

Conservation Easements: What Are They And Who Participates?

Jesse J. Richardson, Jr., Ruth G. Babylon, and Tamara A. Vance

Nationwide, land trusts hold easements on over nine million acres. In Virginia and across the country, the rate of conservation easement donation has increased exponentially in the past several years. Approximately 300,000 acres of farmland and open space in Virginia are subject to voluntary, perpetual conservation easements (VOF). Conservation easements limit the amount of development that may occur on real property.

In 1966, Virginia became one of the first states in the country to pass a law allowing landowners to separate development rights from the rest of their property and sell or donate those rights in the form of a conservation easement. (*Code of Virginia* Sec. 10.0 – 1800 et seq.) A separate law created the Virginia Outdoors Foundation (VOF), a state agency charged with “promot[ing] the preservation of open space lands and...encourag[ing] private gifts of money, securities, land or other property to preserve the natural, scenic, historic, open-space and recreational areas of the Commonwealth.” (*Code of Virginia* Sec. 10.1 – 1700 et seq.)

VOF accomplishes its mission primarily through the use of open space or conservation easements. VOF currently holds easements on over 289,000 acres on more than 1,600 properties throughout the Commonwealth, making the agency one of the largest land trusts in the nation. Approximately 90 percent of the easements in the Commonwealth are held by the VOF, with various land trusts and other governmental agencies holding an additional 175 or so easements comprising an undetermined number of acres (DCR). These easements protect a wide variety of natural resources, including farm and forestland, natural areas, watershed areas, scenic views, and rural historic districts.

Jesse J. Richardson, Jr., is Associate Professor, Urban Affairs and Planning, Virginia Tech; Ruth G. Babylon and Tamara A. Vance are staff and past executive director, Virginia Outdoor Foundation, respectively.

Federal and state income tax and other tax benefits seek to encourage donation of conservation easements. The literature on conservation easements focuses almost exclusively on personal financial benefits. Despite the rapidly growing importance of donated easements on land use in the Commonwealth and the nation, no one has surveyed donors or owners of easement land to determine the motivations of donors or the present use of easement property.

In the summer and fall of 2003, the Urban Affairs and Planning program at Virginia Tech and VOF conducted a survey of all the donors of conservation easements to VOF. The study sought to discover the motivations and characteristics of easement donors, the attitudes of donors towards the easement process, and the present use of protected lands.

Conservation easement defined

A conservation easement is a voluntary legal agreement between a landowner and a public body (such as VOF) or a conservation group in which the parties agree to protect the open space and natural resource value of the land with a series of permanent deed restrictions.¹ In most states, private conservation organizations, called land trusts, hold the lion's share of conservation easements. In Virginia, donors may utilize private land trusts, but the vast majority of landowners engage VOF to hold the easement due to its state agency status.

Conservation easements held by VOF typically restrict mining, industrial, commercial, and intensive residential uses while providing for continued farming and forestry activities. Public access continues to be controlled by the landowner.

¹ Without permanent deed restrictions, tax deductions are not available. The Virginia Beach local government program may be an exception.

The landowner and the organization accepting donations tailor the easement to reflect the conservation values of the individual property. After completion, the signed easement is recorded as a permanent record in the local courthouse.

In Virginia, private organizations such as Piedmont Environmental Council, Middle Peninsula Land Trust, James River Association, Valley Conservation Council, Western Virginia Land Trust, The Nature Conservancy, New River Land Trust, Chesapeake Bay Foundation, and others, aid VOF in spreading the word about land conservation through easements. Landowners in areas where these groups have been active are becoming particularly aware of the benefits of easements as conservation and estate planning tools. As a result, the protected acreage in these areas is rising dramatically: the VOF easement program has grown to over 1,640 total projects, with a record 41,603 acres accepted in 2004. More than half of VOF's total easement acres have been accepted in the last five years alone, reflecting a national trend (Table 1).

Table 1. Acres in easements, 1968 - 2004

Year	Acres
1968 – 1969	444
1970s	20,606
1980s	37,462
1990s	78,274
2000 – 2004	152,209

Donation process

Having made the decision to donate the easement, the landowner discusses the easement provisions with advisors (attorney, accountant, and/or family members) and reaches a preliminary agreement with VOF on the proposed terms of the easement. VOF provides a template easement prepared by the Office of the Attorney General. VOF's Board of Trustees must review and accept each easement.

The length of time required for the approval process varies from easement to easement and from landowner to landowner. Although many landowners complete easements within only a few months, for the majority of landowners the process takes from six months to a year or more.

Tax benefits of donating an easement

A gift of a qualified conservation easement in perpetuity may qualify as a noncash charitable gift which may yield a deduction for federal income tax purposes and a credit for state income tax purposes. In addition, local property tax reductions and federal estate tax exemptions may be possible. An independent certified appraiser must establish the value of the easement which is based on the value of the

development rights forgone. Once that value is established, it becomes the basis for calculating tax benefits. The tax benefits available to easement donors are summarized in Table 2.

The 2000 Virginia General Assembly created a state income tax credit, which is in addition to the other tax benefits available to donors. The income tax credit became transferable to other taxpayers in 2002. The transferability portion of the credit seeks to allow donors with low incomes to benefit from having donated in the past. Prior to institution of the transferable tax credit, a low income donor reaped few benefits from the credit. Now, however, a farmer, for example, may donate an easement and sell the tax credits to high income taxpayers in Virginia and thus receive cash benefits from the donation.

If the landowner intends to take a qualified tax deduction or claim a credit for the noncash charitable gift, the landowner engages an independent appraiser to determine the value of the gift. VOF does not require an appraisal and is not involved in the appraisal process, nor does VOF give tax advice. Landowners are advised to check with their tax adviser or attorney about qualifying for any tax benefits associated with conservation easements.

Survey questions and results

The survey was sent to 962 people. Of those, 549 (57 percent) returned completed surveys. The geographic spread, size of parcel, and other known characteristics of VOF donors generally matched the respondents fairly closely. The survey sought to gather information in four main areas:

- (1) demographic characteristics of donors and of owners of easement property,
- (2) attitudes toward the easement process,
- (3) motivations of donors, and
- (4) the uses to which easement property is being put.

Demographic characteristics of donors

Given the relatively recent genesis of conservation easements and the concentration of donations in recent years, the investigators expected that most owners would be the original donor. Indeed, 76 percent of owners were the original donors. Of owners that were not original donors, 67 percent were not family members of the original donor. This percentage parallels the number of non-donor owners that purchased the easement land from the donor, as opposed to receiving the land as a gift or inheritance. Two-thirds of family members assuming ownership received the property by inheritance, while 33 percent received the land as a gift, with 67 percent

Table 2: Potential tax benefits to landowners for donating conservation easements

<i>Federal Charitable gift deduction</i>	Section 170(h) of the IRS Code establishes the criteria for a “qualified gift of a conservation easement”. The deduction is limited to 30 percent of adjusted gross income in the year of the gift, which if not used up, may be carried forward for an additional five years.
<i>Virginia State Tax Credit</i>	A Virginia State tax credit has been established for conservation easements at 50 percent of the value of the easement. This credit can also be carried forward for five years. A donor may also sell or give all or portions of the credit to others that may, in turn, use the credit. (see <i>Code of Virginia</i> , Sec. 58.1-510 through 513). Virginia limits each taxpayer to using \$100,000 of the tax credit per year on their tax return. No limit exists on transfers of the credit.
<i>Federal Estate Tax Exemption.</i>	Section 2031(c) “The Farm and Ranch Protection Act” allows that up to 40 percent of the value of land under conservation easement may be exempt from estate taxes, depending on appraised value (i.e. a exemption is reduced if appraisal is less than 30 percent of the property value) and subject to a \$500,000 cap for an individual (or \$1 million for a couple with proper estate planning).
<i>Local Property Taxes</i>	may be reduced (see Code of Virginia 10.1-1011 and 58.1-3205); however, if land is already enrolled in a local Land Use Assessment Taxation Program, additional reductions in county real estate taxes are unlikely.

of these entities made up of family members of the original donor.

Present owners, including original donors, are generally older: 68 percent over 56 years old and 38 percent over 65. Owners also report high household incomes, with 38 percent showing incomes of over \$200,000 per year and only 9 percent indicating incomes of less than \$40,000 per year. In the most recent years, higher numbers of lower and moderate income landowners donated conservation easements. The easement landowners hold an incredibly high level of education, with 83 percent holding a bachelor’s degree or higher and almost half (46 percent) holding a post graduate degree. Finally, individuals, households, or family Limited Liability Corporations hold 91 percent of the easement properties. Only 3 percent of easement owners consist of business entities.

The act of placing an easement on one’s property greatly affects the heirs of the donors. Interestingly, only 12 percent of respondents “actively involved” heirs in the easement process, although 83 percent intended heirs to inherit the land under easement. In addition, 83 percent said that the heirs “understood the easement,” although 39 percent reported that the heirs “were not involved” in the easement process. On its face, those results appear inconsistent. Anecdotal evidence indicates that some second generation easement holders fail to fully understand the easement limitations. Although donating an easement remains the sole decision of the donor, heirs may need to be educated about the ramifications of the easement on the use of the land. The existence of the easement also needs to be communicated to purchasers of the property.

Reasons people donate conservation easements

The literature emphasizes the tax benefits of conservation easements almost exclusively. The emphasis suggests that tax benefits form the primary motive of donors. However, the survey responses showed that tax considerations were not as important as the literature suggests.

The survey listed 10 possible motivations for a donation of a conservation easement. Respondents were asked to first rank the motivating factors on a scale of 0 (no influence) to 4 (critically influenced). In addition, the survey asked respondents to list the three top motivations for donating an easement. Respondents could add motivations not listed. Three motivations stood out from the rest: protecting the land from development, protecting the land for the future, and protecting geographic feature/natural area (Table 3). These factors clearly provided the strongest motivation for conservation easement donations. Interestingly, a strong motivation to protect land for descendants decreased as gross income from the land increased.

Taxes generally proved to provide little to moderate motivation. The federal income tax deduction, federal/state estate tax exemption, and state income tax credit scored as moderate to low motivators, local property taxes were a moderate motivating factor and significantly stronger than federal and state tax incentives. Approximately 87 percent of easement owners reported that the land was under use-value assessment. However, only 45 percent said the easement reduced their local property taxes. Many respondents wrote comments, most angry, about the local property tax. While real property tax benefits motivate donors

Table 3. Motivations for donating land to the Virginia Outdoor Foundation

	Critically influenced	Greatly influenced	Influenced	Minimal influence	No influence
	-----%-----				
Protect the land for active farming	28	20	16	1	22
Protect the land from development	85	11	3	1	1
Protect a geographic feature/natural area	51	26	13	7	4
Maintain privacy	31	25	17	14	14
Protect land for future	79	18	2	1	1
Protect land for descendants and families	33	19	19	12	17
Federal income tax deduction	24	23	30	11	12
Federal/state estate tax exemption	16	22	26	13	23
State income tax credit	16	22	25	13	23
Local Property tax	13	15	24	19	29

to a greater degree than other tax incentives, except for a state tax credit, donating an easement often fails, in practice, to give real estate tax benefits. Perhaps respondents worried about the possible loss of use-value taxation through a change in county tax policy. Because county assessors are required by law to take easements into consideration if use value were repealed in a jurisdiction, the easement should reduce the value of the property and give real property tax relief.

The survey posed several specific questions about the state income tax credit. Forty-six percent of respondents indicated that they would not (13 percent) or might not (33 percent) have donated the easement were it not for the state income tax credit. Similarly, 38 percent of respondents indicated that they would not have donated (10 percent) or may not have donated (28 percent) had the state income tax credit not been transferable. These figures, along with a significant increase in donations, indicate that the state income tax credit proves a much bigger incentive to donate than federal income tax and estate tax incentives. Consistent with these findings, the number of donors by income category show that lower and moderate household income landowners donated easements in significantly greater numbers after the state tax credit became available in 2000.

Protecting a geographic feature/natural area and maintaining privacy moderately motivated respondents. Maintaining privacy, somewhat surprisingly, proved much more important to lower income donors than to higher income donors.

Finally, protecting the land for farming clearly provided little motivation for respondents. This result may be attributed to at least three factors. First, only 25 percent of respondents earned income from farming. Second, investigators' experience indicates that many farmers have no heirs that wish to take over the operation. Finally, other listed motivations such as protecting land for family may have covered this topic for respondents.

Use made of easement property

Investigators also desired to determine what use the owners of easement land made of the property. In particular, the level of farming and silvicultural activity occurring would indicate both the propensity of farmers to donate easements and the proportion of open space versus working land protection in the program. VOF broadly seeks "to preserve the natural, scenic, historic, open-space and recreational areas of the Commonwealth."

Twenty-seven percent of easement landowners lease the land to others. The lessee mainly uses the property for crop/hay production or pasture. Of those not leasing the land to others, only 33 percent earned income from the land. Of the 33 percent of respondents earning income from the land, 59 percent earn the income from agriculture, 10 percent from forestry, and 16 percent from both.

The level of agriculture or other land-based economic activity proved to be generally very low. Of those earning non-lease income, 46 percent earn gross receipts of less than \$10,000 per year, while 10 percent earn \$100,000 or greater. The median income from the land for those without lease income totaled \$12,000.

Land uses varied widely, but approximately half the income-producing land is used for agricultural crops, with hay (60 percent of the agricultural land) as the predominant crop. Sixty-one percent of those earning income from the land kept livestock on the land, with cattle (35 percent) and horses (30 percent) being the most popular livestock.

The survey results for forestry indicate some interesting, yet not surprising practices. Seventy-nine percent of the easement property contains some forest, and 69 percent of those having forest land did not plan to harvest the trees at all. Of those planning to harvest trees, 60 percent plan to

possibly conduct a harvest at some undetermined, future time. Therefore, only 13 percent of respondents with forest land have plans to harvest the forest at a determined time. Only 34 percent of respondents have a written conservation, forestry stewardship, or wildlife management plan for the easement property.

Three quarters of easement land contains streams or rivers; 77 percent includes pasture land, and 19 percent includes historic sites.

Conclusions

The first set of findings focuses on the transferability of the state income tax credit. The tax credit became transferable only months before the survey. However, a large number of respondents donated during that several month time period. Those earning income from the land proved to be most motivated by the transferable tax credit. The close relationship between the transferability of the state income tax credit and income from the land suggests the importance of this transferable tax credit. More importantly, this result suggests that the tax credit, and perhaps more importantly, the transferable tax credit, encourages farmers to donate easements.

At the same time, two other groups show strong motivation from the tax credit: those with household incomes of over \$200,000 and those with low household incomes. Note that low household incomes also directly related to relatively

significant levels of income from the land. The tax credit, therefore, attracts both ends of the income spectrum.

Strong motivation to protect the land for descendants decreases as gross income from the land increases. Perhaps farmers have no heirs to take over the operation. In the same vein, the only motivating factor that seemed to change over time (except for changes in the state income tax benefits) was protecting the land for farming. That factor becomes significantly less important over time.

A follow-up survey is advisable as the program spreads statewide and the market for transferable tax credits stabilizes. Historically, VOF's easement program has been concentrated in the Northern Piedmont (partly due to the "word of mouth" method of landowners learning about easements and because of the intensive work of the Piedmont Environmental Council over the last three decades). In the last five years, new VOF regional offices have been established in the Shenandoah Valley and Southwest Virginia. In conjunction with active local private land trusts, easement donations have greatly expanded in these areas. The transferability or sale of the tax credit only became possible in 2002 (the same year the survey was conducted). Because the market for transferable tax credits is still somewhat unstable, landowners' motivation may change as the market evolves. In 2004, a record number of new easements was donated to VOF totaling over 41,000 acres. This popular mechanism for protecting public values in private land needs further study to help VOF determine if it is preserving the lands it is mandated to preserve. Further study of the tax impact is also necessary as the program matures.

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