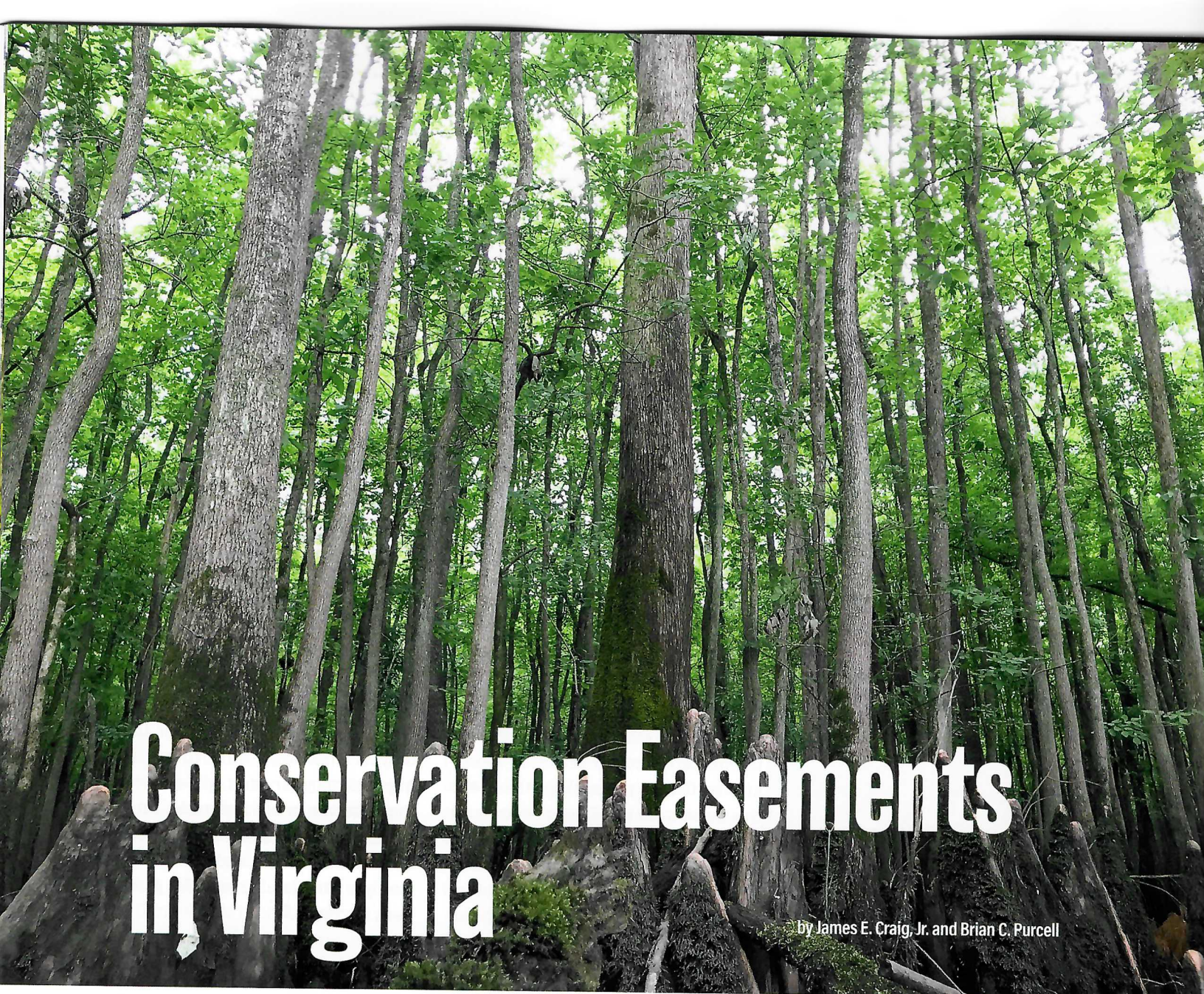


Virginia Forests

SUMMER 2021

TAKING ROOT

Change, Challenges
and Connections to
Family Woodlands



Conservation Easements in Virginia


By James E. Craig, Jr. and Brian C. Purcell

In 1988 the General Assembly of Virginia passed the Virginia Conservation Easement Act to promote land conservation across the Commonwealth. In 1999, the General Assembly further encouraged land conservation transactions by enacting Va. Code Section 58.1-512 to provide state tax incentives for conservation transactions. These laws supplement the Federal law, embodied in IRS code section 170(h), which creates a federal tax benefit for donors of qualified conservation contributions, commonly structured as conservation easements (CE). Landowners, aka “Grantors,”

across the state have benefited from these laws by unlocking value from their real estate holdings in the form of federal and state tax incentives. Despite the potential for tax benefits, several commentators have questioned the long-term benefits of CEs and whether real property owners should participate in these potentially lucrative transactions. Certainly, there are many factors a landowner should consider beyond the potential tax benefits before placing a CE on their property.

A CE is perpetual in nature and once recorded at the local courthouse may not be undone. A CE “runs

with the land” and will impact the ownership rights and privileges of the Grantor as well as all future owners of the property. In essence, the CE creates a contractual relationship with the easement holder or “Grantee.” Grantees can be segregated into two primary groups: public and private. An example of a public Grantee is the Virginia Dept. of Forestry. An example of a private Grantee is a land trust (there are several dozen operating in Virginia). Selecting an easement holder is perhaps the single most critical element of any transaction. There are both positive and negative aspects to each, and some



Future Blackwater Park, Franklin, Virginia, where authors have invested in and are in the process of constructing a 203-acre nature park to protect over 140 acres of standing hardwood timberlands on the state's scenic Blackwater River.

are better suited for different types of property. Once selected, the Grantee becomes the holder in perpetuity, so choose wisely and with the future in mind.

A CE will restrict the future use of the land. Limits on subdividing the property, home site location, quantity and the size of homes and other structures, are key elements of the deed of easement. Other restrictions, such as future use or conversion from forest cover to farmland and vice versa, may also be included. Over the past decade, due to abuse by some Grantors and increased enforcement by the IRS, deeds of easement have become increasingly restrictive in an attempt to tighten standards and ensure compliance with not only the letter of the law, but its spirit as well. A comparison of deeds of easement from 15 years ago to one executed today will reveal substantial additional requirements and documentation.

A landowner considering a CE transaction should retain the services of qualified and expert advisers to ensure they do not "give away the farm" while seeking to preserve it. A competent and experienced land/tax attorney, a CPA, and a properly certified Real Estate appraiser are all required to properly complete a conservation transaction. In some cases, it may also be advisable to hire a consultant specializing in CE transactions to ensure the best possible outcomes for the landowner. As relayed to one client by a consultant, "a CE is a silver bullet and may only be fired once. Make sure you're aiming at the right target."

A landowner should consider the potential for an adverse outcome prior to implementing a CE. For instance, landowners who are planning to sell within three years of the CE should consider the risks of entering a transaction reported to the IRS and then selling at a price in excess of the post easement appraised value. This will set off a red flag with the IRS and is likely to lead to an audit and possible negative adjustment to the reported tax benefits of the transaction. Additionally, owners who plan to sell their property have learned that an attempted sale soon after CE recordation have found resistance in the market from potential buyers. The reasons for this hesitancy vary by purchaser, but ask any real estate agent and they will share stories of long listing times and reluctance of buyers to purchase lands already under easement. In some instances property has sold at substantial discounts to owner's expectations as a result of an existing easement and its terms and conditions.

Recent efforts by landowners impacted by the ACP and MVP pipelines to utilize their easements as a shield against takings were unsuccessful. Many of these landowners were distraught over the inability of Grantees to protect their properties from these landscape scale infrastructure projects. Bear in mind there are three statutory exemptions to CEs that are inviolate: Roads, Railroads, and Utilities. No easement may protect a property from those three potential impacts due to the need for such improvements having a "greater good" for public benefit. All that can be done is to negotiate and mitigate the impacts to each property holder. Those who realized this quickly found success in locating the planned infrastructure along boundary lines or away from existing improvements on their properties.

It is important to note that CEs are not a fit for every landowner. All should carefully consider land / estate planning, financial objectives, family situations and potential heirs to help determine future land use. (See *Creating a Woodland Legacy for Your Family* on page 16 for resources that can help.)

The key to a successful CE transaction is simple: Ask questions. Then, keep asking questions until you are satisfied that there are no more to ask. No landowner should ever feel compelled to go to record due to "deal fatigue" or a self-imposed sense of obligation given the many hours and costs associated with preparing to close a transaction. Trust your instincts, hire the best advisers you can find, and trust them to protect your interests. Finally, plan your transaction to ensure it will meet your short- and long-term personal ownership and financial objectives. Not only is a CE a financial tool for the short term, but it can have a substantial impact on your estate planning and long-term tax liabilities. 🌿

James E. Craig Jr is the principal at Beechtree Group in Falls Church, Va. Beechtree specializes in tax equity and grant based conservation easements, operates a private tax equity investment fund, and works throughout Virginia and North Carolina. Brian C. Purcell is a partner at Willcox Savage, P.C. in Norfolk, Va. As a business and tax attorney, he represents landowners in strategic and tax advantaged transactions. Over the past 20 years, the authors have implemented easements on numerous properties on their own land and on the land of respective clients that includes a project list spanning two states and more than 75,000 acres. Included in those acres are Civil War battlefields, the second most threatened micro-eco system in North America (Roan Mountain, N.C.), significant acreage containing threatened and endangered species along state scenic rivers, and some of the most productive farm and timberland in the Commonwealth.