Easements and Other Servitudes[1]

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I. Easements and Other Servitudes

A. General Principles of Easements and Drafting Considerations

1. Introduction. Simply put, an *easement* is an interest in real estate that gives one person the right to use another's land for a specified purpose. The focus is on use rather than ownership, and an easement does not displace the general possession of the landowner but instead entitles the holder of the easement to occupy the burdened property only to the extent necessary to fully enjoy the rights conferred by the easement. In *Nicholls v Healy,* 20 Mich App 393, 174 NW2d 43 (1969), appeal after remand, 37 Mich App 348, 194 NW2d 727 (1971), the Michigan Court of Appeals said that an easement is an incorporeal hereditament that is a liberty, privilege, or advantage without profit that the owner of one parcel of land may have in lands of another or a right that one proprietor has to some profit, benefit, or beneficial use out of, in, or over the estate of another proprietor. Once granted, an easement cannot be modified by either party or unilaterally. The owner of an easement cannot materially increase the burden of it on the servient estate or impose thereon a new and additional burden. Easements involve complex legal principles; they cannot be treated lightly.

2. Easements Distinguished from Licenses

   a. Licenses also involve the use of one person's land by another for a specified purpose. A license grants permission to do something on the land of the licensor without granting any permanent interest in the realty. Licenses are revocable at the will of the licensor, even if supported by consideration and even if the licensee spends money in reliance upon the license. The key to the distinction between easements and licenses is that an easement constitutes an interest in real estate, but a license does not. Creating a license does not require the formality that is necessary to create an interest in real estate. The statute of frauds, although applicable to easements, does not apply to licenses. Licenses may be written or oral and may be created with or without consideration.

b. A license may be created when the kind of interest that would normally be the subject of an easement is granted but the formal requirements for the creation of an easement are not met.

c. Common examples of licenses include baseball or theater tickets and parking rights.

d. In the words of the Michigan Supreme Court, "an 'irrevocable license' by estoppel cannot be created in Michigan on the basis of an oral promise because recognizing such a conveyance would violate the statute of frauds." *Kitchen v Kitchen*, 465 Mich 654, 658, 641 NW2d 245 (2002). In *Kitchen,* the court considered a dispute between two brothers, Robert and William, who had been equal owners of a large potato farm. Robert owned and resided on a parcel of property bounded on three sides by the farm. The farm operation planted the northern section of Robert's parcel and crossed it with an arm of the farm's irrigation system. Following a dispute between the brothers, William purchased Robert's interest in the potato farm. The purchase agreement did not address the use of Robert's property. Following the buyout, Robert decided that he did not wish the farm to use his land and prevented it from planting crops and using the irrigation system there. The farm asserted that an oral promise Robert had made concerning the use of the northern section of his parcel gave rise to an irrevocable license by estoppel. Specifically, the plaintiffs' complaint alleged that Robert orally represented that the irrigation system could cross his land in perpetuity. The supreme court concluded that the plaintiffs' claim for an irrevocable license based on an alleged oral promise must fail because it was barred by MCL 566.106. Distinguishing oral and written licenses, which are terminable at will by the grantor and hence valid (since these licenses, because of their revocability, do not create an interest in lands), the court noted that an irrevocable license would constitute an "interest in lands" that may not be granted orally in compliance with the statute of frauds, as it would involve a permanent right to use the property. Stating that Michigan does not permit an interest in land to transfer only on the basis of estoppel, the court also rejected the plaintiffs' estoppel-based claim that, under Restatement of Property §519(4), a licensee who makes expenditures in reliance on representations about the license's duration may continue to use the license to realize the value of the expenditures. The court also said:

> We reaffirm that a license may be granted orally, but hold that the oral license is necessarily revocable at the will of the licensor without regard for any promised duration. Neither a written "license" that evidences a promised duration nor the oral conveyance of an intended permanent interest in land is an "irrevocable license." Instead, the grantor of such an intended interest, in effect, orally conveys an easement. Although one can grant an express, irrevocable easement, it must be evidenced by a writing manifesting a clear intent to create an interest in the land.

465 Mich at 661 (citations omitted).

3. Types of Easements. There are two types of easements: easements appurtenant and easements in gross.

   a. An *easement appurtenant* serves or benefits one parcel of land by passing over or burdening another. An easement appurtenant is incident to and necessarily connected with the use or enjoyment of the benefited parcel, and it passes with the benefited property when the property is transferred. An easement appurtenant is incapable of existence separate and apart from the particular land to which it is annexed. The land served or benefited by an easement appurtenant is called the dominant tenement. The land burdened by an easement appurtenant is called the servient tenement.

   b. An *easement in gross* is granted for the benefit of a particular person. An easement in gross is personal, most commonly arises in connection with utility companies and railroads, and may not be transferred except by a utility or railroad.

      Michigan law favors easements appurtenant over easements in gross, and an easement will never be presumed to be a mere personal right where it can fairly be construed to be appurtenant to some other estate. Courts look at surrounding circumstances if an easement is not expressly appurtenant or in gross; if the easement in question relates in some way to a particular parcel of property, it is nearly always deemed appurtenant.

4. Creation of Easements

   a. Generally. An easement may be created either by a grant or other conveyance or by operation of law. In order to create an express easement, there must be language in the writing manifesting a clear intent to create a servitude. Any ambiguities are resolved in favor of the use of the land free of easements. Because an easement is an interest in real estate, it falls within the statute of frauds, and if created by a grant or conveyance, the grant or conveyance must be in writing. Language in the grant must manifest a clear intent to create a servitude. An easement may not be created by an oral promise; and in Michigan, an easement may not rest on estoppel. If the grant or conveyance is not in writing, a license will probably be created.

   b. By Written Instrument

      i. Express Grant or Reservation; Mortgage. An easement may be created by a number of written instruments. In an express grant, for example, which is similar to a deed, the grantor creates an easement across an identified tract of real estate for the benefit of another tract of real estate or, in the case of an easement in gross, for the benefit of a particular person. Such a grant should be prepared just as carefully as a deed and be in recordable form and recorded to protect the interests of the owners of both the dominant and servient tenements. If a grant is not recorded, a subsequent bona fide purchaser takes subject to the easement only if it is visible.

         An easement may be created by an express reservation in another document of conveyance. For example, at the time a parcel of property

is conveyed by its owner, the owner may reserve an easement over it for himself or herself or for the benefit of other property he or she owns.

An easement may not be reserved in favor of a stranger to a deed or a grant. Because a court may construe a deed purporting to convey or reserve title as only creating or reserving an easement when what is conveyed or reserved is a use right, such as "the right to build and use a dock," or "to be used for railroad purposes," or "for right-of-way purposes," the document must be drafted carefully. A court is more likely to consider an exception in a deed as reserving an easement—as opposed to conveying title with an exception—when the way or easement already exists rather than when the exception would create one.

Today, easements are frequently declared to exist over land being developed or land adjacent to land being developed. These easements typically run in favor of utility companies and future purchasers and are created by a recorded document called a *declaration.*

As more and more railroad track has been abandoned in Michigan, the courts have increasingly been called on to determine whether an easement or a fee simple was intended in the original conveyance. A railroad company's right to use a strip of real property as a right-of-way may take a variety of forms: a fee simple absolute, a determinable fee, an easement, a license, or a lease. The language of the conveyance determines the character of the interest acquired. If the grant is for the use of the right-of-way, rather than of the land, an easement is conveyed.

An easement may also be created by a grant or reservation in a mortgage. When created by a mortgage, however, the easement is not truly effective until foreclosure of the mortgage occurs and title to the mortgaged premises has passed at a foreclosure sale, since the creation of an easement by a mortgage is a precaution by one party or the other. So long as the mortgage is not foreclosed, title to the mortgaged property remains in the grantor, so there can be no easement, since the dominant and servient tenements are owned by the same person.

If an easement is to be created by a grant, reservation, or mortgage, it is imperative that the scope, extent, and description of the easement be clearly stated in the written instrument. A proper grant or reservation of an easement might grant or reserve "a perpetual nonexclusive easement appurtenant benefiting the dominant tenement for purposes of ingress and egress and the installation, maintenance, and repair (including reconstruction) of utilities over, under, across, and through the servient tenement." In any grant or reservation of easement, it is also advisable to include a statement concerning who will be responsible for maintenance and repairs, whether the easement may be improved, and whether it is subject to any special limitations. Otherwise, such terms will be implied by law.

The importance of identifying the dominant and servient tenements and the proper parties to an easement grant is underscored by the decision in *Lakeside Assocs v Toski Sands*, 131 Mich App 292, 346 NW2d 92 (1983), in which the court of appeals struggled with ambiguities in an easement grant and concluded that the trial court properly admitted parol evidence to interpret it.

Preparing a grant or reservation of an easement also generally warrants a survey and proper legal description. An easement that is too indefinite for a determinate description will probably not be established and protected by a court.

ii. Plat. Easements may be created by a plat if a plat showing the location of enumerated easements is both approved by all requisite governmental authorities and recorded.

iii. Drains. The Michigan legislature has enacted a comprehensive statute regulating drainage. MCL 280.1 et seq. The statute defines a drain as including the main stream or trunk and all tributaries or branches of any creek or river, any watercourse or ditch, either open or closed, any covered drain, any sanitary or any combined sanitary and storm sewer or storm sewer or conduit composed of tile, brick, concrete, or other material, any structures or mechanical devices, that will properly purify the flow of such drains, any pumping equipment necessary to assist or relieve the flow of such drains and any levee, dike, barrier, or a combination of any or all of same constructed, or proposed to be constructed, for the purpose of drainage or for the purification of the flow of such drains, but shall not include any dam and flowage rights used in connection therewith which is used for the generation of power by a public utility subject to regulation by the public service commission.

MCL 280.3.

MCL 280.6 designates as public easements or rights-of-way the location of certain drains.

c. By Operation of Law

i. Easements by Implied Grant or Implied Reservation. An easement created by operation of law, other than by condemnation, arises because of a supposed grant or reservation between the parties.

In Michigan, an implied easement arises when two or more tracts of property are created from what was once a single tract and the use of one portion of the property for the benefit of the other portion during the unity of title was (1) apparent and obvious, (2) continuous, and (3) necessary to its use and enjoyment. Such easements are easements appurtenant.

An easement by implied grant may arise when the portion of the property conveyed was the parcel benefited during unity of title and no mention of the easement was made in the conveyance. An easement by implied reservation may arise when the portion of the property con-

veyed was the parcel burdened during unity of title and no mention of the easement was made in the conveyance.

An easement is apparent when it is capable of being seen or known on careful inspection. Actual notice to the defendant need not be shown.

Continuity, the second requirement, raises a difficult legal problem. In cases in which the issue has been discussed, the Michigan Supreme Court has said that an easement is continuous if it may be enjoyed without any act upon the party claiming it. A discontinuous easement is one the use of which can only be had by the interference of man. Yet the Michigan Supreme Court has seemed on occasion to hold that a driveway could be the subject of an easement by implied grant or implied reservation without overruling previous authority or paying more than passing attention to the legal issues raised by the continuity requirement. In *Rannels,* 357 Mich at 458, the court held:

> This is an instance where previous use in possession of the common grantor was visible, apparent even to a casual observer, continuous, and necessary to convenient use of the property. [*Federal Sav & Loan Ins Corp v Urschel*, 159 Kan 674, 157 P2d 805)]. Such a use prior to division of the property has been referred to as a quasi-easement. At time of sale of the property without reference to the quasi-easement, an easement is held to exist by implication because of the obvious intention of the parties.

See also Kamm v Bygrave, 356 Mich 189, 96 NW2d 770 (1959) (easement for vehicular ingress and egress implied). In *Harrison v Heald*, 360 Mich 203, 103 NW2d 348 (1960), the court applied the holdings in the *Rannels* and *Kamm* cases to imply an easement by reservation for a sidewalk. *See also Myers v Spencer*, 318 Mich 155, 27 NW2d 672 (1947) (right-of-way recognized is implied easement); *Koller v Jorgensen*, 76 Mich App 623, 257 NW2d 192 (1977) (access to lakeshore created by implied easement). In each of these cases, the court either expressly or necessarily by the context interpreted *continuous* to mean without a break in regular usage. The Restatement (Third) of Property (Servitudes) §2.12, takes a somewhat different approach and requires that the prior use be more than merely temporary or casual.

The third requirement is necessity. Most reported cases have turned on the degree of necessity that is shown and required. Beginning with the *Kamm, Rannels,* and *Harrison* decisions, reasonable necessity has seemed to be a prerequisite to an implied easement. In the most recent decision on the subject, the Michigan Court of Appeals held that an easement may be implied when it is reasonably necessary for the fair enjoyment of the property it benefits.

ii. Easements by Necessity. Even if the requirements for implied easements set forth in the preceding section are not met, if a parcel of land

is split so that one of the resulting parcels is landlocked except for access across the other parcel, a court may imply an easement by necessity. An easement by necessity is supported by the public policy against efforts to render land idle and unproductive. A way of necessity is implied by law out of necessity from the facts of a case. Unlike other implied easements, an easement implied by way of necessity does not require a quasi-easement (or a prior apparent and obvious use) to have existed before severance of the estate by the common grantor. The use exercised by the holders of the easement must be reasonably necessary and convenient to the proper enjoyment of the easement, with as little burden as possible to the fee owner of the land.

An easement by necessity arises when the grantor creates a landlocked parcel in his or her grantee. An easement by necessity may also be reserved by implication when a person, by splitting his or her property, leaves himself or herself landlocked.

A way of necessity may exist over water to provide access to an island. An act by the owner of the dominant tenement, such as failing to use access available to the owner, regardless of the convenience of that access, does not create necessity, nor does the owner's obstruction of a convenient access to his or her property.

In Michigan, there is a substantial body of case law holding that easements implied from necessity require a showing of strict necessity; mere convenience or even reasonable necessity will not suffice.

A way of necessity is appurtenant and passes with each successive transfer of title, whether voluntary or involuntary.

If there are several ways to a landlocked tenement, the owner of the servient tenement may select the way the landlocked owner must use. The way selected must be reasonably convenient. A court of equity may fix the route, but once it has been fixed by the parties, a court of equity may not relocate it.

The owner of an easement by necessity may make it passable and must bear the responsibility for keeping it in repair.

Despite the significant number of cases establishing easements by way of necessity, it would be wrong to think that landlocked property cannot exist in Michigan. A division of a single parcel by a common grantor has been uniformly required by Michigan courts as a prerequisite to an easement by way of necessity.

iii. Prescriptive Easements

(1) Generally. Easements may also arise by operation of law through the doctrine of prescription. A prescriptive easement is based on the legal fiction of a lost grant. *See Dyer v Thurston*, 32 Mich App 341, 188 NW2d 633 (1971). Ownership of easement rights may be acquired by prescription in the same general way and time that title to land may be acquired by adverse possession. Prescriptive

easements arise when a person uses, but does not possess, the land of another for a particular purpose without permission for 15 years. In general, the use must be adverse, under claim of right, continuous (i.e., uninterrupted), open, notorious, peaceable, and with the actual or presumed knowledge or acquiescence of the owner of the servient tenement. The use does not have to be necessary. The use must be exclusive, not in the sense that it is used only by the person claiming the prescriptive easement but in the sense that it does not depend on a like right by others. Since some degree of certainty is required for the easement, the use must also be confined to a specific way or to a definite, certain, and precise line that has been used as a right-of-way. Prescription occurs only with respect to the actual property used adversely for the statutory period and does not extend to the use of additional property. Prescriptive easements are generally appurtenant.

(2) Adverse and Notorious Use. A use is adverse when it is contrary or hostile to the title of the person over whose land it passes.

The owner's permission, before or during the prescriptive period, will, even if given orally, turn a potential prescriptive easement into a license, since it destroys the adverse nature of the use.

If, because of the size or nature of the property, a purchaser may not readily discover an adverse use, the rule is somewhat stiffened. Thus, in *Du Mez v Dykstra*, 257 Mich 449, 451, 241 NW 182 (1932), an unusual case, the Michigan Supreme Court considered use of a road by a person for more than 15 years over lands he had purchased that were described as "wild and uninclosed." Even though the landowner knew of the use for 15 years and had even shared in the cost of improving the roadway, the court refused to find a prescriptive easement since the landowner had no notice that the user was under claim of right. The court said:

> One may acquire a right of way by prescription over wild and uninclosed lands. But, while use alone may give notice of adverse claim of inclosed premises, the weight of authority is that it raises no presumption of hostility in the use of wild lands. This distinction is in recognition of the general custom of owners of wild lands to permit the public to pass over them without hindrance. The custom had been particularly general as to logging roads over timber lands until the carelessness of hunters and campers produced such fire hazards that the protection of timber required the permission to be circumscribed. The tacit permission to use wild lands is a kindly act which the law does not penalize by permitting a beneficiary of the act to acquire a right in the other's land by way of legal presumption, but it requires that he bring home to the owner, by word or act, notice of a claim of right before he may obtain title by prescription.

Id.; see also Whitehall Leather Co v Capek, 4 Mich App 52, 143 NW2d 779 (1966) (use of way of passage of unenclosed vacant land not in use by owner, or even mere possession of it, is not in itself hostile to owner). If the land is wild or unenclosed, the claimant's burden is a heavy one, and the claimant must give actual notice of the hostility of his or her claim or the use must be so open, notorious, and hostile as to leave no doubt in the mind of the owner that the owner's rights are being invaded in a hostile manner.

If the owner of a parcel of land suspects that a neighbor is using it in a way that could result in the establishment of a prescriptive easement, the owner should send the neighbor a letter setting forth revocable permission to take the action that the neighbor is presently taking.

(3) Use Under Claim of Right. A use is under claim of right when either the user fails to acknowledge the need to ask permission or there is some basis for the assertion that the parties intended that such an easement exist.

(4) Continuous Use. A use is continuous when it is regular, even if not constant. A pathway to a summer cottage is considered to be continuous if it is used regularly, even on a seasonal basis. Use when the occasion requires it is continuous.

Interference with an individual's use of the land breaks the continuity and so defeats the claimed prescriptive easement. Once a prescriptive easement has been established, it becomes appurtenant, and mere interference does not defeat it.

(5) Open and Peaceable Use. To be open, the use must be discoverable so that the owner could act to protect his or her title.

(6) Tacking. The prescriptive period of 15 years may, under some circumstances, be shortened for a particular user by tacking the user's prescriptive period to that of his or her predecessors in title. For the concept of tacking to apply in Michigan, each party in the chain must enjoy privity of estate, and the claimed property must actually have been referenced in the instruments of conveyance or by parol references at the time of conveyance.

(7) Burden of Proof. The burden of proving the existence of an easement by prescription rests on the party claiming it. However, when use has been in excess of the prescriptive period for many years, a presumption of a grant arises, and the owner of the relevant estate must show that the use was merely permissive.

iv. Easements Created by Condemnation. Easements may also be created by condemnation in Michigan. The Michigan Uniform Condemnation Procedures Act includes a provision for easements. *See* MCL 213.51(i). Easements are commonly created by condemnation for public utilities that require the use of private property. Electric and gas companies, for example, must run their electric lines or pipelines across private property.

v. Easements by Estoppel. Although other states recognize easements by estoppel, Michigan probably does not.

5. The Duration and Extent of the Burden and Responsibilities of the Parties

a. Generally. The extent to which an easement burdens the servient tenement is determined to a large degree by the words the parties use to create the easement. The rights of the holder of an easement are defined by the easement agreement.

b. Duration of the Burden. Whenever possible, Michigan courts construe an easement as appurtenant and perpetual (since easements appurtenant run with the land).

c. Extent of the Burden. Unless the grant provides otherwise, Michigan law presumes that an easement is nonexclusive, since the owner of the servient tenement may use his or her fee interest for any purpose not inconsistent with the grant. If there are two easements over the same property, the easement that was established first generally has priority if the use of the second would in any way impair the first.

An easement may not be improved by the owner of the dominant estate, except as may be necessary to the owner's actual use and enjoyment of it, since such improvement could unreasonably increase the burden on the servient tenement.

Generally, an easement is limited to uses that are reasonably necessary and convenient to the dominant tenement and that place as little burden as possible on the servient tenement. The owner of an easement for roadway purposes must be assured of unobstructed passage for the owner, the owner's invitees, and the owner's guests. But an easement for roadway purposes or ingress and egress does not carry with it the right to stop or park along the easement.

Similarly, the owner of the servient tenement may make any use of the premises that is not inconsistent with the easement. This includes the right of the owner to use the easement and to grant others the right to use it. The owner of an easement has no right to displace even a trespasser if the use does not impede the free exercise of his or her right. In addition, the owner of the servient tenement has the right to construct improvements over the easement as long as such improvements do not obstruct the passage of the owner of the dominant estate.

An easement once granted may not be altered by either party unilaterally. An easement also may not be made more burdensome or have its use or purpose altered.

An easement must be used strictly for the purposes for which it was granted or received. The owner of an easement may not materially increase the burden of it or impose a new and additional burden on the servient tenement. If, for example, a roadway easement is granted to serve a particular parcel, its use may not be expanded to serve adjacent parcels.

The owner of two parcels of property, only one of which is served by a right-of-way for the installation of water and sewer lines, may not connect his or her house on the other parcel to the water and sewer line, since the second parcel has no right to the easement. *Soergel v Preston,* 141 Mich App 585, 367 NW2d 366 (1985).

The dominant parcel may not be subdivided into so many parcels that the resulting use would unduly burden the servient estate beyond the use contemplated when the easement was granted.

d. Responsibilities of the Parties. The owner of the dominant tenement must repair and maintain the easement for his or her use, and the owner of the servient tenement is under no obligation to do so. It is the duty of the owner of the easement, not the servient tenement, to maintain the easement in a safe condition to prevent injuries to third parties.

Although the owner of the servient tenement is under no obligation to maintain an easement, when an easement is used jointly by the owners of the dominant and servient tenements, the maintenance costs are to be paid in proportion to each party's use.

The owner of the servient estate pays property taxes on the entire parcel.

6. Transfer of Easements. An easement appurtenant, no matter how created, passes on conveyance of the dominant estate, whether it is mentioned in the documents of conveyance or not and whether the document of conveyance refers to appurtenances or not, unless it is specifically excluded from the grant.

7. Termination of Easements

   a. Merger of Title. Easements may be terminated in a number of ways. On a complete merger of title to the dominant and servient estates, an easement will be terminated or suspended. A person cannot hold an easement over his or her own property.

   b. Agreement or Release. An agreement or release may result in the full or partial termination of an easement. When an easement is appurtenant, the power of termination (like the easement) runs with the land. An easement may not be terminated by the acts of the person reserving it if that person has subsequently sold the dominant tenement.

   c. End of Purpose or Necessity. When an easement is granted for a particular purpose and that purpose comes to an end, the easement terminates.

   d. Abandonment. Although an easement may be abandoned, it is difficult to establish the abandonment of an easement created other than by prescription without a clear manifestation of intent. Mere nonuse, no matter how long, does not result in abandonment. To prove the abandonment of an easement, both intent to relinquish the property and external acts putting the intent into effect must be shown. An easement may be lost if it is granted for a particular purpose and the purpose ceases or is abandoned. However, it does not follow from mere nonuse that the purpose for which an easement was created no longer exists.

On the other hand, a prescriptive easement will be lost by nonuser (regardless of the intention of the owner of the dominant tenement) through possession of the prescriptive easement by the owner of the servient tenement for the statutory 15-year period, even if the possession is not hostile or adverse. The possession must be inconsistent with the easement.

e. Adverse Possession. An easement may terminate by adverse possession, but such termination is difficult to establish. In Michigan, "use of an easement by the owner of the servient estate will not ripen into adverse possession unless such use is inconsistent with the easement," since the owner of the servient tenement has "'undoubted rights to make any use of the premises not inconsistent with the easement.'" *Nicholls v Healy*, 37 Mich App 348, 349, 194 NW2d 727 (1971) (quoting *Greve v Caron*, 233 Mich 261, 266, 206 NW 334 (1925)).

f. Tax Sale; Foreclosure of Mortgage. The land over which an easement passes is assessed and taxed as part of the servient estate. Formerly, under MCL 211.60, .72, if the owner of the servient estate failed to pay his or her real estate taxes and the property was sold, the easement terminated when the auditor general—following a sale by the county treasurer of the servient tenement for delinquent taxes and the former owner's failure to redeem the property—delivered a tax deed to a purchaser.

An easement also was terminated when the servient tenement was conveyed to the state because no one had purchased it at a tax sale and the one-year redemption period had expired. MCL 211.67, .67a, .70, .74, .431 (all except section 431 repealed).

MCL 211.78k(5)(e) and MCL 211.79a(2)(d) now protect visible or recorded easements or rights-of-way from extinguishment at a tax sale.

g. Easement for a Particular Term. An easement may terminate by its own terms if it is limited in duration or life. An easement may terminate by its own terms if it is limited in duration.

B. Conservation Easements

1. Definition of a Conservation Easement. A conservation easement in real property is created by dedicating it to a governmental entity or to a charitable or educational association, corporation, trust, or other legal entity.[2] A conservation easement is defined as follows:

> an interest in land that provides limitation on the use of land or a body of water or requires or prohibits certain acts on or with respect to the land or body of water, whether or not the interest is stated in the form of a restriction, easement, covenant, or condition in a deed, will, or other instrument executed by or on behalf of the owner of the land or body of water or in an order of taking, which interest is appropriate to retaining or maintaining the land or body of water, including improvements on the land or body of water, predominantly in

2. MCL 324.2140.

> its natural, scenic, or open condition, or in an agricultural, farming, open space, or forest use, or similar use or condition.[3]

A conservation easement is a perpetual negative easement in gross[4] created pursuant to the Michigan Conservation and Historic Preservation Easement Act.[5]

More simply defined, a conservation easement is a transfer of an interest in land whereby "[t]he landowner retains fee ownership, but conveys certain specified rights to a land conservation organization or a public body to prevent development of the land" forever.[6] It creates a continuing restriction on the property that is enforceable against all future owners when granted to one of the entities listed above.[7]

2. Tax Deductions Available For a Conservation Easement. A conservation easement reduces real property and estate taxes on the dedicated property. If a conservation easement over land is donated to a qualified organization, the existence of this conservation easement also entitles the grantor to deduct the value of the donated rights (i.e., the loss in the real property's value caused by the conservation easement) from the grantor's federal income taxes. For these reasons, conservation easement grants are occurring more frequently in Michigan than ever before.

   a. Real Property Tax Reduction. With respect to real property taxes, a landowner who donates a conservation easement to a private charitable entity in Michigan will receive property tax relief on the property burdened by the conservation easement.[8] The notion is that prohibiting development on the dedicated land by a conservation easement devalues the fair market value of the property even though it may still remain privately owned.[9] In *Lochmoor Club v Grosse Pointe Woods,* the Michigan Court of Appeals held "that a restriction limiting a two-acre parcel to park use could devalue the property

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3. Grier, Thomas, Comment, *Conservation Easements: Michigan's Preservations Tool of the 1990s*, University of Detroit Law Review, Vol 68, 216 (Winter, 1991) (quoting Uniform Conservation Easement Act § 1(1), 12 U.L.A. 64 (Supp. 1989)).

4. A "negative easement" prohibits the grantor (owner of the servient estate) from doing something otherwise lawful on the grantor's property, because it will affect the grantee's (owner of the dominant estate) rights. 510 Black's Law Dictionary (6th ed. 1990).

An "easement in gross" is an easement purely personal to the grantee and usually ends upon the death of the grantee. It does not run with the land. 510 Black's Law Dictionary (6th ed. 1990).

5. MCL 324.22140 *et seq.*

6. Noonan, John D., *Conservation Easements in Northern Michigan*, Michigan Bar Journal, 422 (May, 1994).

7. *Id*. at 423.

8. Michigan Tax Tribunal, MTT Docket No. 157543, 205036 (February 17, 1995); Grier at 207 (citing Comment, *Property Tax Assessment of Conservation Easements*, 17 B.C. Envtl. Aff. L. Rev. 823, 830-832 (1990)).

9. *Id*.

for assessment purposes even though a private club owned the property and denied public access."[10]

The Michigan Tax Tribunal has made a definitive ruling on how to determine the tax savings attributable to a parcel of property that is subject to a conservation easement. On February 17, 1995, the Tax Tribunal declared that this type of "restrictive easement does affect value because it was created in accordance with State and Federal law with the express intent of placing permanent limitations upon the property that negatively affect the market value."[11] Thus, it adopted the Before and After market test to determine the fair market value of land burdened by a conservation easement.[12]

The "Before and After" market test is a formula borrowed from the Internal Revenue Service ("IRS"). To determine the value of a conservation easement for property tax purposes, the formula functions as follows: the Before Value minus the Difference equals the After Value of the property (BV-D=AV).[13] The Before Value is the True Cash Value of the Highest and Best use of the property as though the conservation easement had not been granted.[14] The After Value is the True Cash Value of the Highest and Best Use of the property after the conservation easement has been granted—in our situation, use as a nature preserve.[15]

Property owners should nevertheless proceed with caution. A conservation easement is generally thought to enhance the value of the surrounding land.[16] The benefit received by a property tax deduction attributable to the decreased true cash value of the Undeveloped Property may be lost by the increased true cash value of the abutting properties if such property is also owned by the grantor. Note however, that until there is a "transfer of ownership," Public Act 415 will not permit an uncapping of the "taxable value" to reflect the increase in the surrounding parcels' true cash value.[17]

b. Much of the form of a conservation easement is dictated by the IRS requirements for obtaining a charitable deduction from federal income taxes for donating the conservation easement.[18] "Section 170(b)(1)(B) of the Internal

10.Grier at 207 (citing *Lochmoor Club v Grosse Pointe Woods*, 10 Mich App 394, 398 (1968) ("Land restricted in its use, such as in the instant case, cannot be compared in valuation to subdivision lots in the same general area which may be utilized for the erection of homes.")).

11.Michigan Tax Tribunal at 5.

12.*Id*.

13.*Id*. (cites IRS Revenue Ruling 77-339 for a more detailed explanation on the formula).

14.Michigan Tax Tribunal at 4.

15.*Id*.

16.Meyerson, Howard, "Nature Planning New Director Helps Group Tackle Challenge of Conserving Lands," Grand Rapids Press (Jul 31, 1993).

17.Public Act 415 of 1994.

18.Noonan at 427.

Revenue Code permits federal taxpayers to deduct the value of a charitable contribution up to an amount equal to 30% of their adjusted gross income."[19] "If the value of the contribution exceeds 30% of adjusted gross income for one year, then the remaining value may be deducted at a rate of up to 30% of adjusted gross income for each of the five successive years"[20]

To be eligible for this tax deduction, the Internal Revenue Code (the "Code") provides that the conservation easement must be a "qualified conservation contribution."[21] The Code permits a deduction under § 170 for contributions of certain partial interests in real property for conservation purposes if four (4) requirements are met:

(1) The property contributed must be a 'qualified real property interest;'
(2) The property must be donated to a 'qualified organization;'
(3) The gift must be for 'conservation purposes;' and
(4) The contribution must be 'exclusively' for conservation purposes.[22]

A "qualified real property interest" includes a perpetual conservation restriction, which may be in the form of an easement, such as the conservation easement contemplated by our client.[23] Second, the conservation easement must be given to an organization that is eligible to receive qualified conservation contributions. The Code indicates that a § 501(c)(3) charitable organization is such a qualified organization.[24] The regulations further provide that, in addition to being a qualified organization, the charitable organization "must have a commitment to protect the conservation purpose of the donation."[25] "The necessary commitment is deemed to be present if the donee [the charitable organization] is organized or operated primarily or substantially for a conservation purpose," and has adequate resources to enforce the restrictions in the conservation easement.[26]

The third requirement under the Code requires that the qualified conservation contribution be made for one or more of the following permitted conservation purposes:

(a) Preservation of land areas for outdoor recreation by, or education of, the general public;
(b) Protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem;

19.Grier at 201 (citing IRC § 170(b)(1)(B)).

20.*Id*.

21.*Id*.; Tax Management Portfolio vol 521 A-40 (citing § 170(f)(3)(B)(iii)); Tax Management Portfolio vol 503 A-57 (citing § 170(a)(1); Regs § 1.170A-1).

22.Tax Management Portfolio vol 521 A-40 (citing Regs. § 1.170A-14(a); § 170(h)(1)(A); § 170(h)(1)(B); and § 170(h)(1)(C)).

23.Tax Management Portfolio vol 521 A-40 (citing § 170(h)(2); Regs § 1.170A-14(b)).

24.IRC Code § 170(h)(3)(B).

25.Tax Management Portfolio vol 521 A-40 (citing Regs § 1.170A-14(c)(1)).

26.Tax Management Portfolio vol 521 A-40 (Regs § 1.170A-14(c)(1)).

(c) Preservation of open space, including farmland and forest land, for the scenic enjoyment of the general public or pursuant to a clearly delineated governmental conservation policy, provided such preservation will yield a significant public benefit; and

(d) Preservation of an historically important land area or a certified historic structure.[27]

Finally, the qualified conservation contribution must be used "exclusively" for one or more of the above-permitted conservation purposes. "To satisfy this requirement, the conservation purpose must be protected in perpetuity."[28] No deduction is available if the property is put to an inconsistent use; however, the grantor of the conservation easement may continue an existing use of the property if it does not conflict with the conservation purpose.[29] Hence, the property owner may continue to use the property, such as for recreational use, so long as it (or they) do not use it inconsistently with the conservation easement.

As previously mentioned, valuation of the conservation easement (otherwise known as the qualified conservation contribution) for tax deduction purposes is based on the "Before and After" method to determine the fair market value of the conservation easement. Thus, the IRS uses the method discussed above in Section A of this memorandum, except that the formula is switched so that the value of the conservation easement for income tax deduction purposes is calculated as the Difference between the Before Value and After Value of the property (BV-AV=D). To determine these values, the property owner should consider hiring a licensed qualified appraiser who will follow the manual, *Appraising Easements,* a publication of which the U.S. Tax Court has taken judicial notice of in a reported case.[30]

c. Estate Tax Benefits. Sections 2031(C), 2032(A) and 2055 provide estate tax benefits in connection with conservation easements. The first permits a personal representative to exclude a portion of the value of land subject to a qualified conservation easement from the decedent's gross estate. The second pertains to certain farm and closely-held business property. The third allows a deduction from the value of a decedent's gross estate for grants to specified entities.

3. Structuring The Conservation Easement. The rights granted to the charitable conservation organization will depend on the nature of the land use intended. If the conservation easement is for a conservation purpose, as defined above, and does not anticipate physical access by the public, the easement may reserve the right of access solely to the landowner.[31] In fact, most conservation easements in the lower peninsula of northern Michigan do not include a right of public access.[32]

27.Tax Management Portfolio vol 521 A-40 (Regs § 1.170A-14(c)(1)).

28.Tax Management Portfolio vol 521 A-43 (citing § 170(h)(5)(A); Regs § 1.170A-14(a)).

29.Tax Management Portfolio vol 521 A-43 (citing Regs § 1.170A-14(e)(3)-(f)).

30.Noonan at 429.

31.Noonan at 425.

However, some limited rights of periodic access must be granted to the conservation organization so that it may monitor compliance with the conservation easement. Hence, the property owner may prohibit public access to the Undeveloped Property, provided the conservation organization is allowed entry.

The conservation easement must also be perpetual in nature. The purpose of the conservation easement is to create a restriction on the property that not only prohibits the grantor from subsequently developing the property and, thereby, destroying the conservation purpose, but one that also prohibits future owners of the property from developing the property.[33]

A northern Michigan nature conservancy, the Little Traverse Conservancy, has drafted a "plain English" conservation easement that it is distributing to anyone who is interested. This model conservation easement is attached as *Exhibit A*.[34] The property owner and the selected nature conservancy will need to enter a conservation easement, such as the one provided in the attached *Exhibit A*. Basically, the conservation easement must provide the nature conservancy with a perpetual easement over the Undeveloped Property to preserve it in its natural, undeveloped state. The property owner would be responsible for the maintenance and restoration of and taxes on the Undeveloped Property. The nature conservancy would be responsible for the enforcement of the conservation easement (i.e., that the Undeveloped Property remains in its natural condition). Additionally, it should be responsible for filing an affidavit with the county register of deeds every forty (40) years in compliance with the Michigan Marketable Title Act to preserve in perpetuity the conservation easement.[35]

Most all nature conservancies charge a "cash endowment" fee in connection with the conservation easement. The endowment fee funds any litigation necessary for enforcement of the conservation easement. This fee is often based on the size of the property governed by the conservation easement.

32.Grier at 219 (quoting Tom Bailey).

33.Telephone Interview with Tom Bailey, Executive Director, Little Traverse Conservancy, April 18, 1996.

34.A sample conservation easement to MDEQ and an annotated conservation easement are attached as *Exhibits B* and *C*.

35.MCL 565.101 *et seq.*; *See* Noonan at 427.

Briefly, the Michigan Marketable Record Title Act provides a forty (40) year statute of limitation on a party who has a recorded claim of ownership in contravention of the current holder of title. *See generally* Michigan Land Title Standard 1.1. In other words, any person who has an unbroken chain of title to any interest in Michigan real estate for forty (40) years without anything purporting to divest that person of title appearing of record is deemed to have marketable record title to such interest. Thus, for example, unless the nature conservancy "renews" the recorded conservation easement every forty (40) years, the conservation easement will be considered an ancient claim that can no longer restrict the use of the Undeveloped Property.

C. Restrictive Covenants, Reciprocal Negative Easements and Building and Use Restrictions

1. Introduction

a. Purpose and Types of Restrictions. The use, occupancy, and enjoyment of Michigan real estate may be affected by both public and private restrictions. Public restrictions are typically imposed in the form of zoning ordinances. Private restrictions may be imposed by the owner of a single parcel or by the owners of adjoining parcels acting in concert.

The imposition of private restrictions on real estate is a concept that has been in use for centuries. At common law, the right to own and enjoy real estate was considered to include, as an element of ownership, the right to restrict how that property might be used in the future. Therefore, it was not uncommon for a landowner to convey his or her property subject to any one of a number of possible restrictions. These restrictions were enforceable by the former owner as conditions or covenants.

The Michigan Supreme Court has recognized a strong public policy, well grounded in the common law of Michigan, supporting the right of property owners to create and enforce covenants affecting their own property. Thus, in *Terrien v Zwit*, 467 Mich 56, 71, 648 NW2d 602 (2002), that court said:

> It is a fundamental principle, both with regard to our citizens' expectations and in our jurisprudence, that property holders are free to improve their property. We have said that property owners are free to attempt to enhance the value of their "property in any lawful way, by physical improvement, psychological inducement, *contract,* or otherwise." Covenants running with the land are legal instruments utilized to assist in that enhancement. A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a "valuable property right."

(Citation omitted.)

Enforcement of restrictions by neighboring property owners is a relatively new concept. As explained by Kratovil and Werner:

> If you bought a home in those early days, there was nothing to prevent your neighbor from constructing a slaughterhouse, tannery or other offensive use adjoining your dwelling. Thus matters continued until 1848 when the courts first evolved the idea that if a land developer deeds out all the lots in the subdivision with identical restrictions providing, for example, that only single-family dwellings are permitted in the subdivision, *any lot owner can obtain a court order preventing any other lot owner from violating this restriction.* This was one of the great milestones in the history of law.

Robert Kratovil & Raymond J. Werner, *Real Estate Law* §654 (7th ed 1979) (emphasis in original).

Building, use, and occupancy restrictions as well as other real property covenants are common today. They are generally established in one of three ways. Deed restrictions or obligations are created if they are included in the deed that a landowner gives to his or her grantee. By accepting the deed, the grantee is deemed to have accepted the restrictions and becomes bound by them. Reciprocal negative easements may be created by implication when a parcel of property is developed with a common plan or scheme. The most common type of building, use, and occupancy restrictions today are those that a developer expressly places on lots within a particular tract he or she is developing.

Building, use, and occupancy restrictions and other covenants that run with the land may be understood more easily if they are considered to be analogous to easements appurtenant. *See generally Restatement (Third) of Property: Servitudes.* In fact, restrictive covenants are in many ways like negative easements appurtenant: the restricted property may be likened to the servient tenement, and the land benefiting from the restriction may be considered the dominant tenement. If a set of restrictions applies to an entire subdivision, each parcel will be both *dominant* and *servient.*

b. Deed Restrictions

i. Generally. A deed restriction is a requirement, provision, or statement in a deed that impinges on the free use and enjoyment of the property by the grantee. Deed restrictions can be either covenants or conditions. A *covenant* is an assurance that something will be done, while a *condition* provides that the legal relationship of the grantor and the grantee will be affected when an event that may or may not happen takes place.

The remedy for breach of a covenant is an injunction; on the happening of a condition, the parties' legal relationship can be altered. Whether particular plain and unambiguous language in a deed is a covenant or a condition must be determined by the court. However, deed restrictions that are conditions are usually accompanied by some sort of forfeiture provision—known as a right of entry—that will divest the grantee upon the happening of the condition and exercise of the right. Because forfeitures are not favored, in doubtful cases, a deed restriction will be construed as a covenant and not as a condition.

A provision in a deed that places a restraint on the future alienability of a vested estate in fee simple is void.

ii. The Rule Against Perpetuities. The Uniform Statutory Rule Against Perpetuities, codified in Michigan at MCL 554.71 et seq., may apply to deed restrictions created on or after December 27, 1988, that constitute conditions. The common-law rule against perpetuities may apply to such restrictions created before March 1, 1847, or after September 22, 1949, but before December 27, 1988.

iii. Limitation of Duration of Terminable Interests Act. The Michigan limitation of duration of terminable interests act, MCL 554.61 et seq., applies to deed restrictions containing powers of termination. Essen-

tially, this act provides that if the contingency does not occur within 30 years after the creation of a deed restriction, the right of termination by reason of the specified contingency is unenforceable. The right of termination may, however, be preserved by the recording, within a period of not less than 25 nor more than 30 years after creation of the terminable interest, of a written notice of preservation in the form required by the statute. MCL 554.62–.65.

iv. Enforcement of Nominal Conditions. By statute in Michigan, nominal conditions annexed to conveyances are unenforceable:

> When any conditions annexed to a grant or conveyance of lands are merely nominal and evince no intention of actual and substantial benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded, and a failure to perform the same shall in no case operate as a forfeiture of the lands conveyed subject thereto.

MCL 554.46. This statute has been construed to mean that if restrictions in a deed do not or cease to benefit the grantor, they will not be enforced.

v. Reversionary Rights. Formerly, the reversionary rights held by the grantor under a deed restriction that constituted a condition—rights that were merely the possibility of gaining an estate rather than an estate itself—could not be conveyed or devised but could, at most, pass to his or her heirs. Any attempted conveyance extinguished the right. This rule has been changed by statute, and such rights created on or after September 18, 1931, are now freely transferable. *See* MCL 554.111.

vi. Construction of Deed Restrictions. As would be expected, deed restrictions are construed strictly against the grantor, and all doubts are resolved in favor of free use of the property. For example, a "residence" need not necessarily be a one-family residence.

vii. Duration of Deed Restrictions. If otherwise valid and enforceable, deed restrictions, whether covenants or conditions, seem to run with the land in perpetuity.

c. Express Development Restrictions. Developers of real estate tracts often wish to maintain harmony or uniformity throughout their developments. To do so, they may prepare and record a declaration of building and use restrictions before selling any of the property to be developed. They may also include such restrictions in the condominium bylaws that are attached to the master deed for a Michigan condominium project. In addition, all the landowners in a development may agree to submit their property to an express set of restrictions. A landowner who does not join in restrictions established by his or her neighbors is not bound by them.

2. Drafting Problems

a. Covenants Running with the Land. To achieve the desired result, building and use restrictions and other real property covenants must run with the land; that is, they must bind future owners and not just the immediate grantor and grantee.

b. The Essentials of Covenants Running with the Land. In *Greenspan v Rehberg*, 56 Mich App 310, 320–321, 224 NW2d 67 (1974), the court of appeals said that the essentials of a "covenant running with the land" are "that [1] the grantor and grantee must have intended that the covenant run with the land; [2] the covenant must affect or concern the land with which it runs; and [3] there must be privity of estate between the party claiming the benefit and the party who rests under the burden."

In Michigan, the doctrine of equitable servitudes complicates the general rule that restrictive covenants must run with the land to be binding upon subsequent purchasers. Michigan courts have treated equitable servitudes as a special class of covenants that are enforceable simply because of the equities presented by the facts of a particular case.

Perhaps the distinction between equitable servitudes and covenants lies in that equitable servitudes will be enforced with notice on account of the equities of the situation whereas covenants that run with the land will be enforced without actual notice and regardless of the equities.

3. Construction, Validity, and Interpretation of Building, Use, and Occupancy Restrictions

a. General Principles of Construction and Validity. Whatever form they take, building, use, and occupancy restrictions generally deal with such subjects as type and location of improvements and extent of occupancy. "Restrictive covenants are to be read as a whole to give effect to the ascertainable intent of the drafter." *Mable Cleary Trust v Edward-Marlah Muzyl Trust*, 262 Mich App 485, 686 NW2d 770 (2004).

b. Whether the restriction is stated in the affirmative or the negative has an important bearing on how it will be construed. Affirmative use restrictions (those stating that property must be used in a certain way) will preclude all other uses. However, negative use restrictions (those stating that property may not be used for enumerated purposes) allow the property to be used for all other purposes.

c. A long series of Michigan cases has held that when questions arise about the construction of restrictive covenants, such covenants are to be construed strictly against those creating them or claiming a right of enforcement, and all doubts are to be resolved in favor of free use of the property.

d. However, the general rule of construction that restrictions on the free use of land must be strictly construed and all doubts resolved in favor of the free use of property will not be applied if it would defeat an obvious purpose of the restrictions. Building restrictions should be read as a whole if there is any doubt about their meaning and construed in light of the general plan under which the restrictive district was platted and developed.

e. The enlargement, extension, or limitation of building and use restrictions must be distinguished from their construction. Because the law favors the free alienability of land, restrictions on such alienability will not be readily enlarged, extended, or limited by judicial construction.

f. Often, building, use, and occupancy restrictions include a provision requiring that the plans and specifications for improvements be submitted to a developer, homeowner's association, or architectural committee before construction may start. The cases construing such provisions have held that such power of approval must be exercised in a fair and reasonable manner.

g. In *Hickory Pointe Vill of Homeowners Ass'n v Smyk*, 262 Mich App 512, 686 NW2d 506 (2004), an association of homeowners sought to enforce restrictive covenants requiring association approval for any construction before work was commenced in the subdivision. The defendants had submitted their plans for a backyard deck to the association but the association refused to approve them because they did not conform to the association's specifications. The defendants nevertheless constructed the deck, using the nonconforming architectural element. Noting that, under Michigan law, a covenant constitutes a contract created by the parties with the intent to enhance the value of property, the court rejected the trial court's conclusion that a "technical violation" would not be enjoined and said:

> When interpreting restrictive covenants … when the intent of the parties is clearly ascertainable, courts must give effect to the instrument as a whole. *Cooper v Kovan*, 349 Mich 520, 527; 84 NW2d 859 (1957); [*Borowski,* 117 Mich App at 716].
>
> … .
>
> It is a "well understood proposition that a breach of a covenant, no matter how *de minimis* the damages, can be the subject of enforcement. … If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the Court to interfere by injunction." [*Terrien v Zwit*, 467 Mich 56, 648 NW2d 602 (2002)].

262 Mich App at 515–516. *But see Webb,* 224 Mich App at 211 (technical violation will not be enforced in absence of injury).

Despite the courts' strict scrutiny, in *Craig v Bossenbery*, 134 Mich App 543, 549, 351 NW2d 596 (1984) (citing *Wood*), the court said, "There is a strong policy supporting the right of property owners to enforce the restrictions of covenants affecting their land." Likewise, in *Rofe v Robinson*, 415 Mich 345, 349, 329 NW2d 704 (1982), the court said, "Deed restrictions are property rights. The courts will protect those rights if they are of value to the property owner asserting the right and if the owner is not estopped from seeking enforcement" (footnotes omitted).

4. Expiration, Termination, Waiver, Estoppel, and Change of Conditions

a. Expiration and Termination. Building, use, and occupancy restrictions are valuable property rights that will be enforced so long as they remain of value

to the person seeking to enforce them, but only if that person is not estopped from seeking enforcement. About the only general rule that exists concerning the enforceability of building, use, and occupancy restrictions is that each case must be decided on its own facts. Unless perpetual, they terminate upon expiration of the time to which their duration is limited. Like other real estate interests, building, use, and occupancy restrictions (including reciprocal negative easements) may be terminated by a body holding the power of eminent domain, but only after due process and the payment of just compensation. *Austin v Van Horn*, 245 Mich 344, 222 NW 721 (1929); *Johnstone v Detroit, Grand Haven & Milwaukee Ry Co*, 245 Mich 65, 222 NW 325 (1928); *Allen v Detroit*, 167 Mich 464, 133 NW 317 (1911). Under the Michigan *cy pres* statute, restrictions imposed in conveyances for religious, educational, charitable, benevolent, or public purposes may be terminated and the property sold without them if such use has become impossible or impractical. MCL 554.401–.404.

Building, use, and occupancy restrictions may also be voluntarily terminated by the mutual agreement of all persons interested in them. Such restrictions will probably survive if the property affected is sold because of unpaid taxes. *See Lakes of the North Ass'n v TWIGA Ltd P'ship*, 241 Mich App 91, 97–99, 614 NW2d 682 (2000) (covenant requiring payment of maintenance assessment survived tax sale to state and conveyance to third party; covenant to pay association assessment is not "encumbrance" that would be cancelled as of date of tax sale; restrictive covenants "enhance and preserve the value of real estate"). It is unclear whether the establishment of title by adverse possession will terminate building, use, and occupancy restrictions in Michigan; and the issue does not seem to be the subject of a reported Michigan opinion. At least in some circumstances, the common developmental scheme in the neighborhood where the property being adversely possessed is located would suggest a need for continuation of the restrictions in the hands of the new owner and his or her grantees as an equitable matter.

b. Laches, Waiver, Change of Conditions, and Estoppel

   i. Laches and Waiver. Property owners must act with reasonable promptness after they know or should have known about violations to enforce building, use, and occupancy restrictions, or they may be precluded from doing so under the doctrine of laches. Building, use, and occupancy restrictions may also be waived, abandoned, or terminated. Subsequent acts alone do not operate as abandonment. The acts of a grantor in expressly or impliedly releasing restricted territory from building restrictions is not binding upon the purchasers of other lots who purchase subject to the restrictions and in reliance on them.

   A grantor and provider of building, use, and occupancy restrictions is not free to modify these restrictions once other persons have purchased a portion of the restricted property. However, if the owners of restricted property acquiesce for a long time in improper use, and the improper use does not result in any detriment to the surrounding area,

the court will deem the restrictions waived. Although a plan of restrictions may no longer be enforceable against a particular lot or parcel, this does not necessarily lift the restrictions for other lots or parcels in the subdivision. That may require a general change of conditions.

The willingness of some lot owners in a subdivision to waive restrictions will not have any effect on those property owners who insist on strictly observing those restrictions.

ii. Change of Conditions. Perhaps the most litigated question in the area of duration of building, use, and occupancy restrictions is whether a change in a neighborhood terminates the restrictions or makes them unenforceable. In general, to be so extensive that it makes building and use restrictions unenforceable, a change in the character of the neighborhood must destroy the value of the restrictions. To put it a different way, a court may grant the eradication of servitudes or restrictive covenants upon use when they are unduly burdensome and of no value to the dominant owners due to changed conditions in the surrounding neighborhood. A change in the zoning ordinance by itself will not generally operate to destroy obligations imposed by building restrictions in a subdivision plat, even if it would make the property unusable for the sole purpose to which it is restricted. A zoning change is at most only one of the factors that a court of equity would consider in determining whether a change of circumstances has occurred that would induce it not to enforce the restrictions.

The fact that the lots might have a greater value as business lots rather than as residential lots is an insufficient basis for lifting restrictive covenants, and even substantial changes in the neighborhood may not be sufficient to preclude the enforcement of restrictive covenants.

Generally, relief from building restrictions that have become very burdensome because of a change in the character of a neighborhood will be granted by a court only if it can be done without causing any damage to others who have purchased property in the restricted area in reliance on the restrictions. The fact that a street has become more suitable for commercial rather than residential purposes will not nullify building, use, and occupancy restrictions requiring the residential use of the neighborhood. A building restriction will be upheld wherever it remains of any substantial benefit to parties objecting to its violation, provided they are not estopped by their conduct from making such objections. A few deviations from building restrictions that are generally observed will not result in their abandonment. On the other hand, where the owners of property in a residential subdivision acquiesce in the violation of restrictions imposed by their subdivider and the character of the neighborhood is changed as the result of this acquiescence, the building and use restrictions will not be enforced.

If the general plan for subdivision is not carried out, a court may remove validly imposed building, use, and occupancy restrictions.

iii. Estoppel. Relief from violations of building, use, and occupancy restrictions is not available to someone who is estopped by his or her conduct or inaction from having a restriction enforced. However, property owners in a restricted area are not estopped from preventing a flagrant violation just because slight deviations have been permitted in the past. Mere tolerance of an unlawful use is not ordinarily a sufficient basis for estoppel. As is so often the case in the area of building and use restrictions, what constitutes a waiver, laches, or estoppel must be determined by the facts of each case.

5. Enforcement

a. Since most building and use restrictions constitute covenants, the relief generally sought is equitable in nature for injunctive protection against violations or for specific performance of the covenant. Enforcement is not automatic and is governed by the application of equitable principles generally. However, the right to relief has been held not to be dependent on a showing of damages.

In an action to enforce a restrictive covenant, the drafter's intent controls. However, the covenant's provisions are to be strictly construed against the would-be enforcer and doubts resolved in favor of the free use of the property. Courts will not grant equitable relief unless there is an obvious violation.

In *Webb v Smith*, 224 Mich App 203, 568 NW2d 378 (1997), on appeal after remand from 204 Mich App 564, 516 NW2d 124 (1994), the court reviewed the equitable remedies that may apply in cases involving the enforcement of restrictive covenants. *Webb* involved an action for the enforcement of a one-home-per-lot restriction. After several appellate court decisions in the case concerning whether the defendants had had notice of or violated the restrictive covenants, the court of appeals was called upon to address whether an injunction ordering demolition of the defendants' home would be enforced. In upholding the order of demolition, the court refused to apply a balancing-of-the-equities analysis and held that negative reciprocal easements are valuable property rights that as a rule may be enforced by injunction without consideration of the economic damages to the property owner. *Id.* at 211. The court in *Webb* noted that there are three equitable exceptions to this general enforcement rule, which are outlined in *Cooper.* These are "'(1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches.'" *Webb,* 224 Mich App at 211 (*quoting Cooper,* 349 Mich at 530). *But see Hickory Pointe Vill of Homeowners Ass'n v Smyk,* 262 Mich App 512, 686 NW2d 506 (2004) (court of appeals rejected trial court's conclusion that technical violation would not be enjoined). The *Webb* court concluded that construction of the house in violation of the one-dwelling-per-lot restriction was not a technical violation of the covenants' stated purposes of regulating construction to guarantee a level of privacy and aesthetic enjoyment to the subdivision's landowners. The court also found that there was substantial harm because the plaintiffs' lake view was impaired. The court also rejected the defen-

dants' arguments that general growth of the area resulted in a change of conditions in the subdivision that made enforcement of the covenants inequitable. The court concluded that although demolition of the defendants' home was a harsh remedy, the defendants had proceeded with construction in defiance of the restrictions and the ongoing litigation.

The possibility of money damages and an action at law nevertheless exists.

b. In *Hickory Pointe Vill of Homeowners Ass'n*, the Michigan Court of Appeals directed the trial court to award a homeowners association its attorney fees when the association successfully enforced restrictive covenants pertaining to its subdivision against a homeowner and the restrictive covenants permitted an award of attorney fees.

6. Reciprocal Negative Easements

a. Generally. If a parcel of property is developed in accordance with a common plan or scheme, the doctrine of reciprocal negative easements may subject all lots within the subdivision to the common plan or scheme, whether or not such lots are specifically burdened by restrictions in their chain of title. This doctrine was recognized by the Michigan Supreme Court in *Allen v Detroit*, 167 Mich 464, 133 NW 317 (1911), and confirmed in the landmark case of *Sanborn v McLean*, 233 Mich 227, 229–230, 206 NW 496 (1925), in which it said:

> If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends. It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restrictions must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan.

Citing *Sanborn,* the court in *Webb v Smith*, 204 Mich App 564, 573, 516 NW2d 124 (1994), *appeal after remand,* 224 Mich App 203, 568 NW2d 378 (1997), noted that a reciprocal negative easement is a valuable property right and said that the "policy surrounding reciprocal negative easements is firmly entrenched in the law of [Michigan]." In upholding the enforcement of a one-home-per-lot provision, the court said that the effect of a refusal to enforce the easement provisions because of one owner's plight would be to

dilute their strength and work hardship on the other benefited and burdened property owners.

b. Requirements of the Doctrine

i. Common Plan or Scheme. Reciprocal negative easements require a common plan or scheme. Although burdening a single lot in a small subdivision with restrictions might on appropriate facts impose reciprocal negative easements upon the remaining lots, the Michigan Supreme Court has said that a restriction in the title to a single lot, without more, does not establish a sufficient common plan or scheme to do so. *Buckley v Roman Catholic Archbishop*, 339 Mich 398, 63 NW2d 655 (1954) (citing *Taylor v State Highway Comm'r*, 283 Mich 215, 278 NW 49 (1938)). Instead, a general plan or scheme of development must have been maintained from the property's inception and must have been understood, accepted, and relied and acted on by all having interest in the subdivision. Strict adherence to a common plan is not required. However, substantial deviance may tend to negate the existence of a common plan or scheme.

ii. Common Owner. Reciprocal negative easements must also arise pursuant to a scheme of restriction by a common owner. They may not attach to one lot because other lot owners mutually agree and conform to a general plan, even though the plan may, as a contract, be binding on those who joined in it and their successors. The extension of certain restrictive covenants concerning a subdivision following their expiration will not retroactively affect the rights of persons who purchased property in the subdivision after the expiration but before the extension and who did not join in the extension.

iii. Similarly Situated Lots. For the doctrine of reciprocal negative easements to apply, the lots to be burdened must be similarly situated; in other words, they must bear a relationship to one another.

iv. Application of the Doctrine. A reciprocal negative easement is construed by ascertaining the parties' intention. This can be gleaned from the language of the deed and the surrounding circumstances. The parties are presumed to have intended a reasonable construction that does not produce unusual or unjust results.

The doctrine appears to apply only to lots in a development retained by the common grantor when he or she has conveyed others with some affirmative or negative restriction or otherwise evidenced a common scheme of development. But once established, it applies against both the common grantor who retains lots and those who subsequently acquire an interest in them.

An owner of real estate may be bound by building and use restrictions not appearing in the chain of title if they constitute reciprocal negative easements. The standard owner's policy of title insurance generally used in Michigan may not provide coverage over reciprocal negative easements. It therefore behooves a potential landowner to

thoroughly research any building and use restrictions or common plan or scheme that may apply to lots surrounding the property he or she proposes to purchase.

v. Actual or Constructive Notice

Actual or constructive notice of some kind is required.

D. The Effect of the Restatement of Property Third: Servitudes

1. Creation by estoppel
2. Servitudes implied from general plan
3. Relocation of easement
4. Common interest communities

Exhibit A
Conservation Easement Sample 1

Model draft 5-01-03

CONSERVATION EASEMENT

DATE: _____

OWNER: ***(INSERT OWNER'S NAME AS IT APPEARS ON THE PROPERTY DEED and address. Also include any assigns, successors, administrators, etc., as appropriate.)***

CONSERVANCY: Grand Traverse Regional Land Conservancy, a Michigan non profit corporation, 3860 North Long Lake Road, Suite D, Traverse City, MI 49684

For Purposes of this Conservation Easement, the OWNER, and all subsequent Owners of the subject Property, will be referred to as the "Owner" throughout this Conservation Easement. The Grand Traverse Regional Land Conservancy will be referred to as the "Conservancy" throughout this Conservation Easement.

PROPERTY: ***(INSERT COMPLETE PROPERTY DESCRIPTION)***

CONVEYANCE: The Owner conveys and warrants to the Conservancy a perpetual Conservation Easement over the Property. The scope of the Conservation Easement is set forth in this agreement. This conveyance is a gift from the Owner to the Conservancy and is, therefore, exempt from Transfer Tax pursuant to MCL 207.505(a) and 207.523(a).

THE OWNER AND THE CONSERVANCY AGREE TO THE FOLLOWING:

1. PURPOSES OF THIS CONSERVATION EASEMENT.

A. This Conservation Easement assures that the Property will be perpetually preserved in its predominately natural, scenic, historic, agricultural, forested, and open space ***(DELETE THOSE THAT DO NOT APPLY)*** condition. The Purpose of this Conservation Easement is to protect the Property's natural resource and watershed values; to maintain and enhance bio-diversity; to retain quality habitat for native plants and animals, and to maintain and enhance the natural features of the Property. Any uses of the Property which may impair or interfere with the Conservation Values are expressly prohibited.

B. The Owner is the fee simple title owner of the Property and is committed to preserving the Conservation Values of the Property. The Owner agrees to confine use of the Property to activities consistent with the Purposes of this Easement and the preservation of the Conservation Values.

C. The Conservancy is a qualified holder of this Conservation Easement and is committed to preserving the Conservation Values of the Property and is committed to upholding the terms of this Conservation Easement. The Conservancy is a tax-exempt, nonprofit Michigan Corporation qualified under Internal Revenue Code Sections 501(c)(3) and 170(h)(3) and 170(h)(4)(ii) and (iii); and under the Conservation and Historic Preservation Easement, Sub Part 11 of Part 21 of Natural Resources and Environmental Protection Act, MCL §§ 324.2140 et seq. The Conservancy protects natural habitats of fish, wildlife, plants, and the ecosystems that support them. The Conservancy also preserves open spaces, including farms and forests, where such preservation is for the scenic enjoyment of the general public or pursuant to clearly delineated governmental conservation policies and where it will yield a significant public benefit.

2. CONSERVATION VALUES. The Property possesses natural scenic, historic, open space, scientific, biological, and ecological values ***(DELETE THOSE THAT DO NOT APPLY)*** of prominent importance to the Owner, the Conservancy, and the public. These values are referred to as the "Conservation Values" in this Easement. The Conservation Values include the following:

For example:

A. The Property offers a scenic panorama visible to the public from publicly accessible sites, such as _____which would be adversely affected by modifications of the natural habitat.

B. The Property provides vital corridor wetlands and upland wildlife habitats which serve as a connection for wildlife movement and create a natural "greenway."

C. The Property includes significant natural habitat in which fish, wildlife, plants or ecosystems which support them thrive in a natural state.

D. The Property includes habitat for rare, endangered, or threatened species of animal, fish, plants, or fungi, including: ***(INSERT SPECIES)***.

E. The Property contains natural areas which represent high quality examples of terrestrial or aquatic communities.

F. The Property includes sustainable habitat for diverse vegetation, birds, fish and terrestrial animals.

G. The Property includes a diversity of plant and animal life in an unusually broad range of habitats for a property of its size.

H. The Property is characteristic of **(*INSERT*)**. Its dominant vegetation is **(*INSERT*)** interspersed with ***(INSERT other habitats, streams, important natural features)***. These plant communities are in a relatively natural and undisturbed condition and support the full range of wildlife species found in these habitat types.

I. The Property contains natural wetland areas that provide habitat for aquatic invertebrates, reptiles, amphibians, and aquatic and/or emergent vegetation.

J. The Property includes valued native forest land, which includes diverse native species, trees of many age classes and structural diversity, including a multi-story canopy, standing dead trees and downed logs.

K. The Property provides important natural land within the watershed of **(*INSERT*)**. Protection of the Property in its natural and open space condition helps to ensure the quality and quantity of water resources for the **(*INSERT*)** area.

L. Proximity to the following conserved properties which similarly preserve the existing natural habitat: **(*INSERT*)**.

3. **BASELINE DOCUMENTATION**. Specific Conservation Values of the Property are documented in a natural resource inventory signed by the Owner and the Conservancy. This "Baseline Documentation Report", which is attached hereto as Exhibit __ and incorporated by this reference, consists of maps, a depiction of all existing human-made modifications, prominent vegetation, identification of flora and fauna, land use history, distinct natural features, and photographs. The parties acknowledge that this natural resources inventory, the Baseline Documentation Report, is an accurate representation of the Property at the time of this donation.

4. **PERMITTED USES**. The Owner retains all ownership rights which are not expressly restricted by this Conservation Easement. In particular, the following rights are reserved:

A. Right to Convey. The Owner retains the right to sell, lease, mortgage, bequeath, or donate the Property. Any conveyance will remain subject to the terms of the Conservation Easement and all subsequent Owners are bound by all obligations in this agreement.

B. *Right to Divide Property. The Owner retains the right to make one land division and create two (2) separate parcels. All resulting parcels, including any resulting parcel conveyed, will remain subject to the terms of this Conservation Easement and all subsequent Owners shall be bound by the terms of this Conservation Easement.*

***sample clause. To be used if conditions/negotiations warrant.**

C. Right to Maintain and Replace Existing Structures. The Owner retains the right to maintain, renovate, and replace the existing structure(s) as noted in the Baseline Documentation Report in substantially the same location and size. Any expansion or replacement may not substantially alter the character or function of the structure. Prior to beginning renovation or replacement of the existing structures, the Owner shall provide a written plan to the Conservancy for the Conservancy's review and approval pursuant to the terms set forth in paragraph 6.E. herein.

D. Right to Add, Maintain, and Replace Designated Structures. The Owner retains the right to construct, maintain, and replace the following structures:

At least thirty (30) days prior to initiating any proposed construction the Owner shall deliver a written plan to the Conservancy for review and approval pursuant to the terms set forth in paragraph 6.E. herein. Also, at least 30 days prior to initiating any proposed construction the Owner must install stakes identifying the location of the buildings/structures to allow the Conservancy to confirm their location within the designated Building Envelope.

E. Right to Manage Vegetation *and Conduct Forestry Activities*. The Owner retains the right to cut vegetation *and conduct the following forestry activities* on the Property as follows:

1. Dangerous or diseased trees. Cutting or removing trees or other vegetation is permitted under the following conditions:

   a. to remove dangerous trees;

   b. to remove trees in order to reduce a natural threat of infestation posed by diseased vegetation (as documented by a professional forester or other natural resource specialist and as approved by the Conservancy); or,

   c. to control invasive non-native plant species that endanger the health of native species.

2. Firewood. The Owner retains the right to cut and use trees that are downed as a result of natural occurrence for personal use as firewood provided that said use does not denude the forest floor of dead woody

debris for habitat and soil productivity purposes. Any removal of live trees for the use of or sale as firewood must be outlined as a management activity in the Forest Management Plan (see below).

3. Forest Management. Forest management for the growth and harvest of trees including the production of forest products for use or commercial sale is permitted ***(CHOOSE ONE)*** *on the Property* ***or*** *exclusively within areas designated as Managed Forestland on the Baseline Documentation Map*, if it is conducted in accordance with the following criteria:

   a. the forested character of the Property is maintained for habitat and scenic values;

   b. populations of native plant species and habitat for native animal species is preserved

   c. water quality, wetlands, and riparian zones are protected

   d. it is in accordance with a Forest Management Plan (see below) prepared by a Professional Forester or other qualified natural resources specialist.

   e. it is undertaken in a manner not detrimental to the Conservation Values of the Property.

   f. it is in compliance with the standards set forth in the then current Best Management Practices, as outlined in "Water Quality Management Practices on Forest Land," (1994) Michigan Department of Natural Resources, and in accordance with the recommendations in "Riparian Forest Buffers," (Welsch, 1991) Forest Resources Management, USDA Forest Service, Radnor, PA, NA-PR-07-91, or similar successor publications approved by the Conservancy.

   g. *it is not undertaken in the areas designated as Natural Area on the Baseline Documentation Map.*

4. Forest Management Plan. The Forest Management Plan must be prepared prior to any management activities or harvesting, updated at least every fifteen (15) years, and shall be provided to the Conservancy for review and approval pursuant to the terms set forth in paragraph 6.E. herein.

5. Notice of Commercial Harvest. The Owner shall provide the Conservancy with a written Notice of Harvest at least thirty (30) days prior to commencement of harvesting activities and upon completion, including required reclamation work, which Notice shall include the location of the harvest, contemplated dates, a cutting plan, a plan for ingress and egress, and a summary of activities and practices intended to achieve compliance with the requirements of this paragraph. Timber harvesting shall be conducted under a written contract with competent

operators, which contract shall specify relevant requirements for compliance with this Conservation Easement.

6. Lawns and Gardens. In areas designated as Building Envelope*(s)* on the Baseline Documentation Map, the Owner retains the right to: remove, trim, and otherwise manage vegetation.

F. Right to Conduct Ecological Restoration. The Owner retains the right to conduct ecological restoration on the Property. Ecological Restoration includes, but is not limited to, planting native species, removing non-native or invasive species, installing erosion control structures, or installing fencing necessary for the re-establishment of native vegetation. Such activities shall be conducted pursuant to an Ecological Restoration Plan prepared by a qualified natural resources professional prior to any restoration activities, and provided to the Conservancy for review and approval pursuant to the terms set forth in paragraph 6.E. herein.

G. Right to Add and Maintain Trails *and to Construct Trail-related Structures*. The Owner retains the right to add and maintain trails (by removing groundcover and shrubs and trimming tree branches) on the Property, *except in the area designated as Natural Area on the Baseline Documentation Map,* for low-impact pedestrian use provided such removal and trimming does not adversely impact the Conservation Values of the Property. Said removal and trimming does not include the right to remove trees.

The Owner also retains the right to construct and maintain benches, elevated walkways, and small pedestrian bridges on the Property provided such construction does not adversely impact the Conservation Values of the Property. ***NOTE: this may require plan review and approval.***

H. Right to Maintain Agricultural Operations. The Owner retains the right to maintain agricultural uses only in areas designated as Agriculture on Baseline Documentation Map. Agricultural use is defined as undeveloped land devoted to the production of horticultural, silvicultural and agricultural crops and animals, including fruits, nuts, vegetables, mushrooms, Christmas trees, grains and feed crops, dairy and dairy products, livestock, including breeding, boarding and grazing, and the following related uses and activities:

1. Composting of agricultural plants, trees and vines, animal manure and residential lawn materials in accordance with the Conservation Plan (see below);
2. The lying fallow or nonuse of the Property;
3. Construction of standard structures for the purpose of supporting vine or other fruit and vegetable crops such as a trellis is permitted.
4. Excavation for the purposes consistent with agricultural uses, such as irrigation pipes, for use on the farm is permitted. Disrupted surfaces shall be restored in a manner consistent with agricultural uses, including replacement of a minimum of four (4) inches of topsoil and seeding within a reasonable period of time after disruption.

There shall be no commercial confinement facilities for livestock, swine, or poultry, commonly known as factory farms, on the Property.

Conservation Plan Requirements: Agricultural uses as defined above must be conducted in accordance with a certified Conservation Plan, completed by an agricultural specialist from the USDA Natural Resources Conservation Service, Michigan Department of Agriculture, or Michigan State University Extension.

I. Right to Construct and Maintain Wildlife Hunting and Viewing Blinds. The Owner retains the right to construct and place blinds on the Property for the purpose of hunting and viewing wildlife. Blinds shall not have a foundation constructed with concrete or other permanent materials. The Owner may affix permanent tree stands that are constructed from wood or fasten tree stands that are portable and non-permanent made from any material that is common or standard for these devices.

Along with this right, the Owner retains the right to trim branches less than or equal to one (1) inch in diameter for the purpose of creating shooting/viewing lanes, provided such trimming does not adversely impact the Conservation Values of the Property.

J. Right to Exploit Subsurface Mineral Resources.

The Owner retains the right to extract oil, gas, hydrocarbons, or petroleum from the Property for commercial purposes provided that no exploration for, or extraction of, minerals shall be conducted from the surface of the Property. The Owner may enter into a non-developmental lease if said lease is part of a pool for oil, gas, hydrocarbons or petroleum which solely permits the extraction of oil, gas, hydrocarbons, or petroleum. Extraction shall not involve any surface alteration of the Property or construction or placement of any structures, including pipelines, on, over, across, or under the Property .Extraction of non-hydrocarbon or petroleum minerals, such as, sand, gravel, rock or peat, is prohibited.

K. Right to Conduct Home Occupation Commercial Activities. The Owner retains the right to conduct limited home occupation commercial activities confined to the Building Envelope provided said activities are not detrimental to the Conservation Values of the Property.

L. Right to Operate Motorized Vehicles. The Owner retains the right to operate motorized vehicles on the Property on the established driveways, trails, and parking areas indicated in the Baseline Documentation Report. The Owner also retains the right to operate motorized vehicles off-road on the Property for the purpose of achieving the permitted maintenance/management uses described herein *and for the Owners personal access. However, the right to operate motorized vehicles offroad may be extinguished if the Conservancy determines*

that use of ORV's is adversely impacting the Conservation Values of the Property.

M. Right to Place Signs. The Owner retains the right to place up to *three (3)* signs, each no larger than *six (6)* square feet in size, on the Property at one time. However, signs commonly used for prohibiting unauthorized access or use may be placed along the boundaries of the property. In order to maintain the scenic Conservation Values protected by this Conservation Easement, any other signs placed on the Property require written Conservancy consent.

5. PROHIBITED ACTIONS. Any activity on or use of the Property which is inconsistent with the Purposes of this Conservation Easement or which is detrimental to the Conservation Values is expressly prohibited. By way of example, but not by way of limitation, the following activities and uses are explicitly prohibited:

A. Division. Any division or subdivision of the Property is prohibited, ***except as specified in paragraph 4B.*** This prohibition is intended to exclude the possibility that any portion of the Property is conveyed apart from the whole, effectively consolidating any and all individual parcels into one contiguous parcel which cannot be divided.

B. Commercial Activities. Any commercial activity on the Property is prohibited, except for de minimus commercial recreational activities and as specified in Section 4. herein.

C. Industrial Activities Any industrial activity on the Property is prohibited.

D. Construction. The placement or construction on the Property of any man-made modification, such as buildings, structures, fences, bridges, dams, broadcast towers, roads and parking lots is prohibited*, except as specified in Section 4. Permitted Uses herein.*

E. Cutting Vegetation. Cutting down or otherwise destroying or removing trees or other vegetation whether living or dead is prohibited, *except as specified in Section 4. Permitted Uses herein.*

F. Land Surface Alteration. Any mining or alteration of the surface of the land is prohibited, including any substance that must be quarried or removed by methods that will consume or deplete the surface estate, including, but not limited to, the removal of topsoil, sand, gravel, rock, and peat. In addition, exploring for, developing, and extracting oil, gas, hydrocarbons, or petroleum products is prohibited, except as specified in *paragraph 4._*. herein.

G. Dumping. Processing, storage, dumping, or disposal of liquid or solid waste, refuse, or debris on the Property is prohibited, except for human waste in a properly designed and authorized waste system.

H. Water Course Alteration. Natural water courses, lakes, wetlands, or other bodies of water may not be altered*, except as specified in paragraph 4.__. herein.*

I. Livestock. The raising or housing of livestock, poultry or horses, the commercial kenneling of animals or conducting commercial aquaculture on the Property is prohibited, *except as specified in paragraph 4.__. herein.*

J. Off-Road Recreational Vehicles. Motorized off-road vehicles such as, but not limited to, snowmobiles, dune buggies, all-terrain vehicles, and motorcycles may not be operated off designated roads on the Property, *except as specified in paragraph 4.__. herein.*

K. Signs and Billboards. Billboards are prohibited. Signs are only permitted as specified in paragraphs *4.__.* and 6D. herein.

6. RIGHTS OF THE CONSERVANCY. The Owner confers the following rights upon the Conservancy to perpetually maintain the Conservation Values of the Property:

A. Right to Enter. The Conservancy has the right to enter the Property at reasonable times to monitor the Conservation Easement Property. Furthermore, the Conservancy has the right to enter the Property at reasonable times to enforce compliance with, or otherwise exercise its rights under, this Conservation Easement. The Conservancy may not, however, unreasonably interfere with the Owner's use and quiet enjoyment of the Property. The Conservancy has no right to permit others to enter the Property. The general public is not granted access to the Property pursuant to this Conservation Easement.

B. Right to Preserve. The Conservancy has the right to prevent any activity on or use of the Property that is inconsistent with the Purposes of this Conservation Easement or detrimental to the Conservation Values of the Property.

C. Right to Require Restoration. The Conservancy has the right to require restoration of the areas or features of the Property which are damaged by any activity inconsistent with this Conservation Easement.

D. Signs. The Conservancy has the right to place signs on the Property which identify the land as protected by this Conservation Easement. The number and location of any signs are subject to the Owner's approval.

E. Right to Review and Approve. Wherever herein the Conservancy is granted the right to review and approve any proposed plan for the use, modification, restoration or exploitation of any portion of the Property or improvements thereon, such approval shall be granted or denied by the Conservancy, in writing, within thirty (30) days of the date the Owner delivers notice of the proposed plan, unless otherwise provided herein. The Conservancy's approval may be withheld only upon a reasonable determination by the Conservancy that the proposed action(s) would be inconsistent with the terms of this Conservation Easement or

detrimental to the Conservation Values of the Property. The Conservancy may obtain an additional thirty (30) day period to examine a proposed plan by notifying the Owner of its intent to extend the time within the original thirty (30) day period.

If the Conservancy fails to provide or deny approval within ninety (90) days, the approval shall conclusively be presumed to have been granted, and the Owner shall not be held liable for any action taken consistent with the proposed plan.

7. CONSERVANCY REMEDIES. This section addresses cumulative remedies of the Conservancy and limitations on these remedies.

A. Delay in Enforcement. A delay in enforcement shall not be construed as a waiver of the Conservancy's right to enforce the terms of this Conservation Easement.

B. Acts Beyond Owner's Control. The Conservancy may not bring an action against the Owner for modifications to the Property resulting from causes beyond the Owners' control, including, but not limited to, unauthorized actions by third parties, natural disasters such as unintentional fires, floods, storms, natural earth movement, or an Owner's well-intentioned actions in response to an emergency resulting in changes to the Property. The Owner has no responsibility under this Conservation Easement for such unintended modifications.

C. Notice and Demand. If the Conservancy reasonably believes that the Owner is in violation of this Conservation Easement, or that a violation is threatened, the Conservancy shall provide written notice to the Owner. The written notice will identify the violation and request corrective action to cure the violation and, where the Property has been injured, outline the corrective action necessary to restore the Property.

However, if the Conservancy determines, at its sole discretion, that the violation constitutes immediate and irreparable harm, no written notice is required prior to the Conservancy pursuing its legal remedies to prevent or limit harm to the Conservation Values of the Property. Furthermore, in the event the Conservancy sent written notification of the violation and during the 28-day cure period defined below, the violation constitutes immediate and irreparable harm, the Conservancy may pursue its legal remedies without waiting for the cure period to expire.

Furthermore, if the Conservancy determines that this Conservation Easement is, or is expected to be violated, and the Conservancy's good-faith and reasonable efforts to notify the Owner are unsuccessful, the Conservancy may pursue its lawful remedies to mitigate or prevent harm to the Conservation Values without prior notice and without awaiting the Owner's opportunity to cure. The Owner agrees to reimburse all reasonable costs associated with this effort.

D. Failure to Act. If, within 28-days after written notice, the Owner does not implement corrective measures requested by the Conservancy, the Conservancy may bring an action in law or in equity to enforce the terms of the Conservation Easement. In the case of immediate or irreparable harm, or if an Owner is unable to be notified, the Conservancy may invoke these same remedies without notification and/or awaiting the expiration of the 28-day period.
The Conservancy is entitled to enjoin the violation through temporary or permanent injunctive relief and to seek specific performance, declaratory relief, restitution, reimbursement of expenses, and/or an order compelling the Owner to restore the Property. If the court determines that the Owner has failed to comply with this Conservation Easement, the Owner shall also reimburse the Conservancy for all reasonable litigation costs and reasonable attorney's fees, and all costs of corrective action or Property restoration incurred by the Conservancy.

E. Unreasonable Litigation. If the Conservancy initiates litigation against the Owner to enforce this Conservation Easement, and if the court determines that the litigation was initiated without reasonable cause or in bad faith, then the court may require the Conservancy to reimburse the Owner's reasonable costs and reasonable attorney's fees in defending the action.

F. Actual or Threatened Non-Compliance. The Conservancy's rights under this Paragraph, Conservancy Remedies, apply equally in the event of either actual or threatened violations of the terms of this Easement. The Owner agrees that the Conservancy's remedies at law for any violation of the terms of this Easement are inadequate and that the Conservancy shall be entitled to injunctive relief, both prohibitive and mandatory, in addition to such other relief to which the Conservancy may be entitled, including specific performance of the terms of this Conservation Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies.

G. Conservancy's Discretion. The Conservancy has discretion to enforce, forbear or delay to exercise its rights under this Conservation Easement. The Conservancy may, at its sole discretion, forbear its right to enforce specific Prohibited Actions of this Conservation Easement if circumstances unforeseen at the time of the conveyance of this easement warrant minor actions for reasonable purposes provided that such actions do not impair the Conservation Values of the Property or are inconsistent with the overall Purposes of this Conservation Easement. Forbearance. The Conservancy shall have the right to forbear or delay any exercise of its remedies under this agreement if the Conservancy, in its sole discretion, determines that such forbearance or delay would have a de minimis impact on the Conservation Values of the Property and is not inconsistent with the purpose of this Conservation Easement.

H. Cumulative Remedies. The preceding remedies of the Conservancy are cumulative. Any, or all, of the remedies may be invoked by the Conservancy if there is an actual or threatened violation of this Conservation Easement.

8. **AMENDMENT.** This Conservation Easement may be amended only under the following circumstances:

A. Clerical Errors. An Amendment is allowed to correct clerical errors in the recorded document, such as an inaccuracy in a legal description.

B. Additional Property. An amendment may be allowed to add real property to the legal description and, therefore, preserve additional land.

C. Enhancement of Conservation Values. Any other Amendment may be allowed if the Conservancy determines, in its sole discretion, that the amendment would enhance the Conservation Values and/or strengthen the restrictions set forth in the original easement.

D. Consent of the Owner. Any amendment must be mutually agreed upon by the Owner and the Conservancy, signed and recorded at the Grand Traverse County Register of Deeds.

9. **SUBORDINATION.** Any mortgage or lien arising after the date of this Conservation Easement shall be subordinated to the terms of this easement.

10. ***MORTGAGE SUBORDINATION.*** *At the time of conveyance of this Conservation Easement, the Property is subject to a mortgage, the holder of which has agreed by separate instrument, a copy of which is attached hereto as Exhibit __ and incorporated by this reference, to subordinate its rights in the Property to the extent necessary to permit the Conservancy to enforce the purpose of this Conservation Easement in perpetuity and to prevent any modification or extinguishment of this Conservation Easement by the exercise of any rights of the mortgage holder.*

11. **CONSERVATION EASEMENT REQUIREMENTS UNDER MICHIGAN LAW AND US TREASURY REGULATIONS AND ESTABLISHED RELEVANT PUBLIC POLICY**.

A. This Conservation Easement is established pursuant to the Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Protection Act (NREPA) - MCL §§ 324.2140 *et seq*.

B. The State of Michigan has recognized the importance of protecting our natural resources as delineated in the Constitution of State of Michigan; 1963, Article IV, Section 52: The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety, and general welfare of the people. The legislature shall provide for the protection of the air, water, and other natural resources of the state from pollution, impairment, and destruction.

C. This Conservation Easement is established for conservation purposes pursuant to the Internal Revenue Code, as amended at Title 26, U.S.C.A., Section 170(h)(1)-(6) and Sections 2031(c), 2055 and 2522, and under "Treasury Regulations at Title 26 C.F.R. § 1.170A-14 *et seq*, as amended.

D. The Conservancy is qualified to hold conservation easements pursuant to the Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Protection Act (NREPA) - MCL

§§ 324.2140 *et seq*., and under IRC Section 170(h)(3), to wit: a publicly funded, non-profit 501(c)(3) organization operated primarily to accept lands and easements for the purpose of preserving and protecting natural, scenic, educational, recreational, and open space values of real property; and having a commitment to protect the Conservation Purposes of this Conservation Easement, and the resources to enforce the restrictions hereof.

E. The Property is preserved pursuant to a clearly delineated federal, state, or local conservation policy and yields a significant public benefit. The following legislation, regulations, and policy statements establish relevant public policy: ***(For a more extensive list of conservation/preservation/environmental laws, see the Appendix):***

- Water Pollution Control Act of 1972, 33 USC §§ 1251 - 1387 (§1251 Goals & Policy; § 1344 Wetlands permitting, a.k.a. "Section 404" Clean Water Act.);
- Coastal Zone Management Act, 16 USC §§ 1451 *et seq*.; (§§ 1451, 1452 Congressional Findings and Policy.);
- Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.2140 *et seq*.;
- Shorelands Protection and Management, Part 323 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.32301 *et seq*.;
- Sand Dune Protection and Management, Part 353 of the Michigan Natural Resources and Environmental Protection Act, MCL §§ 324.35301 *et seq*.; (Legislative Findings MCL § 324.35302);
- Wetland Protection, Part 303 of the Michigan Natural Resources and Environmental Act - MCL §§ 324.30301 *et seq*.; (Legislative Findings MCL § 324.30302);
- Inland Lakes and Streams, Part 301 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.30101 *et seq.*;
- Great Lakes Submerged Lands, Part 325 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.32501 *et seq*.;
- Farmland and Open Space Preservation, Part 361 of the Michigan Natural Resources and Environmental Protection Act - MCL §§ 324.36101 *et seq*.;
- Soil Conservation, Erosion, and Sedimentation Control, Parts 91 & 93 of Michigan Natural Resources and Environmental Protection Act – MCL §§ 324.9101 *et seq;* 324.9301 *et seq*; (Legislative Policy § 324.9302);
- Biological Diversity Conservation, Part 355 of the Michigan Natural Resources and Environmental Protection Act, MCL §§ 324.35501 *et seq*.; (Legislative Findings MCL § 324.35502);

PUBLIC POLICY:

F. The ***(INSERT)*** governmental agency has endorsed the proposed scenic view of the Property under a landscape inventory, pursuant to a review process.

G. The **(*INSERT*)** office has recognized the importance of the Property as an ecological and scenic resource, by designating this and other land as **(*INSERT*)**.

H. The Township / County of **(*INSERT*)** has designated this area as **(*INSERT*)** in its Comprehensive Plan dated **(*INSERT*)**.

12. OWNERSHIP COSTS AND LIABILITIES. In accepting this Conservation Easement, the Conservancy shall have no liability or other obligation for costs, liabilities, taxes, or insurance of any kind related to the Property. The Conservancy's rights do not include the right, in absence of a judicial decree, to enter the Property for the purpose of becoming an operator of the Property within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act. The Conservancy, its members, trustees or directors, officers, employees, and agents have no liability arising from injury or death to any person or physical damage to any property on the Property. The Owner agrees to defend the Conservancy against such claims during the tenure of the Owner's ownership of the Property.

13. CESSATION OF EXISTENCE. If the Conservancy shall cease to exist or if it fails to be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3), or if the Conservancy is no longer authorized to acquire and hold conservation easements, then this Conservation Easement shall become vested in another entity. This entity shall be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3). The Conservancy's rights and responsibilities shall be assigned to any entity having similar conservation purposes to which such right may be awarded under the *cy pres* doctrine.

14. TERMINATION. This Conservation Easement may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Conservation Easement's purposes, or by exercise of eminent domain.

A. Unexpected Change in Conditions. If subsequent circumstances render the Purposes of this Conservation Easement impossible to fulfill, then this Conservation Easement may be partially or entirely terminated only by judicial proceedings. The Conservancy will then be entitled to compensation in accordance with the provisions of IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).

B. Eminent Domain. If the Property is taken, in whole or in part, by power of eminent domain, then the Conservancy will be entitled to compensation by the same method as is set forth in IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).

15. LIBERAL CONSTRUCTION. This Conservation Easement shall be liberally construed in favor of maintaining the Conservation Values of the Property and in accordance with the Conservation and Historic Preservation Easement, Sub part 11 of Part 21 of the Michigan Natural Resources and Environmental Code MCL 324.2140 *et seq.*

16. **NOTICES**. For purposes of this agreement, notices may be provided to either party by personal delivery or by mailing a written notice to the party (at the address shown at the top of this agreement, or at last known address of a party) by First Class mail. All notices shall be deemed to have been duly given when hand delivered or when deposited, properly addressed, with the US Postal Service with sufficient pre-paid postage.

17. **SEVERABILITY**. If any portion of this Conservation Easement is determined to be invalid, the remaining provisions will remain in force.

18. **SUCCESSORS**. This Conservation Easement is binding upon, and inures to the benefit of, the Owner's and the Conservancy's successors in interest. All subsequent Owners of the Property are bound to all provisions of this Conservation Easement to the same extent as the current property owner.

19. **TERMINATION OF RIGHTS AND OBLIGATIONS**. A party's future rights and obligations under this Conservation Easement terminate upon transfer of that party's interest in the Property. Liability for acts or omissions occurring prior to transfer will survive the transfer.

20. **MICHIGAN LAW**. This Conservation Easement will be construed in accordance with Michigan Law.

21. **EXHIBITS**. This Conservation Easement includes, and incorporates herewith, the following Exhibits:

A. Exhibit A – Legal Description
B. Exhibit B – Baseline Documentation Map
C. Exhibit C – Baseline Documentation Report
D. Exhibit D – Mineral Rights Subordination Agreement
E. Exhibit E – Mortgage Subordination Agreement

22. **ENTIRE AGREEMENT**. This Conservation Easement sets forth the entire agreement of the parties. It is intended to supersede all prior discussions or understandings.

Exhibit B
Conservation Easement Sample 2

CONSERVATION EASEMENT

(This instrument is exempt from County and State transfer taxes pursuant to MCL 207.505(a) and MCL 207.526, respectively)

This CONSERVATION EASEMENT is created _____, 200___, by and between _____, a _____ _____, whose address is _____ _____("**Grantor**"), and the GEOLOGICAL AND LAND MANAGEMENT DIVISION of the MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY ("**MDEQ**"), whose address is Constitution Hall, 525 West Allegan Street, P.O. Box 30458, Lansing, Michigan 48909-7958 ("**Grantee**");

The Grantor is the title holder of real property located in the City of _____, _____ County, and State of Michigan, more fully described in Exhibit B.

The Geological and Land Management Division of the MDEQ is the agency charged with administering Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act, 1994 PA 451, as amended ("**NREPA**"), and

Permittee has applied for a permit pursuant to Part 303 to authorize activities that will impact regulated wetland. The Geological and Land Management Division of the MDEQ evaluated the permit application and determined that a permit could be authorized for certain activities within regulated wetlands provided certain conditions are met, and

Permittee has agreed to grant the MDEQ a conservation easement that protects the wetland mitigation site and/or the remaining wetlands on the property and restricts further development to the area described in Exhibit A. The MDEQ shall record the conservation easement with the county register of deeds.

ACCORDINGLY, Grantor conveys this Conservation Easement to Grantee pursuant to Subpart 11 of Part 21, Conservation and Historic Preservation Easement, of the NREPA, MCL 324.2140 *et seq,* on the terms and conditions stated below.

1. The property subject to this Conservation Easement (the "**Easement Premises**") consists of approximately _____ acres, legally described as follows:

[Legal Description]

(A map depicting the Easement Premises is attached as Exhibit A. Exhibit C provides a description of the public access to Conservation Easement Area #1, #2, #3 and #4)

2. The purpose of this Easement is to protect the wetland functions and values existing on the Easement Premises by requiring Grantor to maintain the Easement Premises in its natural and undeveloped condition.

3. Except as authorized under MDEQ Permit #_____ or as provided in paragraph 5 (and paragraph 4, if appropriate), Grantor shall refrain from, and prevent any other person from, altering or developing the Easement Premises in any way. This includes, but is not limited to, the alteration of the topography, the creation of paths or trails, the placement of fill material as defined in Part 303, the dredging, removal, or excavation of any soil or minerals, the draining of surface water, the construction or placement of any structure, plowing, tilling or cultivating, and the alteration or removal of vegetation.

4. Grantor shall not be responsible for modifications to the Property resulting from the causes beyond the owner's control, including, but not limited to, unauthorized actions by third parties that were not reasonably foreseeable or natural disasters such as unintentional fires, floods, storms, or natural earth movement.

5. With the prior approval of the Grantee, the Grantor may perform activities associated with the construction or maintenance of the mitigation project within the Easement Premises. Grantor shall provide 5 days notice of undertaking any mitigation activity even if the mitigation project has been conceptually approved. Any activities undertaken pursuant to this paragraph shall be performed in a manner to minimize the adverse impacts to existing wetland or mitigation areas.

6. Grantor warrants that Grantor has good and sufficient title to the Property, and that any other existing interests in the Property have been disclosed to the MDEQ

and subordinated as necessary. (The subordination agreement is attached as Exhibit D.)

7. The Grantor warrants that the Grantor has no knowledge of hazardous substances or hazardous wastes on the property.

8. This Conservation Easement does not grant or convey to Grantee or members of the general public any right to possession or use of the Easement Premises, except for the access provided in paragraph 9.

9. Grantor shall continue to have all rights and responsibilities as owner of the property subject to the Easement.

10. Upon reasonable notice to Grantor, Grantee, and its authorized employees and agents, may enter the Easement Premises to determine whether they are being maintained in compliance with the terms of this Conservation Easement and for the purpose of taking corrective actions if Permittee for Permit #_____ fails to comply with the mitigation conditions of the permit.

11. This Conservation Easement shall be binding upon the successors and assigns of the parties and shall run with the land in perpetuity unless modified or terminated by written agreement of the parties.

12. This Conservation Easement may be enforced by either an action at law or in equity and shall be enforceable against any person claiming an interest in the Easement Premises despite a lack of privity of estate or contract.

13. Grantor shall indicate the existence of this Conservation Easement on all deeds, mortgages, land contracts, plats, and any other legal instrument used to convey an interest in the Easement Premises.

14. Within 90 days after this Conservation Easement is executed, Grantor, at its sole expense, shall place signs, fences, or other suitable markings along the boundary of the Easement Premises to clearly demarcate the boundary of the Easement Premises.

IN WITNESS WHEREOF, the parties have executed this Agreement on the date first above written. Signed in the presence of:

WITNESSES:	GRANTOR:
Signature: _____	Signature: _____
_____	_____
Type/Print Name	Type/Print Name
Signature: _____	_____
	Title
_____	_____
Type/Print Name	Organization Name

STATE OF MICHIGAN }
} ss
COUNTY OF _____}

The foregoing instrument was acknowledged before me this _____day of _____, 200___, by _____, the_____ of _____ _____, a _____, on behalf of the _____ _____.

_____
Notary Public, _____ County, Michigan
My Commission Expires: _____

WITNESS:

Signature: _____

_____
Type/Print Witness' Name

GRANTEE:

STATE OF MICHIGAN
DEPARTMENT OF
ENVIRONMENTAL QUALITY
GEOLOGICAL AND LAND
MANAGEMENT DIVISION

_____

Its _____

STATE OF MICHIGAN }
} ss
COUNTY OF _____ }

The foregoing instrument was acknowledged before me this _____day of _____, 200____, by _____, Geological and Land Management Division, Chief, State of Michigan, on behalf of the Michigan Department of Environmental Quality.

_____
Notary Public, _____ County,
Michigan
My Commission Expires: _____

AFTER RECORDING, RETURN TO:

Geological and Land Management Division
525 West Allegan Street
P.O. Box 30458
Lansing, Michigan 48909-7958
Michigan Department of Environmental Quality

Exhibit C
Conservation Easement Sample 3

CONSERVATION EASEMENT

(NOTE TO USER: Please delete the indented "Explanation" sections from the final copy to be signed by the Donor and the Conservancy)

DATE:

DONOR: _____, husband and wife

CONSERVANCY: (Conservancy/Organization Name and Address)

> **EXPLANATION:** The words "Grantor" and "Grantee" are commonly used in conveyancing forms. These words could appear in a warranty deed as well as in a quit claim deed. The words "Donor" and "Conservancy" similarly offer no insight into whether this is a conveyance with or without warranties. The term "Donor" may be preferable to "Grantor" since it more accurately captures the nature of the gift. On the other hand, the term "Donee" seems legalistic or cumbersome. Therefore this form identifies the recipient of the easement as the "Conservancy". The term "Donor" is used in its singular form the agreement. Although the singular convention might seem awkward for husband and wife donors, any of the alternatives also have disadvantages. A plural convention would probably be more offensive for a singular donor. The use of one agreement form for a single and a separate form for multiple donors has administrative difficulties. The form will inevitably undergo revision in the future. Particular attention will then be required to assure all eventual changes are incorporated in both forms. There is also a risk of accidentally substituting a plural for a singular form. What started out as a multiple, may eventually become a single, donor (or visa versa) before signing. Since each of the agreements will be separately word-processed, it would be tedious to assure that all word-processed changes follow through the substitution of one form for another. In balance, the semantic disadvantages of the singular "Donor" convention seem to be outweighed by the advantages.

PROPERTY: In _____ Township, _____ County, Michigan:

> **EXPLANATION:** The full legal description should be inserted here. A street address will not suffice. The legal description will commonly be derived from a prior deed, a title commitment or a survey.

CONVEYANCE: The Donor conveys and warrants to the Conservancy a perpetual Conservation Easement over the Property. The scope of this Conservation Easement is set forth in this agreement. This conveyance is a gift from the Donor to the Conservancy.

> **EXPLANATION**: The Conservation Easement must be perpetual in order to be tax-deductible. The preceding provisions includes a warranty of title. A quit claim would also be sufficient to convey title and for tax deductibility, but it lacks the Donor's assurance of ownership. Under a quit claim the Conservancy could not require the Donor to satisfy an existing mortgage. The Donor represents "fee title" ownership in a subsequent provision. In some cases, the Conservancy may require a warranty of title. The statutory warranty deed form uses the phrase "conveys and warrants". Alternatively, the statutory quit claim simply defines the conveyance as a "quit claim". The word "conveys" invokes principles of "conveyancing" laws, albeit without warranties. The word "quitclaim" sounds less respectful of the Donor's intent than the word "convey". If a conveyance is to be without warranties of title, the word "convey" is preferred to the words "quit claim".

CONSERVATION VALUES: The Property possesses natural, scenic, open space, scientific, biological and ecological values of prominent importance to the Donor, the Conservancy and the public. These values are referred to as the "Conservation Values" in this easement.

> **EXPLANATION:** Conservation easements traditionally set forth a broad range of "conservation values". These conservation values appear in subsequent portions of the easement to prescribe the rights and responsibilities of the parties. The conservation values are also specifically explained to meet the criteria for tax purposes.

PURPOSE OF THIS CONSERVATION EASEMENT:

A. The Donor is the fee simple title owner of the Property, and is committed to preserving the Conservation Values of the Property. This Conservation Easement assures that the Property will be perpetually preserved in its predominately (natural, scenic, historic, agricultural, forested, open space) condition. Any use of the Property which may impair or interfere with the Conservation Values are expressly prohibited. Donor agrees to confine use of the Property to activities consistent with the purposes of this easement and preservation of the Conservation Values.

> **EXPLANATION:** This paragraph sets forth generic conservation values. It is patterned after the conservation purposes set forth in IRC Section 170(h). The generic conservation values in the preceding paragraph are followed by more specific references.

B. The Conservancy is a tax-exempt, nonprofit Michigan corporation qualified under Internal Revenue Code Sections 501(c)(3) and 170(h)(3) and 170(h)(4)(ii) and (iii); the Conservation and Historic Preservation Easement Act, MCL 399.251 et seq. The Conservancy protects natural habitats of fish, wildlife, plants or similar ecosystems. The Conservancy also preserves open spaces, including farms and

forests, where such preservation is for the scenic enjoyment of the general public or pursuant to clearly delineated governmental conservation policies and where it will yield a significant public benefit.

EXPLANATION: The Conservancy should confirm that it is, in fact, qualified under the cited statutes.

C. The Property has the following specific Conservation Values:

* Significant natural habitat in which fish, wildlife, plants or a similar ecosystem thrive in a natural state.

* Habitat for rare, endangered or threatened species of animal, fish or plants.

* Natural areas which represent high quality examples of terrestrial or aquatic community.

* It consists entirely of "prime farmland" and "farmland of local importance" as classified by the U.S. Department of Agriculture and the Soil Conservation Service.

* A natural area which contributes to the ecological viability of a local, state or national park, nature preserve, wildlife refuge, wilderness area or other similar conservation area.

* It is preserved pursuant to a clearly delineated federal, state or local conservation policy and yields a significant public benefit. The following legislation establishes relevant public policies: the Water Pollution Control Act of 1972, 33 USC 404 et seq; the Coastal Zone Management Act, 16 USC '1451 et seq; the Michigan Shorelands Protection and Management Act of 1970, MCL 281.631 et seq; the Goemaere-Anderson Wetland Protection Act of 1979, MCL 281.701 et seq; the Inland Lakes and Streams Act, MCL 281.951 et seq; the Great Lakes Submerged Lands Act, MCL 322.701 et seq; the Michigan Farmland and Open Space Preservation Act of 1974, MCL 554.702 et seq; the Conservation and Historic Preservation Easement Act, MCL 399.251 et seq; and the _____.

EXPLANATION: Any other legislation or local ordinance should be mentioned in the blank. There may, for example, be a local wetlands ordinance.

* A scenic landscape and natural character which would be impaired by a modification of the Property.

* A scenic panorama visible to the public from publicly accessible sites which would be adversely affected by modifications of the natural habitat.

* Relief from urban closeness.

* Harmonious variety of shapes and textures for the scenic enjoyment of the public.

* The _____ governmental agency has endorsed the proposed scenic view of the Property under a landscape inventory, pursuant to a review process.

* Valued wetlands, as described in Goemaere-Anderson Wetland Protection Act of 1979; MCL 281.701 et seq.

* Sustainable habitat for biodiverse vegetation, birds, fish, and terrestrial animals.

* A diversity of plant and animal life in an unusually broad range of habitats for property of its size.

* A natural habitat for the endangered or threatened _____.

* Proximity to the following conserved properties which similarly preserve the existing natural habitat: . . .

EXPLANATION: List other conserved properties, such as nature preserves, state land, parks, eased properties, etc.

* Preservation of the Property enables the Donor to integrate the Conservation Values with other neighboring lands.

* The _____ office has recognized the importance of the Property as an ecological and scenic resource, by designating this and other land as a _____.

* Prominent visibility to the public from _____, and if preserved in its natural state it will enhance tourism.

* Biological integrity of other land in the vicinity has been modified by intense urbanization, and the trend is expected to continue.

* There is a reasonable possibility that the Conservancy may acquire other valuable property rights in other nearby properties to expand the Conservation Values preserved by this Conservation Easement.

EXPLANATION: As distinguished from the generic conservation values, the preceding list sets forth specific reference points for the Conservation Easement. To some extent it may parallel the baseline information. Treasury Regulation 1.170A-14(d) identifies essentially four "conservation purposes", only two of which are generally relevant to conservation easements. One of the other two requires the property to be open to the general public and the other pertains to historically important land or certified historical structures. The two relevant provisions read as follows:

(ii) Protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem, within the meaning of paragraph (d)(3) of this section,

(iii) The preservation of certain open space (including farmland and forest land) within the meaning of paragraph (d)(4) of this section,

The specific conservation purposes should be enumerated. Furthermore, baseline information will likely be prepared at approximately the same time. The preceding exhaustive list of conservation purposes is intended to be word-processed with the expectation that only a handful of the specific paragraphs will actually be in any particular conservation easement agreement. The preceding list is prepared on the theory that it's easier to word-process out (i.e. delete) revisions than to word-process them in from somewhere else. The preceding list specifically excludes conservation purposes found in the regulations for outdoor recreation of the general public, since these provisions would be more applicable to nature preserves than to eased property. A number of the provisions have been copied directly out of the Treasury Regulations. For example, the somewhat awkward "relief from urban closeness" is "IRS-ese" from the Treasury Regulations.

D. Specific Conservation Values of the Property have been documented in a natural resource inventory signed by the Donor and Conservancy. This "Baseline Documentation" consists of maps, a depiction of all existing man-made modifications, prominent vegetation, identification of flora and fauna, land use history, distinct natural features, and photographs. The parties acknowledge that this natural resources inventory (the Baseline Documentation) is an accurate representation of the Property at the time of this donation.

EXPLANATION: Treasury Regulation 1.170A-14(g)(5)(i) requires Baseline Documentation for an allowable tax deduction. The documentation must establish the condition of the property at the time of the gift. Both parties must sign a statement substantially in the following form: "This natural resources inventory is an accurate representation of (the protected Property) at the time of the transfer." It's not necessary for the Baseline Documentation to be incorporated into the conservation easement. The preceding provision contains the essential language from the Treasury Regulations. This assures that the requirement of a signed statement will not be overlooked or accidentally discarded. Notwithstanding this provision, it is still advisable for both parties to sign the Baseline Documentation.

THE PARTIES AGREE TO THE FOLLOWING TERMS OF THIS CONSERVATION AGREEMENT:

1. PROHIBITED ACTIONS. Any activity on or use of the Property inconsistent with the purposes of this Conservation Easement or detrimental to the Conservation Values is expressly prohibited. By way of example, the following activities and uses are explicitly prohibited:

a. Division. Any division or subdivision of the Property is prohibited.

EXPLANATION: Any exceptions to the prohibition against subdividing should be noted here.

b. Commercial Activities. Commercial or industrial activity is prohibited.

EXPLANATION: Any exceptions, such as a small business activity taking place out of a home or existing building and which does not require additional structures beyond the modifications authorized in this easement should be noted here.

c. Construction. The placement or construction of any man-made modification, such as buildings, structures, fences, roads and parking lots is prohibited.

EXPLANATION: Any exceptions to the prohibition against construction should be noted here.

d. Cutting Vegetation. Any cutting of trees or vegetation is prohibited.

EXPLANATION: Any exceptions to the prohibition against cutting vegetation should be noted here.

e. Land Surface Alteration. Any mining or alteration of the surface of the land is prohibited.

f. Dumping. Waste and unsightly or offensive materials is not allowed and may not be accumulated on the Property.

g. Water Courses. Natural water courses, lake shores, wetlands, or other water bodies may not be altered.

h. Off Road Vehicles. Motorized off-road vehicles, such as snowmobiles, dune buggies, all terrain vehicles and motorcycles may not be operated on the Property.

i. Billboards. Billboards and signs are prohibited. A sign may, however, be displayed to state:

- The name and address of the Property.
- The owner's name.
- The area protected by this Conservation Easement.
- Prohibition of any unauthorized entry or use.
- An advertisement for the sale or rent of the Property.

2. RIGHTS OF THE CONSERVANCY. The Donor confers the following rights upon the Conservancy to perpetually maintain the Conservation Values of the Property:

a. Right to Enter. The Conservancy has the right to enter the Property at reasonable times to monitor or to enforce compliance with this Conservation Easement. The Conservancy may not, however, unreasonably interfere with the Donor's use and quiet enjoyment of the Property. The Conservancy has no right to permit others to enter the Property. **The general public is not granted access to the Property under this Conservation Easement.**

b. Right to Preserve. The Conservancy has the right to prevent any activity on or use of the Property that is inconsistent with the purposes of this easement.

c. Right to Require Restoration. The Conservancy has the right to require restoration of the areas or features of the Property which are damaged by activity inconsistent with this Conservation Easement.

d. Signs. The Conservancy has the right to place signs on the Property which identify the land as being protected by this Conservation Easement. The number and location of any signs are subject to Donor's approval.

3. PERMITTED USES. Donor retains all ownership rights which are not expressly restricted by this Conservation Easement. In particular, the following rights are reserved:

a. Right to Convey. The Donor retains the right to sell, mortgage, bequeath or donate the Property. Any conveyance will remain subject to the terms of this Conservation Easement and the subsequent owner will be bound by all obligations in this agreement.

b. Right to Maintain and Replace Existing Structures. The Donor retains the right to maintain, renovate and replace the existing structure(s) as noted in the baseline documentation in substantially the same location and size. Any expansion or replacement may not substantially alter the character or function of the structure.

c. Right to Add Designated Structures or Uses. The Donor retains the right to add the following structures, modifications or uses to the Property without notifying the Conservancy.

*_____

*_____

EXPLANATION: The Donor may wish to add specified structures to the Property which should be listed here. Examples of specified structures or uses are: * Accessory, non-residential structures within the designated Residential Area * One dock not to exceed __feet in length * Access drives and footpaths * Agricultural uses. **If there are no additional uses or structures, then this paragraph should be deleted in its entirety.**

4. CONSERVANCY REMEDIES. This section addresses cumulative remedies of the Conservancy and limitations on these remedies.

a. Delay in Enforcement. A delay in enforcement shall not be construed as a waiver of the Conservancy's right to eventually enforce the terms of this Conservation Easement.

b. Acts Beyond Donor's Control. The Conservancy may not bring an action against the Donor for modifications to the Property resulting from causes beyond the Donor's control. Examples are: unintentional fires, storms, natural earth movement, trespassers or even a Donor's well-intentioned actions in response to an emergency resulting in changes to the Property. The Donor has no responsibility under this Conservation Easement for such unintended modifications.

c. Notice and Demand. If the Conservancy determines that the Donor is in violation of this Conservation Easement, or that a violation is threatened, the Conservancy may provide written notice to the Donor unless the violation constitutes immediate and irreparable harm. The written notice will identify the violation and request corrective action to cure the violation or to restore the Property.

d. Failure to Act. If, for a 28 day period after written notice, the Donor continues violating this Conservation Easement, or if the Donor does not abate the violation and implement corrective measures requested by the Conservancy, the Conservancy may bring an action in law or in equity to enforce the terms of this Conservation Easement. The Conservancy is also entitled to enjoin the violation through injunctive relief, seek specific performance, declaratory relief, restitution, reimbursement of expenses, or an order compelling restoration of the Property. If the court determines that the Donor has failed to comply with this Conservation Easement, then the Donor also agrees to reimburse all reasonable costs and attorney fees incurred by the Conservancy.

e. Unreasonable Litigation. If the Conservancy initiates litigation against the Donor to enforce this Conservation Easement, and if the court determines that the litigation was without reasonable cause

or in bad faith, then the court may require the Conservancy to reimburse the Donor's reasonable costs and attorney fees in defending the action.

f. Donor's Absence. If the Conservancy determines that this Conservation Easement is, or is expected to be, violated, the Conservancy will make good-faith efforts to notify the Donor. If, through reasonable efforts, the Donor cannot be notified, and if the Conservancy determines that circumstances justify prompt action to mitigate or prevent impairment of the Conservation Values, then the Conservancy may pursue its lawful remedies without prior notice and without awaiting the Donor's opportunity to cure. The Donor agrees to reimburse all costs associated with this effort.

g. Actual or Threatened Non-Compliance. Donor acknowledges that actual or threatened events of non-compliance under the Conservation Easement constitutes immediate and irreparable harm. The Conservancy is entitled to invoke the equitable jurisdiction of the court to enforce this Conservation Easement.

h. Cumulative Remedies. The preceding remedies of the Conservancy are cumulative. Any, or all, of the remedies may be invoked by the Conservancy if there is an actual or threatened violation of this Conservation Easement.

5. OWNERSHIP COSTS AND LIABILITIES. In accepting this Easement, the Conservancy shall have no liability or other obligation for costs, liabilities, taxes or insurance of any kind related to the Property. The Conservancy, its members, directors, officers, employees and agents have no liability arising from injury or death to any person or physical damage to any property on the Property. The Donor agrees to defend the Conservancy against such claims and to indemnify the Conservancy against all costs and liabilities relating to such claims during the tenure of the Donor's ownership of the Property. Subsequent owners of the Property will similarly defend and indemnify the Conservancy for any claims arising during the tenure of their ownership.

6. CESSATION OF EXISTENCE. If the Conservancy shall cease to exist or if it fails to be "a qualified organization" for purposes of Internal Revenue Code Section 170(h)(3), or if the Conservancy is no longer authorized to acquire and hold conservation easements, then this Conservation Easement shall become vested in another entity. This entity shall be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3). The Conservancy's rights and responsibilities shall be assigned to the following named entities in the following sequence:

(1)

(2)

(3) Any other entity having similar conservation purposes to which such rights may be awarded under the *cy pres* doctrine.

EXPLANATION: The preceding has been referred to as the "Executory Limitation" in the existing Land Trust Alliance Model Conservation Easement. As a practical matter, the doctrine of *cy pres* would govern the eventual disposition of charitable gifts, whether we say so or not. This doctrine would require the Conservation Easement to be given to another similar entity if the Conservancy is no longer viable. If the Conservancy is no longer viable, then what is the likelihood of another existing conservancy surviving?

7. TERMINATION. This Conservation Easement may be extinguished only by an unexpected change in condition which causes it to be impossible to fulfill the Conservation Easement's purposes, or by exercise of eminent domain.

a. Unexpected Change in Conditions. If subsequent circumstances render the purposes of this Conservation Easement impossible to fulfill, then this Conservation Easement may be partially or entirely terminated only by judicial proceedings. The Conservancy will then be entitled to compensation in accordance with the provisions of IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).

b. Eminent Domain. If the Property is taken, in whole or in part, by power of eminent domain, then the Conservancy will be entitled to compensation by the same method as is set forth in IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).

8. LIBERAL CONSTRUCTION. This Conservation Easement shall be liberally construed in favor of maintaining the Conservation Values of the Property and in accordance with the Conservation and Historic Preservation Easement Act; MCL 399.251 et seq.

9. NOTICES. For purposes of this agreement, notices may be provided to either party by personal delivery or by mailing a written notice to that party (at the address shown at the top of this agreement, or at last known address of a party) by First Class mail. Service will be complete upon depositing the properly addressed notice with the U.S. Postal Service with sufficient postage.

EXPLANATION: The certainty that the notice has been received would be greater with certified mail, however this is far less conciliatory than first class. Since the mail may be used to notify the Donor, or successors, of a possible (perhaps merely suspected) violation, there may be good reason to minimize the possibility of an adversarial posture. Therefore, this form contemplates personal delivery or First Class mail. There is certainly no prohibition against Certified Mail, which would be recommended if a hostile relationship is inevitable.

10. SEVERABILITY. If any portion of this Conservation Easement is determined to be invalid, the remaining provisions will remain in force.

11. SUCCESSORS. This Conservation Easement is binding upon, and inures to the benefit of, the Donor's and the Conservancy's successors in interest. All subsequent owners of the property are bound to all provisions of this conservation easement to the same extent as the current property owner.

12. TERMINATION OF RIGHTS AND OBLIGATIONS. A party's future rights and obligations under this easement terminate upon transfer of that party's interest in the Property. Liability for acts or omissions occurring prior to transfer will survive the transfer.

13. MICHIGAN LAW. This Conservation Easement will be construed in accordance with Michigan Law.

14. ENTIRE AGREEMENT. This Conservation Easement sets forth the entire agreement of the parties. It is intended to supersede all prior discussions or understandings.

WITNESSES:

(*print/type names under signatures)

DONOR:

_____ *

_____ *

_____

_____

* *

STATE OF MICHIGAN)

:ss

COUNTY OF)

Acknowledged before me on _____, 19___, by _____

_____

Notary Public, _____

County, Michigan.

My commission expires: _____

WITNESSES:
(*print/type names under signatures)

NAME OF YOUR CONSERVANCY,
a Michigan nonprofit corporation

*_____

By:_____
Its:_____

*_____

STATE OF MICHIGAN)
:ss
COUNTY OF)

Acknowledged before me on _____, 19___, by _____ known to me to be the _____ of the NAME OF YOUR CONSERVANCY, a Michigan nonprofit corporation.

_____

Notary Public, _____
County, Michigan.
My commission expires: _____

PREPARED BY: Name and address of the person preparing the document.