

MICHIGAN MODEL AGRICULTURE CONSERVATION EASEMENT TEMPLATE **With Commentary and Optional Sample Affirmative Covenant Language** **Heart of the Lakes 2018**

The Agriculture Conservation Easement Template (ACET) is based, in part, on the Michigan Model Conservation Easement Standard Template, a natural lands template last revised by the state's land conservancy community in 2015. By design, ACET may seem to place more emphasis on natural lands protection than one would expect in a strictly agricultural easement. Many land conservation practitioners in Michigan work with landowners with properties that have a variety of conservation values in addition to farmland. Therefore, the ACET attempts to provide an array of possible language to cover many different circumstances that may occur on farmland property.

Easements must be tailored to reflect the specific conservation values and characteristics of the land protected, current and future landowner goals and needs, and the goals, policies and practices of the conservancy. Consequently, no well-drafted easement will look or read exactly like the ACET. For that reason, caution is urged regarding use of the ACET as an educational tool for landowners contemplating a conservation easement. Some of the ACET provisions may or may not apply to their land and unique circumstances.

The ACET language is purposely designed to be highly protective of conservation values as a place for conversations and drafters to start. To help drafters, the template includes notes, suggestions and, in some cases, alternative language to consider—see **NOTE** or **SAMPLE/EXAMPLE ALTERNATIVE LANGUAGE** throughout the document.

ACET is advisory only and not legal advice. No party is required to adopt any of its provisions. Parties involved in negotiating conservation easement agreements should be represented by their own legal counsel.

ACET is a product of Michigan land conservation practitioners and attorneys who have informally collaborated together, facilitated by Heart of the Lakes. Drafters are encouraged to also consult the Practitioner's Guide to the Michigan Model Standard Template found here: www.heartofthelakes.org/michigan-model

ACET and ACEP-ALE: Easements completed with funding from the federal ACEP-ALE (Agricultural Conservation Easement Program—Agricultural Land Easements) program must comply with the Minimum Deed Terms (MDT) established by the Natural Resources Conservation Service (NRCS). This template notes NRCS MDT in some instances, but it may not completely cover all current federal requirements as they can be subject to change. Drafters must refer to the MDT language when negotiating and drafting ACEP-ALE easements. As that language can change over time, find current MDT language here: <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/easements/acep>

A Tipsheet on applying for ACEP-ALE can be found here: <http://farmland.heartofthelakes.org/farmland-resources/>

Sample Affirmative Covenant Language: For those land conservancies seeking to ensure protected farmland remains in production, sample affirmative covenant and resale restriction language is included as a companion to ACET for land conservancies seeking to augment easements to keep farmland affordable and in active agricultural use. An introduction, sample affirmative covenant and resale restriction language, and a sample lease can be found at the end of ACET.

To comment on this document, please contact Heart of the Lakes at info@heartofthelakes.org

AGRICULTURAL CONSERVATION EASEMENT

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: (INSERT GENERAL LOCATION) The property legally described on attached Exhibit A.

NOTE: As used in this template, “property” refers to the entire property covered by the easement. The property may include designated agricultural areas, natural areas, forestry areas, and/or building envelopes, etc. As delineated in the baseline document report included as part of the easement. Some drafters prefer to identify and use the term ‘protected property’ within a larger property.

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

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). (IF PURCHASED: THE OWNER CONVEYS AND WARRANTS TO CONSERVANCY A PERPETUAL AGRICULTURE AND CONSERVATION EASEMENT OVER THE PROPERTY FOR THE FULL CONSIDERATION OF _____ (\$_____), THE RECEIPT AND ADEQUACY OF WHICH IS HEREBY ACKNOWLEDGED.

NOTE: See the introduction to this template for an explanation of ACEP-ALE. The following language is required if using ACEP-ALE funds for an easement purchase: “Under the authority of the ACEP program, the Natural Resources Conservation Service (hereinafter referred to as “NRCS” has contributed _____ (\$_____) toward the purchase of the easement.”

Easement: This Agriculture 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.

NOTE: If an ACEP Easement, include the following definition

ACEP: Agricultural Conservation Easement Program (“ACEP”) 16 U.S.C. 3865 et seq.

II. REPRESENTATIONS

1. **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.
2. **CONSERVANCY.** Conservancy:
 - A. Is a qualified holder of this Conservation Easement committed to preserving the Conservation Values of the Property and upholding the terms of this Easement,
 - 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.

III. OWNER AND CONSERVANCY AGREE TO THE FOLLOWING:

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

[DELETE ALL THAT DO NOT APPLY. THE FOLLOWING IS BEST USED FOR DONATIVE EASEMENTS GIVEN IRC REGULATIONS. IN OTHER CIRCUMSTANCES, DRAFTERS MAY WANT TO BEGIN WITH AGRICULTURAL PURPOSES—SEE SAMPLE STATEMENT OF PURPOSE LANGUAGE AT THE END OF THIS SECTION.]

- A. To protect a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, **[COULD INCLUDE THE WATERSHED, STREAMS AND RIVERS WITHIN THE EASEMENT AREA.]**
- B. To preserve open space and will yield a significant public benefit
 - 1) For the scenic enjoyment of the general public, or (and) **[COULD INCLUDE THE ROAD WHERE THE PUBLIC TRAVEL]**
 - 2) Pursuant to a clearly delineated Federal, State, or local governmental conservation policy
 - 3) **(ADD AGRICULTURAL PURPOSE(S) AND ANY OTHERS THAT MAY BE**

APPLICABLE)

IF ACEP-ALE:

- 4) The Agricultural Conservation Easement Program, 16 U.S.C Section 3865 et seq., facilitated and provided funding for the purchase of an Agricultural Land Easement on real property, for the purpose of protecting the agricultural use and future viability, and related conservation values, by limiting nonagricultural uses of the Property.

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

SAMPLE PURPOSES LANGUAGE:

1. STATEMENT OF PURPOSE:

The primary purpose of this Conservation Easement is to enable the Property to remain in agricultural use by preserving and protecting its prime soils, agricultural viability, utility, character and values (“Primary Purpose”). It is also the purpose of this Conservation Easement to protect the habitat values of the Property, to the extent that such protection is consistent with the Primary Purpose of this Conservation Easement (“Secondary Purpose”). To the extent that protection of the other Conservation Values referenced above (including the Property’s open-space and scenic values) is consistent with the Primary and Secondary Purposes of this Easement, it is also the purpose of this Easement to protect that or those additional Conservation Values (“Additional Purpose”). The Primary, Secondary, and Additional Purposes are collectively referred to herein as the “Conservation Purpose” of this Conservation Easement. No activity, use or development of the Property for any purpose or in any manner that impairs, interferes with, or conflicts with the Conservation Values of the Property shall be permitted, except as specifically permitted by this Conservation Easement.

2. CONSERVATION VALUES.

The Property possesses agricultural, 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:

NOTE: 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.

A. The Property includes active agriculture and:

- 1) Consists entirely of prime, unique, or locally important farmland as classified (OR DOCUMENTED BY) _____

NOTE: Make sure the easement is tailored to the property—it may not consist “entirely” of prime, unique or locally important farmland

- 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 and protection is consistent with township or county-wide planning as documented in _____
- 4) Lies in close proximity to the following conserved properties which similarly preserve existing agricultural character and/or natural habitat, and preservation of the Property enables Owner to integrate the Conservation Values with other neighboring lands, **(LIST PROPERTIES)**
- 5) **(LIST OTHER APPLICABLE AGRICULTURAL CONSERVATION VALUES)**

B. The Property provides open space for the scenic enjoyment of the general public and will yield a significant public benefit through:

(LIST ONLY THOSE THAT ARE APPLICABLE TO THE PROPERTY)

- 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 agricultural land and/or natural habitat.
- 3) 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.

C. 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:

- 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 361, Farmland and Open Space Preservation, MCL 324.36101 et seq.;
- 4) 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);
- 5) The **(INSERT)** governmental agency has endorsed the proposed scenic view of the Property under a landscape inventory, pursuant to a review process.
- 6) The **(INSERT)** office has recognized the importance of the Property as an ecological and scenic resource, by designating this and other land as **(INSERT)**.
- 7) The Township/County of **(INSERT)** has designated this area as **(INSERT)** in its Comprehensive Plan dated **(INSERT)**.
- 8) **(INSERT/CITE local policy statements which apply)**.
- 9) The following public funding sources were utilized in the purchase of this Conservation Easement: **(INSERT)**

NOTE: Of the following, include only those that apply to the property.

- 10) NREPA Part 355, Biological Diversity Conservation, MCL 324.35501 et seq. (Legislative Findings MCL 324.35502);
- 11) NREPA Part 353, Sand Dune Protection and Management, MCL 324.35301 et seq. (Legislative Findings MCL 324.35302);
- 12) NREPA Part 303, Wetland Protection, MCL 324.30301 et seq. (Legislative Findings MCL 324.30302);
- 13) 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);
- 14) Coastal Zone Management Act, 16 USC 1451 et seq. (§§1451, 1452 Congressional Findings and Policy);
- 15) NREPA Part 323, Shorelands Protection and Management, MCL 324.32301 et seq.;

- 16) NREPA Part 301, Inland Lakes and Streams, MCL 324.30101 et seq.;
- 17) NREPA Part 325, Great Lakes Submerged Lands, MCL 324.32501 et seq.;

D. 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:

NOTE: Depending on the property, you may want to consider any of the following, but do not include those that do not apply.

- 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.
 - 1) 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.

1. 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, including a base map with soils, a depiction of all existing human-made modifications, prominent vegetation features, identification of flora and fauna, land use history, agricultural areas, 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: Any specific conservation areas (agriculture, forestry, natural) and any building envelopes within the property should be delineated in the Baseline Documentation Report.

NOTE: Some practitioners include (and some ag easement funding sources require) the Baseline

Documentation Report as an Exhibit referenced by letter, number or name throughout the easement (e.g. Exhibit B). Others do not record the Baseline Document Report to avoid the cost of filing and recording with the Register of Deeds, as well as the potential for needing to amend the entire easement if the Baseline Document Report requires updating or supplements to document any changes in condition, executed reserved rights, approvals, etc.

4. PERMITTED AND PROHIBITED USES. Owner retains all ownership rights not expressly restricted by this 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:

- A. Convey and Transfer Notices.** 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.
- B. Agricultural Uses:** Owner retains the right to conduct agricultural uses on the property (ADD “in areas designated as Agricultural Area” IF APPLICABLE), provided that all agricultural uses 1) do not impair the Property’s ability to support future agricultural uses and 2) comply with all other provisions of this Easement and all local, state or federal laws. For purposes of this Easement, “Agricultural use” means substantially undeveloped land devoted to the production of plants and animals useful to humans, including forage crops; grains, feed crops, and field crops; dairy and dairy products; poultry and poultry products; livestock, including breeding and grazing of cattle, swine, captive cervidae, and similar animals; berries; herbs; flowers; seeds; grasses; nursery stock; fruits; vegetables; Christmas trees; and other similar uses. Agricultural use includes use in a federal acreage set-aside program, a federal conservation reserve program, or a wetland reserve program. Agricultural use does not include the management and harvesting of a wood or forest lot. “Agriculture” means the production of plants, animals or other organisms useful to humans on substantially undeveloped land devoted to such uses. The management and harvesting of timber is not considered to be an agricultural use, but is a permitted activity under this easement, as described in 4 (F).

NOTE: For ACEP-ALE easements, the NRCS will not accept definitions of agriculture use that are not sustainable. Because of soil impacts, sod farms and ball and burlap nurseries are not acceptable agricultural practices for enrollment. Many conservancies adhere to a similar policy.

NOTE: Some practitioners will require that agricultural uses be conducted in accordance with Generally Accepted Agricultural and Management Practices (GAAMP—Michigan Department of Agriculture and Rural Development) or a conservation plan that may be

required when using public funds for acquisition, such as ACEP-ALE.

ALTERNATIVE LANGUAGE: Some drafters prefer not listing all the different types of agriculture when those types may change over time. Alternative language to consider may be something like the following: “Agricultural use includes the growing, processing, and marketing of agricultural products.”

Agricultural uses include activities that may include, but are not limited to, the following:

- 1) Planting trees or other vegetation to improve agricultural use of the Property, such as wind breaks;
- 2) Removing trees or other vegetation to improve agricultural use, such as air drainage, or to make additional land available for farming, except in areas designated as Forest Areas, which are restricted as described in 4(F);
- 3) Composting plants, animal manure or other natural materials generated by agricultural uses; and
- 4) Lying fallow or nonuse of the Property for the purpose of supporting the future viability of agriculture.
- 5) The use of a Licensed Agricultural Labor Camp or Agricultural Labor Camp including the right to build agricultural worker housing to house migrant farm laborers while they are principally employed on the Owner’s farm operation. (Buildings shall be located outside of the restricted viewshed or prime farming areas, if any, as shown in the Baseline Documentation Report (Exhibit __)). Agricultural worker housing means housing owned by the farm operation that is not occupied by Owner and is being provided rent-free to farm labor whose primary source of income is derived from that farm operation.
- 6) Storage of agricultural machinery, equipment and agricultural materials, including but not limited to chemicals and fertilizers. (Limitations on their location, if any, shall be shown in the Baseline Document Report, Exhibit __).
- 7) Storage, retail or wholesale marketing or processing of agricultural products, so long as more than fifty percent (50%) of the stored, processed or merchandised products are produced on that farm operation for at least 3 of the immediately preceding 5 years.

NOTE: Location for these activities should be designated if buildings or infrastructure are needed.

- 8) Other Agricultural Practices that may in the future be determined by the Township Board to be a common agricultural practice in the region after the use is recommended by the Planning Commission and at least one other state or nationally recognized agricultural organization.

- 9) Agricultural activity specifically does not include the following: golf courses, campgrounds, airfields, vehicle raceways or commercial animal raceways.

C. Subdivision. Separate conveyance of a portion of the Property or division or subdivision of the Property is prohibited except as otherwise permitted below:

- 1) **Right to** (add as appropriate)(insert details of number of divisions allowed as delineated in the Baseline Document Report (OR Exhibit___), the boundaries and allocation of the impervious surface limitation of which has been identified in 4E below and in the Baseline Document Report (OR Exhibit ___)

NOTE: Subdivisions should generally be prohibited to keep the parcel large enough to be a viable farm. Some future divisions may be allowed if appropriately planned. ACEP-ALE Minimum Deed Terms require one of the following options:

[Option 1] Separate conveyance of a portion of the Protected Property or division or subdivision of the Protected Property is prohibited, except where State or local regulations explicitly require subdivision to construct residences for employees working on the Protected Property. Grantor must provide written notice and evidence of such requirements to Grantee and the Chief of NRCS or his or her authorized designee (Chief of NRCS) prior to division of the Protected Property.

[Option 2] The Protected Property must not be divided or subdivided into, or separately conveyed as, more than _____ farm or ranch parcels (_____ divisions allowed), the boundaries and the allocation of the impervious surface limitation of which have been identified in EXHIBIT _____, which is appended to and made a part of this ALE. To protect the agricultural use and future agricultural viability, and related conservation values of the Protected Property, the boundaries of such divisions have been preapproved in writing by Grantee and the Chief of NRCS or his or her authorized designee (Chief of NRCS). Deviations from the identified boundaries will not be allowed. Grantor must give Grantee and the Chief of NRCS written notice prior to subdividing, dividing or separately .conveying a parcel of the Protected Property.

D. Industrial or Commercial Uses. Industrial and commercial activities on the Property are prohibited, except for the following:

- 1) **Right to Agricultural Commercial Activities:**

- a. Agricultural production and related uses;
- b. The sale of excess power generated in the operation of alternative energy structures and associated equipment or other energy structures that Conservancy approves in writing as being consistent with the conservation purposes of this Easement;
- c. Temporary or seasonal outdoor activities or events that do not harm the agricultural use, future viability, and related conservation values of the Property herein protected;

- d. Commercial enterprises related to agriculture or forestry including but not limited to agritourism, processing, packaging, and marketing of farm or forest products, farm machinery repair, and small-scale farm wineries; and
- e. Small-scale commercial enterprises compatible with agriculture or forestry including but not limited to cafes, shops, and studios for arts or crafts.

NOTE: Commercial activities should be contained within the appropriate area—agriculture, building envelope, etc. Consideration should also be given to commercial farms that may have a lot of machinery that needs to be stored.

E. Structures and Construction. The placement, construction or granting of easements for any human-made modifications, including structures, buildings, fences, roads, utilities and related infrastructure, and parking lots is prohibited except as follows below.

NOTE: Consult Minimum Deed Terms if an ACEP-ALE:

(Optional) Right to Maintain and Replace Existing Structures (add as appropriate)(insert details here)

- 1) **Right to Construct Agricultural Infrastructure.** Owner retains the right to construct, maintain and replace buildings and other structures necessary for and consistent with agricultural uses, including new buildings such as greenhouses, roadside stands and other structures and improvements to be used solely for agricultural purposes. Any new structures and improvements must be located within the building envelope, described in the Baseline Documentation Report (OR Exhibit ___), which is appended to and made part of this easement. Any impervious shall not exceed ___ percent of the Property. Impervious surfaces are defined as material that does not allow water to percolate into the soil on the Property, including but not limited to, residential buildings, agricultural buildings with or without flooring, paved areas, and any other surfaces that are covered by asphalt, concrete or roofs.

NOTE: 2% of the protected property is the federal limit for impervious surfaces. For non-ACEP-ALE, the impervious surface limitation needs to be tailored to the property but generally should not be higher than 2% unless property circumstances warrant it.

- 2) **Right to** (add as appropriate)(insert details here)

F. Forest 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 permitted under 4B herein and as follows:

NOTE: Drafters may want to title this section according to the non-agricultural vegetation to be protected—woods, forests, prairies, etc. Caution needs to be exercised here as some vegetation, like Christmas trees, may be considered an agricultural use.

NOTE: ACEP-ALE may require a forest management plan depending on the amount of contiguous forest on the property

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.
- 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.

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.

NOTE: See Minimum Deed Terms for ACEP-ALE easements. All news structures and improvements must be "located within the building envelopes, containing approximately ___ acres and described in exhibit ___ which is appended to and made a part of the ALE".

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. 7 below.

NOTE: Much more detail on forest management is included in the appendix to the Michigan Model Conservation Easement Practitioner's Guide: www.heartofthelakes.org/michigan-model

G. Surface Alteration. Grading, blasting, filling, sod farming, earth removal or any other activity that will disturb the soil surface or materially alter the topography, surface or subsurface water systems, or wetlands of the Property is prohibited, except as follows:

- 1) **Right to (IF APPLICABLE):**
 - a. Dam construction to create ponds for agricultural use, fire protection, or wildlife enhancement, or wetland restoration, enhancement or creation in accordance with _____
 - b. Erosion and sediment control pursuant to _____
 - c. As required in the construction of approved buildings, structures, roads and utilities provided that the required alteration has been approved in writing by Conservancy as being consistent with the conservation purpose of this Easement
 - d. On-site sand and gravel from a Building Envelope or other pre-determined location defined by this Easement for onsite road construction and maintenance permitted by the Easement
 - e. Agricultural activities conducted as allowed by this Easement.

NOTE: For many farms, a good portion of irrigation water comes from surface water (farm ponds). The ability to clear out existing farm ponds and construct new farm ponds for irrigation purposes may be important to farmers and may need to be considered along with the conservation values to be protected.

H. 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:

- 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.

NOTE: See the Minimum Deed Terms for ACEP-ALE easements. Mining is generally prohibited from the property except for limited on-farm use if suitable or limited extraction may be allowed subject to specific provisions.

- I. Dumping.** 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. This is not intended to prohibit the use of organic waste or other agricultural byproducts used for agricultural uses, so long as it conforms to local, state and federal law.
- J. Water Courses, Groundwater.** Water from natural water courses, lakes, rivers, streams, creeks, wetlands, and other bodies of surface water and groundwater or water features may not be diverted, blocked, extracted, pumped, or piped from the Property or degraded or polluted, except as follows:
- 1) **Right to** (add as appropriate)(insert details here)
- K. 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 follows:
- 1) **Right to Operate Motorized Vehicles.** Owner retains the right to operate motorized vehicles on the Property on the established driveways, trails, two-tracks and Agricultural Area as delineated 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 agricultural and/or forestry maintenance/management uses described herein. Owner also retains the right to operate motorized vehicles off-trail on the Property, such as snowmobiles on snow, and for Owner’s access. However, the right to operate motorized vehicles off-trail may be modified or extinguished if the Conservancy determines that use of ORV’s or other motorized vehicles are adversely impacting the Conservation Values of the Property.
 - 2) **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.
- L. Livestock.** Commercial confinement facilities for livestock, swine, or poultry, commonly known as Confined Animal Feeding Operations (“CAFOs”) are prohibited on the Property. CAFOs are herein defined as agricultural facilities that house and feed a large number of animals in a confined area for 45 days or more during any 12-month period.

NOTE: The NRCS will not support restrictions of this type in ACEP-ALE. The agency believes issues related to CAFOs are best handled by local ordinance and right to farm laws. Some

farmers may not agree to this provision. Drafters should also consider that farms with livestock may need to contain their animals during the winter months. If this is the case, identifying where they will be held within a building or farmstead envelope will be important.

- 1) Right to raise or graze livestock.** Owner retains right to raise or graze livestock only within the area designated as the Agricultural Area delineated in the Baseline Documentation Report (OR Exhibit _____), incorporated herein by reference, and provided it is done in a manner that minimizes erosion and/or degradation of soils. The per acre density of any animals and all livestock must not impair the Conservation Values of the Property. Owner will maintain adequate fencing to prevent livestock from entering area designated as _____.
- M. Signs and Billboards.** Billboards are prohibited. Owner retains the right to place up to three (3) signs, each no larger than six (6) square feet in size, on the Property at one time. However, signs commonly used for prohibiting unauthorized access or use may be placed along the boundaries of the property. In order to maintain the scenic Conservation Values protected by this Easement, any other signs placed on the Property require written Conservancy consent.
- N. Hunting, Trapping and Fishing.** Owner retains all rights to hunt, trap, and fish on and from the Property consistent with all applicable laws. Owner retains the right to construct and place blinds on the Property for the purposes of hunting and viewing wildlife. Blinds shall not have a foundation constructed with concrete or other permanent materials. Owner may affix permanent tree stands that are constructed from wood or fasten tree stands that are portable and non-permanent made from any material that is common or standard for these devices. Along with this right, Owner retains the right to trim branches less than or equal to one (1) inch in diameter for the purpose of creating shooting/viewing lanes, provided such trimming does not adversely impact the Conservation Values of the property.
- O. (OPTIONAL) On-Farm Energy Production.** Renewable energy production is allowed for the purpose of generating energy for the agricultural and residential needs of the property. Renewable energy sources must be built and maintained within impervious surface limits, with minimal impact on the conservation values of the Property.

NOTE: Consider the above optional language if energy production is requested by the landowner and if it doesn't impair conservation values. Siting will be an important consideration, e.g. inside or outside a building envelope, as will any impervious surface limitations.
- P. 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.

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

NOTE: For ACEP-ALE, there will need to be a section on 'Protection of the United States' Interests'. See Minimum Deed Terms.

- 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. **(OPTIONAL) 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.

NOTE: Some practitioners prefer omitting 5.D.

- 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 natural occurrences.
 - 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.
- 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.

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.

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.

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, 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.

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.
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.
- 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.
- 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.
- 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.
- 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:
- A. Exhibit A: Legal Description
 - B. Exhibit B: (INSERT name of additional exhibits as applicable such as the Baseline Documentation Report if included as an Exhibit)

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 _____, 201__, 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 Director's or other signer's name), known to me to be the of the (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:

Introduction

Sample Affirmative Farming Covenant /Affordable Covenant and Resale Restriction Language Heart of the Lakes 2016

For land conservancies and farmland owners seriously interested in protecting farming and not just protecting farmland from development, Affirmative Farming Covenant language might be an option to consider. The intent of affirmative covenant language is to keep the land in active production, not just to prevent development or subdivision as with a traditional conservation easement (see the Michigan Model Agriculture Conservation Easement Template). Affirmative Farming Covenant language gives the Conservancy the right (but not the obligation) to enforce active agricultural use of the property. The language can be included as part of a new agricultural conservation easement or can be “layered on” as a second easement to an already-existing agriculture easement.

Under Affirmative Farming Covenants as in the following sample language (adapted from the Peconic Land Trust), monitoring becomes more than just determining if any violations of prohibited activities have occurred. Lands must be monitored for active production requirements as well. And should the original Owner cease active farming, the land conservancy holding the easement also assumes the responsibility of determining the qualifications of a farmer wishing to lease the land or could even assume the lease itself. (A sample lease between the owner and a conservancy is also included in this document.)

Not all land conservancies are comfortable with this approach. Those that wish to consider affirmative language (and companion Affordable Covenant and Resale Restriction sample language) should have a clear mission and a deep commitment to farming as demonstrated by experience—including managing, operating and conveying agricultural land. It would also be prudent to search out other land trusts using affirmative language to review other samples for comparison.

The sample Affordable Covenant and Resale Restriction companion language that follows the Affirmative Covenant Language sets a maximum sale price for the farmland as a means of keeping the land affordable for the next farmer. It also sets resale restrictions, including the qualifications of the purchasing farmer. And if a qualified farmer cannot purchase the land, it must be offered for sale to a “local, not-for-profit land preservation organization with demonstrated experience.”

Affirmative Farming Covenant and Affordable Covenant and Resale Restriction easement terms establish standards and land conservancy roles somewhat different from a traditional agricultural conservation easement. Nonetheless, if it is the goal of the land conservancy and the landowner to keep land in farming in perpetuity, a traditional agriculture conservation easement, which essentially gives the right to a landowner to conduct agricultural activities but does not obligate them to do so, may not be sufficient on its own.

This document is advisory only and not legal advice. No party is required to adopt any of its provisions. Parties involved in negotiating conservation easement agreements should be represented by their own legal counsel. All conservation easements should be tailored to reflect the specific conservation values and characteristics of the land protected, current and future landowner goals and needs, and the goals, policies, and practices of the conservancy. This template includes notes and suggestions, which should be deleted from actual draft easements.

**OPTIONAL LANGUAGE FOR THE MICHIGAN MODEL AGRICULTURE
CONSERVATION EASEMENT TEMPLATE:**

**Affirmative Farming Covenant / Affordable Covenant Farming And Resale Restrictions /
Agricultural Lease**

Adapted from Peconic Land Trust

NOTE = Note to drafters

III. OWNER AND CONSERVANCY AGREE TO THE FOLLOWING:

- 1. Purposes:** The parties recognize the Conservation Values of the Property and have the common purpose of preserving and protecting these Conservation Values in perpetuity. The primary purpose of this Easement is to protect the Property’s high-quality agricultural soils and productive agricultural capacity and to ensure that the Property will continue to be used for active agricultural production and other agricultural uses in perpetuity (the “Primary Conservation Purpose”). To the extent that protection of the Property’s other Conservation Values (including but not limited to its scenic views and open-space values) is consistent with the Primary Conservation Purpose, it is also the purpose of this Easement to protect those Conservation Values and ensure that the Property will be maintained in such scenic and open-space condition (the “Secondary Conservation Purpose”). The Primary Conservation Purpose and Secondary Conservation Purpose shall collectively be referred to herein as the “Conservation Purpose” of this Easement. Such Conservation Purpose shall be upheld and fulfilled by the inclusion of provisions that require the active agricultural management of the Property in perpetuity, including the Affirmative Farming Covenant and Resale Restriction, and by the prevention of any use or development of the Property for any purpose or in any manner contrary to the intent and provisions hereof, including the Conservation Purpose. Any use or activity that is inconsistent with the Conservation Purpose or deleterious to the Conservation Values is prohibited.

NOTE: The purposes language above should be considered if the intent of the easement is to keep the land in active agricultural production in perpetuity.

X. AFFIRMATIVE FARMING COVENANT

NOTE: Adjust numbering/formatting to integrate with an agricultural conservation easement. In this model language, x, y and z = numbers that follow the numerical sequence found in the conservation easement.

A. Agricultural Conservation Plan

NOTE: An agricultural conservation plan is not required for an affirmative farming covenant. However, going through the process of creating one is the best way to understand what is sustainable for the farm and its location. Note that the language “in consideration of” is less strict than “in compliance with” or other similar language.

All Agricultural Activities on the Property shall be conducted in consideration of an agricultural conservation plan (“Agricultural Conservation Plan”) prepared by or in consultation with the Natural Resources Conservation Service (“NRCS”) utilizing the standards and specifications of the NRCS localized Field Office Technical Guide and approved by Conservancy and **(INSERT Local Conservation District)** _____ . Within ninety (90) days after the execution of this Easement, Owner will submit to Conservancy an Agricultural Conservation Plan prepared by or in consultation with the NRCS as outlined above for the Property for Conservancy’s confirmation and approval that such Agricultural Conservation Plan is consistent with the terms of this Easement. Upon Conservancy’s approval, such Agricultural Conservation Plan will be incorporated herein by this reference, and a copy of such Agricultural Conservation Plan will be appended to the Baseline Documentation. Owner shall update the Agricultural Conservation Plan at least every ten (10) years or sooner in the event of any proposed significant change to the existing Agricultural Conservation Plan or any transfer of any interest in the Property (including a leasehold interest). Any subsequent update and/or amendment shall be prepared by or in consultation with the NRCS as outlined above and shall be submitted to Conservancy within ten (10) days of issuance for Conservancy’s review and approval.

B. Abandonment of Agricultural Uses: Owner and Conservancy intend that the Property shall be actively used for Agricultural Uses in perpetuity; however, Owner and Conservancy recognize that unforeseen events may necessitate that the Property be taken out of such use temporarily or that Owner may, for whatever reason, wish to cease conducting Agricultural Uses on the Property. Land allowed to lie fallow (defined as land that is not used for Agricultural Uses for a temporary period in order to restore its fertility and/or as part of crop rotation; shall be deemed to be used for Agricultural Uses in consideration of the Agricultural Conservation Plan, provided that Owner shall obtain Conservancy’s written approval to allow land to lie fallow for a period greater than two (2) years.

If Owner decides to cease, or ceases, to conduct Agricultural Uses on the Property for a period longer than six (6) months, Owner shall notify Conservancy (an “Owner Cessation Notice”) of such decision or of the cessation of Agricultural Uses on the earlier to occur of the following dates:

- (i) Within twenty (20) days of any decision by Owner to cease to conduct Agricultural Uses on the Property for a period longer than six (6) months; or
- (ii) Within twenty (20) days following the end of any six (6)-month period during which the Property has not been used for Agricultural Uses.

Additionally, if Owner has ceased Agricultural Activities on the Property for a period longer than six (6) months, Conservancy shall have the option to notify Owner of such fact (a “Conservancy Cessation Notice”). An Owner Cessation Notice or Conservancy Cessation Notice, alternatively, shall be referred to herein as a “Cessation Notice.”

During any period of cessation of Agricultural Uses, Owner agrees to keep the Property open and available for Agricultural Uses consistent with the Agricultural Conservation Plan. If Owner fails to resume active Agricultural Uses within one year after the Date of Cessation, Conservancy shall have the right, but not the obligation, to enter on the Property and restore, prepare and/or maintain the Property for future Agricultural Uses. Conservancy's activities on the Property shall be consistent with the Agricultural Conservation Plan and the Conservation Purpose and other terms and conditions of this Easement. Conservancy shall have the right to obtain reimbursement from Owner for the costs associated with the implementation of such restoration, preparation, and maintenance.

If Owner:

- (i) Fails to resume Agricultural Uses on the Property (a) within six (6) months from the date upon which a Cessation Notice is delivered or (b) if no timely Cessation Notice is delivered, within six (6) months from the date upon which Conservancy discovers that the Property has not been used for Agricultural Uses for a period of six (6) months or more; or
- (ii) Notifies Conservancy that it has decided that it no longer intends to conduct Agricultural Uses on the Property (each of the foregoing a "Triggering Event"), then

Owner shall immediately upon the occurrence of such Triggering Event use its best efforts to enter into an agricultural lease with a Qualified Farmer of at least the portion of the Property used for Agricultural Uses in compliance with all terms and conditions of this Easement, for a period of not less than five (5) years for the conduct of Agricultural Uses on the Property in accordance with the terms of the Agricultural Conservation Plan and the Conservation Purpose and other terms and conditions of this Easement; provided that the Agricultural Conservation Plan may be amended to accommodate the lessee's proposed Agricultural Uses so long as such amendment is made pursuant to the terms of Section X.A above. Owner shall incorporate by reference the Agricultural Conservation Plan (as amended as provided above) and this Easement in any such lease, shall promptly notify Conservancy in writing of the execution of any such lease, and shall provide a copy of such lease to Conservancy for its review to confirm consistency with the terms of the Agricultural Conservation Plan (as may be amended) and the Conservation Purpose and other terms and conditions of this Easement.

For purposes of this agreement, a Qualified Farmer means a person or legal entity that meets all of the following criteria: (i) may reasonably be expected to earn more

than one-half of his, her, or its annual adjusted gross income from the “business of farming,” as farming is defined in Treasury Regulation Section 1.175-3 (or any successor regulation); and (ii) expects to devote substantially full-time to farming operations including on the Property (in the case of an entity operator, substantially full-time for each of its principal employees). Notwithstanding the foregoing, Conservancy shall make the final determination of the qualification of a proposed operator, lessee or purchaser as a Qualified Farmer based on the above requirements and including, but not limited to, the submission to Conservancy of a business plan and the submission of demonstrated farming experience and/or training.

If Owner is unable to secure an agricultural lease of the Property with a Qualified Farmer within six (6) months of the date Owner is obligated to begin seeking a Qualified Farmer lessee as provided above, Conservancy shall have the right, but not the obligation and at its discretion, to unilaterally invoke, by written notice to Owner, the lease attached hereto as Exhibit ___ and incorporated herein by this reference (“Lease”) for a term of not less than five (5) years to restore, prepare and/or maintain the Property for future Agricultural Uses, to conduct Agricultural Uses itself, and/or to assign the Lease or sublease the Property to a Qualified Farmer pursuant to the terms of the Lease. Conservancy’s activities on the Property shall be consistent with the Lease, the Agricultural Conservation Plan, and the Conservation Purpose and other terms and conditions of this Easement; provided that the Agricultural Conservation Plan may be amended to accommodate Conservancy’s and/or the Qualified Farmer’s proposed Agricultural Uses so long as such amendment is made pursuant to the terms of Section X.A. above. Conservancy shall have the right to deduct from the rent owed under the Lease any costs associated with the implementation of any restoration, preparation, and maintenance of the Property for future Agricultural Uses and/or any costs incurred by a lessee related to any assignment or sublease of the Lease to a Qualified Farmer.

The parties agree that Conservancy’s remedies at law for any violation of Owner’s commitment to conduct Agricultural Uses on the Property as required by this Easement are inadequate, and Conservancy shall be entitled to specific performance of the commitment to conduct such use as required by this Easement without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. This right is in addition to the right to injunctive relief, both prohibitive and mandatory, and such other relief to which Conservancy may be entitled. Conservancy’s remedies described in this section shall be cumulative and shall be in addition to any other remedies provided in this Easement as well as in addition to all remedies now or hereafter existing at law or in equity.

Y. AFFORDABLE FARMING COVENANT AND RESALE RESTRICTIONS

Owner may sell, lease, give, devise, pledge, transfer or otherwise convey the Property, or any interest therein, including any controlling interest in any entity such as a corporation or partnership owning the Property (any such transaction, a “Conveyance”), but only subject to the following restrictions:

- A. Notice of Intent to Market the Property for Sale.** Owner shall notify Conservancy in writing no less than forty-five (45) days prior to any marketing of the Property for sale, including advertising the Property for sale or entering into an agreement with a real estate broker for the purpose of listing the Property for sale.
- B. Maximum Sale Price.** Owner shall offer the Property for sale at no more than the “Maximum Sale Price,” which is limited to annual appreciation of the Property as determined by Conservancy by multiplying the per-acre value of the Property encumbered by this Easement as of the Effective Date, which the parties have determined is _____, by the lesser of (1) the change in Area Median Income (AMI) or (2) the Consumer Price Index (CPI) (for all Urban Consumers Midwest), and, in any event, no more than 3.5% per year. As with any property sold, the condition of the property and closing terms may result in a selling price below the Maximum Sale Price set by Conservancy.
- C. Capital Improvement Credit.** Credit for the present value (calculated at the time of the transfer or sale of the Property to a Qualified Farmer) of capital improvements made by Owner and the purchase price of any easements and covenants affecting the Property acquired by Owner will be added to the Maximum Sale Price.
- D. Qualified Farmer.** Except as otherwise provided in Section Y.E. below, Owner shall sell the Property only to a Qualified Farmer as defined in Section X.B above. Conservancy shall make the final determination of the qualification of a proposed purchaser as a Qualified Farmer based on, but not limited to, the requirements contained in Section X.B. herein and the submission to Conservancy of a business plan and proof of demonstrated farming experience and/or training together with Owner’s Notice of Intent to Convey (as defined below).
- E. Exempt Transactions.**

 - 1) If the Property is conveyed without consideration to a member of Owner’s Family (defined as (i) Owner’s spouse; (ii) Owner’s children; (iii) Owner’s grandchildren; (iv) Owner’s siblings, together with any spouses and children; (v) a corporation, partnership, or other legal entity which is wholly owned and controlled by Family members as defined above; or (vi) a trust of which Family members are the sole beneficiaries), the Conveyance shall be exempt from the requirements hereunder with respect to the sale to a Qualified Farmer and the price limitations of Section Y.B only.

- 2) Any mortgage, pledge, or other assignment of the Property to a lender as security for an indebtedness of Owner shall be exempt from the requirements hereunder with respect to the sale to a Qualified Farmer and the price limitations of Section Y.B only; provided, however, that any Conveyance of the Property as result of a default of Owner in the payment of such indebtedness shall be subject to the terms of this Easement, including but not limited to this Article, in the same manner as Owner hereunder, and the terms of this Easement will survive and continue in full force and effect after any such Conveyance resulting from a default of owner.

All other terms and conditions of this Easement shall remain in full force and effect and the exempt transaction shall be subject to the terms of this Article with respect to a future resale.

F. Notice of Intent to Convey. Should Owner be prepared to enter into a transaction constituting a Conveyance of the Property, including a Conveyance which may be exempt pursuant to Section Y.E above, Owner shall so notify Conservancy in writing. Such notice shall be referred to herein as “Notice of Intent to Convey” and shall include:

- 1) A counterpart original copy of any written agreement between Owner and the proposed transferee relating to the proposed Conveyance, including verification that the proposed purchase price agreed upon was arrived at using the “Maximum Sale Price” formula described in Section Y.B above, as appended, together with such other instruments as may be required to show that proposed transaction has been entered into in good faith and in accordance with this Section;
- 2) A written description of the proposed transferee’s training and experience as an agricultural producer, together with an agricultural business plan for the Property, including a description of the Agricultural Uses to be conducted or facilitated by the proposed transferee, proposed improvements to the Property, and a statement of anticipated agricultural income and expenses for the three-year period following the Conveyance of the Property; or, if the proposed transferee has no such training and experience or intention of operating an agricultural business on the Property, a written statement to that effect; and
- 3) If the proposed Conveyance is to a member of Owner’s Family or a Qualified Farmer, documentation sufficient to establish the proposed transferee as such, including the most recent federal income tax filing(s) for any Qualified Farmer.

Owner shall deliver to Conservancy a Notice of Intent to Convey along with the required supporting documentation at least sixty (60) days prior to such Conveyance. Conservancy shall respond to Owner as to whether or not Conservancy approves of the proposed Conveyance within forty-five (45) days of receipt of said Notice of Intent to Convey and supporting documentation from Owner.

- G. Buyer of Last Resort.** If Owner can demonstrate that the Property has been marketed for sale for a period of not less than twelve (12) months and that no Qualified Farmer has entered into a contract with Owner to purchase the Property, then Owner shall offer the Property to a local, not-for-profit land preservation organization with demonstrated experience with managing, operating and conveying agricultural land within thirty (30) days of being notified by Owner that the required twelve (12)-month marketing period has lapsed, or anytime thereafter, to purchase the Property at a price not to exceed the Maximum Sale Price plus credit for capital improvements pursuant to Section Y.C above, so long as such not-for-profit organization agrees to use its best efforts to close on the Property not more than six (6) months from the date of entering into the contract with Owner. Such organization may also assign its right to purchase the Property while in contract or at the closing.
- H. Continuing Effect.** This Easement created hereunder shall remain in full force and effect after any Conveyance of the Property.
- I. Confidentiality.** All information delivered to Conservancy pursuant to this Easement shall remain confidential and shall not be disclosed to any person or entity not a party to this instrument without the prior consent of Owner, except as required by law.
- J. Partial Release of Conservancy's Rights.** If Conservancy fails to deliver a response to Owner's Notice of Intent to Convey as required under Section Y.F then at the request of Owner, Conservancy shall promptly execute and deliver to Owner a document, in suitable form for recording in the office of the _____ County Clerk, releasing Conservancy's rights under this Section Y only in connection with the proposed Conveyance, and Owner may proceed with the proposed Conveyance; provided, however, that the proposed Conveyance by Owner must be completed within a twelve (12)-month period following delivery to Owner of the document releasing Conservancy's rights under this Section Y in connection with the proposed Conveyance. Any such partial release of this Affordable Farming Covenant and Resale Restrictions shall state that it only releases this Affordable Farming Covenant and Resale Restrictions for purposes of the specific Conveyance in question and that this Affordable Farming Covenant and Resale Restrictions shall continue to be in effect for all other future Conveyances of the Property.

Z. ADDITIONAL OWNER OBLIGATIONS

- A. Annual Mowing Requirement.** In the event Owner seeks to leave the Property open and fallow (as defined in subsection Y.B above) in consideration of the Agricultural Conservation Plan, then Owner hereby agrees to mow such fallow portion of the Property at least once during the growing season so as to prevent successional field growth to predominate. In the event Owner fails to comply with the provisions of this section after reasonable notice is given to Owner by Conservancy, then, in addition to all other remedies set forth herein, Conservancy or its agents is hereby authorized to enter upon the Property to perform such mowing. Notwithstanding the foregoing, in no way does this mowing requirement permit Owner to mow the Property regularly for the purpose of a secondary residential use such as a lawn.

EXHIBIT _____

Agricultural Lease for Property between Owner and Conservancy

[Attached]

**SAMPLE AGRICULTURAL LEASE
BETWEEN OWNER AND CONSERVANCY**

THIS LEASE ("Lease"), dated _____, _____ (for reference purposes only), is by and between _____, a _____, having an address at _____ (herein called "Lessor"), and _____, a _____, having an address at _____ (hereinafter called "Lessee").

WHEREAS, Lessor is the owner of that certain real property located at _____, more particularly bounded and described in "SCHEDULE A," which is attached to that certain Conservation Easement defined and described below and incorporated herein by this reference (the "Property"). Lessee holds a conservation easement ("Conservation Easement") on the Property, which Conservation Easement is recorded at _____ in the official records of _____, and which Conservation Easement, including all of its schedules, exhibits, and other attachments, is hereby incorporated herein by this reference; and

WHEREAS, in the Conservation Easement, Lessor, as owner of the Property, covenanted and agreed that, if Lessor failed, for any reason, to keep the Property in active commercial agricultural production for a period of two (2) consecutive years (or earlier if Lessor notified Lessee that Lessor no longer intended to conduct active commercial agricultural operations on the Property), and Lessor did not timely enter into an agricultural lease with a farmer pursuant to the terms of the Conservation Easement, Lessee had the right to unilaterally invoke this Lease pursuant to the terms hereof as well as to assign this Lease or sublet all or a portion of the Property, at Lessee's sole discretion, to any farmer who (1) agrees to conduct Agricultural Uses (as that terms is defined in Section _____ of the Conservation Easement) on the Property in

compliance with all applicable laws and ordinances and the terms and conditions of the Conservation Easement, including but not limited to conducting sound farming practices as provided in Section 4.B of the Conservation Easement and adhering to an approved Agricultural Conservation Plan as described in Section X.1 of the Conservation Easement (as such Agricultural Conservation Plan may be amended pursuant to the terms of such section); and

WHEREAS, Lessor has ceased active agricultural operations on the Property for a period of two (2) consecutive years (or, as applicable, Lessor has notified Lessee that Lessor no longer intends to conduct active agricultural operations on the Property), and Lessee has notified Lessor that Lessee intends to invoke this Lease pursuant to the terms of the Conservation Easement.

NOW, THEREFORE, for and in consideration of their mutual covenants, agreements, and undertakings hereinafter set forth, Lessor and Lessee agree as follows:

1. Lease. Lessor and Lessee agree that this Lease will be deemed fully effective and valid on the date that Lessor receives Lessee's written notification that the circumstances upon which Lessee is entitled to invoke this Lease have occurred and that Lessee intends to invoke this Lease ("Lessee's Notice of Intent to Lease"); provided that, during the Term (as defined below) of this Lease, Lessee shall not use the Property or any part thereof for any purpose other than the purpose(s) stated in this Lease or in violation of the Conservation Easement or any applicable law or ordinance. In Lessee's Notice of Intent to Lease, Lessee shall provide the Annual Fair Market Value of this Lease (as defined and further described in Section 3 below) and all data and information that Lessee relied upon to calculate same.

2. Term. The term of this Lease shall commence on the date of Lessor's receipt of Lessee's Notice of Intent to Lease ("Effective Date"), regardless of the date of Lessee's actual entry, and shall run for a period of five (5) consecutive years ("Initial Term"). Said Lease shall renew automatically at the end of each five (5)-year term for an additional five (5) years so long as Lessee is in full compliance with all of the covenants and conditions contained in this Lease, unless (i) Lessee notifies Lessor of Lessee's intent to terminate this Lease, which notice must be given in writing not less than ninety (90) days prior to date of termination of any existing term or (ii) Lessor notifies Lessee of Lessor's intent to terminate this Lease, which notice must be given in writing not less than ninety (90) days prior to date of termination of any existing term and provided that Lessor may only so terminate if Lessor intends to conduct, and within three (3) months of said termination actually commences conducting, Agricultural Activities on the Property in compliance with all applicable laws and ordinances and the terms and conditions of the Conservation Easement, including but not limited to conducting sound farming practices as provided in Section 4.B of the Conservation Easement and adhering to an approved Agricultural Conservation Plan as described in Section X.1 of the Conservation Easement (as such Agricultural Conservation Plan may be amended pursuant to the terms of such section).

The Initial Term and any succeeding five-year term complying with the terms of this section shall be referred to herein as the “Term” of this Lease.

3. Lease Payment. Lessee agrees to pay annually as rent the sum equal to the “Annual Fair Market Value” of this Lease as of the Effective Date. The Annual Fair Market Value of this Lease shall be determined according to the following method: (i) Lessee shall compile annual rental rates of three (3) agricultural leases currently in effect from the nearest agricultural operations to the Property; (ii) those rental rates shall be divided by the respective number of acres subject to such other agricultural leases, which will produce a per-acre rate for each lease; (iii) those three per-acre rental rates shall be averaged and rounded to the nearest whole dollar; and (iv) such average shall be multiplied by the number of acres subject to this Lease, thereby producing the Annual Fair Market Value of this Lease. This Annual Fair Market Value may not be disputed by Lessor so long as Lessee has satisfied the terms of this section.

[For illustrative purposes only, if the number of acres subject to this Lease is 100, and Lessee compiles the following annual rental rates for the leases on the three nearest farming operations then in effect, the Annual Fair Market Value of this Lease would be \$12,800/year, calculated as follows:

Farm A: \$4,200 (40 acres): \$105/acre

Farm B: \$5,000 (50 acres): \$100/acre

Farm C: \$3,600 (20 acres): \$180/acre

*Average: \$128/acre * 100 acres = \$12,800/year = Annual Fair Market Value]*

The Annual Fair Market Value shall be paid by Lessee either (I) on an annual basis on or before the first day of each year of the Term; or (II) on a monthly basis on or before the first day of each month of the Term (with the first month’s rent of the Initial Term and last month’s rent of any unextended Term to be prorated based on a 30-day month). The Annual Fair Market Value shall be adjusted every five (5) years according to the method provided in this section. Any other payment arrangement shall require the prior written approval of Lessee and Lessor. Upon assignment of this Lease or sublease of the Property as provided in Section 4 below, Lessee shall keep records of all expenses related to such assignment or subleasing and may deduct those expenses from the annual rent payment.

4. Assignment/Sublease. Lessee may freely assign this Lease or sublet all or a portion of the Property to a Qualified Farmer at any time during the Term without any prior notice to or consent of Lessor and in Lessee’s sole and absolute discretion; provided that Lessee shall provide written notice to Lessor of any such assignment or sublease and the identity of the Qualified Farmer sublessee within thirty (30) days of executing such assignment or sublease. Lessee shall provide a full copy of the Conservation Easement to such sublessee upon the execution of any such assignment or sublease of this Lease by Lessee pursuant to this paragraph.

5. Utilities; Taxes. Lessor shall continue to pay all charges for heat, electricity, gas, telephone, water, trash collection, sewer and all other utilities, if any, servicing the Property during the Term of the Lease and shall continue to pay existing real property taxes and customary increases, except for any increases attributable to Lessee's activities on, or improvements to, the Property. Lessee shall be solely responsible for the payment of any personal property taxes levied on the personal property owned by Lessee and used on the Property.

6. Permitted Agricultural Operations. Lessee may use the Property only for the conduct of Agricultural Activities, which include but are not limited to restoration, preparation and/or maintenance of the Property for future Agricultural Activities or the conduct of commercial Agricultural Activities itself. Notwithstanding the foregoing, Lessee may conduct, at its discretion, any Agricultural Activities on the Property that are in compliance with all applicable laws and ordinances and the terms and conditions of the Conservation Easement, including but not limited to conducting sound farming practices as provided in Section 4.B of the Conservation Easement and adhering to an approved Agricultural Conservation Plan as described in Section X.1 of the Conservation Easement (as such Agricultural Conservation Plan may be amended pursuant to the terms of such section). Lessee shall be solely responsible for the cost of all materials, equipment, and labor required to conduct commercial Agricultural Activities on the Property, including but not limited to sprays, trellises and other infrastructure and inputs, but may deduct from the rent paid to Lessor those costs incurred by Lessee associated with the implementation of any restoration, preparation, and maintenance of the Property for future Agricultural Activities.

7. Future Improvements. Lessee may make such improvements to the Property as are reasonably necessary for the permitted agricultural operations on the Property, provided that any such improvement shall comply with the terms and conditions of the Conservation Easement as well as any applicable law and regulation, whether municipal, state and/or federal, now in force, or which may hereafter be in force, pertaining to the Property and Lessee's use and occupancy thereof. Any cost and expense incurred as a result of the improvements shall be paid by Lessee.

8. Maintenance; Storage; Dumping. Lessee shall maintain all portions of the Property in a reasonable state of cleanliness and orderly condition, free from trash, waste and debris; provided, however, that the deposition of organic materials used on the Property for, or resulting from, the conduct of Agricultural Activities that are conducted in accordance with this Lease and Section 4.B of the Conservation Easement is permitted. Lessee may store and/or deposit material and equipment about the Property on a temporary basis and in accordance with sound agricultural practices.

9. Hazardous Substances. Lessee shall not install, store, treat, use, transport, or otherwise dispose of any hazardous materials on, under, above, or in the Property unless such use, storage, and transportation is in compliance with all applicable laws. As used in this Lease, the term "hazardous substances" means any substance, material, or waste now or hereafter determined by any federal, state, or local governmental authorities to be capable of posing a risk of injury to

health, safety, or property, including, but not limited to, any substance, material, or waste: (i) containing asbestos, radioactive materials, petroleum, petroleum fractions, or petroleum distillates; (ii) now or hereafter defined as a “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” or “restricted hazardous waste” under any provision of Michigan law; (iii) now or hereafter defined as “hazardous waste” pursuant to Section 1004 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6903; or (iv) now or hereafter defined as a “hazardous substance” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*

10. Indemnification; Insurance. Lessee shall indemnify, defend, and hold harmless Lessor from any and all claims, demands, lawsuits or judgments arising out of the use of the Property during the Term of this Lease. Lessee agrees to carry and maintain at its own cost and expense throughout the entire term of this Lease a policy or policies of insurance, in which Lessor shall be named as an additional insured, insuring against death or injury to persons and damage to property in an amount not less than \$2,000,000.00 combined single limit for both bodily injury and property damage liability type claims. Prior to taking possession of the demised Property, Lessee shall deliver to Lessor a certificate of the insurance company issuing such insurance, evidencing such coverage.

11. Default. In the event Lessee defaults in performing or observing any of the covenants or conditions of this Lease and does not cure such default within thirty (30) days of Lessee’s receipt of written notice thereof by Lessor, or under circumstances where the default cannot reasonably be cured within a thirty (30)-day period, fails to begin curing the violation within the thirty (30)-day period, or does not continue diligently to cure the failure until finally cured, Lessor may, at Lessor’s option, terminate and cancel this Lease, re-enter the Property and dispossess Lessee and remove its effects and take possession of the Property and hold the same as if this Lease had not been made.

12. No Waiver. The failure of Lessor to insist upon the strict performance of any of the terms, conditions, and covenants herein shall not be deemed a waiver of any right or remedy that Lessor may have and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions and covenants herein contained.

13. Quarantine. Lessee shall not be required to pay rent for any portion of the Property during any such time that such portion of the Property is quarantined by the New York State, Suffolk County, or similar governmental agency. In such event, the annual rent shall be proportioned based upon the area of the Property quarantined and the number of days the quarantine remains in effect.

14. Notice. Any bill, statement, or notice that either party desires to give or is required to be given by the terms of this Lease shall be made in writing and delivered or mailed to the intended recipient at the parties’ respective addresses shown on the first page of this Lease (or to such

other address as such party may designate to the other pursuant to the terms of this section). Said notice will be considered delivered on the day it is mailed, if applicable, or if not mailed, when actually delivered to the recipient at the proper address. Any such notice shall be delivered personally; sent by certified U.S. mail, return receipt requested, with sufficient postage prepaid; or sent by a reputable overnight delivery service.

15. Amendment. This Lease may be amended only by an agreement in writing signed by the parties to this Lease.

16. Termination. In addition to other events of termination provided for in this Lease, this Lease may also be terminated at any time upon mutual consent of Lessor and Lessee.

17. Surrender of Property. Upon the expiration or termination of this Lease, Lessee shall quit and surrender the Property to Lessor. On termination or expiration, Lessee shall have the right to remove personal property at its expense, and shall have sixty (60) days after the expiration of the Lease in which to remove any or all of said personal property. If Lessee fails to remove all said personal property within 60 days after expiration of the Lease, then that personal property not removed shall be deemed abandoned by Lessee and title to that property may be retained by Lessor.

18. Eminent Domain. If the whole or any part of the Property is acquired or condemned by eminent domain for any public or quasi-public use or purpose, then the terms of this Lease shall terminate from the date of title vesting in such condemning entity, and Lessee shall have no claim against Lessor for the value of any unexpired Term of this Lease.

19. Lien. This instrument shall not be a lien against said Property in respect to any mortgages that hereafter may be placed against said Property and that the recording of such mortgage or mortgages shall have preference and precedence and be superior and prior in lien to this Lease, irrespective of the date of recording, and Lessee agrees to execute any such instrument, without cost, which may be deemed necessary or desirable to further effect the subordination of this Lease to any such mortgage or mortgages.

20. No Broker. Each party represents to the other that no broker brought about the signing of this Lease. In the event any person asserts a claim for a broker's commission or finder's fee, the party on account of whose conduct or actions the claim is asserted will indemnify, defend and hold the other party harmless from said claim.

21. Lease Runs with the Property. This Lease and all its terms shall run with the Property and shall survive a sale of the Property by Lessor.

22. Successors and Assigns. The covenants, conditions, and agreements contained in this Lease shall bind and inure to the benefit of Lessor and Lessee and their respective heirs, successors,

and permitted assigns.

23. Entire Agreement. Any prior negotiations, oral representations, or statements made by either Lessor or Lessee are merged into this Lease. All prior claims, counter-claims, defenses, or actions are extinguished upon execution of this Lease. This Lease contains and fully integrates the entire agreement between the parties, and it shall not be modified in any manner except by an instrument in writing executed by the parties. If any term or provision of this Lease or the application of this Lease to any person or circumstances shall, to any extent, be determined to be invalid or unenforceable, the remainder of this Lease, or the application of such Lease's terms or provisions to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected, and each remaining term and provision of this Lease shall be valid and shall be enforced to the fullest extent permitted by law.

24. Construction. This Lease shall be governed by and construed under the laws (statute and common) of the State of New York. Paragraph headings and summaries are for convenience only. In no event shall any such title or caption be deemed to be part of this Lease or interpretive of any of its language or intent. No provision of this Lease is to be interpreted for or against either party because that party or that party's legal representative drafted this Lease or any of its provisions. Words of any gender in this Lease shall be held to include any other gender, and words in the singular number shall be held to include the plural when the sense requires.

25. Time of Essence. Time is of the essence in this Lease and all the provisions relating to timely performance shall be strictly construed.

IN WITNESS WHEREOF, the parties have executed this Lease on the date as first above written.

LESSOR

LESSEE

BY: _____

BY: _____

ITS: _____

ITS: _____