

Ohio Department of Agriculture

Office of Farmland Preservation

# Ohio Agricultural Easement Donation Program

## **Guidelines**



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Printed: February 2007

# OHIO AGRICULTURAL EASEMENT DONATION PROGRAM

## GUIDELINES

February, 2007

### A. Introduction

The Ohio Department of Agriculture (ODA) is interested in accepting donated agricultural easements which meet ODA's guidelines. This brochure summarizes those guidelines and the step-by-step procedure for donating an agricultural easement to ODA. (Note: The donation of agricultural easements to ODA is governed by Ohio Revised Code Sections 901.21 through 901.23, Section 5301.67, and others.)

### B. Definition of an Agricultural Easement

An agricultural easement is a permanent, legally binding restriction, which forever limits the use of the subject land to predominantly agricultural activity.

Protecting a farm through a donated agricultural easement allows the landowner to retain ownership and exclusive use of the land. The landowner still pays taxes, can continue to farm the land with any agricultural activity permitted by Ohio law, and can sell the land or pass it along as a gift or through the landowner's estate. Even through those transfers, the easement's restriction remains on the land to prevent the new owner from developing or otherwise converting the land to a non-agricultural use. (Note: The legal definition of an "agricultural easement" and "agricultural activities" can be found in Section 5301.67 and 5713.30 of the Ohio Revised Code, respectively.)

### C. Eligible Farms

To be eligible for the program, the land must meet the following criteria:

1. The land must be at least 40 acres in size and comprised of one or more contiguous parcels. ODA will consider accepting a donation on a 25- to 40-acre farm if it is contiguous to an existing agricultural easement. For the purposes of the Program, two or more parcels of land are contiguous if they share a common boundary or would share a common boundary but for the fact that the parcels are separated by a public or private right-of-way or rights-of-way or by rivers, streams, or other bodies of water.
2. The landowner must warrant that the landowner has no knowledge of a release of a hazardous substance, toxic waste, or other environmental pollutant prohibited by state or federal law.

3. If there is a mortgage lien on the land, the landowner must obtain a “Subordination Agreement” from the lender on an ODA-prescribed form.
4. There cannot be any third-party interests in the land that are not conducive to agriculture, as determined by the director of ODA. Examples of such interests would be surface mining leases; water, sewer, or utility lines, or roads and highways outside of existing right-of-ways; or other development activities that would damage the topsoil or subsoil of the farm.
5. Generally, no portion of the parcel or contiguous parcels may be excluded from the donation, including the homestead.
6. Generally, the land must be located in an area of a township or county that local officials have (a) designated for agriculture in an adopted comprehensive land use plan or (b) zoned for agricultural use. If the land is located in a township or county where local officials have not identified the use, the director of ODA must determine that the land will support the long-term economic viability of a farming operation. ODA will not accept donations on land that (a) local officials have officially designated for non-agricultural use or (b) the director of ODA determines will not support the long-term economic viability of a farming operation.
7. The land must be enrolled in both the Current Agricultural Use Value (CAUV) tax program and the Agricultural District program with the County Auditor.
8. The land’s real-property description (also called a “legal” or “metes-and-bounds” description) must be clear as determined by ODA. If not, the landowner must hire a licensed surveyor to conduct a survey and prepare the needed description.
9. If the landowner intends to take advantage of federal tax benefits arising from the donation, the IRS will require the landowner to (a) commission and pay for an appraisal of the land and (b) submit an IRS Form 8283 signed by the director of ODA. ODA will require the landowner to provide to ODA a copy of the IRS-required appraisal. It is also noted that if the appraised value of the agricultural easement is more than \$500,000, the IRS requires that a copy of the entire appraisal report be submitted with IRS Forms 1040 and 8283.

#### D. Landowner Requirements

Landowners wishing to donate an agricultural easement to ODA must meet or agree to the following criteria:

1. If the landowner is a person, the landowner must be at least 18 years old and have full power, capacity, and authority to donate an agricultural easement. If the landowner is other than a person (e.g., corporation, limited liability company, trust, etc.), the landowner must provide ODA with authorization that the landowner can donate an

agricultural easement. Examples of such validation include a copy of the trust agreement, a certificate of authority, or other written documentation as deemed necessary by ODA.

2. ODA strongly advises the landowner to seek legal counsel to review the “Deed of Agricultural Easement” prior to signing it.
3. ODA encourages every landowner to seek advice from an accountant, tax attorney, or other financial professional regarding any tax benefits or consequences which might result from a gift of a perpetual agricultural easement to ODA. The landowner retains sole responsibility for any and all tax benefits and consequences and must hold ODA harmless from any and all costs, claims, or liability relating to them.

NOTE: The fact that a parcel of land is subject to an agricultural easement WILL NOT relieve the landowner of the landowner’s obligation to pay property taxes on the parcel.

4. ODA encourages the landowner to select a disinterested local person to observe the donation procedure in order to ensure its integrity. The disinterested observer might be a trusted neighbor or friend of the landowner, a county commissioner or commissioners’ staff person, a township trustee or trustees’ staff person, and OSU extension agent, a local soil and water conservation district (SWCD) representative, a county regional planning administrator, a local land trust representative, etc. In addition to a disinterested observer, ODA prefers to bring the landowner’s immediate family members, who do not have an ownership interest in the farmland, into the donation process.

#### E. Local Easement Co-holder or Partner

ODA prefers that a local or regional entity “co-hold” the easement and take some or all of the responsibility for monitoring compliance with and enforcing the Deed. Under Ohio law only counties, townships, municipalities, land trusts, and local soil and water conservation districts (SWCDs) may co-hold an agricultural easement with ODA. ODA will work with the eligible co-holders to establish the extent of the co-holder’s responsibility.

Rather than be a co-holder, these local or regional entities may also agree to serve as a “local partner” for the sole purpose of monitoring the easement as ODA’s agent. In such a partnership, ODA will assume sole responsibility for enforcing the easement.

#### F. ODA and Land Trust Advantages and Disadvantages

At the beginning of the donation process, ODA will inform the landowner of any land trust (or local government or SWCD), which ODA is aware of, that is interested in holding agricultural easements. ODA will also review with the landowner the differing characteristics of ODA- and land-trust-held agricultural easements.

The two most-attractive characteristics of ODA-held easements are a measure of protection from extinguishment through eminent domain and lower up-front costs. The lower costs result from ODA's policy of not charging an up-front fee for monitoring, enforcing, or holding an agricultural easement.

The primary disadvantage of ODA-held easements is a practical geographic limitation. Due to the small staff of ODA's Office of Farmland Preservation, ODA cannot travel beyond central Ohio to conduct necessary annual monitoring visits.

The primary characteristics of easements held by land trusts are essentially the opposite of those of ODA-held easements. That is, land trusts usually charge an endowment fee, either up front or in the future, in order to fund the monitoring, enforcement, and other costs associated with holding an agricultural easement. Additionally, land trusts do not provide any protection from extinguishment through eminent domain. But land trusts have the capacity to monitor agricultural easements in the area of the state that they serve.

In view of the above-described characteristics, ODA strongly encourages co-holder or partner participation with all agricultural easements. By combining the advantages of both organizations, such affiliations truly serve the interests of Ohio's farmland owners.

#### G. Local Government Review

Before accepting a donated agricultural easement, ODA will give notice of the donation to the local government officials (i.e., county commissioners, township trustees, and the mayor of any municipality within one-fourth of a mile of the farm). The local officials will be given 30 days to review and comment on the proposed donation. If one or more local elected governments object to the donation for a "valid" reason, the director of ODA may decline the donation. A valid reason might be that the local government has officially designated the farm property for a non-farm use.

#### H. Agricultural Activity Policy

ODA's policy is that landowners who own farmland that ODA holds or co-holds an agricultural easement on, or those who farm their land, can undertake any agricultural activities permitted by Ohio law. Agricultural activities are defined in Sections 5713.30 and 929.01 of the Ohio Revised Code. Generally, ODA will not exclude or restrict any legally permitted agricultural activities from its Deed of Agricultural Easement.

#### I. Housing Policy

ODA has a strict policy on the number and location of new houses that may be built on land which is subject to an agricultural easement. That policy is summarized as follows:

1. If the farm is 100 acres or less in size, ODA will permit one house. Hence, if there is not a house on the farm, one may be built. But if there is already a house on the farm, no more houses may be built.
2. If the farm is over 100 acres in size, ODA may permit the construction of one additional house. ODA's permission is subject to the discretion of its director and the landowner's demonstration of a compelling reason. As a general rule, ODA will not permit the construction of a house which is not related to the operation of the farm. Such houses often interfere with the ability of area farmers to engage in agriculture.
3. If ODA permits the construction of a house, the landowner must build the house within a defined homestead. The homestead's area must be no larger than the larger of one acre or the smallest size required by local zoning and health regulations. If the size and location of the homestead are known at the time of donation, that information must be designated on a map attached to the Deed of Agricultural Easement. If the information is not known at the time of donation, the Deed must contain provisions which limit the homestead's size and require the landowner to obtain ODA's agreement on the homestead's location before starting construction.

#### J. Step-by-Step Donation Procedure

##### *Step 1 – Initial Conversation:*

After reviewing these guidelines, landowners, their representatives, or other interested parties should contact ODA's Office of Farmland Preservation for an initial conversation concerning Program eligibility and other aspects of the donation process. If as a result of the initial conversation the landowner wishes to continue with the donation process and it appears to ODA that the Program's eligibility requirements will be met, ODA will schedule a site visit.

##### *Step 2 - Site Visit:*

A staff member of ODA's Office of Farmland Preservation will visit the farm, tour it, possibly take photographs, and discuss the donation process further with the landowner. ODA may delegate those tasks to a local co-holder or partner, such as a land trust or local SWCD.

Through the site visit, ODA will decide whether to continue with the below-outlined donation process. ODA will continue the process if it determines that it is likely that the Program's eligibility requirements will be met.

##### *Step 3 - Information:*

In order to donate an agricultural easement, the landowner must provide the following documents and information to ODA for its review:

1. A copy of the current deed(s) to the property.
2. A map or maps showing the landowner's name, parcel number(s), the acreage for each parcel, and an outline of the land's outer perimeter.
3. A soils-unit map of the land on which the land's outer perimeter is marked.
4. Written verification from the County Auditor that the land is enrolled in the CAUV tax program and the Agricultural District program.
5. An aerial map of the land, if available.
6. A "Subordination Agreement" for each mortgage lien on the land.
7. A copy of all tax statements related to the land including the homestead.

*Step 4 – Title Search:*

Once ODA verifies all the above information in items 1 through 7 in *Step 3*, and the landowner commits to proceed with the process to donate an agricultural easement, ODA will have a title search conducted by a certified Ohio title company. The title examination report will identify ownership of the property, identify any mortgage liens and other third party interests on the property, and provide a legal description of the land.

ODA will be able to accept the donation of an agricultural easement from the landowner if the following conditions are met as a result of the title examination report:

1. The ownership of the property is clear. If not, this is a problem that the landowner will have to resolve.
2. If there is a mortgage(s) on the property, the landowner will either need to have the mortgage(s) removed (such as paying off a loan) or have it subordinated to the agricultural easement.
3. The legal description of the land must be clear. If the legal description is not clear, as determined by ODA, the landowner must hire a licensed surveyor to survey the farm and prepare a new description.

ODA will pay for the initial title search. However, if the landowner does not sign a Deed of Agricultural Easement within six months of ODA receiving a completed title examination report, then the landowner must pay for an updated title search.

*Step 5 - Present Condition Report:*

ODA or the local co-holder or partner will complete a Present Condition Report on the farm. The Report will contain a narrative and various maps and photos, which together describe the

farm's history, identify natural features, and document the farm's existing buildings, structures, and agricultural activities. The Report will be recorded as an attachment to the Deed of Agricultural Easement and used to monitor the continued use of the land and compliance with the easement.

*Step 6 - Deed of Agricultural Easement:*

The final step in the procedure is the negotiation of the Deed of Agricultural Easement. ODA will provide a draft or template Deed to use as the starting point.

After all of the parties sign the Deed of Agricultural Easement it will be recorded by ODA or the local co-holder or partner in the office of the County Recorder. ODA will maintain the original Deed in perpetual storage and provide a copy to the landowner and local co-holder or partner.

**K. Monitoring for Easement Compliance**

While ODA may itself visit the farm and monitor the agricultural easement, the local co-holder or partner will be primarily responsible for those tasks. Monitoring visits usually will be conducted annually and documented on an ODA-prescribed form.

Regular and documented monitoring is essential for several reasons:

1. Monitoring is an easement holder's chief tool for verifying compliance with the terms and conditions of the Deed of Agricultural Easement.
2. Regular monitoring can detect noncompliance before it becomes so deeply entrenched that only legal action can resolve the situation.
3. Documentation of monitoring provides a record in case of court action and is essential to determine adequate restoration or resolution of a violation.
4. For landowners who receive federal tax benefits, IRS regulations require the holder of the agricultural easement (i.e., ODA and a local co-holder) to protect the conservation purposes of the donation. IRS may inspect ODA's files to determine whether ODA has met that requirement.

**L. Enforcing the Easement**

ODA is committed to enforcing all agricultural easements that it holds or co-holds. The objectives of that policy are to preserve the integrity of all agricultural easements and to comply with IRS requirements related to those landowners who receive federal tax benefits for donating an agricultural easement. Accordingly, if ODA discovers or is made aware of a violation, ODA will work with the landowner and local co-holder or partner (if applicable)

to resolve the situation. But if that attempt fails, ODA will have no choice but to bring legal action to enforce the easement.

#### M. Extinguishment and Recoupment

An agricultural easement held or co-held by ODA is intended to exist in perpetuity. To further that intent, ODA easements may only be extinguished under the following circumstances:

1. If the easement is taken through eminent domain; or
2. If an unexpected change in the conditions of or surrounding the land makes continued agricultural use of the land impossible or impractical.

The procedure for extinguishment on account of changed conditions always begins with a request from the landowner to the director of ODA. Thereafter, the general process varies:

1. If the director of ODA and the local co-holder (if any) *agree* that it is no longer possible or practical to farm the land, and the donor landowner *did not* take advantage of donation-related federal tax benefits, the director may extinguish the easement.
2. If the director of ODA and the local co-holder (if any) *do not agree* that it is no longer possible or practical to farm the land, and the donor landowner *did not* take advantage of donation-related tax benefits, the landowner may ask a court to extinguish the easement.
3. If the donor landowner took advantage of donation-related federal tax benefits, only a court may extinguish the easement.

In the rare event that an agricultural easement is extinguished, IRS regulations and ODA policy require that ODA and the local co-holder (if any) will be entitled to a share of the proceeds.

ODA's policy is that the recoupment amount shall be the greater of either **(a)** the percentage of the fair market value of the land that was donated at the time the agricultural easement was acquired, applied to the fair market value of the land at the time the agricultural easement is extinguished, or **(b)** seventy-five percent of the fair market value of the land at the time the agricultural easement is extinguished. The fair market value shall be determined by a general real estate appraiser who is certified under Chapter 4763 of the Revised Code, and such appraisal shall be obtained by the Grantor.

#### N. ODA Easement Documents

In addition to this brochure, the following ODA documents are available to landowners or anyone else interested in learning more about ODA's donation program:

1. Deed of Agricultural Easement - *Draft*
2. Present Condition Report - *Sample*
3. Press Releases on previous donations.

O. Contact

For more information on the Ohio Agricultural Easement Donation Program, including a donation packet, please contact:

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***Leaving a Legacy***

***In addition to donating an agricultural easement to the Ohio Department of Agriculture (ODA), Ohio law offers farmland owners another option to preserve the family farm: landowners can give their farm to ODA. This generous gift can be done through various legal means, including a will or trust agreement, or a deed which reserves a life estate for the landowner. Once ODA receives ownership of the farm, the department will place an agricultural easement upon the land, so that it must continue as a farm in perpetuity. ODA will then sell the property and all the proceeds that the department receives from the sale of the farm must, by law, be used to purchase additional agricultural easements in Ohio. For making such a generous gift, ODA will pay for all costs associated with receiving ownership of the farm.***

Updated: April 2008