

Conservation Agreement

DATED this day of , 201__.

B E T W E E N:

Your name
(hereinafter called the “Owner”)

OF THE FIRST PART

- and -

Escarpment Biosphere Conservancy, Inc.
(hereinafter called the “Conservancy”)

OF THE SECOND PART

Note: this wording was drafted for a specific landowner and will be changed to suit your own wishes for your land and the specific conditions which affect your land. This is only an example and will be customized over several meetings as you wish. In particular, sections 1 and 4 generally are heavily revised, while sections 2, 3, 5, 6, 7, 8, 9 and 10 are usually lightly revised.

The boxes included in this sample will disappear from the final version and are only included here to explain why the text is worded this way.

Commentary

We call this a conservation agreement because it includes both covenants (restrictions on use) and easements (things the owner is required to do)

The Owner may be referred to instead as the Grantor. Section 3 of the Conservation Land Act provides that (only) the owner of land may grant an easement or enter into a covenant with a conservation body. Owner is defined in the Act as the “person registered on title in the proper land registry office as the owner of the land.” There may be more than one “Owner”.

The Conservation Body may be referred to instead as the Land Trust, the Municipality, the Grantee etc. to best suit the circumstances.

Only a qualified Conservation body will be capable of holding a conservation easement under the Act. Conservation bodies are defined in sub-section 3(1) of the Act to include various government organizations and non-government corporations which are a charity registered under the Income Tax Act (Canada). An individual or an unincorporated organization will not qualify as a Conservation body. See the Act, attached as Appendix I for the complete definition of conservation body.

In consideration of the sum of two (\$2.00) dollars now paid by the Conservancy to the Owner and in consideration of the covenants, easements, terms, conditions and restrictions contained herein, the sufficiency of which is hereby acknowledged, and pursuant to the *Conservation Land Act*, R.S.O. 1990, c. C.28, as amended, the Owner and the Conservancy hereby agree to the Covenants, restrictions and Easements as set out in this Agreement.

This references the consideration or exchange made for the Agreement and helps qualify it as a contract. If the Agreement is a gift, it can still reference a nominal exchange of funds and qualify as a gift for income tax purposes. Especially if it is a gift for charitable purposes, the Agreement alternatively could simply state: "In consideration of the covenants, terms, conditions and restrictions contained herein and pursuant to the Conservation Land Act, R.S.O. 1990, c. C.28, as amended, the Owner and the Conservation Body hereby agree to the covenants, restrictions and Easements as set out in this Agreement, which shall run with the Lands for the Term." Recitals can also be added before this phrase to set some context, such as the Owner's intentions or past practices. Note, however, that core concepts and provisions intended to be legally binding should be included in the body of the agreement.

ARTICLE 1

DEFINITIONS

For the purposes of this Agreement, the following words and phrases shall have the following meanings:

- (a) "Act" means the *Conservation Land Act*, R.S.O. 1990, c. C.28, as amended, and any statute that may be enacted to modify or replace this Act.

This sample conservation easement is pursuant to the Ontario Conservation Land Act which authorizes a wide range of government and non-government organizations to hold such easement agreements. Note however, that conservation easements are also authorized by the Ontario Heritage Act which may be applicable where, for example, the objective is preservation of historical or cultural resources and trail or recreational uses.

- (b) "Agreement" or "this Agreement" or "Conservation Agreement" means this

agreement including its covenants and implementing easements and the schedules attached hereto as at the date hereof and as amended in writing and signed by Owner and the Conservancy from time to time

- (c) “Conservancy” means Escarpment Biosphere Conservancy, Inc., the party of the Second Part, a conservation body as defined in the Act.
- (d) “Conservation Values” means the features and/or functions to be conserved through this Agreement, which are more specifically set out in the Report.
- (e) “Covenants” mean the covenants set out in Article 4 which may be waived, varied or released by the Conservancy in accordance with this Agreement.

The Covenants are the obligations and restrictions on the parties that are intended to run with the Lands and bind future owners. The other principal operative part of the conservation easement agreement is the right of access under the Easement heading of Article 5.

- (f) “Easement” means the rights described in Article 5 of this Agreement which may be waived, varied or released by the Conservancy in accordance with this Agreement .
- (g) “Farm Zone” means that part of the Lands including the farmland that is delineated in the Baseline Documentation Report.
- (h) “Gross Floor Area” means the square footage of building area within the exterior walls and is measured by adding together the square footage of each floor whose average elevation is not more than two feet below grade.
- (i) “Lands” means the lands and premises of the Owner situate in the Province of Ontario and more particularly described in Schedule “A” attached to and forming part of this Agreement and includes any buildings, structures and improvements now existing or constructed after signing this Agreement.
- (j) “Owner” means the above-named party of the First Part and any person who at any time after registration of this Agreement becomes the registered owner of the Lands or any part thereof or any ownership interest therein, including being a trustee for any beneficial owner of the Lands.

This will normally refer to all of the contiguous Lands owned by the Owner. Where only part of the Lands are to be affected by the conservation easement or where the Owner owns abutting lands, the conservation body should seek professional advice on compliance with the severance provisions of the Ontario Planning Act.

Ideally the parties may establish a plan for management of the property in advance, dealing for example with habitat enhancement or with timber

harvesting. However, the easement agreement may also be executed by the parties and registered with simply the restrictions on future use and without a detailed prescription for management.

- (k) “Protection Zone” means that part of the Lands including the wetlands and woodlots that is delineated in the Report.

This definition anticipates that some parts of the Lands may be subject to a greater level of protection and to greater restrictions on use. It will be essential to future enforceability that the Protected Area be very clearly defined or described. Where a clearly defined boundary is not easily identified, a reference plan prepared by an Ontario Land Surveyor may provide the necessary clarity and precision. In other cases, a well-defined drawing will be included in the Baseline Documentation Report. It is essential to the future enforceability of the Agreement that the Protected Area be very clearly defined and described in writing and identifiable on the ground.

- (l) “Report” means the Baseline Documentation Report referred to in Schedule “C” hereto completed or to be completed by the Conservancy at its own expense describing the Lands and documenting the natural values and features and current uses of the Lands.

A baseline report, intended to document the existing condition of the Lands and the heritage resource may be invaluable in future enforcement of the conservation agreement in the future. Restrictions, for example on tree cutting may be valid on their own, but may be much more effective and enforceable if the prior composition and condition of the forest is documented. While often helpful, this definition and the provision for a baseline report may be deleted if there will not be such a report.

- (m) “Residential Zone” means those portions of the Lands including the area around the house, garage, barn, garden and road as delineated in the Report.

If the easement is to be granted for fewer years than perpetuity, then a definition of “term” will be required and the grant of conservation covenants and easement (sections 4 and 5) may be drafted accordingly. The “term” perpetuity is included in section 10, “Registration”.

ARTICLE 2

REPRESENTATIONS AND WARRANTIES

- 2.1 The Owner represents and warrants that the Owner is the legal, beneficial and registered owner of the Lands with good title thereto and that there are no encumbrances affecting the Lands (**except the hydro easement/mortgage/letter of credit which exists on the Lands at the date of signing this Agreement**).

This clause helps document ownership and thus demonstrates that the Agreement

qualifies under the Conservation Land Act's definition of "Owner". Identify any easements, mortgages, liens or letters of credit registered against the property. To obtain full value for the conservation agreement, it must be registered first on title.

Readers may be familiar with the traditional form of agreement in which background facts and the purpose of the agreement are set out in recitals or whereas clauses. Although that traditional form is acceptable, the recitals may not be considered an operational or enforceable part of the agreement. Critical facts, such as ownership of the property, should be incorporated into the operative part of the agreement whether or not the traditional form of recitals are used. So, for example if parties use the traditional recital format, the agreement text should provide that "The statements contained in the recitals are true and correct".

In this sample agreement the traditional recitals have been replaced by operative sections setting out the Representations and Warranties and the Intention of the Parties.

It is critical that the Conservation Body obtain a title search and existing surveys as soon as possible in the process of preparing the easement agreement. There may be ownership and title issues to deal with before an easement can be finalized. For example if there are mortgages on title, the Conservation Body will want to have the interest of the mortgagee postponed or subordinated to the conservation easement. Without that protective measure a pre-existing mortgagee could come into possession of the property on a mortgage default and might not be bound by the conservation easement.

- 2.2 It is agreed that the Report, when completed, will describe the Lands including the current use and the significant natural features of the Lands and is intended to serve as an objective information base for monitoring compliance with this Agreement.
- 2.3 The Lands include the significant natural features summarized or to be summarized in the Report and which the Owner and the Conservancy have agreed to protect.
- 2.4. The Conservancy covenants and warrants that it is a corporation incorporated under Part II of the *Canada Corporations Act*, that it is a charity registered under the *Income Tax Act* (Canada) and that it is a Conservation Body within the meaning of the Act and has the right to enter into this Agreement.
- 2.5. The Owner covenants and warrants that spousal consent is not necessary to this Agreement under the provisions of the Family Law Act, R.S.O. 1990. c. F.3, unless the Owner's spouse has executed this Agreement.

This section helps ensure that there is compliance with the Family Law Act and thus the Agreement will have full effect.

ARTICLE 3

INTENTION

3.1 It is the intention of the parties that this Agreement will ensure the:

- a) Conservation, maintenance, restoration and or enhancement of all or a portion of the land or the wildlife on the land;
- b) Protection of the water quality and quantity;
- c) Improvement of air quality and sequestration of carbon;
- d) Conservation, preservation or protection of the land for agricultural purposes;

on the Lands and will prevent any use of the Lands that will damage or destroy its Conservation Values and biodiversity or prevent their restoration and enhancement. More specifically, it is intended that the use of the Lands will be restricted to *[agricultural, forestry, wildlife management and other]* uses that are consistent with the primary intention of the parties.

Article 3.1, which sets out the purpose and intention of the parties in broad terms, will be a useful reference in interpreting the detailed Covenants and rights under the Agreement in the future. It may also provide guidance for those situations and disputes that were not or could not be anticipated when the Agreement was prepared.

The wording here follows closely the wording in the Act for the purposes for which an Agreement may be entered. Other purposes are also found in the Act and, if the Agreement is intended to achieve those purposes, they should be clearly referenced here.

3.2 There is public interest and benefit in the conservation, maintenance, restoration and enhancement of the Conservation Values and features of the Lands and the wildlife thereon.

3.3 This Agreement is to be construed, interpreted, performed and applied so as to give effect to the purpose and intent of this Agreement and to enforce the Covenants and Easement.

ARTICLE 4

COVENANTS

4.1 The Owner reserves to *itself*, and to its successors and assigns and any transferee therefrom, all rights accruing from ownership of the Lands, including the right to engage in, or permit or invite others to engage in, all uses of the Lands that are not expressly prohibited herein and that are not inconsistent with the purpose and terms of this Agreement.

It is normal to interpret the Agreement as conveying only those rights and restrictions specifically described in the terms of the Agreement and to assume that the Owner reserves all rights not conveyed. This provision is included to provide the Owner/Grantor with the comfort of having that assumption made explicit.

- 4.2 The parties covenant and agree that the Covenants shall be deemed to be covenants governed by and having the benefit of the Act, that from the registration of this Agreement the burden of such Covenants shall run with and bind the Lands and every part thereof to which they apply, and the benefit thereof shall enure to the Conservancy for the Term.
- 4.3 No waiver, release or variance of the Covenants or Easements of this Agreement may be effected without the consent of the Minister of Natural Resources for Ontario and, if this Agreement is in furtherance of an Ecological Gift under the *Income Tax Act* of Canada, the authorization of Environment Canada or any replacement entity responsible for enforcing the provisions relating to Ecological Gifts, if such consent or authorization is necessary.

This section makes it clear that approvals for changes or releases are required for conservation agreements, particularly those donated as Ecological Gifts

- 4.4 The Owner shall not use the Lands nor permit any use of the Lands that will damage or destroy the Conservation Values of the Lands or prevent their restoration and enhancement. Without limiting the generality of the foregoing, the Owner expressly covenants and agrees that, **except** with the prior written approval of the Conservation Body, the Owner shall abide by the Covenants. The Owner will not knowingly permit any breach of the covenants by any person whatsoever, and, if the Owner learns of any breach or the likelihood of a breach occurring, the Owner will notify the Conservancy of such breach or anticipated breach as soon as possible and, in addition, where reasonable in the circumstances, will take the steps necessary to prevent the breach from occurring or continuing.

The covenants are a key operative part of the agreement. Careful attention and negotiation will be required to determine the exact nature of the restrictions and obligations to be imposed on any particular property. The final outcome will recognize the nature of the resource to be protected, the intended management of the resource and the objectives of both the conservation body and the owner.

Examples of both restrictions (negative covenants) and obligations (positive covenants) are provided in this sample agreement. However, these must be viewed as examples only. Timber harvesting, agricultural activities, limited recreational development, and hunting are all examples of activities that may be prohibited, restricted or permitted depending upon the objectives of the parties and the requirements of sound resource management. The opportunity to tailor each set of restrictions and obligations to the nature of the land resource may be viewed as one of the major advantages of the conservation easement as a tool for land protection.

Note that each sentence below is preceded by the words, “The Owner shall not”

Recent changes in legislation now allow land trusts to have conservation agreements apply to only a portion of the property.

4.5 The Owner expressly covenants and agrees that the Owner shall not:

a) Subdivision

Sell, convey, mortgage, charge, lease or otherwise dispose of any part of the Lands separate from any other part of the Lands, or apply for or make any application for plans of subdivision or consents for severance of the Lands under Part VI of the *Planning Act*, R.S.O. 1990, c. P.13, as amended or replaced from time to time, or otherwise apply for, make or register any severance or subdivision of any part of the Lands save and **except** for conservation purposes with prior written consent of the Conservancy;

b) Other Easements

Grant to any person any easement, right of way or right in the nature of an easement, in, on, over, under or through the Lands, **except** within the Residential Zone, and then only to provide a reasonable right of way to provide services exclusively to the Residential Zone;

This clause prevents other easements from being registered on the property. Other easements could conflict and threaten the natural features of the property depending on the type of easement (e.g. hydro easement, trail easement on sensitive areas) and location of the easement (e.g. residential area versus protected area).

c) Buildings and Structures

Construct, erect, maintain or allow the construction, erection or maintenance of any building, structure, sign, tower, fixture or other improvement of any kind in, on or over the Protection Zone **except** fencing, benches for viewing nature or “no trespassing” or “no hunting” signs;

Construct, erect, maintain or allow the construction, erection or maintenance of any building or structure, sign, tower, fixture or other improvement of any kind in, on or over the Farm Zone **except fencing, movable animal shelters, and movable feed containers**, “no trespassing”, “no hunting” signs or wind generators providing the majority of their power to the Lands;

Construct, erect, maintain or allow the construction, erection or maintenance of any building or structure, sign, fixture or other improvement of any kind in, on or over the Residential Zone **except**:

- (1) one single family dwelling **which shall not exceed 3,000 square feet (and which shall not have a permanent swimming pool or tennis court);**
- (2) **up to six outbuildings, including existing outbuildings,** a single barn not to exceed **2,500 square feet, a single (multiple-car) garage not to exceed 1,000 square feet, a single shed not to exceed 100 square feet and a single studio not to exceed 800 square feet** erected as accessory buildings to the dwelling, and none of which may be used for habitation; and
- (3) **wind, solar or biogas energy generators which may be erected for providing (the majority of their) power or water to either or both the Farm Zone and the Residential Zone;**

d) Roads, Parking Lots, Trails, Docks, Landing Strips

Construct, improve or allow the construction or improvement of any trail, road, driveway, laneway or parking lot within the Protection Zone or Farm Zone, **except** for foot trails, fire lanes or other accesses at a maximum width of 2 metres with natural soil surface (which shall not be gravelled, filled or paved) for maintaining the farm or forested areas;

Construct, improve or allow the construction or improvement of **any ATV trail, snowmobile trail, dock, diving board,** aircraft landing strip or other such facility anywhere within the Lands;

Several approaches to the structure of this part of the agreement are possible. For example, an easement agreement could remove all of the potential development rights and uses from a property subject only to specific exceptions identifying those uses and activities which would still be permitted. While that might be a strong legal position, it might also make it more difficult to negotiate an agreement with a donor. In this sample agreement, a different approach is taken and one that is more common in practice. The specific restrictions and obligations are listed (in section 4) and other rights are reserved to the Owner (see section 4.1). In determining which approach may be appropriate and effective in different circumstances, consideration might be given to whether the easement is being donated or purchased and whether a minimal or a very high level of protection is required.

e) Motorized Vehicles

Operate or allow the operation of motorcars, dune buggies, snowmobiles, all-terrain vehicles, motorcycles, motorboats, personal watercraft or any other types of motorized vehicles within the Lands **except** for the use of motorcars, all-terrain vehicles, trucks or tractors for access to the residence and for farm or forest management or conservation purposes. In carrying out the permitted activities, the Owner will make reasonable efforts to minimize the disruption to wildlife and minimize the damage of natural features;

f) Mobile Homes, Camping

Use or allow the Lands to be used commercially with or without accommodation as a commercial trailer or mobile home park, boat dock, parking area or storage area. Use or allow the use of the Lands for commercial camping;

g) Grading, Topography

Change or allow any changes in the general appearance or topography of the Lands or any part thereof, which shall include without limiting the generality of the foregoing, tilling of the soil, grazing of livestock, construction of drainage ditches, tiling fields, removing any soil, loam, rock, gravel, earth, sand, petroleum products or other such material from the Lands, allow extensive soil compaction, rutting or erosion provided that, notwithstanding the foregoing:

- (1) in the Farm Zone and Residential Zone tilling of the soil, tiling fields, building wells and grazing of livestock may be continued;
- (2) in the Residential Zone the construction of septic beds, wells, drainage ditches, retaining walls, dams or ponds and transmission lines will be permitted, as will the non-commercial excavation, dredging or removal of soil, loam, rock, gravel, earth, sand or other materials;
- (3) in the Protection Zone, the Owner may improve existing ponds, creeks or wetlands using the principles of the Wetland Habitat Fund or Ducks Unlimited Canada or their successors or assigns.
- (4) the Lands may be used for archaeological digs, provided the Lands are restored to their original condition;

h) Dumping

Dump or allow the dumping or spreading of soil, fill, rubbish, ashes, garbage, sludge (in any of its forms), compost, septage, waste, petroleum products or other unsightly, toxic or offensive materials of any type or description on the Lands **except** that:

- (1) clean soil from the Residential Zone or Farm Zone may be dumped in the Farm Zone;
- (2) ashes, compost, clean soil or cat litter from the Lands may be dumped in the Residential Zone;
- (3) small quantities of clean soil from the Residential Zone or Farm Zone may be placed in the Protection Zone for planting trees or shrubs;
- (4) **piles of scrap metal, garbage or non-functional equipment from the Lands may accumulate in preparation for removal from the Lands in the Residential Zone or Farm Zone for up to (three) months;**
- (5) **toxic materials from the Lands including dry cell or wet cell batteries may be stored in a suitable building for up to (six) months;**
- (6) **up to (seventy) cubic yards** per year of soil, gravel, rock or other similar maintenance or construction products may be deposited in the Residential Zone

and Farm Zone combined for maintenance or construction of buildings, roads or gardens **and unused quantities may be accumulated for up to five years and used within that time period;**

i) Burning

Burn plastic, coal, rubber, or any other materials producing toxic fumes except commercial fuels as required to operate mechanical equipment for purposes allowed by this Agreement;

j) Pesticides

Use or allow the use of pesticides, insecticides, herbicides, chemicals or other toxic materials of any type or description within the Protection Zone **except:**

- (1) as required by law;
- (2) **insect repellents may be applied on the body or clothing;**
- (3) **as permitted under the Canadian General Standards Board's National Standard of Canada for Organic Agriculture, CAN/CGSB-32.310-99; or**
- (4) **to protect the life of people or native plants;**

Note: If noxious weeds or invasive species are to be controlled or removed, this shall be done by burning or controlled flame (allowed by law) or other means not prohibited herein;

k) Vegetation

Remove, destroy, vandalize, burn, cut or allow the removal, destruction, vandalization, burning or cutting of trees, shrubs or other vegetation within the Protection Zone **except** as may be necessary for:

- (1) the maintenance of foot trails, fire lanes or farm access lanes for farm or forest maintenance or access to the residence;
- (2) to control non-native or exotic intrusion;
- (3) to remove a danger or hazard;
- (4) the prevention or treatment of diseases of the trees, shrubs or other vegetation as approved in advance by the Conservancy and a forester; or
- (5) other good husbandry practices (as set out in the forest management plan attached as Schedule "C" and, when updated, is updated by a registered forester to move the forest progressively toward old growth) incorporating a maximum annual cut allowance of **5 bush cords (640 cubic feet)** from trees or branches (**which have died of natural causes and are without significant wildlife habitat**)(**which will move the species composition and age distribution of the forest toward old growth**)(**which will improve the wildlife habitat content of the forest**) for fuel wood or equivalent volumes of timber for saw logs or an equivalent volume of cedar posts, provided that any unused portion of the annual cut allowance may be carried forward for a maximum of five years;
- (6) the periodic harvesting of trees in the Protection Zone at 20 year intervals following the prescription of a qualified forestry professional, appointed

jointly by the Conservancy and the Owner with regard to crop tree selection and harvest operation. In particular, the sum of the basal areas of all trees greater than 10 cm and 1.3 m above grade shall not be reduced to less than 24 m squared/ha;

- (7) thinning operations in the conifer plantation as necessary, leaving as many [] as practical while achieving an “old growth” mix of tree types;
- (8) a maximum annual cut allowance of 5 full cords (640 cubic feet) for fuelwood for personal use by the Owner; and

Activities governed by the exceptions above shall be conducted in a manner that is not injurious to the remaining trees, flora, fauna and soils and maintains soil stability, water quality and quantity and the other conservation features on the property;

l) Water Features

Drain or allow the drainage of any wetlands on the Lands **except** by nature, and **except** that existing drains may be maintained in the locations shown in the Report. Removal of beaver dams may be required to meet municipal regulations or by mutual consent with the Conservancy;

Perform or permit any activity or action on the Lands which may reasonably be expected to be detrimental or adverse to water conservation or water quality on, in or about the Lands;

m) Water Taking, Water Quality

Remove or allow the commercial removal of water from the Lands or conduct any activity which may reasonably be expected to be detrimental or adverse to water quality or quantity on, in or about the Lands;

n) Collection of Plants and Animals

Collect or remove native or naturally occurring plant or animal species **except** as permitted by the hunting or vegetation clauses of this Agreement;

o) Planting and Animal Husbandry

Plant, introduce or allow the planting or other introduction of non-native plant or animal species or hybrid seed in the Protection Zone but notwithstanding the foregoing, current and existing plants and animals and natural seeding or offspring arising therefrom as well as plantings and seeding arising from natural causes such as wind or rain or animal wildlife if not brought onto the property by the Owners shall not be considered to be in contravention of the provisions hereof;

p) Hunting, Fishing, Trapping

Use or allow the Lands to be used for (**commercial**) hunting, fishing, trapping, **except** that within the Lands (**Residential Zone**) hunting or trapping shall be permitted

- (1) for the control of nuisance animals (**causing danger or harm to the residents, crops, livestock or pets) (including nuisance raccoons, groundhogs, opossums, rats, mice, moles, mosquitoes, flies or other commonly understood nuisance species);**
- (2) **to supply food for consumption by residents of the Lands; or**
- (3) **to remove diseased or non-native wildlife;**

q) Firearms

Use or allow the use of firearms or explosive devices on the Lands other than for control of nuisance animals or hunting as allowed under the hunting **clause above** in this Agreement;

r) Horses and Bicycles

Allow horses and bicycles anywhere in the (Protection Zone) (wetland areas) (except horses engaged in forest management for allowable forestry activities);

Allow horses and bicycles anywhere on the Lands other than on trails or lanes in the Farm Zone or Residential Zone;

Allow horses and bicycles but in the Protection Zone except where the land is , in the opinion of the Conservancy, capable of retaining its ecological significance;

s) Livestock and Fences

Permit agricultural livestock to enter or to use the Protection Zone or permit agricultural activities in the Protection Zone;

This is an example of a negative covenant combined with a positive obligation to maintain livestock fences. Positive obligations to maintain fences, culverts, trails etc. could be imposed upon either the Owner or the Conservancy according to the requirements of the particular circumstances. The primary obligation is on adjacent landowners to fence their out cattle, but this Owner is to ensure they fulfil that obligation.

t) Commercial uses

Use or allow the use of the Lands for commercial purposes or business that were not permitted under the municipality's zoning bylaws extant at the date of the signing of this Agreement (and for greater certainty, no activity defined in the local bylaw as agricultural-industrial shall be permitted);

u) Games

Play or allow to be played games which may damage the Protection Zone including but not limited to paintball, golf and other refuse making or trampling activities;

v) Access to sensitive areas

Knowingly (approach, disturb, or touch nesting or breeding areas during the nesting season or knowingly) allow injury to birds, fish, reptiles, amphibians,

mammals, insects or other animals or their habitat except for nuisance species (as set out in the hunting clause) (that affect the comfort, safety or livelihood of residents or guests) (in the Residential Zone and Farm Zone);

w) Wildlife Movement

Construct, permit or suffer the construction of fencing or other obstacles which would exclude or unduly restrict wildlife movement in or through the Protection Area;

x) Dark Sky

Allow yard lights or other exterior lighting to be illuminated except by a motion sensor or for planned, temporary lighting of paths, markers or numbers for residents or guests, and provided that the light source is fully shielded to prevent light spill above the angle of the horizon;

y) Cats and Dogs

Allow cats and dogs to enter the Protection Zone except on a leash;

x) Agriculture: Fail to follow organic standards for Agriculture in the Farm Zone meeting provincial or federal organic certification standards and which agricultural use shall be carried out in a manner that promotes sustainable soil and water use and improvement. The Owner shall provide as evidence of compliance of the organic use of the Lands upon thirty (30) days notice from the Conservancy a compliance certificate from an organic standards compliance body defined elsewhere in this Agreement.

If the Owner and Conservancy agree that Agricultural use is not longer viable in the Farm Zone or some portion thereof, that portion of the Farm Zone shall be forested, allowed to naturally regenerate or be converted to parkland, in accordance with a mutually agreed upon plan. Except as provided in such plan, the Restrictions applying to the Protection Zone shall apply after the discontinuance of Agriculture in some or all of the Farm Zone. If the parties are unable to mutually agree to a plan for the subject portion, the disagreement shall be resolved in accordance with section 10.11.

ARTICLE 5

EASEMENT

For further certainty, the Easements are described below to allow the Conservancy to enforce the covenants and restrictions described in this Agreement.

5.1 The parties covenant and agree each with the other that the Easement set out below shall be deemed to be an easement governed by and having the benefit of the Act, that the burden of the Easement shall run with and bind the Lands and every part thereof from the registration of this Agreement so long as the Covenants are in effect, and the benefit of the Easement shall enure to the Conservancy.

Section 3(2) of the Act provides in effect that an owner may grant an easement for access to the land for the purposes listed in the Act in section 3(2). In this sample Agreement, an access Easement is provided to allow compliance inspections, monitoring, and enforcement, and possibly management and enhancement activities that may be identified in the Agreement or to remedy a default by the Owner. In establishing and setting out the extent of the Easement, it is important to ensure that the subdivision control provisions of section 50 of Ontario's Planning Act are complied with. In simple terms, that section of the Planning Act prohibits any agreement granting the use of land or right in land unless it affects the entire parcel of land and all abutting lands owned by the same landowner. Exceptions to the prohibition are made in the Planning Act for conveyances of conservation agreements under certain circumstances, by governments, for land described by a plan of subdivision, or where the consent of the municipality is obtained.

5.2 The rights described in Article 5.1 are collectively referred to as the "Easement."

5.3 No right of access by the general public to any portion of the Lands is conveyed by this Agreement.

In many cases public access to the natural features located on the Lands may not be necessary or desirable. In addition, land owners may be more willing to grant a conservation easement knowing that rights of public access are not attached. In cases where the parties agree that rights of public access are to be included, the conservation body should seek professional advice on the mechanisms for ensuring the enforceability of such rights.

5.4 The parties covenant and agree and the Owner hereby grants to the Conservancy an easement and enters into a covenant to permit the Conservancy to enter the Lands and not to interfere with such entry by the Conservancy, in order to permit the Conservancy and the employees, agents, servants, workers, contractors, officers, directors, successors and assigns of the Conservancy and their supplies, equipment, materials, machinery and vehicles to enter on and have access to the Lands at reasonable times and subject to the notice requirements specified below and for the following purposes:

- (1) inspection, on foot, in order to determine compliance with this Agreement and to determine those measures necessary to ensure compliance with this Agreement;

Paragraph 3(2) (a) of the Act provides in effect that an owner may grant an easement for access to the lands for the purposes of conservation, maintenance, restoration or enhancement of all or a portion of the land or the wildlife on the land. In this sample agreement, an access easement is provided to allow compliance inspections and to allow work by the conservation body on the land either to carry out any management and enhancement activities that may be identified in the agreement or to remedy a default by the owner.

Caution: In establishing and setting out the extent of the easement, it will be important to ensure that the subdivision control provisions of section 50 of the Ontario Planning Act are also complied with. That section of the Planning Act prohibits any agreement granting the use of or right in land unless it is affecting the entire parcel of land.

- (2) to carry out any construction, demolition, maintenance, alteration, repair, improvements, installation, work or restoration of the natural features reasonably required in the opinion of the Conservancy to remedy any default of the Owner pursuant to Article 8 of this Agreement; and

These “self-help” provisions of the Agreement may be necessary where the conservation body has significant management responsibilities or where major restoration or enhancement of natural features is proposed. However, where the conservation easement is merely to protect open space and natural evolution of the landscape such access may not be necessary or desirable.

- (3) for all purposes reasonably necessary or incidental to the exercise of the rights hereby created or related to any of the foregoing purposes.

5.5 Prior to entry or access to the Lands for the purposes identified in Article 5.4, the Conservancy shall provide written notice to the Owner as follows, unless, in the opinion of the Conservancy, there is an emergency or other circumstance which does not make it feasible to give notice of the intent of the Conservancy to enter onto the Lands:

- (1) for the purposes specified in paragraph 5.4(1) at least twenty-four hours oral or written notice; and

Although not required by the Act, these provisions requiring that notice be provided by the Conservancy prior to access on the Lands are suggested as a courtesy to the existing and future land owners. Notice is shorter where the purpose of access is for compliance inspection and longer where more intrusive and expensive works are proposed.

- (2) for the purposes specified in paragraphs 5.4(2) and 5.4(3) at least ten days written notice. The notice under this paragraph (2) shall describe the nature, scope, design, location, timetable and any other material aspect of the activity proposed.

ARTICLE 6

OWNER'S OBLIGATIONS AND INDEMNITY

6.1 The Owner shall, at the expense of the Owner, continue to care for and operate the Lands as would a careful and prudent owner. In particular, and without limiting the generality of the foregoing, the Owner shall:

- (1) maintain the Lands and keep and repair the improvements thereon and keep the Lands free of valid construction liens, work orders and deficiency notices;
- (2) carry and maintain adequate comprehensive general liability insurance coverage for property damage and bodily damage with the Conservancy being an additional named insured thereunder and provide the Conservancy with evidence of such coverage not less than annually; and

The requirement for the Owner to maintain insurance recognizes that the Owner still has control and management of the Lands. This provision insures only their activities, not those of the Conservation Body. With the assistance of an insurance agent, other more detailed policy endorsements could be included, such as:

- (i) cross-liability;*
- (ii) waiver of subrogation; and*
- (iii) 30-day notice of cancellation*

- (3) pay as they become due municipal and provincial taxes, rates and fees including any that may be charged or levied against the Conservancy by reason of this Agreement and the rights transferred hereunder and all charges for utilities, public or otherwise, and provide the Conservancy with evidence of such payments on its reasonable request.

The Owner of the Lands remains responsible for activities and taxes on the Lands. This ensures that the standard of these responsibilities is clear among the parties. Some of the insurance provisions could be modified depending on the nature of the Lands.

6.2 The Owner agrees to indemnify and save harmless the Conservancy, its directors, officers, employees, agents and contractors from and against any and all actions,

causes of action, suits, claims or demands by or on behalf of any person caused by any act or omission, negligent or otherwise, in the use and maintenance of the Lands by the Owner, any licensee or lessee of the Owner or anyone for whom the Owner is in law responsible.

The Owner agrees to indemnify and save harmless the Conservancy, its directors, officers, employees, agents and contractors from and against any penalty in tax imposed under the *Income Tax Act* (Canada) arising from any change in the use of the Lands or any part of the Lands certified as ecologically sensitive land under the *Income Tax Act* (Canada), which penalty or tax shall be paid by the Owner to the Conservancy or as the Conservancy shall direct.

With respect to the second sentence above, section 207.31 of the Income Tax Act (Canada) imposes a tax on charities, public bodies performing a function of government and/or municipalities that dispose of or change the use of an ecological gift property without the authorization of the Minister of the Environment. The tax can amount to 50% of the fair market value of the property at the time of the unauthorized change in use or disposition.

Such a tax may be appropriate against a charity or municipality where the charity or municipality is the owner in control of the property. However, in the case of conservation agreements, Conservation Bodies that are the holders of the agreement but not the owners in control of the property may wish to negotiate for the type of indemnity outlined in the second sentence of article 6.2 of this sample Agreement. This sentence may be deleted if the Lands are not certified as "ecologically sensitive" under the Income Tax Act.

This provision is intended to protect the Conservancy from tax penalties levied by CRA where the intention of the easement (for which a tax receipt was issued) has been broken by the Owner, even with permission of the Conservancy.

- 6.3 The Owner shall give prompt notice to the Conservancy of any proposals or processes involving activities that could potentially affect the Lands or within five hundred (500) metres of the Lands of which the Owner becomes aware which may have any impact on the Lands in order to give the Conservancy the opportunity to participate in relevant processes. **Except** as required by law, the Owner shall not permit any access to the Lands under the *Aggregate Resources Act*, R.S.O. 1990, c. A.8, the *Mining Act*, R.S.O. 1990, c. M.14, either as amended or replaced, or any other legislation for the purposes of extracting aggregates, minerals, water or any other resources, without obtaining the prior written consent of the Conservancy.

This provision will enable the Conservation Body to become informed and participate in any processes affecting the Lands, and obtain compensation for any impact on its interests in the Lands that it cannot control

- 6.4 The Owner shall give notice to the Conservancy of any change in the ownership of or any interest in the Lands and the Conservancy shall give notice to the Owner of any assignment of the interest of the Conservancy in accordance with Article 9 of this Agreement. Any such notice shall include the name and address of the new party and shall be given at least ten (10) days prior to the change of interest.
- 6.5 The Owner shall not transfer or permit any mortgagee to transfer any ownership interest in the Lands without requiring the transferee to acknowledge in writing (by acknowledgement addressed and delivered to the Conservancy) the priority of this Agreement and the interest of the Conservancy thereunder, and will not lease or licence the Lands or any part thereof without such lease or licence being made expressly subject to this Agreement. The failure of the Owner to perform any act required by this Article or the preceding Article shall not impair the validity of this Agreement or limit its enforceability in any way.
- 6.6 The Owner recognizes his obligation to honour the negative covenants contained herein; however, notwithstanding anything contained herein to the contrary; this Agreement shall not be deemed to obligate the Owner to take or continue to take any positive action with respect, for example, to participating in any forest management plan or reforestation project or to install or remove any fencing on the Lands except to meet covenants like fencing out their own cattle or to meet organic agricultural standards. Wherever the owner wishes to cease meeting the requirements set out as negative covenants, they shall allow the land (and encourage others to allow the land) to become “naturalized” or forested as set out in the Vegetation clause while not exceeding the cutting limitations therein.

ARTICLE 7

CONSERVANCY’S OBLIGATIONS

7.1 The Conservancy shall:

- (1) at its own expense, carry and maintain adequate and comprehensive insurance coverage relating to its rights, use and access to the Lands under this Agreement;
- (2) provide the Owner with evidence of such coverage on the reasonable request of the Owner, hereby indemnify and save harmless the Owner, its trustees and beneficiaries from and against any and all actions, causes of actions, suits, claims, costs or damages by or on behalf of any person arising out of or occasioned by any act or omission, negligence or otherwise, in the use and maintenance of the Lands by the Conservancy, any licensee or lessee thereof,

or anyone for whom the Conservancy is in law responsible and not caused or permitted by, or resulting from, or connected with any act or permission given by the Owner except for claims made pursuant to this Article.

7.2 The Conservancy shall not:

- (1) hold the Owner liable for the Conservancy's actions arising from the rights contained in this Agreement; and
- (2) cause or permit any action which would result in a breach of the Conservancy's obligations contained in this Agreement. The Conservancy shall, at its expense, rectify any breach of its obligations contained in this Agreement caused by it, its servants, agents or licencees.

ARTICLE 8

DEFAULT

- 8.1 Breach or Default In the event of breach of or default in the obligations and covenants of the Owner under this Agreement, the Conservancy may take any action available to it at law, in equity, by statute or under this Agreement provided that the Conservancy shall first give to the Owner written notice of the default which notice shall specify the nature of the non-compliance and the measures necessary to secure compliance with the terms of this Agreement. If notice of default is given, the Owner shall have sixty (60) days following receipt of the notice of default to complete the required measures and to rectify the non-compliance or default.
- 8.2 If the Conservancy acting reasonably determines that circumstances require immediate action to prevent or mitigate damage to the conservation features of the Lands, the Conservancy may pursue its remedies under this Article 7 without waiting for the expiry of the sixty day notice period as otherwise required under Article 8 but after having given notice to the Owner.
- 8.3 In the event that the Owner has failed to provide compliance within the sixty day period allowed, then the Conservancy shall be entitled to enter on to the Lands and to complete those works and measures necessary to provide compliance and to remedy the default at the expense of the Owner.
- 8.4 The parties recognize that damages based upon market value may not be adequate or effective to compensate for destruction of or restoration of the conservation features of the Lands as they existed prior to default or breach of the Agreement. Accordingly, the parties agree that:

- (1) compensation to the Conservancy in the event of default or breach of the Agreement may be based upon market value or restoration or replacement costs, whichever, in the opinion of the court, shall best compensate the Conservancy,
- (2) in addition and without limiting the scope of the other enforcement rights available to the Conservancy under this Agreement, the Conservancy may bring an action or an application for injunctive relief to prohibit or prevent default or the continuance of default under this Agreement.

Traditionally, a court would look to the market value of a property before and after breach of an agreement to determine the appropriate amount of compensation. However, when considering the ecological integrity of natural features such as wetlands, it is possible that destruction and drainage of the wetland could actually enhance the development potential and market value of the Lands. In these circumstances the Agreement is specifically drafted to provide compensation which would allow restoration or replacement of the damaged natural feature.

In addition, it should be recognized that since restoration or replacement of a mature natural feature or ecosystem may not be possible, the agreement should specifically provide for injunctive relief to prevent damage to the natural features in the first place.

- 8.5 All reasonable costs incurred by the Conservancy in enforcing the terms of this Agreement, including without limitation legal costs and expenses, and any costs of restoration required to remedy any violation of the terms of this Agreement by the Owner shall be paid by the Owner to the Conservancy. Until paid by the Owner to the Conservancy, such costs of remedy incurred by the Conservancy shall be a debt owed by the Owner to the Conservancy and shall be a charge upon the Lands enforceable in the same manner as a mortgage and recoverable by the Conservancy in a court of law.

ARTICLE 9

NOTICE

- 9.9.1 Any notice (which term in this paragraph includes any request or waiver) provided or given hereunder shall be sufficiently given by either party if in writing and delivered by hand, sent by facsimile or other means of electronic communication or mailed by prepaid registered post to the Conservancy as follows:

Address: 503 Davenport Road, Toronto, Ontario, M4V 1B8

Facsimile Number: 416-960-9460

Email: rbarnett@escarpment.ca

and if to the Owner as follows:

Address: **Your address**

Facsimile Number: **Your fax number**

Email: **Your email address**

Any notice so delivered or any notice so forwarded by facsimile or other means of electronic communication shall be deemed to have been given on the next business day following the day of delivery or forwarding and any notice so mailed shall be deemed to have been given on the fourth business day following the day of mailing. Either party may in any manner aforesaid give notice to the other party of any change in the address or facsimile number thereof and thereafter the new address or facsimile number shall be the address of such party for the purpose of giving notice hereunder.

ARTICLE 10

GENERAL PROVISIONS

- 10.1 Liability after Transfer. No person who is an Owner shall be liable to the Conservancy for any breach of or default in the obligations owed to the Conservancy under this Agreement committed after:
- (1) the registration of a transfer by such person of all of such person's interest in the Lands; and
 - (2) delivery to the Conservancy of an acknowledgement and assumption agreement signed by the new registered Owner(s), acknowledging the priority of this Agreement and the interest of the Conservancy and assuming the obligations of the Owner under this Agreement.

<p><i>This provision provides an incentive for the owner to ensure that any purchaser of the lands will provide explicit written acknowledgement and acceptance of the obligations under the agreement.</i></p>

- 10.2. Force Majeure. Neither the Owner nor the Conservancy shall be liable to the other hereunder for any damage to or change in the Lands resulting from causes beyond the control of such party or its successors or assigns, or transferees therefrom, including, without limitation, accidental fire, flood, storm, earth movement, trespass, insect plague or disease or from any prudent action taken by

the Owner under emergency conditions to prevent, abate, or mitigate significant injury to the Lands or to lands abutting thereto resulting from such causes. The burden of proving that a particular breach or default was due to a cause beyond the control of the party shall be borne by both parties by hiring an agreed-upon expert. Furthermore, the time by which a party is required to perform any step or action hereunder is postponed to the extent and for the period of time that the party is prevented from meeting such time by reason of any cause beyond its reasonable control provided that the party prevented from rendering such performance notifies the other party immediately and furnishes details of the commencement and nature of such a cause.

This provision would relieve the land owner for responsibility or liability for acts of God lying outside of the Owner's control.

- 10.3 Assignment. If necessary, the Conservancy may assign all of its interest in this Agreement to any qualified Conservation Body (**including: members of the Ontario Land Trust Alliance, Ontario Nature, Nature Conservancy of Canada, the Ontario Heritage Trust,**) (the local municipality or the conservation authority) provided that the Conservancy shall provide the Owner with written notice of such assignment. The Conservancy shall not be liable to the Owner for any breach or default in the obligations owed to the Owner under this Agreement committed after notice of the assignment of this Agreement has been given to the Owner.

Assignment of the agreement to another conservation body is specifically contemplated by sub-section 3.(3) of the Act.

The Conservation charity should list specific charities in sequence to be assigned the easement.

This provision in the agreement is directed to relieve the original conservation body from any obligations or liability to the owner after the assignment and notice of assignment.

Note that the Act also provides for mandatory assignment of the agreement to the Minister of Natural Resources in the event that the original conservation body ceases to be a conservation body. That might occur if a non-profit corporation lost its charitable status under the Income Tax Act (Canada) and could not longer satisfy the definition of a Conservation Body in the Act.

If the Agreement is made further to an Ecological Gift under the Income Tax Act (Canada), then the Conservancy will need to seek the approval of Environment Canada for any assignment and the assignee needs to be an eligible recipient.

- 10.4 Registration. The Conservancy shall register this Agreement against title to the Lands in perpetuity and the Owner shall execute any document that may be required to allow such registration. The Owner hereby agrees to execute a transfer of easement incorporating the provisions of the Easement, which may be registered as a separate document. The Owner hereby agrees that this Agreement may be registered in a conservation agreement registry established by a government authority where it may be viewed by other conservation organizations or individuals.

Registration on title will of course be essential to provide notice to any subsequent purchaser, mortgagee or any other person taking an interest in the land of the prior interest of the conservation body and of the existence of the conservation easement and the restrictions and obligations attached to the land.

Read in combination with section 10.8 the costs of registration would fall upon the conservation body. Of course the agreement can be amended to specify that this will be to the account of the Owner. Alternately, the Conservancy might negotiate to accept a donation from the Owner to cover the cost of agreement preparation and registration.

- 10.5 Failure to Enforce No failure by the Conservancy to require performance by the Owner of any provision of this Agreement shall affect the right of the Conservancy thereafter to enforce such obligation, and no failure by the Owner to perform any of its rights or obligations hereunder shall be taken as a waiver of such performance or the performance of any other obligations in the future.
- 10.6 Time of the Essence. Time shall be of the essence of this Agreement and shall be deemed to remain so notwithstanding any extension of any time limit.
- 10.7 Severability. All provisions of this Agreement including each of the Covenants shall be severable and should any be declared invalid or unenforceable, the validity and enforceability of the remaining provisions shall not be affected thereby.
- 10.8 Costs Save as provided herein or ordered by any court or tribunal, each party shall be responsible for its own legal fees and related expenses arising from the negotiation and implementation of this Agreement. Any amount paid by a party hereunder by reason of the default of the other party shall bear interest from the date the amount was paid until the date of repayment at a rate which is the lesser of (i) five (5) percentage points over the prime rate of interest from time to time charged by the Bank of Canada or (ii) the maximum rate allowed by law.
- 10.9 Joint and Several Whenever the Owner should comprise more than one person, the obligations thereof hereunder shall be joint and several.

10.10 Amendment. The parties agree that this Agreement, including the Easement and Covenants, shall run with the Lands in perpetuity and may be amended only by permission of the Conservancy, or its successor or assign, which is not obliged to accept any amendment request for a full or partial release of the terms of this Agreement in accordance with the law, and that any amendment may need the approval of the Minister of Natural Resources as required under the Act. It will be the sole responsibility of the Owner to seek and receive such approval and any reasonable costs shall be borne by the Owner.

Pursuant to the Income Tax Act (Canada) regarding EcoGifts, the authorization of the Minister of the Environment for Canada or his/her delegate, is required prior to implementing a disposition of this Agreement or a change of use of the Property not in compliance with the Agreement.

10.11 Dispute Resolution. The parties agree that any dispute arising out of or relating to this Agreement shall be submitted to a single arbitrator pursuant to the terms of the *Arbitration Act, 1991*.

10.12 Signage. The parties agree that the Conservancy may erect signage on the Lands setting out the existence of this Agreement and may otherwise publicize the existence of this Agreement.

10.13 Entirety. This written Agreement embodies the entire agreement between the parties with regard to the matters dealt with herein, and no understandings or agreements, verbal, collateral or otherwise exist between the parties **except** as herein expressly set out.

10.14 Headings. The headings used in this Agreement are included for convenience of reference only and shall have no effect upon the construction or interpretation of the Agreement.

10.15 Spousal Consent. The owner agrees that, if married, the property has not been used as a matrimonial home and that if so, spousal consent has been provided.

10.16 Jurisdiction. This Agreement shall be construed and enforced in accordance with, and the laws of Ontario and the laws of Canada applicable therein.

10.17 Assurances. Each party at the request of the other party shall execute and deliver such assurances and do such other acts as may be reasonably required or desirable to give full effect to the provisions and intent of this Agreement.

10.18 Independent Advice. The Parties hereby acknowledge and confirm the following:

- a. The Owner has been advised by the Conservancy to obtain independent legal, financial and tax advice prior to entering into this Agreement and has obtained

that advice [or: b “has elected not to obtain that advice”.]

The option of electing not to get independent legal advice should be discouraged. The best practice is to use a lawyer representing the Owner and another lawyer representing the Conservancy. It is, however, the Owner’s choice as to whether she or he obtains or heeds that advice.

10.19 This Agreement remains enforceable regardless of any change in land use planning, change in planning classification, or use of the Lands or use of adjacent or nearby properties.

IN WITNESS WHEREOF the Owner and the Conservancy have executed this Agreement as at the date first above written.

Witness to the signature of
Your name

Your name

Witness to the signature of
Your spouse’s name

Spouse’s name

Escarpment Biosphere Conservancy, Inc.

Per: _____
Ted Cowan
Chair

Per: _____
Gwen Harris
Secretary

We have the authority to bind the
Corporation

SCHEDULE "A"

LEGAL DESCRIPTION

Your legal description: Part Lots ? and ?, Concession ?, Geographic Township of ??????, Town of ????, County of ????, more particularly described as follows:

As previously described in instrument no. ????.

SCHEDULE "B"

Baseline Documentation Report

The Conservancy shall complete at its expense a Baseline Documentation Report. When completed the Owner agrees to execute an acknowledgment in the Baseline Documentation Report to confirm the photographs and written information are accurate depictions and descriptions of the Lands and its significant natural features and uses. A signed copy of the completed Baseline Documentation Report shall be provided by the Conservancy to the Owner. An original signed copy of the Baseline Documentation Report will be filed at and may be examined at the Escarpment Biosphere Conservancy, Inc. office at 503 Davenport Road, Toronto.

A summary of the significant natural features and uses of the Lands is included in this Schedule "B" for reference purposes. In the event of a conflict between this summary and the completed Baseline Documentation Report, the Baseline Documentation Report shall prevail.

Summary of significant natural features and uses of the Lands: farmland, ancient forest, drumlins, Walter's Creek and farmstead.