

WLRM Section 6 - District Easement Programs

Disclaimer: The materials produced and distributed by the Community Conservation Committee of the North Carolina Association of Soil and Water Conservation Districts area intended to serve only as general guidance for local soil and water conservation districts involved in working lands preservation. These materials, including example conservation easement documents and all support documents, should not be used in lieu of professional legal advice. The Community Conservation Committee recommends that all legal documents be reviewed by an attorney licensed to practice in the state of North Carolina.

Land trusts, conservation nonprofits and SWCD are the primary organizations in North Carolina working in the arena of land stewardship. Easements and fee simple purchases are the two most commonly used land protection tools, for examples of other working lands preservation tools, refer to WLRM Section 3. Every SWCD has an established relationship with a large number of rural land owners so it makes sense that SWCD would consider holding easements in appropriate situations. SWCD are frequently being offered easements, land ownership and stewardship opportunities. These offers of easement holding are being made for many reasons including, longevity, trusted relationships with landowners, technical expertise, IRS qualified land stewardship status and other land protection organizations being unable to take on all available preservation opportunities. The District Easement Program Section is meant to provide guidance to a SWCD considering holding an easement. A District Easement Program may not be right for your SWCD today, but when it is, this section will be a valuable resource.

Reasons for District Easement Programs

An easement is a legal agreement between a landowner; the grantor, and an organization; the grantee. The grantor of the easement continues using the property and can will it to heirs or sell the property at a later date. The easement is attached to the title for the purpose of informing current and future owners that activities on the property are restricted to certain uses. Easements that most SWCD work with limit activities to agriculture, forestry, water impoundments, and wildlife habitat. A modern farm or forestland easement will also include a management plan. To read a lengthier discussion of what a conservation easement is and the history of conservation easements, please refer to WLRM Section 2.

In North Carolina, SWCD administer the Agriculture Cost Share Program (ACSP) and as a result are already in the temporary easement business. The maintenance life of a practice is another way of saying a land is tagged with a temporary easement. However, a major difference exists in administering the ACSP and a permanent easement program. A SWCD should not consider holding an easement lightly. The ACSP final administrative decisions are made by the Soil and Water Conservation Commission, an easement program at the SWCD level has no such support at this time.

North Carolina General Statute 139, the District Law, empowers SWCD with the authority for ownership of property, including easements and land. As a result, every SWCD is obligated to be knowledgeable of land protection tools and to have a strategy plan for working with citizens

who desire protection of their land. A SWCD land protection strategy can be as simple as informing landowners of the basics of working lands preservation and directing them to the appropriate land protection organization. A more in-depth SWCD strategy can mean assisting landowners with every step of land preservation including securing a conservation easement. As of Spring 2009 approximately one-third of the conservation districts in the state were involved with some phase of easement and land ownership. As noted in the preface, the North Carolina Association of Soil and Water Conservation Districts' Community Conservation Committee supports SWCD holding easements and the compilation of this resource manual.

Talking Points for SWCD Board Meetings

As of Spring 2009, over one-third of the districts in North Carolina are either taking on easements, or investigating options for holding easements. When your SWCD decides to answer the question of whether or not to hold an easement, you should consider both the advantages and disadvantages. Below are some of the advantages to a SWCD holding an easement:

- G.S. 139 addresses holding easements and it is within the scope of the SWCD legislated authority to be a steward of all natural resources within the SWCD boundaries including holding title to land. Owning land is just one step removed from holding an easement.
- SWCD are already in the business of holding easements by holding watershed structure easements and ACSP contract maintenance agreements, which are considered temporary easements.
- Some landowners are only comfortable working with a SWCD as opposed to other land protection organizations. Other landowners are only comfortable working with a land trust. Thus the more organizations that are involved in land stewardship, the more choices are available and the more landowners who will be served.
- As North Carolina experiences increased development and while the federal tax incentives are so strong, landowners are flooding land trust offices with requests for easements. Land trusts are limited by staff size and the scope of the type of easements they are set up to hold and how many easements they can manage. Threshold limits for easement holding varies with each organization. A SWCD working jointly with a land trust can increase the amount of land that is protected locally and statewide.
- The liability of holding easements can be minimized with a well run District Easement Program. Easements with strong boilerplate language combined with careful action by the SWCD will minimize the chance of liability issues. A District Easement Program will also consider long-term stewardship of the easements and follow specific steps with regard to monitoring that will limit liability issues.
- Holding easements helps with land use planning by protecting the conservation values of the county. SWCD are charged with being stewards of the natural resources of your county. What better way to ensure good management of natural resources than by holding conservation easements. Taking on conservation easements is just another justification for SWCD activities to be supported by funding from the county budget now and in the future.

- Every farm and forestland easement equates to more open space and land available for lease by farmers. The result is an increase in agriculture and forestland sustainability.

Considerations before Committing to an Easement Program

Working with easements and land ownership will add a new dimension to the existing SWCD programs. Many pros and cons are noted to land stewardship work. Below are a list of points to consider and questions to answer as each SWCD decides on and adopts a land protection strategy.

- **Perpetual responsibility** – A conservation easement is forever, consider the potential for your SWCD to change in the future. Discuss how that might affect your ability to monitor and be responsible for an easement.
- **The need for dedicated staffing** – Many hours of time will be spent in securing an easement. After an easement is in place, the SWCD has the long term responsibility of monitoring and enforcing the easement.
- **The need for continuous education** – SWCDs are permanent but their staff and supervisors change over time. Each member will need to be educated on the District Easement Program to be able to make good management decisions in the future. Existing members will need to have continual education provided to them to ensure that they stay informed of any issues within the easement arena.
- **Record keeping requirements** – The SWCD is responsible for maintaining records in digital and hardcopy format for the lifetime of the easement. The responsibility extends to having a secure method of protecting original records from natural disasters. DSWC can provide guidance for state guidelines on maintaining records as well as your county. Record keeping is another substantial cost to easement holding.
- **Changing Landowners** – Easements are permanent, but landowners are not. The property may stay in the same family for generations or it may be sold off the week after closing the easement. It is the responsibility of the SWCD to maintain strong relations with any and all landowners so that information regarding restrictions and approved activities for the property as outlined in the easement are understood and enforced.
- **Need for additional funding / stewardship endowment** – Real costs and hidden costs exist for holding an easement. Putting the easement in place includes closing costs, surveying, title work, and other such activities. The SWCD will need to have resources to conduct monitoring annually as well as the resources to enforce the easement, possibly in court if necessary. Please refer to WLRM Section 8 for additional information on stewardship and WLRM Sections 4 and 5 for additional information on funding.
- **Increasing costs of stewardship over time** – Inflation happens, so what things cost today will likely increase in the future. Be prepared to manage any stewardship funds in an appropriate manner to ensure the long-term availability of the funds.

- **Potential for liability issues** – A SWCD increases their liability by holding an easement. Easements can be written to minimize liability, but it cannot cover every possible situation. Please refer to Section 7 on liability for additional information.

Questions a SWCD Must Answer Prior to Holding Easements

- What are some of the different working lands preservation tools?
- What is the level of easement knowledge among our staff and board?
- What is land stewardship and what is a land stewardship strategy plan?
- How does land ownership differ from easement ownership?
- What liability exists with holding an easement on land?
- Has our role in land stewardship been discussed with county leadership?
- How will success be quantified for the District Easement Program?
- Who are our District Easement Program partners?
- Why are land trusts chartered to work only with permanent easements?
- Why do land trusts, in most instances, only accept easements that come with funding?
- Why use a landowner questionnaire and why is securing a letter of intent from a landowner a good idea?
- At what stage does an easement and land donation equate to tax benefits for the landowner?
- Is it possible to terminate an easement or relinquish easement holding responsibilities?
- How many easements should we take on during the first year?
- Should all easements accepted by the SWCD only be for land with title insurance?
- What is the best approach to publicizing an easement program?
- How do endowment funds differ from roll over funds?
- What is a baseline document and who puts it together?
- Why are annual inspections and reporting on easements important?

- What is the best approach to handling landowner contacts and communications?

Liability

Statement of Disclaimer: The following information was not written by a lawyer; information in this section was collected from a variety of sources and should not be considered legal advice. You should always seek consultation of a licensed attorney for all legal matters.

Liability is a term that strikes fear in the minds of many people, it can equate to a lawsuit with the plaintiff's lawyer looking for the deepest financial pockets that can be emptied in compensation for a client's damages. Liability means the owner/occupier was responsible for an injury or damage. Holding an easement is a non possessory right to property. Non possessory means the SWCD is associated with the property and has the right to enforce the terms of the easement. As the easement holder you have limited control of most activities that occur on the land, no control over who has access to the land and in most instances you no control over who owns the property today, or in the future. Several things should be considered with regard to limiting liability damages and the potential of a lawsuit, please refer to WLRM Section 7 for greater details.

Some Methods for Limiting Liability

- **Easement Language** - Include boilerplate language in the easement, specifically regarding taxes and liens as well as a hold harmless clause.
- **Liability Insurance** - Purchase liability insurance or make sure the SWCD activities are covered by the county insurance policy. However, staff at the Institute of Government has stated in the past that a court of law can interpret the presence of insurance as an indicator that the policyholder expected problems to occur. That expectation can equate to the burden of responsibility being with the insured person, or persons.
- **Title Insurance** - Include title insurance as part of the closing costs of the easement.
- **Continuing Education** - Participate in adequate training to maintain your level of expertise in the easement arena.
- **Monitoring** - Follow through with all monitoring requirements and maintain a strong stewardship program. Refer to WLRM Section 8 for more details.
- **Environmental Contamination** - Verify as much as possible that the property holds no environmental contamination by checking historic records such as aerial photographs. Consider hiring an environmental professional to conduct an Environmental Site Assessment of the property prior to closing the easement.

6 Steps to Starting a District Easement Program

- **Information** – Your SWCD should learn as much as possible about taking on easements and owning land. Review all of the information included in this resource manual and then seek additional information sources to answer any additional questions you may have.
- **Other SWCDs** - The district should talk to other conservation districts about their experiences with taking on easements. To date, the following SWCDs either hold land, are holding an easement, have a local purchase of development rights program, or monitor easements.

2010 Data for the 33 SWCDs Involved in Easements & Land Ownership

Holds Easements	Alleghany, Beaufort, Buncombe, Cabarrus, Chatham, Cumberland, Duplin, Durham, Fishing Creek, Forsyth, Franklin, Gaston, Gates, Halifax, Harnett, Haywood, Hyde, Iredell, New Hanover, Onslow, Polk, Rowan, Rutherford, Stokes, Surry, Wayne
Monitors Easements	Alamance, Beaufort, Buncombe, Cabarrus, Chowan, Gates, Hertford, Hyde, Fishing Creek, Jones, Lenoir, Northampton, Orange
Owens Land	Durham, New Hanover, Polk
Local PDR	Alamance, Buncombe, Haywood

- **Partnerships** - The SWCD should meet with all land trusts that cover areas within their county to learn about their activity and goals. Your SWCD may want to sign a MOU with land trust(s) in the area to enhance future collaborations. The land trusts may be aware of other conservation groups such as The Nature Conservancy that take a special interest in habitat in your county. Another good wildlife habitat protection partner to involve is the Wildlife Resource Commission.
- **Stewardship Costs** - Stewardship costs can include annual inspections and legal defense against easement violations. During the initial stages, the SWCD needs to determine legal and staffing costs that will be supported by the county. Endowment funds can not currently be maintained within the scope of county government. In some instances endowment funds can be maintained by a separate organization, such as a foundation. Please refer to WLRM Sections 4 and 5 regarding financial options.
- **Resolution** - Decide if the SWCD will accept ownership of both land and easements, or refer landowners to other stewardship organizations. Then pass a motion on the strategy that the SWCD is going to take with stewardship.
- **Strategy Plan** - Every SWCD should adopt a strategy plan for working with easements and landownership. This strategy plan should include guidelines that the SWCD will follow in accepting easements and land. Components of such a plan can include the following items:
 - **Training** - The costs of staff and board training in easement stewardship should become a part of the annual budget.

- **Land Trust Alliance** - Consider maintaining a membership in the LTA. Membership gives access to resources and potential legal assistance. More information can be found at <http://www.landtrustalliance.org/>.
- **Priorities** – Describe how the land will be evaluated and prioritized in relation to SWCD objectives for stewardship.
- **Ranking Form** – Every easement program should incorporate an easement ranking form. A ranking system keeps the program on track with set priorities. When there are more applicants than resources can support, this is a tool for justifying selection of one project over another.
- **Oversight Committee** - A donated land may include the stipulation of establishing an oversight committee per request of the grantor that is beyond the scope of the SWCD.
- **Land Owner Packet (LOP)** - The LOP is a primer composed of easement information, a questionnaire, forms to aid the landowner with decision making and an example letter of intent for each donor to write and give to the district shortly after making an initial contact. This packet will save time and resources by identifying serious inquiries.
- **Title Insurance** - Adopt policy on the requirement for title insurance.
- **Stewardship** – Develop protocol and forms for easement stewardship work. Include the process for annual monitoring as well as the response to any noted easement violations.
- **Record Keeping** - No set protocol exists for record keeping as it relates to easements and SWCDs beyond your county document retention policy. However, it is essential that records be maintained on all easement properties. The easement records should include a set of originals as well as a working set including all documents and records of activity related to the land. The easement records can be requested by a court of law if you ever have to take court action for the enforcement of the requirements of an easement. Documentation is verification that an organization is qualified to enforce an easement. The IRS and DOR have the right to request evidence of easement monitoring and enforcement of violations. SWCD must be able to demonstrate that adequate monitoring methods were employed to avoid jeopardizing their qualification as a qualified entity to accept easement and land donations in exchange for the owner being given a break on taxes.
- **Public Relations** - Promoting the easement program is important. All citizens of the county should be aware of the program and know enough about it to support the SWCDs stewardship efforts. Good easement program publicity includes the following components; Newsletters, News Articles, Brochures, Displays, Workshops and Success Stories.

- **Measures of Program Success** - Every conservation district that works with easements and land acquisition will want to have the best program possible. Measurement of program success will be most easily accomplished by putting guidelines in place, setting goals, reviewing accomplishments and making adjustments on an annual basis.

Board Priorities and Easement Ranking Criteria

All aspects of a SWCD easement program are driven by priorities. Priorities are a means for identifying the most important components to your board, what you consider worth preserving. An equitable formula for ranking directs funding to the most important program components in a manner that is fair to all interested parties.

Each SWCD that takes on land and easements will encounter a time when project ranking will be necessary. This necessity will arise due to many reasons which may *include* limited funding to purchase easements, limited staff time to properly process easements and working towards objectives that make the easement program most effective in strategically protecting farm and forestlands.

The SWCD should determine priorities for taking on farmland ownership and easements. The process should include minimum criteria and ranking priorities with assigned points. All components of a SWCD easement program should be adopted as an official board policy and be stated as such in the meeting minutes.

Minimum criteria for ranking easements can include many components. The list below is a starting point for your SWCD to consider. You can also inquire to see what your local land trust is using.

- Property located in the county
- Landowner has clear title to the easement property
- Land currently is used for agriculture and woodlands
- Minimum of total acreage to qualify
- An application, or letter of intent signed by the landowner(s)
- No commercial or industrial structures on the property
- Absence of past, or present use that renders incompatibility of the establishment of a conservation easement
- Absence of a third party owning mineral, or other rights to the property
- In order to pursue purchase of development rights, some organizations are requiring the applicant to make a cash deposit

Other factors to consider as ranking parameters are listed below. See the WLRM Section 6 CD resources for an example SWCD Easement Ranking Criteria Form.

- VAD Membership
- Soil Quality (prime farmland)
- Size of Parcel
- Imminence of Threat for Conversion into Development
- Proximity to other farms

- Proximity to other Easement Properties
- Conservation Plan in place
- Donation as opposed to purchase of easement
- Outside grant funding available to help with easement purchase
- Stewardship funds that can be secured from the applicant, or an outside funding source
- Bargain Sale Option (amount owner is willing to discount the offering price as opposed to the fair market value)
- Adjacent easement properties, whether same or different landowner
- Permanent easement verses temporary easement
- Presence of an agricultural business plan
- Buffer Potential to development spreading into a non developed area, or as protection for a military base, etc.
- Historical and Cultural Values
- Natural Heritage Values (for example presence of endangered species)

The Conservation Planning Tool (CPT)

The Conservation Planning Tool (CPT) consists of assessments and maps that identify, evaluate, and prioritize important natural resources required to maintain healthy and sustainable ecosystems statewide. Six assessments and maps are included in the CPT: Biodiversity - Wildlife Habitat, Marine - Estuarine, Water Services, Open Space - Conservation Lands, Forestry and Farmland.

This planning tool illustrates the locations and conservation values of significant natural resources throughout North Carolina, and has been applied by local governments, state agencies, COGs and conservation organizations to support land use decision-making. This tool can be used to evaluate and rank properties that are being considered for protection by your conservation district. For additional information contact the NC DENR Office of Conservation and Community Affairs or by visiting;

<http://www.onencnaturally.org/pages/ConservationPlanningTool.html>.

Landowner Packet

Over time your SWCD will be contacted by individuals with an interest in easements and land protection. While each individual has an interest in land protection, each one will have unique desires and expectations based upon their own landownership, knowledge of easements, commitment to land protection and other factors including family relations and financial situation. The best first step to take with anyone who makes an inquiry is to provide them with knowledge and to ask questions about their situation. A packet for the landowner can be composed of many things; the following items can be handed out as hard copies, or emailed based upon the preference of each client. All of these materials can be found on the WLRM CD. Keep in mind that some individuals will process this information quickly and others may hold on to it for years before taking any actions. We also recommend reviewing all material in WLRM Sections 2 and 3 before making a final decision on your SWCD landowner packet.

- WLRM Sec 6 - Easement Acquisition 12 Step Guide by Robin Hammond, 2003
- WLRM Sec 7 – Working Lands Conservation Easement Guidance Document 2010
- WLRM Sec 2 - Questions Every Landowner Should Be Able To Answer
- WLRM Sec 2 - Conservation & Historic Preservation Easements Coastal Land Trust 2008

Next Steps – Easement Acquisition

Now that your SWCD has decided to take on easements and you have your strategy plan in place, the following document will provide additional resources; Twelve Steps to Conservation Easement Acquisition, compiled by Robin Hammond in 2003. The Twelve Steps document provides starter template documents for landowner forms, baseline checklists, monitoring forms and many other pieces of information. As discussed in other portions of this resource manual, the NCASWCD Community Conservation Working Lands Subcommittee is also evaluating template documents for working land easements and additional information is located in Section 7. Reach out to your resource people when questions arise and you are well on your way to a solid District Easement Program.

There are many steps that an entity such as a SWCD can follow in taking on easements. Each entity that is involved in land protection has a unique process, but all have commonalities. The Resource CD contains examples of land transaction steps that were provided by the NC Coastal Land Trust, Triangle Land Conservancy, and Southern Appalachian Highlands Conservancy during the 2010 SWCD Conservation Easement Workshops. Your SWCD can take examples, examine each approach and use them as a starting point for designing for your program. The easement acquisition process that is adopted by your SWCD should not be a static guideline, it should be considered a living and dynamic process that will change over time to reflect changing program needs and changing legal requirements. Your acquisition process should be adopted as official board policy, recorded in the minutes, reviewed on an annual basis and updated as needed.

Land Trust and Soil & Water Conservation Districts Collaboration

Many land protection organizations exist in North Carolina and across the nation. Two of the premier land protection entities who hold easements and land in North Carolina are land trusts and SWCD. As noted in an earlier section the first easements date back to 1900, but accelerated use of easements for land protection came about in the 1980s when many land trusts were formed. NC SWCD have had legal authority to take on this same role for decades, but only got involved recently and started taking an active role after the year 2000.

Land protection is not a primary objective of SWCD, but they are one of the few IRS qualified entities available to hold easements for many agricultural landowners who want to donate development rights in exchange for tax benefits, or simply to sell them for a fee. Land trusts do have a primary role of permanent land protection through fee simple purchase and donations of land and easements. Land trusts long ago worked through this process and were forced to work through many of the obstacles by developing sound processes, contacts, funding sources and legal assistance. Today land trusts as private nonprofits are working to get nationally accredited, a step which will not be required of government organizations including conservation districts.

Every SWCD in the state is located in a county that is covered by one or more land trusts. Regardless of the role that each SWCD takes in land protection, they should consider getting to know and working with the land trust(s) that works within their boundaries. Many reasons are noted for why SWCD and land trusts should consider partnering on land protection efforts. Financial resources, expertise and time are limiting factors for any organization that works in the

land protection arena. In addition, many funding sources such as the NCDA&CS ADFP give priority to applicants who partner on a grant request. Below is a chart which shows the differences and similarities between conservation districts and land trusts.

	<u>Land Trusts</u>	<u>SWCD</u>
Board	Y	Y
Annual Budget	Y	Y
Annual Planning	Y	Y
County Funding	N	Y
Must Raise All Funds	Y	N
Nonprofit	Y	Y
Government Agency	N	Y
Private Organization	Y	N
Can Hold Easements	Y	Y
Can Own Land	Y	Y
Can Accept Easement Donation to Qualify Landowner for Tax Credits and Deductions	Y	Y
Temporary Easements	N	Y
Permanent Easements	Y	Y
Office Each County	N	Y
Regional Offices	Y	N
Top Priority	Y	N
Land Protection	Y	Y
Works With Partners	Y	Y
Primary Objective is Land Protection Through Easements & Land Ownership	Y	N

SWCD Steps Working with a Land Trust

- SWCD staff make contact and formalize a meeting with land trust staff.
- Discuss the goals, needs and accomplishments of each organization. Also be certain to talk about how each organization can help the other.
- Invite the land trust staff to a SWCD board meeting at least once a year. Each land trust is a nonprofit organization, with a board that is more private than the SWCD board, which is subject to the NC Open Meetings Law.
- Explore options for working and partnering with the land trust on goals, objectives and projects. Land trusts have a long track record of land protection, are networked with lawyers and land appraisers, as well as a long list of landowner contacts. SWCD have some experience in land protection, strong technical skills and a very long list of land users. Many opportunities exist to trade or barter services between organizations. Grant applications and other initiatives that are shared will be looked upon favorably as partnership initiatives.
- The SWCD may want to sign a memorandum of understanding, or cooperative agreement with the land trust, an example MOU is provided on the Resource CD.

Further Information Sources

- Program Summary and Ranking System for Purchase of Development Easements. Bergen County Open Space, Recreation, Farmland and Historic Preservation Trust Fund. Bergen County Agricultural Development Board. New Jersey. 2009
<http://www.co.bergen.nj.us/BergenFarms/FarmlandPreservation.html>
- Easement Priority Ranking System. Harford County Maryland. 2009.
<http://www.harfordcountymd.gov/Downloads.cfm?FormID=165>
- A National View of Agricultural Easement Programs: How Programs Select Farmland to Fund. A Joint Project of American Farmland Trust and Agricultural Issues Center. 2006.
<http://www.farmland.org/resources/national-view/default.asp>
 - Report 1 – Profiles and Maps
 - Report 2- How Programs Select Farmland to Fund.
 - Report 3 - Easements and Local Planning
 - Report 4 - Measuring Success in Protecting Farmland
- The Land Trust Standards and Practices Guidebook: An Operating Manual for Land Trusts. Volume One Organizational Management Standards 1 – 7. Land Trust Alliance. 2006. Resource can be purchased at www.landtrustalliance.org.
- The Land Trust Standards and Practices Guidebook: An Operating Manual for Land Trusts. Volume Two Land Transactions Standards 8 – 12. Land Trust Alliance. 2006. Resource can be purchased at www.landtrustalliance.org.

Resources on CD Only

- Twelve Steps to Conservation Easement Acquisition. Compiled by Robin Hammond. 2003 rvs 2010.
- Roundtable Topic Questions regarding SWCD holding Conservation Easements. Spring 2010 Regional Conservation Easement Workshops for SWCD.
- Example SWCD Easement Ranking Criteria Form. JDorsett 2010.
- Example MOU for SWCD and Land Trust Collaboration. JDorsett 2010.

- North Carolina Agricultural Development and Farmland Preservation Trust Fund Conservation Easement Acquisition Procedure. North Carolina Coastal Land Trust. 2010 Regional SWCD Conservation Easement Workshops.
- Conservation Easement Donations Steps In The Process. North Carolina Coastal Land Trust. 2010 Regional SWCD Conservation Easement Workshops.
- A Step-by-Step Approach for Working with Triangle Land Conservancy to place a Conservation Easement on Your Land. Triangle Land Conservancy. 2010 Regional SWCD Conservation Easement Workshops.
- Steps in the Process of Completing a Land Conservation Transaction. Southern Appalachian Highlands Conservancy. 2010 Regional SWCD Conservation Easement Workshops.