BOOK 371 PAGE 324

Issued Oct 12 2005
$16.00
State of North Carolina MADISON County
Real Estate Excise Tax

FILED in MADISON County,NC on
Oct 12 2005 at 08:46:57 AM
by: Susan Rector
Register of Deeds

RETURN TO:
Dept. of Transportation
Right of Way Negotiations
79 Turtle Creek Dr., Asheville, NC 28803

CONSERVATION EASEMENT and EASEMENTS OF INGRESS AND EGRESS

State of North Carolina
Madison County
Number 8 Spring Creek Township

I.D. No. A-10WM
State Project 32573.4.1
F.A. Project **STP-APD-13-1(33)**
Parcel No. **SP-704WM**

THIS CONSERVATION EASEMENT and EASEMENTS OF INGRESS AND EGRESS, made this 21st day of July, 2005, by and between Hazel L. Kirkpatrick through her Attorney in Fact, John W. Kirkpatrick, 10931 N.C. Hwy. 209, Hot Springs, NC 28743

hereinafter called the "Grantor(s)" and the North Carolina Wildlife Resources Commission, Division of Inland Fisheries, 1721 Mail Service Center, Raleigh, NC 27699-1721, hereinafter called the "WRC," and administered by the North Carolina Department of Transportation, hereinafter called the "NCDOT," provides the following:

WITNESSETH

WHEREAS, the Grantor is the sole owner in fee simple of certain real property in Number 8 Township of Madison County, North Carolina, as more particularly described in Book 89, Page 157 of the Madison County Registry, North Carolina, which land is hereinafter referred to as "the Property";

WHEREAS, the NCDOT is an agency of the State of North Carolina whose purpose includes the construction of transportation projects for public use and who has the authority to acquire land for the purpose of mitigating environmental impacts of these transportation projects;

WHEREAS, the NCDOT desires to restore 674 linear feet of stream in Madison County on the said Property, through the WRC:

WHEREAS, the WRC is an agency of the State of North Carolina whose purposes include the restoration and conservation of open space and streams for stream mitigation purposes; is authorized by the laws of the State of North Carolina to accept, hold and administer conservation easements; and who has the authority to accept and is willing to accept this Conservation Easement from the Grantor under the terms and conditions hereinafter described;

WHEREAS, the Grantor is willing to grant a perpetual Conservation Easement over 1.055 acres of the Property (the Conservation Easement Area), thereby restricting and limiting the use of land within the Conservation Easement Area to the terms and conditions and for the purposes hereinafter set forth, and to further grant both a Temporary and Permanent Access Easement of Ingress and Egress to the Conservation Easement Area upon and along the Property as more particularly set forth hereinafter;

WHEREAS, the Uniform Conservation and Historic Preservation Agreements Act, N.C.G.S. § 121-34 et. seq., provides for the enforceability of restrictions, easements, covenants or conditions appropriate to retaining land or water areas predominantly in their natural, scenic or open condition or in agricultural, horticultural, farming or forest use;

WHEREAS, the NCDOT, under a Section 404 permit granted by the U. S. Army Corps of Engineers (USACE), must conduct certain off-site trout stream enhancement to mitigate for impacts to trout streams resulting from the construction of the I-26 corridor from northeast of US 19 to the Tennessee state line at Sam's Gap (TIP No. A-10 C & D); WHEREAS, the NCDOT has entered into an agreement with the WRC to reimburse them for conducting the mitigation activities;

WHEREAS, the USACE has reviewed and approved the use of the Conservation Easement on the Property to mitigate for the stream impacts, and such will satisfy the said permit conditions after the completion of the stream monitoring period;

92607

WHEREAS, the purposes of this Conservation Easement are to protect the mitigation activities performed by the WRC, to preserve and protect the conservation values of the Conservation Easement Area, to prevent any use of the Conservation Easement Area that will significantly impair or interfere with these purposes, and to maintain permanently the dominant woodland, scenic and natural character of the Conservation Easement Area designated on the Property as hereinafter described.

NOW THEREFORE, in consideration of the sum of $7,925.00 (Seven thousand nine hundred twenty five dollars) and other valuable considerations to the Grantor in hand paid by the NCDOT, the receipt of which is hereby acknowledged, and in further consideration of the mutual covenants, terms, conditions, and restrictions hereinafter set forth, the Grantor hereby grants and conveys unto the WRC and its successors or assigns forever and in perpetuity a Conservation Easement, pursuant to the USACE Section 404 permit requirements, of the nature and character and to the extent hereinafter set forth, in respect to the land of the grantor situated in Madison County, North Carolina, as described in **Exhibit A**, and hereinafter referred to as the "Conservation Easement Area". For a plat of the above described Conservation Easement, please see plat titled "Conservation Easement" recorded in Plat Book 5, Page 401 of the Madison County Registry.

The terms, conditions and restrictions of the Conservation Easement are as hereinafter set forth:

ARTICLE I. DURATION OF EASEMENTS; ACCESS

A. Conservation Easement. This Conservation Easement shall be perpetual. It is an easement in gross, runs with the land and is enforceable by the WRC or its successors and/or assigns against the Grantor(s), Grantor(s) heirs, devisees, successors and assigns, lessees, agents and licensees.

B. Temporary Access. It is specifically understood by all parties to this document that Temporary Access over the Property will be valid until the completion of the construction and monitoring of the stream mitigation project within the Conservation Easement Area of said Property of the Grantor. The NCDOT, the WRC, and authorized representatives of the WRC, shall have the right to access the Conservation Easement Area through the accepted farm access routes on the Property in order to conduct the mitigation activities, and shall have the right to place equipment and materials on the Property.

C. Permanent Access. In addition to the temporary access described above, and continuing in perpetuity, the NCDOT, the WRC, and authorized representatives of the WRC, shall have the right in perpetuity to enter the Conservation Easement Area through the accepted farm access routes on the Property at all reasonable times to undertake additional mitigation activities as determined to be necessary by the NCDOT or WRC.

Further, the NCDOT, the WRC, and authorized representatives of the WRC, shall have the right in perpetuity to enter the Conservation Easement Area through the accepted farm access routes on the Property at all reasonable times, for the purpose of inspecting said Conservation Easement Area to determine if the Grantor is complying with the terms, conditions, restrictions, and purposes of this Conservation Easement. The NCDOT or WRC will notify the Grantor by phone, email, or other correspondence before entering the Property for this purpose. However, if the NCDOT or WRC in its sole discretion determines that circumstances require immediate entry, such party is not required to notify Grantor prior to entry but will notify Grantor within two business days of such entry.

D. Public Access. The easement rights granted herein do not include public access rights. However, the public has the right to view the Conservation Easement Area from any adjacent publicly accessible area.

ARTICLE II. PROHIBITED, RESTRICTED AND RESERVED ACTIVITIES

Any activity on, or use of, the designated Conservation Easement Area inconsistent with the purposes of this Conservation Easement is prohibited. Unless expressly reserved as a compatible use herein, any activity in, or use of, the Conservation Easement Area by the Grantor is prohibited as inconsistent with the purposes of the Conservation Easement. The Conservation Easement Area 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 this Conservation Easement Area. Any rights not expressly reserved hereunder by the Grantor have been acquired by the WRC.

Without limiting the generality of the foregoing, the following activities and uses are expressly prohibited, restricted or reserved as indicated hereunder:

1. Disturbance of Natural Features. Any changes, disturbance, alteration or impairment of the natural, scenic and aesthetic features of the Conservation Easement Area or any introduction of non-native plants and/or animal species is prohibited unless the WRC shall give its prior written consent or unless otherwise expressly permitted herein.

2. Agricultural, Grazing and Horticultural Use. Agricultural, grazing and horticultural use, including landscaping, of the Conservation Easement Area is prohibited. Livestock shall only cross or access water at areas appointed and agreed upon in the Stream Mitigation Plan, attached as **Exhibit B**. Grantors may have limited *(an area no wider than 20 linear feet along the creek bank)* access to the Conservation Easement Area for the purpose of operating irrigation pumps. In an emergency situation, in which no other water source is available, livestock may have limited access to the stream for water. Such emergency access is limited to one side of the stream for a length not to exceed 30 linear feet and the Grantor shall notify the WRC in writing at the address shown above within 3 business days of such access. Grantors reserve the right to maintain drainage pipes that are buried within the easement and when needed to install new drainage pipes through the easement. When a drainage pipe is needed the Grantor will contact the WRC so that they can establish the pipe alignment and map it. The method for constructing drains that pass through the easement should be approved by the U.S. Natural Resources Conservation Service and WRC. Any damage caused to the riparian area during these activities should be repaired by the landowner and reported to the WRC.

3. Silvicultural Use and Land Clearing. There may be no destruction or cutting of trees or plants in the Conservation Easement Area, except in accordance with the Stream Mitigation Plan, attached hereto as **Exhibit B**, or upon written approval of the WRC. The gathering of firewood in the Conservation Easement Area shall be limited to dead trees, such that the gathering is consistent with purposes of this Conservation Easement. Removal of large live trees may be allowed in some cases provided that any such request is consistent with the purposes of this Conservation Easement and the Grantor obtains prior written approval from the WRC.

4. Hunting and Fishing. Grantor expressly reserves the right to hunt and fish on the Conservation Easement Area and to control access of all persons for the purpose of hunting and fishing; provided that these activities do not impact the protection and conservation of any wildlife habitat or other conservation values of the Conservation Easement Area.

5. Dumping or Storage. Dumping or storage of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, machinery, or hazardous substances, or toxic or hazardous waste, or any placement of underground or aboveground storage tanks or other materials on the Conservation Easement Area is prohibited.

6. 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 material, and no change in the topography of the land in any manner on the Conservation Easement Area nor shall there be any activities conducted on the Conservation Easement Area or on adjacent property if owned by the Grantor and his successors which would cause erosion or siltation on the Conservation Easement Area.

7. Industrial Use. Industrial activities in the Conservation Easement Area are prohibited.

8. Residential Use. Residential use of the Conservation Easement Area is prohibited.

9. Commercial Use. Commercial activities in the Conservation Easement Area are prohibited

10. New Construction. There shall be no building, shed, facility, mobile home, or other structure constructed or placed in the Conservation Easement Area; provided, however, that the WRC expressly reserves the right to install, operate and maintain structures for the purpose of reestablishing, protecting, and enhancing stream functional values, including those described in the Stream Mitigation Plan, **Exhibit B**, for the Conservation Easement Area.

11. Signs. No signs shall be permitted in the Conservation Easement Area except interpretive signs describing restoration activities and the conservation values of the Conservation Easement Area, signs identifying the owner of the Protected Property and the holder of the Conservation Easement, and signs giving directions or proscribing rules and regulations for the use of the Conservation Easement Area.

12. Subdivision. Subdivision, partitioning, or dividing the Conservation Easement Area is prohibited.

13. Development Rights. No development rights which have been encumbered or extinguished by this Conservation Easement shall be transferred pursuant to a transferable development rights scheme or cluster development arrangement or otherwise.

14. Utilities. The installation of utility systems, including, without limitation, water, sewer, power, fuel, and communication lines and related facilities, is prohibited. If there are existing utility easements (rights of way) located in the Conservation Easement Area or affecting the Conservation Easement, Grantor shall notify the WRC if right of way clearing or other work in the Conservation Easement Area is scheduled by the utility.

15. Water Quality and Drainage Pattern. Grantor shall conduct no activities in the Conservation Easement Area that would be detrimental to water purity or to any of the plants or habitats within the Conservation Easement Area, or that would alter natural water levels, drainage, sedimentation and/or flow in or over the Conservation Easement Area, or cause soil degradation or erosion. Diking, dredging, alteration, draining, filling or removal of wetlands or stream by the Grantor is prohibited. In addition, Grantor is prohibited from diverting or causing or permitting the diversion of surface or underground water into, within or out of the Conservation Easement Area by any means; polluting or discharging into waters, springs, seeps, or wetlands; or using pesticides or biocides in the Conservation Easement Area unless agreed to in writing by the WRC.

16 Grantor's Rights. The Grantor, for himself, his successors, assigns, invitees and licensees, hereby reserves the right to quiet enjoyment of the Conservation Easement Area; the right of ingress and egress to the Conservation Easement Area and all adjacent property of the Grantor; the right to continue such uses as exist as of the date of this grant not inconsistent with this Conservation Easement; and the right to sell, transfer, gift or otherwise convey the Conservation Easement Area, in whole, provided such sale, transfer or gift conveyance is subject to the terms of this Conservation Easement and written notice is provided to the WRC in accordance with the provisions herein below. In addition the Grantor reserves the following rights:

a. Grantor reserves the right to keep and maintain the existing barn structure that is located on the southwestern corner of the property near the bridge on S.R. 1151 and shown on the attached property Plat. This reservation includes the right to continue present uses of this barn. This reservation does not include the right to replace this structure with a new structure. When this structure is no longer useable or is abandoned for 5 years this reservation is void and the site will be allowed to return to a natural condition.
b. Grantor reserves the right to manage the vegetation in an area 30 feet by 75 feet at the northeastern end of the easement corridor on his property. He reserves the right to manage the vegetation within this area for family recreation. This area is demarcated on the northeastern easement boundary by Line-12 on the attached property Plat and by a line parallel to Line-12 (which is not shown on the Plat), that has its end points 30 feet from the end-points of Line-12.

17. WRC's Rights. The WRC reserves the right to use the Conservation Easement Area in any way necessary, consistent with the terms herein, to undertake any activities to protect, restore, manage, maintain, or enhance stream functional values, and monitor the restoration resources, as described in the Stream Mitigation Plan (Exhibit B), for the Conservation Easement Area, in order to mitigate for impacts to streams resulting from road construction. These mitigation activities include, but are not limited to, construction of new stream channels; restoration/stabilization of existing stream channels; installation of natural and manmade materials as needed to direct in-stream, above ground, and subterraneous water flow; planting of trees, shrubs and herbaceous vegetation; and utilization of heavy equipment to grade, fill, and prepare the soil. The WRC further reserves the right to monitor the results of the mitigation activities in perpetuity and to repair or restore any damage to the Conservation Easement Area occurring after initial completion of the construction associated with mitigation activities.

ARTICLE III. ENFORCEMENT AND REMEDIES

Nothing contained herein shall be construed to entitle the Grantor or WRC to bring any action against the other party for any injury or change in the Property resulting from causes beyond the control of either party, including fire, flood, storm, war, acts of God or third parties, or from any prudent action taken in good faith by either party under emergency conditions to prevent, abate, or mitigate significant injury to life, damage to property or harm to the Conservation Easement Area resulting from such causes, in accordance hereunder.

The WRC has the right to prevent any action on or use of the Conservation Easement Area that is inconsistent with the purpose of this Conservation Easement and to require the restoration of such areas or features of the Conservation Easement Area that may be damaged by any inconsistent activity or use. If the WRC determines that the Grantor is in violation of the terms of this Conservation Easement or that a violation is threatened, WRC shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Conservation Easement Area resulting from any use or activity inconsistent with the purpose of this Conservation Easement, to restore the portion of the Conservation Easement Area so injured. If Grantor fails to cure the violation within thirty (30) days after receipt of notice thereof from WRC, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing such violation within the thirty (30) day period, or fails to continue diligently to cure such violation until finally cured, WRC may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Conservation Easement, to enjoin the violation, as necessary, by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement, including damages for the loss of conservation values, and to require the restoration of the Conservation Easement Area to the condition that existed prior to any such injury. If the WRC, in its sole discretion, determines that circumstances require immediate action to prevent or mitigate significant damage to the conservation values of the Conservation Easement Area, the WRC may pursue its remedies without prior notice to the Grantor. WRC shall exercise reasonable efforts to notify the Grantor and shall, in any event, notify Grantor within two business days after action is taken to explain the action undertaken.

WRC's remedies shall be cumulative and shall be in addition to any other rights and remedies available to WRC at law or equity. Any cost incurred by WRC in enforcing the terms of this Conservation Easement against Grantor or its successors or assigns, including, without limitation, costs of suit and attorney's fees, and any costs of restoration necessitated by Grantor's violation of the terms of this Conservation Easement shall be borne by Grantor.

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

The Grantor reserves the right to take action against the WRC for use of the Conservation Easement Area in a way that is inconsistent with the purpose of this Conservation Easement. Any cost incurred by Grantor in enforcing the terms of this Conservation Easement against WRC or its successors or assigns, including, without limitation, costs of suit and attorney's fees, shall be borne by WRC.

ARTICLE IV. MISCELLANEOUS

A. Amendments. The NCDOT, WRC and Grantor may amend this Conservation Easement, only by a jointly executed written agreement, and provided that no amendment will be allowed that is inconsistent with the purposes stated herein, and provided that it is approved by the USACE.

B. Exhibits. The attached Exhibit A (metes and bounds of property), Exhibit B (Stream Mitigation Plan), and Plat recorded in Plat Book 5, Page 401 of the Madison County Registry are incorporated in and made a part of this instrument by reference. The parties acknowledge that the Stream Mitigation Plan, developed by a WRC biologist and dated June, 2004, a copy of which is on file at the office of the NCDOT and the WRC, and which is also attached hereto and incorporated herein, describes the plan for mitigation activities in the Conservation Easement Area.

C. Title. The Grantors covenant and represent that the Grantors are the sole owner and are seized of the Property in fee simple and have good right to grant and convey the aforesaid Conservation Easement and Temporary and Permanent Access Easements of Ingress and Egress; that the Conservation Easement Area and Temporary and Permanent Access Easements are free and clear of any and all encumbrances, except easement and leases of record or in effect by prescriptive rights as of the date hereto, and Grantors covenant that the WRC shall have the use of and enjoy all of the benefits derived from and arising out of the aforesaid easements conveyed. The easements conveyed herein shall run with the land and must be made part of any transfer of title by the Grantors.

D. Notification. Except as otherwise provided herein, any notices shall be sent by registered or certified mail, return receipt requested to the parties at their addresses shown above or to other address(es) as either party establishes in writing upon notification to the other.

E. Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Conservation Easement and Easements of Ingress and Egress and supersedes all prior discussions, negotiations, understandings or agreements relating to the said easements. 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 is found to be invalid, shall not be affected thereby.

F. Recording. The NCDOT shall record this instrument and any amendment hereto in timely fashion with the Office of the Register or Deeds of Madison County, North Carolina, and may re-record it at any time as may be required to preserve its right under this Conservation Easement.

G. Costs and Liabilities. The Grantor retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep, and maintenance of the Property, including the payment of all taxes, assessments, fees, and charges of whatever description levied on or assessed against the property.

H. Construction of Terms. This Conservation Easement shall be construed to promote the purposes of the North Carolina enabling statute set forth in N.C.G.S. □ 121-34, which authorizes the creation of Conservation Easements for purposes including those set forth in the recitals herein, and the conservation purposes of this Conservation Easement, including such purposes as are defined in Section 170(h)(4)(A) of the Internal Revenue Code.

I. Authorized Representative. All parties agree that the NCDOT is an authorized representative of the WRC for purposes of this Conservation Easement and Easements of Ingress and Egress.

J. Conservation Purpose. The WRC, for themselves, and their successors and assigns agree that this Conservation Easement shall be held exclusively for conservation purposes. The parties hereto recognize and agree that the benefits of this Conservation Easement are in gross and assignable, provided, however, that the WRC hereby covenants and agrees that in the event they transfer or assign this Conservation Easement they hold under, 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) and section 2301 of the Internal Revenue Code, and the WRC 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 that the contribution was originally intended to advance, set forth in the Recitals herein.

TO HAVE AND TO HOLD the aforesaid Conservation Easement and Easement of Ingress and Egress unto the NORTH CAROLINA WILDLIFE RESOURCES COMMISSION, its successors and assigns, forever. The rights and obligations set forth herein shall inure to and be binding upon the Grantor, WRC, and NCDOT, their heirs, executors, assigns and successors in title or interest.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals and caused this instrument to be signed in their respective names by authority duly given, the day and year first above written.

GRANTOR(S):

Hazel L. Kirkpatrick (Seal) _____ (Seal)

Hazel L. Kirkpatrick

_____ (Seal) _____ (Seal)

By: _____ (Seal) _____ (Seal)

John W. Kirkpatrick, Attorney in Fact for Hazel L. Kirkpatrick

STATE OF NORTH CAROLINA COUNTY OF BUNCOMBE

I, Robert L. Haskett, Jr. a Notary Public for said County and State, do hereby certify that John W. Kirkpatrick attorney-in-fact for Hazel L. Kirkpatrick

personally appeared before me this day, and being by me duly sworn, says that he/she executed the foregoing and annexed instrument for and in behalf of the said Hazel L. Kirkpatrick

and that his/her authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of the Register of Deeds, MADISON County, North Carolina, on the 17 day of MARCH, 2003 in Book 291 at Page 103, and that this instrument was executed under and by virtue of the authority given by said instrument granting him/her power of attorney

I do further certify that the said John W. Kirkpatrick acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said Hazel L. Kirkpatrick

Witness my hand and official stamp or seal, this the 21st day of July, 20 05.

My commission expires 12/6/07 Robert L. Haskett Jr. Notary Public

ROBERT L. HASKETT, JR. NOTARY PUBLIC BUNCOMBE COUNTY, N.C. (Stamp/Seal)

NCDOT:
ACCEPTED FOR THE DEPARTMENT OF TRANSPORTATION BY:

Robert L. Haskett Jr., Division Right of Way Agent
name and title

NORTH CAROLINA, COUNTY OF BUNCOMBE

I, MARK A. MUNDY a Notary Public of BUNCOMBE County do hereby certify that ROBERT L. HASKETT, JR., DIVISION RIGHT OF WAY AGENT, of the North Carolina Department of Transportation, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this 9TH day of AUGUST, 2004 05.

Mark A. Mundy
Notary Public

My Commission Expires: 1-29-07

MARK A. MUNDY NOTARY PUBLIC BUNCOMBE CO., NC (Notary Seal)

WRC:
ACCEPTED FOR THE WILDLIFE RESOURCES COMMISSION BY:

Richard B. Hamilton, Executive Director
name and title

NORTH CAROLINA, COUNTY OF Johnston

I, Charonda B. Lee a Notary Public of Johnston County do hereby certify that Richard B. Hamilton, Executive Director, of the North Carolina Wildlife Resources Commission, personally appeared before me this day and acknowledged the execution of the foregoing instrument. Witness my hand and official stamp or seal, this 25 day of August, 2004 2005

Charonda B. Lee
Notary Public

My Commission Expires: 3-23-2010

CHARONDA B. LEE NOTARY PUBLIC JOHNSTON COUNTY, NC (Notary Seal)

The foregoing Certificate(s) of _____, Notaries/Notary Public, is/are certified to be correct. This instrument and this certificate are duly registered at the date and time and in the Book and Page shown on the first page hereof. This the ___ day of _____, 2004.

_____
Register of Deeds For Madison County