

**200107260508**

**GRANT OF CONSERVATION EASEMENT**

This Grant of Conservation Easement ("Conservation Easement") is made this 24th day of July, 2001 by and between the MacIntosh Land Company Limited Partnership, an Ohio limited partnership, its successors and assigns (the "Grantor") having an address at 737 Bolivar Road Cleveland, Ohio 44115 and Ohio Stream Preservation, Inc. an Ohio not-for-profit corporation, its successors and assigns (the "Grantee") having an address at 24850 Aurora Rd., Unit C, Bedford Heights, Ohio 44146.

**WHEREAS**, Grantor is the owner in fee simple of certain real property by instrument recorded (or to be recorded) in Volume 92-3182, Page 15 of Cuyahoga County records, and is situated in Broadview Heights, Ohio, County of Cuyahoga, Ohio, consisting of approximately 310 acres and more fully described in Exhibit A (Legal Description) and depicted in Exhibit B (Overall Development Plan), both attached hereto and made a part hereof which real property is commonly known as New Hampton, a planned unit development (the "Development"); and

**WHEREAS**, the Grantor has proposed to construct a certain project on the real property depicted on Exhibit B (the Overall Development Plan), which project may have environmental impacts to certain surface water bodies located on the real property and will require the Grantor to obtain a 401 water quality certification from the Ohio Environmental Protection Agency ("OEPA") and a 404 Individual Permit from the Army Corps of Engineers ("ACOE"); and

**WHEREAS**, the Grantor is creating the New Hampton Master Association, Inc., ("Master Association") and is adopting for the Master Association its Declaration of Covenants, Conditions, Restrictions, and Easements for the Development, City of Broadview Heights, Cuyahoga County, Ohio ("Master Declaration"); and

**WHEREAS**, the Grantor agrees to cause the Master Declaration to commit the Master Association to being bound by the terms of this Conservation Easement, and Grantor agrees to provide compensation to the Grantee for services performed related to this Conservation Easement, on behalf of the Grantor; and

**WHEREAS**, in order to protect the quality of the surface waters located on the real property, the OEPA has required that Grantor, as a condition of being issued a 401 water quality certification, grant a Conservation Easement in and to a portion of the Grantor's real property, which is more specifically identified in Exhibit B (the "Preserve") and more fully described in Exhibit C (Legal Description of the Preserve); and

**WHEREAS**, Section 5301.69 of the Ohio Revised Code authorizes Grantee to acquire and hold conservation easements for the purposes set forth herein; and

**WHEREAS**, the Grantee agrees by accepting this grant to honor the intentions of Grantor stated herein and to preserve and protect the conservation values of the Preserve in perpetuity and to prevent or remedy subsequent activities or uses that are inconsistent with the terms of the Conservation Easement.

**NOW THEREFORE**, in consideration of the foregoing premises and the mutual promises and covenants contained herein, the parties hereto agree as follows:

1. **Grant of Easement:** Grantor hereby grants and conveys to Grantee, its successors and assigns, an estate, interest, easement and servitude in and to the Preserve of the nature and character and to the extent hereinafter expressed, to be and to constitute a servitude upon the Preserve, which estate, interest, easement and servitude will result from the covenants and restrictions set forth herein and hereby imposed upon the use of the Preserve by Grantor, and, to that end and for the purpose of accomplishing the intent of the parties hereto, the Grantor covenants on behalf of itself, its heirs, successors and assigns with the Grantee, its successors and assigns, to do and refrain from doing, severally and collectively, upon the Preserve, the various acts hereinafter described, it being hereby agreed and expressed that the doing and the refraining from such acts, and each thereof, is and will be for the benefit of Grantee.
  
2. **Term of Easement:** The easement granted hereunder shall be perpetual and shall have no expiration date. Article 10 describes the process for termination of said easement.
  
3. **Conservation Values:** The Preserve possesses substantial value in conserving and protecting the physical, biological and chemical integrity of the tributary to the East Branch of the Rocky River and is important in the protection of the existing or designated use of the waters of the state pursuant to §303 of the Clean Water Act, 33 U. S. C. §1313 and §6111.041 of the Ohio Water Pollution Control Act. The specific conservation values of the Preserve have been documented in the application for Section 404 Permit No. (B) 96-494-0037(2) (U. S. Army Corps of Engineers) and in the Grant of Section 401 Certification (Ohio EPA), dated November 6, 2000, as submitted as a Preferred Alternative and modified in an August 31, 2000 letter and the Mitigation and Fill Map dated October 2000.  
  
A "Baseline Documentation Report" attached hereto as Exhibit D and incorporated by reference herein, may consist of any and all maps, reports, photographs, descriptions of prominent vegetation, land use history and distinct natural features characterizing the Preserve at the time of the grant and is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant. The parties acknowledge that the Baseline Documentation Report is an accurate representation of the Preserve at the time of this grant.
  
4. **Prohibited Actions:** Any activity on or use of the Preserve inconsistent with the purposes of this Conservation Easement or detrimental to the conservation values expressed herein is expressly prohibited. By way of example, and not of limitation, the following activities and uses are explicitly prohibited:
  - a. **Division:** Any division or subdivision of the Preserve beyond that shown on the Overall Development Plan of the Development in Exhibit B;
  - b. **Commercial Activities:** Commercial development, commercial recreational use, or industrial activity;
  - c. **Construction:** The placement or construction of any man-made modifications including but not limited to buildings, structures, fences, mobile homes, advertising, billboards, camping accommodations, roads and parking lots except the installation, maintenance, repair and replacement of utilities necessary for buildings and appurtenances to be located within the property described in Exhibit A, and limited to

storm and sanitary sewers, and stormwater detention/retention basins and all appurtenances (“Utility Work”) thereto within [the] designated utility easements as shown on Exhibit B; and the installation, maintenance, repair and replacement of pedestrian and bicycle trails as shown on Exhibit B. Where areas of the Preserve are affected by the Utility Work as provided in this section, Grantor shall restore all such affected Preserve areas to their condition immediately prior to any Utility Work. Where the pedestrian/bicycle trails cross wetlands, raised boardwalks must be used.

- d. **Destruction or Introduction of Vegetation and Animals:** The removal or destruction of native growth in the Preserve, including without limitation the use of fertilizers, the spraying of herbicides, pesticides or biocides, the introduction of nonnative wild animals and vegetation, grazing of domestic animals, or disturbance or change in the natural habitat (except in the enhancement of wildlife habitats) and the cutting of trees, ground cover or vegetation, except as approved in writing by the Grantee, which approval will not be unreasonably withheld or delayed, and limited to the following purposes:
  - (1) The control or prevention of imminent hazard, disease, or fire, and for the purpose of restoring natural habitat areas to promote native vegetation; and,
  - (2) The removal of those portions of dead, diseased, damaged, destroyed, or fallen trees, shrubs, or other vegetation that physically block streams, Utility Work, or pedestrian and bicycle trails; and,
  - (3) The elimination and removal of grapevines, poison ivy, and other toxic and undesirable growth which can be cut and left laying;
  - (4) Hunting or trapping as necessary to keep the animal population within numbers consistent with the ecological balance of the area; and,
  - (5) Utility Work and the installation, maintenance, repair and replacement of pedestrian and bicycle trails as shown on Exhibit B.
- e. **Land Surface Alterations:** The removal, filling, or excavation, of soil, sand, gravel, rock minerals or other materials from the Preserve, or doing any act that would alter the topography of the Preserve, except for the activities outlined in Article 4(c), and that caused by the forces of nature;
- f. **Dumping:** The dumping or accumulation of any substance of any kind, nature, and description including but not limited to grass clippings or other yard debris, soil, trash, ashes, garbage, waste, or other unsightly or offensive material or any placement of underground storage tanks, on or in the Preserve (see Article 5(e)(8));
- g. **Water Courses:** Alteration of the natural water courses, streams, wetlands, marshes, or other water bodies, and their adjacent riparian buffer areas, and any use or activity detrimental to water purity on the Preserve, except for those activities listed in Article 4c;



e. **Requirements for the Preserve:** The following minimum conditions shall apply to the Preserve:

- (1) The Grantor shall be responsible for ensuring that contractors and/or workers involved activities listed in Article 4(c) have knowledge of the terms and conditions of these restrictions and that a copy of these restrictions is at the project site throughout the period the work is underway; and
- (2) Construction debris shall be prevented from entering the waterway, stream or buffer area, and shall be removed immediately should any such debris be present in said areas; and,
- (3) That the mechanical equipment used to execute any and all work be operated in such a way as to minimize turbidity (i.e., stirring up sediment into the water) that could degrade water quality and adversely affect aquatic plant and animal life; and,
- (4) Best Management Practices (BMP's) including silt controls be installed downstream from all construction areas adjacent to or abutting the Preserve Area and shall remain in place during all excavation and restoration operations including landscaping. Said controls shall not be removed until stabilization of the project site is satisfactorily complete; and,
- (5) That all installed landscaping along the western edge of the stormwater retention basin and maintenance of said landscaping, including mowing and fertilization, be no closer to the waterway or stream than the designated buffer adjacent to said waterway or stream, or as approved in writing by the Grantee, which approval will not be unreasonably withheld or delayed, and limited Utility Work and pedestrian/bicycle paths that exist or will exist as shown on Exhibit B; and,
- (6) Until the dedication and acceptance of the utilities by government authorities, or utility companies having jurisdiction, the Grantor shall be responsible for the liability and maintenance of all Utility Work. The Master Association shall be responsible for the maintenance of pedestrian/bicycle paths in and to the Preserve, to the reasonable satisfaction of the Grantee. Should the Master Association fail to maintain the pedestrian/bicycle paths, to Grantee's reasonable satisfaction, Grantee may undertake all necessary work and assess the costs against the Master Association; and,
- (7) All trash or nonconforming material that is dumped or placed on the Preserve shall be removed or cause to be removed by the Grantor immediately. In the event that the nonconforming material is placed by an adjacent landowner or party unknown to the Grantor, the Grantee and Grantor shall work collectively to locate and notify the offender and cause the material to be removed immediately by the offender. If the offender is not identified or is uncooperative, the Grantor shall be responsible for removal of the nonconforming material.

6. **Rights of Grantee:** The Grantor confers the following rights upon the Grantee to perpetually maintain the conservation values of the Preserve:
- a. **Right to Enter:** The Grantee has the right to enter the Preserve at reasonable times to monitor or to enforce compliance with this Conservation Easement; provided that such entry shall be upon prior written reasonable notice to the Grantor. The Grantor may use the Preserve without interference provided that the Grantor restricts his/her use to those permitted under this Conservation Easement. The Grantee has no right to permit others to enter the Preserve. The general public is not granted access to the Preserve under this Conservation Easement;
  - b. **Right to Preserve:** The Grantee has the right to prevent any activity on or use of the Preserve that is inconsistent with the terms or purposes of this Conservation Easement;
  - c. **Right to Require Restoration:** The Grantee shall have the right to require the restoration of the areas or features of the Preserve which are damaged by any action prohibited by this Conservation Easement;
  - d. **Right to Placement of Signs:** The Grantee shall have the right to place a reasonable number of small signs on the Preserve which identify the land as being protected by this Conservation Easement;
7. **Grantee's Remedies:** In the event of a breach of this Conservation Easement, the Grantee shall have the following remedies and shall be subject to the following limitations:
- a. **Actions Against Grantor:** In the event of a breach of this Conservation Easement], the Grantee may bring action against the Grantor for failing to fulfil its obligations as contained herein. Prior to an action being brought, the Grantee shall provide written notice, as set forth herein to the Grantor, advising of the breach of duty and demanding that Grantor abide by the provisions of this Conservation Easement;
  - b. **Requirement of Notice:** If, after a twenty-eight (28) day period following the date of written notice as provided above ("Notice Period"), the Grantor continues in its breach of duties or if the Grantor does not take substantial corrective measures within the Notice period, or if Grantor should fail to continue diligently provide said duties, the Grantee may bring an action in law or in equity to enforce the terms of the Conservation Easement and recover any damages for the loss of the conservation values protected hereunder, including without limitation, attorney fees. The remedies available to Grantee include, without limitation, enjoining the violation through injunctive relief, seeking specific performance, and obtaining declaratory relief, restitution, reimbursement of expense including without limitation the expense of restoration of the Preserve, and/or an order compelling restoration of the Preserve;
  - c. **Emergency Action:** If the Grantee determines that the use permitted by this Conservation Easement is, or is expected to be violated so to cause significant or irreparable damage to the physical, biological and/or chemical integrity of the water

course, the Grantee will provide written notice to the Grantor. If, through reasonable efforts, the Grantor cannot be notified, or if the Grantee determines, in its sole discretion, that the circumstances justify prompt action to mitigate or prevent injury to the Preserve, then the Grantee may pursue its lawful remedies without awaiting the Grantor's opportunity to cure. Grantor shall not be liable for any costs arising from Grantee's failure to provide advance notice as set forth in Section 7 (b) above;

- d. **Injunctive Relief for Actual or Threatened Non-Compliance:** Grantor acknowledges that actual or threatened events of non-compliance under this Conservation Easement constitute immediate and irreparable harm. The Grantor acknowledges that Grantee's remedies at law for any violation of the terms hereof are inadequate and Grantee is entitled to injunctive relief, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including specific performance of the terms of this Conservation Easement, without the necessity of proving either actual damages or inadequacy of otherwise available legal remedies;
  - e. **Cumulative Remedies:** The preceding remedies of the Grantee are cumulative. Any or all of the remedies may be invoked by the Grantee if there is an actual or threatened violation of this Conservation Easement. Grantee may not, however, receive more than one remedy (including without limitation, damages and injunctive relief) for the same injury or violation;
  - f. **Delay in Enforcement:** Notwithstanding the foregoing, any delay in enforcement shall not (by itself) be construed as a waiver of the Grantee's rights to enforce the terms of this Conservation Easement.
8. **Ownership Costs and Liabilities:** In accepting this Conservation Easement, the Grantee shall have no liability or other obligation for costs, liabilities, taxes or property insurance of any kind related to ownership of the Preserve. The Grantee and its trustees, officers, employees, agents and members have no liability arising from injury or death to any person or from physical damage to any other property located on the Preserve or otherwise. The Grantor agrees to defend the Grantee against such claims and to indemnify the Grantee against all costs and liabilities relating to such claims. Notwithstanding the foregoing, Article 8 does not apply to losses caused by the negligence, actions or inaction of employees, agents and invitees of Grantee.
  9. **Cessation of Existence:** If the Grantee shall cease to be authorized to acquire and hold conservation easements, then this Conservation Easement shall become vested in another qualified entity that is eligible to acquire and hold a conservation easement under Ohio law, upon the mutual consent of Grantor and Ohio EPA.
  10. **Termination:** This Conservation Easement may be extinguished only by an unexpected change in condition, which causes it to be impossible to fulfill the Conservation Easement's purposes, or by exercise of eminent domain:
    - a. **Unexpected Change in Conditions:** If subsequent circumstances render the purposes of this Conservation Easement impossible to fulfill, then this Conservation Easement may be partially or entirely terminated only by judicial proceedings. The

amount of the compensation to which the Grantee shall be entitled from any sale, exchange, or involuntary conversion of all or any portion of the Preserve, pursuant to such proceedings, subsequent to such termination or extinguishment, shall be established, unless otherwise provided by Ohio law at the time, as provided in (b) below with respect to the division of condemnation proceeds. The Grantee shall use any such proceeds in a manner consistent with the purposes of this Conservation Easement;

- b. **Eminent Domain**: If the Preserve is taken, in whole or in part, by power of eminent domain, then the Grantee will be entitled to compensation in accordance with applicable laws and in proportion to the Grantee's interest in the Preserve at the effective date of this Conservation Easement.
11. **Recordation**: The Grantor or its successors and assigns shall record this instrument in a timely fashion in the official record of Cuyahoga County, Ohio and shall re-record it at any time as may be required to preserve the Grantee's rights in this Conservation Easement.
12. **Assignment**: This Conservation Easement is transferable, but Grantee may assign its rights and obligations hereunder only to an organization or entity that is qualified to hold conservation easements under Ohio law, and any applicable federal tax law, at the time of transfer, provided that such transfer is approved by Grantor which approval will not be unreasonably withheld or delayed. As a condition of such transfer, the Grantee and Grantor shall require that the conservation purposes that this grant is intended to advance, continue to be carried out.
13. **Liberal Construction and Section Headings**: This Conservation Easement shall be liberally construed in favor of maintaining the conservation values of the Preserve. The section headings and subheadings identified herein are for reference purposes only and shall not be used to interpret the meaning of any provision hereof.
14. **Notices**: For purposes of this Conservation Easement, notices may be provided to either party, by personal delivery or by mailing a written notice to that party by first class mail, postage prepaid. Delivery will be complete upon depositing the properly addressed notice with the U. S. Postal Service.

The notice shall be served to the Grantor at:

MacIntosh Land Company Limited Partnership  
c/o The Zaremba Company  
737 Bolivar Road  
Cleveland, Ohio 44115

with a copy to its attorney at:

Steven A. Marrer, Esq.  
Taft, Stettinius and Hollister, LLP  
3500 BP Tower  
200 Public Square  
Cleveland, Ohio 44114-2302

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The notice shall be served to the Grantee at:  
Ohio Stream Preservation, Inc.  
24850 Aurora Road, Unit C  
Bedford Heights, Ohio 44146

with a copy to its attorney at:  
Reddy, Grau and Meek  
Attn. Mr. David Meek  
5306 Transportation Blvd.  
Garfield Heights, Ohio 44125

In addition, a copy of any notice hereunder shall be given to Pulte Homes of Ohio Corporation ("Pulte"), who has entered into an agreement with Grantor to purchase a portion of the Development (the 293.60 acre Residential Parcel referred to in Section 20 hereof). Until such time as Pulte informs Grantee that Pulte has terminated its agreement to purchase a portion of the Development, notice shall be given to Pulte as follows:

Pulte Homes of Ohio Corporation  
Attn. Robert Dyer, Director of Land  
30575 Bainbridge Road, Suite 150  
Solon, Ohio 44139

with a copy to its attorney:

Richard A. Rosner, Attorney at Law  
Kahn, Kleinman, Yanowitz & Arnson Co., L.P.A.  
Suite 2600, Tower At Erievue  
1301 East Ninth Street  
Cleveland, Ohio 44114-1824

15. **Severability:** If any portion of this Conservation Easement is determined to be invalid or unenforceable, the remaining provisions of this agreement will remain in full force and effect.
16. **Subsequent Transfers:** This Conservation Easement shall be a covenant running with the land and shall constitute a burden on the Preserve and shall run to the benefit of the parties hereto and their successors in interest. All subsequent owners of the Preserve shall be bound to all provisions of this Conservation Easement to the same extent as the current parties. Grantor shall incorporate the terms of this Conservation Easement, by reference, in any deed or other legal instrument by which they divest themselves of any interest in all or a portion of the Preserve, including, without limitation, a leasehold interest. Grantor further agrees to provide written notice to the Grantee of the transfer of any interest at least thirty (30) days prior to the effective date of such transfer.
17. **Termination of Rights and Obligations:** A party's future rights and obligations under this Conservation Easement shall terminate upon transfer of that party's interest in the Preserve. Liability for acts or omissions occurring prior to transfer shall survive any such transfer.

18. **Applicable Law:** This agreement shall be governed by, and construed in accordance with the substantive law of the State of Ohio, irrespective of its conflicts of laws rules.
19. **Entire Agreement:** This Conservation Easement sets forth the entire agreement of the parties and supersedes all prior discussions and understandings.
20. **Assumption by Purchaser and Release of Grantor:** The Grantor intends to divide the Development into two (2) parcels, one parcel containing approximately sixteen (16) acres located on the southwest corner of the Development (the "Commercial Parcel"), and the other parcel containing approximately two hundred ninety-three and 60/100 (293.60) acres (the "Residential Parcel"). Upon the sale and conveyance by Grantor of all or a portion of either parcel, the purchaser thereof shall assume Grantor's rights and obligations with respect to the parcel so conveyed. Grantor shall be responsible for all obligations with respect to a parcel accruing prior to the sale and conveyance thereof, and the purchaser of such parcel shall be responsible for all obligations under this Conservation Easement accruing with respect to such parcel subsequent to such conveyance. Upon the assumption by the purchaser of Grantor's obligations hereunder with respect to the parcel being conveyed, Grantee shall release the Grantor from all obligations and extend to purchaser all rights under this Conservation Easement accruing after (but not before) said conveyance. Furthermore, Grantee shall look solely to Grantor (and not such purchaser) with respect to any obligations accruing prior to the conveyance of the subject parcel. It shall be a condition of this Section 20 that the Grantor and purchaser enter into an agreement with respect to such assumption and release[.

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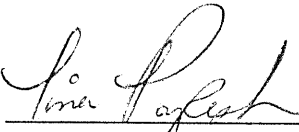
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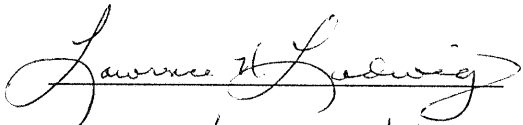
IN WITNESS WHEREOF, the Grantor and Grantee have set their hands on the day and year first above written.

**WITNESSES:**

\_\_\_\_\_  
Print Name: \_\_\_\_\_

**WITNESSES:**

  
\_\_\_\_\_  
Print Name: Tina Papesh

  
\_\_\_\_\_  
Print Name: LAWRENCE N. LUDWIG

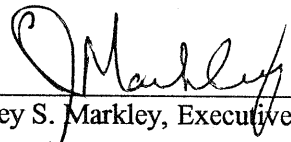
**GRANTOR**

MacIntosh Land Company, Limited Partnership,  
an Ohio Limited Partnership  
By: MacIntosh Land Investment Corporation, an  
Ohio corporation, General Partner

By: \_\_\_\_\_  
Authorized Signature

**GRANTEE**

**OHIO STREAM PRESERVATION, INC.**

By:   
\_\_\_\_\_  
Jeffrey S. Markley, Executive Director

By:   
\_\_\_\_\_  
Jeffrey Falski, Secretary

Date: 7/24/2001

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