

# A Quick Guide to Conservation Easements

Berkeley County Farmland Protection Board



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**Disclaimer.** This document is intended to be an informal guide to the basics of conservation easements. It does not provide legal advice nor advice related to local, state, or federal income tax. Statements contained within do not supersede opinions or actions of the Berkeley County Farmland Protection Board or its approved policy documents. Individuals interested in placing their land into a conservation easement are encouraged to seek legal guidance before proceeding.

# A Quick Guide to Conservation Easements

## Berkeley County Farmland Protection Board

This guide will help you understand what a conservation easement is and whether it is the right land protection tool to meet your needs. When you place your property into a conservation easement, you create a permanent legacy to ensure that your land is protected for generations to come. Because this is an important decision for you, and a conservation easement runs in perpetuity, it is important that you understand what easements are and how the easement acquisition process works. This guide will explain the basics of a conservation easement and how to apply to the Berkeley County Farmland Protection Board (also referred to in this guide as either the BCFPB or simply *the board*).

## What is an Easement?

A conservation easement (we will also simply use the term *easement*) is a legal, voluntary agreement between you, as the property owner, and a land trust (here, the Berkeley County Farmland Protection Board) which helps to permanently protect the land from future intensive development and subdivision. You still own your land and are free to sell it or convey it via a will. The Berkeley County Farmland Protection Board owns the development rights to the property, which we extinguish, thus protecting your land from future subdivision. Under West Virginia law, conservation easements *must* be perpetual in duration. They are created using a Deed of Conservation Easement which is signed by all parties and recorded in the courthouse like any other deed.

## What Parties are Involved?

At a minimum there are two parties involved in the easement: the property owner or owners, and the Berkeley County Farmland Protection Board. The board is referred to as the grantee in the deed of conservation easement, but another term is simply the *holder* of the easement. In some cases, additional land trusts may participate and are listed as additional grantees in the deed. The term *co-holder* is applied to any additional land trust listed in the easement. Lastly, if state or federal monies were used to help pay for the easement, they are listed in the deed as entities with a third-party interest in the easement.

## What is the Process?

The process of placing your property into a conservation easement takes time. If you are asking to be financially reimbursed for the easement the process is highly competitive and the board uses a formal schedule with an application deadline each fiscal year. The funds to purchase an easement may come from a variety of sources but always include a local match, with those funds coming from the county tax on the transfer of real property. Usually at the beginning of each fiscal year, the board decides if matching funds will be used. Voluntarily donating an easement can be done outside of the annual application cycle and thus may take less time. In cases where a property owner wishes to donate the easement, the board still will evaluate the property to ensure the property meets the goals of our program.

In some years, the board also accepts applications for programs which use matching state or federal funds. These may involve an application process that differs in requirements or timing (or both). For applications that only seek to partner with the board, we use the term *local funding* and the monies used to purchase an easement are *local funds*.

For an application offering to sell an easement the steps are:

- The property owner contacts the board and sets up an initial meeting. This may be at the board office or at the property of interest.
- If the owner is interested, they complete and submit an application form. If applying only for local funding a few additional documents may be required. For applications seeking matching federal or state monies, there will be additional requirements, many of which are time-sensitive.
- If the initial meeting wasn't on the property, the board contacts the property owner to arrange for an initial property visit. This visit allows the board to get a sense of the qualities of the land as well as to identify any potential liabilities that may affect the easement.
- Once the application deadline has passed (usually in the mid to late Fall) the board evaluates each application and scores the property. We use a publicly available scoring sheet for local applications and scored applications are independently verified using board staff and board members. At the end of this scoring and vetting process (usually in early to mid-Winter) the board is ready to announce funding decisions. Properties that are selected are the highest-rated properties and they are selected in descending order with the highest scoring property at the top of the list. Typically, the board sets a specific amount of local funds aside early in the fiscal year (beginning in July) and the properties which are selected are chosen because there are sufficient funds available that year.

This process is covered in greater detail beginning in the section **How to Apply**, starting on page 8.

## For the Purchase of an Easement, how is Value Determined?

The board will not purchase an easement, or accept an easement as a donation, without securing a market appraisal to determine the easement value. We generally use one of two related appraisals, a Restricted Use Appraisal for projects using local or state funds and a Yellow Book Appraisal for those projects which involve a Federal match. In essence, both appraisals take the same basic approach.

Like a standard appraisal to obtain a fair market value for a property, easements are appraised using similar methodology. For example, any property located within a flood plain or with very limited access to a public road will appraise lower than similar properties without those impediments. These issues of valuation will be the same regardless of whether one appraised for a market sale or a conservation easement. The one difference is that because a conservation easement appraisal uses a “before and after” approach, the value of buildings and other improvements are not taken into account. There are two reasons for this: The value of any buildings or improvements doesn't change in any before and after scenario, and the purchase of the easement is a purchase of the development rights on the land and not a purchase of any buildings or improvements.

To value a conservation easement, either of the two appraisals mentioned above derive two values:

- Fair Market Value – is like a regular appraisal (except buildings are not valued) and represents what the property would sell for on the open market.
- Restricted Use Value – is a unique appraisal that attempts to value the property as if it were already encumbered by an easement. Another way to think about this value is in terms of agricultural value. What would a willing farmer pay for the property if the interest were solely to farm the land?

The difference between these two values, fair market and restricted use, represents the value of the easement. When you think of it, the conservation value represents the value of the development rights since the fair market value represents the full development rights and the restricted use value represents the limited or extinguished development rights.

As a practical example, a 200-acre farm is appraised using a restricted use appraisal. The fair market value is determined to be \$1,800,000 while the restricted use value comes in at \$825,000. The difference between these two amounts is \$975,000 (or \$4,875 per acre). Note that under WV law the board may not pay more than the lower of either the asking price or the appraised value of the easement. If the farmer had asked for \$1,000,000 then the board would pay \$975,000 (assuming that the farmer finds this agreeable). If the farmer had asked for \$850,000 then that would be the amount the board would pay. In this case however, the farmer can realize a donation of the difference between the agreed-upon asking price and the appraised price (here, it is \$975,000 – appraised minus \$850,000 – asking – which represents a \$125,000 donation. This topic is further discussed in the next section.

## Tax Considerations for Landowners

As we have mentioned, you may sell or donate a conservation easement to the board. In both cases there may be significant tax considerations and we always encourage property owners to talk with their accountant, financial consultant, or tax advisor before proceeding. This is important because although we may generally address tax issues, the board is not qualified to provide tax, financial, or legal advice.

First, if the sale of the conservation easement does not qualify for any type of tax deduction, the payment to the property owner is considered as income for the year in which the easement closes. This can be a significant issue for the property owner as easements may be valuable (easements have been purchased in excess of a million dollars). The purchase price will be reported to the IRS as part of the closing process. However, it is not uncommon for there to be a donation as part of the transaction and in general, the donation component is eligible to be declared as a tax deduction.

In general, the United States Internal Revenue Service (IRS) has rules which define a *qualified conservation easement* and the grantor of such an easement may realize a deduction as part of a charitable contribution. The board is recognized as a non-profit under section 501(c)3 of IRS Code. As such, we only accept easements which meet the requirements as laid forth by the IRS.

There are two general ways to realize a tax deduction. A donation of all or part of the easement property may create a tax deduction, because all or part of the value of the conservation easement has been donated to the board, again a qualified non-profit entity as recognized by the IRS.

Even if the easement is being purchased by the board, under certain conditions the easement may be worth more at closing than the originally agreed-upon price. This typically happens if the real estate market continues to increase in value during the time between the initial appraisal and the agreed purchase price, and closing the easement. Often, it is in the interest of the property owner to secure an IRS appraisal (the IRS requires that the taxpayer pay for this service) that has a valid analysis date within 60 days of closing. If the appraised value of the easement at that time is greater than the amount paid for the easement at closing, the differential may be considered a donation.

As an example, a property is selected for purchase of an easement. Early in the process a restricted use appraisal values the easement at \$450,000. Over the next year the board works toward securing the other services necessary to acquire the easement. At the time of closing, the property owner pays for an IRS appraisal and that values the easement at \$600,000. This might be because the fair market value of comparable lands continued to increase over that prior year. So, at closing, the property owner was compensated \$450,000 for an easement that was actually worth \$600,000. The difference, \$150,000, can be claimed as a charitable contribution and would be eligible for reporting to the IRS.

Unfortunately, West Virginia does not currently recognize donations involving conservation easements for state tax purposes.

# A Conservation Easement Primer

Conservation easements are in place in all 50 states, and to a large degree, Federal Tax Law dictates much about how easements are defined and managed. Each state typically also defines what a conservation easement is and so there are usually small differences between easements across state lines. West Virginia is no exception – conservation easements are generally defined in WV Code §20-12 (Conservation and Preservation Easements – Natural Resources code) and specifically, farmland protection boards and their easements are defined in WV Code §8A-12 (Voluntary Farmland Protection Act – Land Use Planning code).

In this section we address what is typically permitted and prohibited in a conservation easement within West Virginia. The central issue with easements in our state is that they must be *permanent* in nature. At the Federal level, the Internal Revenue Service also requires conservation easements to be *permanent* to realize a tax deduction against federal income tax. Some states, such as Maryland, allow semi-permanent easements that last 30 years.

## What is Permitted

Farmland protection easements focus on the residential and agricultural use of the land, so generally these uses along with some related ones, are allowed. This list is potentially long as the Deed of Conservation Easement generally lists what isn't permitted rather than what is. So use this guide as a general template. You should review the current deed template that the farmland protection board uses before making any decision to enroll your land.

### *Residential Uses*

Single family residences and the associated outbuildings and structures are permitted by an easement. A 2.0-acre area, called the residential area or residential envelope, is defined by survey and serves to act as a container to locate any residentially-related structures. This includes the main residence, any additions, a guest house, in-ground or above-ground swimming pools, decks and patios, garages, garden sheds, and parking areas. Most easements restrict this area to a maximum of 9,000 square feet of impervious surfaces, which includes gravel parking areas and lanes.

Within the home, many home-based businesses are permitted. The exception is those that require a WV Department of Environmental Protection permit. The business must be within the house and must be clearly subordinate to the residential use of the building.

### *Agricultural Uses*

West Virginia broadly defines agriculture to include equestrian activities and agritourism. Within the general definition of agriculture, all related practices are allowed, including orchards, vineyards and Christmas tree farms. Agricultural tourism activities are generally permitted, again provided that the activity is clearly subordinate to the agricultural use of the land. Corn mazes, hay and pony rides, and barn weddings fall into this category of tourism.

The easement also permits production and retail sales facilities to be located within the agricultural area. For a production facility, the majority of product produced must come from the agricultural easement. Likewise, a retail facility must maintain that, at minimum, 51% sales be derived from the agricultural easement area. The retail space is typically limited to 2,000 square feet. The production facility, along with all agricultural structures and impervious areas, must not exceed 2% of the total surface area of the easement (if a residential area is included in the easement, subtract the 9,000 square foot limit to obtain the total permitted agricultural impervious surface area).

## Forestry

Forestry on conservation easements is relatively new in West Virginia. Older easements limit the harvest of trees to no more than 1% of the total trees present in any given year. The lumber must be used by the easement owner and may not be sold commercially in any form (this includes firewood and milled wood). Dead and diseased trees do not apply to this limit.

Beginning several years ago, the BCFPB adopted a new deed template that permits commercial forestry operations, with restrictions. First, a timber management plan (or similar) must be created by a licensed forester. Second, the plan must be reviewed and approved by the BCFPB. This is a requirement as the board must take care to ensure that existing woodland isn't simply harvested for a one-time profit. A timber management plan ensures that a high-quality forest will replace the harvested forest in time.

For woodland on agriculturally important soils (termed *Prime farmland, State-wide important, or locally important soils* by the NRCS) the trees may be harvested and replaced completely by agriculture. For this to happen, this right must be mentioned specifically in the Deed of Conservation Easement as well as the Easement Documentation Report. The reasoning is to ensure that the IRS knows that the conservation value of the easement was the agricultural soils and not the woodland.

Sawmill, milling, and commercial wood working operations are not permitted on easement properties.

## What is not Permitted

The list of activities prohibited by conservation easements is short. All industrial activities and nearly all commercial activities (except those discussed above) are prohibited. Unless arranged prior to the easement closing, subdivision of the land is also prohibited.

### *Industrial and Commercial Activities*

No industrial activities of any type are permitted on easements. This includes mining or prospecting for oil, gas, or mineral resources. Utilities are also prohibited so unless an existing utility right of way exists, no new right of ways may be created, and existing ones may not be expanded (unless that grant exists in the original right of way). Solar arrays and wind farms are considered utilities and may not be placed on an easement. The exception is for solar or wind generation that provides power only for the easement property.

### *Subdivision*

Future subdivision of the easement is prohibited unless arrangements were made before the easement was created. There are two permitted forms of subdivision. For very large farms, and with advance preparation, a farmland board may engage in an easement that permits a future subdivision of the farm into two or more smaller farms. This right to subdivision is at the sole discretion of the board and must result in the creation of two or more viable agricultural parcels. Currently, the NRCS prohibits this type of subdivision on easement they co-fund.

A more common arrangement is to define one or more areas on the property which will be excluded from the easement area. These are called *exemptions* or *exemption areas* and are not legally under the terms and conditions of the easement yet are still part of the overall property. They are not subdivisions and the property owner must take care when defining an exemption area, to ensure that it will meet local subdivision and building ordinances in the future. A third, safer option is to simply subdivide one or more portions of the property before offering the remaining property for an easement.

### ***Impervious Surfaces that Exceed 2% of the Easement Area***

The topic of impervious surface areas has been addressed in previous sections but is worth repeating. The total cap on impervious surfaces varies between states and Federal programs. West Virginia has adopted the 2% cap used by the USDA. The cap means that the total impervious surface area, from all uses within the easement, may not exceed 2% of the total easement area.

As previously mentioned, 9,000 square feet is allocated to any residential area so subtracting that number from the calculated 2% value will yield what can be allocated to agricultural structures, lanes, and driveways. This cap includes existing structures, and one purpose of the Easement Documentation Report (discussed in more detail on page 11) is to account for the impervious surface area present at the time the easement closed. As time goes on, any new structures and surfaces are reported during annual monitoring visits. Structures and surfaces removed are also reported. If many changes to the impervious surface tally take place, the board may generate a *Current Conditions Report* to update the impervious surface accounting.

As an example, consider the following scenario. A farmer owns 110 acres and places 100 of that into a conservation easement. All of the buildings and impervious surfaces are contained within the 100 easement acres. The house, garage, parking area and lane total to 4,600 square feet while the gravel farm lane, barns, silos, and concrete feed lots come to 24,300 square feet. The following table accounts for these surfaces and notes how much additional impervious surface can be created for both residential and agricultural use.

<b>(Line)</b>	<b>Item</b>	<b>Description</b>	<b>Surface Area</b>	<b>Notes</b>
1	R1	House	2,500	
2	R2	Garage	500	
3	R3	Parking/Lane	1,600	
4		<b>Total residential surfaces</b>	<b>4,600</b>	<i>Sum of lines 1-3</i>
5		Permitted total residential surfaces	9,000	<i>From deed</i>
6		Remaining permitted residential surfaces	4,400	<i>line 5 minus line 4</i>
7	A1	Hay/Milking Barn	2,700	
8	A2	Silos	900	
9	A3	Feed Lot #1	4,500	
10	A4	Feed Lot #2	3,000	
11	A5	Equipment Shed	3,600	
11	A6	Farm lane	9,600	
12		<b>Total Agricultural surfaces</b>	<b>24,300</b>	<i>Sum of lines 7-11</i>
13		<b>Total impervious surfaces - all uses</b>	<b>28,900</b>	<i>Lines 4 plus 12</i>
14		Easement Acreage	100	<i>From deed</i>
15		Total Easement Area, square feet	4,356,000	<i>43,560 sq ft in an acre</i>
16		2% of Easement Area, square feet	87,120	<i>0.02 times line 15</i>
17		Total Additional Impervious Surfaces <i>Of Which</i>	58,220	<i>Line 16 minus line 13</i>
18		<i>Additional Residential</i>	4,400	<i>From line 6</i>
19		<i>Additional Agricultural</i>	53,820	<i>Line 17 minus line 18</i>

### ***Envelopes, Exemptions, and Retained Development Rights***

Envelopes and exemptions have been previously discussed but it is a good idea to recap these and to include a third special area, the retained development right.

- Envelopes denote one or more special areas on the easement property that are within the easement. The most typical is the residential envelope. Some early easements also define an agricultural envelope (commonly called a farmstead area). The USDA/NRCS still requires one or more farmstead areas be noted on the survey. For USDA-funded easements, existing and future agricultural structures must be within these areas.
- Exemptions are surveyed portions of the overall property which are not under the terms and conditions of the easement. These may be subdivided in the future, subject to county ordinances and permissions.
- Retained Development Right is an area noted as being a *future* residential envelope. These are typically created (and noted on the survey) for properties where either (1) there are no existing residential structures, or (2) the existing residence is within an exemption. Retained Development

Rights allow a future owner of the easement portion of the property to live on their land. Recall that if the residence is in an exemption, it can be sold separately from the easement. So, it is likely that over time the owner of the house and the owner of the easement property are different parties. A retained development right addresses this possibility.

## How to Apply

The board accepts applications year-round, but only those submitted between 1 July and 31 October are considered for local funding each fiscal year (which begins 1 July and ends 30 June of the next year). If you submit outside of this time frame you will be invited to update your application after 1 July. Occasionally, as additional outside funding becomes available, the board will advertise for a special application season. This may be to accommodate a unique Federal application season or to focus on a time-limited grant that highlights a specific watershed or environment.

You must be the legal owner of the property to apply. All individuals named on the deed associated with the land must sign and date the application form. If the land is owned by a business entity (such as an LLC or a corporation) then additional documentation is required. A business entity must provide proof that they are certified to operate in West Virginia, articles of incorporation or partnership agreements, and in some cases, a resolution or minutes from a duly organized meeting of the governing individuals giving one or more individuals authority to represent the entity to the BCFPB. If you have any doubts about the documentation required, please contact the board office for more information.

Please note that we no longer accept applications for properties which are currently listed for sale (this includes sale by owner). If, following acceptance of an application, the property becomes marketed for sale the board will immediately disqualify the property from the application pool. This limitation extends to properties which have been selected for funding as well.

## Information You will Need

As mentioned above, you will need signatures of all legal owners of the land in question and if the land is owned by a business entity, additional documents are also required. Beyond that, the kind of information you should gather includes:

- The tax identification information for the property. This can be obtained from a current tax bill or tax receipt. Tax ID includes the tax district, tax map, parcel and (if exists), sub parcel information.
- The current deed for the property. This should include the names of all legal owners of the land, including the business name for business entities.
- If, for tax assessment purposes, the land is assessed at farm valuation rates, a copy of the most recent, approved farm valuation form from the Berkeley County Assessor's office. This form should clearly state the value of all agricultural products produced on the land and so include a stamped "Approved" mark from the Assessor's office.
- If you wish to exclude some of the land from the proposed easement, a detailed map showing the exact location and configuration of the proposed exemption area or areas. This is required as our scoring system uses the shape of the proposed easement area when awarding points. For example, points are awarded for road frontage on all but minor roads. If the proposed exemption area runs completely along a public road, we need to know that before considering awarding points in this category.

Other information required as conditions warrant:

- If there is a lien or mortgage on the applicant property, we need to know this information. Likewise, if one or more property owners (this includes business entity ownership of the land) has any sort of legal or financial judgement we need to know this as well. Failure to disclose this information may result in disqualification as an applicant. This is a requirement as these instruments can prevent clear title and may take precedence over a conservation easement.
- If there is a mortgage on the land and the lender is willing to subordinate the loan, a letter from an officer of the lending organization stating this intent is helpful (we award points for this situation).

## Submission of Application Materials

Ideally, you can submit your application package in person and meet with board staff. That way we can ensure that the application is complete and if not, let you know what materials or items are incomplete. We accept email submissions as well, but the package should be complete and all materials must then be mailed to our offices. We require original signed documents for our records.

It is not a good idea to wait until the last minute when there is an application deadline. Staff may not have the time to fully review your application, and you may not have the time to correct any deficiencies. For this reason, it is always a good idea to plan ahead, schedule a meeting with staff, and submit, at minimum, a few days ahead of any deadlines.

## Initial Property Visit

Staff and Board members may request to visit the applicant property. This visit can be part of a pre-application meeting, a meeting to review and accept an application, or a meeting scheduled after receipt of an application.

We generally conduct these meetings to achieve three goals:

- Meet with one or more of the property owners – just to get to know you, hear about your interests in your land, and discuss any questions you may have about the program or the application process.
- Conduct a site verification for those items we may award points for, for which we lack other verifiable means. For example, we have data sets that show the location of all named streams in the county. The dataset for springs however is not complete, so if an application claims the presence of a perennial or season spring and this fact is not noted on our datasets, this property visit is useful to help document this claim.
- Conduct a quick tour to ensure that the property is without serious liabilities. For working orchards, we ask to see any chemical storage and/or transfer sites. If fuel or chemicals are stored in tanks, we need to see those as well.

It is important to remember that during a site visit, the board is only interested in that portion of the property proposed to go into an easement. If there are proposed exemption areas, we will not tour those areas.

## How Applications are Processed

This procedure only applies to applications being processed for a fiscal year using local funds only. When an application is submitted to the NRCS/USDA for consideration, NRCS staff oversee the processing and scoring procedure.

For local funding applications, once an application has been received and deemed to be complete, the scoring process begins. Two board staff first independently score the properties using a standard procedure manual

and identical data sets. We primarily use Geographic Information Systems (GIS) tools to conduct the scoring operation.

After all applicants have been scored by staff, the Executive Director reviews the two score sets and, if differences in scoring for any given property are noted, determines the cause of the discrepancy. Once that issue has been reconciled for all properties with differing scores, the application pool is ready to go before the board.

Generally, in December, board members are invited to participate in a vetting process. The properties are reviewed with staff from the top-ranked down through the list. For each scoring item, the board may challenge staff as to why points were or were not awarded. Staff use the scoring maps, created for each property, as well as other submitted materials to justify their actions. Occasionally minor changes to a score are made. Once the vetting process is complete, the final score sheet is prepared for full board review.

Prior to the January board meeting, staff review the asking price for each applicant property. Existing appraisal data for recently closed easements are used to estimate what the cost to the board might be and a running tally of costs, from the top-ranked property downward, is generated. This step is necessary as the board will make funding decisions based on what it can afford for that fiscal year. The funds set aside each year for the purchase of easements is typically done back in July or August, at the beginning of the fiscal year.

When the board meets in January, they formally review the scores and the projected costs. The board sometimes will add additional funds to fully cover a property that otherwise would be partially cut off from funding due to lack of sufficient funds. This does not necessarily happen each year.

Once the top ranked properties that the board feels it can afford is selected, the announcements go out to the various property owners. If a property wasn't selected but is close to the funding cut off, those owners are also contacted and asked to be patient – if a selected property is pulled for any reason the board may decide to begin moving down the application list. Lastly, properties that scored low are notified. Owners are encouraged to meet with staff to determine if there are ways to improve a property's score in the future (for example, removing an exemption area or paying off a mortgage).

## **If Your Property is Selected**

The following sections outline the steps required to close a conservation easement. It assumes that your property was highly rated and selected by the board. This process is similar for properties selected under the NRCS/USDA application process, but some minor differences apply.

### **Initial Communication**

The process begins with a letter issued by the board to the property owner, indicating that the property has been selected for the purchase of a conservation easement. The letter asks the property owner to reply with an indication as to whether they are or are not interested in proceeding. Upon receipt of a positive reply, the process moves forward.

### **Restricted Use Appraisal**

The next step in the process is to secure a restricted use appraisal. The board pays for this service and selects the vendor. The vendor is asked to contact the property owner to seek permission to visit the property. An appraisal can take a few weeks to be completed, although this process may take longer due to the vendor's workload.

Once the appraisal has been received by the board, staff review it for accuracy and completeness. By state law (WV Code 8A-12-14(a)) a farmland protection board may only purchase an easement using the lower of either: (1) the property owner asking price, or (2) the appraised value of the easement. Based on this limitation, the board votes to approve the specific amount of the offer to purchase a conservation easement and staff then delivers this offer via a letter to the property owner.

Like the initial communication, the written offer to purchase includes a reply that the property owner completes, indicating that they are or are not willing to accept the offer. If the reply accepts the offer, the process moves through the next steps in the due diligence phase.

## **Title Search**

Following the property owner's acceptance of an offer to purchase an easement, a title search is ordered and paid by the board. The result of this process is a title commitment, which insures the board and their monetary interest in the event an issue arises in the title to the property. The process may involve several back-and-forth stages – for example, to ensure that the property owner pays off an existing tax lien or addresses an adverse judgement by a court. Issues can arise if the property is part of a chain of title that involved an estate without a recorded will. Other conditions can arise that require the property owner to actively work toward some form of resolution.

Once clear title is within reach, the title-related documents (usually former deeds, recorded right of ways, and other land-related records) are passed along to the surveyor.

## **Survey**

The board pays for a survey of the property next. The surveyor is asked to coordinate with the property owner to arrange for one or more site visits, and in cases where envelopes or exemption areas are required, to ensure that the owner work closely with the surveyor to ensure that these envelopes and exemptions are satisfactory to the owner (and to the board). When a draft survey is in place, a copy is delivered to the property owner for review. Following any revisions or resurvey work, the board orders a final, sealed set of plats for submission to the planning commission. This process requires some signatures from the property owners prior to submission of the final plat.

## **Easement Documentation Report**

Once a working draft copy of the survey is available the board then orders the creation of an Easement Documentation Report (EDR). This document is also known as a baseline report. Either board staff or an independent vendor contact the property owner and arrange for a site visit. The EDR documents what the land looks like about the time that the easement goes into effect. It consists of photographs of the land and buildings, various maps (including topographic and soils), aerial and/or satellite imagery, and an inventory of the impervious surface areas (discussed on page 6). The draft is reviewed by the property owner and the board and once any final edits are made, copies are prepared for signature at closing. The property owner will receive one copy and the board will retain another for their permanent records. Should the property owner be able to deduct some part of the purchase payment on their Federal income tax, a copy of the EDR is required to be submitted to the IRS, along with the other tax forms for that filing year.

## **Draft Deed of Conservation Easement**

The last document to be created is the Deed of Conservation Easement (DOCE). This document will legally create the easement and is signed at closing, then recorded in the county courthouse. The DOCE includes a metes and bounds legal description of the easement boundary, as well as the boundaries of any envelopes

contained within the easement. The DOCE also references the EDR. A draft is reviewed by both the board and the property owner. Following any approved edits to the document, all steps in the due diligence phase have been completed and both parties move on to schedule closing.

## Closing the Easement

An easement is closed in the same way as if the property was being sold. Once the closing has been scheduled, a lawyer for the board prepares a closing statement that lays out the purchase price and closing costs (which the board pays). Should any portion of real estate tax be outstanding for the tax year, the lawyer arranges to pay those taxes – this amount is deducted from the purchase price and so the property owner in essence pays for this fee. A copy of the closing statement is provided to the property owner prior to closing.

Several days ahead of closing, the board arranges to wire transfer their purchase amount plus closing costs to the law firm's escrow account. Once that transfer has been verified, all parties are notified that the closing process will proceed as planned.

At closing, one or more board members are present and sign the DOCE and the EDR for the board. All of the legal owners of the property must also be present, and in addition to these two documents, must sign additional affidavits and tax-related documents as required by state and federal law. Once the DOCE has been signed by both parties and recorded, a check is issued to the property owner and the creation of the easement is complete.

At any point in this process, up to but not including the mutual signing of the DOCE, the property owner may withdraw their offer to place a conservation easement on their land. Once the DOCE is signed, the conservation easement takes effect and becomes perpetual. This is required by WV law.

## What Happens After the Easement is Created?

After the conservation easement takes effect, you still own your land. The board, through the Deed of Conservation Easement, has extinguished most development rights. At this point, we enter a phrase known as *Stewardship*.

## Annual Monitoring Visits

Stewardship of an easement involves occasional site visits to ensure that the terms and conditions of the easement are being upheld. The board has typically conducted site visits annually but may move to a every two years schedule for some easements. An annual monitoring visit begins by contacting the property owner and arranging for a convenient time for both parties. The property owner need not be present, but our preference is to be able to meet with the owner and walk the land together.

These visits are when changes in impervious surface area are documented – either new structures or lanes are created or existing buildings or other impervious surfaces removed. They are also a good time to discuss any future plans and to answer any questions that the property owner might have.

Once the visit has been conducted, a monitoring report is created and first reviewed by the board. Once approved, a copy is delivered to the property owner and the original is filed along with the Easement Documentation Report.

## Landowner Responsibilities

The DOCE lays out the responsibilities of both the landowner and the board once the easement takes effect. For example, the landowner is responsible for the timely payment of all property taxes. The landowner is also the primary party responsible to ensure that the terms and conditions of the conservation easement are being upheld – this includes acts by neighbors and other trespassers. Depending upon the specifics in the deed, the landowner may also be responsible for:

- Maintaining a conservation plan or an Agricultural Land Easement plan, depending upon who other co-holders and third-parties are involved in the easement.
- Contacting the board prior to any major construction or site work. Although the landowner has the right to build (in nearly all cases) without seeking board permission, locating a building outside of a surveyed envelop or exceeding the impervious surface area cap could be a very costly mistake. Checking in with the board ensures that mistakes don't happen.

## When to Contact the Board

It is a good idea to maintain an open communication with the board, especially if you have any questions about your easement. The landowner should contact the board if any of the following occur (this list is representative but not exhaustive):

- Any trespass or damage done by third parties, such as a neighbor illegally timbering on the easement.
- Plans to timber or harvest trees, to clear woodland, or to remove a significant number of dead or diseased trees.
- 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.
- You plan on selling your property.

## Abbreviations

**BCFPB** The Berkeley County Farmland Protection Board, also referred to in this document as the Board.

**DOCE** Deed of Conservation Easement. This is the legal document that creates a conservation easement.

**EDR** Easement Documentation Report, also called a baseline report. This documents what the property looked like around the time the easement took effect.

**IRS** Internal Revenue Service.

**NRCS** Natural Resource Conservation Service, a unit of the USDA.

**RDR** Retained Development Right – a surveyed area where a future residence may be constructed within an easement, subject to certain conditions.

**USDA** United States Department of Agriculture.