a land trust), providing that after 20 years “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.”²² The Conservation and Historic Preservation Agreements Act directly addresses the modification of conservation agreements and conservation easements. Those conservation easements funded by ADFPTF or any other easement where federal funds were used for purchase and a state government body is a party may not be terminated or modified for economic development.²³ (Discussion on cancellation of non-perpetual conservation agreements is explored below in the context of voluntary agricultural districts.)

In rare circumstances, extinguishment may be accomplished through a court proceeding. Successful extinguishment requires a convincing demonstration that, due to a change in circumstances (normally regarding the surrounding land use) use of the property for the original conservation purposes of the conservation easement are no longer practical or possible. 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.²⁴

If the conservation easement is a result of a sale of development rights funded in part by ACEP, the NRCS Conservation Program Manual (citation) encourages program administrators to prospectively address subdivision prior to closing.

It is possible that a conservation easement can be amended by agreement of the owner and the holder of the easement. Such agreements can clarify an ambiguity in the easement, but cannot in any way diminish the conservation value upon which any tax deductions were calculated. Amendments also can add acreage to an easement or add further to the protection of the property. For instance, 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 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.²⁵ Under this rule, the non-profit land trust risks losing their 501(c)(3) status should they consent to an impermissible modification.

Public 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 no 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.²⁶ However, 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.”²⁷ 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.²⁸ 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.²⁹

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 landowner and the conservation easement holder based on their relative interest in the value of the conservation easement (development rights).³⁰

Other Term-Limited Programs and Contract Termination

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:

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.

Conservation Reserve Enhancement Program (CREP)

CREP is established under the CRP whereby states also supply resources (financial and technical) for protection of ecologically sensitive cropland and marginal pastureland. CREP offers contracts of 10-, 15-, and 30-year terms providing annual payments, as well as reimbursement for installation of conservation practices, such as grassed filter strips, forested riparian buffers, hardwood tree establishment, and wetlands restoration. CREP is available to properties located in the Neuse, Tar-Pamlico, Chowan, Lumber, White Oak, Yadkin-PeeDee, Cape Fear (including Jordan Lake), Roanoke, and Pasquotank river basins. CREP is primarily administered by the NC Division of Soil and Water.

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.³¹

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.³² 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.

Revocability of Conservation Agreements: Voluntary Agricultural Districts and Enhanced Voluntary Agricultural Districts

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.³³ 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 2021, 90 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.³⁴ Another possible benefit is the waiver of water and sewer assessments otherwise required under another county ordinance.³⁵ 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.)³⁶ 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).³⁷

With the passage of the NC Farm Act of 2021³⁸ 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 Farm³⁹ 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.”

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...”⁴⁰

Such conservation agreements are distinguished from conservation easements, which under NC statute⁴¹ mirror the federal definition in the Internal Revenue Code, which requires perpetuity.⁴² (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.)

Term and Revocability of VADs and EVADs

As a baseline, a conservation agreement has a standard term of ten (10) years in both VAD and EVAD enrollments. The VAD agreement is revocable at the election of the landowner.⁴³ Though the statute is silent as to the process of revocation, it is presumed such revocation be in writing in that it involves a real property interest per NC's statute of frauds.⁴⁴ Unlike an EVAD agreement (see below), a VAD conservation agreement has no required automatic renewal period, and because the statute requires "at least" a 10 year term, some counties elect to add an automatic renewal in their ordinance and agreement.

Conservation agreements executed for enrollment in an EVAD are irrevocable for a 10-year term with an automatic 3-year renewal period.⁴⁵ Unlike the VAD agreement, the landowner must affirmatively notify the county holder of the agreement that it will terminate at the expiration of the 10-year term to prevent the 3-year automatic renewal term. This notice - presumably in writing - must be given in a "timely manner... as prescribed in the ordinance,"⁴⁶ so counties have discretion as to the notification period when drafting or revising the ordinance. Though landowners should be familiar with this period, counties should consider placing the notification period in the agreement itself. Without notification, the agreement by statute automatically renews for a period of three years.⁴⁷

EVAD conservation agreements are not easily modified, and the county (the holder of the agreement) is without authority to unilaterally modify or allow early termination of the agreement, even in the event of greater economic opportunity (including increased tax revenue) from the parcel. This raises the question: under what circumstances can a conservation agreement be revoked or modified?

Because the VAD/EVAD enabling statute points to a separate General Statute Chapter 121 to define "conservation agreement," it follows that the provisions of that chapter apply to termination of such EVAD agreements which are irrevocable for a set statutory term (10 years). (Again, one assumes a VAD agreement is revocable because the VAD enabling statute specifically says so.) Under N.C.G.S. §121-39.1, a specific process is prescribed for modifying or terminating conservation agreements, though a county body cannot circumvent the process described below.⁴⁸

To modify an agreement or terminate "prior to the period of time stipulated in the agreement,"⁴⁹ the landowner with EVAD enrolled land would approach the farmland preservation advisory board (however such a body is titled under the VAD/EVAD ordinance; here, "farm preservation board") (or vice versa) with request for early termination or modification of agreement such as removal of some acreage from the agreement. That body is then required by statute to conduct a "conservation

benefit analysis.”⁵⁰ The farm preservation board has discretion to design the form of analysis, but is restrained from allowing any modification (including termination) that fails to increase the conservation benefit of the tract as currently enrolled.⁵¹

If such an analysis demonstrates that the modification improves the conservation benefit, the farm preservation board reports the results to the Council of State, the body established by the NC Constitution of elected state agency heads (including the governor, lieutenant governor, and commissioners of agriculture, insurance, education, etc.). The Council has “the final decision” on the modification, one would assume by majority vote.⁵² It would appear the Council is similarly constrained in its decision to produce an increase in conservation benefit, though the statute does not specifically state so.

Therefore, while EVAD 10 year-irrevocable conservation agreements are in theory terminable or subject to modification before the end of their term (or automatic three year renewal), the process appears to be steep. As such, landowners cannot easily expect land to be removed in the event a lucrative commercial, industrial or development opportunity arises. (Without further analysis, it is not immediately clear who would have legal standing to challenge a farm preservation board decision or Council of State vote to early terminate or remove acreage from a conservation agreement.)

One question that emerges is whether a VAD or EVAD enrollment “runs with the land.” This term refers to the common law principle that a disposition of real property interest relates to the property itself, and not to the owner (unless such limitation is specifically stated in the written instrument.) Under this principle, a subsequent owner of real property is bound by the restriction agreed by the previous owner. North Carolina common law suggests that for a restriction or some other disposition to run with the land against a subsequent purchaser, the instrument must be recorded in the chain of title for that real property, and thus be enforceable against subsequent purchasers.⁵³ Whether a VAD conservation agreement runs with the land is less clear, though if recorded such an argument would be stronger. Because an EVAD conservation agreement must be recorded, the restriction very likely runs with the land regardless of who holds the title during the 10-year term (and automatic renewal if applicable).

Relevant North Carolina Statutes

§106-744. Purchase of agricultural conservation easements; establishment of North Carolina Agricultural Development and Farmland Preservation Trust Fund and Advisory Committee.

(a) A county may, with the voluntary consent of landowners, acquire by purchase agricultural conservation easements over qualifying farmland as defined by G.S. 106-737.

(b) For purposes of this section, “agricultural conservation easement” means a negative easement in gross restricting residential, commercial, and industrial development of land for the purpose of maintaining its agricultural production capability. Such easement: (1) May permit the creation of not more than three lots that meet applicable county zoning and subdivision regulations; (1a) May permit agricultural uses as necessary to promote agricultural development associated with the family

farm; and (2) 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.

§ 121-39.1. Termination or modification of agreements.

(a) Easements secured by the Agricultural Development and Farmland Preservation Trust Fund, including perpetual agricultural conservation easements and forest land easements, military base protection and flyway easements regardless of funding source, or any other agricultural conservation easement that has been secured, in whole or in part, with federal funds and where at least one party to the agreement is a public body of this State, shall not be terminated or modified for the purpose of economic development.

(b) Prior to any modification or termination of a conservation agreement where at least one party to the agreement is a public body of this State, the agency requesting the conservation agreement modification or termination shall conduct a conservation benefit analysis. The criteria for the conservation benefit analysis shall be established by the agency requesting the conservation agreement modification or termination. Conservation agreements may only be modified or terminated if the conservation benefit analysis concludes that the modification or termination results in a greater benefit to conservation purposes consistent with this Article.

(c) The conservation benefit analysis conducted by the requesting agency shall be reported to the Council of State prior to the vote of the Council of State on the final decision to modify the agreement.

(d) Notwithstanding any authority given to a public body of this State, including the State, any of its agencies, any city, county, district or other political subdivision, municipal or public corporation, or any instrumentality of any of the foregoing, to release or terminate conservation easements under other law, this section shall apply to conservation agreements that are intended to be effective perpetually or that are terminated or modified prior to the period of time stipulated in the agreement, and where at least one party to the agreement is a public body of this State, including the State, any of its agencies, any city, county, district or other political subdivision, municipal or public corporation, or any instrumentality of any of the foregoing.

(e) Parties to a conservation agreement may include a provision at the time an agreement is executed requiring the consent of the grantor or the grantor's successors in interest to terminate or modify the agreement for any purpose.

(f) Any agency managing a conservation agreement program may adopt rules governing its procedure for termination or modification of a conservation agreement, provided that any such rules may be no less stringent than the requirements of this section.

(g) This section shall not apply to a condemnation action initiated by a condemnor governed by Article 6 of Chapter 40A of the General Statutes or to a voluntary termination or modification affecting no more than the lesser of two percent (2%) or one acre of the total easement area of the

conservation agreement when requested by a public utility, the Department of Transportation, or a government entity having eminent domain authority under Article 3 of Chapter 40A of the General Statutes. (2015-263, s. 13(a); 2017-108, s. 14.)

Acknowledgments

Research and writing for this paper is supported by the Sustainable Agriculture and Research Education Professional Development Program (SARE PDP) project **Land Summit Professional Development (Award #531905)**.



Endnotes

¹ For example, see 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. ↵

² 26 U.S.C. §170(h) ↵

³ See N.C.G.S. §113A-235 ↵

⁴ N.C.G.S. §113A-235(a)(4) and 26 U.S.C. §170(h). Referred to as a “qualified real property interest” for tax deduction purposes, perpetuity is a key feature. ↵

⁵ N.C.G.S. §106-744 et seq. ↵

⁶ See N.C.G.S. §106-744(b)(1). Though most deeds of conservation easement prohibit subdivision,

“Agricultural Conservation Easements” may subdivide into no more than 3 parcels. ⁶

⁷ 26 CFR § 1.170A-14(h)(3)(i) ⁷

⁸ 26 U.S.C § 170(b)(1)(E) ⁸

⁹ 26 U.S.C. §170(b)(1)(E)(ii) ⁹

¹⁰ To author’s knowledge, no study has been made of the use of proceeds from the sale of a conservation easement. 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 property. ¹⁰

¹¹ N.C.G.S. §106-744. ¹¹

¹² N.C.G.S. §106-744(g) ¹²

¹³ PUBLIC LAW 115–334 ¹³

¹⁴ See ADFPTF Policies and Guidelines [<https://www.ncagr.gov/divisions/farmland-preservation/applicants/policy-guidelines/open>] (2008). ¹⁴

¹⁵ See 7 CFR Part 1491. ¹⁵

¹⁶ N.C.G.S. §105-287(a)(2a) ¹⁶

¹⁷ See *In re Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 339 S.E.2d 681, cert. denied, 316 N.C. 736, 345 S.E.2d 392 (1986) ¹⁷

¹⁸ N.C.G.S. §105-277.3(d1). Curiously, this statute reference refers to N.C.G.S. §113A-232 to indicate the requirements of the easement itself, which are actually outlined in §113A-235. Criteria includes farm and forest land conservation. ¹⁸

¹⁹ See article PUV: Maintaining the Individual Ownership Requirement in Co-Tenancy, Trusts and LLCs in this series. ¹⁹

²⁰ 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. ²⁰

²¹ From author’s conversation with NCDA&CS staff, this language does not preclude funding and placement of an easement on a single parcel less than 20 acres. ²¹

²² N.C.G.S. §106-744(b)(2) ²²

²³ N.C.G.S. §121-39.1(a) ²³

²⁴ 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 [<https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1253&context=scholarship>] (2021). (Draft for future publication at 56 Real Prop. Tr. & Est. L.J. 1 (2021). ²⁴

²⁵ See Gentry, Paige M., Applying the Private Benefit Doctrine to Agricultural Conservation

Easements [<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3384&context=dlj>], Duke Law Journal, Vol. 62:1387 (2013). [↵](#)

²⁶ N.C.G.S. §40A-80 [↵](#)

²⁷ N.C.G.S. §40A-81 [↵](#)

²⁸ N.C.G.S. §40A-82(b) [↵](#)

²⁹ N.C.G.S. §40A-82(c) [↵](#)

³⁰ Treas. Reg. § 1.170A-14(g)(6)(ii). [↵](#)

³¹ These three program vignettes were adapted from NC State 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 [<http://content.ces.ncsu.edu/voluntary-conservation-options-for-land-protection-in-north-carolina>] (NC State Extension Fact Sheet #WON-31). [↵](#)

³² 7 CFR § 1410.52 [↵](#)

³³ For VADs and EVADs, N.C.G.S. §106-735 through § 106-743.5 [↵](#)

³⁴ N.C.G.S. §106-740 [↵](#)

³⁵ N.C.G.S. §106-742 [↵](#)

³⁶ N.C.G.S. §106-741 [↵](#)

³⁷ N.C.G.S. §106-850 et seq. [↵](#)

³⁸ Senate Bill 605 / SL 2021-78 [↵](#)

³⁹ N.C.G.S. §G.S. 106-743.4(a) and G.S. 160D-903. See The Basics of North Carolina's "Right to Farm" and "Bona Fide Farm" Zoning in this series. [↵](#)

⁴⁰ N.C.G.S. §121-35. The definition continues to further describe in detail various prohibited activities. [↵](#)

⁴¹ 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. ⁴²

⁴² 26 U.S. Code §170(h)(2) ⁴³

⁴³ §106-737.1 ⁴⁴

⁴⁴ See N.C.G.S. § 22-2 ⁴⁵

⁴⁵ N.C.G.S. § 106-743.2 ⁴⁶

⁴⁶ Id. ⁴⁷

⁴⁷ N.C.G.S. § 106-737.1 ⁴⁸

⁴⁸ N.C.G.S. § 121-39.1(f) ⁴⁹

⁴⁹ N.C.G.S. § 121-39.1(d) ⁵⁰

⁵⁰ N.C.G.S. § 121-39.1(b) ⁵¹

⁵¹ Id. ⁵²

⁵² N.C.G.S. § 121-39.1(c) ⁵³

⁵³ See *Rowe v. Walker*, 441 S.E.2d 156, 114 N.C.App. 36 (NC App. 1994) ⁴⁴

Author

Robert Andrew Branan, JD

Associate Extension Professor Agricultural and Resource Economics

Publication date: Dec. 4, 2024

Reviewed/Revised: Dec. 3, 2024

N.C. Cooperative Extension prohibits discrimination and harassment regardless of age, color, disability, family and marital status, gender identity, national origin, political beliefs, race, religion, sex (including pregnancy), sexual orientation and veteran status.

This publication printed on: April 02, 2026

URL of this page [<http://content.ces.ncsu.edu/conservation-easements-and-agreements-obligations-modification-and-termination>]



