

# Greenways: Landowner Considerations In Making Land Available For Public Use

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The author wishes to acknowledge and thank  
the firm of Helms Mulliss & Wicker, PLLC  
and associate Chelli Robinson and summer clerk  
Scott Addison for their generous assistance  
in the preparation of this Manuscript

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## I. Introduction – Greenways As Conservation Options

### A. Landowner Conservation Options In General

The purpose of this article is to briefly review some of the factors that might be considered by a landowner who is contemplating the donation or sale of (perhaps at less than fair market value) the fee title to, or an easement over a portion of his/her property in order to facilitate the creation of a public greenway system.

Landowners who desire to see their lands conserved for the benefit and enjoyment of future generations have a variety of options that have been well publicized and documented by the various land conservation organizations working to protect the North Carolina landscape. The two most common options are the conveyance of either (i) the fee title to the entire tract (usually for ultimate incorporation into some type of public land, such as a park or nature preserve) or (ii) a “conservation easement” in favor of either a governmental entity or a non-profit land conservation organization, with the fee title (and control) remaining in the landowner.<sup>1</sup>

The option of making a portion of the land available for greenway purposes is less frequently utilized, and therefore may not be understood as well by landowners and their advisors. Since the typical greenway scenario involves the conveyance of either (i) the fee title to, or (ii) an access easement over a part of the landowner’s land (although in some instances it may involve the conveyance of the entire tract), and it is done essentially for conservation purposes (although public recreation is the principal motivation), many of the same considerations that apply to the typical conservation transaction also apply. However there are some subtle differences in the applicable considerations due to the fact that only a part of the owner’s land is affected (usually) by the transaction. Although the landowner may not be specifically relinquishing development rights (as is done in the case of a conservation easement) by granting the access easement, as a practical matter (and particularly if the easement document is appropriately drafted) the landowner gives up the right to use it for any inconsistent purposes (i.e. development), and thus for all intents and purposes donates “value” (to the extent the greenway easement is donated).

### B. Public Policy Favoring Conservation – Financial Incentives & Liability Protection

Conveying all or a portion of one’s property for conservation purposes is encouraged by most states and the federal government in the form of financial incentives and liability protection.

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<sup>1</sup> A “conservation easement” is, in effect, a “negative easement” whereby a landowner relinquishes certain rights (usually development rights) to his/her property. The “conservation easement” is so commonly used by land conservationists, that the term has come to be practically synonymous with what is codified in the North Carolina statutes as a “conservation agreement”. Under North Carolina statutory law, “conservation agreements” are considered “interests in land.” N.C. Gen. Stat. Sec. 121-38(b) “A ‘conservation agreement’ means a right, whether or not stated in the form of a restriction, reservation, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of land . . . appropriate to retaining land . . . predominantly in their natural, scenic or open condition . . . to forbid or limit any or all . . . (v) surface use except for . . . outdoor recreational purposes or purposes permitting the land . . . to remain predominantly in its natural condition . . .” N.C. Gen. Stat. Sec. 121-35(1).

Financial incentives are provided in the form of tax deductions (at the federal level) and/or tax credits (at the state level) to the extent land value is donated by the landowner for conservation purposes. This public policy encourages either outright donations or so-called “bargain sales” (i.e. sales for less than the full market value) of interests in real property in certain prescribed instances. Since charitable deductions for land donations are addressed elsewhere in the seminar materials, they will not be addressed in this article.<sup>2</sup>

Liability protection is provided in most states, including North Carolina, through the enactment of so-called “recreational use” statutes.<sup>3</sup> North Carolina also has enacted the North Carolina Trails System Act<sup>4</sup> which provides even stronger landowner protection for a landowner who opens part of his/her land for use as part of the state trail system.

### C. Other Greenway Benefits

In addition to the aforementioned statutory incentives, there are a number of other reasons for landowners to support greenway projects. Many articles have been written about the various benefits of greenways, both to the landowner and to the community at large. The author especially commends the presentation by Chuck Flink of Greenways, Inc. which may be found on line at: [www.centerfortheenvironment.com/pdfs/transcription.pdf](http://www.centerfortheenvironment.com/pdfs/transcription.pdf)

## II. Financial Incentives For Conservation - North Carolina Conservation Tax Credit

### A. General

The General Assembly has extended to North Carolina Department of Environment and Natural Resources (NCDENR) the authority to oversee a statewide conservation easements program.<sup>5</sup> The purpose of the program is to “develop a nonregulatory program that uses

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<sup>2</sup> Section 170(h) of the Internal Revenue Code and regulations promulgated thereunder (the “Code”) addresses federal tax deductions for donations of land or interests in land for conservation purposes. It should be noted, however, that Treas. Reg. Sec. 1.170A-14 states that “A deduction under Section 170 is generally not allowable for a charitable contribution of any interest in property that consists of less than the donor’s entire interest in the property....” One exception to this rule is the donation of a “perpetual conservation restriction” or a so-called conservation easement, which qualifies as a “qualified conservation contribution” provided it is for one or more of certain allowed “conservation purposes”. But a garden variety access easement may not qualify as such a “restriction” unless carefully drafted. As a starting point, the easement would need to restrict the fee owner’s use of the easement area as well as provide the affirmative right to use the area for a public right of way. Note that this should not be an insurmountable hurdle because the Treasury Regs specifically provide that “the donation of a qualified real property interest to preserve land areas for the outdoor recreation of the general public .... will meet” the conservation purposes test, and they give as an example the donation of land for the preservation of a public nature or hiking trail. See Treasury Reg. Section 1.170A-14(d)(2).

Assuming the Section 170(h) hurdle can be overcome, another potential hurdle in the greenway situation is satisfying the Code’s “donative intent” requirement for charitable deductions. Where a landowner dedicates land for a public greenway in connection with the recording of a subdivision plat (discussed in more detail below) the requisite “donative intent” may be difficult to establish if the greenway is being donated in exchange for some type of consideration from the regulatory entity (e.g. rezoning) or pursuant to a requirement of that entity’s subdivision or zoning ordinance. Also, if the developer/landowner is receiving a benefit in exchange for the donation (e.g. a density bonus), the value of benefit received must be offset against the value of the gift. Assuming these issues are not present, the landowner’s advisor should be aware of, and make plans to comply with the various Code requirements that apply to land value donations, including the filing of a form 8283 signed by the donee organization. Code Section 170 (f)(8) also requires the donor’s contemporaneous receipt of a letter from the donee acknowledging the gift in certain circumstances.

<sup>3</sup> N.C. Gen. Stat. Sect 38A - 4

<sup>4</sup> N.C. Gen. Stat. Sect 113A – 83 to -96

<sup>5</sup> N.C. Gen. Stat. § 113A-230.

conservation tax credits as a prominent tool to accomplish conservation purposes, including the maintenance of ecological systems.<sup>6</sup> The conservation tax credit (the “Tax Credit”) is currently provided by two sections of the General Statutes: (i) N.C. Gen. Stat. § 105-151.12,<sup>7</sup> and (ii) N.C. Gen. Stat. § 105-130.34.<sup>8</sup> At the time of this writing, legislation is pending that would combine these two statutes into a new Article 3H under Chapter 105, among other changes.<sup>9</sup>

## B. Applicability To Greenway Easements

The availability of the Tax Credit for donations or bargain sales of the entire fee interest, or a conservation easement over an entire parcel is well documented. Less well known is the availability of the credit for a donation or bargain sale of the fee title to, or an access easement over less than the entire parcel for greenway purposes. The good news for landowners considering the donation or bargain sale of a greenway easement is that the statute makes the Tax Credit available for the “donation of an interest in real property.” Since an easement constitutes an interest in real property, a conveyance of an access easement to a qualified donee arguably should qualify for the Tax Credit provided that the transaction otherwise satisfies the other requirements of the statute. For example, the easement should make it clear that it is granted for one of the specific conservation purposes set forth in the statute.<sup>10</sup>

One difficulty with easements is that the Tax Credit requires the establishment with some specificity of the value of the donated property interest. Establishing this value usually requires a “before and after appraisal” to determine the value of the donated interest.<sup>11</sup> “To find the true value of the property, the [State Property Tax] Commission [must] determine the market value prior to the granting of the easements and then reduce that value by applying a damage factor caused by the granting of the conservation easements. Determining the highest and best use of the property prior to the granting of the easement [is] a critical part of the appraisal process.”<sup>12</sup>

Easement donors and their advisors should be also aware that the statute requires the interest be donated in perpetuity. Thus, by its terms, the easement cannot be limited to a term of years, and also must not be cancelable in the landowner’s discretion. NCDENR staff read two meanings into the perpetuity requirement: (1) the gift must be one intended to last forever; and (2) the benefit must last forever. So, if the landowner (or his/her successor) is allowed to use the

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<sup>6</sup> N.C. Gen. Stat. § 113A-231.

<sup>7</sup> For full text, *see* Appendix A.

<sup>8</sup> For full text, *see* Appendix B.

<sup>9</sup> Senate Bill 521 may be found at <http://www.ncga.state.nc.us/Sessions/2005/Bills/Senate/HTML/S521v1.html>. However, a proposed committee substitute to Senate Bill 521, S521-CSSV-27 [v. 5], has also been submitted to subcommittee at this time for consideration. *See* Appendix C.

<sup>10</sup> In drafting the greenway easement, the landowner’s advisor should consider including language that states the purpose of the easement is to “promote outdoor recreation by providing public access to public trails.” A “belt and suspenders” drafting approach would also include a provision to the effect that another purpose of the easement is to conserve the easement tract largely in its natural state. To assure this, the easement might even expressly restrict the use of the easement tract to outdoor recreation purposes and limit the development of the tract to a trail and related amenities (e.g. restroom facilities), and require that except as otherwise permitted, it be maintained in its natural state by the easement holder. In the case of the fee donation or bargain sale, such provisions might be included in the sale contract or donation agreement, and/or in the deed itself (particularly in the donation scenario where there may not be a contract to create the “paper trail” that documents the purpose of the transaction.

<sup>11</sup> N.C. Gen. Stat. § 121-40.

<sup>12</sup> *Rainbow Springs P’ship v. County of Macon*, 79 N.C. App. 335, 342, 339 S.E.2d 681, 685 (1986) (explaining N.C. Gen. Stat. § 121-40).

burdened land in some way that may vitiate the easement, the gift arguably would not be considered perpetual. However, the IRS and the state revenue department have statutes of limitation regulating how long they are allowed to recover the tax credit. That topic is beyond the scope of this paper.<sup>13</sup>

### III. Liability Considerations Pertaining to Greenway Easements

#### A. Introduction

Landowners who are approached about conveying or donating either the fee or an access easement for public greenway purposes first must decide if they are willing to cede total control over a part of their property. Some landowners, for various reasons, may insist on the transfer of the entire parcel. However, some landowners may be willing to give up control over part of the property. In those instances, the landowner may prefer to retain control of the greenway strip by conveying only an easement versus the entire fee title. In this way, for example, the landowner preserves his total acreage for development density calculation purposes.<sup>14</sup> However, in such instances, landowners may hesitate to grant public access easements due to concern over their potential liability for an injury to someone using the easement. As the owner of the underlying fee, the easement grantor must consider whether he/she might have some exposure in such instances.

#### B. General Landowner Liability in North Carolina

The personal injury liability of a landowner generally is determined by the classification of the person injured while on the property.<sup>15</sup> Traditionally, someone entering the property was considered either an invitee, a licensee, or a trespasser.<sup>16</sup> An invitee “is one who goes onto another’s premises in response to an express or implied invitation and does so for the mutual benefit of both the owner and himself.”<sup>17</sup> A store customer is the classic example of an invitee.<sup>18</sup> A licensee, by comparison, “is one who enters onto another’s premises with the possessor’s permission, express or implied, solely for his own purposes rather than the possessor’s

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<sup>13</sup> Information about the Tax Credit Program may be obtained from NCDENR at (919) 715-4191, or online at <http://www.enr.state.nc.us/conservationtaxcredit/>.

<sup>14</sup> Generally, the most common greenway easement scenario involves a subdivision developer who dedicates a greenway strip as part of a subdivision plat. Developers often are supportive of such programs because they perceive greenways as amenities that add market appeal and therefore value to their developments. Moreover, a public greenway contains the added enhancement of being maintained by a public entity (greenways being essentially linear parks), which relieves the developer and later the homeowners’ association from the financial maintenance burden. Among the issues that developers and their counsel should consider in such circumstances are whether the dedication should be in fee or in the form of an easement. A developer might favor an easement, for example, because he/she not only retains greater control over the property, but also in retaining the ownership of the underlying fee, the developer can count the greenway area as part of his/her property’s overall area for purposes of calculating development density. In this regard, it should be noted that normally, the recordation of a plat showing a public right of way, such as a greenway, is considered to be an easement rather than a transfer of the fee. The easement is considered perpetual, but it can be abandoned by the public. DAVID M. LAWRENCE, LOCAL GOVERNMENT PROPERTY TRANSACTIONS IN NORTH CAROLINA §302 (2d ed. 2000).

<sup>15</sup> *Nelson v. Freeland*, 349 N.C. 615, 617, 507 S.E.2d 882, 883 (1998).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 617, 507 S.E.2d at 883.

<sup>18</sup> *Id.*

benefit.”<sup>19</sup> A social guest is the classic example of a licensee.<sup>20</sup> “Lastly, a trespasser is one who enters another’s premises without permission or other right.”<sup>21</sup>

In 1998, the Supreme Court of North Carolina followed the lead of numerous other states and abolished the licensee and invitee categorizations, combining the two into a “lawful visitor” category.<sup>22</sup> The lawful visitor classification, unlike that for licensee and invitee, focuses on the duty owed by a “reasonable person,” which is prevalent in all of tort law.<sup>23</sup> Adopting the negligence standard “eliminate[d] the complex, confusing, and unpredictable state of premises-liability law and replace[d] it with a rule which focuses the jury’s attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.”<sup>24</sup> Now, under North Carolina law, a landowner owes a duty of reasonable care under the circumstances to anyone entering the property as a lawful visitor.<sup>25</sup> With respect to trespassers, a landowner still must only refrain from the willful or wanton infliction of injury.<sup>26</sup> “Willful injury constitutes actual knowledge of the danger combined with a design, purpose, or intent to do wrong and inflict injury, . . . [and] a wanton act is performed intentionally with a reckless indifference to the injuries likely to result.”<sup>27</sup>

### C. Recreational Use Statute

In an effort “to encourage owners of land to make land and water areas available to the public at no cost for educational and recreational purposes,” the North Carolina General Assembly enacted the Recreational Use Statute, which limits the liability of landowners to persons entering the land for those purposes.<sup>28</sup> N.C. Gen. Stat. § 38A-4 reads:

Except as specifically recognized by or provided for in this chapter, an owner of land who either directly or indirectly invites or permits without charge any person to use such land for educational or recreational purposes owes the person the same duty of care that he owes a trespasser, except nothing in this chapter shall be construed to limit or nullify the doctrine of attractive nuisance<sup>29</sup> and the owner

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<sup>19</sup> *Id.* (internal citations omitted).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 617, 507 S.E.2d at 883.

<sup>22</sup> *Id.* at 632, 507 S.E.2d at 892.

<sup>23</sup> *Id.* at 622-23, 507 S.E.2d at 887.

<sup>24</sup> *Id.* at 631-32, 507 S.E.2d at 892.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 618, 507 S.E.2d at 884.

<sup>27</sup> *Id.*

<sup>28</sup> N.C. Gen. Stat. § 38A-1 (1995). A nearly identical statute exists limiting the liability of owners of land associated with watershed improvement projects. N.C. Gen. Stat. § 139-41.3 (2001).

<sup>29</sup> The “attractive nuisance” rule was explained in *Briscoe v. Lighting and Power Co.*, 148 N.C. 396, 411, 62 S.E. 600, 606 (1908):

It must be conceded that the liability for injuries to children sustained by reason of dangerous conditions on one’s premises is recognized and enforced in cases in which no such liability accrues to adults. . . . We think that the law is sustained upon the theory that the infant who enters upon premises, having no legal right to do so, either by permission, invitation or license or relation to the premises or its owner, is as essentially a trespasser as an adult; but if, to gratify a childish curiosity, or in obedience to a childish propensity excited by the character of the structure or other conditions, he goes thereon and is injured by the failure of the owner to properly guard or cover the dangerous conditions which he has created, he is liable for such injuries, provided the facts are

shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge. This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise.<sup>30</sup>

As previously mentioned, the duty of care owed to a trespasser is merely to refrain from willful and wanton infliction of injury.<sup>31</sup> Therefore, when a landowner opens land for public use and does not charge a fee for admission, any visitors entering the property are owed no greater duty of care than trespassers for purposes of premises liability. For example, in a lawsuit filed by a plaintiff who was injured at a church festival held on a landowner's farm, the North Carolina Court of Appeals applied the Recreational Use Statute and affirmed dismissal of the suit as to the landowner because evidence demonstrated that the festival was not a commercial activity, and no evidence existed showing that the landowner willfully or wantonly inflicted injury on the plaintiff.<sup>32</sup>

It is important to note that the Recreational Use Statute does not absolve landowners of all liability. The attractive nuisance doctrine still applies, and a landowner must inform direct invitees<sup>33</sup> of any known artificial or unusual hazards. However, by negative implication, landowners have no duty to warn trespassers or indirect invitees of such dangers.<sup>34</sup>

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such as to impose the duty of anticipation or prevision; that is, whether under all of the circumstances he should have contemplated that children would be attracted or allured to go upon his premises and sustain injury.

<sup>30</sup> See Appendix D

<sup>31</sup> *Nelson*, 349 N.C. at 618, 507 S.E.2d at 884.

<sup>32</sup> *Clontz v. St. Mark's Evangelical Lutheran Church*, 157 N.C. App. 325, 578 S.E.2d 654 (2003).

<sup>33</sup> Note that the terms "direct" and "indirect" may be interchangeable with "express" and "implied." Black's Law Dictionary (8th ed. 2004) defines "express" as "Clearly and unmistakably communicated; directly stated." "Implied" is defined as "Not directly expressed; recognized by law as existing inferentially." Additionally, Black's defines "invitation" as "In the law of negligence, the enticement of others to enter, remain on, or use property or its structures; conduct that justifies others in believing that the possessor wants them to enter." Arguably, a direct or express invitee would be a person who has received an invitation directly from the landowner to enter to property, whereas an indirect or implied invitee would be a person who is part of a larger group that has received an invitation to enter the premises.

<sup>34</sup> *Fesmire v. U.S.*, No. 00-1310, 9 Fed. Appx. 212, 215, 2001 U.S. App. LEXIS 10784, at \*7 (4th Cir. May 24, 2001). In *Fesmire*, a teenager "driving his Jeep Grand Cherokee with three teenaged female passengers on a joyride over the sand dunes in Carteret County, North Carolina, drove onto federal property and accidentally proceeded down a steep Navy boat ramp, plunging into the ocean." *Id.* at 213, 2001 U.S. App. LEXIS 10784, at \*1. The driver and one of the passengers failed to escape the vehicle and drowned. *Id.* at 213, 2001 U.S. App. LEXIS 10784, at \*2. The driver's estate contended that the teenagers were not trespassers because their use of the property occurred with the implied knowledge of the United States who, as landowner, had removed the gate for repairs and that such implied knowledge amounted to an implicit invitation to use the property. *Id.* at 214, 2001 U.S. App. LEXIS 10784, at \*3-4. Applying North Carolina's Recreational Use Statute, the court determined that even if the teenagers were indirect invitees, their use of the property was recreational, and as such, the United States, viewed as a private landowner, only owed a duty to refrain from committing a willful or wanton injury. *Id.* at 214-15, 2001 U.S. App. LEXIS 10784, at \*5-6. The United States' alleged wrongful omission of warning signs did not "impose liability for which trespassers or even implicit invitees [could] assert a claim." *Id.* at 215, 2001 U.S. App. LEXIS 10784, at \*6. The duty to warn of "artificial or unusual hazards of which the owner has actual knowledge" applies only to "direct invitees." *Id.* at 215, 2001 U.S. App. LEXIS 10784, at \*7. The court

## D. Trails System Act

The North Carolina Trails System Act<sup>35</sup> provides stronger protection for owners of land dedicated to use for the state trail system. The statute protects both the landowner who donates the land and any person who “has constructed, maintained, or caused to be constructed or maintained a designated trail or other public trail pursuant to a written agreement with any person who is an owner, lessee, occupant, or otherwise in control of the land.”<sup>36</sup> The Trails System Act, however, mirrors the Recreational Use Statute but does not contain the exceptions for attractive nuisance or direct invitees.<sup>37</sup>

## E. Easements

### 1. Apportionment of Liability Between Landowner and Easement Holder

With respect to easements, “the general rule [is] that [i]t is not only the right but the duty of the owner of an easement to keep it in repair; the owner of the servient tenement is under no duty to maintain or repair it, in the absence of an agreement therefor. . . . If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate or to third persons, the owner of the easement will be liable in damages for the injury so caused.”<sup>38</sup> *Green v. Duke Power Co.* involved an injury to a child resulting from an exposed electrified portion of a transformer owned and maintained by Duke Power on the land of another party. Duke owned an easement granting “the right, privilege and easement . . . to construct, maintain and operate [thereon] . . . transformers . . . together with the right at all times to enter said premises . . . .”<sup>39</sup> Following the rule that “the owner of the easement is the party to be charged with its maintenance,”<sup>40</sup> the court found that Duke, as holder of the easement, retained the *sole* responsibility for maintaining the safety of the transformers.<sup>41</sup> As part of its holding, the court “follow[ed] the well-reasoned holding of the Hawaii Supreme Court that in such cases ‘it is the control and not the ownership which determines the liability.’”<sup>42</sup> Therefore, the rule of law necessarily following from *Green v. Duke Power Co.* is that upon relinquishing control of the property to the easement holder, a landowner also relinquishes potential liability associated with maintenance of the property.

### 2. Recreational Use Statutes Applied to Easements

#### a. Landowner (i.e. Easement Donor) Protection

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concluded by saying, “The accident in this case was a most unfortunate tragedy. But it was not an accident for which the United States, as landowner where the accident occurred, was liable in tort under North Carolina law.” *Id.* at 215, 2001 U.S. App. LEXIS 10784, at \*8.

<sup>35</sup> N.C. Gen. Stat. §§ 113A-83 to -96.

<sup>36</sup> *Id.* at § 113A-95.

<sup>37</sup> The Trails System Act statutorily places responsibility for maintaining public trails on NCDENR, which would transfer premises liability to the Department under common law. N.C. Gen Stat § 113A-93

<sup>38</sup> *Green v. Duke Power Co.*, 305 N.C. 603, 611, 290 S.E.2d 593, 598 (1982) (internal citations removed).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (citing *Richardson v. Jennings*, 184 N.C. 559, 114 S.E. 821 (1922)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (quoting *Levy v. Kimball*, 50 Haw. 497, 499, 443 P. 2d 142, 144 (1968)).

In conveying a greenway easement for public use, a landowner not only receives the common law liability protection discussed above, but he/she is also afforded the liability protection provided by the Recreational Use Statute. North Carolina's Recreational Use Statute applies to "an owner of land."<sup>43</sup> As a general rule, the owner of the servient tenement retains fee title to the easement tract.<sup>44</sup> According to the definitions listed in N.C. Gen. Stat. § 38A-2, an "owner" includes "any individual or nongovernmental legal entity that has any fee, leasehold interest, or legal possession . . . ."<sup>45</sup> The statute also requires the easement be granted for recreational use, which includes "any activity undertaken for recreation, exercise, education, relaxation, refreshment, diversion, or pleasure."<sup>46</sup> Additionally, with a properly drafted easement agreement conferring control and maintenance of the property on the easement holder, liability for personal injury arising out of the failure properly maintain the easement tract also transfers to the easement holder.<sup>47</sup>

#### b. Easement Holder Protection

No reported North Carolina case law currently exists for application of the Recreational Use Statute to an easement holder. Other jurisdictions, however, have commented on the issue. Arizona,<sup>48</sup> New York,<sup>49</sup> New Jersey,<sup>50</sup> California,<sup>51</sup> Nevada,<sup>52</sup> Wisconsin,<sup>53</sup> Michigan, South Dakota,<sup>54</sup> Pennsylvania,<sup>55</sup> and South Carolina<sup>56</sup> all have case law on the application of recreational use statutes to easements. While all these states identify the purpose of the statute as to encourage landowners to open land for public use, the courts differ on when the statutory immunity extends to easement holders. The primary question appears to be whether the easement holder is an owner or occupant within the definition of the statute. Because typically the easement holder does not receive a possessory interest in the property,<sup>57</sup> he or she arguably is not an "owner" under the Recreational Use Statute. This may not present a drafting issue since the typical greenway easement holder is a governmental entity that will not need the statute's protection.

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<sup>43</sup> N.C. Gen. Stat. § 38A-4 (1995).

<sup>44</sup> *See Century Communications, Inc. v. Housing Authority of City of Wilson*, 313 N.C. 143, 326 S.E.2d 261 (1985); *Bivins v. Southern Ry. Co.*, 247 N.C. 711, 102 S.E.2d 128 (1958); *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 51 S.E.2d 191 (1949); *Hildebrand v. Southern Bell Telephone & Telegraph Co.*, 219 N.C. 402, 14 S.E.2d 252 (1941); *Powell v. Hamlet Ice Co.*, 209 N.C. 195, 183 S.E. 386 (1936); *City of Statesville v. Bowles*, 6 N.C. App. 124, 169 S.E.2d 467 (1969).

<sup>45</sup> N.C. Gen. Stat. § 38A-2(4).

<sup>46</sup> N.C. Gen. Stat. § 38A-2(5).

<sup>47</sup> *See supra* Part III.A.4.a.

<sup>48</sup> *Ward v. Arizona*, 181 Ariz. 359, 890 P.2d 1144 (1995).

<sup>49</sup> *Albright v. Metz*, 635 N.Y.S.2d 331, 217 A.D.2d 123 (1995).

<sup>50</sup> *Labree v. Millville Manufacturing, Inc.*, 195 N.J. Super. 575, 481 A.2d 286 (1984).

<sup>51</sup> *Collins v. Tippett*, 156 Cal.App.3d 1017, 203 Cal.Rptr. 366 (1984).

<sup>52</sup> *Boland v. Nevada Rock & Sand Co.*, 111 Nev. 608, 894 P.2d 988 (1995).

<sup>53</sup> *Urban v. Grasser*, 243 Wis.2d 673, 627 N.W. 2d 511 (2001).

<sup>54</sup> *Musch v. H-D Electric Coop., Inc.*, 460 N.W.2d 149 (S.D. 1990).

<sup>55</sup> *Stanton v. Lackawanna Energy, Ltd.*, 2003 PA Super. 83, 822 A.2d 707 (2003), opinion withdrawn.

<sup>56</sup> *Corbett v. City of Myrtle Beach*, 336 S.C. 601, 521 S.E.2d 276 (Ct. App. 1999).

<sup>57</sup> WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 15-1 (Matthew Bender & Company, Inc. 2004) ("An easement is a nonpossessory interest in the real property of another for a limited purpose; it is not an estate.").

## F. Injuries to Users of a Public Way Caused by Conditions on an Adjoining Landowner's Property

Under North Carolina common law and under the Recreational Use Statute, as discussed above, because a landowner who donates an easement for public use relinquishes control and maintenance of the property, the landowner generally owes no duty to users of the public way and thus would not be liable, absent one of the exceptions discussed above, for an injury to a member of the public using the easement; however, the landowner should also be aware that regardless of whether he/she donates/conveys fee title or an easement, the greenway or trail might be deemed by the courts to be a "public way," thus potentially making the landowner liable for injuries to persons using the greenway caused by hazardous conditions on his adjoining property. Under the "public way" doctrine, an adjoining landowner may be liable for injuries to users of the public way from dangerous artificial conditions<sup>58</sup> or falling tree limbs of which the landowner had notice that could foreseeably present a dangerous condition to the public.<sup>59</sup>

Additionally, North Carolina courts have found that landowners owe a duty to prevent unreasonable risks of harm to those persons who may incidentally deviate slightly on their property.<sup>60</sup> For example, if a person loses control of his car and inadvertently deviates onto the landowner's property, striking a negligently maintained dangerous condition, and suffers injuries, the landowner may be liable.<sup>61</sup>

Lastly, a landowner may be liable for injuries to persons outside the premises caused by the activities of third persons on the land if the landowner knows or has reason to know that third persons would engage in the activity that causes the injury and thereafter has a reasonable opportunity to prevent or control such conduct.<sup>62</sup> Landowners do not, however, have a duty to periodically inspect their property to determine if other persons are carrying on dangerous activities or have created dangerous conditions to the property.<sup>63</sup> Therefore, a landowner who has donated an easement for public use should take care to remove any identified dangerous condition that may foreseeably injure someone using the public land and to require that the easement holder clearly mark the boundaries of the easement.

## G. Other Landowner Defenses

### 1. Contributory negligence

Other defenses maybe available to landowners in premises liability cases, even with land donated for public use. North Carolina recognizes contributory negligence as an affirmative defense to negligence in premises liability cases involving public land used for recreational purposes.<sup>64</sup> In *Jenkins v. Lake Montonia Club, Inc.*, a teenage boy dove head first from a slide

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<sup>58</sup> *Sowers v. Forsyth Warehouse Co.*, 256 N.C. 190, 123 S.E.2d 603 (1962).

<sup>59</sup> *Gibson v. Hunsberger*, 109 N.C. App. 671, 428 S.E.2d 489 (1993).

<sup>60</sup> *Bunch v. Town of Edenton*, 90 N.C. 431 (1884).

<sup>61</sup> *Petty v. City of Charlotte*, 85 N.C. App. 391, 355 S.E.2d 210 (1987).

<sup>62</sup> *Benton v. Montague*, 253 N.C. 695, 117 S.E.2d 771 (1961).

<sup>63</sup> *Sexton v. Crescent Land & Timber Corp.*, 108 N.C. App. 568, 424 S.E.2d 176 (1993).

<sup>64</sup> *Jenkins v. Lake Montonia Club, Inc.*, 125 N.C. App. 102, 479 S.E.2d 259 (1997). Contributory negligence is defined as:

into a shallow swimming area, striking his head on the concrete bottom, which rendered him permanently, partially paralyzed.<sup>65</sup> Although the court found the defendant “was negligent in creating and maintaining a hazardous condition,”<sup>66</sup> it granted summary judgment for the defendant because the plaintiff “was aware that the water beneath the slide was shallow, and that if he hit his head on the bottom of the swimming pool it would hurt,”<sup>67</sup> and therefore the “plaintiff was contributorily negligent as a matter of law.”<sup>68</sup>

## 2. Assumption of risk

Absent the establishment of some type of “implied contract” between the landowner and the using public, it seems doubtful that a landowner who conveys a greenway easement will be able to rely on the assumption of risk doctrine as an affirmative defense to premises liability actions. This is because the well established law in North Carolina is that “assumption of risk is not available as a defense to one not in a contractual relationship to the plaintiff.”<sup>69</sup> The courts have distinguished between assumption of risk, which arises out of contract, and contributory negligence, which arises out of tort.<sup>70</sup> “Assumed risk is founded upon the knowledge of the [plaintiff], either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely a matter of conduct.”<sup>71</sup>

## 3.. Governmental Immunity

Landowners who donate their land, either in fee or by easement to a governmental entity, likely cannot “piggyback” on the easement holder’s immunity under the North Carolina State Tort Claims Act.<sup>72</sup> First, the Act provides for the Industrial Commission to hear and pass upon

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Every person having the capacity to exercise ordinary care for his own safety against injury is required by law to do so, and if he fails to exercise such care, and such failure, concurring and cooperating with the actionable negligence of defendant contributes to the injury complained of, he is guilty of contributory negligence. Ordinary care is such care as an ordinarily prudent person would exercise under the same or similar circumstances to avoid injury.

....

Plaintiff may be contributorily negligent if his conduct ignores unreasonable risks or dangers which would have been apparent to a prudent person exercising ordinary care for his own safety.

*Id.* at 105, 479 S.E.2d at 262 (quoting *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 673, 268 S.E.2d 504, 507 (1980) (quoting *Clark v. Roberts*, 263 N.C. 336, 139 S.E.2d 593 (1965))).

<sup>65</sup> *Id.* at 103, 479 S.E.2d at 261.

<sup>66</sup> *Id.* at 107, 479 S.E.2d at 263.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *McWilliams v. Parham*, 269 N.C. 162, 166, 152 S.E.2d 117, 120 (1967).

<sup>70</sup> *Cobia v. Atl. Coast Line R.R.*, 188 N.C. 487, 491, 129 S.E. 18, 21 (1924).

<sup>71</sup> *Id.* (quoting *Horton v. Seaboard Air Line R.R. Co.*, 175, N.C. 472, 475, 95 S.E. 883, 884 (1918)).

<sup>72</sup> N.C. Gen. Stat. § 143-291 to -300.

tort claims against any *state agency*.<sup>73</sup> Second, North Carolina courts have stated they will view the act narrowly because it is in derogation of the doctrine of sovereign immunity,<sup>74</sup> and have even found that the “Tort Claims Act only applies to state actors, not municipal employees.”<sup>75</sup>

#### IV. Best Practices

From the foregoing information, some key issues are important to remember when drafting easements as donations for public use.

- Claiming the Tax Credit
  - Clearly state the donation is for a conservation purpose listed in the statute.
  - Clearly state the donation is in perpetuity.
  - Only donate to a governmental entity or a non-profit organization that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions.
  - Reference the language of the statute in the easement document.
  
  - Although not a drafting matter, the landowner or his/her advisor should confirm that NCDENR will issue the required certification that the property interest donated is suitable for one or more of the public benefits required by the statute.
  
- Claiming Liability Protection
  - Reference the Recreational Use Statute (and the Trails Act if applicable)
  - State that the donation is for a recreational purpose as defined in the statute.
  - Specify the duty of the grantee to maintain the easement tract.<sup>76</sup>

#### V. Conclusion

The North Carolina General Assembly has taken affirmative steps to encourage and support the conservation efforts, particularly landowner contributions of all or a portion of their interest in their property. Landowners, as both individuals and corporations, should know the extent of the incentives and protections afforded them once they chose to donate their land for public use and/or conservation. Not only do such donations receive significant financial rewards in the form of tax credits, but also virtually all premises liability is removed. Except in limited

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<sup>73</sup> N.C. Gen. Stat. § 143-291(a). The Commission must “determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.” *Id.*

<sup>74</sup> *Etheridge v. Graham*, 14 N.C. App. 551, 554-55, 188 S.E.2d 551, 553 (1972).

<sup>75</sup> *Seaton v. Owens*, 2003 U.S. Dist. LEXIS 22298, at \*5 n.2 (M.D.N.C. Dec. 8, 2003).

<sup>76</sup> Aggressive advisors may seek to include a blanket indemnity for the landowner; however, it has been the author’s experience that local governments are unwilling to grant such indemnities, citing their fear of losing their privileges under applicable governmental immunity laws]

cases, landowners may enjoy the pride that comes with contributing to the health and well being of their community without fear of liability.

## Appendix A

N.C. Gen. Stat. § 105-151.12. Credit for certain real property donations:

- (a) A person who makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, or (iv) other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions under the Code. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed two hundred fifty thousand dollars (\$ 250,000). To support the credit allowed by this section, the taxpayer must file with the income tax return for the taxable year in which the credit is claimed a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.
  - (b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.
- Any unused portion of this credit may be carried forward for the next succeeding five years.
- (c) Repealed by Session Laws 1998-212, s. 29A.13(b).
  - (d) In the case of property owned by a married couple, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this section on a separate return.
  - (e) In the case of marshland for which a claim has been filed pursuant to G.S. 113-205, the offer of donation must be made before December 31, 2003 to qualify for the credit allowed by this section.
  - (f) (Expires for taxable years ending on or after January 1, 2006) Notwithstanding G.S. 105-269.15, the maximum dollar limit that applies in determining the amount of the credit applicable to a partnership that qualifies for the credit applies separately to each partner.

## Appendix B

N.C. Gen. Stat. § 105-130.34. Credit for certain real property donations:

- (a) Any corporation that makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for public beach access or use, public access to public waters or trails, fish and wildlife conservation, or other similar land conservation purposes is allowed a credit against the tax imposed by this Part equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in real property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions pursuant to G.S. 105-130.9. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. The credit allowed under this section may not exceed five hundred thousand dollars (\$ 500,000). To support the credit allowed by this section, the taxpayer must file with its income tax return, for the taxable year in which the credit is claimed, a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this subsection.
- (b) The credit allowed by this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer.
- (c) Any unused portion of this credit may be carried forward for the next succeeding five years.
- (d) That portion of a qualifying donation that is the basis for a credit allowed under this section is not eligible for deduction as a charitable contribution under G.S. 105-130.9.

Appendix C

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005

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SENATE BILL 521  
PROPOSED COMMITTEE SUBSTITUTE S521-CSSV-27 [v.5]

6/14/2005 11:21:31 AM

Short Title: Tax Credit for Certain Real Prop. Donations.

(Public)

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Sponsors:

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Referred to:

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March 15, 2005

A BILL TO BE ENTITLED

AN ACT TO RECODIFY THE CREDIT FOR CERTAIN REAL PROPERTY DONATIONS  
AND TO INCREASE THE CREDIT FOR CERTAIN PASS-THROUGH ENTITIES.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 105 of the General Statutes is amended by adding a new Article to read:

"Article 3H

"Tax Credit for Certain Real Property Donations.

**"§ 105-129.70. Tax credit allowed.**

A person who makes a qualified donation of an interest in real property located in North Carolina during the taxable year that is useful for (i) public beach access or use, (ii) public access to public waters or trails, (iii) fish and wildlife conservation, or (iv) other similar land conservation purposes is allowed a credit equal to twenty-five percent (25%) of the fair market value of the donated property interest. To be eligible for this credit, the interest in property must be donated in perpetuity to and accepted by the State, a local government, or a body that is both organized to receive and administer lands for conservation purposes and qualified to receive charitable contributions under the Code. Lands required to be dedicated pursuant to local governmental regulation or ordinance and dedications made to increase building density levels permitted under a regulation or ordinance are not eligible for this credit. To support the credit allowed by this Article, the taxpayer must file with the tax return for the taxable year in which the credit is claimed a certification by the Department of Environment and Natural Resources that the property donated is suitable for one or more of the valid public benefits set forth in this section. The certification for a qualified donation made by a pass-through entity must be filed by the pass-through entity.

**§ 105-129.71. Credit amount.**

(a) Corporations. – The aggregate amount of credit allowed to a corporation in a taxable year under this Article for one or more qualified donations, whether made directly or

indirectly as owner of a pass-through entity, may not exceed five hundred thousand dollars (\$500,000). That portion of a qualifying donation that is the basis for a credit allowed under this subsection is not eligible for deduction as a charitable contribution under G.S. 105-130.9 if it is claimed against income tax under Article 4 of this Chapter.

(b) Individuals. – The aggregate amount of credit allowed to an individual in a taxable year under this Article for one or more qualified donations, whether made directly or indirectly as owner of a pass-through entity, may not exceed two hundred fifty thousand dollars (\$250,000). In the case of property owned by a married couple, if both spouses are required to file North Carolina income tax returns, the credit allowed by this section may be claimed only if the spouses file a joint return. If only one spouse is required to file a North Carolina income tax return, that spouse may claim the credit allowed by this Article on a separate return.

(c) Pass-Through Entities. – The aggregate amount of credit allowed to a pass-through entity in a taxable year under this section for one or more qualified donations, whether made directly or indirectly as owner of another pass-through entity, may not exceed five hundred thousand dollars (\$500,000). Each individual who is an owner of a pass-through entity is allowed as a credit an amount equal to the owner's allocated share of the credit to which the pass-through entity is eligible under this subsection, not to exceed two hundred fifty thousand dollars (\$250,000). Each corporation that is an owner of a pass-through entity is allowed as a credit an amount equal to the owner's allocated share of the credit to which the pass-through entity is eligible under this subsection, not to exceed five hundred thousand dollars (\$500,000).

**§ 105-129.72. Tax Election; Cap.**

(a) Tax election. – The credit provided in this Article are allowed against the franchise tax levied in Article 3 of this Chapter, the income taxes levied in Article 4 of this Chapter, and the gross premiums tax levied in Article 8B of this Chapter. The taxpayer must elect the tax against which a credit will be claimed when filing the return on which the credit is claimed. This election is binding. Any carryforwards of a credit must be claimed against the same tax.

(b) Cap. – The credit allowed in this Article may not exceed the amount of tax against which it is claimed for the taxable year reduced by the sum of all credits allowed except payments of tax made by or on behalf of the taxpayer. This limitation applies to the cumulative amount of credit, including carryforwards, claimed by the taxpayer under this Article against each tax for the taxable year.

**§ 105-129.73. Carryforward Election; Refund.**

A taxpayer may elect to carry forward any unused portion of this credit as follows:

- (1) For the next succeeding five years; or
- (2) For the next succeeding two years, and after a credit has been carried forward for two years, the Secretary must refund to the taxpayer in the next succeeding year an amount equal to fifty percent (50%) of the remaining unused amount of the credit.

**§ 105-129.74. Marshland.**

In the case of marshland for which a claim has been filed pursuant to G.S. 113-205, the offer of donation must be made before December 31, 2003, to qualify for the credit allowed by this section.

**§ 105-129.75. Reports.**

The Department of Revenue must report to the Revenue Laws Study Committee and the Fiscal Research Division of the General Assembly by May 1 of each year the following information for the 12-month period ending the preceding December 31:

- (1) The number of taxpayers that claimed a credit allowed in this Article.
- (2) The amount of each credit claimed.
- (3) The total amount refunded in excess of tax liability.
- (3) The total cost to the General Fund of the credits claimed."

**SECTION 2.** G.S. 105-130.34 is repealed.

**SECTION 3.** G.S. 105-151.12 is repealed.

**SECTION 4.** In order to pay for its costs of computer programming to implement this act, the Department of Revenue may withhold not more than fifty-five thousand dollars (\$55,000) during the 2006-2007 fiscal year from individual income tax collections under Part 2 of Article 4 of Chapter 105 of the General Statutes.

**SECTION 5.** The title of Article 16 of Chapter 113A of the General Statutes reads as rewritten:

"Article 16.

"Conservation Incentive Program."

**SECTION 6.** G.S. 113A-231 reads as rewritten:

**"§ 113A-231. Program to accomplish conservation purposes.**

The Department of Environment and Natural Resources shall develop a nonregulatory program that uses conservation tax credits as a prominent tool to accomplish conservation purposes, including the maintenance of ecological systems. As a part of this program, the Department shall exercise its powers to protect real property and interests in real property: donated for tax credit under G.S. 105-129.70; conserved with the use of other financial incentives; or, conserved through nonregulatory programs. The Department shall call upon the Attorney General for legal assistance in developing and implementing the program."

**SECTION 7.** G.S. 113A-232(c) reads as rewritten:

"(c) Property Eligibility. – In order for real property or an interest in real property to be the subject of a grant under this Article, the real property or interest in real property must possess or have a high potential to possess ecological value, must be reasonably restorable, and must qualify for tax credits under G.S. 105-129.70"

**SECTION 8.** G.S. 113A-232(c1) reads as rewritten:

"(c1) Grant Eligibility. – State conservation land management agencies, local government conservation land management agencies, and private nonprofit land trust organizations are eligible to receive grants from the Conservation Grant Fund. Private nonprofit land trust organizations must be qualified pursuant to G.S. 105-129.70 and must be certified under section 501(c)(3) of the Internal Revenue Code."

**SECTION 9.** G.S. 113A-233 reads as rewritten:

**"§ 113A-233. Uses of a grant from the Conservation Grant Fund.**

(a) Allowable Uses. – A grant from the Conservation Grant Fund may be used only to pay for one or more of the following costs:

- (1) Reimbursement for total or partial transaction costs for a donation of real property or an interest in real property from an individual or corporation satisfying either of the following:

- a. Insufficient financial ability to pay all costs or insufficient taxable income to allow these costs to be included in the donated value.

- b. Insufficient tax burdens to allow these costs to be offset by the value of tax credits under G.S. 105-129.70 or by charitable deductions.
  - (2) Management support, including initial baseline inventory and planning.
  - (3) Monitoring compliance with conservation easements, the related use of riparian buffers, natural areas, and greenways, and the presence of ecological integrity.
  - (4) Education on conservation, including information materials intended for landowners and education for staff and volunteers.
  - (5) Stewardship of land.
  - (6) Transaction costs for recipients, including legal expenses, closing and title costs, and unusual direct costs, such as overnight travel.
  - (7) Administrative costs for short-term growth or for building capacity.
- (b) Prohibition. – The Fund shall not be used to pay the purchase price of real property or an interest in real property."

**SECTION 10.** G.S. 105-130.9 reads as rewritten:

**"§ 105-130.9. Contributions.**

Contributions shall be allowed as a deduction to the extent and in the manner provided as follows:

- (1) Charitable contributions as defined in section 170(c) of the Code, exclusive of contributions allowed in subdivision (2) of this section, shall be allowed as a deduction to the extent provided herein. The amount allowed as a deduction hereunder shall be limited to an amount not in excess of five percent (5%) of the corporation's net income as computed without the benefit of this subdivision or subdivision (2) of this section. Provided, that a carryover of contributions shall not be allowed and that contributions made to North Carolina donees by corporations allocating a part of their total net income outside this State shall not be allowed under this subdivision, but shall be allowed under subdivision (3) of this section.
- (2) Contributions by any corporation to the State of North Carolina, any of its institutions, instrumentalities, or agencies, any county of this State, its institutions, instrumentalities, or agencies, any municipality of this State, its institutions, instrumentalities, or agencies, and contributions or gifts by any corporation to educational institutions located within North Carolina, no part of the net earnings of which inures to the benefit of any private stockholders or dividend. For the purpose of this subdivision, the words "educational institution" shall mean only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where the educational activities are carried on. The words "educational institution" shall be deemed to include all of such institution's departments, schools and colleges, a group of "educational institutions" and an organization (corporation, trust, foundation, association or other entity) organized and operated exclusively to receive, hold, invest and administer property and to make expenditures to or for the sole benefit of an "educational institution" or group of "educational institutions."

- (3) Corporations allocating a part of their total net income outside North Carolina under the provisions of G.S. 105-130.4 shall deduct from total income allocable to North Carolina contributions made to North Carolina donees qualified under subdivisions (1) and (2) of this section or made through North Carolina offices or branches of other donees qualified under the above-mentioned subdivisions of this section; provided, such deduction for contributions made to North Carolina donees qualified under subdivision (1) of this section shall be limited in amount to five percent (5%) of the total income allocated to North Carolina as computed without the benefit of this deduction for contributions.
- (4) The amount of a contribution for which the taxpayer claimed a tax credit pursuant to G.S. 105-129.70 shall not be eligible for a deduction under this section. The amount of the credit claimed with respect to the contribution is not, however, required to be added to income under G.S. 105-130.5(a)(10)."

**SECTION 11.** G.S. 105-277.3(d1) reads as rewritten:

"(d1) Exception for Easements on Qualified Conservation Lands Previously Appraised at Use Value. – Property that is appraised at its present-use value under G.S. 105-277.4(b) shall continue to qualify for appraisal, assessment, and taxation as provided in G.S. 105-277.2 through G.S. 105-277.7 as long as the property is subject to an enforceable conservation easement that would qualify for the conservation tax credit provided in G.S. 105-129.70 without regard to actual production or income requirements of this section. Notwithstanding G.S. 105-277.3(b) and (b1), subsequent transfer of the property does not extinguish its present-use value eligibility as long as the property remains subject to an enforceable conservation easement that qualifies for the conservation tax credit provided in G.S. 105-129.70. The exception provided in this subsection applies only to that part of the property that is subject to the easement."

**SECTION 12.** G.S. 113-77.9(d) reads as rewritten:

"(d) Acquisition. – The Department of Administration may, pursuant to G.S. 143-341, acquire by purchase, gift, or devise all lands selected by the Trustees for acquisition pursuant to this Article. Title to any land acquired pursuant to this Article shall be vested in the State. A State agency with management responsibility for land acquired pursuant to this Article may enter into a management agreement or lease with a county, city, town, or private nonprofit organization qualified under G.S. 105-129.70 and certified under section 501(c)(3) of the Internal Revenue Code to aid in managing the land. A management agreement or lease shall be executed by the Department of Administration pursuant to G.S. 143-341."

**SECTION 13.** G.S. 113A-256(g) reads as rewritten:

"(g) Tax Credit Certification. – The Trustees shall develop guidelines to determine whether land donated for a tax credit under G.S. 105-129.70 are suitable for one of the purposes under this Article and may be certified for a tax credit."

**SECTION 14.** G.S. 105-151.26 reads as rewritten:

**"§ 105-151.26. Credit for charitable contributions by nonitemizers.**

A taxpayer who elects the standard deduction under section 63 of the Code for federal tax purposes is allowed as a credit against the tax imposed by this Part an amount equal to seven percent (7%) of the taxpayer's excess charitable contributions. The taxpayer's excess charitable contributions are the amount by which the taxpayer's charitable contributions for the taxable year that would have been deductible under section 170 of the Code if the taxpayer had not elected

the standard deduction exceed two percent (2%) of the taxpayer's adjusted gross income as calculated under the Code.

No credit shall be allowed under this section for amounts deducted from gross income in calculating taxable income under the Code or for contributions for which a credit was claimed under G.S. 105-129.70 or G.S. 105-151.14. A nonresident or part-year resident who claims the credit allowed by this section shall reduce the amount of the credit by multiplying it by the fraction calculated under G.S. 105-134.5(b) or (c), as appropriate. The credit allowed under this section may not exceed the amount of tax imposed by this Part for the taxable year reduced by the sum of all credits allowed, except payments of tax made by or on behalf of the taxpayer."

**SECTION 15.** Section 1 of this act is effective for credits claimed against income tax or gross premiums tax for taxable years beginning on or after January 1, 2006, and for credits claimed against franchise tax for taxable years beginning on or after January 1, 2007, and applies to property interests contributed on or after January 1, 2006. Section 4 of this act is effective when this act becomes law. The remainder of this act is effective for taxable years beginning on or after January 1, 2006.

## Appendix D

### § 38A-2. Definitions

The following definitions shall apply throughout this Chapter, unless otherwise specified:

- (1) "Charge" means a price or fee asked for services, entertainment, recreation performed, or products offered for sale on land or in return for an invitation or permission to enter upon land, except as otherwise excluded in this Chapter.
- (2) "Educational purpose" means any activity undertaken as part of a formal or informal educational program, and viewing historical, natural, archaeological, or scientific sites.
- (3) "Land" means real property, land, and water, but does not mean a dwelling and the property immediately adjacent to and surrounding such dwelling that is generally used for activities associated with occupancy of the dwelling as a living space.
- (4) "Owner" means any individual or nongovernmental legal entity that has any fee, leasehold interest, or legal possession, and any employee or agent of such individual or nongovernmental legal entity.
- (5) "Recreational purpose" means any activity undertaken for recreation, exercise, education, relaxation, refreshment, diversion, or pleasure.

### § 38A-3. Exclusions

For purposes of this chapter, the term "charge" does not include:

- (1) Any contribution in kind, services or cash contributed by a person, legal entity, nonprofit organization, or governmental entity other than the owner, whether or not sanctioned or solicited by the owner, the purpose of which is to (i) remedy damage to land caused by educational or recreational use; or (ii) provide warning of hazards on, or remove hazards from, land used for educational or recreational purposes.
- (2) Unless otherwise agreed in writing or otherwise provided by the State or federal tax codes, any property tax abatement or relief received by the owner from the State or local taxing authority in exchange for the owner's agreement to open the land for educational or recreational purposes.