

Disclaimer for Model County Voluntary Agricultural District & Enhanced Voluntary Agricultural District Ordinances

The intent of the editors of this model ordinance was to produce a "clean" ordinance that gives counties a great deal of operational and fiscal flexibility. However, this model ordinance is provided here only for reference and example purposes. It does not constitute a legal document or the provision of legal advice. For this document to be valid and legally enforceable it must be modified, reviewed, and approved by a county board of commissioners after consultation with a county attorney or other legal counsel. Many of the provisions in this document are required while others are optional. All guidance and authority for what counties must and may include in their ordinance is conferred by Chapter 153A of the North Carolina General Statutes generally, and North Carolina General Statutes §§106-735 through 744 (the Agricultural Development and Farmland Preservation Enabling Act). Please refer to the **Notes** section of this document, which offers guidance on this model ordinance. Copies of county voluntary agricultural district ordinances currently in effect may be found at: <http://www.cals.ncsu.edu/wq/lpn/ncordinances.htm>. These ordinances are provided for reference and example purposes. Official copies should be obtained from the governmental unit that promulgated the ordinance.

Notes

General Notes

Some counties have included within their agricultural district ordinance, and often under the "incentives" section of the ordinance, a public expenditures provision. This provision is sometimes entitled "Expenditure of County Funds for Non-Farm Uses". This provision requires that when the county or any other unit of local government proposes to spend county funds on projects or activities that would convert land in voluntary agricultural districts to non-farm uses, it shall submit to the Advisory Board that the county or other governmental unit has considered other alternatives before spending such funds. In 2005, statutory changes (H.B. 607) authorized the creation of Enhanced Voluntary Agricultural Districts, which require a 10 year, irrevocable commitment from land owners, but enjoy new and extended benefits. This model ordinance creates a program with both district options available, as has been adopted by Cabarrus County. Polk County has enacted both programs separately. Either option is available to counties although it would be difficult to enact the enhanced program without first or simultaneously adopting the regular program.

There are various ways to fund the VAD/EVAD program. It can be funded through application fees, donations from agricultural suppliers, lenders, and others, grants, or through county or municipal appropriations.

Establishing an EVAD/VAD program places a county or municipality under no obligation to apply for monies from the NC Agricultural Development & Farmland Preservation Trust Fund. Any county or municipality that wishes to purchase permanent (or term) conservation easements with Trust Fund or other monies, must either pass a separate ordinance to permit the county to hold such an easement, or have the easement held by its soil and water conservation district. County soil and water districts are already authorized to hold such easements. Soil and water conservation districts may also accept donations of easements. For a county to accept donations of conservation easements it must have enacted an ordinance that authorizes the county to accept and hold such easements. Authorization to purchase easements or accept donations of easements is usually included in the same ordinance.

Article II

The county may also rely on the general ordinance making authority delegated to counties through Chapter 153A to supplement provisions contained in the Agricultural Development and Farmland Preservation Enabling Act.

Article V, Sections A & B

The county may want to consider basing the minimum number of Advisory Board members (i.e., the number prior to the creation of any agricultural districts) on the regions to be established in the county. This would allow the entire county to be represented on a geographical basis regardless of whether or not a region of the county actually contained an agricultural district. It would also ensure that regions of the county that do not contain agricultural districts, but that are adjacent to or

that would somehow otherwise be affected by agricultural districts in a county, would have a voice in the creation and maintenance of those districts.

There are three possible advantages to establishing regions within which voluntary agricultural districts may be formed:

1. The formation of a single district within each such region will stabilize the representation on the Advisory Board because the maximum total number of districts is fixed in advance by the number of regions established. Farms with noncontiguous acreage may be contained in a single district within a region. A region is not a district; only land actually enrolled within a region constitutes a district. The failure to control the total number of districts that can be formed may result in a multiplicity of districts. This leaves the county with the unpalatable choice of either leaving some districts unrepresented on the advisory board or, in the alternative, adding additional members as new districts are created. Experience in some counties has shown that as the number of members on the advisory board increases it becomes difficult to set a meeting time that meets the schedules of a quorum of the membership of the advisory board.
2. The designation of such areas contributes to the formation of large blocks of contiguous or noncontiguous (though spatially close) protected areas of farmland.
3. District formation can be more easily coordinated with the county's comprehensive land use plan and its county-wide farmland protection plan.

Article V, Section C

Membership in the advisory board must include an enrolled landowner from each district. A majority of the members of the advisory board must be actively engaged in farming, forestry and/or horticulture. Nonresident landowners with land enrolled in the VAD/EVAD program may serve as *ex officio* members. This provision (Article V(C)(4)) is intended to encourage participation of nonresident landowners. Many landowners in North Carolina are absentee owners living out of county or out of state. Involving these owners is likely to contribute to successful agricultural district programs and farmland preservation programs. The landowner and residency requirements are inapplicable to *ex officio* members to allow the appointment of those who may provide valuable technical knowledge and advice to the advisory board. At time of initial appointment there will be no landowners with land enrolled any districts as that cannot happen until an Advisory Board is appointed. The initial members of the Advisory Board should be landowners who have made a commitment to enroll land in the district or enhanced district program.

Article V, Sections C (2)

This may be expressed as a fraction, percentage or number. If expressed as a fraction or percentage the ordinance should be drafted such that *ex officio* members of the board are excluded from calculation of the fraction or percentage. Counties may want to add language here to ensure

adequate representation by both landowners in enhanced and regular district programs. Some landowners may be participants in both programs as there is no requirement that a landowner enroll all land owned in one program or the other.

Article V, Section F

The purpose of this provision is to give the county board of commissioners the discretion to remove members from the advisory board without the necessity of holding a hearing or using other means to prove cause for removal. The only exception to this discretion is removal of a member for an illegal reason; e.g., race or religion. An attempt to remove a member for an illegal reason could create liability for the county. Any advisory board member who is removed is eligible for reappointment at any time, as this model ordinance contains no prohibition on reappointment. To give advisory board members more protection from removal, some county ordinances require a unanimous vote for removal.

Article V, Section H (2)

This section of the ordinance may also include either a reference to a specified version of **Robert's Rules of Order** or a requirement that it be used as a guide for procedure. The ordinance, if it references **Robert's Rules of Order**, should reference a specified version rather than the current version. Reference to the current version may create confusion and effectively allows amendment of the ordinance without a vote of the Board of Commissioners, a likely violation of North Carolina law.

Article V, Section I (6)

Through House Bill 2170 of the 2005 session of the NCGA, the requirements for county matching funds have changed. A county that is a development tier two or three county, as these tiers are defined in G.S. 143B-437.08, and that has prepared a countywide farmland protection plan shall match fifteen percent (15%) of the Trust Fund monies it receives with county funds. A county that has not prepared a countywide farmland protection plan shall match thirty percent (30%) of the Trust Fund monies it receives with county funds. A county that is a development tier one county, as defined in G.S. 143B-437.08, and that has prepared a countywide farmland protection plan shall not be required to match any of the Trust Fund monies it receives with county funds. It is to the fiscal advantage of all counties to adopt a farmland protection plan in conjunction with a voluntary agricultural district ordinance.

Article VI, Section A

Regions are usually defined along the logical division lines for a county. Townships boundaries are a typical choice. These lines may include roads, bodies of water, and school district lines. By using regions and limiting each region to one district the number of districts, and, therefore, the number of representatives on the Advisory Board, can be fixed at the time of the adoption of the ordinance.

The model suggests four regions; however, each county should determine a number of regions that makes sense for that county.

Article VI, Section B

This section may also include a provision to allow for small tracts or lots to be included in existing or proposed voluntary agricultural districts when they are surrounded by or adjacent to farms which will be or that are currently part of agricultural districts. Generally these minimum acreages should not be less than the minimum acreages required under the use value program, i.e., 10 acres for agriculture, 5 acres for horticulture, and 20 acres for forestry.

Additionally, although the statute is not entirely clear, it appears that the intent of the General Assembly was that land in either the regular or the enhanced program should be treated for administrative purposes as being in the same district.

Article VII, General Notes

This article is based on the statutory requirements for the qualification of farmland contained within N.C.G.S §106-736. Farms that do not participate in the present-use-value program but that meet the requirements of N.C.G.S. §105-277.3 may participate in the voluntary agricultural district program. Some counties have elected to relax the acreage requirements of N.C.G.S. §105-277.3 to allow participation by small organic farms, greenhouse operations, and horticultural operations; however, this is not authorized by the Agricultural Development and Farmland Preservation Enabling Act.

As of the 2005 amendments, certification through the National Resource Conservation Service of the USDA is no longer required. Ordinances that predate these amendments will include language referring to certification by NRCS.

N.C.G.S. §106-737(3) references the 'Soil Conservation Service'. That agency of the U.S. Department of Agriculture has had a name change to the 'Natural Resources Conservation Service'.

Managing highly erodible land as required by the National Resource Conservation Service is probably required for the land to qualify for the present-use-value taxation program since the present-use-value taxation program requires sound management of the land as a condition of participation.

Article VIII, Section A (2)

The conservation agreement should be short and meet the format requirements prescribed by the county's register of deeds so as to reduce filing fees. Farm uses include agriculture, horticulture, forestry, and outdoor recreation. Model agreements are also available at <http://www.cals.ncsu.edu/wq/lpn>.

The 2005 amendments (SL 2005-390) to the Agricultural Development and Farmland Preservation Enabling Act did not address the question of whether the Conservation Agreement for the Enhanced District Program is binding upon those who receive the land as the result of purchase, gift, or death of the landowner. Since the statute states that the agreement is 'irrevocable', it implies that successors in interest are bound by the Conservation Agreement. This issue should be explicitly addressed in the Conservation Agreement.

The statute does not state the form that the EVAD agreement should take. There are three possibilities: term conservation easement, lease, and a contract. A term conservation easement is almost certainly binding on subsequent owners such as heirs and purchasers whereas leases and contracts, could depending upon their terms be binding only upon the owner who signed the agreement, or could be binding on subsequent owners.

There are also enforcement issues. A term easement as a deed restriction is almost certainly enforceable through legal action seeking injunctive relief. Whether leases or contracts can or should be limited to enforcement through termination of the agreement, or whether the Agricultural Development & Farmland Preservation Enabling Act (the Act), by requiring the agreement to be irrevocable, requires the ability for the county or municipality to seek enforcement through injunctive relief is another open question. Of course, where judicial enforcement is sought, there is the issue of how to pay for it, as well as the monitoring from which such an enforcement action might arise.

As a practical matter most counties do little or no monitoring. Most enforcement results when the tax office provides the advisory board with information that a particular parcel no longer qualifies for the present use value tax program.

A separate issue is whether the EVAD agreement can or should include a provision permitting the award of reasonable costs, including attorney fees, to the prevailing party.

Another question is whether a landowner can be given a hardship termination of an EVAD agreement.

There is also the question of how and whether a county can limit the type of non-farm products sold by farms enrolled in the EVAD program. The Act provides no guidance, it addresses only the quantity (measured in dollars) of non-farm products.

These questions have arisen from counties considering the EVAD program. Given ambiguities in the Act there are no definitive answers to these questions.

What is clear is that enforcement of the VAD program provisions is solely through termination of the conservation agreement. VAD agreements must be for at least a 10 year initial period and can be for a longer time, including perpetuity. VAD agreements may be terminated by the landowner at any time. [Most VAD ordinances require 30 day notice to the advisory board to allow the board time to complete administrative duties such as filing a notice of termination with the office of the register of deeds.] Generally VAD agreements, if for a term, should include an automatic renewal provision. The renewal provision should be automatic to avoid gaps in the benefits provided by the

VAD program. [For example, an inadvertent lapse in VAD program participation could trigger an obligation to pay water and sewer assessments, where those had been waived.]

Enforcement of the EVAD agreement could be either through termination of the conservation agreement or through a legal action. The latter option would involve significant county resources. While this is a possibility it has not proven to be an issue to date in any counties. Landowners who are sufficiently interested to participate in the program have proven to be committed to honoring their agreements. It is presumably possible for EVAD conservation agreement to limit enforcement to revocation of the agreement while permitting the county to negotiate judicial enforcement in subsequent conservation agreements.

The General Assembly evinced no intent to supersede existing security interests, liens, and future interests in the property, that predate the Conservation Agreement, so successors in interest that succeed to the property as the result of such an interest would not be bound by the Conservation Agreement, which would be extinguished as the result of the exercise or operation of such a right. [Attempting to impair such a preexisting interest would likely constitute an uncompensated taking prohibited by the 5th Amendment such that the County would have liability for the value of the property interest impaired.]

Article VIII, Section B (1)

The amount of time outlined in this section that the Advisory Board has before it must vote on an application could be expanded to 60 days. This allows any agencies or offices 30 days to evaluate the application and give their recommendations to the Board and also an additional 30 days for the Board to evaluate those recommendations before it must vote on the application.

Article VIII, Section B (2)

The local Natural Resources Conservation Service office may only be asked to evaluate the application but it may not be required to do so by the advisory board or county commissioners. The county has no jurisdiction over this federal agency. The same applies to the Soil and Water Conservation District office unless they are under contract with the county. If so the office may be required to evaluate applications. This requirement should be included in the written contract between the county and the Soil and Water Conservation District office.

Article IX, Section A

In the event that land in either a voluntary agricultural district or an enhanced voluntary agricultural district is either voluntarily withdrawn by the landowner, or participation is involuntarily terminated, notice of such withdrawal must be recorded with the county land records system to give notice that the land is no longer in the district program. The county must be prepared to pay this fee because there is no practical means to compel the landowner to pay it. Some amount of money could be included in the initial application fee to help defray this expense.

Article IX, Section B (1)

If neither the County nor the landowner gives a notice of termination, the Conservation Agreement could be renewed for successive 10-year periods indefinitely.

Article IX, Section B (2)

For the Enhanced Voluntary Agricultural District program, the Conservation Agreement shall, if no notice of termination is given, be renewed for a successive 3-year period. Although statute is silent, presumably the EVAD conservation agreement automatically renews for an indefinite number of 3-year periods. Given the ambiguity in the Act, the EVAD ordinance should make it clear that this is so.

Article X, Section A

The statute gives county commissioners authority to extend the waiver of sewer and water assessments to farms inside or outside of agricultural districts. The county may not want to grant this waiver to farms outside of agricultural districts, however. The waiver could be a valuable incentive to offer to farms to encourage them to create or join an agricultural district; farms that otherwise might not become involved in a county agricultural district program might do so to receive the waiver. Restricting waivers to land within agricultural districts also reduces the cost of the program to the county.

Some federal, state, or other sewer and/or water construction or improvement grants may have provisions in conflict with this waiver provision. The county may want to include a provision, such as the one in section F that avoids such conflicts.

N.C.G.S. §106-743.5 provided that in addition to the waiver of water and sewer assessments provided to enrollees in the Voluntary Agricultural District program, enrollees in the Enhanced Voluntary Agricultural District program shall have a waiver for assessments to all county-provided utilities for so long as they choose not to connect to those utilities.

Article XI

The statute lists several additional benefits to the Enhanced Voluntary Agricultural District, and also allows for further benefits at the discretion of the county. The “standards of proof” required for the twenty five percent non-farm sales limit may require that the county enact an additional ordinance that defines the proof required.

Article XII

N.C.G.S. §106-740 allows the condemning agency to proceed 30 days after notice is given to the Advisory Board, without regard to whether the Advisory Board has acted. Thus everything the Advisory Board must do is compressed into 30 days. Publishing legal notices in the time provided will be difficult or impossible. Unfortunately the statute provides only for a 30-day period, so the forbearance of the condemning agency after 30 days would be voluntary. For condemnations initiated by the county, the county of course may bind itself to follow the longer 60-day period under the terms of its ordinance. This section applies only to condemnations under state law. Condemnations under federal law are unaffected by these provisions.

Article XIII, Section A (1)

This provision allows for the only legally effective way to ensure that someone searching the chain of title of a tract of land will find that the land is within the proximity of an agricultural district. Whether the buyer reads the abstract of title, or even if an abstract was not prepared, the buyer is conclusively presumed to be on notice that the land purchased is in close proximity to a voluntary agricultural district or an enhanced voluntary agricultural district. The way this provision is written for this model assumes that a county adopting this ordinance has not computerized their land records system yet. However, if a county's land records system is already computerized, this part of section A should be changed to reflect that. Some computerized records systems, however, cannot support this feature. Drafters of a county's ordinance must ascertain the capabilities of their county's land record system before drafting the ordinance.

Article XIII, Section C

This provision is not required by the Agricultural Development and Farmland Preservation Enabling Act; however, it is a part of a well-designed public education program. The agencies listed are by way of example. Drafters should pick these with relevance to their county.

Article XV, Section B

This provision for the posting of a notice in the office of the register of deeds is useful for educational purposes; however, it does not provide record notice of the agricultural district to purchasers of property. Only the "Record Notice of Proximity to Voluntary Agricultural District" provision of Article XIII, Notification, can provide record notice to a potential purchaser that the tract of land in question is located within one-half aerial mile of a voluntary agricultural district. This provision is included in the model ordinance primarily as a means to educate the public that agricultural districts exist in a county.

Article XVII, General Notes

The Agricultural Development and Farmland Preservation Enabling Act does not require that the written report, submitted to the North Carolina Department of Agriculture and Consumer Services

(NCDA & CS) on a yearly basis, be made available to the public by the county. However, it is a public record, and, as such, is available to the public. To promote public education a provision can be inserted in this section of the ordinance that requires that the report be made available to the public. Also, if a provision is already included in the ordinance to make county maps marked with agricultural districts available to the public then a county could also choose to make those maps available in both the annual report to the NCDA & CS and in the public report as well.

Although, not required by this model ordinance, the county may choose to report the number of existing agricultural districts in the annual report.**SELECTED RESOURCES:**

American Farmland Trust

<http://www.farmland.org/>

The American Farmland Trust maintains a regional office in Graham, North Carolina.

School of Government

<http://ncinfo.iog.unc.edu>

Land Preservation Notebook

<http://www.cals.ncsu.edu/wq/lpn/>

North Carolina Association of County Commissioners

<http://www.ncacc.org>

North Carolina League of Municipalities

<http://www.nclm.org/>

North Carolina Department of Environmental and Natural Resources

<http://www.enr.state.nc.us/>

North Carolina Cooperative Extension

<http://www.ces.ncsu.edu/>

North Carolina Department of Agriculture and Consumer Services

<http://www.agr.state.nc.us/paffairs/farmlandpreservation.htm>

North Carolina Farm Transition Network

<http://www.ncftn.org/>

The following is information about the Agricultural District Ordinance Notes and the Model Ordinance and is not part of the Model Voluntary Agricultural District Ordinance:

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