Ohio Department of Agriculture
Office of Farmland Preservation

Ohio Agricultural Easement Donation Partnership Program

Guidelines

John R. Kasich, Governor

David T. Daniels, Director
Ohio Department of Agriculture

August 2012

Ohio | Department of Agriculture
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Dear Ohio Landowners:

On behalf of the Ohio Department of Agriculture, I invite you to learn more about our Agricultural Easement Donation Partnership Program and consider whether or not it is a good fit for your family and your farm. Information about the donation program is contained in the attached Guidelines.

Under the Partnership Program a landowner voluntarily donates an agricultural easement on their farm in return for knowing that it will remain forever in agricultural production and that the easement will be legally backed by the State of Ohio and a local partner organization. There may be tax benefits to the donation and landowners should consult their tax advisor.

Our department has set aside funds to help our local partners (counties, townships, soil and water conservation districts and land trusts) cover up to $3,000 in administrative costs for the donation of farms up to 200 acres. The incentive will increase by $5 an acre for larger farms.

Ohio has grown from zero preserved farmland acres to more than 54,000 preserved acres in just over 10 years. This would have never been possible without the dedication of farm owners and our local partners. With the Partnership Program, we hope to preserve many more acres of donated agricultural easements for future generations of Ohioans.

To learn more about agriculture and farmland preservation in Ohio, please visit our website: http://www.agri.ohio.gov/divs/FarmLand/FarmLand.aspx.

Sincerely,

David T. Daniels
Director

OHIO AGRICULTURAL EASEMENT DONATION PARTNERSHIP PROGRAM

GUIDELINES

A. Introduction

The Ohio Department of Agriculture (ODA) is interested in accepting donated agricultural easements which meet ODA's guidelines. This document 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 ("R.C.") Sections 901.21, 901.23, and 5301.67-.69, and others.) While ODA greatly appreciates donations of agricultural easements, there may be circumstances which preclude ODA's acceptance of a donation. The Director of ODA, at his discretion, shall make the final determination whether or not to accept an agricultural easement for donation.

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 R.C., 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 or other permanently protected land. 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. All contiguous parcels owned by the same legal entity must be submitted to the Donation program as one farm. No contiguous parcels under the same

ownership can be withheld from the easement unless the director of ODA provides an exception.

3. 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.

4. If there is a mortgage lien on the land, the landowner must obtain a "Subordination Agreement" from the lender on an ODA-prescribed form. These agreements ensure that any future action regarding the mortgage will not take the land out of agricultural use.

5. 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.

6. Generally, no portion of the parcel or contiguous parcels may be excluded from the donation, including the homestead.

7. 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.

8. The land must be valued for purposes of real property taxation at its Current Agricultural Use Value (CAUV) under Section 5713.31 of the R.C. or that constitutes a homestead when the easement is granted. The land must also be enrolled in the Agricultural District program with the County Auditor.

9. The land's real-property description (also called a "legal" or "metes-and-bounds" description) must be clear and accurate as determined by ODA. If not, the landowner must hire a licensed surveyor to conduct a survey and prepare the needed description.

10. A current conservation plan from the local Natural Resources Conservation Service/Soil and Water Conservation District must be in place at the time of the donation. However, in the case of a property predominantly covered with trees, the landowner will only need to have a forest management plan. The conservation or forest plan must be maintained, updated, and implemented.

11. Separate from the ODA program the landowner may seek professional tax advice and take advantage of any federal tax benefits arising from the donation. In order to do this 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. In order for the director to sign the IRS 8283 Form, the landowner must provide ODA with a copy of the IRS-required appraisal.

12. Please note that a parcel of land subject to an agricultural easement will not relieve the landowner of the landowner's obligation to pay property taxes on the parcel.

13. The land must be owned by a person(s) at least 18 years of age 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 entity must provide ODA with authorization that it has the authority to 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.

D. Landowner Should Seek Trusted Advice

ODA prefers that the landowner identify a trusted and unbiased local person(s) to witness the donation procedure in order to ensure its integrity. Examples of disinterested witnesses have included county commissioners or their staff, township trustees, OSU extension agents, Soil & Water Conservation District representatives, county planning administrators, etc.) In addition, ODA prefers that the landowner(s) bring immediate family members into the donation discussion early in the process.

An agricultural easement can be a major decision for a landowner and his or her family. In order to ensure that the best interests of the landowner are met, ODA highly recommends that the landowner seek independent legal counsel, as well as independent financial advice. There may be federal 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.

E. Local Easement Partner/Monitoring Agent

ODA requires that a local partner assume responsibility for creating a Present Condition Report (described in section L, step 5) and serve as ODA's monitoring agent by conducting an annual visit to the farm to assure that the landowner is complying with the terms and conditions of the agricultural easement (described in section M). In such a partnership, ODA will assume legal responsibility for enforcing the easement. In some cases, the local partner will want to co-hold the agricultural easement with ODA and, therefore, share legal responsibility for enforcing the easement. A local partner can be a township, county, municipality, land trust, or

local soil and water conservation district. Local partners may apply for reimbursement of real estate closing and administrative expenses through the Agricultural Easement Donation Partnership Program (AEDPP). Information about the program is posted on the ODA website under Farmland Preservation at: http://www.agri.ohio.gov/farmland/.

F. ODA – Local Partnership Benefits Landowners

The Agricultural Easement Donation Partnership Program combines the assets of ODA and local partners, and thereby provides to farmland owners the lowest possible cost and the strongest possible agricultural easement in Ohio.

The lower costs result from ODA's policy of not charging landowners a fee for its farmland preservation services. Rather, ODA will reimburse its local partners for certain expenses and costs associated with the donation. It should be noted, however, that land trusts may 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.

Agricultural easements are intended to protect the land in perpetuity for future generations of Ohioans. An ODA-held easement offers the strongest measure of protection in Ohio from extinguishment through eminent domain. By combining the advantages of ODA and the local partner, whose mission it is to support and protect the agriculture industry in their area, the interests of Ohio's farmland owners are best served.

G. Local Government Review

Before ODA accepts a donated agricultural easement, the local partner will give notice of the donation to the local government officials, i.e., county commissioners, township trustees, and any municipality within one-fourth of a mile of the farm. Local officials will be given a minimum of 30 days to review and comment on the proposed donation. However, subsequent to this formal review, any new information regarding the donation brought to the attention of ODA will be taken into consideration. The Director of ODA may take into account the comments of local officials, as well as other interested parties, in the director's decision to accept or decline the proposed donation.

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.

I. Housing Policy

ODA's housing policy is based on the traditional principle that a farm should have a farmstead (i.e., house, barn, etc.) that serves as a residence for the farm family and supports the operation of the farm. Conversely, a non-farm residence on farmland can interfere with the operation of the farm. Therefore, ODA's housing policy, based on this traditional principle, is as follows:

1. If no farmstead currently exists on the applicant property, ODA encourages that one farmstead, including a single residence, be permitted in the future. The size and location of the farmstead is negotiated between ODA and the landowner applicant, and must take into consideration any local zoning and health regulations. If the land is adjacent to other preserved farmland and is 40 acres or less, this provision is waived.

2. Generally, if a house/farmstead exists on the property at the time of application, then no additional residences may be built. The director of ODA, at his discretion, may make an exception to this policy in the case of a very large farm or the subdivision of a very large farm as permitted under section K of these Guidelines.

3. Any existing or future house on the preserved farm may not be subdivided from the farm.

J. Permitted Non-Farm Activity

As stated in section B and C of this document, the land must be enrolled in the County Auditor's CAUV program and the land must be used predominantly for agricultural activity, except the homestead. The word "predominantly" allows for some incidental non-farm activity on the farm, such as windmills, telecommunication towers, billboards, and oil and gas wells. The Director of ODA can, at his discretion, permit these and other incidental non-farm activities as long as 1) the land's CAUV tax value is maintained, and 2) the activity involves minimal impact on the agricultural land.

In the case of oil and gas exploration and extraction, the Deed of Agricultural Easement will require that only the minimum amount necessary of the farm's surface area necessary for extraction activities is disturbed. And, when such activities are

completed, the land must be restored as near as possible to its original state prior to the commencement of extraction activities.

The farmstead, which is the farmer's "castle," may be used for any farm or non-farm activity permitted by local or state laws and regulations.

K. Large Farm Exception Policy

As a general rule, ODA does not like to subdivide a farm because it diminishes the agricultural value of the land. However, in the case of a large farm – defined as 400 or more acres in size – the landowner can request a one-time option to split the farm in the future into two parcels of approximately equal size. The Director of ODA, at his discretion, shall determine whether to grant this subdivision request.

L. Step-by-Step Donation Closing Process

The timeframe needed to complete the entire donation process depends on how long it takes to undertake Steps 1 through 6 below. Some easements take longer to complete due to unique circumstances, such as title issues, mortgage subordinations, local government objections to the agricultural easement, or, in the case of an unclear description of the property's boundary, the need for a survey. ODA staff will work diligently with the landowner and local partner to complete the donation process and close on a legally sound easement.

Step 1 – Initial Conversation:

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

In order to donate an agricultural easement, the landowner may be required to provide the following documents and information to ODA for its review. It is highly recommended for the landowner to begin to gather the following items:

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 2 – Local Easement Partner/Monitoring Agent is acquired and a Site Visit is performed:

ODA will assist the landowner in searching for and recruiting a Local Easement Partner/Monitoring Agent.

The local partner will visit the farm, tour it, possibly take photographs, and discuss the donation process further with the landowner. ODA will continue the easement closing process if it is determined that the farm is likely to meet the Program's eligibility requirements.

Step 3 – Local Government Review:

As noted in Section G, above, before accepting a donated agricultural easement, the local partner will give notice of the donation to the local government officials (county commissioners, township trustees, and 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. Comments received during this 30 day period or subsequently, must be forwarded to ODA for review.

Step 4- Signed Notice:

Before the local partner proceeds with ordering a title commitment to be performed, ODA must sign off that the previous steps have been satisfactorily completed and the local partner has sent the landowner(s) a *Notice* document which acknowledges their commitment to proceed with the easement closing process.

Step 4 – Title Search:

Once ODA verifies all the above information in items 1 through 7 in *Step 1*, and the landowner commits to proceed with the process to donate an agricultural easement through the *Notice*, the local partner will have a title search conducted by a licensed 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 once the following conditions are met as a result of the title examination report:

1. The ownership of the property is clear. The landowner will be responsible for clearing and/or subordinating all interests that limit the title of a property, such as mortgages, leases, liens, restrictions, or legal or equitable interests, unless exempted by the director.

2. 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 or the local partner 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 may be required to pay for an updated title search.

Step 5 - Present Condition Report (PCR):

The local easement partner/monitoring agent will complete a PCR on the farm. The PCR 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 PCR 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. A template to be used for the PCR's creation is available on ODA's website.

Step 6 - Deed of Agricultural Easement:

ODA will provide a draft or sample Deed to use as the starting point for the landowner and their legal counsel to review prior to closing. Once reviewed, ODA will ask the title company to arrange for all parties to sign the Deed of Agricultural Easement and then maintain the Easement in perpetual storage and provide a copy to the landowner and local easement partner. An "Ohio Preserved Farmland" sign will be supplied by the ODA to the landowner for display on the farm.

M. Monitoring for Easement Compliance

While ODA may itself visit the farm and monitor the agricultural easement, the local monitoring agent will be primarily responsible for those tasks. Monitoring visits 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 or a local monitoring agent) to protect the conservation purposes of the donation. IRS may inspect ODA's files to determine whether ODA has met that requirement.

N. 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 monitoring agent (if appropriate) to resolve the situation. But if that attempt fails, ODA will have no choice but to bring legal action to enforce the easement.

O. 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 proceedings under applicable state or federal law; or

2. If an unexpected change in the conditions of or surrounding the land makes continued agricultural use of the land impossible or impractical, as specified by Section 5301.691 (G) of the Ohio Revised Code.

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 requires that ODA be entitled to a share of the proceeds. The recoupment amount shall be the greater of either (a) the difference between the fair market value of the Protected Property unencumbered by this Easement and the fair market value of the Protected Property with the Easement at the time the agricultural easement was acquired, 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 of the Protected Property shall be determined at the time this Easement is extinguished, terminated or condemned by a completed certified appraisal conducted by an Ohio certified general appraiser certified under Chapter 4763 of the Revised Code. The Director of ODA must approve the appraiser. The fair market value of the Protected Property shall not include any increase in value after the date of this Easement attributable to improvements.

P. ODA Easement Documents

In addition to these guidelines, the following ODA documents are available to anyone interested in learning more about ODA's donation program:

1. Sample Deed of Agricultural Easement

2. Present Condition Report - *Template*

3. Press Releases on previous donations

4. Agricultural Easement Donation Partnership Program Local Partner agreement

Q. Contact

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

Ohio Department of Agriculture

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Web site: www.agri.ohio.gov/farmland

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.

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