



MEMORANDUM

To: MCWD Board of Managers
From: Tiffany Schaufler, Project and Land Manager
Date: November 13, 2017
Re: Conservation Easement Stewardship Framework

Purpose

At the November 9, 2017 meeting of the Board of Managers, the Board directed staff to develop a stewardship plan or formal guidance document for use in managing the District's conservation easements.

The purposes of the plan are to:

1. Establish an intentional and consistent framework for the District to protect the conservation values and ecosystem services for which public investment has been made; and
2. Ensure a sound record that documents the District's careful administration of its land conservation program.

Background

Incorporated herein is a draft framework for a Land Stewardship plan that is based largely on the District's standard protocols for monitoring, inspecting, and enforcing easements. Additionally, this draft framework incorporates clear guidelines for reporting of easement violations from staff to the Board in a way that allows the Board to ratify the proposed corrective actions.

Generally, these protocols are consistent with those implemented by other land trust organizations such as the Trust for Public Land, the Minnesota Land Trust, and The Land Trust Alliance and include:

- Routine documentation of property condition at regular intervals
- Proactive, clear, and consistent communication with fee owner(s) regarding inspections and findings from inspections
- Clearly defining required action by fee owners to address non-conformance to easement terms
- Clearly defined reporting to the Board of Managers
- A framework of escalating enforcement action

Moving forward, the Land Stewardship plan may also include sub-policies and template documents. It may be applied as well to the District's capital project easements and, with appropriate adjustment, to its monitoring of lands on which wetland buffers, stormwater practices or hydraulic structures are subject to maintenance under District permits.

Following discussion at the November 16, 2017 Planning and Policy Committee Meeting, staff will expand and refine the framework based on feedback before bringing back to Committee or the Board for additional consideration.

Stewardship Framework

1. Communication. Proactive and regular communication with fee owners and other stakeholders is key. Good communication serves the following purposes: maintains a positive relationship; ensures the owner is aware of the easement, understands how it affects property use, and understands the District's role in periodically inspecting the property condition; communicates that the District treats the easement's purposes and terms as important; deters an owner's casual attitude toward compliance; and helps the District remain informed of changes in land ownership or use.

Staff will communicate with fee owners by letter and/or meeting at least semi-annually in conjunction with inspections. In addition, staff will seek to meet promptly with new owners on learning of a change in property ownership, whether by notice or otherwise. Staff will invite fee owners to communicate with the District in respect to any question, and will ensure owners are aware of easement requirements to notify and/or seek approval from the District before undertaking certain activities.

With fee owner concurrence, staff also will include the owner on appropriate lists to receive District communications, to facilitate the owner's knowledge of the District and its mission.

At least biannually, staff will review the title record of each fee owner subject to a District easement as a means to remain aware of any ownership changes as well as any new encumbrances that suggest the potential for third-party disturbance of the property.

2. Notice and approval procedures. The District's easements require that fee owners notify the District before undertaking certain allowed actions and, in some cases, seek advance District approval. Standard procedures to manage such communications ensure that the District's easement rights are not forfeited by waiver; allow the District to maintain good relationships by meeting its obligation to fee owners to review requests promptly and in good faith; and foster sound documentation of activity on the property and the District's actions approving or disapproving the activity.

When staff first meets with a fee owner, notice/approval requirements under the easement will be discussed. Internal procedures will be in place so that notice and approval requests are routed to appropriate staff and approval decisions are made by an authorized staff member. Staff will judge whether further information, an inspection or a meeting with the fee owner or other party (fee owner's contractor) is warranted before decision or as a term of approval. In addition, staff will determine if an inspection is warranted to ensure the noticed or approved action has been properly conducted.

Some easements will allow a one-time action or improvement. When that right is exercised, the administrator, with advice of counsel, will consider recording a notice on the title documenting the exhaustion of the right.

3. Monitoring. Monitoring easement compliance is fundamental to the integrity of the District's role as easement holder. Monitoring, properly structured, helps to develop the relationship with the fee owner, allows the District to learn of ownership changes, allows the District to remain knowledgeable of ecological conditions and learn of violations, maintains a documented record of the property's condition over time, demonstrates to the fee owner the District's diligence and the importance of compliance, and helps the District avoid liability from unaddressed hazards.

Staff will inspect each easement approximately semi-annually, but may inspect certain properties more frequently. This may include properties on which the easement allows a greater level of activity, that are in more developed areas, that about a number of other properties, that allow public access, or that are an element of a partnership agreement.

Regular inspections will be scheduled with notice to the fee owner and an invitation to accompany staff. Staff views the regular inspection as an opportunity to maintain the owner relationship, to keep the owner mindful of the property's conservation values and to remain aware of owner intentions.

Before the inspection, staff will review the property file including the easement terms and management plan and prior inspection reports. Staff will identify areas within the easement of particular inspection importance. Staff may customize the program's standard inspection form for use.

Staff will inspect for several purposes, including fee owner compliance with the easement; evidence of activity contrary to the easement, whether by owner or trespasser; conditions that may present a safety hazard; the general ecological health of the property; and needs that may warrant District attention under its own easement right to engage in ecological maintenance and enhancement. Staff will document the inspection by means of notes, photographs, and measurements.

After the inspection, staff will prepare a report for the file and transmittal to the fee owner. The report may or may not document violations or other matters warranting fee owner attention. If there are potential violations, staff will consult with the department head, Board of Managers, District consultant and/or counsel to determine the appropriate next step and the communication to the fee owner will reflect the approach selected.

The Board of Managers will be apprised of potential violations through inspection reports provided as electronic notices. Through these reports, staff will convey to the Board a summary of the potential violation(s), any determination of the need for immediate corrective action, and recent communication with the fee holder. This reporting provides the Board an opportunity to request discussion during a regular Board meeting and subsequently direct appropriate correction of the violation and required restoration; require potential reimbursement for additional monitoring or the District's actions to restore; and determine the desire to pursue legal action.

4. Compliance. Gaining compliance when an easement violation is discovered is essential for several purposes. First, it is paramount to protect the conservation values and ecosystem services that the easement exists to secure. It also is necessary to maintain the fee owner's incentive to conform to the easement, to avoid a legal waiver of enforcement right through inaction, to set an example for other fee owners of District easement properties, and to maintain public confidence in the District's conservation program and expenditures.

Initiating compliance action rests on carefully documenting easement nonconformance through inspection documentation and a review of easement and management plan terms. It also requires careful comparison of discovered conditions to prior conditions and confirmation of fee owner vs. trespasser or other third party responsibility. Staff may consult with counsel to review the record of nonconformance supporting legal compliance action. An essential piece to prepare for compliance action is a sound determination of the actions necessary to cure nonconformance and an achievable schedule to do so.

Absent extraordinary circumstances, the District will follow a progressive enforcement approach, meaning that compliance action will begin with correspondence to the fee owner documenting the noncompliance and the necessary action. As appropriate, staff will seek to meet with the owner at the property to review what needs to be done and reinforce the existence and importance of the easement.

On the basis of communication, staff may adjust the required action or schedule; coordinate with the fee owner to address trespass or other third-party causes of nonconformance; arrange with the owner for the District to undertake corrective action with fee owner funding; or consider amending the easement to refine the framework of owner/District rights without reducing the easement's ecosystem outcomes. Any adjustment will be documented and shared with the fee owner.

Staff will carefully track schedules for fee owner action and monitor owner progress. Monitoring efforts and documented communications will continue so long as staff, with department head consultation, believes that the owner is exhibiting good faith and progress continues. If staff is unable to so conclude, the District will consider and, as warranted, initiate formal enforcement action. Depending on easement terms, this may include the District's entry to correct conditions and seek reimbursement; legal action for a district court restoration, entry or reimbursement order; or other action. Enforcement action will be determined in consultation with the department head, counsel and the District administrator. The Board must approve the filing or serving of a legal complaint.

5. Reporting to Board. Staff will report to the Board of Managers on easement monitoring to provide for staff accountability, ensure Board policy concurrence and keep managers informed on matters about which they may receive inquiry. Regular reporting will be provided through quarterly reports from the Project Maintenance and Land Management program.

Staff will advise managers by email or other correspondence of material compliance issues. For Open Meeting Law compliance, this correspondence will be purely informational, but a manager may request discussion at a Board meeting by contacting the District administrator.

The administrator will request Board concurrence before initiating formal legal action. With counsel advice, this may occur in open or closed meeting session.

Quarterly reporting throughout the year will inform and support workplan and budgeting decisions.

6. Title records. District easement recordkeeping serves purposes including the long-term preservation of easements within property chain of title. For example, Minn. Stat. §541.023 may require that a notice of easement encumbrance be filed on the title at least every 40 years to maintain the enforceability of the easement. District staff will consult with counsel and take action as prudent to preserve recorded or registered easements.

Next Steps

Staff will incorporate manager comments and input from the November 16, 2017 committee discussion and prepare a proposed final Land Stewardship plan document for Board consideration and approval in December 2017. Areas for Board consideration may include the degree of authority the Board wishes to delegate to staff in the case of easement violations and corrective measures and the level of specificity this plan provides regarding a communication framework including staff reports to the Board.

If there are questions in advance of the meeting, please contact Tiffany Schaufler at tschaufler@minnehahacreek.org or (952) 641-4513.