

Upshur County Farmland Protection Program

2016

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I. Background

A. Conservation and Preservation Easements Act

In June 1995, West Virginia enacted the Conservation and Preservation Easements Act by amending Chapter 20 of the West Virginia Code through the addition of Article 12 revised to 8A-12-1 through 8A-12-21 (2004). Through this Conservation and Preservation Easements Act, the West Virginia Legislature recognized the importance and significant public benefit of conservation and preservation easements in its ongoing efforts to protect the natural, historic, agricultural, open-space and scenic resources of the state. This enabling legislation was required to allow perpetual conservation and preservation easements to be created within the state. Currently, all fifty states have enacted conservation and preservation easement enabling statutes.

Within the Conservation and Preservation Easements Act, conservation and preservation easements are defined, and the basics are outlined as to how easements are to be created and the various rights and duties concerning the easement. The Voluntary Farmland Protection Act first incorporates the concepts created under this Conservation and Preservation Easements Act, and then expands upon them to allow the creation of the state and county Voluntary Farmland Protection Programs.

B. Voluntary Farmland Protection Act

On March 10, 2000, the West Virginia Legislature unanimously passed into law WV Code §8-24-72 through §8-24-84(2000), known as the Voluntary Farmland Protection Act. The Act went into effect on June 8, 2000 and amended a 1982 statute of similar code location that once allowed the creation of Farmland Preservation Committees.

Through this Act, the legislature declares that agriculture is a unique “life support” industry and that a need exists to assist those agricultural areas of the state which are experiencing the irreversible loss of agricultural land. The Act further authorized the creation of county farmland protection board(s) and program(s) and creation of the WV Agricultural Land Protection Authority; detailed the contents and requirements of the farmland protection program(s); outlined the powers and duties of the farmland protection boards and the authority; detailed the methods of farmland protection; detailed the value of a conservation easements; outlined the criteria for acquisition of easements; outlined the use of land after a conservation easement is acquired; outlined funding for the farmland protection program(s); and authorized the commissioner of agriculture to promulgate rules.

On March 9, 2002, the West Virginia Legislature modified the Voluntary Farmland Protection Act to allow each county with a farmland protection

program to provide funding for such program through a real estate transfer tax. The County Commission of each eligible county may enact an additional tax on the privilege of transferring real estate to be used solely to fund the county's farmland protection program. The maximum rate allowable is \$1.10 per \$500 (\$2.20 per \$1,000) or fraction thereof of the real estate transfer value, to a maximum transfer value of \$1 million. These monies must be used exclusively for the purpose of funding farmland preservation.

C. Upshur County Commission Resolution

On May 24, 2012, the Upshur County Commission authorized a resolution creating the Upshur County Farmland Protection Board. The Commission affirmed that the agricultural community of Upshur County provides sources of agricultural products for the citizens of the state; enhances tourism, protects worthwhile community values, institutions and landscapes which are inseparably associated with traditional farming; and controls the urban expansion which is consuming land, topsoil, and woodland of the county. The Board, as appointed by the Commission, is authorized to create and administer the Upshur County Farmland Protection Program in consultation with the Tygarts Valley Conservation District, and as approved by the Commission.

D. Farmland Protection Board Composition

The composition of every farmland protection board is dictated by the Voluntary Farmland Protection Act at WV Code §8A-12-4 (2015).

The Upshur County Farmland Protection Board is composed of seven members, each serving without compensation but eligible for reimbursement of actual expenses while engaged in the discharge of official duties. All members are required to be county residents except the Development Director who may actually reside in another county. Each member is a voting member, except for the Upshur County Commissioner, who shall serve in a non-voting, advisory capacity. All members are appointed by the Upshur County Commission and serve at the will and pleasure of the Commission.

The specific composition of the Board is as follows:

1. One Upshur County Commissioner.
2. Executive Director of the Upshur County Development Authority.
3. One farmer who is a member of the Upshur County Farm Bureau.
4. One farmer who is a member of the Tygarts Valley Soil Conservation District.
5. One farmer who need not be a member of any farm organization.
6. One county resident who is not a member of the foregoing organizations.
7. One county resident who is not a member of the foregoing organizations.

E. Purpose

Nationwide, America is losing farmland. According to the American Farmland Trust, the United States is losing 2.2 million acres of rural lands to urban sprawl every year. This means that, across the United States, over 4 acres of rural lands are consumed every single second.

In an effort to address the loss of farmland, over 20 states have implemented farmland protection programs. In 1996, the U.S. Department of Agriculture funded a farmland protection effort with a 6-year goal of protecting between 170,000 and 340,000 acres of farmland.

Agriculture is an integral part of Upshur County's economy, landscape, and natural resource base. The industry in Upshur County consisted of approximately 503 farms and 70,882 acres of farmland in 2007. The market value of products sold which originated in Upshur County are impressive – crop sales topped out at \$766,000 in 2007, while livestock sales made up approximately \$3,367,000. There is an amazing amount of diversity in the agricultural yields produced in Upshur County. Farms specialize in cattle, bees, cut Christmas trees, fruit, tree nuts and berries, corn for silage, and rye for grain. These diverse crops, vital life sources and way of life must be preserved in Upshur County. Not only does it add to the value of our community, but it forms the primary occupation for 185 families in Upshur County alone.

This program establishes uniform standards and guidelines for the eligibility of properties and the ranking criteria utilized to prioritize funds allocation to purchase conservation easements, or to pay associated costs for the purchased or donated easements. The guidelines established by this program outline the various methods of farmland protection available to prospective participating property owners, and the procedures to be followed in applying for program consideration.

F. General Principles of Land Protection

Every land trust or farmland protection board in the United States operates under well-established industry principles. Some of these principles are designed to meet legal or Federal tax requirements, while others are in keeping with sound, time-tested principles of land protection. The following principles have been used by the Upshur County Farmland Protection Board in its program design where possible, and will be used in any decision-making process:

- ❖ The property owner is willing to sell or donate the conservation easement over the property through a legally binding agreement that is perpetual and enforceable.
- ❖ The property owner(s) have clear title to the property.

- ❖ The property is either free of any mortgage, lien or tax assessment, the lender is willing to subordinate the loan to conservation easement, or the loan is not in excess of the agricultural value. If a secured loan exists, the donor understands that Federal tax benefits are not available.
- ❖ The conservation easement donation preserves open space, natural resources, an ecosystem, forestland, farmland, and/or native plants or animals.
- ❖ The property is either farmland or is in a relatively undisturbed natural condition, or contains natural features that need to be preserved.
- ❖ The property is not unduly subject to pollution or adverse influences from surrounding sources. The property itself is not polluted or subject to liability for any pollution clean up.
- ❖ Protection of the property will be consistent with established public policy. For instance, it may be inappropriate to accept a conservation easement on a piece of property already indicated for intended public roads.
- ❖ The property is of sufficient size that the conservation resources of the property are likely to remain intact.
- ❖ The conditions required to be agreed to by the property owner do not contain provisions which are unworkable or inconsistent with the overall intent of the conservation easement. The provisions, for instance, could not diminish the property's primary conservation value or be unenforceable.
- ❖ The conservation easement is within the Upshur County Farmland Protection Board's means and ability to monitor and enforce, and/or the landowner is willing to provide compensation to assist in this effort to make the effort financially feasible.
- ❖ The acceptance of the conservation easement will not create an unusual or special liability exposure.
- ❖ Adequate and permanent access to the property is available.
- ❖ A survey has been completed on the property at some point in time, or current property lines can be verified.

II. Program

A. Eligibility Requirements

Property must meet the following minimum criteria in order to be considered for either a purchased or donated conservation easement:

1. The property shall be located in Upshur County.
2. The property shall be land which meets one or more of the following criteria:
 - 20 acres or more required for matching funding. (Applications will be considered on a case by case basis)
 - Used or usable for agriculture, horticulture or grazing (qualifying property).
 - Wetlands that are part of the qualifying property.
 - Woodlands that are
 - (a) part of or appurtenant to a qualifying property tract; or
 - (b) held by common ownership of a person or entity owning qualifying property.
3. No commercial or industrial structure shall be located on the parcel.
4. Clear title to the property must be established and the application must be signed by the property owner(s). Liens and mortgages may exist, but must be subordinated.
5. The property shall not have any current or past uses that would render the establishment of a conservation easement inconsistent with the intent of the Act or this Program. Such determination shall be made by the Upshur County Farmland Protection Board after consideration of all facts and circumstances.

Purchased easements and expenses on donated easements shall be ranked in accordance with the program criteria.

B. Farmland Protection Ranking Criteria

Imminence of Residential, Commercial or Industrial Development Points

1. Sales potential
 - a. Property is offered by buyer who holds a current sales contract on the property.....25
 - b. Property has been listed for sale for a period of six months at any time during the last two years.....15
 - c. Property is in the estate process or has been inherited within the last two years10

2. Area development	
a. Intensive development (10 lots or more) in the adjacent properties	30
b. Extensive scattered development (20 lots or more) within 2,500 feet	10
c. Scattered non-agricultural development (20 lots or more) within 5,000 feet.....	5
3. Availability of public water and sewer characteristics	
a. Public water and/or sewer available at the property	25
b. Public water and/or sewer within 2,500 feet of the property	15
c. Public water and/or sewer within 5,000 feet of the property	10
Total Acreage Offered for Conservation or Preservation Easement Points	
1. Size of parcel(s) offered for easement	
a. > 300 acres	25
b. > 150 acres	15
c. > 50 acres	5
2. Entire tract offered for enrollment.....	75
Presence of Prime or Unique Farmland; Farmland of State-Wide Importance; or Locally-Significant Farmland; Productive Points	
1. Farmland categorized as one of the following:	
a. Prime or unique soils – 50% or greater	50
b. State-wide or locally significant farmland – 50% or greater	40
c. Other farmland.....	10
d. Property currently has a farm-use valuation for ad valorem tax (overall valuation) purposes.....	20
e. Non-timberland agriculture: acres offered for enrollment is greater than 30% non-timberland	15
2. Property currently has a conservation plan	10
Property is Contiguous or Appurtenant to Working Farms Points	
1. Proximity of working farms	
a. Contiguous with properties under easement with the Upshur County Farmland Protection Board, other Conservation Programs or public lands.	25

b. Within 2,500 feet of properties under easement with the Upshur County Farmland Protection Board, other Conservation Programs or public lands.	15
2. Proximity of protected property	
a. Contiguous with other property with a perpetual conservation easement, or public property (unimproved parkland, wildlife management area).....	25
b. Within 2,500 feet of other property with a perpetual conservation easement, or public property (unimproved parkland, wildlife management area).....	20

Existence and Amount of Secured Debt on the Property Points

1. Property has no secured debt	50
2. Property has secured debt	25

NOTE: Secured debt on the property in excess of the agricultural value shall disqualify the property from consideration under this program unless the loan amount in excess of the agricultural value has been subordinated by the lending institution.

Historical, Architectural, Archaeological, Cultural, Recreational, Natural, Scenic, Source Water Protection, or Unique Value of the Easement Points

1. Property is associated with or contains a structure with unique architectural/historical value	
a. The structure or site is on the National Register of Historic Places.....	20
b. The structure or site has value on a national or state level	10
c. The property is adjacent to such a structure or site.....	5
2. Property contains an archaeological site	
a. Property has documented archaeological significance	20
b. Property has potential archaeological significance based on its history or past uses.....	10
3. Property contains important or unique natural features such as:	
a. Contains mountainous terrain or scenic ridgelines.....	15
b. Contains managed forests	15
c. Contains a cave	15
d. Is an area of biological significance.....	15

e. Contains or is contiguous to endangered or threatened species habitat	15
f. Source water.....	25
g. Property is within 2,500 feet of properties listed above.....	10

Local importance (List/Define major streams, marshes, lakes, etc.)

1. Middlefork, Stone Coal Lake, Buckhannon River, French Creek	15
2. Generational farmer (50+ years).....	50

Mineral Rights

1. Mineral rights owned by landowner	50
2. Mineral rights severed – subordination possible.....	10
3. Mineral rights severed – subordination not possible	0

TOTAL POINTS_____

C. Easement Purchases – Rules and Guidelines

The Upshur County Farmland Protection Board may purchase conservation easements. The following considerations are applicable for any purchases:

1. Funds for purchasing conservation easements must be available and allocated
2. A completed application must be submitted by the landowner(s)
3. The property must meet all eligibility requirements
4. All application submissions shall be scored using the Farmland Protection Ranking Criteria
5. The purchase must be approved by the Upshur County FBP
6. The purchase must be approved by the Upshur County Commission

A sale of conservation easement application form must be submitted to the Upshur County Farmland Protection Board in order to be considered. The Upshur County Farmland Protection Board, in its sole discretion, may reject an offer for sale if the property has any current or past uses that would render the establishment of a conservation easement inconsistent with the intent of the Act or this program. Such circumstances include, but are not limited to, possible contamination on the subject property, surrounding land uses, conservation values of the property, and the scope and difficulty of the protection and monitoring of the property. A written confirmation of the rejection, if applicable, shall be provided to the applicant, including the reasons for rejection.

The Upshur County Farmland Protection Board may allocate funds to offset any or all costs associated with the conservation easement, including, but not limited to, legal fees, closing costs, survey fees and appraisal costs. Reimbursement policies will be established on a yearly basis, no later than June 30, for the following fiscal year by the Upshur County Farmland Protection Board. Any costs to be the responsibility of the landowner(s) will be clearly indicated.

The Farmland Protection Ranking Criteria are used to evaluate the characteristics of properties offered into the program. In the event that the offering price of properties voluntarily offered to the program in any given year exceeds the funding available for the purchase of those conservation easements, the priority of acquisition shall be determined by relative ranking of the property. The Farmland Protection Ranking Criteria consists of a number of factors and criteria descriptive of the characteristics of the property. Each criterion is assigned numerical points signifying its importance relative to all other criteria. Once the score for each property has been calculated, all properties shall be ranked. Those properties ranked the highest will be given priority to purchase.

Properties less than twenty (20) acres in size shall not normally be accepted by the Upshur County Farmland Protection Board, however such properties may be considered on a case-by-case basis, particularly if they contain unique features or are otherwise considered worthy of protection.

D. Easement Donations – Rules and Guidelines

A donation application form must be submitted to the Upshur County Farmland Protection Board in order to be considered. The Upshur County Farmland Protection Board, in its sole discretion, may accept or reject an offer for donation after considering all facts and circumstances. Such circumstances include, but are not limited to, possible contamination on the subject property, surrounding land uses, conservation values of the property, and the scope and difficulty of the protection and monitoring of the property. A written confirmation of the acceptance or rejection shall be provided to the applicant, including the reasons for rejection, if applicable.

The Upshur County Farmland Protection Board may allocate funds to offset any or all costs associated with the conservation easement, including, but not limited to, legal fees, closing costs, survey fees and appraisal costs. Costs not funded by the Upshur County Farmland Protection Board shall be the responsibility of the landowner making the donation offer, including stewardship funds for the perpetual monitoring of the property. Reimbursement policies will be established on a yearly basis no later than June 30 for the following fiscal year by the Upshur County Farmland Protection Board after consideration of the funds available to it. Donation properties shall be ranked for potential reimbursement according to the “Farmland Protection Ranking Criteria”.

Properties less than twenty (20) acres in size shall not normally be accepted by the Upshur County Farmland Protection Board, however such properties may be considered on a case-by-case basis, particularly if they contain unique features or are otherwise considered worthy of protection.

E. Easements: Special/Targeted Grants

In the event private, local, state or Federal monies become available to purchase a particular category of property, or properties with certain characteristics, the Farmland Protection Ranking Criteria may be waived by the Upshur County Farmland Protection Board. This procedure shall be undertaken only when the grant terms render other than the targeted properties ineligible to apply for the grant.

F. Nature of Development Rights Acquired

A Conservation Easement

The ownership of property is often characterized as a bundle of rights. Typically, a landowner owns all of these rights through the deed; possession of all of these rights is called fee simple ownership. A landowner can sell or donate some of these rights and still retain ownership of the land. For instance, a landowner might sell the timber rights on the property, but still retain all other rights over the property. Under the Upshur County Farmland Protection Program, the landowner agrees to give up certain development rights and specific commercial

uses of the property. The protection of farmland all over the country typically is accomplished by limiting the risk that the farmland is converted into a commercial development or a residential subdivision. The Upshur County Farmland Protection Program also utilizes this method of protection. The possession of the property, maintenance, right of access, and the right to sell the property or to leave it to heirs remains with the landowner.

The mechanism for acquiring these development rights is called a conservation easement. These easements are also sometimes referred to as open space easements. The Upshur County Farmland Protection Board may acquire these rights by purchasing the easement or through the acceptance of a donation. The sale or donation of development rights is accomplished through a Deed of Conservation Easement, which is recorded with the original deed to the land.

Easement Holder

The Upshur County Farmland Protection Board is the grantee under the Deed of Conservation Easement, and agrees to protect the property according to its mandate and the desires of the property owner executing the easement. The Upshur County Farmland Protection Board is a quasi-governmental board established by the Upshur County Commission. State law mandates the background of appointees that must serve on the board, and the Upshur County Commission appoints the candidates. All appointees must live in Upshur County.

The Deed of Conservation Easement is held and administered locally, here in Upshur County. In addition, with the approval of the Upshur County Farmland Protection Board, a landowner may designate a co-holder under the Deed of Conservation Easement. Typically, private land trusts may be utilized to co-hold easements with governmental and quasi-governmental entities as desired by the landowner. The Nature Conservancy is an example of a private land trust. The landowner may also grant the easement to a private land trust as the grantee and apply to have the Upshur County Farmland Protection Board act as co-holder.

Duration of the Easement

A conservation easement must be perpetual in order to qualify for potential Federal income tax and estate tax benefits. The Upshur County Farmland Protection Program will only consider offers of perpetual conservation easements. Under a perpetual easement, even though you may sell or bequeath the land, subsequent owners will be bound by the terms of the easement. Although there is a common law "rule against perpetuities" which otherwise prevents any agreement from being recorded as perpetual, conservation easements have become an exception to this rule. Almost all 50 states have passed state laws to allow for perpetual conservation easements. West Virginia passed its own Conservation and Preservation Easements Act (Article 12, Chapter 20) in 1995. Perpetual easements have been accepted into farmland protection programs and

by land trusts all over the United States for over 30 years. To date, the courts have upheld the legitimacy of perpetual conservation easements and have acted against those who would seek to undo them.

Restrictions Under the Easement—Voluntary Farmland Protection Act

The Voluntary Farmland Protection Act passed by the State of West Virginia in 2000 establishes certain restrictions and prohibitions regarding easement property accepted into any county program, but also allows the county programs flexibility to establish their own specific criteria within this framework. The restrictions set by the Act are as follows:

- ❖ The landowner may not develop the land for any commercial, industrial, residential or other non-farm purposes. (Current residences and retained development rights as defined under the Upshur County Farmland Protection Program are allowable.)
- ❖ The landowner must agree not to further subdivide the property aside from the residential development rights agreed to under the Deed of Conservation Easement.
- ❖ Woodland may be included in the easement with restrictions as imposed by funding partner(s).

Under state law, home-based businesses not requiring a West Virginia Division of Environmental Protection Permit to operate are allowable. Each residential dwelling provided for under the Deed of Conservation Easement is allowed two acres for all residential activities. In addition, activities performed for religious, charitable or educational purposes or to foster tourism are allowable on the eased property.

Deed of Conservation Easement

Through the Deed of Conservation Easement, the Upshur County Farmland Protection Program outlines the terms, conditions and restrictions on the property under easement to protect both the grantor and the grantee, and to clarify the understanding of each party. Certain portions of the Deed of Conservation Easement are negotiable and subject to change, while others are mandated by either Federal income tax laws, state laws or practice, or land trust industry practice. Typically, each conservation easement is unique and the Deed of Conservation Easement should reflect this uniqueness.

The Upshur County Farmland Protection Program has incorporated the broad prohibitions under the Voluntary Farmland Protection Act into its program, as outlined above. In addition, the Upshur County Farmland Protection Program has enacted additional guidelines [addressing specific conditions and limitations under which new residential building lots may be created (e.g. parent to child conveyances). Also, uses that are not compatible with or conducted in support of the agriculture industry or agri-tourism uses are not permitted by the Zoning Ordinance. Proposed uses shall be considered on a case-by-case basis by the Farmland Protection Board.]

Generally, the Deed of Conservation Easement allows the property owner the full right to reside and enjoy the property. This “quiet enjoyment” as it is termed allows hunting, touring, swimming, fishing, biking and like activities. At the same time, the Deed of Conservation Easement ensures that the property is protected from obvious destructive activities such as dumping, polluting, mining, and removal of natural resources. The Deed of Conservation easement incorporates the state prohibitions on commercial forestry and unlimited subdivision.

Agricultural activities and construction are allowed on any portion of the property. Activities for religious, charitable, or education purposes, or to foster tourism are allowed to the extent they are compatible with and supportive of the rural character of the property.

In addition, the Upshur County Farmland Protection Board encourages each landowner participating in the program to protect any other unique, historic, scenic, or natural resource value on the property through specific provisions in the Deed of Conservation Easement. See Tab 11: Deed of Conservation Easement for a model of a conservation easement. Depending on the funding source, the Deed of Conservation Easement can be modified to fit the circumstances and characteristics of each property. Deed restrictions may vary from one funding source to the next.

Value of Conservation Easement

A landowner may make an offer to sell a conservation easement on qualifying property. Such offers shall be ranked utilizing the Upshur County Farmland Protection Ranking Criteria in order to fairly allocate any available funds for purchasing easements. Offers may be made by the landowner from one dollar up to the maximum value of the easement as defined under the Voluntary Farmland Protection Act. The *fair market value* and the *agricultural value* of the property are defined under the Voluntary Farmland Protection Act:

Fair Market Value

The fair market value of the land is the price at the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay for the property if the property was not subject to any restriction imposed under the Deed of Conservation Easement.

Agricultural Value

The agricultural value of land is the price at the valuation date which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay for the property subject to the restrictions placed upon it by the Deed of Conservation Easement.

Maximum Easement Value

The maximum easement value is the difference between the fair market value of the land and the agricultural value of the land.

Offering Price

The offering price is the amount the landowner is asking to be reimbursed for the sale of the conservation easement to the Upshur County Farmland Protection Board. The offering price can be the maximum easement value, or it can be some fraction of this value. Landowners gain points in the ranking criteria by offering to sell the easement for less than the maximum value.

Payment to Landowners

Subject to the availability of funds, payments made to landowners shall be the smaller of the offering price or the maximum easement value, but in no case shall exceed the maximum easement value.

An Example

The fair market value of a 100-acre parcel of unrestricted land in Upshur County is \$5,000 an acre or \$500,000 for the entire parcel. The land is suitable for a housing subdivision and is in an area that is currently being developed. The agricultural value of the land is \$2,000 an acre or \$200,000 for the entire parcel. Under the proposed Deed of Conservation Easement, the property owner wishes to build two future residences in addition to the residence already on the property. The remainder of the property would remain open for farming. The maximum value of the conservation easement on this parcel is \$300,000 (\$500,000 fair market value less \$200,000 agricultural value).

The offering price is \$100,000, or one-third of the full easement value. The landowner gains 33 points under the Upshur County Farmland Protection Ranking Criteria system. Subject to the availability of funds, the owner would be compensated \$100,000 for the conservation easement.

III. Offering to Sell or Donate

An application form for either a sale or donation must be submitted to the Upshur County Farmland Protection Board in order to be considered. Such application must be complete, including all documents as required by the application. A landowner may offer all, or part, of their land into the Upshur County Farmland Protection Program. Additional points are gained under the Upshur County Farmland Protection Ranking Criteria system by offering the entire parcel into the program.

A landowner may make an offer and rescind it up until the time of the closing of the Deed of Conservation Easement. Any fees or costs of closing incurred by the Upshur County Farmland Protection Board shall be the responsibility of the landowner if an offer is made and then rescinded. A landowner may also submit a new offer in order to increase the points under the farmland protection ranking criteria, and possible acceptance into the program. An offer made during the fiscal year (July 1 through June 30 of the following year), shall expire at the end of the fiscal year. Certain deadlines for submissions may apply. Any unaccepted offers may be re-submitted by the landowner for consideration in any subsequent year, but a new application must be made.

The Upshur County Farmland Protection Board may make a counter-offer to the landowner in order to secure the property or properties in the event that adequate funds are not available to purchase all properties with outstanding offers. Such counter-offers shall be made in writing to the applicant. The applicant shall have sixty days to accept the offer through the submission of a revised offer in the form of a revised application. The absence of a revised application within the sixty days shall be deemed as a rejection of the counter-offer.

A written confirmation of the acceptance or rejection of any offer shall be provided to the applicant, including the reasons for rejection, if applicable.

G. Third Party Mineral Rights

1. Properties where the subsurface mineral rights are owned by a third party are subject to special requirements. A tax deduction for the easement may be taken only if:
 - a. Ownership of the surface estate was separated from ownership of the mineral right before June 13, 1976; and
 - b. The probability of surface mining occurring on the property is “so remote as to be negligible.”¹

¹ Internal Revenue Code Section 170A-14(g)(4)

Landowners should consult applicable Internal Revenue Service regulations to determine whether they may be entitled to a tax deduction for placing a conservation easement upon property subject to third party mineral rights.

2. The Upshur County Farmland Protection Board will accept easements on such properties if:
 - a. The third-party mineral owner agrees to prohibit any surface mining; and
 - b. The third-party oil and gas owner agrees to construct a maximum number of wellheads as determined by the Board; or
 - c. The probability of surface mining is considered to be extremely unlikely as determined by the Board after consideration of all facts and circumstances. Such considerations shall include, but shall not be limited to:
 - ❖ Past or current surface mining in the vicinity
 - ❖ The identity of the third part owner and whether they are still in existence
 - ❖ The probable extent of such minerals and the resultant financial attractiveness
3. Due to mining activity in Upshur County, the likelihood of surface mining exists. The Upshur County Farmland Protection Board will accept easements on properties with severed mineral rights when a potential for drilling exists under the following conditions:
 - a. When a 'for sale' or 'donation' property is accepted with severed mineral rights, 50% of the appraised value will be offered. In this instance, a release will be required, acknowledging that an IRS tax deduction is not allowed.
 - b. An acreage reduction, floating area, defined acreage, etc. for oil and gas development will be addressed with the mineral owner whenever possible.
 - c. When a well is drilled the UCFPB will work closely with the landowner and mineral owner to ensure the easement values are maintained to the best extent possible.
 - d. The UCFPB will not accept parcels into the program with severed coal rights.

IV. Administrative

A. Process Flowchart

See the Appendix for an outline of the administrative process and timing for completing a conservation easement.

B. Baseline Documentation

Baseline documentation is the record of the condition of the property and features that are to be protected at the time the conservation easement is donated. Prior to the actual sale or donation of the easement, the baseline documentation must be completed. The purpose of the documentation is to create a record for administration of the easement and protection of natural features contained in the Deed of Conservation Easement. Such documentation is very helpful in future years in documenting the original condition of the property. In addition, baseline documentation is required under IRS regulations for donated easements claimed as a charitable deduction.

Baseline documentation may include:

- ❖ Survey maps from the U. S. Geological Service
- ❖ A map of the property showing all existing man-made improvements, vegetation, land use history and distinct natural features
- ❖ An aerial photograph of the property
- ❖ On-site photographs taken at appropriate locations
- ❖ GIS maps
- ❖ A survey by a WV licensed surveyor or engineer, OR a legal description by metes and bounds

See Appendix—Baseline Documentation Form and Checklist for the form that will be completed by the Upshur County Farmland Protection Board.

If the Deed of Conservation Easement contains restrictions with regard to a particular natural resource to be protected, such as water quality, the condition of the resource at or near the time of the gift must be established. In addition, the baseline documentation must be accompanied by a statement signed by the donor and the Upshur County Farmland Protection Board clearly referencing the documentation and affirming that it is an accurate representation of the property.

Any retained development rights, selective timber cutting for personal use, subsurface mineral rights, etc., must be clearly documented in the baseline documentation.

C. Closing

Once the easement purchase or donation has been negotiated with the landowner(s) and agreed to through formal action of the Upshur County Farmland Protection Board, several steps remain to be completed. All purchases must be approved by the Upshur County Commission. Important paperwork and procedures as indicated by the closing checklist (see Appendix – Closing Checklist) must be completed. Finally, the Deed of Conservation Easement must be closed much like any other real estate transaction. A date and time shall be agreed upon with the Upshur County Farmland Protection Board's closing attorney. The landowner(s) may have an attorney present for the closing, but this is not a requirement. All landowners will need to be present at the closing to sign the Deed of Conservation Easement and the closing documents.

D. Inspection and Enforcement

An important part of any easement program involves periodic inspections to ensure that the conservation restrictions agreed to by the donor and the Upshur County Farmland Protection Board are adhered to. Such inspections are normally done on an annual basis. Easement violations typically occur with owners subsequent to the original owner of the property who enacted the easement. Even though the original landowner enacting the easement has sold or bequeathed the land, subsequent owners are bound by the terms of the easement. The easement is said to “run with the land.” The Upshur County Farmland Protection Board has a duty, as evidenced in the Deed of Conservation Easement, and as desired by the original landowner grantor, to enforce the easement restrictions so that the easement property remains protected. Subsequent owners are bound by the conservation restrictions, and are put on notice at the time of purchase of the property through the recorded Deed of Conservation Easement. The current owner shall be required by the Deed of Conservation Easement to provide annual access to the property for monitoring purposes.

Where the conservation easement is jointly held by a private land trust, the responsibility for the easement monitoring and coordinated enforcement efforts shall be clearly delineated. The Upshur County Farmland Protection Board may complete the easement monitoring through its staff, or may subcontract this work through an appropriate agent. The Tygarts Valley Conservation District currently assists landowners to prepare and implement soil and water conservation plans. It also assists in the design of Best Management Practices and verifies compliance with farm management plans. The Upshur County Farmland Protection Board shall ensure that the periodic inspection program is carried out, and work closely with all involved parties for a consistent and coordinated inspection program that is satisfactory to the donor.

Generally, there are three keys to preventing an easement violation:

1. A good relationship with the property owner
2. A Deed of Conservation Easement with clear restrictions
3. A program of regular, systematic, and well-documented monitoring

In the event of an easement violation, the Upshur County Farmland Protection Board would make every attempt to work with the landowner to rectify the easement violation. In the event that a satisfactory resolution cannot occur, the Upshur County Farmland Protection Board may work through the Upshur County Attorney or through private attorneys to meet its perpetual obligation to protect the property.

V. Outreach and Funding

A. Outreach

The WV Voluntary Farmland Protection Act requires each farmland protection board to promote the protection of agriculture within the county by offering information and assistance to landowners with respect to the acquisition of easements.

Therefore, the Upshur County Farmland Protection Board will evaluate and utilize, on a continual basis, the development of several methods of outreach within each annual budget. Such potential methods of outreach might include:

1. The development of articles within the Tygarts Valley Conservation District quarterly newsletter.
2. The development of articles within the Upshur County Farm Bureau Newsletter.
3. The development of articles within the USDA - Farm Service Agency quarterly newsletter.
4. The development of a Upshur County farmland protection Internet web page with links from the Upshur County Commission Web page and other associated farm agency web pages.
5. The development of handouts, flyers and other promotional materials as appropriate, for placement at libraries, farm related events, mass mailing, etc.

B. Funding

The Upshur County Farmland Protection Board has established a fund to carry out the purposes of this Farmland Protection Program. The fund is called the Upshur County Farmland Protection Fund and is authorized to accept money or property from general or special fund appropriations by the county or state; a distribution from the WV Agricultural Land Protection Authority as detailed below; county real estate transfer tax fees; private or governmental grants; private contributions, fundraising or gifts; or earnings from investments, interest, dividends or distributions. The Farmland Protection Fund monies shall not be comingled with other public funds, and shall be managed by the Upshur County Administrator.

The WV Voluntary Farmland Protection Act authorizes the Upshur County Farmland Protection Board to seek out any and all county, state, Federal and private funding available, consistent with the purpose of the Farmland Protection Program to establish and operate the program. However, the Upshur County Farmland Protection Board is also authorized to decline, reject or deny private grants, contributions or gifts that represent or have the appearance of representing an impropriety which could result in the temporary or permanent

loss of public faith and trustworthiness in the Farmland Protection Program or the Upshur County Farmland Protection Board.

The Upshur County Farmland Protection Board clearly recognizes for this program to succeed at its fullest, funding for the actual compensation for the placement of conservation easements must be secured and this funding level will need to be substantial. In addition, Federal opportunities require up to a 50 percent state or local match. The Upshur County Farmland Protection Board intends to use funding from all available sources:

1. Governor's Contingency Fund.
2. Legislative Digest Grants (when available).
3. Private foundation gifts or grants.
4. Any county real estate transfer tax fee under WV Code.
5. Any future county or state taxes or funding dedicated to farmland protection.

In addition, the WV Voluntary Farmland Protection Act requires the establishment of a state level WV Agriculture Land Protection Authority. This Authority is required to assist the county Upshur County Farmland Protection Board's in applying for and obtaining all state and federal funding available consistent with the purposes of the farmland protection program.

To accomplish that function, WV Code requires the WV Department of Agriculture to include within its budget funding for the Authority for the next fiscal year. The Authority is then required to distribute within 60 days after the end of its fiscal year at least 80% of that fiscal year's remaining budget to county farmland protection boards that have certified to the Authority that there is pending an application for one or more conservation easements. This state level funding is called the WV Farmland Protection Fund.

This funding, similar to the county farmland protection fund, is authorized to be comprised of any money made available to the fund by general or special fund appropriations; grants or transfers from governmental or private sources; money realized by investments, interests, dividends or distributions; monies appropriated by the Legislature. In addition, the Authority is authorized to seek and apply for all available funds from Federal, state and private sources.

VI. Policies

Policies, as adopted, will be added to the Program Book under this tab.

The following Policies were approved by majority vote of the Board at the March 24, 2016 meeting:

1. Easement Valuation WV Code 8A-12-14 (Tab, 13, Page 8)
 - a. Market analysis will be used if available. If not available, appraisal method will be followed.
 - b. Appraisal method – Yellow book appraisal will be used. This allows for consistency across the state. A Restricted Use Report may be used.
 - c. 50% value will be paid if oil and gas rights have been severed. *Please see April 14, 2017 Program updates.*
 - d. N/A - “d” was removed from Policy at the December 15, 2016 meeting.
2. Reimbursement Policy

Extinguishment and Condemnation clauses to remain in effect for all easements processed by the UCFPB. For easements with severed mineral rights, however, this board has decided NOT to ask for reimbursement should drilling occur. It is the boards desire to open communications with the owner and proceed in a manner which allows the easement values to be maintained to the best extent possible.
3. Title Review and Policy (Legal review)
 - a. A 40-year search will be conducted for all easements. In the judgement of the title attorney and/or the UCFPB a more in-depth search may be required. These will be viewed on a case by case basis.
 - b. Acceptable encumbrances: Policy will except oil and gas rights. Every attempt will be made to negotiate with oil & gas companies to obtain subordination.
4. Oil and Gas
 - a. An acreage reduction, floating area, defined acreage, etc. for oil and gas development will be addressed with the mineral owner whenever possible. These items will not be a requirement for funding consideration.
 - b. When mineral rights are severed, an amount not greater than 50% of the appraised value will be paid.
 - c. When a well is drilled the UCFPB will work closely with the landowner and mineral owner to ensure the easement values are maintained to the best extent possible.

- d. Donations with severed mineral rights will not be accepted without a release from the landowner acknowledging that IRS tax deductions will not apply.
- 5. Restrictive requirements
 - a. A current residence must exist or be reserved.
 - b. No subdivision allowed.
- 6. Application requirements:
 - a. Applicant will have USDA conservation plan.
- 7. Due diligence:
 - a. If not required by funding source, a Phase I will not automatically be required? If information presents warranting a Phase I, one will be ordered.
 - b. Payment Responsibility:
 - i. Purchased Easement
 - Land owner pays:** Appraisal, Survey, Title search & binder, Deed preparation, Closing costs (recording costs, document prep, attorney fees, etc.)
 - UCFPB pays:** Baseline documentation, Annual monitoring
 - UCFPB will pay for all items as they occur. Landowner will reimburse at closing. If an easement does not proceed to closing, costs will be handled as follows:
 - Landowner withdraws due to low appraisal value – UCFPB will cover costs incurred to date.
 - Landowner withdraws simply because they change their mind - Landowner is responsible for costs incurred to date.
 - Please see April 14, 2017 Program updates.*
 - ii. Donated Easement
 - Land owner pays:** Appraisal
 - UCFPB pays:** All remaining costs associated with easement
- c. Option Contract and Agreement, identifying the above, is prepared prior to expenses being incurred. Landowner and BOD sign agreement.

The following **Program** change was approved by majority vote of the Board at the December 16, 2017 meeting:

8. Third Party Mineral Rights

- a. In accordance with the Program, the UCFPB will not accept parcels into the program with severed coal rights.
- b. Section III.G.3.d, V17 is to be removed in its entirety. The Board will consider parcels with severed coal rights on a case by case basis.

The following Policies were approved by majority vote of the Board at the April 14, 2017 meeting:

9. Low Easement Value:

- a. In accordance with previously established Policy, the landowner is required to pay full cost for the appraisal. This cost will be paid by the Board, and reimbursed by the landowner at closing.
- b. Section 7.b.i. (above) is appended to read: If the appraisal comes in with a value lower than the asking price (said price having been determined reasonable at the time of acceptance), the Board will pay 50% of the appraisal cost if the landowner chooses to withdraw their application.

10. High Asking Price:

- a. If a land owner sets an asking price higher than reasonable/recently established values, the landowner will be asked to obtain an appraisal (at their cost) and present it to the Board. In this instance, the Board will pay based on the easement value established in the appraisal document.

The following **Program** change was approved by majority vote of the Board at the April 14, 2017 meeting:

11. Easement Valuation:

- a. In accordance with the Program and previously established Policy, 50% value will be paid if oil and gas rights have been severed.
- b. Section III.G.3.a, V17 and Section 1.c (above) are amended to read: 75% value will be paid if oil and gas rights have been severed.