



CONSERVATION EASEMENT 201

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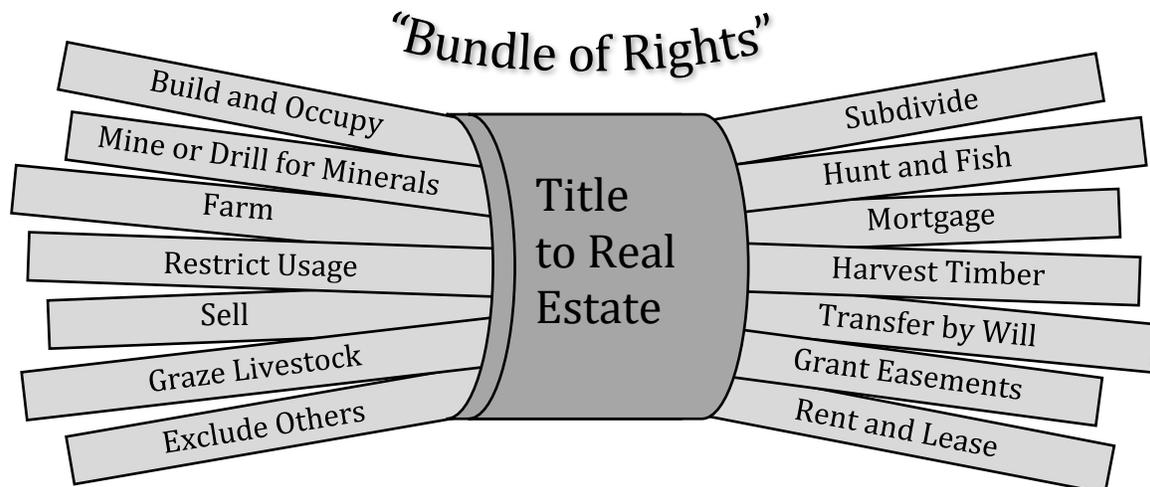
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What is a Conservation Easement?

A **Conservation Easement** is a voluntary legal agreement between a landowner and a land trust, or another qualified easement holder. It's a publicly recorded document, just like a deed or an access easement, and it sticks with the land from one owner to the next, forever. A conservation easement functions similar to deed restrictions or a restrictive covenant but is far stronger, more complex, and essentially unchanging.

A helpful analogy for conceptualizing property rights, and by extension conservation easements, is the "Bundle of Sticks" metaphor. Think of land ownership as owning a bundle of sticks, where each stick is a different property right. For example, the right to build a house, to hunt and fish, to harvest timber, to mine minerals, and so on. The "bundle" is the title to the land, the thing that ties all those rights together. Together these bundled rights represent everything a landowner can legally do on and to the property. What a conservation easement allows is for certain rights to be removed from that "bundle", tied together, and given to a land trust who is then legally bound to keep those rights together and from being misused.

The landowner still owns the property and can exercise their remaining rights within the limits of the Conservation Easement they created. Simultaneously, the land trust is entrusted by the landowner with conserving those transferred rights and enforcing the conservation easement's terms. When they eventually transfer ownership of the property, whether through sale, inheritance, donation, or otherwise, the land trust will forever be there to make sure the terms of the conservation easement are honored by any and all future landowners.



Why would someone want to donate a Conservation Easement?

A conservation easement is a valuable tool for landowners who seek to leave a conservation legacy on their property. Since a conservation easement is perpetual, permanent, and sticks with the land, it's one of the only ways a landowner can retain influence over their land after they sell it or pass it on to their heirs. A conservation easement allows the landowner to decide everything that can and can't be done with the property, forever. Every conservation easement is different and they are custom drafted both to meet the precise needs of the landowner and to protect the unique conservation values of the property. Conservation easements can be especially helpful in keeping family land intact through generational changes. Additionally, there are potential federal, state, and local tax savings and grant programs that incentivize the charitable donation of conservation easements for conservation purposes.

Is a Conservation Easement really perpetual?

Under normal every day circumstances, a conservation easement is permanent and unchanging. The land trusts who hold and steward conservation easements are themselves perpetual non-profit organizations whose duty is to uphold the terms of the conservation easement and defend the conservation values of the property from harm. However, it would be disingenuous to say conservation easements are always 100% perpetual. Under highly specific circumstances, a conservation easement may be extinguished in part or in full. For example, eminent domain along a widened highway. Yet this is exceedingly rare, especially full extinguishment, and there is almost always a lengthy court battle, fought by the land trust, to prevent it. Suffice it to say, a conservation easement cannot be willfully extinguished by a third party without direct government interference. More realistically, a conservation easement may unravel due to an undiscovered title defect, retroactively rendering the landowner's donation of the conservation easement invalid and thus its terms unenforceable by the land trust. However, this is usually avoidable and is why proper title research is a key requirement in creating a conservation easement. From a different perspective, the most common way a conservation easement can change is through amendment. Amending a conservation easement is not an easy or casual feat. First, it must be permissible by the terms of the conservation easement. Then, it requires the consent of both the current landowner and the land trust to enact and must result in a stronger, more protective conservation easement as a result, as determined by the land trust, their legal counsel, and a qualified appraiser's opinion. Generally, amendments are done to clarify ambiguity, correct oversights, fix errors, and adjust limitations to account for unforeseen impediments to the purposes of the conservation easement. Think of an amendment like a zip-tie, it only gets tighter when used. It is indeed altering the perpetual Conservation Easement but in the end results in a net increase to its conservation values.

What involvement does the Land Trust have with the Conservation Easement after it's done?

After a conservation easement is drafted, the land trust only has minimal direct involvement with the property going forward. Land trust staff will visit the property once a year, with prior notice to the landowner, to inspect the property, document changes, and make sure the terms of the conservation easement are being upheld. If there are no violations, concerns, or issues, then no further follow up is made other than to notify the landowner that all is good. Throughout the year, the land trust will review any notices made by the landowner that may require approval and keep record of any management activities or other actions that may be covered by the terms of the conservation easement. Apart from that, the land trust has no further involvement with the property. However, land trust staff are always available to answer any questions the landowner may have concerning the conservation easement and can support the landowner in their management efforts where feasible.

If a concern or issue is noted during monitoring, the land trust staff will notify the current landowner of the problem and, if appropriate, assist in helping them remedy it. (For example, signs of trespass or a new invasive plant species found.) If a violation of the terms is documented, the land trust will notify the current landowner of the violation, identify the offending party, and seek restoration of any damages to the land's conservation values. If necessary, the land trust will litigate to resolve and remediate a major violation but this is reserved as a last resort.

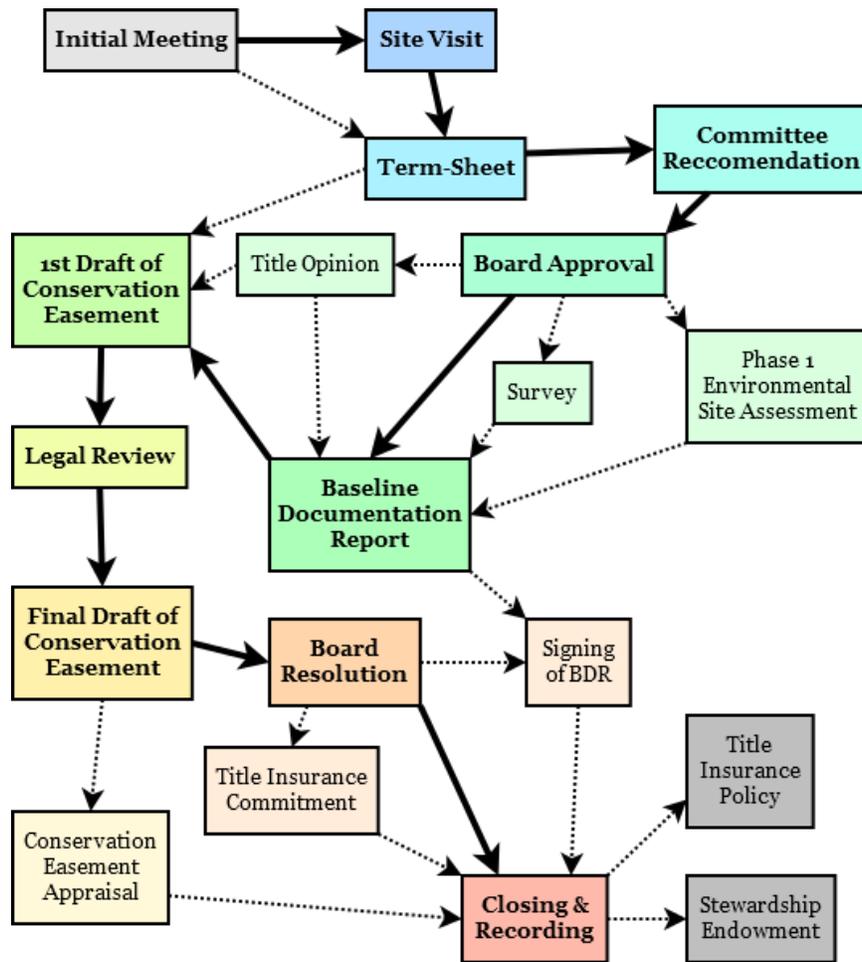
What needs to be done to create a Conservation Easement?

A conservation easement is a highly detailed and perpetual legal arrangement which needs to withstand the test of time. As such, there is substantial ground work necessary to lay a solid foundation for the conservation easement to firmly stand upon into the future. Collectively this work is called **Due Diligence**. Because of this, it can take a year, or often more, for a conservation easement to be recorded once the process begins. It's simply the nature of the beast.

One of the first steps that needs to be taken is the drafting of a term-sheet, which acts as a summary and outline of all the property rights a landowner wishes to retain, all the rights they want to give-up, and all the limitations they want to apply to the retained rights. The landowner and the land trust will negotiate this term-sheet on the front end in order to guide them both through the remainder of the work. This term-sheet is not binding and will invariably be updated during the process. Simultaneously, land trust staff will perform a site visit to the property to assess its conservation values. This will provide the land trust with the information needed to determine if the project merits their drafting and acceptance of the conservation easement. Because a conservation easement is a perpetual obligation to a land trust, care has to be taken by the land trust to assess each conservation easement's relevancy to their mission and its potential risks to the organization. The staff will then present the term-sheet and the results of the site visit internally for committee and subsequent board review. The board will ultimately make a determination on if the organization wants to proceed forward with the project. If they say yes, the landowner can then send the land trust a letter of intent and the real work will begin.

One of the next steps is for the land trust to research the title of the property and receive a title opinion from an attorney. This title opinion should determine if there are any limitations to the landowner's ownership, additional owners, access easements, or errors in the chain of title that may impact the conservation easement and need to be addressed before it's recorded. Within 30 days prior to accepting the conservation easement, the land trust will update this title opinion and obtain a title insurance commitment and policy for their interest in the conservation easement. This is to protect the land trust financially against any title defects that may still exist. Alongside this, it is also good practice to get the property re-surveyed, if there isn't already a recent or up-to-date plat showing major land features and significant structures. A new plat could also reveal boundary discrepancies that need to be referenced in the conservation easement. At this same stage, a Phase 1 Environmental Site Assessment (ESA) will also need to be performed. An ESA will inform the land trust on if there is any known or suspected chemical contamination to the waters or soils on the property, which could impact the conservation values. Rarely are there major concerns but it is not uncommon for minor issues to be identified that warrant rectifying before closing. While these are all underway, land trust staff will draft a **Baseline Documentation Report (BDR)** which documents and reports the baseline conditions of the property at the time the conservation easement was donated. This includes photos and locations of all structures, roads, wetlands, and other significant natural features as well as general information about the property, maps, and a detailed summary of the conservation values and wildlife habitat present on the property. The BDR will incorporate elements of the title opinion, survey, and ESA and will be signed by both parties just before the Conservation Easement is recorded. A copy of the BDR will be retained on file by the land trust to serve as a point of comparison against potential violations and general ecological changes. Amidst all

The Steps to Creating a Conservation Easement



of this, the land trust and the landowner will both obtain their own legal representation and begin drafting the conservation easement document proper. Typically, land trust staff will take the negotiated term-sheet and data gleaned from site visits and apply these to a template conservation easement to create a first draft. This draft will then be reviewed by both parties and revised until a satisfactory final document is agreed upon by all.

Once the conservation easement is more or less finalized, all the previously mentioned due diligence work is complete, any issues found, if any, addressed, and a target closing date set, the landowner should begin obtaining a **Conservation Easement Appraisal** from a qualified conservation easement appraiser. A conservation easement appraisal is a detailed and highly specialized appraisal that assesses the highest and best use of the property, without any existing improvements (I.E. houses, barns) and without making any extraordinary assumptions, in order to estimate a fair market value for the property prior to the conservation easement. It then does the same for the property under the limits of the proposed Conservation Easement terms. The difference between these two values is the **Conservation Easement Value**. This value is integral to any tax savings the landowner may seek to claim, will need to be referenced in the conservation easement as its proportionate value, will set the size of the permanent stewardship endowment, and determines the amount of title insurance the land trust will obtain. It is critical that this appraisal be done by a qualified and competent appraiser, as the landowner will be denied a tax deduction by the IRS if the

appraisal does not meet IRS requirements. Additionally, the land trust will not sign off on any tax forms referencing what it suspects may be an abusively inflated appraisal. If a landowner is applying for grant funding, a preliminary appraisal estimate will likely be beneficial to obtain earlier on, sometime after the term-sheet is negotiated, in order to guide the funding structure of the grant application and to determine if the grant application will be financially viable.

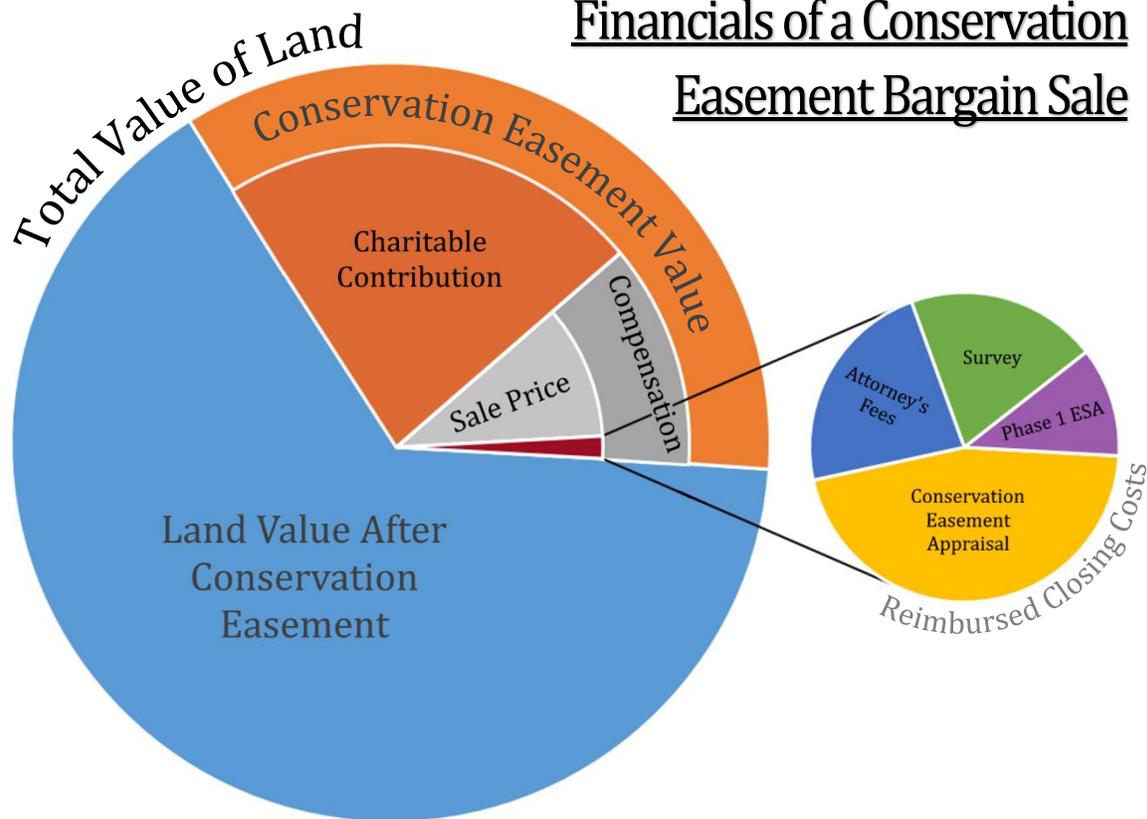
Once these due diligence requirements are met, the land trust will officially resolve to accept the conservation easement through an internal review process. Once this is done, the landowner and the land trust can then close on the conservation easement and have the document publicly recorded. Once the conservation easement is recorded, it becomes enforceable. The land trust will then need to establish a **Stewardship Endowment** for the conservation easement. This is an initial seed of funding dedicated to a restricted account for the perpetual management, monitoring, enforcement, and legal defense of the conservation easement. The land trust will request the landowner contribute to this endowment. The size of the endowment is set by the value of the conservation easement. The land trust must obtain and retain this funding through some means. So it is in the best interest of the conservation easement donor to contribute to this fund in order to ensure the finances for the management of their conservation easement are covered. Otherwise, the land trust may be left vulnerable while it attempts to find funds to meet the deficit.

Every landowner, land trust, and property is unique and consequently every conservation easement will be unique and have its own unique challenges. So it's possible there may be additional work that needs to be done based on grant requirements, internal policy for the specific land trust, or as a result of issues discovered or unusual circumstances that require further work to meet IRS guidelines, federal or state laws, or Land Trust Alliance Standards and Practices. Conversely, certain circumstances may mean corresponding requirements can be relaxed or circumvented if necessary. Additionally, policies, laws, guidelines, standards, and best practices change over time, sometimes suddenly, and new requirements not listed here may become essential in the future. I say this not to add undue confusion but simply to highlight that there is no definite roadmap that must be strictly followed towards a final conservation easement. However, having a roadmap helps us not get lost or miss a stop along the way, and to keep our end goal in sight.

What does it cost to create a Conservation Easement?

A conservation easement is a complicated document with a lot of specialized work that needs to be done before it can be created. As such, it is not a cheap undertaking and complications during the due diligence process can increase these costs suddenly and unexpectedly. On average, a conservation easement has roughly \$20,000 in due diligence costs which are split between both parties. About a third of these are the responsibility of the land trust, and the remaining two-thirds the responsibility of the land owner. The costs for the work performed by the land trust on the term-sheet, site-visits, baseline documentation report, and initial drafting of the conservation easement, as well as any time spent meeting with the landowner, is covered by the land trust and not passed along to the landowner. The land trust will also cover its own attorney's fees and other costs when it comes to the title opinion, title insurance, drafting of the conservation easement, and closing of the easement. These together typically cost the land trust \$5,000 to \$8,000. The landowner is expected to pay for their Phase 1 ESA (\$1,500-\$2,000), survey (\$2,000-\$5,000), conservation easement appraisal (\$5,000-\$10,000), and attorney's fees (\$1,500 - \$8,000). The cost of an ESA is pretty consistent but the cost of a survey, an appraisal, and attorney's fees can vary wildly based on who is hired, the size of the property, timing, and the complexity of any issues that may arise. Once the conservation easement is donated, there is one additional cost to the landowner. They will be asked to donate to the stewardship endowment for their conservation easement. The total amount of the stewardship endowment is 2% of the conservation easement value or \$6,500, whichever is greater.

Financials of a Conservation Easement Bargain Sale



If the landowner is unable to contribute the full amount, or unwilling to contribute, the land trust must raise the funds through some other means to meet this deficit.

Despite these unavoidable expenses, there exists the potential for significant financial incentives and compensation for donating a conservation easement. These come in the form of tax savings and grant funding. (More on grant funding in the next section.) The largest potential tax savings come in the form of federal income tax deductions. The donation of a conservation easement, if the due diligence is performed correctly according to federal tax law and IRS guidelines, can be claimed as a charitable contribution. If so, the conservation easement value, less any compensation paid to or on behalf of the landowner at closing, is considered a qualified conservation contribution. Special rules apply to qualified conservation contributions and they may be utilized to reduce the donor's adjusted gross income by up to 50% annually (100% for qualified farmers) for up to 16 years or until the entire contribution amount is deducted, whichever comes first. If the land trust or a grant pays any closing costs on behalf of the landowner or the landowner receives any payment for the conservation easement, this compensation must be subtracted from the contribution amount prior to reporting to the IRS. Qualified conservation contributions are reported to the IRS by the donor on Form 8283, which both the appraiser and the land trust must review and sign. Certain costs paid by the landowner during the course of donating the conservation easement, such as the stewardship endowment, may also qualify as charitable contributions. In addition to these federal income tax deductions, there is also a two-fold estate tax reduction that applies to the property. By the simple fact that the property value is reduced, the amount of estate tax owed will be reduced by that decrease in the land's fair market value. On top of that, there is an exclusion of up to 40% or \$500,000, whichever is less, that can be taken as well. However, the property's tax-basis will not step-up if this exclusion is taken. Additionally, the estate tax threshold at the time of this writing is \$12,920,000, meaning this estate tax reduction may only be beneficial to donors with larger estates.

Beyond the federal tax savings, there are also state tax credits. For every acre of high-ground covered by the conservation easement, the donor can receive \$250 in SC tax credits from the SC Department of Revenue, up to 25% of their total federal charitable contribution. These credits do not expire, can be transferred or sold between individuals, and can be used to offset the donor's tax liability at a one-to-one rate against their SC state taxes owed. Up to \$52,500 in these SC tax credits can be claimed by a taxpayer annually. A market also exists for these tax credits and they can generally be sold at roughly 75-cents on the dollar. Furthermore, there is also the potential to reduce annual property taxes on the eased property. After donating a conservation easement, the landowner can apply to their county and/or municipality's assessor's office, provide a copy of the recorded conservation easement and the conservation easement appraisal, and request their assessment be lowered to reflect the reduced value from the conservation easement. If the assessor's office accepts this reduction, this may reduce the annual property taxes for the property.

Land trusts and their staff are not allowed to give personalized tax or legal advice and none of the above should be misconstrued as such. This information is presented as a generalized example for educational purposes. The landowner must seek qualified and competent independent legal or tax advice for any personal issues or questions they may have.

Are there any grants to pay for the costs of a Conservation Easement?

Public grant funding does exist to help defray the costs of a conservation easement, both for the landowner and the land trust. Many landowners, especially those who are retired or live on a fixed income, can't take full advantage of the potential federal income tax savings. Simultaneously, the significant closing costs the landowner must incur for the required due diligence work may be especially burdensome in the short-term for some landowners. In this scenario, the land trust can apply for grant funding to assist the landowner financially and facilitate the conservation easement. The South Carolina Conservation Bank (SCCB) offers conservation grant funding for conservation easement projects throughout South Carolina. The Charleston County Greenbelt Program (CCGB) offers funding for conservation easement projects located in Charleston County. The Edisto Island Open Land Trust (EIOLT) is a qualified applicant who can apply for funding from both grant programs. As the SCCB covers the whole state, their grant program is more competitive and usually awards less funding. So EIOLT prefers to apply to the less competitive and more local CCGB but can apply to both for exceptional projects in need of additional funding. Grant awards from these funding sources can cover both the landowner's and the land trust's costs for developing a conservation easement and can even pay the landowner for a portion of the land value they are "giving up" through the donation of the conservation easement. This is called a **Conservation Easement Bargain Sale**. EIOLT on average applies for 25% of the conservation easement value, in addition to funds to cover both parties' closing costs.

EIOLT requires a \$2,500 application fee from the landowner before we will begin the submission process for a grant application. This application fee is a "down-payment" of sorts and ensures EIOLT's additional costs incurred while applying will be covered whether the grant succeeds or fails. A grant application takes over a hundred hours of staff time to prepare, submit, present, and complete, in addition to all the additional work that needs to be done to prepare a conservation easement for closing. These applications are not guaranteed to succeed and can be stressful and taxing for staff to complete, as they require further coordination with multiple parties over the span of several months



**Charleston County
Greenbelt Program**



until the conservation easement closes. However, if the application is successful, both parties will be reimbursed for the majority of their closing costs and the landowner will be paid a pre-determined amount in order to “purchase” their conservation easement. This cash payout and any reimbursement to the landowner are subtracted from the federal charitable contribution as compensation. This compensation is typically considered capital gains for the donor’s tax purposes with a proportionate basis from the property, at the same proportion as the appraised conservation easement value compared to the unencumbered appraised fair market value.

Many landowners find grant compensation compelling, as the lump-sum payment and reimbursement of expenses at closing provides a more tangible financial result in the short-term and, for those with limited income, is often considered to be a better financial outcome given their lower tax burden. However there are downsides to grant application, which include: the upfront application fee, the conservation easement donation process becomes more complicated, the whole process takes longer, there is a level of public scrutiny to the project, more details about the property become part of the public record, there is a second layer of conservation restrictions applied to the conservation easement, and there is an additional layer of approvals, deadlines, and oversight in the drafting and closing process from a public entity. However, in the end, it compensates both parties for their expenses and creates a conservation easement document that is arguably stronger due to the grant program’s added restrictions.

What is the Edisto Island Open Land Trust?

The Edisto Island Open Land Trust is a 501(c)(3) non-profit organization that was founded in 1994. We are a land trust accredited by the Land Trust Alliance, meaning we are recognized as successfully holding ourselves to the highest standards for ethics and fiscal responsibility in land conservation. We’re governed by an entirely volunteer board of directors and have a small staff of employees. Our mission is *“to preserve the rural quality of life on Edisto by protecting lands, waterways, scenic vistas, and heritage through conservation and education.”* We work to preserve the conservation values of Edisto Island as well as the southern end of Charleston County, to include Meggett, Hollywood, Ravenel, and Parker’s Ferry. We do this predominantly through the donation of conservation easements. However, we also own and manage a few publicly accessible greenspaces, host educational programs for children and adults, and run several projects focused on improving or preserving aspects of the Edisto Island community as a whole.

How does someone begin the process of donating a Conservation Easement to EIOLT?

To get started with creating a conservation easement, the landowner only needs to reach out to Edisto Island Open Land Trust staff, either by email or by phone. (Our contact information is below.) Let them know they’re interested in donating a conservation easement and provide them with contact information and some basic information about the property, such as its address, county tax map number(s), its size, and what the current land uses are. Staff will locate the property in their GIS database, generate a few basic maps, perform a rudimentary title search, and evaluate its potential conservation values. Then they’ll reach back out to the landowner with any questions and to schedule an initial meeting and/or site visit, in order to get to know them and the property better. It’s that easy and it’s all done at zero cost to the landowner.

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