

Buncombe County

Soil and Water Conservation District

Farmland Preservation Program

Program Policies

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Buncombe County Soil & Water Conservation District

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Conservation Easement Project Acceptance Policy

Buncombe County Soil and Water Conservation District (BCSWCD) conservation easement projects are evaluated on a case-by-case basis. BCSWCD staff and Ag Advisory board members visit each potential site to assess its specific conservation values. If the property is assessed to have significant conservation values, then BCSWCD staff will determine if the project contributes to the program's goals. Ultimate decisions as to whether the project moves forward are made by the Board of Commissioners, per the recommendation and support of the Ag Advisory Board and staff.

Buncombe County Ag Advisory Board Acceptance policy is based on the criteria listed below. After ranking the application with the Farmland Preservation Ranking System, the Ag Advisory board uses these criteria to decide which projects are eligible for funding and should move forward through the conservation easement process. The Ag Advisory board may deny a project if it does not meet the criteria described below. During the easement process, the Ag Advisory Board can decide if a landowner/application has become ineligible based on not meeting these criteria. The Ag Advisory Board will always have the flexibility to make exceptions to the policies based on special circumstances.

Each project is evaluated on its own characteristics and must preserve/protect conservation values of the property. Criteria that BCSWCD considers when evaluating a conservation easement project:

- Property is in a relatively natural, undisturbed condition
- Property is part of a working timber or agricultural operation
- Provides scenic views to the public or is part of a scenic view plane visible to the public
- Provides habitat or habitat buffer zones for state or federally listed Rare, Threatened or Endangered species
- Provides critical or significant habitat for other native wildlife or plant species (including deer, elk, bear, fish, sagebrush, and riparian or wetland areas, etc.)
- Protects or contributes to an important linkage of habitat landscapes or habitat connectivity, and/or supports known migration routes or wildlife movement corridors
- Preserves significant portions of unobstructed natural waterways, or is an integral part of a significant watershed area, lake, or other body of water
- Shares a common boundary with publicly or privately conserved land
- Property will be conserved with few or no retained building rights.
- Greater than 15-acre parcel (funds are limited and need to focus on larger parcels)
- Meets the IRS guidelines of a qualified conservation easement § 1.170A-14
- Meets the NC General Statutes - Chapter 113A Article 16 guidelines for conservation easement
- Landowner is cooperative and respectful

Factors that may preclude BCSWCD Farmland Preservation Program involvement:

- The property is outside of BCSWCD's service or focus area
- Disrespectful and uncooperative landowner
- The conservation value of the property is likely to be significantly diminished by development or habitat destruction of the adjacent area
- The donor requires conditions or reserved rights that the District believes will seriously compromise the conservation value of the property
- The ownership type does not allow the property to be protected (i.e., complicated trust, etc.)
- Pre-existing mineral leases do not preclude significant surface disturbances
- Title issues on the property
- Lien/Mortgages in which the bank will not subordinate
- Significant environmental hazards

Conservation Easement Funding Estimates

- Restricted Appraisal Report – A Restricted Appraisal Report is a brief report that includes fewer details than a conventional report. The appraiser's research, analyses, and data used are kept in the appraiser's work file. This type of report is not applicable to every appraisal problem but can be used to estimate grant funding amounts in order to give the landowner a rough idea of what type of funding

Conservation Easement Appraisal

- Conservation Easement (Conventional USPAP or Yellow Book (UASFLA) Format)– This appraisal is for the purpose of determining the value of the property before the placement of a conservation easement, and the value of the property after the encumbrance of a conservation easement. The difference between the two values indicates the change in value due to the encumbrance of a conservation easement, also known as the "easement value". These are often used to apply for state and/or federal funding or for conservancy-landowner negotiations. The report can be completed to conventional USPAP and yellow book standards. *Reports completed to USPAP and yellow book standards do not meet the requirements for a tax deduction with the Internal Revenue Service.

IRS Appraisal to Seek Tax Benefits

Buncombe County Soil and Water Conservation District (BCSWCD) shall inform each landowner of appraisal requirements relevant to the transaction, and also that BCSWCD will not knowingly participate in transactions where it has significant concerns regarding a tax benefit claimed by the landowner. Any information distributed by BCSWCD is not tax advice – please consult a personal tax advisor for official tax advice.

To seek a federal income tax deduction the landowner (not Buncombe County) must obtain what the IRS terms a "qualified" appraisal of the value of the donated conservation easement, conducted by a "qualified" appraiser who follows Uniform Standards of Professional Appraisal Practice (USPAP). This appraisal must state that it was prepared for income tax purposes.

Please note: The appraisal completed by Buncombe County as part of the due diligence associated with the conservation easement project will not suffice for your tax purposes. This is mentioned in the County-Landowner Conservation Easement Contract or Letter of Intent signed at the beginning of the easement process. Any determination of the value of the donation is the responsibility of the donor. Buncombe County can provide you with a variety of names of appraisers who are experienced in appraising conservation easements.

For federal income tax purposes, your appraisal should be dated no earlier than 60 days prior to the closing. If the IRS Appraisal report is completed after the closing date of the easement, then the date of valuation should be the contribution (closing) date. The IRS Appraisal report must be completed no later than the due date of the return in which the contribution is claimed (*i.e.*, April 15th, 2025, for the calendar year 2024 returns). The IRS Appraisal must be received by the donor before the due date of the tax return, including extensions. If not delivered to the donor prior to the date of the return, the donation may not qualify as a noncash charitable contribution.

A "qualified appraisal," as defined in Treasury Regulation §1.170A-13(c)(3), is an appraisal which:

- Is made no earlier than 60 days prior to the date of contribution;
- Includes certain information, which is described below;
- Is prepared, signed and dated by a "qualified appraiser"; and
- Does not involve a prohibited appraisal fee, such as a fee based on the percentage of the valuation.

A "qualified appraisal" must include the following information:

- A description of the property in sufficient detail to determine that the property appraised was the property donated; (USPAP requirement)
- The physical condition of the property; (USPAP requirement)
- The date (or expected date) of donation; (effective date of Appraisal set 60 day window)
- The terms of any agreement or understanding entered into (or expected to be entered into) by the donor that relates to the use or sale of the donated property;
- The name, address and identifying number of the qualified appraiser. Note that often two ID numbers can be required: the appraiser's social security number and the employer's ID number;
- The qualifications of the qualified appraiser; (USPAP requirement)
- A statement that the appraisal was prepared for income tax purposes; (USPAP requirement)
- The date on which the property was appraised; (USPAP requirement)
- The appraised fair market value on the date (or expected date) of contribution; (USPAP Requirement)
- The method of valuation used to determine fair market value, such as the income approach or comparable sales approach; and
- The basis for the valuation. (USPAP Requirement)

The federal government will <u>not</u> allow an income tax deduction if the conservation easement does not meet the "conservation purposes test" (IRC §170(h)(4)), which language is quoted below:

1) the preservation of land areas for outdoor recreation by, or the education of, the general public, or
2) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, or
3) the preservation of open space (including farmland and forest land) where such preservation is—
    a) for the scenic enjoyment of the general public, or
    b) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit
4) the preservation of an historically important land area or a certified historic structure.

Furthermore, if your property satisfies the conservation purposes test but the conservation easement allows development or other uses that degrade the conservation values (i.e., poorly placed roads or house sites), the conservation easement may not qualify.

Buncombe County cannot guarantee that a tax deduction will result from your conservation easement donation. Please consult with a qualified tax advisor.

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Conservation Easement Annual Monitoring Guidelines and Protocols

Monitoring Visit Prep Work

1. Before contacting the landowner to schedule a monitoring visit, review the previous year(s) monitoring reports, landowner communications over the past year, and any landowner requests to exercise reserved rights. Search the PIN on county GIS to confirm ownership is the same as previous years.
2. Contact landowner via phone call or email to schedule the monitoring visit. Use snail mail as a last resort if the landowner is not responsive via other methods. Ask the landowner the following questions, the responses may dictate areas you inspect during the monitoring visit. Make sure to document any communication with the landowner in the Landscape record.
    a. Have there been any changes on the Property in the past year? Are there any changes planned for the upcoming year?
    b. Are you planning on selling the Property/has the Property been sold?
3. After communicating with the landowner to schedule the visit and learn about any changes on the Property, prepare for the site visit. If necessary, review the conservation easement to review any reserved rights requests from the landowner.

Monitoring Site Visit

1. Make sure to visit any areas of the Property where the landowner has made changes or plans to make changes/exercise reserved rights. Document any changes on Landscape.
2. If the monitor comes across something they think may violate the conservation easement, make sure to take lots of pictures for photo documentation.
    a. If the landowner is accompanying the monitoring during the visit, do not make any final statements about the potential violation to the landowner. Ask them about the potential violation and try to understand their goal in making the change.

Monitoring Report

1. Back at the office, complete the Landscape monitoring report. Make sure to caption all of the photos and describe what the photo shows.
2. In the “Observation” section of the monitoring report, describe changes made on the Property, and reference photos.
3. In the “Interpretation” section of the monitoring report, cite which section of the conservation easement would allow or prohibit certain changes that were made on the Property. This is where the interpretation for any violation will be noted.
    a. In the case of an easement violation, make sure there is plenty of documentation on Landscape, as well as in the server folders.
4. If NCDA or USDA reporting is required, complete the necessary forms. Make sure to save a copy in Landscape and in the server folder.
5. Submit the NCDA and USDA reports to the appropriate individual or online portal.
6. Track any reserved rights requests in Landscape.

Follow Up

1. Once the monitoring report has been completed, make sure it has been reviewed by the Farmland Program Manager.
2. Export the monitoring report on Landscape and save it in the Property folder on the server.
3. Print out a copy of the monitoring report and mail it to the landowner. Include any required NCDA or USDA reports.
4. Schedule any necessary follow up visits with the landowner to re-inspect a potential violation or reserved right request.

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Conservation Easement Encroachment or Violation Policy

If Staff are made aware of a potential violation on a conservation easement by the landowner or easement monitor, here are the general steps to follow:

1. Create an "Issue" in the Landscape easement record that is linked with the monitoring visit and includes details about how the violation was identified and/or reported. Reference the specific section of the conservation easement that is being violated as well as a direct comparison to the baseline conditions. Link any communication with the landowner, neighbor, or other third party. Make sure to update the "Interpretation" section of the monitoring report citing the easement and how the change is considered a violation.
2. Notify the party of violation in writing and give them the opportunity to voluntarily correct the violation. Notify by phone call prior to sending an official letter and include a reiteration and summary of the phone conversation in the letter. The conservation easement deed requires written notification of a breach of easement; however, a phone call before sending out the letter can clarify why the landowner made the changes they did and getting any other context necessary to better understand the violation. Once the landowner is notified, they have 30 days to correct the violation or begin correcting the violation depending on the severity of the breach. In the letter, specify the date that staff will return to the Property to re-inspect the violation. Document any communications in Landscape.
3. If the violation requires a more complex solution, set up a meeting with any parties involved to visit the violation site and discuss the violation. During the site visit with the landowner, ensure that the violation is thoroughly documented with photos, descriptions, and tracks of the visit. Be friendly and polite to maintain good relationships and avoid escalation. Be clear and transparent about timelines. DO NOT make any decision or declaration when in the field with the landowners or involved parties. Make sure to track the site visit on Landscape and link the "Issue" work item.
4. Following any site visit, send written communication to the landowner or violating party to summarize the visit and outline the next steps that were discussed during the visit. Document the agreed upon solution, including a schedule for any implementation, in a "Resolution Memo". Staff should create a brief memo describing the violation and staff's remediation recommendations.
5. After 30 days of notice of the violation, visit the site to ensure that the violation has been remedied, or steps have been taken to fix the issue. If steps have been taken to resolve the issue, or it has been remediated after 30 days, send an acknowledgement letter to the landowner or violating party.
    - If no steps have been taken to correct the violation or initiate correction of the violation, send another letter to the violating party detailing Buncombe County's interest in the Property and enforcement responsibilities. In this second letter, set a date for a second follow-up visit. If the violating party is still not cooperating after the second site visit, engage a County Attorney and begin to consider litigation to correct the violation.
6. If the meeting or any communication turns contentious or involved parties are not cooperating, contact the County Attorney to seek their advice. At any point, staff may decide to funnel communication through the County Attorney.

Non-cooperation and Escalation

If the landowner refuses to correct a violation or continues to violate the terms of the conservation easement, it may be time to consider taking legal action. Litigation is expensive, time-consuming, and can irreparably damage the relationship between Buncombe County and the landowner. Engage a Buncombe County attorney to discuss the potential of litigation and ensure that there is adequate documentation of the violation to be legally defensible.

Below are some potential legal remedies to a conservation easement violation:

- Injunctive relief: Filing an injunction in court will compel the violating party to cease all prohibited activity and undertake corrective measures, if necessary. Failure to comply with a court order may result in being held in contempt of court. This can result in fines or even jail time.
- Monetary compensation: The violating party compensates the easement holder (or easement funders) for losses suffered or conservation values damaged.
- Litigation: When taking an easement violation to court, judges will interpret the easement, assess the validity of each party's claim, and issue a ruling on appropriate remedies of a violation.

Mitigating Factors

Mitigating factors should be considered when assessing the severity of a violation. Below, see examples of both positive and negative mitigating factors:

Positive Mitigating Factors

- The landowner demonstrates a legitimate misunderstanding of the easement terms
- A third party committed the violation without the knowledge or approval of the landowner
- The easement is old, poorly drafted, or confusing
- The landowner's intent was consistent with the conservation purposes of the easement

Negative Mitigating Factors

- You can demonstrate that the landowner intentionally violated the easement terms
- There is a documented history of the landowner violating the conservation easement
- The landowner has violated local, state, or federal laws
- The landowner is extremely uncooperative

Types of conservation easement violations

- **Technical violations**. Technical violations do not adversely impact the conservation values or natural resources of the Property. Examples of this type of violation include failure to give required notification of reserved right action or failure to receive required approval for reserved right action.
- **Minor violations**. Minor violations are smaller in scale, measurable, non-permanent impacts on the conservation values or natural resources on the Property. These violations can be easily

remedied through restoration. Examples include trash dumping, third party encroachment, mowing within the riparian buffer, minor forest or farm road construction, etc.

- **Major violations**. Major violations are serious and often have permanent adverse impacts on the conservation values and natural resources on the Property. Examples include construction of a building outside of a designated building area, major road construction, carrying out a timber harvest not in accordance with a management plan, or impact on a large area of the Property. Additionally, an extreme lack of landowner communication may constitute a major violation.

When assessing the severity of a conservation easement violation, consider the positive and negative mitigating factors. For example, a negative mitigating factor may be that the landowner intentionally violated the conservation easement and is intentionally being uncooperative. In that case, what would usually be a minor violation might be considered a major violation.

Good practice items to remember:

- Keep a written record of everything: visit summaries, interpretation memos, resolution memos, communication, and anything else related to the violation.
- The more detail, the better. All actions taken by Buncombe County need to be legally defensible.
- Focus on clear landowner communication! Remain polite and understanding.

For EVAD properties that are also protected in a Conservation Easement:

- The annual conservation easement monitoring visit and report will fulfill the EVAD monitoring requirements.

For EVAD properties NOT protected under a Conservation Easement:

- The property shall be monitored on-site in the year that the conservation agreement is recorded.
- After the initial on-site monitoring visit, Staff will conduct an on-site monitoring visit every three years. Between on-site monitoring visits, Staff will evaluate aerial imagery to determine if any changes have been made on the property.
- The monitor should follow the steps outlined below for the site visit and reporting.

EVAD Monitoring Site Visit and Reporting

3. Contact the landowner prior to the visit to let them know you will be on the property and if they have made any changes on the property.
4. Make sure to visit any areas of the property where the landowner has made changes or plans to make changes/exercise reserved rights. Document any changes on Landscape.
5. If the monitor comes across something they think may violate the conservation agreement, make sure to take lots of pictures for photo documentation.
    a. If the landowner is accompanying the monitoring during the visit, do not make any final statements about the potential violation to the landowner. Ask them about the potential violation and try to understand their goal in making the change.
6. When back at the office, complete the annual conservation easement monitoring report. This should be every year for the EVAD properties also under a conservation easement, and every three years for the properties not under easement.
7. Reports should be filed in the project folder – it could be a conservation easement folder or the EVAD folder depending on whether the Property is under a conservation easement or not.

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Conservation Easement Records Policy

Buncombe County Farmland Preservation Program creates, collects, and maintains records for all approved conservation easement projects, including the stewardship of these properties. This document outlines the storage and retention guidelines for documents involved in transactions conveying any real estate interest.

Land Transaction Records

Irreplaceable transactional records, listed below, shall have physical copies stored in the Buncombe County SWCD office, as well as online copies on the County Server, Landscape software, as well as on a backup drive hosted by Buncombe County. All executed and delivered deeds and other legal documents as appropriate will be recorded as the Buncombe County Register of Deeds.

Irreplaceable transactional records include:

- Conservation easement deeds
- Mortgage subordination agreements
- Lease subordination agreements
- Baseline Documentation Reports
- Environmental Assessments
- Title insurance policies or commitments
- Owner's affidavits
- Indemnity agreements
- County – landowner agreements
- Surveys
- Appraisals
- Contemporaneous written acknowledgement letters
- Grant-requested documents (if applicable)

Other transactional records may include:

- Record of Board of Commissioner approval
- Agricultural Advisory Board meeting minutes, agendas, board packets, and project approvals
- Grant contracts
- IRS 8283 forms and supplemental statements*

***Any relevant tax documents associated with the real estate transaction must be stored in perpetuity.**

Stewardship

Upon completion of a land conservation transaction, irreplaceable documents essential to the defense of the conservation easement shall be stored on the County Server, Landscape software, as well as on a backup drive hosted by Buncombe County.

Irreplaceable stewardship documents include:

- Annual monitoring reports
- Reserved right action requests and written approvals
- Conservation easement amendments
- Baseline Documentation Report updates
- Conservation Plans and updates
- Forest Management Plans and updates
- Conservation Easement Violation communication and documentation

Retention

All irreplaceable transactional and stewardship documents must be retained permanently, since all are essential to defending the conservation easement in perpetuity.

Other, non-essential documents and records will follow the county's record retention policy requirements.