

# **2015 PRACTITIONER'S GUIDE TO THE MICHIGAN MODEL CONSERVATION EASEMENT**

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**HEART OF THE LAKES  
CENTER FOR  
LAND CONSERVATION POLICY**

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# 2015 PRACTITIONER'S GUIDE TO THE MICHIGAN MODEL CONSERVATION EASEMENT

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# INTRODUCTION

The **Practitioner's Guide** includes the suggested conservation easement language of the **Michigan Model Conservation Easement (MMCE)** standard template, as well as commentary and instructions for incorporating the MMCE into land conservancy practices. The MMCE was created by and for the state's land protection practitioners to assist users with the creation of easements that will withstand scrutiny, benefit the public and help landowners reach their conservation goals.

The MMCE is not a complete easement. It is suggested language that will assist users as they draft their own conservation easements. The MMCE is most applicable for conservation easements placed on natural lands, it is not meant to be a model for working (agricultural and forest) easements.

The MMCE is advisory and no party is required to adopt its provisions in whole or in part. The MMCE should be used as a reference only and should not be used in lieu of legal review. Legal counsel should represent parties involved in negotiating conservation easements.

Finally, the MMCE is intended to add uniformity in Michigan to the conservation easement negotiating and drafting process, provide legal strength and clarity to each document, promote best practices for easement drafting, and lower the time and costs of drafting and monitoring a conservancy easement.

The Practitioner's Guide, therefore, is intended to assist practitioners with using the MMCE standard template. It is available only to Michigan land conservancies and their representative attorneys and is not meant for widespread distribution.

## MMCE HISTORY

Grand Traverse Regional Land Conservancy, Little Traverse Conservancy, and Leelanau Conservancy first developed the MMCE in 1999. It was the result of consensus by land protection professionals and attorneys who wanted a document that used plain language and included provisions of widespread use.

In 2009, an MMCE Advisory Committee was formed for the first-ever review and update of the model easement. That review was completed in 2010 with facilitation from Heart of the Lakes Center for Land Conservation (Heart of the Lakes).

In 2014, Heart of the Lakes initiated another review of the Model with a newly constituted Advisory Committee

and support from ITC Holdings, Inc. The 2015 MMCE is the result of consensus by the advisory committee as well as other members of the state's land trust community. Changes were discussed and debated through conferencing and electronic means, facilitated by Heart of the Lakes. The Practitioner's Guide is also an outcome of the 2014-15 review.

## USING THE MICHIGAN MODEL CONSERVATION EASEMENT

Instead of starting with a document or easement prepared for another project, using the MMCE template will help remind you of issues and purposes that should be considered as you draft a new easement.

The MMCE contains provisions that were purposely written, with some exceptions, as the most restrictive as a place for practitioners to start. Each conservancy should tailor the MMCE to create a template that reflects its own purposes, mission, conservation values to be protected on the property, and capacity to monitor and enforce the provisions. Each easement is different based on the land and the landowner, as well as the policies and practices of the conservancy, and should be tailored to accommodate those varied needs.

The MMCE and Practitioner's Guide are not substitutes for more extensive reference books, resources and training available for drafting and negotiating conservation easements. Conservancy personnel should review the guidelines in *Land Trust Standards & Practices: [landtrustalliance.org](http://landtrustalliance.org)*, Standard 9E in particular. These standards were developed by The Land Trust Alliance to be the ethical and technical guidelines for the operation of a land trust or conservancy. A few additional resources that practitioners should use are listed below, under Sources.

## MMCE PRACTITIONER'S GUIDE

The **Practitioner's Guide** is a new companion to the standard Michigan Model Conservation Easement (MMCE) template, first created in 2015. The standard MMCE is a template for drafting purposes, and contains sample provisions in a typical conservation easement for natural lands protection. However, each easement is different based on the land and the landowner, as well as the policies and practices of the conservancy, and should be tailored to accommodate those varied needs.

The Practitioner's Guide is a guide to the MMCE and is not a guide to drafting easements in and of itself. It provides additional language options and commentary to easement drafters using the MMCE template.

Neither the standard MMCE or the Practitioner's Guide address working (farm and forest) lands.

For the best understanding of the MMCE, read through the Practitioner's Guide at least once. The commentary in the Practitioner's Guide follows the same format as the MMCE; notes and commentary are embedded in the pertinent sections.

## ACKNOWLEDGEMENTS

The **Michigan Model Conservation Easement** Review Team for 2014-15 is comprised of land protection practitioners and attorneys. The committee drafted new language and provided invaluable valuable commentary throughout the review process. Committee members are:

**Robin Burke**, Legacy Land Conservancy

**Dan Cline**, Attorney

**Geoff Cripe**, Southwest Michigan Land Conservancy

**Al Gemrich**, Gemrich Law PLC

**Heather Huffstutler**, Walloon Lake Trust and Conservancy

**Steve Kelley**, Attorney

**Sara Thomas**, Livingston Land Conservancy

**Todd Vigland**, Grand Traverse Regional Land Conservancy

Julie Stoneman, Heart of the Lakes' Associate Director, provided overall facilitation of the Review Team's work on both the MMCE and the Practitioner's Guide. Meredith Johnson deserves special recognition for her contributions to this introduction to the Practitioner's Guide.

Thank you to all the land protection practitioners who commented on both the draft MMCE and the Practitioner's Guide. Heart of the Lakes and the 2014-15 Review Team would especially like to thank ITC Holdings, Inc. for their generous support of the 2014-15 Michigan Model Conservation Easement review process and creation of this Practitioner's Guide.

## SOURCES

Byers, Elizabeth and Karin Marchetti Ponte. [The Conservation Easement Handbook](#). Land Trust Alliance and The Trust for Public Land (2005).

Hamilton, Jane Ellen. Conservation Easement Drafting and Documentation. Land Trust Alliance (2008). A Standards and Practices Curriculum Course Book

Land Trust Standards & Practices

<http://www.landtrustalliance.org/learning/sp/land-trust-standards-and-practices>

## DISCLAIMER

The materials, information and comments and any sample clauses contained in this document are provided for informational purposes only and should not be relied on as legal advice. It is intended to solely provide guidance to the user and shall not be a substitute for the user's exercise of the user's independent judgment in developing what the user determines to be appropriate for the user's purposes. Nothing herein constitutes the establishment of an attorney-client relationship between any user and any attorney involved in the drafting of the same, including without limit any sample clause A sample clause may not reflect the most recent legal developments and cannot and does not address the unique facts and circumstances of any specific situation and should not be relied on for the user's particular transaction. No representations, warranties, claims, promises, or guarantees about the accuracy, completeness, or adequacy of any materials, information, comments or sample clauses are made and none shall be implied or inferred. A sample clause should not be used without first obtaining the independent advice of a competent attorney. Nothing contained in these materials, information, comments or sample clauses shall be considered or construed to constitute a recommendation or endorsement of the same by the Heart of the Lakes Center for Land Conservation and Policy, any of its member organizations, any service provider, law firm or attorney.

## COMMENTS REQUESTED

The Michigan Model Conservation Easement and this Practitioner's Guide are the products of the work of several Michigan land conservation practitioners and attorneys who have informally collaborated together. Draft changes to the MMCE and Practitioner's Guide were also submitted to Michigan's land protection practitioners for feedback and input as part of the 2014-15 review process. Heart of the Lakes, the state association of Michigan's land conservancies, facilitated the review and produced the final documents. For more about Heart of the Lakes, go to [www.heartofthelakes.org](http://www.heartofthelakes.org).

The Practitioner's Guide is considered a living document; contributions from land protection practitioners and their legal counsel from around the state are welcome. It is our intent to provide opportunities to solicit additions or corrections on an annual basis. Any proposed additions—including commentary on specific sections of the MMCE or alternative language—will be peer reviewed first before inclusion in the next edition of the Practitioner's Guide.

# CONSERVATION EASEMENT

**Note:** The standard template of the MMCE employs its original format and numbering system to make it compatible with previous versions so drafters can track model changes over time. But this format can be cumbersome, and can make it difficult to track where you are in the document. Drafters may want to contemplate alternatives; the standard template of the MMCE is available in a more updated numbering system.

## I. DEFINITIONS AND CONVEYANCE

**Date:** (INSERT DATE)

**Owner:** (INSERT DONOR/SELLER'S LEGAL NAME(S), MARITAL STATUS AND FULL ADDRESS)

**Conservancy:** (INSERT FULL LEGAL NAME AND FULL ADDRESS)

**Property:** The property legally described on attached Exhibit A.

**Conveyance:** Owner conveys and warrants to Conservancy a perpetual Conservation Easement over the Property. The scope of this Conservation Easement is as set forth in this agreement.

**Note:** The conveyance description should include identification of the parties, a legal description of the land, required words of conveyance (such as "give, grant and convey"), a statement of consideration (see below), title covenants, duration of restrictions (perpetuity), and signature formalities.<sup>1</sup>

**Consideration:** This conveyance is a gift from Owner to Conservancy and the consideration is less than \$100.00; accordingly, this conveyance is exempt from county and state real estate transfer taxes pursuant to MCL 207.505(a) and 207.526(a).

**Alternate consideration language:** The consideration for this conveyance is \$ \_\_\_\_\_

**Easement:** This Conservation Easement.

**Party or Parties:** Owner and/or Conservancy as applicable.

**MCL:** Michigan Compiled Laws.

**NREPA:** The Michigan Natural Resources and Environmental Protection Act, MCL 324.101 et seq.

## II. REPRESENTATIONS

- OWNER.** Owner is committed to preserving the Conservation Values of the Property. Owner is committed to restricting the use of the Property to activities consistent with the Purposes and preservation of the Conservation Values.
- CONSERVANCY.** Conservancy:
  - Is a qualified holder of this Conservation Easement committed to preserving the Conservation Values of the Property and upholding the terms of this Easement,

<sup>1</sup> The Conservation Easement Handbook, p. 291

- B. Is a tax-exempt, nonprofit Michigan corporation qualified under Internal Revenue Code 501(c)(3) and 170(h)(3) and NREPA Part 21 Subpart 11, Conservation and Historic Preservation Easement, MCL 324.2140 et seq.,
- C. Has the resources to enforce this Easement,
- D. Protects natural habitats of fish, wildlife, plants, and the ecosystems that support them, and
- E. 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 such preservation will yield a significant public benefit.

**Note:** Many conservation easements use recitals or “whereas” clauses as a preamble that establishes legal and factual background information on the creation of the easement. The Michigan Model Conservation Easement (MMCE) standard template does not follow this form, but does not discourage its use. Use of the whereas clause is a traditional, but not obligatory drafting practice. The whereas clauses can help a reader know where they are in a lengthy document, but may also encourage readers to skip over this part.<sup>2</sup>

### III. OWNER AND CONSERVANCY AGREE TO THE FOLLOWING:

1. **PURPOSE.** The Purposes of this Conservation Easement are as follows:

**Note:** The Purpose Statement is a very important section of the conservation easement because the easement’s enforceability could turn on the Internal Revenue Service Conservation purposes test: only uses that are consistent with protection of the conservation values of the property are permitted under the terms of the conservation easement. For an example of a Sample Purposes Statement, please see the Appendix to the Practitioner’s Guide.

The Purposes section should include a statement of the conservation values of the property, a statement that satisfies the IRS test, and specific goals for the property. Examples:

“The purpose of this Conservation Easement is to forever conserve the Protected Property for the following conservation purposes: . . .”

“To protect in perpetuity the Protected Property’s significant recreational, wildlife and ecological values for public benefit. . .”

“To conserve water quality, wetlands, and riparian values of the Protected Property; . . .”

**(DELETE ALL THAT DO NOT APPLY)**

- A. To protect a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- B. To preserve open space and will yield a significant public benefit
  - 1) For the scenic enjoyment of the general public, or (and)
  - 2) Pursuant to a clearly delineated Federal, State, or local governmental conservation policy,
- C. To preserve the Property for outdoor recreation by, or the education of, the general public, and
- D. To preserve a historically important land area or a certified historic structure.

These purposes are referred to as the “Purposes” of this Easement.

<sup>2</sup> Id. At 392

## 2. CONSERVATION VALUES.

The Property possesses natural, ecological, biological, scientific, scenic, open space, and historic values of prominent importance to Owner, Conservancy, and the public. These values are referred to as the "Conservation Values" in this Easement. Certain Conservation Values may have relevance to more than one Purpose even though only listed once. The Conservation Values of this Easement include the following:

**(IT IS CRITICALLY IMPORTANT TO THE ENFORCEABILITY OF THE CONSERVATION EASEMENT TO DELETE ALL CONSERVATION VALUES THAT DO NOT APPLY TO THE PROPERTY AND TO TAILOR THESE VALUES TO THE PROPERTY AS EVIDENCED BY THE BASELINE DOCUMENTATION REPORT, ETC.)**

**Note:** The Conservation Values of the property are the reasons for establishing the easement. An easement must provide a public benefit, and if it is a donation or bargain sale, must also meet federal standards for deductibility under Section 170(h)(4)(A) of the IRS Code and 1.170A-14(d)

The MMCE provides a list of suggested items to include in a conservation easement, but a best practice for conservancies is to use a narrative, paragraph style that addresses all of the conservation values that apply to the conservation easement. Using a narrative ensures that the conservation easement is tailored to the specific property and its terms instead of reusing a list from a previous easement document.

**It is critically important to state all of the Conservation Values that are specific to your Property since defense of the easement may rely on them in case of a challenge.** Consider the list in the MMCE to be a checklist; include items from the list that apply to the specific property, then add additional specific values and include local policy statements, goals and laws. Do not include Conservation Values or statute references that do not apply to your specific property or are too broad.

- A. The Property provides open space for the scenic enjoyment of the general public and will yield a significant public benefit through:
- 1) A scenic landscape and natural character which would be impaired by modification of the Property.
  - 2) A scenic panorama visible to the public from publicly accessible sites, such as **(INSERT)**, which would be adversely affected by modifications of the natural habitat.
  - 3) Relief from urban closeness.
  - 4) Prominent visibility to the public from **(INSERT)**, which will enhance tourism if the Property is preserved in its natural state.
  - 5) Biological integrity of other land in the vicinity of the Property has been modified by intense urbanization and that trend is expected to continue.
  - 6) There is a reasonable possibility that Conservancy may acquire other valuable property rights on nearby or adjacent properties to expand the Conservation Values preserved by this Conservation Easement.
  - 7) The Property is desirable for substantial residential development because of its size, location, and orientation and in the absence of this Conservation Easement the Property could be developed in a manner that would destroy the Conservation Values.
  - 8) The Property will be open to the public and utilized for outdoor recreation and education by **(if applicable, INSERT or identify group or community to be served, otherwise delete this benefit)**.

- B. The Property is preserved pursuant to clearly delineated federal, state, and/or local conservation policies and its preservation yields a significant public benefit. The following legislation, regulations, and policy statements identify relevant public policies:

**Note:** The following list of statutory citations in 2.B. was reviewed in November 2014 and confirmed to be valid at that time.

- 1) The State of Michigan has recognized the importance of protecting our natural resources as delineated in the Michigan Constitution:  
  
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. (1963 Constitution, Article IV, Section 52.)
- 2) NREPA Part 21 Subpart 11, Conservation and Historic Preservation Easement, MCL 324.2140 et seq.;
- 3) NREPA Part 355, Biological Diversity Conservation, MCL 324.35501 et seq. (Legislative Findings MCL 324.35502);
- 4) NREPA Part 353, Sand Dune Protection and Management, MCL 324.35301 et seq. (Legislative Findings MCL 324.35302);
- 5) NREPA Part 303, Wetland Protection, MCL 324.30301 et seq. (Legislative Findings MCL 324.30302);
- 6) Water Pollution Control Act of 1972, 33 USC 1251-1387 (§1251 Goals & Policy; §1344 Wetlands permitting, also known as “Section 404” of the Clean Water Act);
- 7) Coastal Zone Management Act, 16 USC 1451 et seq. (§§1451, 1452 Congressional Findings and Policy);
- 8) NREPA Part 323, Shorelands Protection and Management, MCL 324.32301 et seq.;
- 9) NREPA Part 301, Inland Lakes and Streams, MCL 324.30101 et seq.;
- 10) NREPA Part 325, Great Lakes Submerged Lands, MCL 324.32501 et seq.;
- 11) NREPA Part 361, Farmland and Open Space Preservation, MCL 324.36101 et seq.;
- 12) NREPA Parts 91 and 93, Soil Conservation, Erosion, and Sedimentation Control, MCL 324.9101 et seq.; 324.9301 et seq. (Legislative Policy MCL 324.9302);
- 13) The **(INSERT)** governmental agency has endorsed the proposed scenic view of the Property under a landscape inventory, pursuant to a review process.
- 14) The **(INSERT)** office has recognized the importance of the Property as an ecological and scenic resource, by designating this and other land as **(INSERT)**.
- 15) The Township/County of **(INSERT)** has designated this area as **(INSERT)** in its Comprehensive Plan dated **(INSERT)**.
- 16) **(INSERT/CITE)** local policy statements which apply).
- 17) The following public funding sources were utilized in the purchase of this Conservation Easement: **(INSERT)**

- C. The Property contains significant natural habitat in which fish, wildlife, plants or the ecosystems which support them thrive in a natural state, as demonstrated by:
- 1) The Property provides vital corridor wetlands and upland wildlife habitats which serve as a connection for wildlife movement and create a natural "greenway" **(INSERT AREA)**.
  - 2) The Property is noteworthy for the **(INSERT)**.
  - 3) Wetlands, as described in NREPA Part 303, Wetland Protection, MCL 324.30301 et seq., identified as important natural resources for the people of the State of Michigan, are present on the Property.
  - 4) Habitat for rare, endangered, or threatened species of animal, fish, plants, or fungi, including: **(INSERT SPECIES)**.
  - 5) **(INSERT if threatened or endangered and whether in the State of Michigan or federally listed)** are supported on the Property.
  - 6) The Property contains natural areas which represent high quality examples of terrestrial or aquatic communities **(INSERT)**.
  - 7) The Property contains sustainable habitat for biodiverse vegetation, birds, fish, amphibians and terrestrial animals. The Owner [or Conservancy] has documented the existence of **(INSERT)** on the Property.
  - 8) The Property contains a diversity of plant and animal life in an unusually broad range of habitats for a property of its size.
  - 9) 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.
  - 10) The Property contains natural wetland areas that provide habitat for aquatic invertebrates, reptiles, amphibians, and aquatic and/or emergent vegetation.
  - 11) Valued native forest land exists on the Property, which includes diverse native species, trees of many age classes and structural diversity, including a multi-story canopy, standing dead trees and downed logs.
  - 12) The Property provides important natural land within the watershed of **(INSERT)**.
  - 13) 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.
  - 14) The Property includes the **(INSERT)** feet of frontage on the **(INSERT name of river, stream, lake)**.
  - 15) The Property has a significant amount of undeveloped frontage on the banks/shore of **(INSERT)**, which is a State designated Natural River (designated as a Wilderness River, Wild and Scenic River, or Country-Scenic River) under NREPA Part 305, Natural Rivers, MCL 324.30501-30515 et seq., **[AND/OR]** is a State-designated trout stream in Michigan.
  - 16) Sections of the Property are situated on hillsides with slopes greater than 20% that are adjacent to or in close proximity to **(INSERT name of body of water or stream)** and the vegetated slopes would be highly susceptible to erosion damage and accelerated stormwater runoff that could adversely affect water quality if the trees or other vegetation were removed.

- 17) The Property lies in close proximity to the following conserved properties which similarly preserve the existing natural habitat: **(INSERT)**.
- 18) This Easement protects a natural area which contributes to the ecological viability of a local, state, or national park, nature preserve, wildlife refuge, wilderness area, or similar conservation area.
- 19) Preservation of the Property enables Owner to integrate the Conservation Values with other neighboring lands.

D. The Property includes active agriculture and:

**Note:** The MMCE standard template was written largely for natural lands but many of those lands may have an agriculture component. Use this section if that is the case and if these values are applicable. Drafters working on strictly agricultural easements may want to refer to a different template.

- 1) Consists entirely of “prime farmland” and “farmland of local importance” as classified by the U.S. Department of Agriculture and the Natural Resources Conservation Service,
- 2) Has a long history of productive farming and contains significant areas with soil classifications designated as **(INSERT)**,
- 3) Is located within **(INSERT)** Township, a community with an agriculture-based economy in an area presently experiencing rapid development, including the subdivision of prime farmland.

3. **BASELINE DOCUMENTATION.** Specific Conservation Values of the Property have been documented in a natural resource inventory signed by both Owner and Conservancy (hereinafter “Baseline Documentation Report” regardless of specific name(s) on inventory(ies) ). The Baseline Documentation Report, incorporated herein by reference, consists of maps, a depiction of all existing human-made modifications, prominent vegetation features, identification of flora and fauna, land use history, distinct natural features, and photographs of the Property. The parties agree that the Baseline Documentation Report is an accurate representation of the Property at the time of execution of this Conservation Easement. Conservancy may use the Baseline Documentation Report to enforce this Conservation Easement but is not limited to the Baseline Documentation Report to show a change in conditions. Any characterization of this Easement in the Baseline Documentation Report shall not be interpreted so as to alter, amend, limit, or otherwise modify this Easement; the terms of this Easement shall control in the event of any alleged or actual conflict or inconsistency between the terms of this Easement and the Baseline Documentation Report.

**Note:** Baseline documentation provides an essential description of the property at the time the easement is transferred as a point of comparison to illustrate the degree of any damage that results from a violation.<sup>3</sup> It also serves as a guideline for monitoring easements and is an IRS requirement for claiming income tax deductions for easement donations.

A baseline provides, through maps, photography, description of the conservation values, management plans, and human-made improvements so the conservancy can monitor the terms of the easement.<sup>4</sup> The baseline should have enough information to document the property’s conservation values. Documentation should be specific and measurable, and should not extend beyond those items protected in the purposes of the easement.<sup>5</sup>

Attaching and recording the Baseline Documentation Report is not necessary for legal effectiveness of the Conservation Easement, but many conservancies attach the Baseline as a best practice. If you do attach and record the Baseline be sure that it is free of errors and does not contain information that

<sup>3</sup> Id. At 100

<sup>4</sup> Conservation Easement Drafting and Documentation, p. 209

<sup>5</sup> Id. At 104

could be detrimental to your conservancy's efforts to enforce the Conservation Easement in the future. To ensure compliance with Internal Revenue Code Section 170(h), make sure that the date of the Baseline Documentation Report is on or significantly before the date of the Conservation Easement's execution.

4. **PERMITTED AND PROHIBITED USES.** Owner retains all ownership rights not expressly restricted by this Conservation Easement but any activity on or use of the Property that is inconsistent with the Purposes or detrimental to the Conservation Values is expressly prohibited. Explicitly retained rights and explicitly prohibited activities and uses include the following, without limitation, with respect to the Property:

**Note:** Section III. 4 outlines the activities a landowner is prohibited from performing as well as the reserved rights of the landowner, i.e. the ways in which the landowner may use the land without impacting the conservation values. This section must be relevant, be tailored to the property<sup>6</sup> and not conflict with the conservation purposes/values of the easement.

The 2015 MMCE combines two sections from previous versions—Section 4 Prohibited Actions and Section 5 Permitted Uses. As restructured, each topic in the new combined section begins with prohibited activities (if any under that topic), and then any expressly permitted rights are described as subpoints. This format allows drafters to easily add permissive language without limited amounts of re-writing, and with minimal references to other sections of the easement. To aid drafters, note the addition of this language in the following subsections: “(, **except as otherwise expressly permitted in the following:)**” and “**(#) Right to (add as appropriate) (insert details)**”. This is where the Practitioner's Guide departs from the stricter standard template of the MMCE, allowing drafters to add, modify and tailor permitted activities that may not impact the purposes or conservation values of the easement.

Conservation easements should not include prohibitions that have nothing to do with the conservation values of the property or are impossible to enforce. For example, if invasive species management is an issue, you do not want to prohibit the removal of vegetation. The prohibitions listed in the MMCE are typically written as the most restrictive, so careful thought should be given during drafting to ensure that prohibited actions can be enforced by the land conservancy and that the conservation values are protected.

- A. Right to Convey and Transfer Notice.** Owner retains the right to sell, mortgage, bequeath, donate, or otherwise convey the Property subject to the terms of this Conservation Easement. Each subsequent Owner will be bound by this Easement. At least 30 days prior to transfer of any of Owner's rights in the Property, Owner or Owner's representative shall give a) the proposed transferee of the Property a true, accurate, recorded and complete copy of this Easement, and b) the Conservancy written notice of the proposed transfer including the full name(s) and address(es) of the prospective transferee(s). Owner at all times shall provide Conservancy with up-to-date contact information including mailing address, telephone number, and any email address regularly checked.

**Note:** Reviewers of the Practitioner's Guide suggested that the requirement to notify a Conservancy of a property transfer may be easily violated by landowners, especially those subsequent to the owner who originally conveyed the easement. The MMCE review team asserts that this provision formalizes a common expectation of landowners in writing. The annual monitoring visit is an opportune time to get updated contact information and to remind the owner that should they sell, they should give the conservancy the buyers' information, hence minimizing the risk of failing to notify.

- B. Subdivision.** The following are prohibited, except as otherwise expressly permitted below: The legal or de facto subdivision of the Property, including any subdivision, short subdivision, platting, binding site plan, testamentary division, creation of a site condominium or other submission of the Property to a condominium form of ownership, or other process by which the Property is divided into lots or in which title to different portions of Property are held by different owners.

- 1) Right to **(add as appropriate)(insert details)**

**Note:** Most easements aim to prevent future divisions of the land so that large parcels may be preserved

<sup>6</sup>Id. At 292-93

and unified, and to allow for easier monitoring and enforcement. Preventing subdivision is often a main objective of an easement to prevent residential development, encourage unified management of natural resources and lessen the conservancy's administration costs.

Since 2010, MMCE language has prohibited multiple owners owning different portions of the Property. In *In re: Stieter*, Chapter 11 Case No. 14-56980, the U.S. Bankruptcy Court for the Eastern District of Michigan held that a conservation easement created in 2003, which covered two tax parcels and merely stated, "Any division or subdivision of the Property is prohibited," did not preclude the sale of one of the tax parcels to a different owner. In other words, the easement did not limit ownership of the two tax parcels to a single person. Although the conservation easement was left in place for both parcels, including the prohibition on dividing/subdividing the original tax parcels, the conservancy now bears a greater burden with two landowners to deal with and therefore twice as much chance for violation.

III. 4. B. takes a very restrictive approach to the Owner's ability to share ownership in the Property. Allowing different persons to own separate parcels covered by the conservation easement will not necessarily affect the validity of the Conservation Easement, but as in the case above, may increase the land trust's monitoring burden and the risk of violations. As always, careful review by legal counsel is recommended when considering ownership issues.

**C. Industrial, Institutional and Commercial Activities.** All industrial, institutional and commercial activity on the Property is prohibited, except as follows:

**Note:** Remember, the MMCE takes a most restrictive stance so if an institution such as a hospital wants to put a conservation easement on natural lands on its property, an outright prohibition on institutional activities might not make sense. Instead, those activities could be confined to a designated area such as a building envelope as long as they do not impact the purpose and conservation values of the easement.

- 1) **Right to de minimis commercial recreational activity.** Owner retains the right to de minimis commercial recreational activity as such term is referenced in an Internal Revenue Code section 2031(c)(8)(B) or as otherwise authorized below.

**Note:** III. 4. C. 1) The "de minimis commercial recreational activity" (hunting and fishing) language should only be included in the conservation easement if the easement is going to allow it, such as in III.4.M below.

- 2) **Right to home occupations.** Owner retains right to home occupations that do not involve outside storage of materials, supplies, equipment or products, or require commercial licensing or zoning specific to the Property, or site improvements to accommodate regular visitors or clientele.

**Note:** III. 4. C. 2) It may be appropriate to allow the Owner to engage in limited commercial activity in any residence located on the property so long as such activity does not negatively impact the Conservation Values of the Property. How to do so is subject to debate. For example, Owner may operate a consulting practice on the Property and such an allowance could be made in this section—but how would that affect future owners who may decide on another home business other than a consulting practice? Another way to go about this would be to simply adjust the language in 4. C. 2) so that the residence is in a designated building envelope in which any activities would be approved so long as they have no impact on conservation values. Care is needed, defining home occupation can be tricky and would not include such things as commercial timber harvest.

Finally, some practitioners raise the question, "Should we be concerned with what goes on in a building as long as it doesn't impact the conservation values?"

See the Appendix for other sample language regarding commercial activities.

**D. Structures and Construction.** The placement or construction of any human-made modifications, including structures, buildings, fences, roads, and parking lots is prohibited (**except as otherwise expressly permitted in the following**):

**Note:** Again, consider the conservation values to be protected and whether or not some structures could be constructed in a designated building envelope that would not negatively impact the conservation values or public benefit of the easement. In those cases, an outright prohibition would not be appropriate so any rights the landowner has for maintaining, replacing or adding designated structures could be outlined in this subsection as in the options below.

- 1) **(Optional if applicable) Right to Maintain and Replace Structures Existing as of Execution of this Easement.** Owner retains the right to maintain, renovate, and replace the structure(s), buildings, fences and roads existing as of the execution of this Easement in substantially the same location and size as documented in Baseline Documentation Report. Any replacement or expansion may not substantially alter the character or function of the structure, building, fence, or road. Prior to beginning renovation or replacement of the structure(s) existing as of execution of this Easement, Owner will provide a written plan to Conservancy for Conservancy’s review and approval; such approval may be withheld only upon a reasonable determination by Conservancy that the action as proposed would be inconsistent with the Purpose and terms of this Easement.
- 2) **(Optional if applicable) Right to Add Designated Structures or Uses.** Owner retains the right to add the following structures, modifications, or uses on the following legally described portion of the Property (**INSERT** legal description of authorized building envelope). Prior to beginning any site development or construction, Owner will provide a written plan to Conservancy for Conservancy’s review and approval; such a plan shall contain a description including timeline, diagram(s) and copies of permit applications; such approval shall not be unreasonably withheld.
  - a. \_\_\_\_\_
  - b. \_\_\_\_\_

**Note:** III.4.D. 2) A comment was made that it is more important to be interested in the number and location of permitted structures vs. the size, use, building materials, etc.

**CAUTION:** “Uses” in the title of this subsection are more difficult to monitor or control vs. structures.

**E. Vegetation Management.** Any alteration, including pruning, trimming, cutting down, using herbicides, or otherwise causing the destruction or removal of trees or other vegetation, whether living or dead, in whole or in part, is prohibited, except as follows:

**Note:** As drafters know, easement language for vegetation management can be tricky. Note again that the MMCE standard template takes a very restrictive stance even though the 2015 version does create some exceptions, as outlined below. Please remember that the MMCE standard template is written for natural areas, not working farms or forests. It also does not address voluntary vegetation management plans that may be created to tackle ecosystem improvement, riparian restoration, floodwater control, groundwater infiltration, or other issues.

- 1) **Right to Manage Dangerous, Nonnative or Diseased Trees or Vegetation.** Pruning, trimming, and removing trees or other vegetation is permitted only under the following conditions:
  - a. To respond to, minimize, and/or eliminate real danger to a structure or humans in frequently-used areas due to a structural or health defect of a tree as documented by a registered forester or other natural resource specialist and as approved by Conservancy.
  - b. To respond to, minimize, and/or eliminate a threat of infestation posed by diseased vegetation as documented by a registered forester or other natural resource specialist and as approved by Conservancy.
  - c. To respond to, minimize, and/or eliminate threats from invasive or non-native plant species.

**Note:** III. 4. a) and b) An alternative was suggested that simply requires approval by the Conservancy in advance of removing trees or vegetation due to danger, infestation or disease instead of requiring the landowner to find a registered forester or natural resource specialist—but that would only be an option to consider if a conservancy has the resources or expertise to make the determination.

III. 4. c) To define invasive species, utilize lists provided by local Cooperative Weed Management Areas groups, The Stewardship Network, Michigan Natural Features Inventory (MNFI), or Midwest Invasive Plant Network (MIPN). Plant management databases which can be used as first resources include: MIPN database, <http://mipn.org/control.html>; Michigan Invasive Species Coalition list of species and management areas, <http://www.michiganinvasives.org/>; MNFI Invasive Species Accounts, <http://mnfi.anr.msu.edu/invasive-species/factsets.cfm>

- 2) **Right to Facilitate Maintenance and Construction.** Reasonable pruning, trimming, or removing trees or other vegetation is permitted to facilitate the maintenance, repair, replacement or construction of any structure, improvement, or trail, expressly permitted by this Easement with Conservancy’s permission to correct or restore unusual storm or wildfire damage.
- 3) **Right to Use and Cut Downed Trees for Firewood.** Owner retains the right to cut and use trees that are downed as a result of natural occurrence for personal use as firewood without a management plan, provided that said use retains adequate woody debris on the forest floor for habitat and soil productivity purposes. This right does not include any removal of live or standing dead trees.
- 4) **Right to Conduct Planned Forest Management.** Any removal of live or standing dead trees for purposes not addressed above is considered forest management and is subject to requirements of a mutually agreed upon forest management plan, and Owner shall provide Conservancy with 60 days prior notice of any tree removal or harvest, in accordance with Sec. III. 7 below.

**Note:** III. 4. E. 4) Again, this is not a template for commercial harvest of timber, but instead addresses those instances when there is a forest component but the land is not managed primarily for timber production. The Appendix to the Practitioner’s Guide includes alternative language that expands and defines forest management, forest management plans, and notice of harvest.

**F. Disturbance/Alteration of Land.** Disturbance, alteration, and mining of the surface of the Property, including the excavation, removal, quarrying, filling, storing, or relocation of soil, sand, gravel, aggregate, rock, stone, ore, marl, limestone, gypsum, salt, coal, clay, peat, sod, or topsoil, are prohibited, except as permitted in III.4.F. 1) below. Treatment, processing, storage, transportation, and other handling of overburden, effluent, tailings, or other waste or byproducts created or produced during mining, the removal of surface or mineral resources, or oil and gas extraction also are prohibited. (**, except as otherwise expressly permitted in the following:**)

**Note:** If disturbances of land are needed to implement activities specifically permitted in the Easement, then an outright prohibition may not make sense.

- 1) **Right to use on site sand and gravel.** Owner retains the right to use on site sand and gravel removed from a Building Envelope defined by this Easement for onsite road construction and maintenance if that construction or maintenance is within a Building Envelope defined by this easement or otherwise is permitted by this Easement.

**G. Mining and Oil and Gas Extraction.** Mining is expressly prohibited, including but not limited to any activity which will disturb, consume, deplete, use, occupy, or alter the surface estate, ecosystem, hydrology, or groundwater, including but not limited to the removal of non-hydrocarbon metallic and non-metallic minerals. No circumstance, including the exercise of the retained rights below, shall be interpreted to permit any of the following: injection, mixing, use, retention, storage, transportation, or other presence of hydraulic, fracking or similar fluids, chemicals, or substances, whether new, used, reclaimed, recovered, waste, or otherwise across or on the Property; use of

any surface water on the Property for oil and gas activities, including but not limited to hydraulic fracking; mining or oil or gas exploration, development, or testing for or extraction conducted on, from, or across the surface of the Property; and alteration or use of the Property surface or construction or placement of any structures, including wells and pipelines, on, over, or across the property. Notwithstanding the foregoing prohibitions, the following activities are permitted:

**Note:** The Mining section is one exception from the intentional design of the Michigan Model to use the most restrictive language to start. There are challenges to enforcing a flat out prohibition when oil, gas, hydrocarbons or petroleum underneath lands can be accessed from outside the property using directional drilling methods. Consequently, language first appeared in the 2010 Model to acknowledge the difficulty of enforcing a strict prohibition of oil and gas exploration and extraction when those resources can be exploited using non-development leases that do not disrupt the surface of the easement encumbered land. Moreover, unlike other surface mining, oil and gas exploration and extraction are permitted under the IRC, subject to limitations, when considering a charitable deduction. (1.170A-14(g)(4)) **Adequately addressing mineral rights and ownership and oil and gas development in a conservation easement can be very complicated so practitioners need to be well-versed on the topic and regulations with access to the right expertise.** Needless to say, the best practice is to determine mineral right ownership and lease status early in any project and legal counsel is essential. See the Appendix for alternative oil and gas language under various scenarios, including the language that was adopted in the 2010 MMCE.

**Note:** Drafters may want to consider allowing exploration as long as it is conducted in a manner that will not have a detrimental impact on the Conservation Values of the easement. See also III.4. G. 1) below where the term exploration appears again.

- 1) **Right to authorize extraction.** Owner retains the right to authorize the extraction of oil, gas, hydrocarbons, or petroleum from beneath the surface of the Property for commercial purposes provided that no exploration, development, or testing for or extraction shall be conducted on, from, or across the surface of the Property and all such extraction is by directional or horizontal drilling from a surface location off of the Property to prevent any impairment of water or other resources protected by this Easement. Nothing otherwise prohibited herein may be allowed by the owner's authorization.
- 2) **Right to enter into a non-developmental lease.** Owner retains the right to enter into a non-developmental lease which solely permits the extraction of oil, gas, hydrocarbons, or petroleum from beneath the Property surface without any alteration or use of the Property surface or construction or placement of any structures, including wells and pipelines, on, over, or across the Property. Nothing otherwise prohibited herein may be allowed by the terms of the non-developmental lease.

**H. Waste.** Processing, retention, storage, transporting, dumping, disposal, or injection of liquid, solid, gaseous, natural or human-made waste, refuse, or debris on or into the Property is prohibited. (, **except as otherwise expressly permitted in the following:**)

- 1) Right to **(add as appropriate) (insert details)**

**Note:** Drafters will need to make certain this section does not conflict with permitted construction clauses, e.g. storage of household trash and construction materials until they are properly disposed off-site; composting of household waste; etc.

**I. Water Courses, Groundwater.** Natural water courses, lakes, rivers, streams, creeks, wetlands, and other bodies of surface water and groundwater or water features may not be altered or impounded. Water from ground or surface sources may not be diverted, blocked, extracted, pumped, or piped from the Property or degraded or polluted. (, except as otherwise expressly permitted in the following:)

- 1) Right to **(add as appropriate) (insert details)**

**CAUTION:** Although included here, changes to groundwater can be difficult to measure and evaluate and hence difficult to enforce.

**J. Off-Road Recreational Vehicles.** Motorized off-road vehicles such as, but not limited to, snowmobiles, dune buggies, all-terrain vehicles, dirt bikes, and motorcycles may not be operated off of designated roads and trails on the Property. (**except as otherwise expressly permitted in the following:**)

1) **Right to Emergency Vehicle Access and Restoration Work.**

Emergency vehicles are permitted as necessary. Vehicles used to complete Conservancy-approved restoration work are permitted as necessary.

**CAUTION:** An outright prohibition of off-road vehicles may be difficult to enforce. Some reviewers of the standard template thought this section should be removed entirely and that emergency vehicles already have the right to enter the property in an emergency.

Optional language could include the following: "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. 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 owners personal access. However, the right to operate motorized vehicles off-road may be extinguished if the Conservancy determines that use of off-road or motorized vehicles is adversely impacting the Conservation Values of the property."

Another note: In some areas, such as sand dunes, any wheeled vehicle may be problematic.

**K. Livestock.** Raising or housing of livestock, poultry or horses, commercial breeding, and commercial aquaculture are prohibited on the Property. (**except as otherwise expressly permitted in the following:**)

1) Right to **(add as appropriate) (insert details)**

**Note:** Prohibitions on livestock may be optional. Conservancies may consider allowing for the presence of certain livestock if it does not hinder the conservation values of the property.

**Note:** The Michigan Model Conservation Easement is the standard template for conservation easements protecting natural lands. Drafters looking for assistance in writing agricultural easements may want to use a template specifically for agricultural lands.

**L. Signs and Billboards.** Billboards and permanent signs are prohibited except as follows:

- 1) **Right for signs for specific purposes.** Owner retains the right to display signs for the following purposes and any other purposes consistent with Permitted Uses under Sec. III.4.
  - a. To disclose the name and address of the Property or the owner's name.
  - b. To disclose that the Property is protected by a conservation easement (See also III. 5. D.)
  - c. To state that trespassing or any unauthorized entry or use is prohibited.
  - d. To advertise the Property for sale or lease.
  - e. To identify and interpret trails and natural features.
  - f. To warn of the presence of dogs or other animals.
  - g. To warn or deal with matters of property boundaries, health, safety, and welfare.
  - h. To comply with any applicable law or regulation.

**Note:** The old MMCE presented the most restrictive language, i.e. an outright prohibition of signs or billboards. However, as in the above, it may be necessary to post signs for the demarcation of the property lines of the easement and therefore drafters would not want to outright prohibit signs.

**CAUTION:** Restricting or limiting the number and size of signs might be legally preferable than restricting sign content.

**M. Right to Hunt, Trap and Fish.** Owner retains all rights to hunt, trap, and fish on and from the Property consistent with all applicable laws.

**Note:** Do not include this section if the intent is to prohibit these activities. But be careful, depending on the property, a prohibition may be difficult to enforce.

**N. Right to Renewable Energy.** Owner reserves the right to and may construct, operate, maintain, replace, and upgrade otherwise lawful non-commercial solar, wind, geothermal, and other types of renewable energy generation equipment ("Equipment") to the extent such uses are not inconsistent with this Easement provided (a) the energy generated is principally intended for non-commercial, non-industrial (e.g., residential and/or agricultural) use on the Property, (b) Owner obtains the prior written approval of Conservancy, (c) such Equipment will be and is located solely within the approved Building Envelope, and (d) installation, construction, and use of such Equipment does not adversely impact the Conservation Values protected by this Easement.

**Note:** The 2014-15 MMCE Review Team wanted to include a Renewable Energy provision so this is a brand new section. Commenters on the draft, however, stated that these structures should be treated like any other under Sec. III.4. D. Structures and Construction as they could have as much impact on Conservation Values as any other permitted structure. Therefore, there should be no need for a special section. However, it may be important to landowners for it to be called out and hence is included here as an optional provision. Drafters should note that some of the "infrastructure" needed for renewable energy may have to go outside of a building envelope so be certain that placement is subject to Conservancy approval in those instances.

**O. Right to Other Permissible Uses.** Conservancy and owner acknowledge that there may be other permissible uses that may be fully consistent with the protection of the Conservation Values and Purposes but are not contemplated or expressly reserved in this Easement. Accordingly, Conservancy and Owner agree that the Owner may engage in any such permissible use only if the Owner seeks approval from Conservancy prior to implementing any such use, and the Conservancy confirms in writing, and in its sole discretion, that the proposed use does not impair or interfere with the Conservation Values and Purposes of this Easement.

**Note:** New section in 2015 and has been used for some time by the Little Traverse Conservancy. For comparison, see Sec. III. 14 of the Practitioner's Guide and the cautionary note included there.

5. **CONSERVANCY RIGHTS.** Owner grants the following rights to Conservancy to perpetually maintain the Conservation Values of the Property:

**A. Entry and Cooperation.** The public is not granted access to, right of entry onto, or use of the Property by this Easement. Conservancy including its authorized agents may enter the Property at reasonable times to monitor the Property, to enforce compliance with this Easement, and to otherwise exercise its rights under this Easement. Owner shall fully cooperate with Conservancy in Conservancy's undertaking and execution of Conservancy's responsibilities under this Easement; Conservancy will not unreasonably interfere with Owner's use and quiet enjoyment of the Property or permit others to enter the Property. Except in case of emergency or if there is imminent threat to the Conservation Values, Conservancy shall exercise reasonable efforts to notify Owner in advance of Conservancy's planned entry onto the Property. Owner agrees to fully cooperate with Conservancy regarding all matters relating to this Easement including, without limit, promptly, truthfully and accurately reporting and fully disclosing all activities and conditions on or affecting the Property regarding or affecting the Purposes and

Conservation Values of this Easement and any violations of this Easement. Owner shall not directly or indirectly interfere with, restrict, place conditions upon access, or otherwise prevent Conservancy or its representatives or agents from entering the Property for purposes of monitoring, inspecting, verifying, protecting, correcting, preserving or otherwise acting to protect the Conservation Values of or otherwise enforce this Easement. If locked gates or other features restrict access to the Property, Owner shall provide Conservancy with keys and all other information or means necessary for Conservancy or its agents to be able to reasonably enter the Property by vehicular means over established access roads or trails; without liability, Conservancy may undertake reasonable self-help to access the Property for Easement-related purposes if such information or means are not provided by Owner.

- B. Right to Preserve.** Conservancy has the right to prevent any activity on or use of the Property that is inconsistent with the Purposes or detrimental to the Conservation Values of the Property.
- C. Right to Require Restoration.** Consistent with the remedies below, Conservancy has the right to require Owner to restore to its prior condition any area or feature of the Property which is damaged by any activity inconsistent with this Conservation Easement. Owner shall conduct the restoration in accordance with a plan submitted to and approved by Conservancy.
- 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, which shall not be unreasonably withheld or restricted.

**6. CONSERVANCY REMEDIES.** Conservancy has the following cumulative, nonexclusive remedies:

- A. Delay in Enforcement.** Any delay in enforcement shall not be construed as a waiver of Conservancy's right to enforce the terms of this Easement.
- B. Third Person Violations.** Owner and Conservancy shall have the following rights for acts or occurrences at the Property beyond the direct or indirect control of Owner:
  - 1) Conservancy may not bring an action against Owner for modifications to the Property or damage to the Property or its Conservation Values resulting from natural causes beyond Owner's control, including natural disasters, fires, floods, storms, natural earth movement or other acts of God.
  - 2) Owner shall be responsible for modifications or damage to the Property that impair or damage the Conservation Values of the Property and result from the acts of third persons whose use of, or presence on, the Property was authorized by Owner. Owner shall perform such restoration pursuant to and in accordance with the restoration plan prepared by a competent professional selected by Owner and submitted to and approved by Conservancy in writing.
  - 3) In the event of an unauthorized third-person violation of the Conservation Values on the Property, Conservancy shall not seek restoration or exercise remedies available to it if and so long as Owner diligently pursues all available legal remedies against the violator. In the event actions taken by unauthorized third persons impair the Conservation Values protected by this Easement, Conservancy reserves the right, either jointly or singly, to pursue all appropriate civil and criminal penalties to compel restoration and Owner assigns all claims and rights to recover against such third persons to Conservancy.
- C. Notice and Demand.** If Conservancy determines that Owner is in violation of this Easement, or that a violation is threatened, Conservancy shall provide written notice to Owner. The written notice will identify the violation and request corrective action to cure the violation and, where the Property has been injured, to restore the Property. If at any time Conservancy determines, in its sole and absolute discretion, that the violation constitutes or threatens immediate and irreparable harm, no written notice is required and Conservancy may then immediately pursue its remedies to prevent or limit harm to the Conservation Values of the Property. If Conservancy believes that this Easement has

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

**D. Owner Failure to Act.** If, within 28 days after written notice, Owner does not implement corrective measures requested by Conservancy, Conservancy may bring an action in law and/or in equity to enforce the terms of the Easement. In the case of immediate or irreparable harm, as determined in the sole discretion of Conservancy, or if Owner is unable to be notified, Conservancy may invoke these same remedies without notification and/or awaiting the expiration of the 28-day period. Conservancy is entitled to seek 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 Owner to restore the Property. Conservancy shall have the right of specific performance to impose or enforce any right and obtain relief by immediate temporary restraining, preliminary and/or permanent injunctive order, without the necessity of bond or other security, and without having to prove damages. Such relief shall be against Owner and/or any person or entity acting in concert with Owner and in addition to damages and other available remedies to the Conservancy and all such rights and remedies shall be cumulative. Owner agrees if a violation of this Easement is threatened or occurs the harm and injury to the Conservancy will be irreparable and such that the Conservancy will have no adequate remedy at law and could not be compensated adequately by damages. If the court determines that Owner has failed to comply with this Easement, Owner shall also reimburse Conservancy for all reasonable litigation costs and reasonable attorney's fees, and all costs of corrective action or Property restoration incurred by Conservancy.

**E. Frivolous Litigation.** If Conservancy initiates litigation against Owner to enforce this Easement, the court determines that Owner is the prevailing party, and the court determines that (i) the litigation was initiated with the primary purpose to harass, embarrass, or injure Owner; (ii) Conservancy did not have a reasonable basis to believe that the facts underlying Conservancy's legal position were in fact true; or (iii) Conservancy's legal position was devoid of arguable legal merit, then the court may require Conservancy to reimburse Owner's reasonable costs and reasonable attorney's fees in defending the action.

**Note:** This section was written to assuage landowner concerns but, understandably, not all practitioners or their legal advisors appreciate or recommend this section. Hence, it remains an optional provision.

**F. Actual or Threatened Non-Compliance.** Conservancy's rights under this Section 6 apply equally in the event of either actual or threatened violations of the terms of this Easement. Owner agrees that Conservancy's claim for money damages for any violation of the terms of this Easement is inadequate. Conservancy shall also be entitled to affirmative and prohibitive injunctive relief and specific performance, both prohibitive and mandatory. Conservancy's claim for injunctive relief or specific performance for a violation of this Conservation Easement shall not require proof of actual damages to the Conservation Values.

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

**7. NOTIFICATION.** If Owner proposes to undertake any activity which requires notice to Conservancy or Conservancy's approval, Owner shall provide 60-days written notice of Owner's planned activity together with all reasonably related information, including a written description of the planned activity, engineer/architect plans and drawings, permits, schedules, and the like. Conservancy may obtain an additional thirty (30) day period to provide its approval by notifying Owner of its intent to extend the time within the original sixty (60) day period. If Conservancy does not object to Owner's planned activity within 60 days after actual receipt of written notice and supporting materials or request a 30-day extension, then its approval shall be impliedly given, but there is no implied approval for any activity contrary to this Conservation Easement or

impairing a Conservation Value. Conservancy's approval, actual or implied, shall continue for three years. If Owner's approved activity is not completed within three years after Owner's initial written notice to Conservancy, then Owner must re-submit Owner's written application to Conservancy.

**Note:** The amount of time for notification is subject to debate. Some argue that landowners may not like a total of 90 days (if Conservancy requests an extension), others state that even 60 days is too long. This time period may need to be negotiated with the Owner. However, varying response periods in different easements could become challenging for Conservancies to track so a consistent time period in all easements is ideal.

Drafters could consider language stating that the Owner may not rely on any approval by the Conservancy unless provided in writing. In that case, however, there would be no "implied approval" provision if the Conservancy does not act within the response period as written in this section. Keep in mind that Owners may appreciate an implied approval provision after a reasonable amount of time, otherwise the Conservancy could unnecessarily delay the Owner by simple inaction.

8. **SUBORDINATION.** Owner represents and warrants that as of the date of execution and recording of this Conservation Easement, the Property is not subject to any lease, land contract, mortgage, lien, claim or interest which has not been subordinated to this Conservation Easement. Any lease, land contract, mortgage, lien, claim or interest in the Property arising after the date of recording this Conservation Easement shall be subject and subordinate to the terms of this Conservation Easement.

**Note:** The IRS requires existing mortgage holders to subordinate their rights to "the right of the qualified organization to enforce the conservation purposes of the gift in perpetuity."<sup>7</sup> This is so that a prior-recorded mortgage will not extinguish the easement. Therefore, if the property is ever foreclosed upon, the land will remain subject to the conservation easement.

9. **CONSERVATION EASEMENT REQUIREMENTS UNDER MICHIGAN AND FEDERAL LAW.**

- A. This Conservation Easement is an immediately vested interest in real property created pursuant to NREPA Part 21 Subpart 11 Conservation and Historic Preservation Easement, MCL 324.2140 et seq. Owner agrees that this Conservation Easement has a fair market value that is at least equal to the proportional value that the Conservation Easement at the time of the gift bears to the value of the Property as a whole at that time.
- B. This Conservation Easement is established for conservation purposes pursuant to the Internal Revenue Code, as amended, 26 U.S.C. Section 170(h)(1)-(6) and Sections 2031(c), 2055, and 2522, and under Treasury Regulations at Title 26 C.F.R. Section 1.170A-14 et seq., as amended.
- C. Conservancy is qualified to hold conservation easements pursuant to these statutes. Conservancy is a publicly funded, non-profit 501(c)(3) organization with the authority to accept lands, easements, and buildings for the purpose of preserving and protecting natural, scenic, educational, recreational, or open-space values of real property, and with the commitment to preserve the Conservation Values of the Property.

**Note:** Ill. 9. C. may be a bit redundant with the new section, II. Representations, created in 2015, but it is not considered to be a problem to repeat it here as well.

10. **OWNERSHIP COSTS AND LIABILITIES.** In accepting this Conservation Easement, Conservancy shall have no liability or other obligation for costs, taxes, assessments, insurance, maintenance, or other liabilities of any kind related to the Property. 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, NREPA, or any similar statute or regulation. Conservancy, its members, trustees or directors, officers, employees,

<sup>7</sup> Treasury Regulations §1.170A-14(g)(2)

and agents have no liability arising from injury or death to any person or physical damage to any property on the Property. Owner agrees to defend, indemnify and hold harmless Conservancy against such claims arising during the term of Owner's ownership of the Property.

11. **HAZARDOUS MATERIALS.** Owner represents and warrants that Owner has no knowledge of any release, discharge, dispersal or storage of hazardous substances, or hazardous wastes on the Property. Owner agrees to defend, indemnify, and hold harmless Conservancy against all claims of hazardous materials contamination on the Property.

**Note:** In older versions of the MMCE, this section was limited to only the "release" of hazardous substances or hazardous wastes on the Property. "Discharge, dispersal or storage" was added in 2015 to make it more restrictive and conform with the overall intent of the MMCE. At one point, drafts also included "petroleum or petroleum derivatives". Several commenters raised the issue of the common practice of petroleum storage for fuel and the likelihood of storage of other hazardous substances if active agriculture is present on the property. As always, careful easement drafting is required to avoid a situation where an accepted use, like agriculture, would automatically create a violation that is difficult to enforce.

On the other hand, drafters of easements placed on property with no existing structures and no reserved rights for future construction may want to consider prohibiting petroleum and petroleum derivatives.

12. **CESSATION OF CONSERVANCY EXISTENCE.** If Conservancy ceases to exist or fails to be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3), or if Conservancy is no longer authorized to acquire and hold conservation easements, then this Conservation Easement shall become vested in another entity which is a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3). 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.
13. **ASSIGNMENT.** The Conservancy may assign its rights and obligations under this Conservation Easement only to an organization that, at the time of the assignment, is a "qualified organization" under Section 170(h)(3) of the Internal Revenue Code of 1986, as amended. The Conservancy shall require as a condition of assignment that the assignee assume all obligations of the Conservancy under this Conservation Easement and continue to carry out the conservation purposes of this Conservation Easement.
14. **FUTURE CONDITIONS.** No use shall be made of the Property and no activity thereon shall be permitted which is, or is likely to become, inconsistent with the Purposes of this Easement. Owner and Conservancy acknowledge that, in view of the perpetual nature of this Easement, they are unable to foresee all potential future land uses, technologies, climate changes, evolution in flora and fauna, other natural resources, and other circumstances, occurrences and conditions affecting the Property or the purposes of this Easement.

**Note:** This is a new section. Compare with Sec. III. 4.O above—one may be preferable to the other but there should not be an issue if both are kept. Flag for legal review.

15. **TERMINATION.** This Conservation Easement may be extinguished only by a court order upon an unexpected change in condition, which causes it to be impossible to fulfill the Purposes, or by exercise of eminent domain.

**A. Unexpected Change in Conditions.** If subsequent circumstances render the Purposes impossible to fulfill, then this Conservation Easement may be partially or entirely terminated but only by judicial proceedings. Conservancy will then be entitled to a share of the proceeds of any sale, exchange, or involuntary conversion of the Property, according to Conservancy's proportional interest in the Property, as determined and as required under Treasury Regulations Section 1.170A-14(g)(6)(ii) or its successor. Notwithstanding the foregoing, Owner and Conservancy intend that this Conservation Easement not be subject to the legal doctrine of "changed conditions" that is applied to traditional servitudes. In making this grant, Owner has considered the possibility that uses prohibited by the terms of this Easement may become more economically valuable than permitted uses, and that neighboring properties may in the future be put entirely to such prohibited uses. The unprofitability

of conducting or implementing any or all of the uses permitted under the terms of the Conservation Easement shall not impair the validity of this Conservation Easement or be considered grounds for its termination or extinguishment. It is the intent of Owner that any such economic changes shall not be deemed to be changed conditions or a change of circumstances justifying the judicial termination, extinguishment or amendment of this Conservation Easement.

**B. Eminent Domain.** If the Property is taken, in whole or in part, by power of eminent domain, then Conservancy will be entitled to a share of the proceeds of any sale, exchange, or involuntary conversion of the Property, according to Conservancy's proportional interest in the Property, as determined and as required under Treasury Regulations Section 1.170A-14(g)(6)(ii) or its successor.

**16. LIBERAL CONSTRUCTION.** This Conservation Easement shall be liberally construed in favor of maintaining the Conservation Values of the Property and in accordance with the NREPA Conservation and Historic Preservation Easement statutory provisions, Part 21 Subpart 11, MCL 324.2140 et seq.

**17. AMENDMENT.** Owner and Conservancy may jointly amend this Conservation Easement, provided that (i) such amendment is in writing and approved by Conservancy in its sole and absolute discretion, (ii) no amendment shall be allowed that shall affect the qualification of this Conservation Easement or the status of Conservancy under any applicable laws, including MCL 324.2140-324.2144 or Section 170(h) of the Internal Revenue Code, (iii) any amendment shall be consistent with the Purposes, and (iv) shall not affect the perpetual duration of this Conservation Easement. Any such amendment shall be in writing and recorded in the official property records of the County where the Property is located and in all other jurisdictions and places where such recording is required.

**Note:** A change in circumstances may justify an amendment to a conservation easement. This was a new section in 2010 that allows for amendments made jointly with conservancy approval, as long as it complies with state law, is consistent with the purposes of the Conservation Easement, and is recorded in the appropriate jurisdiction.

**18. OWNER RESPONSIBILITY AND CONSERVANCY APPROVAL.** If the approval of, consent to or non-objection by Conservancy is required or given regarding any act, action, or activity of Owner or Owner's agents or contractors upon the land, then, notwithstanding any such approval or consent of the Conservancy, for all purposes Owner shall be solely responsible for the planning, design, necessity, implementation, means, methods, materials, execution, adequacy, timing, soundness, supervision, inspection, completion, conduct, effectiveness, impacts, results, or consequences of any such activity and any act or omission in connection therewith, occasioned thereby, or arising in connection with the same, including without limit any adverse impact the same may have upon the Conservation Values protected by this Conservation Easement. Under no circumstances shall the approval of, consent to and/or non-objection by Conservancy to any act, action, activity of Owner or Owner's agents or contractors be deemed to be, directly or indirectly, in whole or in part, participation, acceptance, ratification, release, waiver, or a defense or other impediment to Conservancy's right to protect the Conservation Values of or otherwise to enforce the terms of this Conservation Easement against the Owner or any third person.

**Note:** This new section was added in 2015 to ensure the Conservancy isn't held liable for something the Owner does while exercising a reserved right approved by the Conservancy.

**19. INDEMNIFICATION.** Owner agrees to defend, indemnify and hold harmless Conservancy, its directors/trustees, officers, employees, agents, volunteers, and representatives ("the Indemnified Parties") from and against all claims, actions, proceedings, liabilities, damages, losses, penalties, fines, costs, enforcement and restoration fees and costs, testing and engineering fees and costs, consultant and expert fees and costs, and reasonable attorney fees and costs, including those incurred in enforcing this indemnity, arising directly or indirectly from or in conjunction with:

**A.** injury or death to any person, damage to or diminution in the value of any property, or damage to natural resources from any act, omission, condition or other matter related to or occurring on or about the Property regardless of cause, including any injury, harm to, or death of an Indemnified Party,

- B. the presence, suspected presence, or threatened or actual release of any hazardous substance whether into the air, soil, surface or groundwater on, in, above, or below the Property,
- C. any actual or alleged violation of any environmental law affecting the Property, whether occurring prior to or during Owner's ownership of the Property and whether caused or permitted by Owner or any person other than Owner,
- D. any claim or defense by Owner or any third person that any Indemnified Party is liable as an owner or operator of the Property under any environmental law, or
- E. any breach of Owner's representations, warranties, or retained responsibilities, obligations, or liabilities under this Conservation Easement, provided, however, this paragraph shall not apply if it is finally determined by a Michigan court that any of the foregoing was solely caused by gross negligence or material willful misconduct of Conservancy.

**Note:** This new section added in 2015 is intended to protect the Conservancy

- 20. **NOTICES.** All notices required or permitted under this Agreement shall be in writing and deemed given to a party and effective when: a) delivered in person to a party or to an officer of the party being notified, or b) sent by certified mail return receipt requested, express mail with proof of delivery, first class mail prepaid, or a recognized nationwide courier service with proof of delivery to a party at the address set forth herein or to the last known address of a party. Either party may change its address by providing written notice of the same. Refusal of a party to accept notice shall not impair the giving of notice.
- 21. **SEVERABILITY.** If any portion of this Conservation Easement is determined to be invalid, the remaining provisions will remain in force.
- 22. **SUCCESSOR RIGHTS AND OBLIGATIONS.** This Conservation Easement is binding upon, and inures to the benefit of Owner's and 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 Owner. A party's respective future rights and obligations under this Conservation Easement terminate upon transfer of that party's interest in the Property, provided, however, liability accruing for acts or omissions prior to transfer survives transfer.

**Note:** It is important to establish that the conservation easement agreement is enforceable against all successive owners and conservancies.

- 23. **MICHIGAN LAW AND FORUM.** This Conservation Easement will be construed in accordance with Michigan law. Owner and Conservancy agree and consent that all litigation with respect to or arising out of this Easement shall be filed, heard and decided by a Michigan court with jurisdiction over the Property or where Conservancy maintains its principal place of business in Michigan.
- 24. **ENTIRE AGREEMENT.** This Conservation Easement sets forth the entire agreement of the parties and supersedes all prior discussions and understandings.
- 25. **EXHIBITS.** This Conservation Easement includes, and incorporates the following Exhibits:

**Note:** Exhibits that may be attached to the easement may include administrative provisions, maps of the property and separate land use areas, inventories of natural resources or improvement, a list of permitted encumbrances, documentation of specific building sizes or other features, resolutions and certificates of authority, and building sizes or other features. List any exhibits referenced in the document, if any.

A. **Exhibit A:** Legal Description

B. **Exhibit B:** \_\_\_\_\_  
 (INSERT name of additional exhibits as applicable)

**Note:** Some conservancies prefer to list the Baseline Documentation Report as an Exhibit and reference that Exhibit by letter, number or name in the Easement; others do not to avoid the cost of filing and recording the Baseline report with the Register of Deeds.

**OWNER:**

Printed Name: \_\_\_\_\_  
(INSERT Owner's full name, add further signature blocks so one for each owner with printed name)

**STATE OF MICHIGAN**  
**COUNTY OF** \_\_\_\_\_

Acknowledged before me on this \_\_\_\_\_ of \_\_\_\_\_, 20 \_\_\_\_\_,

by \_\_\_\_\_, \_\_\_\_\_.  
(INSERT Owner's names) (INSERT marital status)

\_\_\_\_\_, Notary Public

\_\_\_\_\_, County, Michigan

Acting in \_\_\_\_\_ County

My commission expires: \_\_\_\_\_

**CONSERVANCY:**

By: \_\_\_\_\_

Name: \_\_\_\_\_  
(INSERT signer's name)

Title: \_\_\_\_\_  
(INSERT signer's title with Conservancy)

\_\_\_\_\_  
(INSERT full legal name of Conservancy)

**STATE OF MICHIGAN**  
**COUNTY OF** \_\_\_\_\_

Acknowledged before me on this \_\_\_\_\_ of \_\_\_\_\_, 20 \_\_\_\_\_,

by \_\_\_\_\_,  
(INSERT Conservancy Executive or other signer's name)

known to me to be \_\_\_\_\_  
(INSERT signer's formal title with Conservancy)

of \_\_\_\_\_  
(INSERT Conservancy's full legal name)

\_\_\_\_\_, Notary Public

\_\_\_\_\_, County, Michigan

Acting in \_\_\_\_\_ County

My commission expires: \_\_\_\_\_

**DRAFTED BY:**  
(INSERT principal drafter's name and address)

**AFTER RECORDING PLEASE RETURN TO:**  
(INSERT Conservancy's full name and address)

**CONTINUE TO SEND TAX BILLS TO:**  
(INSERT Owner's full name(s) and address)

**EXHIBIT A**  
**LEGAL DESCRIPTION**

(INSERT full legal description)  
**TAX ID No:**

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# APPENDIX

## ALTERNATIVE / SAMPLE LANGUAGE

### SECTION III. 1. PURPOSES

#### Sample Language for Sec. III. 1.

*Submitted by Grand Traverse Regional Land Conservancy for Sec. III. 1: Purposes*

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.

### SECTION III. 4. C. INDUSTRIAL AND COMMERCIAL ACTIVITIES

#### Sample Language for Sec. III. 4. C.

*Sample Addendum for Sec. III. 4. C.*

*Submitted by Steve Kelley*

**Note:** The following sample language would be used as an addendum to a conservation easement.

#### COMMERCIAL ACTIVITIES ADDENDUM TO CONSERVATION EASEMENT

This Addendum is attached to and forms a part of the Conservation Easement entered into between OWNER and CONSERVANCY dated \_\_\_\_\_, 20\_\_\_\_, for the PROPERTY described therein. OWNER and CONSERVANCY further agree that OWNER retains the right to and may undertake the following additional commercial activities on the PROPERTY but only to the extent they do not adversely affect the Conservation Values of the PROPERTY (**check all that apply**):

**Home Office Activities.** Otherwise lawful home office activities within buildings on the PROPERTY existing at the time of inception of or as otherwise authorized by this Conservation Easement, such as, but not limited to, small home-based bookkeeping, accounting, legal, computer repair, veterinary, medical, physical therapy, counseling, child care, elder care, contracting, plumbing, electrician, and consulting businesses and similar activities which do not create significant additional traffic or parking needs and do not adversely affect the Conservation Values of the PROPERTY.

**Customary Rural Enterprise Activities.** Otherwise lawful and customary limited, low-impact rural enterprises, such as, but not limited to a small-scale farmer's market or roadside stand, pick-your-own sales, egg, honey, and pumpkin sales, homemade craft sales, farm machinery repair/blacksmith services, sawmills, firewood distribution, bed-and-breakfast, camp, ecotourism, agritourism, corn maze, animal rescue, equestrian facility, boarding kennel, education programs, and indoor third-party vehicle and boat storage, are authorized so long as such uses are confined to locations within the Building Envelopes as identified in Exhibit \_\_\_\_\_, do not create significant additional traffic or parking needs, and do not adversely affect the Conservation Values of the PROPERTY. Trailer parks; yard waste, compost, and refuse storage; golf courses and driving ranges; vehicle sales or dealerships; motorized recreation vehicle facilities; motorized vehicle racetracks; outdoor third-party vehicle and boat storage or maintenance; auto parts and junk yards; outdoor concerts, festivals, parties, sales or other events involving more than 100 persons without CONSERVANCY's advance written permission; and all other activities which are inconsistent with protection of the Conservation Values of the PROPERTY are expressly prohibited. Conducting customary rural enterprises on any other part of the Property is not permitted without Conservancy's advance written approval for each instance. Conservancy shall not give such permission unless Conservancy determines that the proposed use will not substantially diminish or impair the Conservation Values of the PROPERTY.

**Equestrian Activities.** Otherwise lawful equestrian activities (including but not limited to breeding, raising, training, pasturing, grazing, boarding and sale of horses, horseback riding instruction, equestrian husbandry and other commercial equestrian activities) and equestrian sports (including but not limited to cross-country, dressage, and hunting with hounds), but only to the extent they do not adversely affect the Conservation Values of the PROPERTY. The CONSERVANCY commits to work with the OWNER but has sole discretion to reasonably limit location, time of year, frequency, duration, and scope of Equestrian Activities to protect the Conservation Values of the PROPERTY and the larger ecological landscape.

**Activities within the Agreed Commercial Activity Envelope:** Otherwise lawful commercial activities which do not adversely affect the Conservation Values of the PROPERTY within the agreed Commercial Activity Envelope on the PROPERTY depicted on Exhibit \_\_\_\_\_ and legally described as follows:

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**Other Approved Commercial Activities:** The following otherwise lawful commercial activities, which do not adversely affect the Conservation Values of the PROPERTY:

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### SECTION III. 4. E. VEGETATION MANAGEMENT

#### Alternative Language for Sec. III. 4. E. When Property Has a Forest Component But Not Commercial Forestry

*Submitted by Grand Traverse Regional Land Conservancy*

**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:

**Note:** A "Forester" is defined for the purposes of this document, as a person who is professional forester and is registered as such with the State of Michigan.

1. **Dangerous or Diseased Trees.** Pruning or removing trees or other vegetation is permitted under the following conditions:
  - A. to remove trees that pose real danger to a structure or humans in frequently used areas due to a structural or health defect of the tree.
  - B. to remove trees in order to reduce a natural threat of infestation posed by diseased vegetation (as documented by a Forester or other natural resource specialist and as approved by the Conservancy).
  - 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 without a management plan, provided that said use retains adequate woody debris on the forest floor for habitat and soil productivity purposes. Except as provided in F.1 above, any removal of live or standing dead trees, whether for firewood or other purpose, is considered Forest Management and is subject to requirements of the Forest Management Plan and Notice of Harvest as described below.
3. **Forest Management.** Forest management for the growth and harvest of trees including the production of forest products for use or sale is permitted on the Property in accordance with the following Criteria:

- A. It is in accordance with a Forest Management Plan (see below) prepared by a Forester or other qualified natural resources specialist that is pre-approved by the Conservancy.
- B. It meets the minimum standards set forth in the then current Best Management Practices, as outlined in "Sustainable Soil and Water Quality Practices on Forest Land," (as revised 2009) Michigan Department of Natural Resources and Michigan Department of Environmental Quality, or similar successor publications approved by the Conservancy.

Additional setbacks or restrictions may be required by the Conservancy in order to protect the Conservation Values.

- C. Any commercial harvest must be marked and supervised by a Forester in order to ensure adherence to the Forest Management Plan and the protection of the Conservation Values.
- D. Forest Management shall be conducted under written contract(s) with the Forester and competent logging operator(s). These contracts shall specify relevant requirements for compliance with this Conservation Easement and the approved Forest Management Plan. These contracts shall be provided to the Conservancy prior to any harvest.
- E. The forested character of the Property is maintained for habitat and scenic values.
- F. Populations and diversity of native plant species and habitat for native animal species is preserved.
- G. Water quality, wetlands, and riparian zones are protected.
- H. It is undertaken in a manner not detrimental to the Conservation Values of the Property.

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.D. herein.

Additionally, a plan must include the following:

- A. Date the plan was prepared and the date of expiration for the plan (no more than 15 year term).
- B. Reference to this Conservation Easement, the Conservation Values of the Conservation easement, and forest management criteria required in paragraph \_\_.3.
- C. Specific management goals and objectives of the forest management plan.
- D. Stand delineation maps with acreage of stands.
- E. Stocking level and size class distribution information (both before and after harvest).
- F. Description of any actions that are necessary to prevent the spread of non-native invasive species into the forest and throughout the forest by logging equipment. Conservancy staff can provide a list of invasive species in our region that are known to harm the conservation values of the forest.
- G. Prescription of silvicultural treatments used to achieve stand goals.
- H. Explanation of harvest method and recommended equipment to be used.
- I. Timeline for implementation with anticipated harvest schedule.
- J. Signature page, including signatures of landowner, Forester and Conservancy.

5. **Notice of Harvesting.** The Owner shall provide the Conservancy with a written Notice of Harvest. This Notice of Harvest shall be provided at least thirty (30) days prior to commencement of harvesting activities. The Owner shall also notify the Conservancy of harvest completion. The prior notice shall include:
- A. The location of the harvest, explanation of harvest method, and equipment to be used.
  - B. Contemplated dates for the harvest.
  - C. A plan for ingress and egress and the location of staging area(s).
  - D. Required reclamation work.
  - E. Description of any other activities and practices intended to achieve compliance with the requirements of the Conservation Easement.

### SECTION III. 4. G. MINING AND OIL AND GAS EXTRACTION

#### Alternative Language for Sec. III. 4. G.

*Source 2010 MMCE*

Owner retains the right to extract oil, gas, hydrocarbons, or petroleum from the Property for commercial purposes provided that no exploration for, or extractin of, minerals shall be conducted from the surface of the Property. 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.

#### Sample Language for Sec. III. 4. G. to Prohibit Oil and Gas Development

*Submitted by Livingston Land Conservancy*

In addition, exploring for, developing, and extracting oil, gas, hydrocarbons, petroleum products and other minerals (including water for commercial uses and/or sale) is prohibited along with the injection or release of water or chemicals and other substances to facilitate such extraction. The construction or placement of any structures or improvements on, over, across, or under the Property for any such exploration, development, or extraction purposes, including but not limited to pipelines, is prohibited.

**IMPORTANT NOTE / CAUTION ABOUT THE ABOVE OPTION:** An outright prohibition of oil and gas development is the most environmentally protective as it prohibits any drilling (direct from surface or directional drilling from off-site) to extract oil and gas underneath the conservation easement property. However, it may be challenging to enforce in situations when a landowner may want to exploit oil and gas minerals in their ownership through a non-development lease. In cases where the landowner owns the mineral rights but wants to outright prohibit oil and gas development, conservancies should keep in mind that those landowners may be subject to compulsory pooling under Michigan statute, making enforcement of such an easement provision potentially impossible. Additionally, future owners of the conservation easement property and subsurface minerals may not be as interested in preventing oil and gas development as the original easement donor. [Any land conservancy wishing to pursue this option should fully vet this with knowledgeable legal assistance and ensure they have adequate resources to enforce.](#)

#### Sample Language for Sec. III. 4. G. For Varying Circumstances

*Submitted by Grand Traverse Regional Land Conservancy*

**SAMPLE OIL AND GAS LANGUAGE IF LANDOWNER OWNS MINERALS AND WISHES TO LEASE NON-DEVELOPMENT MINERAL RIGHTS (Or if Minerals Have Been Severed and Leased and the Lessee Consents to Non-Development)**

1. **Exploration.** Exploration for minerals conducted in a manner that will not have a detrimental impact on the Conservation Values of the Property, including but not limited to certain methods of seismic testing, is permitted pursuant to a written plan submitted to the Conservancy for review and approval pursuant to the terms set forth in \_\_\_\_\_ herein.
2. **Development.** 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, except as provided for herein. 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, or across the Property.

#### **ADDITIONAL SAMPLE OIL AND GAS LANGUAGE**

Optional Language per mineral rights ownership, lease status and needs of landowner. Landowner may not be in position to negotiate restrictions on mineral development if the rights have been severed partially or wholly.

**Note:** The following language may be used if mineral rights have been severed and leased and the mineral rights owner(s) and lessee(s) consent(s) to non-development:

The owners of the mineral rights retain 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 owners of the mineral rights 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, or across the Property.

At the time of the conveyance of this easement, the fee simple title owner of the Property (Owner) does not own the mineral rights on the Property. The third party owners at the time of conveyance of this easement will by separate instrument, a copy of which is attached hereto as Exhibit \_\_\_\_\_ and incorporated by this reference, subordinate their interests to this easement.

**OR:**

**Note:** The following language may be used: If wells are present or future wells can be placed in a manner that has no more than a limited, localized impact on the real property and in such a manner as will not be irremediably destructive of significant conservation values. It may be possible to determine future well sites locations to satisfy this criteria depending on mineral rights ownership and lease status if all interested parties agree. One-acre size

limitation for well site is intended to exclude high-volume, horizontal extraction activities which require large well sites and substantial industrial activity.

The Owner retains the right to explore, by geophysical or other methods, to drill, operate and produce oil, gas and other hydrocarbons, to lay pipelines, and other structures for the purpose of extracting oil, gas and hydrocarbons from the Property for commercial purposes in a manner that has no more than a limited, localized impact on the real property and in such a manner as will not be irremediably destructive of significant Conservation Values of the Property. Therefore, subsurface mineral extraction activities shall be conducted in accordance with the following restrictions:

**Note:** The following is an example of site-specific limitations, which may be used if practitioner determines the site can accommodate extraction without detriment to conservation values. This language is the most liberal for extraction purposes and may be used if wells are present or future wells can be placed in a manner that has no more than a limited, localized impact on the real property and in such a manner as will not be irremediably destructive of significant conservation values. It may be possible to determine future well site locations if all interested parties agree.

1. The location, number, and size of the well sites shall be limited as follows;
  - A. Total number of well sites on the Property shall never exceed two (2);
  - B. Each well site shall be limited in size to no more than 10acre for a total of not more than two (2) acres for the Property in its entirety; and
  - C. Prior to any construction or the removal of any vegetation, the location of the proposed well sites shall be subject to the approval in writing by the Conservancy.
2. No structures associated with extraction of said minerals shall be located within forested areas or wetland areas or within three hundred (300) feet of any wetland or creekbed (perennial or ephemeral);
3. Under no circumstances are surface mining methods allowed; and
4. Within two years from plugging and abandonment of a well-site or removal of pipelines or other structures, the well site(s) or the locations of where structures existed shall be restored through the planting of native species. Said restoration shall occur regardless of any speculation that the well-site/location may be used again for further gas and oil extraction/use in the future, to prevent non-native, invasive plant species from colonizing the well-site.
5. Extraction of non-hydrocarbon, metallic or non-metallic minerals, such as, ores, sand, gravel, rock or peat, is prohibited.

**OR:**

The Owner retains the right to explore, by geophysical or other methods, to drill, operate and produce oil, gas and other hydrocarbons, to lay pipelines, and other structures for the purpose of extracting oil, gas and hydrocarbons from the Property for commercial purposes in a manner that has no more than a limited, localized impact on the real property and in such a manner as will not be irretrievably destructive of significant Conservation Values of the Property. Under no circumstances are surface mining methods allowed.

**Note:** It may be useful to define significant conservation values and limit extraction to least sensitive portions of the property. Limit surface area disturbance to 2-5% of land surface area.

Within two years from plugging and abandonment of a well-site or removal of pipelines or other structures, the well site(s) or the locations of where structures existed shall be restored through the planting of native species. Said restoration shall occur regardless of any speculation that the well-site/location may be used again for further gas and oil extraction/use in the future, to prevent non-native, invasive plant species from colonizing the well-site.

Extraction of non-hydrocarbon or petroleum minerals, such as, sand, gravel, rock or peat, is prohibited.