

# Conservation Easements for Natural Resource Protection

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Georgia Environmental Policy Institute and Sautee-Nacoochee Community Association

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## What is a Conservation Easement?

A conservation easement is a legally binding agreement between a property owner and a governmental body or a land trust that restricts the type and amount of development and use that may take place on the property. (The land trust,<sup>1</sup> a non-profit corporation whose purpose includes acquiring and holding land and interests in land for conservation purposes, must be recognized as a publicly-supported charitable organization by the Internal Revenue Service [IRS]). Conservation easements can be an effective complement to government acquisition programs and the regulation of uses to protect environmentally sensitive land. In 1992 the Georgia legislature passed the Uniform conservation Easement Act, which authorizes and promotes the use of conservation easements in Georgia.<sup>2</sup>

Ownership of land includes a "bundle" of rights - including the right to subdivide, to sell, to farm, to cut timber, and to build. A landowner may voluntarily agree to give up one or more of these rights in order to protect a resource or conservation value. For example, he might agree to prohibit any structures, roads, or clearcutting on a parcel in order to protect wildlife habitat. Or he might restrict land disturbance and chemical application within a river or lakeshore buffer zone, or restrict dredging in a wetland.

In addition, he may reserve an number of basic rights - to sell, lease, assign and use the property; to restrict public access; to maintain the land for agricultural use subject to specified best management practices; or to construct additional dwellings on specified sites, for example. Under no condition may these reserved rights impair the resource or conservation value the easement seeks to protect.

The agreement restricting and reserving certain uses is binding on future purchasers of the property and is recorded as a Deed of Conservation Easement. It is the responsibility of the easement holder (the government or the land trust) to routinely monitor the property, usually once a year, to ensure that the agreement is not violated and to pursue legal recourse to compel compliance if necessary. The land trust creates and maintains a stewardship fund to cover the costs for perpetual maintenance of the easement. To ensure that they put their limited resources to the best use, most land trust develop written criteria to guide them in determining whether to pursue or accept an easement.<sup>3</sup>

## Benefits to the Landowner

By entering into a conservation easement, a landowner ensures that his land will be protected for future generations while remaining in private hands.

There may be financial benefits as well. If the landowner gives the easement to a qualified charitable organization in perpetuity for conservation purposes recognized by the IRS, he may deduct the value of the easement from his personal federal and state income taxes.<sup>4</sup>

The Internal Revenue Code, Section 170(h)(4)(A), defines conservation purposes as the preservation of land areas for:

- outdoor recreation by, or the education of, the general public;
- the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystems;

- the preservation of open space (including farmland and forest land) yielding significant public benefit for the scenic enjoyment of the general public, or pursuant to a clearly delineated federal, state or local governmental conservation policy; or
- the preservation of historically important land areas or buildings.

The value of the easement is the difference between the fair market value of the land without the restriction and the fair market value after the restriction.<sup>5</sup> This must be determined by a qualified appraiser if the gift's value exceeds \$5,000.<sup>6</sup> The land-owner can deduct up to 30% of his adjusted gross income over a period of six years until the value of the easement is exhausted if the property is a long-term capital gain asset.<sup>7</sup>

## Calculating Income Tax Benefits

The Lullwaters own a 200-acre parcel of pristine hardwoods, wetlands and fields adjacent to a river in a rapidly growing county. The property's current value is \$4,000 an acre or \$800,000 for the entire parcel. The Lullwaters convey a perpetual easement on the entire parcel to the local land trust. The easement reserves for the Lullwaters the right to live in the farmhouse and to construct three additional houses on specified sites for their children, to use the land for passive recreational purposes, and to use designated portions for agricultural purposes. The easement specifies that the land will not be subdivided, nor timber harvested. As a result of these restrictions, the property's value is decreased to \$400,000. The Lullwaters' adjusted gross income is \$80,000 and will remain constant over the next six years.

Value of the Lullwaters' Easement Donation	=	Fair market Value (FMV) of land	-	FMV of land subject to easement restrictions
\$400,000	=	\$800,000	-	\$400,000
Annual amount of Lullwaters' deduction (The donor can take this deduction every year for six years or until the value of the easement is exhausted, whichever occurs first)			=	30% of the Lullwaters' Adjusted Gross Income
			=	\$.30 x \$80,000
			=	\$24,000

The Lullwaters can take this deduction every year for six years for a total deduction of \$144,000. An experienced tax or estate attorney should be consulted in order to ensure maximum financial benefits to the donor.

Donors who overvalue their easements may be penalized by the IRS, as may the appraiser. The IRS requires that baseline data be compiled to establish the condition of the property at the time of the gift. This data must be accompanied by a statement asserting its accuracy, signed by the landowner and a representative of the land trust.

High estate taxes, which have forced the sale of many treasured family lands, may be similarly decreased through the use of conservation easements satisfying the internal Revenue Code. If a

property owner restricts the use of his property through a conservation easement prior to his death, the estate tax is assessed on the restricted value of the property. When the landowner bequeaths a conservation easement to a land trust in his will, the value of the easement is deducted from the estate.

Property taxes may be decreased as well since restricting various development rights may diminish the fair market value of the land.<sup>8</sup> The public benefits from resource protection afforded by the easements should substantially outweigh the costs in terms of decreased revenue to the local government. Easements restricting land-disturbing activities and chemical handling on a river bank, for example, may result in decreased costs of drinking water treatment and increased revenues generated by recreational users. Easements protecting agricultural uses on a tract of land help assure the viability of agricultural-dependent open space and scenic views may result in increased property values on adjacent land.

## **Mortgages**

In the case of land subject to a pre-existing mortgage, the lender must agree to subordinate its rights in the property to the rights of the easement holder to ensure that the easement is not extinguished in the event of foreclosure.

## **Liability**

The Georgia legislature has exempted the easement holder (land trust or local government) from liability for damages or injury that may be suffered by any person on the property.<sup>9</sup> Where an easement provides for public access for recreational purposes, the property owner will be protected against liability in most cases as well.<sup>10</sup> The Land Trust Alliance provides land trust with low-cost general liability and related insurance coverage under its "Green Umbrella" program.<sup>11</sup>

## **Flexibility**

While this flexible management tool is new to Georgians, conservation easements have been used to protect valuable resources for many years in other parts of the country. There are over 900 land trust in the United States protecting 2.7 million acres of farms, wetlands, wildlife habitat, urban gardens and parks, forests, watersheds, coastlines, river corridors, aquifer recharge areas and trails.<sup>12</sup>

The possibilities of designing a conservation easement tailored to the wishes of the landowner, the natural features of the property, and the goals of the land trust, are endless. For example, the Red Hills Conservation Association was incorporated to protect the natural, historical, cultural and scenic features of Southwest Georgia's Red Hills Region while providing for consumptive use of wildlife and forestry resources.<sup>13</sup> A typical easement of this land trust specifies timber practices such as selective harvesting and uneven age management to be used on the tract. The Delaware and Raritan Greenway is establishing a connecting network of greenways along a 60-mile canal in New Jersey.<sup>14</sup> Some of these greenways will include pedestrian trails. Conservation easements held by this land trust require that the public be granted pedestrian

access to specified segments of some tracts and provide that the land trust indemnify the property owner in the event that a pedestrian is injured using the trail. Conservation easements protecting particular ecosystems or resources do not have to provide for public access, but those falling within the IRS conservation purpose of "recreation or education of the general public" do. Visual access may be sufficient for scenic and open space easements.

The Montana Land Reliance protects 200 miles of stream bank through 64 easements across the state.<sup>15</sup> One easement across a ranch protects twenty miles of habitat and spawning grounds for the last major population of river grayling in the lower 48 states. This particular easement allows the landowner to continue agricultural operations on the land but prohibits subdivision of the tract. The agreement specifies grazing strategies to protect the riparian area. These include both fenced and unfenced buffer zones to reduce erosion and runoff, and special provisions for stock watering.

A local industry gave the Anderson Valley Land Trust in Yorkville CA an easement for the use of all its water rights in Indian Creek in order to conserve instream flow for salmon habitat.<sup>16</sup> The land trust will withdraw water only where necessary to restore riparian habitat.

## **Governmental Cooperation**

Many government agencies work closely with private land trusts, developers, and landowners to promote the use of conservation easements. The Thousand Islands Land Trust in New York's St. Lawrence River Valley, for example, obtained its first easement when the St. Lawrence Eastern Ontario Commission conditioned its approval of an island subdivision project on a requirement that the developers enter into an easement including set backs and forest protection.<sup>17</sup>

In March 1993 Windward Properties settled an EPA lawsuit alleging that wetlands in its Alpharetta development had been filled in without authorization from the U.S. Army Corps of Engineers. The settlement included Windward Properties' agreement to purchase wetlands within the Big Creek watershed and give a conservation easement to the town of Alpharetta to preserve them in perpetuity.<sup>18</sup> To facilitate such arrangements, local land trust should alert federal and state agencies as to their existence and the types of properties they will accept.

Federal funding may be available for the purchase of easement. For example, funds are available under the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 for acquisition and development of trail corridors, scenic easements and sites, and preservation of abandoned railway corridors. The Land and Water Conservation Fund Act of 1965 provides grants to state and local governments for acquisition of land, waters and interests in land or waters.<sup>19</sup> Under a nine-state pilot project of the Federal Wetlands Reserve Program, the Department of Agriculture may buy conservation easements from farmers who permanently restore wetlands on their farms.<sup>20</sup> Some states provide monies to local land trusts for the purchase of easements and land in fee simple. The Marin Agricultural Land Trust has received bond money slated for farmland protection to purchase easements on 33 properties, protecting 22,098 acres from conversion to non-farm use. The Maryland legislature has created and funded the Maryland Environmental Trust to provide a number of services to local land trusts.<sup>21</sup> The staff of seven includes three easement planners. The Trust administers two grant programs for local land trusts. The Janice

Hollmann Grant Fund is applied toward land trusts' administrative expenses and the \$2 million Land Trust Grant Fund is a revolving loan program for acquisition projects.

All levels of government in Georgia can provide critical support to local land trusts by recognizing the land trusts as well as the resources they seek to protect in the local, regional and statewide land use plans required pursuant to the Georgia Planning Act. Madison County's land use plan, for example, acknowledges the importance of preserving the ecological value of the Broad River and its tributaries and the role of the local land trust, the Broad River Watershed Association, in protecting that ecological value. Designation as a Regionally Important Resource, preferential zoning for open space, and tax valuation for conservation uses, are other examples of governmental policies relied upon by the IRS in evaluating whether a particular easement satisfies a conservation purpose.

## **Other Means of Acquisition by Land Trusts**

Besides accepting the donation of conservation easements, many land trusts purchase easements and land. Membership and individual donations fund about 70% of these purchases with other funds contributed by government agencies, foundations and corporations.<sup>22</sup> Where a landowner makes a "bargain sale" to a land trust, the landowner receives some cash for his property as well as a tax deduction reflecting the difference between the sale price and the fair market value of the property.

In cases where land trusts borrow money from individuals or banks to purchase land, repayment is made through fundraising, sales to conservation buyers or sales to local, state or federal conservation agencies.<sup>23</sup> In the past ten years the Iowa National Heritage Foundation, a statewide land trust, has borrowed over \$3.2 million through 58 separate loans with interest rates ranging from zero to 12.5%.<sup>24</sup> In carefully controlled situations, a land trust may fund a purchase with limited development that protects the land's conservation values. The Colorado Open Lands land trust, for example, paid off a multimillion dollar foundation loan to purchase a ranch by selling several parcels of the ranch for development subject to conservation easements.<sup>25</sup>

## **Conclusion: Critical Role of Land Trusts**

Though local, state and federal government agencies may purchase and/or accept donations of conservation easements, land trusts play the most critical role in working with landowners to protect conservation lands in their local area. Some private landowners are reluctant to give any gift, including an easement, to a governmental body but will make a donation to a private non-profit group. Land trusts can often step in to negotiate easements, and raise funds for their purchase where necessary, more quickly than a public agency can. Land trusts may hold and manage easements themselves or they may act as intermediaries for public agencies in land transactions.

Over half of the land trusts in the United States are run by volunteers. Their annual budgets range from under \$10,000 to over \$1 million. Many are local in scope though there are also statewide and national land trusts. There are twenty-two land trusts active in Georgia,<sup>26</sup> most were founded in the past three years due to the tremendous popularity of the easement approach to resource protection.

## Resources

Laurie Fowler, Co-Director  
River Basin Center, Odum School of Ecology  
110 Riverbend Road, Room 101  
University of Georgia  
Athens, GA 30602  
(706) 583-0463

Services: provides training on easement issues to attorneys and appraisers; assists grassroots groups and state and local governments in the development of policies to protect sensitive natural resources.

Hans Neuhauser  
Georgia Environmental Policy Center / Georgia Land Trust Service Center  
380 Meigs St.  
Athens, GA 30601  
(706) 546-7507

Services: Offers printed materials and programs on land trust formation, operation and conservation easements; maintains current listing of land trusts and land trust leaders in the state; offers assistance in the organizational management of land trusts; maintains resource library. Hans is Georgia's representative to the national Land Trust Council.

The Hyperion Society  
University of California  
Hastings College of the Law  
20 McAllister Street  
San Francisco, CA 94102  
(415) 565-4857

Services: Publishes *The Back Forty*, a bi-monthly journal covering legal issues pertaining to land trusts.

Land Trust Alliance  
1331 H St. NW Ste. 400  
Washington, DC 20005  
(202) 638-4725

Services: Clearinghouse for information on land trusts across the nation; particularly valuable publications include "The conservation Easement Handbook," "The Standards and Practices Guidebook: An Operating Manual for Land Trusts," and "Exchange," a professional land trust journal.



Rand Wentworth  
The Trust for Public Land  
1447 Peachtree St. NE, Ste. 601  
Atlanta, GA 30309  
(404) 873-7306

Services: Provides technical assistance to land trusts on issues ranging from incorporation to negotiating easements and to agencies, organizations and individuals developing trail and greenway projects.

American Farmland Trust  
1200 18th St. NW, Ste. 800  
Washington, DC 20036  
(202) 331-7300

Services: Provides technical assistance in preserving lands of historical, agricultural and environmental significance and accepts easements on agricultural land through its Farm Legacy Program.

Rivers and Trails Conservation Assistance Program  
National Park Service Planning and Federal Programs Division  
75 Spring St. SW, Ste. 1020  
Atlanta, GA 30303  
(404) 331-5838

Services: provides technical assistance to state and local governments, land trusts, and landowners in the preparation of river conservation and trail plans; inventories and evaluates river and trail corridors.

American Greenways Program  
The Conservation Fund  
1800 North Kent St., Ste. 1120  
Arlington, VA 22209  
(703) 525-6300

Services: Maintains a greenway project database including names, addresses, phone numbers and background information on local greenway projects; provides financial assistance to local greenways groups through the Dupont Awards program.

Camilla Herlevich, Attorney  
313 N. Front St., Ste. A  
Wilmington, DE 38401  
(910) 251-0666

Services: Assists landowners in evaluating conservation options; assists land trusts in drafting conservation easements and complying with IRS regulations; trains staff and volunteers in land trust management procedures.

State Outdoor Recreation Planner  
Parks, Recreation and Historic Sites Division  
Georgia Department of Natural Resources  
205 Butler St., Ste. 1352-E  
Atlanta, GA 30334  
(404) 656-6530

Services: assists local governments in the acquisition and preservation of public recreation lands by providing technical and financial assistance; coordinates rail-trail conversions; promotes regional trail systems; and coordinates local organizations and state and federal agencies on trail issues.

# Supplemental Material

## ***Georgia Uniform Conservation Easement Act***

### ARTICLE 1

#### UNIFORM CONSERVATION EASEMENTS

##### 44-10-1. Short title.

This article shall be known and may be cited as the "Georgia Uniform Conservation Easement Act."

##### 44-10-2. Definitions.

As used in this article, the term:

(1) "Conservation easement" means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic, or open-space values of real property; assuring its availability for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.

(2) "Holder" means:

(A) governmental body empowered to hold an interest in real property under the laws of this state or the United States; or

(B) A charitable corporation, charitable association, or charitable trust, the purposes or powers of which include retaining or protecting the natural, scenic, or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational, or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological, or cultural aspects of real property.

(3) "Third-party right of enforcement" means a right provided in a conservation easement to enforce any of its terms granted to a governmental body, charitable corporation, charitable association, or charitable trust, which, although eligible to be a holder, is not a holder.

44-10-3. Creation or alteration of conservation easements; acceptance; duration; effect on existing rights and duties; limitation of liability.

(a) Except as otherwise provided in this article, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements, except that a conservation easement may not be created or expanded by the exercise of the power of eminent domain.

(b) No right or duty in favor of or against a holder and no right in favor of a person having a third-party right of enforcement arises under a conservation easement before its acceptance by the holder and a recordation of the acceptance.

c) Except as provided in subsection (c) of Code Section 44-10-4, a conservation easement is unlimited in duration unless the instrument creating it otherwise provides.

(d) An interest in real property in existence at the time a conservation easement is created is not impaired by it unless the owner of the interest is a party to the conservation easement or consents to it.

(e) The ownership or attempted enforcement of rights held by the holder of an easement shall not subject such holder to any liability for any damage or injury that may be suffered by any person on the property or as a result of the condition of such property encumbered by a conservation easement.

#### 44-10-4. Actions affecting easements; parties; power of court to modify or terminate easement.

(a) An action affecting a conservation easement may be brought by:

- (1) An owner of an interest in the real property burdened by the easement;
- (2) A holder of the easement;
- (3) A person having a third-party right of enforcement; or
- (4) A person authorized by other law.

(b) The easement holder shall be a necessary party in any proceeding of or before any governmental agency which may result in a license, permit, or order for any demolition, alteration, or construction on the property.

(c) This article does not affect the power of a court to modify or terminate a conservation easement in accordance with the principles of law and equity.

#### 44-10-5. Validity of easement.

A conservation easement is valid even though:

- (1) It is not appurtenant to an interest in real property;
- (2) It can be or has been assigned to another holder;
- (3) It is not of a character that has been recognized traditionally at common law;
- (4) It imposes a negative burden;
- (5) It imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder;

(6) The benefit does not touch or concern real property; or

(7) There is no privity of estate or of contract.

44-10-6. Interests covered by article; interests not invalidated by article.

(a) This article applies to any interest created after July 1, 1992, which complies with this article, whether designated as a conservation or facade easement, or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise.

(b) This article applies to any interest created before July 1, 1992, if such interest would have been enforceable had such interest been created after July 1, 1992, unless retroactive application contravenes the Constitution or laws of this state or the United States.

(c) This article does not invalidate any interest, whether designated as a conservation or preservation or facade easement or as a covenant, protective covenant, equitable servitude, restriction, easement, or otherwise, that is enforceable under other law of this state.

44-10-7. Construction and application of article to effect uniformity of laws.

This article shall be applied and construed to effectuate its general purpose to make uniform the laws with respect to the subject of this article among states enacting it.

44-10-8. Recordation of easements; revaluation of encumbered property; appeals.

A conservation easement may be recorded in the office of the clerk of the superior court of the county where the land is located. Such recording shall be notice to the board of tax assessors of such county of the conveyance of the conservation easement and shall entitle the owner to a revaluation of the encumbered real property so as to reflect the existence of the encumbrance on the next succeeding tax digest of the county. Any owner who records a conservation easement and who is aggrieved by a revaluation or lack thereof under this Code section may appeal to the board or equalization and may appeal from the decision of the board of equalization in accordance with Code Section 48-5-311.

## ***For Additional Reading***

*The Conservation Easement Handbook* (269 pp./1988) by Janet Diehl and Thomas S. Barrett; published by the Trust for Public Land and the Land Trust Exchange (now the Land Trust Alliance). Provides land trusts and public agency personnel with detailed guidance for operating a successful easement program.

*Starting a Land Trust* (175 pp./1990) published by the Land Trust Alliance. Guides a land trust through the early stages of organization including incorporation, obtaining and keeping tax-exempt status, selecting a board of directors, fundraising, and developing community support.

*The Federal Tax Law of Conservation Easements* (437 pp./1990) by Stephen J. Small. Interprets the IRS regulations on gifts of conservation easements and discusses related issues.

*The Standards and Practices Guidebook: An Operating Manual for Land Trusts* (363 pp./1994) published by the Land Trust Alliance. Explains how a land trust can operate responsibly and ethically; provides examples and ideas to help land trusts develop their own policies and procedures.

*Appraising Easements* (82 pp./1990) published by the Land Trust Alliance and the National Trust for Historic Preservation. Describes general principles of easement evaluation.

*Preserving Family Lands* (100 pp./1992) by Stephen J. Small; published by Landowner Planning Center. Discusses tax strategies for families who want to conserve their land.

All of these publications are available through the Land Trust Alliance, 1331 H St. NW Ste. 400, Washington, DC 20005, (202) 638-4725.

## **Sample Easement**

(Please note this is just one example of an easement; each easement is different and reflects the needs and interests of the landowner and the land trust involved.)

STATE OF GEORGIA  
COUNTY OF MADISON  
CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT (herein "Conservation Easement") is made this \_\_\_\_ day of December, 1993, by and between JOHN AND MARY SMITH whose address is Route X, Box Y, Royston, Georgia 30662 (hereinafter "Grantors") and BROAD RIVER WATERSHED ASSOCIATION, INC., a Georgia nonprofit corporation, with an address of Box 661, Danielsville, Georgia 30633 (hereinafter "Grantee").

### RECITALS

A. Grantee is a nonprofit corporation established for the purpose of promoting the preservation of environmentally valuable and sensitive lands, recreational lands, agricultural lands, lands of historic or cultural importance, and open space in the Broad River Watershed and other watersheds within the State of Georgia for charitable, scientific, educational and aesthetic purposes.

B. Grantors, husband and wife, own in fee simple as tenants in common certain real property in Madison County, Georgia, being 53 acres, more or less, and more particularly shown and described in Exhibit A attached hereto, hereinafter "Property".

C. Grantors is willing to grant a perpetual Conservation Easement over the Property, thereby restricting and limiting the use of the land and contiguous water areas of the Property, on the terms and conditions and for the purposes hereinafter set forth, and Grantee is willing to accept such Conservation Easement.

D. Grantors and Grantee recognize the conservation value of the Property in its present state, being adjacent to the Broad River and Hannah Creek, as a significant natural area which provides a "relatively natural habitat for fish, wildlife, or plants or similar ecosystems" as that phrase is used in Section 170(h)(4)(A)(ii) of the Internal Revenue Code, including habitat for deer, muskrat, raccoon, opossum, squirrel, beaver, red and gray fox, otter, a variety of birds including turkey, and numerous fish species.

E. Due in part to its location adjacent to Hannah Creek and the Broad River, one of the last free-flowing rivers, unpounded and unchanneled, in the eastern Piedmont, Grantors and Grantee recognize the conservation and open space values of the property in its present state, the preservation of which (a) is pursuant to federal, state and local government policy as evidenced by:

(1) the designation of all Northeast Georgia perennial streams, including the Broad River and its tributaries, as Regionally Important Resources pursuant to the Georgia Planning Act of 1989 at O.C.G.A. 50-8-3 et. seq.

(2) the requirement that a Broad River corridor management plan be developed pursuant to O.C.G.A. 12-2-8(g) for the purpose of protecting the corridor, public water supply and wetlands;

(3) the recognition by the National Park Service in its 1982 Nationwide Rivers Inventory that 99 miles of the Broad River, including the segment adjacent to the Property, is pristine enough to qualify for consideration in the Federal Wild and Scenic Rivers System

(4) the recommendation by the Georgia Department of Natural Resources in 1976 that a "Broad River Environmental Corridor" be created and the recognition of the Department of Natural Resources and the Georgia Natural Heritage program of the outstanding ecological and recreational importance of 175 miles of the Broad River system, including the segment adjacent to the Property;

(5) the recognition in the Madison County Comprehensive Plan of the importance of preserving the ecological value of the Broad River and its tributaries and the Broad River Watershed Association's role in the protection of that ecological value;

(6) the qualification of the Property for the special use ad valorem provision of the state property tax regime for forestland, set forth in O.C.G.A. 48-5-7(b.1) et.seq.; and (b) the preservation of which will provide for the scenic enjoyment by the general public, as evidenced by:

(1) the large number of canoeists and rafters who float the Broad River to enjoy the scenery and wildlife;

(2) the fact that development of the Property would impair the natural scenic character enjoyed by the public;

and (c) the preservation of which will yield other significant public benefit including:

(1) preservation of the water quality of the Broad River through control of point and non-point source discharges;

(2) preservation of the scenic and natural landscape which attracts tourism and commerce to Madison County;

(3) continuation of the traditional use of the non-residential portion of the Property for hiking, nature study, and other passive recreational uses.

F. Grantee is a tax exempt public charity under Section 501(c)(3) and 509(a)(2) of the Internal Revenue Code, is authorized by the laws of the state of Georgia to accept, hold and administer conservation easements,



possesses the authority to accept and is willing to accept this Conservation Easement under the terms and conditions hereinafter described, and is a "qualified organization" and an "eligible donee" within the meaning of Section 170(h)(3) of the Internal Revenue Code and regulations promulgated thereunder;

NOW, THEREFORE, as an absolute gift of no monetary consideration but in consideration of the mutual covenants, terms, conditions and restrictions hereinafter set forth, Grantors hereby unconditionally and irrevocably grant and convey unto Grantee, its successors and assigns, forever and in perpetuity a Conservation Easement of the nature and character and to the extent hereinafter set forth, over the Property more particularly described in Exhibit A together with the right to preserve and protect the conservation values of the Property.

The purposes of this Conservation Easement are to preserve and protect the conservation values of the Property and to maintain permanently the dominant woodland, scenic, open, and natural character of the Property, including land and water resources; to protect rare plants and animals and animal and plant communities on or affected by the property's management; and to prevent any use of the Property that will significantly impair or interfere with the conservation values or interests of the property. To achieve these purposes, the following conditions and restrictions are set forth:

#### ARTICLE I. DURATION OF EASEMENT

This Conservation Easement shall be perpetual. It is an easement in gross, runs with the land and is enforceable by Grantee against Grantors, their personal representatives, heirs, successors and assigns, lessees, agents and licensees.

#### ARTICLE II. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity on, or use of, the Property inconsistent with the purposes of this Conservation Easement is prohibited. Development that would significantly impair or interfere with the conservation values of the Property is prohibited. The Property shall be maintained in its natural, scenic and open condition and restricted from any development that would significantly impair or interfere with the conservation values of the Property.

All rights reserved by the Grantors are considered to be consistent with the conservation purposes of this Conservation Easement and, except to the extent that prior written approval of Grantee is required by any paragraph of this Article, require no prior notification to or approval by Grantee. Notwithstanding the foregoing, the Grantors and Grantee have no right to agree to any activity that would result in the termination of this Conservation Easement or would cause it to fail to qualify as a qualified conservation contribution as described in section 170(h) of the Internal Revenue Code, or any regulations promulgated thereunder.

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited or restricted on the Property:

A. Disturbance of Natural Features. Any change, disturbance, alteration or impairment of the natural, scenic, and aesthetic features of the property is prohibited.

B. Industrial and Commercial Use. Industrial activities are prohibited on the Property. Commercial activities are prohibited except Grantors can operate a consulting business with no more than one additional employee in the residential dwelling so long as such a business conforms with local zoning ordinances and regulations.

C. Agricultural and Horticultural Use. Commercial agricultural and horticultural use and livestock production is prohibited. Existing agricultural and horticultural uses may be continued but not expanded.

D. Silvicultural Use. Planting of loblolly pine and non-native species is prohibited. Commercial timber cutting is prohibited. Cutting for Grantors' household firewood use or to prevent imminent hazard is allowed.

E. Hunting and Fishing. The right to hunt and fish on the Property and the right to lease all or any portion of the Property is allowed, provided that all such activity is conducted in accordance with local, state and federal regulations and provided that there shall be no material impairment of any conservation value of the Property. Except as provided herein, there shall be no disturbance of plant and animal populations and/or their habitat, nor any introduction of any non-native animal species.

F. Signage. Display of billboards, signs or advertisements is prohibited on or over the Property, except the posting of no trespassing signs, signs identifying the conservation values of the Property and/or identifying the Grantor as owner of the Property.

G. Dumping. Dumping of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery, or other materials on the property is prohibited.

H. Mineral Use, Excavation, Dredging. There shall be no filling, excavation, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock peat, minerals or other materials; and no change in the topography of the land in any manner.

I. Conveyance and Subdivision. There shall be no subdivision of the Property.

J. Water Quality and Drainage Patterns. There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, subsurface water or any other water bodies, except that Grantors reserve the right to continue to operate, maintain and replace the existing groundwater well. Notwithstanding the foregoing, there shall be no activities conducted on the Property or on adjacent property if owned by Grantors which would be detrimental to water purity or which would alter natural water levels, drainage, sedimentation and/or flow in or over the Property or to Hannah Creek, or to the Broad River, or cause soil degradation or erosion. Disruption of natural drainage patterns and creation of artificial drainage patterns including but not limited to construction of check dams and other impoundments is prohibited.

K. Public Utilities. Installation of overhead public utility lines is prohibited. Burial of a line to conduct electricity or water is permitted only where the width of the cleared area will not exceed ten (10) feet.

L. Path, Building, Road, and fence Construction. Paths can be constructed only where they will not exceed a width of three (3) feet. The construction of buildings, roads and fences are prohibited except as described in Section N of this Article.

M. Residential Use, Improvements, New Construction and Access Thereto. There shall be no residential use, nor any building, facility, or mobile home constructed or placed on the Property nor any construction of any new permanent roads nor any widening of existing roads, nor construction of fences, except that Grantors may exercise the following rights within the residential boundary of the property as shown and described on the Map of the Property's Residential Boundary attached as Exhibit B hereto, after providing written notice to Grantee:

1. To construct accessory buildings designed, constructed and utilized for the purpose of serving the existing residence

2. To replace the existing residential dwelling and associated buildings with buildings of similar size and purpose; to improve, including adding a deck and boardwalk to the existing residential dwelling, repair, restore, alter, remodel, and maintain all existing buildings;

3. To maintain reasonable means of access to the residential dwelling, provided, however, that no road nor right of way may be wider than thirty (30) feet and only semi-permeable or permeable materials shall be used for road maintenance.

Notwithstanding the provisions above, construction of buildings or structures visible from the river are prohibited, as is construction of buildings exceeding a height of thirty (30) feet.

### ARTICLE III. ENFORCEMENT AND REMEDIES

A. Upon any breach of the terms of this Conservation Easement by Grantors or by a third party which comes to the attention of the Grantee, the Grantee shall notify the Grantors in writing of such breach. The Grantors shall have ninety (90) days after receipt of such notice to undertake actions that are reasonably calculated to correct promptly the conditions constituting such breach. If the breach remains uncured after ninety (90) days, the Grantee may exercise any or all of the following remedies:

- (1) Institute suits to enjoin any breach or enforce any covenant by ex parte, temporary, and/or permanent injunction either prohibitive or mandatory and/or to recover any damages from injury to any conservation values protected by this Conservation Easement, including damages for the loss of scenic, aesthetic, and environmental values; and

- (2) Require that the Property be restored promptly to the condition required by this Conservation Easement.

Grantee's remedies shall be cumulative and shall be in addition to any other rights and remedies available to Grantee at law or equity. If Grantee, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Property, the Grantee may pursue its remedies without prior notice to Grantors.

B. Any cost incurred by Grantee in enforcing the terms of this Conservation Easement against Grantors, including, without limitations, costs of suits and attorney's fees, and any costs of restoration necessitated by Grantors' acts or omissions in violation of the terms of this Conservation Easement, shall be borne by the Grantors.

C. No failure on the part of Grantee to enforce any covenant or provision hereof shall discharge or invalidate such covenant or any other covenant, condition, or provision hereof or affect the right to Grantee to enforce the same in the event of a subsequent breach or default.

D. Grantee, its employees and agents and its successors and assigns, have the right, with reasonable notice, to enter the Property at reasonable times for the purpose of inspecting the Property to determine whether the Grantors, their personal representatives, heirs, successors or assigns are complying with the terms, conditions and restrictions of this Conservation Easement.

E. Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantors for any injury or change in the Property resulting from causes beyond the Grantors' control, including, without limitation, fire, flood, storm, and earth movement or from any prudent action taken in good faith by the Grantors under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Property resulting from such causes.

#### ARTICLE IV. PUBLIC ACCESS

The granting of this Conservation Easement does not convey to the public the right to enter the Property for any purpose whatsoever. The public has the right of scenic enjoyment of the property from the Broad River, however.

#### ARTICLE V. EXHIBIT, DOCUMENTATION AND TITLE

A. Legal Description. Exhibit A, Legal Description of the Property, and Exhibit B, Map of the Property's Residential Boundary, are attached hereto and made a part hereof by reference.

B. Easement Documentation Report. The parties acknowledge that the Smith Property Conservation Planning Data Sheet dated December 21, 1993, a copy of which is on file at the office of the Grantee, accurately establishes the uses, structures, conservation values and condition of the Property as of the date hereof.

C. Title. The Grantors covenant and represent that the Grantors are the sole owners and are seized of the Property in fee simple and have good right to grant and convey the aforesaid Conservation Easement; that the Property is free and clear of any and all encumbrances; and

Grantors covenant that the Grantee shall have the use of and enjoyment of all of the benefits derived from and arising out of the aforesaid Conservation Easement.

## ARTICLE VI. MISCELLANEOUS

A. Subsequent Transfers. Grantors agree for themselves, their heirs, successors and assigns, to notify Grantee in writing of the names and addresses of any party to whom the Property, or any part thereof, is to be transferred at or prior to the time said transfer is consummated. Grantors, for themselves, their heirs, successors and assigns, further agree to make specific reference to this Conservation Easement in a separate paragraph of any subsequent lease, deed or other legal instrument by which any interest in the Property is conveyed.

### B. Conservation Purposes.

(1) Grantee, for itself, its successors and assigns, agrees that this Conservation Easement shall be held exclusively for conservation purposes, as defined in Section 170(H)(4)(a) of the Internal Revenue Code.

(2) The donation of this Conservation Easement gives rise to a property right, immediately vested in Grantee, with a fair market value equal to the proportionate value that the Conservation Easement bears to the value of the property as a whole. That proportionate value of the Grantee's property rights shall remain constant. If a change in conditions makes any continued protection of the Property for conservation purposes impossible or impractical, the restrictions contained herein may only be extinguished by judicial proceeding. Upon such proceeding, the Grantee, upon a subsequent sale, exchange or involuntary conversion of the Property, shall be entitled to a portion of the proceeds at least equal to that proportionate value of the Conservation Easement. The Grantee shall use its share of the proceeds in a manner consistent with the conservation purposes set forth in the Recitals herein.

(3) Whenever all or part of the Property is taken in exercise of eminent domain by public, corporate, or other authority so as to abrogate the restrictions imposed by this Conservation Easement, the Grantors and the Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking and all incidental or direct damages resulting from the taking, which proceeds shall be divided in accordance with the proportionate value of the Grantee's and Grantors' interests as specified above; all expenses including attorneys fees incurred by the Grantors and the Grantee in this action shall be paid out of the recovered proceeds to the extent not paid by the condemning authority.

(4) The Grantors and the Grantee agree that the terms of this Conservation Easement shall survive any merger of the fee and easement interests in the Property.

(5) The parties hereto recognize and agree that the benefits of this Conservation Easement are in gross and assignable, provided, however, that the Grantee hereby covenants and agrees, that in the event it transfers or assigns this Conservation Easement, the organization receiving the interest will be a qualified organization as that term is

defined in Section 170(h)(3) of the Internal Revenue Code of 1986 (or any successor section) and the regulations promulgated thereunder, which is organized or operated primarily for one of the conservation purposes specified in Section 170(h)(4)(A) of the Internal Revenue Code, and Grantee further covenants and agrees that the terms of the transfer or assignment will be such that the transferee or assignee will be required to continue to carry out in perpetuity the conservation purposes which the contribution was originally intended to advance, set forth in the Recitals herein.

(6) The Grantors agree to pay any real estate taxes or other assessments levied on the Property.

C. Construction of Terms. This Conservation Easement shall be construed to promote the purposes of the Uniform Conservation Easement Act, O.C.G.A. 44-10-1 et. seq., which authorizes the creation of Conservation Easements for purposes including those set forth in the Recitals herein.

D. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, and understandings or agreements relating to the Conservation Easement. If any provision is found to be invalid, the remainder of the provisions of this Conservation Easement, and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

E. Recording. Grantee shall record this instrument in timely fashion in the official records of Madison County, Georgia, and may re-record it at any time as may be required to preserve its rights under this Conservation Easement.

F. Hazardous Waste. The Grantors covenant and represent that no hazardous substances or toxic wastes exist nor have been generated, treated, stored, used, disposed of, or deposited in or on the Property, and that there are not now any underground storage tanks located on the Property.

G. Notices. Any notices shall be sent by registered or certified mail, return receipt requested, addressed to the parties as set forth above, or to such other addresses as the parties may establish in writing to the other.

In any case where the terms of this Conservation Easement require the consent of the Grantee, such consent shall be requested by notice to Grantee. Such consent shall be deemed to have been given unless, within forty-five (45) days after receipt of notice, Grantee mails notice to Grantors of disapproval and the reason therefore.

TO HAVE AND TO HOLD unto the Broad River Watershed Association, Inc., its successors and assigns, forever. The covenants agreed to and the terms, conditions, restrictions and purposes imposed as aforesaid shall be binding upon Grantor, his personal representatives, heirs, successors and assigns, and shall continue as a servitude running in perpetuity with the Property.



## Notes

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<sup>1</sup> Most land trusts are not trusts in the legal sense. In order for a non-profit organization in Georgia to use the word "trust" in its name, the organization must apply for written permission from the Georgia Department of Banking Finances at 2990 Brandywine Road, Suite 200, Atlanta, Georgia 30341.

<sup>2</sup> This act, O.C.G.A. 44-10-1 et seq., repealed the Façade and Conservation Easement Act of 1976. A copy of the act is included in the addendum section of this paper.

<sup>3</sup> Sample criteria may be obtained from the Land Trust alliance. See the Resource Section for their address and phone number.

<sup>4</sup> The IRS requirements (Treasury Regulations Section 1.120A-13 and 14) are appended to The Conservation Easement Handbook and are explained in Steve Small's The Federal Tax Law of Conservation Easements and Preserving Family Lands.

<sup>5</sup> The appraiser must consider the impact of the easement on adjacent land owned by the donor or his immediate family and subtract the value of any enhancement to these lands from the easements value. Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements, p. 22.

<sup>6</sup> A qualified appraiser is a person who holds himself out to the public as an appraiser, who is qualified to make appraisals of the type of property being valued, and whose relationship to the landowner or the land trust would not "cause a reasonable person to question the independence of such an appraiser." Federal Tax Law of Conservation Easements, p. 12-2. For more information on appraisals, see Appraising Easements: Guidelines for Valuation of Historic Preservation and Land Conservation Easements.

<sup>7</sup> A long-term capital gain asset is one that has been held for investment purposes for at least 12 months.

<sup>8</sup> O.C.G.A 44-10-8 provides that recording the easement in the office of the clerk of the superior court of the county where the land is located shall be notice to the board of tax assessors of the conveyance and shall entitle the owner to a revaluation of the property. An aggrieved owner may appeal to the board of equalization.

<sup>9</sup> O.C.G.A 44-10-3(c).

<sup>10</sup> O.C.G.A.51-3-20 and 12-3-100 et seq.

<sup>11</sup> For more information, call Ruth Taylor, Program Coordinator, at (202) 638-4725.

<sup>12</sup> Land Trust Alliance, "Land Trust Facts", summer 1991.

<sup>13</sup> To contact the Red Hills Conservation association, call (904) 893-4153.

<sup>14</sup> To contact the Delaware and Raritan Greenway, call (609) 452-1441.

<sup>15</sup> To contact the Montana Land Reliance, call (406) 443-7027.

<sup>16</sup> To contact the Anderson Valley Land Trust, call (707) 894-4272.

<sup>17</sup> To contact the Thousand Islands Land Trust, call Ken Deedy at (212) 794-5342.

<sup>18</sup> Georgia Environmental Law Letter, April 1993, p. 9.

<sup>19</sup> Call the Georgia Outdoor Recreation Planner at (404) 656-6530 for more information about these programs.

<sup>20</sup> The states included in this pilot program are California, Iowa, Louisiana, Minnesota, Missouri, Mississippi, New York, North Carolina, and Wisconsin. For more information, contact the Conservation and Environmental Protection Division of the Agriculture Stabilization and Conservation Service at P.O. Box 2415, Washington DC 20013 or call (202) 720-6221.

<sup>21</sup> To contact the Maryland Environmental Trust, call (410) 514-7900.

<sup>22</sup> For information about foundations that fund land trusts, see the Directory of Environmental Grantmaking Foundations, available through the Environmental Data Research Institute at (716) 473-3090.

<sup>23</sup> For a more complete discussion of this topic, see The Land Trust Alliance's Starting A Land Trust, p.97.

<sup>24</sup> To contact the Iowa National Heritage Foundation, call (515) 288-1846.

<sup>25</sup> To contact Colorado Open Lands, call (303) 443-7347.

<sup>26</sup> To obtain a current listing of Georgia land trusts, contact Hans Neuhauser at the Georgia Environmental Policy Institute. See the Resource Section for address and phone number.