

Conservation Easement: New Owners Guide

Berkeley County Farmland Protection Board



Berkeley County Farmland Protection Board
PO Box 1243, Martinsburg, WV 25402 (mail)
229 E. Martin Street, Suite 3, Martinsburg WV 25401 (office)
(304) 260-3770
Email: Berkeley@wvfp.org
Web: Berkeley.wvfp.org

Table of Contents

- About the Berkeley County Farmland Protection Board..... 1
 - Members of the Berkeley County Farmland Protection Board..... 1
 - Farmland Protection Board Staff and Partners 1
 - How We Protect Farmland..... 1
- Understanding Your Conservation Easement 2
 - What is a Conservation Easement? 2
 - What is a Holder? 3
 - What is a Co-holder? 3
 - What is a Third-Party Interest? 3
- Who Manages Easement-Protected Land? 3
 - The Board’s Responsibility 4
 - The Annual Site Visit and Monitoring Process: Staying in Touch 4
 - Easement Enforcement 4
 - The Property Owner’s Responsibility 5
 - Timely Payment of Property Taxes 5
 - Conservation Plan..... 5
 - Agricultural Land Easement Plan 5
 - Timber Management or Forest Stewardship Plan..... 6
 - When to Contact the Farmland Protection Board: Staying in Touch – Part II..... 6
- Changes in Ownership 6
- Glossary of Terms 8
- Contact Information and Our Partners..... 9
 - Our Conservation Partners:..... 9
 - Berkeley County Partners..... 9

About the Berkeley County Farmland Protection Board

The Berkeley County Farmland Protection Board was formed by the County Commission (now County Council) in 2000 to protect and preserve agricultural land in Berkeley County. The Board is a 501(c)3 nonprofit organization and a quasi-autonomous entity of county government.

The mission of the Berkeley County Farmland Protection Board is to protect productive farmland for future generations to maintain the long-term viability of agriculture in Berkeley County, the state of West Virginia and the country. We believe that farmland preservation is an important investment in our economy, farming heritage, and quality of life for all residents. Our scenic working lands and rural character are important assets that make the county a desirable place to live, work, and visit.

We accomplish our work through holding purchased and donated conservation easements, collaborating with like-minded organizations, and providing community outreach and education to raise awareness about farmland protection.

Members of the Berkeley County Farmland Protection Board

The composition of every West Virginia farmland protection board is dictated by the Voluntary Farmland Protection Act at WV Code §8A-12. The Berkeley County Farmland Protection Board is composed of seven volunteer members who are county residents. Each is a voting member, except for the Berkeley County Councilperson, who serves in a non-voting, advisory capacity. All members are appointed by the Berkeley County Council. The Board employs one full-time program director and one part time administrative assistant who is also the stewardship manager.

The composition of the Board is as follows:

- One Berkeley County Councilperson (non-voting).
- The Executive Director of the Berkeley County Development Authority.
- One farmer who is a member of the Berkeley County Farm Bureau.
- One farmer who is a member of the Eastern Panhandle Soil Conservation District.
- One farmer who need not be a member of any farm organization.
- Two county residents who are not a member of any of the foregoing organizations.

Farmland Protection Board Staff and Partners

The Board's staff works directly with landowners to create and uphold conservation easements. We are also available as a resource to you to help you understand your easement and how it may or may not affect your management of your land. In addition, the Board works closely with its partners who co-hold its easements, agencies, consultants, and others who support our work. Contact information for our Board and staff is included at the end of this handbook.

How We Protect Farmland

The Board protects farmland throughout the County by either purchasing, or accepting donations of, conservation easements from landowners.

Funding for the Board was established under a state law passed in 2000 that allows West Virginia counties to levy a transfer tax on real estate to purchase development rights from landowners who

wish to protect their land for agricultural use. The Board often matches the real estate transfer tax through federal and state grants and private donations as well as landowner donations of easement value.

We receive applications throughout the year from private landowners. Typically, we evaluate the applications in the fall, and rank them using criteria based on soil quality, farm acreage, water resources, proximity to protected lands and other farms, and other factors. Then, depending on available local funds, federal matching funds and donations we select top-ranking properties and work with the landowners to tailor the conservation easement to protect their property. It is also our promise that we will legally defend the conservation of these places -- forever.

Understanding Your Conservation Easement

What is a Conservation Easement?

A conservation easement is a legal agreement between a landowner and the Farmland Protection Board to permanently protect the important natural resources, or conservation values, of a property. Conservation easements can protect values that include farmland, water resources, forestland, wildlife habitat, as well as scenic lands. Each conservation easement is unique and is tailored to reflect the characteristics of the property, the interests of the granting landowner, and the objectives of the Board. By entering into a conservation easement, a landowner retains ownership of the land, while the Farmland Protection Board retains rights to protect agricultural and natural resources. The easement typically restricts uses of the land such as subdivision, industrial and commercial uses, excavation or mining, and other activities that damage the conservation values, thereby protecting the land for agricultural uses. The landowner continues to own and enjoy the property but agrees to adhere to the conservation terms of the easement. It is important to note that although a conservation easement might have been purchased using public funds, this does not make the land accessible to the public.

The conservation easement grants access rights to the Board for monitoring and other property inspections, although the board strives to always arrange for these visits ahead of time. However, if severe damage is occurring to one of the stated conservation values the board may enforce its right to visit a property without notice.

The decision to place a conservation easement on a property is strictly voluntary. However, once an easement is established, it “runs with the land,” meaning it is legally binding on all future landowners of the encumbered property. As with any real property interest, the easement is recorded and becomes part of the chain of title for the property. The conservation values of the land are protected for future generations. Because of the perpetual nature of these easements, it is not possible to “buy back” the development rights.

Since conservation easements are designed to be perpetual, changing or revoking them is extremely difficult. The Board and its co-holders have an amendment policy that describes the limited situations in which an easement might be amended. The Board may consider an amendment if the overall conservation values of the property are enhanced or increased. Due diligence shall be observed that there is no actual or perceived insider benefit, private inurement, or impermissible profits from any changes in the easement.

In rare cases, an amendment will be considered to clarify easement language or to correct an administrative or technical error, provided there is no loss of the property’s conservation values by doing so. The amendment process can be time intensive, and any request by a landowner to amend

an easement may require payment by the landowner to cover the related costs. In all cases, amending an existing easement requires that the Board be aware of its obligations to Federal Income Tax Law as administered by the Internal Revenue Service. If circumstances arise that render the purpose of the easement impossible to accomplish, the easement can only be terminated or extinguished, in whole or in part, upon approval of the Board, the co-holders and the United States (if there is a Federal interest). The termination must be by judicial proceedings in a court of competent jurisdiction.

What is a Holder?

A grantee in the Deed of Conservation Easement defined as (a) a governmental body empowered to hold an interest in real property under the laws of the state of West Virginia; or (b) a charitable corporation, charitable association or charitable trust registered with the Secretary of State and exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code of 1986, or other federal or state statutes or rules, the purposes or powers of which include retaining or protecting the natural, scenic, agricultural or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational or open-space use; protecting natural resources and wildlife; maintaining or enhancing land, air or water quality; or preserving the historical, architectural, archaeological or cultural aspects of real property.

What is a Co-holder?

A co-holder jointly holds title to an easement with another holder; the easement can be enforced by either holder. Each are legally responsible for upholding the easement's conservation objectives. In Berkeley County, the Board may partner with private land trusts such as the Land Trust of the Eastern Panhandle, The Potomac Conservancy, or with another governmental entity such as the West Virginia Agricultural Land Protection Authority.

What is a Third-Party Interest?

Most of the easements which involve Natural Resource Conservation Service (NRCS) funds list the NRCS as a third-party interest. This means that the NRCS (which is a unit of the US Department of Agriculture) was a party to the financial transaction but is not a primary party to any monitoring or enforcement actions. However, the NRCS does reserve the right to engage in legal action to defend the conservation easement, if need be.

Who Manages Easement-Protected Land?

You, as a landowner, retain full rights to control and manage your property within the terms of the easement. The Board and its co-holders monitor the property annually to ensure compliance with the easement terms.

The landowner is responsible for maintaining the conservation values of the property and continues to bear all costs and liabilities associated with owning the property. The Board is available as a resource to provide feedback or advice on conservation issues and to assess whether activities are permitted under the terms of the easement. In addition, we can often provide connections to partners, contractors, and funding sources, when appropriate, to support your management of your property.

The Board's Responsibility

The Board is responsible for the annual monitoring visits and the associated monitoring report. This includes review and board approval of the report, permanent storage of all monitoring reports associated with the property, and delivery of each approved report to the property owner. Through the annual monitoring process, the board is responsible for ensuring that the terms and conditions of the Deed of Conservation Easement are being honored. The board is also responsible for maintaining the tally of impervious surfaces on the easement. The board is also responsible for issuing an Estoppel Certificate to a party with a legal interest in purchasing the easement property if the certificate is requested by the current property owner.

The Annual Site Visit and Monitoring Process: Staying in Touch

The Board and if applicable, co-holding partner organizations, are responsible for insuring that that the terms of the conservation easement are upheld. This is done through an annual site visit (also called a monitoring visit) that is coordinated with the landowner in advance.

Approximately a month before we plan to visit your property, we will contact you to schedule a mutually convenient time for the site visit. The Board typically visits the program's protected properties in late winter through spring and in late fall. Visits are usually rain or shine, although we will reschedule in the event of severe weather. In some cases, we may visit at other times of the year. We encourage you to participate in the visit, but you are not required to be there. If you choose not to be at the site visit, all we require is to have access to the property. Please advise our staff about any hindrances such as locked gates, dogs on the premises, or cautions regarding livestock or recent chemical applications. The time required for a monitoring visit depends upon the size of your property and/or difficulty of terrain. We will speak to you in person or on the phone to ask you about any changes or future plans related to the property.

If we find that the terms of the conservation easement are being followed, we will send you a copy of the board-approved monitoring report. If we have any concerns about compliance with one or more of the conservation easement terms, we will discuss the concern with you and work with you to determine the best way to resolve the issue.

Easement Enforcement

The phrase "an ounce of prevention is worth a pound of cure" is especially pertinent for maintaining the conservation values of your property. Fortunately, easement violations are rare. In most cases, easement violations are not caused by the original easement grantor, but by third parties, or by subsequent landowners who are unaware of the terms of the easement.

The Board has established ***Conservation Easement Stewardship Policies***. To help prevent violations, we ask you to do your part by staying familiar with the terms of your conservation easement, informing your neighbors about your conservation easement, maintaining the easement area boundary lines (including internal lines for residential, retained development, and exemption areas), and notifying the Board about any change in ownership.

Our primary responsibility regarding conservation easements is to ensure that the terms of the easement are upheld. If a violation is identified on a protected property, the Board, and its co-holders (if applicable) are obliged to enforce the terms of the conservation easement, in order to protect the conservation values of the land and to meet our legal obligations under the easement terms. Our ***Enforcement Policy*** helps to guide our enforcement actions once a violation has been identified.

Should a violation occur, you can expect to hear from the Board's staff and/or co-holder. We will want to schedule a visit to the property with you to review the issue together and determine the nature, extent, and significance of the violation. Each violation is reviewed on a case-by-case basis. We are always willing to work with landowners to find a reasonable plan to resolve the violation.

A third party, such as a neighbor or contractor, may do something on your property that violates the easement. If you discover that something questionable is underway, please notify us as soon as possible so we can help you determine a positive course of action. Landowners are expected to respond in a timely manner to stop the violation and to seek remediation for any damage to the resources protected by the easement. We understand the importance of maintaining positive relationships with whoever is responsible and will assist you as much as we can.

The Property Owner's Responsibility

The property owner is responsible for ensuring that the day-to-day activities are following the terms and conditions of the conservation easement, and if there are questions about a proposed activity, the owner is responsible for contacting the board to discuss their plans. The owner is also responsible for ensuring that the property tax on the easement is paid in full in a timely manner each year. If the property owner intends to sell the easement property, they are strongly encouraged to inform the board (some of our deeds *require* notification). This helps to ensure that any potential buyer of the easement fully understands the terms and conditions of the easement. The board can also provide an Estoppel Certificate ahead of a sale of the easement property.

Timely Payment of Property Taxes

The Deed of Conservation Easement requires that property owners not enter any state of delinquency as it relates to the property tax levied by the Sheriff of Berkeley County. Easement lands that are listed as being in a state of delinquency will trigger a notice letter to the current property owner informing the owner that the terms and conditions of the Deed of Conservation Easement are in violation and requesting an immediate remedy. Continued delinquency of property taxes may result in legal action against the property owner by the Board, including but not limited to the placement of a lien on the easement property.

Conservation Plan

All easements accepted by the Berkeley County Farmland Protection Board must maintain a current Conservation Plan that has been developed by the Natural Resources Conservation Service with the landowner. The Conservation Plan is a management plan for best practices for the landowner's use. While the Board does not enforce the Conservation Plan, it is our policy to confirm that landowners confirm that they maintain a current plan, typically during the annual site visit.

Agricultural Land Easement Plan

Agricultural Land Easement (ALE) plans only apply to specific easements funded through the NRCS for certain Farm Bill years. Your Deed of Conservation Easement will state if an ALE plan is required. The Board is compelled to confirm that this plan is being followed, and the landowner is required to inform the Board and NRCS if substantially different agricultural practices will be implemented.

Some conservation easements identify a resources management plan, such as a Forest Management Plan or other conservation activity which the landowner and the Board develop together to help guide the management of the property, including restoration and enhancement activities. While these plans are often prepared at the time the easement is established, the plan can be updated or amended later, with agreement from both the Board and the landowner.

Timber Management or Forest Stewardship Plan.

Some easements permit commercial forestry and/or conversion of woodland to agricultural land. These specific permissions will be set forth in your Deed of Conservation Easement. Both operations will require approval by the board and in the case of commercial forestry, a timber management or forest stewardship plan must be approved as well. These plans may only be created by a certified forester.

When to Contact the Farmland Protection Board: Staying in Touch – Part II

Your conservation easement details the permitted and prohibited activities and uses on your property. Some allowable activities may need our approval prior to being undertaken. If you have any question about whether your proposed project is allowed, please do not hesitate to contact us. The following examples of activities and uses would call for notification beforehand:

- Construction of improvements including residential, agricultural, and other structures. Specific approval is not required for these activities but incorrectly locating a building or exceeding the maximum impervious surface area allocation will cause serious problems.
- Changes in your Agricultural Land Easement Plan (only for NRCS-funded properties under the 2014 Farm Bill).
- Construction of ponds or other water diversion.
- Requests for granting of an easement, including right of way, utility, or access easements.
- Developing renewable energy.
- Habitat improvements, for example, stream restoration, timber management, and invasive tree species removal.
- Water rights- leasing your water rights or notices regarding your water rights
- You plan on selling your property.

When prior notification or approval is required, it is very important that you notify the Board as soon as possible and submit any required documentation, as outlined in your easement document. If your planned activity is allowed under the terms of the conservation easement, Farmland Protection Board will send written approval by mail or email. If the activity is not permitted, Board staff will work with you to find a mutually agreeable solution.

We encourage you to stay in touch. Even if you are not sure about a notification requirement, just give us a call or send us an email. Our staff is happy to help you sort through the easement terms.

Changes in Ownership

As with any property, land subject to a perpetual conservation easement will change hands over time. To ensure protection of conservation easements, please notify all potential owners and leaseholders about the easement on your property. It is especially important that prospective landowners of an easement property, as well as leaseholders, understand the significance of the easement: why it exists, how it works, the specific restrictions and allowances, and the Board's monitoring procedures.

We are available to speak to prospective owners or leaseholders regarding the terms of the easement, and we are sensitive to the delicate nature of the leasing, buying, and selling process. It is our experience that prospective owners often feel better about buying a protected property when they

understand the easement and have a chance to meet the people they will be interacting with for easement-related business. For your protection, you may consider requesting an Estoppel Certificate from the board. This certifies that, within a specific period, the board finds that there are no obvious violations of the terms and conditions of the easement.

If you sell your property or if you transfer ownership to another party, we ask that you notify the Board. We will contact the new landowner to introduce our organization and explain the conservation easement terms, our stewardship program and answer any questions the new owners may have. Establishing contact immediately with the new landowners helps us to minimize misunderstandings and prevent violations of easement terms. This helps you as well as all parties fully disclose the conditions and limitations that an easement places on the land.

If you do decide to market your property for sale, consider providing your real estate agent with a copy of our ***A Guide to Conservation Easements for the Real Estate Industry***. Contact our office for a copy or visit our website.

Glossary of Terms

This list addresses the various types of documents associated with your conservation easement.

- **Deed of Conservation Easement** – the legal document that creates a conservation easement on your property, as dictated by WV State Law. This document is permanent and is filed in the County Court House. Its terms and conditions run permanently with the land.
- **Monitoring Report** – A summary of the annual monitoring visit, reviewed and approved by the board and distributed to the property owner. It records the current land uses as well as any new improvements or changes in land use.
- **Current Conditions Report** – A report that is used to summarize a series of changes to the easement over a multiple-year period. If there have been multiple improvements created and/or removed on a property over time (each individually reported in a Monitoring Report) a Current Condition Report may be used to summarize these changes. This report is also used to document large-scale changes (intentional or unintentional) such as the creation of a farm pond or a devastating forest fire.
- **Easement Documentation Report (also known as a Baseline Report)** – This report serves several purposes but primarily documents what the property looks like about the time the easement takes effect. The documentation focuses on the conservation values which are deemed important to the easement, and includes maps, photography, and text descriptions. If the owner can realize a charitable deduction on their Federal tax return for the year the easement closed, this report is required by the Internal Revenue Service as part of the taxpayer's filing. This report is also used by the board when conducting annual monitoring visits and may be used in court as evidence should any litigation occur.
- **Estoppel Certificate** – Is a letter from the Board to the property owner certifying compliance by the property owner to the terms and conditions of the easement. This certificate is usually created prior to the sale of the easement property and is delivered to the buyer during the sale. In cases where the terms and conditions of the easement are not being met, the Board reserves the right to refuse to issue an Estoppel Certificate.

Contact Information and Our Partners

A roster of the current board members and staff may be found at our website:
www.berkeley.wvfp.org

Contact Information:

By Phone: (304) 260-3770
By email: berkeley@wvfp.org
By regular mail: Berkeley County Farmland Protection Board
P.O. Box 1243
Martinsburg, WV 25402
Office Location: 229 E. Martin Street
Suite 3
Martinsburg, WV 25401
Website: Berkeley.wvfp.org

Our Conservation Partners:

- USDA/Natural Resources Conservation Service
- Land Trust of the Eastern Panhandle
- Jefferson County Farmland Protection Board
- Potomac Conservancy
- Eastern Panhandle Conservation District
- West Virginia Conservation Agency
- West Virginia Agricultural Lands Protection Authority
- West Virginia Association of Farmland Protection Boards
- West Virginia Department of Environmental Protection
- West Virginia Department of Natural Resources
- West Virginia Rivers
- Land Trust Alliance

Berkeley County Partners

- Berkeley County Assessor
- Berkeley County Council
- Berkeley County Development Authority
- Berkeley County GIS Office
- Berkeley County Historic Landmarks Commission
- Berkeley County Planning Office