

Frequently Asked Legal Questions Regarding CREP Conservation Easements



1. What is a conservation easement?

Simply put, a conservation easement is an interest in real estate. An easement is an agreement between two parties regarding land whereby the owner of the land allows the other party to use the land for certain purposes, or the owner of the land agrees to not use their own land for purposes to which the owner would otherwise, in the absence of the agreement, have a legal right.

CREP conservation easements are of the latter category. When a landowner signs a CREP conservation easement, that landowner agrees not to do certain things on his or her land that the landowner otherwise has the legal right to do. When a landowner agrees not to do a certain thing, it is called a “restrictive covenant”. In essence, the landowner is paid consideration (i.e. money) in exchange for his or her agreement not to do that certain thing. For example, when a landowner signs a CREP conservation easement, speaking broadly, a landowner agrees, among other things, not to farm the land for a certain duration. This is one of the restrictive covenants to which the landowner agrees and for which he is paid.

It may help to think of a conservation easement as a “legal tool” to accomplish conservation goals on a particular tract of land. This “tool” is used much like any other document or agreement regarding real estate. The purpose (i.e. conservation goals) of the easement is the factor that distinguishes it from other types of documents.

2. The easement says “Deed of Conservation Easement”. Am I deeding my property away?

Many landowners see the word “Deed” and think that they are “deeding away” their land in a manner similar to the way you would sell a house to another party. This is not the case. You are agreeing to give up certain rights that you now have in the land. Land can be divided up in a number of ways. One way is to divide certain rights or interests in the land. As mentioned in the answer to Question 1 above, when a landowner signs a CREP conservation easement, the landowner agrees to give up certain rights, or interests, that the landowner has in the land.

The landowner is not deeding the property away as you would deed a house to a third party. In selling a house, the owner generally executes a General Warranty Deed to the third party which would convey, or deed, 100% of that property to the third party. This is

what is known as conveying “fee simple” interest in the property. Fee simple is the most complete form of ownership a landowner can have in land in North Carolina.

In that sense, a landowner is not “deeding away” his property by executing a CREP conservation easement. The landowner is giving up certain rights in the property that the landowner now has.

3. Once the conservation easement is on my land, can I later sell the land?

Yes. Anyone with a conservation easement on their land may sell the land to a third party if they so choose. The easement would go along with the land to the new landowner. The new landowner would have to comply with the terms of the easement.

4. I have a Deed of Trust on my property. Can I still enroll in the CREP State Incentive program?

Generally, yes. In most cases, however, the landowner will be required to secure a subordination agreement from the bank that holds the Deed of Trust on the land. A subordination agreement is a document that is executed by the bank, which places the conservation easement in front of the Deed of Trust in terms of priority. It’s a good idea to talk to your bank prior to enrolling in CREP to be sure that the bank is willing to execute the subordination agreement.

5. I am married. Does my spouse have to sign the Conservation Easement?

Yes. North Carolina law gives spouses of persons owning real property what is known as a statutory “marital interest” in the property of their spouse. This is the case even if the property was not deeded to the spouse. When a spouse signs the conservation easement, the spouse is giving up, or waiving, their “marital interest” in the property as to that conveyance. In the absence of an executed agreement between you and your spouse or a properly worded separation agreement, your spouse will have to sign the conservation easement to ensure that all interests are accounted for.

6. I am the owner of the property. I have given the farm operator a FSA Power of Attorney to execute FSA documents and contracts. Can the farm operator execute the Conservation Easement on my behalf using the FSA Power of Attorney?

No. The FSA Power of Attorney can only be used to execute FSA documents. The CREP Conservation Easement is a conveyance of an interest in real property to the State of North Carolina. As such, in order for the farm operator, or anyone other than the landowner, to execute the Conservation Easement, the landowner must execute a separate Power of Attorney to that effect.

7. I own the property with my 5 brothers and sisters. I am the only one still living in North Carolina, and I handle all operations regarding this property. The rest of my siblings live in other states. Can I participate in CREP-State Incentive without bothering them?

No. All legal owners of record must be willing to participate in the program.

8. Under the facts of Question 7, do my brothers and sisters have to sign all the documents?

Yes. Unless you have a valid Power of Attorney authorizing you to sign on your sibling's behalf, all owners of record must sign the conservation easement and accompanying documents in order to participate in the program. If the siblings are owners of record, they must sign the documents.

9. I have a life estate in the property. Upon my death the property is to go to my two children (they are the "remaindermen" of the life estate). Do my children have to sign the easement?

Yes. Similar to the points of emphasis in questions 6 through 8, all owners of the property must sign the conservation easement, regardless of the size or duration of their ownership interest.

10. Miscellaneous Items.

- a) **Estate Issues.** If the property is currently in an estate settlement procedure (i.e. the owner of the land has passed away), the CREP program generally waits until the estate is closed before closing the conservation easement with the new owners of the property (i.e. the heirs of the deceased). This is done to ensure that estate and inheritance taxes have been paid as well as any claims by creditors of the estate.
- b) **Checks made payable to...** The CREP program generally makes checks payable to the owners of the property in the proportion of each respective owner's interest in the land.
- c) **Tax Questions.** Many landowners are unsure as to how the payment received for the purchase of the conservation easement should be taxed. Is it ordinary income? Is it a capital gain? For answers to these and any other tax related questions, please consult your accountant or tax advisor.
- d) **Landowner Questionnaire.** As always, we would greatly appreciate a completed and signed landowner questionnaire.