

## REQUEST FOR BOARD ACTION

### HENDERSON COUNTY BOARD OF COMMISSIONERS

**MEETING DATE:** August 7, 2017

**SUBJECT:** Memorandum of Understanding and Conservation Easement

**PRESENTER:** John Mitchell, Business and Community Development

**ATTACHMENTS:** Yes  
(1) MOU Conserving Carolina  
(2) Conservation Easement Conserving Carolina

#### **SUMMARY OF REQUEST:**

At the April 4<sup>th</sup> 2016 meeting of the Board of Commissioners, the Board agreed to endorse Carolina Mountain Land Conservancy's PARTF application to secure land for a proposed park adjacent to the Green River. The name of the proposed park is the Chief and Calla Bell Trail Park. CMLC is now operating as Conserving Carolina.

At that meeting, the Board directed staff to draft a Memorandum of Understanding that specifically addressed the construction and maintenance of the park with Conserving Carolina.

Staff negotiated an MOU, and a Conservation Easement (CE) between Conserving Carolina and Henderson County that outlines park development, responsibilities and meets Clean Water Management Trust Fund requirements. The MOU includes language requested by the Board which places the responsibility for construction and maintenance with Conserving Carolina.

#### **BOARD ACTION REQUESTED:**

Accept the Memorandum of Understanding and Conservation Easement with Conserving Carolina.

#### **Suggested Motion:**

*I move to accept the Memorandum of Understanding and Conservation Agreement with Conserving Carolina and direct staff to move forward with the project.*

**Memorandum of Understanding between  
Henderson County and Conserving Carolina  
for creation of the Chief and Calla Bell Trail Park**

- I. **Purpose:** The purpose of this Memorandum of Understanding (MOU) is to memorialize the partnership between Henderson County (Henderson County) and Conserving Carolina (CC), in order to create the Chief and Calla Bell Trail Park and develop a trail or trails connecting to points within the park. HENDERSON COUNTY and CONSERVING CAROLINA are the only parties to this MOU (hereinafter "Party" or "Parties").
  
- II. **Background:** Henderson County is a North Carolina county formed in 1838. CC is a North Carolina nonprofit corporation with a mission of protecting and stewarding land and water resources vital to our natural heritage and quality of life and to fostering an appreciation and understanding of the natural world. In 2016, CC purchased 68 acres, more or less, located off of Highway 176 near the Henderson/Polk county line (the Property). The Property is known by CC as the Chief and Calla Bell Trail Park. The Property was purchased both to protect the conservation values of the Property, including but not limited to public recreation by creating a trail park for the residents of Henderson County and beyond. A conservation easement encumbering the Property will be conveyed to the State of North Carolina in order to protect these resources. CC now seeks to convey ownership of the Property to a public entity such as Henderson County that is better positioned to manage the anticipated recreational uses on the property. In 2016, Henderson County was awarded a grant from the North Carolina Parks and Recreation Trust Fund (PARTF) in order to purchase this tract from CC. Grant deliverables included only the transfer of the Property, but future plans include trail development across the Property as well as signage conforming to Henderson County parks. This MOU encompasses the agreement in principle shared between CC and Henderson County and sets out the Parties' roles, obligations, and particularities for the establishment of the park and the advancement of trail development at the Property.
  
- III. **Collaboration goals:** The partners acknowledge and agree that their collaborative goals include:
  - a. Transferring the Property to Henderson County to establish Chief and Calla Bell Trail Park; and

- b. Developing an appropriate length of trail(s) that will provide the optimum recreational opportunities on the Property.

**IV. Responsibilities of the Parties:** The Parties acknowledge and agree to the following responsibilities in order to attain the foregoing collaboration goals:

- a. Henderson County will pay to CC \$320,000 for the Property. Because PARTF is a reimbursement grant that requires a cancelled check as proof of payment prior to issuance of funding for the purchase, Henderson County will initially issue a check to CC for the purchase price, at which time CC will then issue a check back to Henderson County in the same amount. Once PARTF releases funding to Henderson County, the county issue another check to CC for the purchase price. CC will also provide copies of invoices to Henderson County for work performed as allowed under the grant. Henderson County will reimburse CC for all such documented expenses from the remaining PARTF funding up to an amount of \$30,000. Documentation of this transactional procedure is included in this MOU for purposes of providing context to financial auditors.
- b. Henderson County will place a NC Clean Water Management Trust Fund (CWMTF) conservation easement on the property immediately after it acquires the property. CWMTF grant funds are serving as match to PARTF funds and will help cover CC land acquisition and trail development costs. The CWMTF will permit the park and recreational uses planned for Bell Trail Park.
- c. CC will provide technical assistance services by its full-time Trails Coordinator for project design, project management, and construction oversight for trail development at the Property.
- d. CC will construct the trails and design the trailhead and park signage in partnership with Henderson County. The park name shall remain the "Chief and Calla Bell Trail Park". CC will utilize surplus funding to pay for the development of the trails.
- e. Trail planning and construction will meet the standards accepted by the Professional Trailbuilders Association and/or North Carolina State Parks.
- f. Ongoing trail maintenance will be conducted via volunteer crews provided by CC.
- g. CC will provide technical assistance services by staff in facilitating the real estate transaction of the transfer of the Bell Trail tract to Henderson County. To the extent that such expenses are eligible for reimbursement from the PARTF grant award, Henderson County will reimburse CC for the costs of writing and preparing the grant and facilitating the real estate transaction.
- h. The Parties agree that the real estate transaction must be completed within three (3) years of the execution of the PARTF grant contract.

- i. The Parties agree that at least ¼ mile of trail must be completed on the Property within three (3) years of the execution of the PARTF grant contract. The Parties will cooperate to raise any additional funds needed to complete the trail.

**V. Principal Contacts:** The principal contacts for the Parties are:

John Mitchell  
Business and Community Director  
Henderson County  
100 N. King Street  
Hendersonville, NC 28792  
[John.mitchell@hendersoncountync.org](mailto:John.mitchell@hendersoncountync.org)  
(828) 697-4819 (office)

Kieran Roe  
Executive Director  
CC  
847 Case Street  
Hendersonville, NC 28792  
[Kieran@carolinamountain.org](mailto:Kieran@carolinamountain.org)  
(828) 697-5777 (office)

**VI. Limitations:**

- a. This MOU does not create an obligation for funding or budgeting for ongoing trail maintenance or property management. All responsibilities of the Parties are subject to the availability of funds.
- b. This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not a Party to this agreement against CC, Henderson County, or their partners. This MOU does not apply to any person not directly associated with a Party.

**VII. Intellectual Property/Names and Emblems:** By signing this MOU, each Party consents to the use of its name and unique artwork, e.g. the logo, of Henderson County and CC on material, including material published in any format, for the promotion of the Chief and Calla Bell Trail Park and its network of trails to the public and private parties.

**VIII. Proprietary Information:** To carry out the joint work resulting from this MOU, Henderson County and CC may need to disclose to each other confidential information. The Parties agree to clearly identify confidential information disclosed to each other in written form, and to memorialize in writing, within a reasonable time, confidential oral communications. The Parties agree not to disclose information not identified as confidential.

**IX. Commencement/Duration/Modification/Termination:** This MOU takes effect when signed by all Parties and will remain in effect until either Party terminates the MOU by providing written notice to the other. This MOU may be extended or modified at any time per the mutual written consent of the Parties. Upon receipt of the

termination notice, all Parties will take all reasonable actions to cancel outstanding commitments and limit financial expenditures related to the work described in this MOU.

- X. **Financial Provisions:** All commitments made by Henderson County and CC in this MOU are subject to the availability of funds. Nothing in this MOU, in and of itself, obligates either Party to expend funds or to enter into any contract or incur financial obligations that would be inconsistent with either Party's budget priorities.
  
- XI. **Compliance with Laws:** The Parties will observe all applicable laws and regulations during the execution of the work described in this MOU. The Parties agree and acknowledge that all parties to this transaction are regulated by the federal and state laws and regulations governing governmental and nonprofit corporations as applicable. Neither Party shall engage in any transaction that is illegal or fraudulent.
  
- XII. **Approval:** This MOU takes effect upon the date of the last signature below.

**FOR HENDERSON COUNTY:**

\_\_\_\_\_  
John Mitchell, Business and Community Director

\_\_\_\_\_  
Date

**FOR CONSERVING CAROLINA:**

\_\_\_\_\_  
Kieran Roe, Executive Director

\_\_\_\_\_  
Date





**CONSERVATION EASEMENT  
Chief and Calla Bell Trail Park Property**

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**Prepared by: Conserving Carolina and Clean Water Management Trust Fund**

**After Recording Return to: Conserving Carolina, 847 Case Street, Hendersonville, NC 28792**

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**NORTH CAROLINA  
Tax Parcel No. 10000760**

**Henderson COUNTY  
CWMTF No. 2015-27**

**THIS DEED OF CONSERVATION EASEMENT** ("Conservation Easement") is made, given, granted and executed on this the [redacted] day of [redacted], 2017 by and between **Henderson County**, a local government of the State of North Carolina with an address at 200 N. Grove St., Suite 129, Hendersonville, NC, 28792 ("Grantor") and the **STATE OF NORTH CAROLINA** with its address c/o State Property Office, Attn: CWMTF Real Property Agent, 1321 Mail Service Center, Raleigh, NC 27699-1321 ("State" or "Grantee," and together with the Grantor, the "Parties") acting by and through **NORTH CAROLINA CLEAN WATER MANAGEMENT TRUST FUND**, a division of the North Carolina Department of Natural and Cultural Resources with an address at 1651 Mail Service Center, Raleigh, North Carolina 27699-1651, Attn: Contract Administrator ("Fund").

**RECITALS & CONSERVATION PURPOSES**

**A.** Grantor owns in fee simple absolute certain real property lying and being in Green River Township, unincorporated, North Carolina (the "Property"), and more particularly described on the attached "Exhibit A" incorporated by reference as if fully set forth herein.

**B.** Grantor is a local government with a Parks and Recreation Department that will help manage and maintain the Property.

**C.** The State has enacted the North Carolina Conservation and Historic Preservation Agreements Act (the "Act"), Chapter 121, Article 4 of the North Carolina General Statutes ("N.C.G.S."), which provides for the enforceability of restrictions, easements, covenants or conditions "appropriate for retaining land or water areas predominantly in their natural, scenic, or open condition . . . ."

**D.** The Clean Water Management Trust Fund is authorized by N.C.G.S. Chapter 143B, Article 2, Part 41 to acquire land and interests in land:

- for riparian buffers for the purposes of providing environmental protection for surface waters and urban drinking water supplies and establishing a network of riparian greenways for environmental, educational, and recreational uses; and
- for the purpose of protecting and conserving surface waters and enhancing drinking water supplies, including the development of water supply reservoirs; and
- to provide buffers around military bases to protect the military mission; and
- that represents the ecological diversity of North Carolina, including natural features such as riverine, montane, coastal, and geologic systems and other natural areas to ensure their preservation and conservation for recreational, scientific, educational, cultural, and aesthetic purposes; and
- that contributes to the development of a balanced State program of historic properties.

**E.** Grantor and Grantee have agreed to set aside 60.03 acres of the Property (as described in the attached “Exhibit B” incorporated by reference as if fully set forth herein and hereinafter referred to as the “Easement Area”) for the purpose of creating a conservation easement, to

- preserve, enhance, restore, and maintain the natural features and resources of the Easement Area, to provide habitat for native plants and animals, to control runoff of sediment, and to improve and maintain water quality, including providing environmental protection for surface waters of portions of the Green River and its tributaries.
- protect and preserve the ecological diversity represented by the Easement Area for recreational, scientific, educational, cultural and aesthetic purposes.

Moreover, Grantor and Grantee recognize that the Easement Area has other conservation values, including fish and wildlife conservation, open space, and scenic values (hereinafter, collectively with the conservation values defined in this Section E of the Recitals and Conservation Purposes of this Agreement, the “Conservation Values”).

**F.** Grantor grants and conveys unto the Grantee, its successors, assigns and designated representatives, a right of ingress, egress, and regress from a public road across the lands of the Grantor to the Easement Area, for the purpose of gaining uninterrupted access to the Easement Area described herein above.

**G.** Grantor and Grantee recognize that the Easement Area contains unnamed tributaries to the Green River and is located within 500 feet of the main stem of the Green River, and that the Easement Area has been deemed by the State to qualify as a riparian buffer, addressing the protection, including, but not limited to, cleanup and prevention of pollution, of the State’s surface waters, and the establishment of a network of riparian buffers.

**H.** Grantor and Grantee recognize that the Easement Area represents the ecological diversity of North Carolina, including, but not necessarily limited to, natural features such as Montane Cliffs, intact Canada



Hemlock Forest and Montane oak/hickory natural communities. Grantor and Grantee further recognize that restricting use of the Easement Area in the manner set forth herein will facilitate preservation and conservation of these natural features for recreational, scientific, educational, cultural, and aesthetic purposes.

**I.** Grantor has received or will receive a grant from the Fund, identified as Grant Contract No. 2015-27 (the "Grant Contract"), entered into between the Grantor and the Fund and effective as of [REDACTED], in consideration of which the Grantor has agreed to enter into this Conservation Easement (the "Project"). The terms and conditions of said Grant Contract are hereby incorporated by reference. It is on file and available for public inspection in the offices of the Grantor, the Fund, and the North Carolina Department of Natural and Cultural Resources ("NC DNCR").

**J.** Grantor and Grantee acknowledge that the Easement Area is currently unimproved except as permitted in Article V of this Conservation Easement. The characteristics of the Easement Area, its current use and state of improvement are described in a Baseline Documentation Report (the "BDR"), as incorporated into the Grant Contract, that is on file in the offices of the Grantor and the Fund and available for public inspection. The Parties acknowledge that the BDR is the appropriate basis for monitoring compliance with the objectives of preserving the conservation and water quality values; and that it is not intended to preclude the use of other evidence (e.g. surveys, appraisals) to establish the present condition of the Easement Area if there is a controversy over such present condition.

**NOW, THEREFORE,** in consideration of the premises and the mutual benefits recited herein, together with other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, the Grantor hereby unconditionally and irrevocably gives, grants and conveys forever and in perpetuity to the Grantee, its successors and assigns, and the Grantee hereby accepts, this Conservation Easement of the nature and character and to the extent hereinafter set forth in, over, through and across the Easement Area, together with the right and easement to preserve and protect the Conservation Values.

The purpose of this Conservation Easement is to protect and preserve the Conservation Values as outlined above in Section E of the Recitals and Conservations Purpose(s) and it shall be so held, maintained, and used therefore. Grantor hereby conveys to Grantee all development rights that are now or hereafter allocated to, implied or inherent in the Easement Area, and the Parties agree that such rights are terminated and extinguished, and may not be used on or transmitted to any portion of the Property, as it now or hereafter may be bounded or described, or to any other property. It is the further purpose of this Conservation Easement to prevent any use of the Easement Area that will significantly impair or interfere with the preservation of said Conservation Values. Grantor intends that this Conservation Easement will restrict the use of the Easement Area to such activities as are consistent with the Conservation Values described in the Recitals herein.

#### **ARTICLE I. DURATION OF EASEMENT**

This Conservation Easement shall be perpetual. It is an easement in gross, runs with the land, and is enforceable by Grantee against Grantor, its representatives, successors, assigns, lessees, agents and licensees.

#### **ARTICLE II. RIGHTS RESERVED TO GRANTOR**

Grantor reserves certain rights accruing from the fee simple ownership of the Property, including the right to engage in or permit others to engage in the uses of the Easement Area that are not inconsistent with the purpose(s) of this Conservation Easement. All rights reserved by the Grantor, are reserved for Grantors, their representatives, successors, and assigns, and are considered to be consistent with the purpose(s) of this Conservation Easement. Except for the specific restrictions and prohibitions made applicable herein to the Easement Area, Grantor shall continue to own and may use the Property in any lawful manner. The Parties acknowledge and agree that they have no right to agree to any activity that would result in the termination of this Conservation Easement.

The Easement Area shall be restricted from any development or usage that would impair or interfere with the purposes of this Conservation Easement. The following uses are reserved as indicated:

**A. Passive Recreational Use.** Grantor reserves the right to engage in and to permit others to engage in passive recreational uses of the Easement Area requiring minimal surface alteration of the land, so long as related alterations, construction, improvements, maintenance, activities and uses pose no threat to the Conservation Values. By way of illustration, such passive recreational uses may include non-commercial hunting, fishing, hiking, walking, scientific study, animal/plant observation, nature and environmental education, historic tours, photography, and any other purposes consistent with these accepted uses and the maintenance of the Conservation Value, subject to all applicable federal, state and local laws and regulations. All improvements shall be subject to the terms and conditions set forth herein and by the aforementioned Grant Contract. Usage of motorized vehicles in the Easement Area is prohibited, except as they are used exclusively for management, maintenance, or stewardship purposes, and on existing trails, paths or roads.

**B. Public Use and Access.** Grantor reserves the right to allow public access and use of the Easement Area for the purpose of creating open space with associated passive recreational activities as provided for herein.

**C. Hiking and Greenway Trails.** Grantor reserves the right to construct and maintain paved and/or unpaved trails on the Easement Area. All unpaved trails must be located a minimum distance of fifty (50) feet from the top of the bank and tributaries of the Green River, unless such locations are physically impracticable. All paved trails must be located a minimum distance of 30 feet from the top of bank of surface waters. All trails, paved and/or unpaved, must be located so as not to impair the Conservation Values as set forth herein. In the construction of such trails and when required by the terrain, boardwalks, ramps and handrails are permitted herein. The Grantor may also construct and maintain park benches, litter receptacles, and trail/feature signs along the trails. All necessary care shall be taken to complete the construction of such features in a manner so as not to impair any Conservation Values either during or after construction.

**I. Vegetation Management.** Grantor reserves the right to manage vegetation for the following activities: (1) boundary marking, fencing, and signage; (2) selective cutting and prescribed burning and the application of herbicides and pesticides for fire containment, insect and disease control, restoration of hydrology, wetlands enhancement, and or control of invasive exotic plants; and (3) removal of damaged trees and debris caused by storms and fire and posing a threat to life or property.

**E. Early Successional Habitat Areas.** Grantor reserves the right to maintain existing early successional habitat areas in early successional habitat for the purpose of providing habitat diversity for wildlife species and may include the planting of various native grasses, forbs, and herbaceous vegetation. This activity must be conducted a minimum distance of 100 feet from surface waters as measured from top of bank.

**F. Native Community Restoration, Management, and Maintenance.** Grantor reserves the right to perform all activities necessary to restore, manage, and/or maintain the native plant and animal communities on the Easement Area. All necessary care shall be taken to protect all Conservation Values and restoration and management shall be carried out in a manner so as not to cause or allow harm or degradation to any Conservation Values either during or after restoration activities. Specific activities allowed, with the goals and objectives of native plant and animal community preservation include, but may not be limited to:

- Prescribed burning, including creation of firebreaks
- Selective timber harvesting following approved Forest Management Plan

**H. Hunting and Fishing.** Grantor reserves the right to hunt and fish pursuant to all federal, state, and local rules and regulations.

**ARTICLE III. PROHIBITED AND RESTRICTED ACTIVITIES**

Any activity on, or use of, the Easement Area inconsistent with the purpose(s) of this Conservation Easement is prohibited. The Easement Area shall be maintained in its natural, scenic, wooded and open condition and restricted from any development or use that would impair or interfere with the purpose(s) of this Conservation Easement.

**Except for those rights specifically reserved to Grantor in Article II and without limiting the generality of the foregoing, the following activities and uses are expressly prohibited or restricted.**

**A. Industrial and Commercial Use.** Industrial and commercial activities are prohibited on the Easement Area.

**B. Agricultural, Grazing and Horticultural Use.** Agriculture, grazing, horticultural and animal husbandry operations and any rights of passage for such purposes are prohibited on the Easement Area.

**C. Disturbance of Natural Features, Plants and Animals.** There shall be no cutting or removal of trees, or the disturbance of other natural features within the Easement Area except as noted in Article II.

**D. Construction of Buildings and Recreational Use.** There shall be no constructing or placing of any building, mobile home, asphalt or concrete pavement, billboard or other advertising display, antenna, utility pole, tower, conduit, line, pier, landing, dock or any other temporary or permanent structure or facility on or above the Easement Area.

**E. Signs.** Signs are not permitted within the Easement except as follows: no trespassing signs; local, state, or federal traffic or similar information signs; for sale or lease signs; signs identifying the Conservation Values of the Easement; signs identifying the Grantor as owner of the Property; signs identifying the Grantee as holder of the Conservation Easement; and educational and interpretative signs.

**F. Mineral Use, Excavation, Dredging.** There shall be no filling, excavation, dredging, mining or drilling; no removal of topsoil, sand, gravel, rock, peat, minerals, hydrocarbons, or other materials. There shall

be no change in the topography of the land in any manner except as necessary for the purpose of combating erosion or incidental to any conservation management activities otherwise permitted on the Easement Area.

**G. Wetlands and Water Quality.** Except as set forth in Article II above, there shall be no pollution or alteration of surface waters and no construction or other activities that would be detrimental to water quality or that would alter natural water levels, drainage, sedimentation and/or flow in or over the Easement Area or into any surface waters, or cause soil degradation or erosion, nor any diking, dredging, alteration, draining, filling or removal of wetlands, except activities to restore natural hydrology, wetlands enhancement, or to enhance or improve water quality as permitted by state and any other appropriate authorities, and then only after written approval is granted by the Fund for such activities.

**H. Dumping.** Dumping of soil, trash, ashes, garbage, waste, abandoned vehicles, appliances, or machinery, or other materials on the Easement Area is prohibited.

**I. Conveyance and Subdivision.** The Easement Area or any underlying property interest within the Easement Area may not be subdivided, partitioned nor conveyed, except in its current configuration as an entity or block of property.

**J. Open Space and Development Rights.** The Easement Area shall not be used to satisfy open space requirements of any cluster or other development scheme; nor shall the development rights encumbered hereby be transferred to any other land pursuant to a transfer of development rights scheme or cluster development arrangement or otherwise.

**K. Mitigation.** There shall be no use of the Easement Area or any portion thereof to satisfy compensatory mitigation requirements under 33 USC Section 1344 or NCGS §143-214.11 or any successor or replacement provision of the foregoing.

#### **ARTICLE IV. ENFORCEMENT AND REMEDIES**

**A. Enforcement and Remedies.** To accomplish the purpose(s) of this Conservation Easement, Grantee is allowed to prevent any activity on or use of the Easement Area that is inconsistent with the purpose(s) of this Conservation Easement, and to require the prompt restoration to the condition required by this Conservation Easement of such areas or features of the Easement Area that may have been damaged by such activity or use. Upon any breach of the terms of this Conservation Easement by Grantor that comes to the attention of the Grantee, the Grantee shall, except as provided below, notify the Grantor in writing of such breach. The Grantor shall have ninety (90) days after receipt of such notice to correct the conditions constituting such breach. If the breach remains uncured after ninety (90) days, the Grantee may enforce this Conservation Easement by appropriate legal proceedings including damages, injunctive and other relief. The Grantee shall also have the power and authority, consistent with its statutory authority: (a) to prevent any impairment of the Easement Area by acts which may be unlawful or in violation of this Conservation Easement; (b) to otherwise preserve or protect its interest in the Easement Area; or (c) to seek damages from any appropriate person or entity. Notwithstanding the foregoing, the Grantee reserves the immediate right, without notice, to obtain a temporary restraining order, injunction or other appropriate relief if the breach of the term of this Conservation Easement is or would irreversibly or otherwise materially impair the benefits to be derived from this Conservation Easement. The Grantor and Grantee acknowledge that under such circumstances damage to the Grantee would be irreparable and remedies at law will be inadequate. The rights and remedies of the Grantee



provided hereunder shall be in addition to, and not in lieu of, all other rights and remedies available to Grantee in connection with this Conservation Easement, including, without limitation, those set forth in the Grant Contract under which this Conservation Easement was obtained.

**B. Access for Inspection and Right of Entry.** Grantee shall have the right, by and through their agents and employees, to enter the Property to inspect the Property for compliance with this Conservation Easement at all reasonable times and with prior notice and, if necessary, cross other lands retained by the Grantor for the purposes of (1) inspecting the Property to determine if the Grantor is complying with the covenants and purpose(s) of this Conservation Easement; (2) enforcing the terms of this Conservation Easement; (3) taking any and all actions with respect to the Property as may be necessary or appropriate with or without order of the Court, to remedy or abate violations hereof; and (4) making scientific and educational observations and studies and taking samples in such a manner as will not disturb the quiet enjoyment of the Property by the Grantor.

**C. Termination and Proceeds of Property Rights Created.** This Conservation Easement gives rise to a property right that is immediately vested in the Grantee at the time of recordation, with a fair market value that is equal to the proportionate value that the Conservation Easement bears to the value of the Property as a whole on the date of the recording of this Conservation Easement. This proportionate value shall remain constant.

1. **Eminent Domain.** Whenever all or part of the Property is taken by exercise of eminent domain by public, corporate or other authority, or by negotiated sale in lieu of condemnation, so as to abrogate the restrictions imposed by this Conservation Easement, the Grantor shall immediately give notice to Grantee and the Fund, and shall take all appropriate actions at the time of such taking or sale to recover the full value of the taking and all incidental or direct damages resulting from the taking. The Grantee, its successors and assigns, shall be entitled to a portion of the proceeds of such sale, exchange, involuntary conversion of the Property, or any damage award with respect to any judicial proceeding according to Grantee's proportional interest in the value of the Property as determined under Treasury Regulations §1.170A-14(g)(6)(ii) or any successor regulation. "Proceeds of Sale" shall mean the cash value of all money and property paid, transferred or contributed in consideration for, or as otherwise required as a condition to the sale, exchange or involuntary conversion of the Property, or any damages otherwise awarded as a result of judicial proceeding, *minus* the Grantor's expenses from such transaction or proceeding. As allowed by NCGS §146-30(a), Grantee shall use its share of the Proceeds of Sale in a manner consistent with the purpose(s) of the Conservation Easement as set forth herein. Notwithstanding the foregoing, all Proceeds of Sale shall be distributed among the Parties according to each Party's respective contribution to the purchase price of the Property and this Conservation Easement. For the purposes of determining any distribution of proceeds pursuant to this section, Grantor's proportionate contribution to the purchase price shall be deemed to be 37%, and Grantee's proportionate contribution to the purchase price shall be deemed to be 62%.

2. **Changed Conditions.** If a subsequent, unexpected change in conditions surrounding the Property makes impossible or impractical the continued use of the Property for the purpose(s) of this Conservation Easement as set forth herein, and the Conservation Easement is extinguished by judicial proceeding, the Grantee, its successor and assigns, shall be entitled to a portion of the proceeds of any sale, exchange, involuntary conversion of the Property, or any damage award with respect to any judicial proceeding according to Grantee's proportional interest in the value of the Property as determined under Treasury Regulations §1.170A-14(g)(6)(ii) or any successor regulation. "Proceeds of Sale" shall mean

the cash value of all money and property paid, transferred or contributed in consideration for or as otherwise required as a condition to the sale, exchange or involuntary conversion of the Property, or any damages otherwise awarded as a result of judicial proceeding, *minus* the Grantor's expenses from such transaction or proceeding. As allowed by NCGS §146-30(a), Grantee shall use its share of the Proceeds of Sale in a manner consistent with the purpose(s) of the Conservation Easement as set forth herein. Notwithstanding the foregoing, all Proceeds of Sale shall be distributed among the Parties according to each Party's respective contribution to the purchase price of the Property and this Conservation Easement. For the purposes of determining any distribution of proceeds pursuant to this section, Grantor's proportionate contribution to the purchase price shall be deemed to be 37%, and Grantee's proportionate contribution to the purchase price shall be deemed to be 62%.

**D. Acts Beyond Grantor's Control.** Nothing contained in this Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury or change in the Easement Area resulting from the acts of third parties not authorized by Grantor, or from causes beyond the Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken in good faith by the Grantor under emergency conditions to prevent, abate, or mitigate significant injury to life, property damage or harm to the Easement Area resulting from such causes.

**E. Costs of Enforcement.** Any costs incurred by Grantee in enforcing the terms of this Conservation Easement against Grantor, including, without limitation, any costs of restoration necessitated by Grantor's acts or omissions in violation of the terms of this Conservation Easement, shall be borne by Grantor.

**F. No Waiver.** Enforcement of this Conservation Easement shall be at the discretion of the Grantee and any forbearance by Grantee to exercise its rights hereunder in the event of any breach of any term set forth herein shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or of any other term of this Conservation Easement or of Grantee's rights. No delay or omission by Grantee in exercise of any right or remedy shall impair such right or remedy or be construed as a waiver.

## ARTICLE V. TITLE

The Grantor covenants and represents and warrants (i) that the Grantor is the sole owner and is seized of the Property and Easement Area in fee simple and has good right to grant and convey the aforesaid Conservation Easement; (ii) that there is legal access to the Property and the Easement Area, (iii) that the Property and Easement Area are free and clear of any and all encumbrances, except those permitted exceptions outlined below, none of which would nullify, impair or limit in any way the terms or effect of this Conservation Easement; (iv) that Grantor shall defend its title against the claims of all persons whomsoever; and (v) that the Grantee, its successors and assigns, shall have the right to monitor and defend the terms of the aforesaid Conservation Easement.

## ARTICLE VI. MISCELLANEOUS

**A. Stewardship of the Conservation Easement.** Pursuant to the terms of the Grant Contract and any contract for stewardship of the Easement Area entered into pursuant to the Grant Contract, Conserving Carolina will monitor and observe the Easement Area in perpetuity to assure compliance with the purposes and provisions of this Conservation Easement and the provisions of the Grant Contract, and it will report on the condition of the Easement Area, or provide for such reporting to the State and the Fund no less frequently than once a year; and further will report immediately to the State and the Fund any observed and/or known violations

of this Conservation Easement or the Grant Contract. The Parties acknowledge that the associated stewardship monies awarded under the Grant Contract are administered pursuant to NCGS §143B-135.236 which establishes the North Carolina Conservation Easement Endowment Fund, or any successor law, and the internal policies and procedures of the Fund, and that Conserving Carolina's obligation to monitor the Easement Area at any given time is contingent on the availability of said stewardship funds. Further, the Parties acknowledge that this obligation to monitor the Easement Area is assignable provided such assignment is made with the prior written approval of the Fund and evidenced by a written instrument signed by the Parties thereto and recorded in the Office of the Register of Deeds of Henderson County. Provided further, that any such assignment of Conserving Carolina's obligation to monitor the Easement Area shall include a right of entry onto the Property and the Easement Area for the assignee of said monitoring obligation, and shall require the monitoring to be carried out in accordance with and subject to NCGS §143B-135.236 or any successor law, and the Fund's internal stewardship policies and procedures. The Parties specifically acknowledge that neither Conserving Carolina's obligation to monitor the Easement Area, nor its assignment of said obligation, shall have any effect on the rights and obligations of the Grantee of this Conservation Easement. Further, the Parties covenant that the obligation to provide monitoring of the Easement Area will survive any transfer of Grantor's fee interest in the Property.

**B. Subsequent Transfers of the Fee.** Grantor agrees for itself, its successors and assigns, that in the event it transfers the Property, or any portion thereof including the Easement Area, to notify the Grantee and the Fund in writing of the names and addresses of any party to whom the Property is to be transferred at or prior to the time said transfer is consummated. Grantor, for itself, its successors and assigns, further agrees to make specific reference to this Conservation Easement in a separate paragraph of any subsequent lease, deed, or other legal instrument by which any interest in the Property is conveyed. The Property owner shall not convey the Property or any interest therein, and shall not incur, assume, or suffer to exist any lien, upon or with respect to the Property, without disclosing to the prospective buyer the Conservation Easement, the obligations of the Property owner and limitations on use of the Property

**C. Subsequent Transfers of the Conservation Easement.** The Parties hereto recognize and agree that the benefits of this Conservation Easement are in gross and assignable with any such assignee having all the rights and remedies of Grantee hereunder. The Parties hereby covenant and agree, that in the event this Conservation Easement is transferred or assigned, the transferee or assignee of the Conservation Easement will be a qualified organization as that term is defined in Section 170(h)(3) of the Internal Revenue Code of 1986, as amended, or any successor section, and the regulations promulgated thereunder (the "Code") that is organized or operated primarily for one of the conservation purposes specified in Section 170(h)(4)(A) of the Code, a qualified holder as that term is defined in the Act or any successor statute, and a qualified grant recipient pursuant to N.C.G.S. Chapter 143B, Article 2, Part 41. The Parties further covenant and agree that the terms of the transfer or the assignment will be such that the transferee or assignee will be required to continue to carry out in perpetuity the purpose(s) of the Conservation Easement that the contribution was originally intended to advance as set forth herein, but acknowledge specifically that any transfer or assignment of the Conservation Easement shall have no effect on Conserving Carolina's obligation to provide stewardship of the Conservation Easement as set forth in this Article VI.

**D. Existing Responsibilities of Grantor and Grantee Not Affected.** Other than as specified herein, this Conservation Easement is not intended to impose any legal or other responsibility on the Grantee, or in any way to affect any existing obligation to the Grantor as owner of the Property, which includes the Easement Area. Among other things, this shall apply to:



1. Taxes. The Grantor shall continue to be solely responsible for payment of all taxes and assessments levied against the Property. If the Grantee is ever required to pay any taxes or assessments on its interest in the Easement Area, the Grantor will reimburse the Grantee for the same.
2. Upkeep and Maintenance. The Grantor shall continue to be solely responsible for the upkeep and maintenance of the Property, including the Easement Area, to the extent it may be required by law. The Grantee shall have no obligation for the upkeep or maintenance of the Easement Area.
3. Liability and Indemnification. If the Grantee is ever required by a court to pay damages resulting from personal injury or property damage that occurs on the Property, including the Easement Area, the Grantor shall indemnify and reimburse the Grantee for these payments, as well as reasonable attorneys' fees and other expenses of defending itself, unless the Grantee has committed a deliberate act that is determined to be the sole cause of the injury or damage.

**E. Conservation Purpose.** Grantor and Grantee, for itself, its successors and assigns, agree that this Conservation Easement shall be held exclusively for conservation purposes set forth by the Grant Contract, this Conservation Easement and as specified in Section 170(h)(4)(A) of the Code. Further, this Conservation Easement shall be construed to promote the purposes of the Act and such purposes of this Conservation Easement as are defined in Section 170(h)(4)(A) of the Code.

**F. Recording.** Grantee shall record this instrument and any amendment hereto in timely fashion in the official records of Henderson County, North Carolina, and may re-record it at any time as may be required to preserve Grantee's rights.

**G. Notices.** Any notices shall be sent by registered or certified mail, return receipt requested, to the parties at their addresses shown below:

If to Grantee:  
CWMTF Real Property Agent  
1321 Mail Service Center  
Raleigh, NC 27699-1321

If to Owner:  
Henderson County  
200 N.Grove St., Ste 129  
Hendersonville, NC 28792

**H. Amendments.** Grantor and Grantee, or their successors in interest in the Property, are free to jointly amend this Conservation Easement to meet changing conditions, provided that no amendment will be allowed that is inconsistent with the purpose(s) of this Conservation Easement or affects the perpetual duration of this Conservation Easement. Such amendment(s) require the written consent of both Grantor and Grantee and shall be effective upon recording in the public records of Henderson County, North Carolina.

**I. Environmental Condition of the Property.** The Grantor warrants, represents and covenants to the Grantee that to the best of its knowledge after appropriate inquiry and investigation: (a) the Property described herein is and at all times hereafter will continue to be in full compliance with all federal, state and local environmental laws and regulations; (b) as of the date hereof there are no hazardous materials, substances,

wastes, or environmentally regulated substances (including, without limitation, any materials containing asbestos) located on, in or under the Property or used in connection therewith; (c) that there is no environmental condition existing on the Property or the Easement Area that may prohibit or impede use of the Property or the Easement Area for the purpose(s) set forth herein; and (d) the Grantor will not allow such uses or conditions.

**J. Indemnity.** The Grantor agrees to the fullest extent permitted by law, to protect, indemnify and hold harmless Grantee from and against all claims, actions, liabilities, damages, fines, penalties, costs and expenses suffered as a direct or indirect result of any violation of any federal, state, or local environmental or land use law or regulation or of the use or presence of hazardous substance, waste or other regulated material in, on or under the Property.

**K. Entire Agreement.** The Recitals set forth above and the exhibits, if any, attached hereto are incorporated herein by reference. This instrument, including the Grant Contract incorporated by reference herein, sets forth the entire agreement of the Parties with respect to the Project and supersedes all prior discussions, negotiations, understandings or agreements relating to the Project. To the extent that this Conservation Easement is in conflict with the Grant Contract, the terms of the Conservation Easement shall control.

**M. Interpretation.** This Conservation Easement shall be construed and interpreted under the laws of the State and the United States, and any ambiguities herein shall be resolved so as to give maximum effect to the conservation purposes sought to be protected herein. The normal rule of construction of ambiguities against the drafting party shall not apply in the interpretation of this Conservation Easement. Further, this Conservation Easement shall be construed to promote the purposes of the Act, which authorizes the creation of conservation agreements for purposes including those set forth herein, and such conservation purposes as are define in Section 170(h) (4) (A) of the Code. If any provision of this Conservation Easement is found to be invalid, the remainder of the provisions of this Conservation Easement, and the application of such provision to persons or circumstances other than those as to which it is found to be invalid, shall not be affected thereby.

**N. Parties.** Every provision of this Conservation Easement that applies to the Grantor or to the Grantee shall likewise apply to their respective heirs, executors, administrators, successors and assigns.

**O. No Extinguishment through Merger.** The Parties agree that the terms of this Conservation Easement shall survive any merger of the fee and easement interest in the Property and Easement Area. Further, the Parties agree that should Grantee, or any successor in interest to Grantee, acquire title to all or a portion of the fee interest in the Property subject to this Conservation Easement, (i) said owner shall observe and be bound by the obligations and the restrictions imposed upon the Property by this Conservation Easement, and (ii) this Conservation Easement shall not be extinguished through the doctrine of merger in whole or in part in view of the public interest in its enforcement.

**P. Subsequent Liens.** No provisions of this Conservation Easement shall be construed as impairing the ability of Grantor to use this Property for collateral for borrowing purposes, provided that any mortgage or lien arising there from shall be subordinated to this Conservation Easement.

**Q. Gender.** The designations Grantor, Grantee, State and Fund, as used herein shall include the Parties, their heirs, administrators, successors and assigns, and shall include the singular, plural, masculine, feminine or neuter as the context may require.

**R. Headings.** The headings of the various sections of this Conservation Easement have been inserted for convenience only and shall not modify, define, limit or expand the express provisions of this Conservation Easement.

**TO HAVE AND TO HOLD** unto the State by and through the Fund, its successors and assigns, forever. The covenants agreed to and the terms, conditions, restrictions and purposes imposed as aforesaid shall be binding upon Grantor, Grantor's representatives, successors and assigns, and shall continue as a servitude running in perpetuity with the Property.

[See next page for signatures and notary acknowledgement]

**IN WITNESS WHEREOF**, Grantor and Grantee, by authority duly given, have hereunto caused these presents to be executed in such form as to be binding, the day and year first above written.

**GRANTOR:  
HENDERSON COUNTY**

[Corporate Seal]

**BY:** \_\_\_\_\_  
**NAME:** \_\_\_\_\_  
**TITLE:** \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
**NAME**, Secretary

**NORTH CAROLINA  
HENDERSON COUNTY**

I, the undersigned Notary Public, do hereby certify that \_\_\_\_\_ personally came before me this date and acknowledged that he/she is the \_\_\_\_\_ of Henderson County, and that by authority duly given and as the act of the corporation, the foregoing document was signed in its name by \_\_\_\_\_, its **TITLE**, sealed with its corporate seal and attested by him/herself as its \_\_\_\_\_. Witness my hand and official stamp or seal, this the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_, Notary Public

Print Name: \_\_\_\_\_

My Commission Expires: \_\_\_\_\_

STAMP/SEAL

**EXHIBIT A**

**LEGAL DESCRIPTION OF PROPERTY**

**GREEN RIVER TOWNSHIP  
HENDERSON COUNTY, NORTH CAROLINA**

**BEING** all of that real property described in a deed from J. Yorke Pharr, III, and wife, Barbara V. Pharr, to Conserving Carolina, which deed was recorded on December 29, 2016 in the office of the Register of Deeds for Henderson County at Deed Book 1692, Page 258.

