

**CONSERVATION EASEMENT  
City of New Berlin**

Document Number

RETURN TO:

Dept. of Community Development  
City of New Berlin  
3805 South Casper Drive  
New Berlin, WI 53151

Tax Key No. NBC [#####]

THIS GRANT DEED OF CONSERVATION EASEMENT is made this \_\_\_\_\_ day of \_\_\_\_\_, [YEAR], by and between [NAMES], (“Grantor”), and the City of New Berlin, a Wisconsin Municipal Corporation, (“Grantee”).

**WITNESSETH:**

WHEREAS, Grantors are the sole owners in fee simple of certain real property in the City of New Berlin, Waukesha County, Wisconsin, more particularly described in Exhibit A attached hereto and incorporated by this reference (the “Property”); and

WHEREAS, the property possesses natural, scenic, ecological and open space values (collectively, “conservative values”) of great importance to Grantors, the people of the City of New Berlin and the people of the State of Wisconsin; and

WHEREAS, the specific conservation values of the Property are further documented in an inventory of relevant features of the Property and on The Map of Potential Conservation Areas, dated April 12<sup>th</sup>, 2005 and incorporated by this reference (“Baseline Documentation”), which consists of reports, maps, photographs and other documentation that the parties agree provide, collectively, an accurate representation of the Property at the time of this grant and which is intended to serve as an objective information baseline for monitoring compliance with the terms of this grant; and

WHEREAS, Grantors intend that the conservation values of the [PRIMARY ENVIRONMENTAL CORRIDOR, SECONDARY ENVIRONMENTAL CORRIDOR, ISOLATED NATURAL RESOURCE AREA] area be preserved and maintained by the continuation of land use patterns existing at the time of this grant, that do not significantly impair or interfere with those values; and

WHEREAS, Grantors further intend, as owners of the Property, to convey to Grantee the right to preserve and protect the conservation values of the Property in perpetuity; and

WHEREAS, Grantee is a publicly supported, tax-exempt nonprofit organization, qualified under Sections 501(c)(3) and 170(h) of the Internal Revenue Code, and the regulations promulgated thereunder (the "Internal Revenue Code"), whose primary purpose is to provide municipal governance under the laws of the State of Wisconsin.

WHEREAS, Grantee agrees by accepting this grant to honor the intentions of Grantors stated herein and to preserve and protect in perpetuity the conservation values of the Property for the benefit of this generation and the generations to come;

NOW, THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, and pursuant to the laws of the State of Wisconsin and, in particular, the Uniform Conservation Easement Act, Wis. Stat. Sec. 700.40, Grantors hereby voluntarily grant and convey to Grantee a conservation easement in perpetuity over the Property of the nature and character and to the extent hereinafter set forth ("Easement").

**1. Purpose.** It is the purpose of this Easement to assure that the wetlands and the natural, scenic landscape, natural character and open space values of the Property will be retained forever in its natural state and to prevent any use of the Property that will significantly impair or interfere with the conservation values of the Property. Grantors intend that this Easement will confine the use of the open land on the Property to such activities that maintain and enhance the natural features and scenic enjoyment of the Property including, without limitation, those involving its conservation, recreational, forestry and residential uses and purposes as provided herein, such as relief from urban closeness and preservation or creation of woodlands, fallow fields, grassy meadows, and such others as are consistent with the purpose of this Easement.

**2. Rights of Grantee.** To accomplish the purpose of this Easement the following rights are conveyed to Grantee by this Easement:

- a) To preserve and protect the conservation values of the Property;
- b) To enter upon the Property, at reasonable times, in order to monitor Grantor's compliance with and otherwise enforce the terms of this Easement, provided that such entry shall be upon prior reasonable notice to Grantors and with their permission. In the event that the Grantor refuses permission for access to the site, the Grantee reserves the right to pursue a Special Inspection Warrant from the Municipal Court. The Grantee shall not unreasonably interfere with Grantor's use and quiet enjoyment of the Property; and
- c) To prevent any activity on or use of the Property that is inconsistent with the purpose of this Easement and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to paragraph 6 herein.

**3. Prohibited Uses.** Any activity on or use of the Property inconsistent with the purpose of this Easement is prohibited, including all items outlined in the City of New Berlin Municipal Code and more specifically listed in Table 275-37-1 of the Zoning Code.

**4. Reserved Rights.** Grantors reserve to themselves, and to their personal representatives, heirs, successors and assigns, all rights accruing from their ownership of the Property, including the right to engage in, or permit or invite others to engage in, all uses of the Property that are not expressly prohibited herein and are not inconsistent with the purpose of this Easement and the City of New Berlin Municipal Code and Table 275-37-1 of the Zoning Code. This conservation easement will limit the areas of disturbance, within the Conservation Easement, on each lot to 25,000 square feet to protect the [PRIMARY ENVIRONMENTAL CORRIDOR, SECONDARY ENVIRONMENTAL CORRIDOR, ISOLATED NATURAL RESOURCE AREA] identified on the site. No land clearing shall take place until this Conservation Easement is recorded and a stake out survey is on file with the City limiting the areas of disturbance.

- a) A note shall be placed on the CSM identifying the Conservation Easement limits.
- b) A tree preservation plan/protection plan shall be in place prior to any construction and will be inspected at the time of building permit.

**5. Notice of Intention to Undertake Certain Permitted Actions.** The purpose of requiring Grantors to notify Grantee prior to undertaking certain permitted activities, as provided hereunder, is to afford Grantee an opportunity to ensure that the activities in question are designed and carried out in a manner consistent with the purpose of this Easement. Whenever notice is required, Grantors shall notify Grantee in writing not less than 60 days prior to the date Grantors intend to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purpose of this Easement.

**5.1 Grantee's Approval.** Where Grantee's approval is required, Grantee shall grant or withhold its approval in writing within 60 days of receipt of Grantor's written request therefore. Grantee's approval may be withheld only upon a reasonable determination by Grantee that the action as proposed would be inconsistent with the purpose of this Easement.

**5.2 Arbitration.** If a dispute arises between the parties concerning the consistency of any proposed use or activity with the purpose of this Easement, and Grantors agree not to proceed with the use or activity pending resolution of the dispute, either party may refer the dispute to arbitration by request made in writing upon the other. Within 30 days of the receipt of such a request, the parties shall select a single arbitrator to hear the matter. If the parties are unable to agree on the selection of a single arbitrator, then each party shall name one arbitrator and the two arbitrators thus selected shall select a third arbitrator; provided, however, if either party fails to select an arbitrator, or if the two arbitrators selected by the parties fail to select the third arbitrator within 10 days after the appointment of the second arbitrator, then in each such instance a proper court, on petition of a party, shall appoint the second or third arbitrator or both. The matter shall be settled in accordance with the American Arbitration Rules then in effect, and a judgment on the arbitration award may be entered in any court having jurisdiction thereof. The prevailing party shall be entitled, in addition to such other relief as may be granted, to a reasonable sum as and for all its costs and expenses related to such arbitration, including, without limitation, the fees and expenses of the arbitrators and attorneys' fees, which shall be determined by the arbitrator(s) and any court of competent jurisdiction that may be called upon to enforce or review the award.

**6. Grantee's Remedies.** If Grantee determines that Grantors are in violation of the terms of this

Easement or that a violation is threatened, Grantee shall, except as otherwise stated herein, give written notice to Grantors of such violation and demand corrective action sufficient to cure the violation and, where the violation involves injury to the Property resulting from any use or activity inconsistent with the purpose of this Easement, to restore the portion of the Property so injured. If Grantors fail to cure the violation within 60 days after receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a 60 day period, fail to begin curing such violation within the 60 day period, or fail to continue diligently to cure such violation until finally cured, Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce the terms of this Easement, to enjoin the violation by temporary or permanent injunction, to recover any damages to which it may be entitled for violation of the terms of this Easement of injury to any conservation values protected by this Easement, including damages for the loss of scenic, aesthetic or environmental values, and to require the restoration of the Property to the condition that existed prior to any such injury including the costs of the enforcement action and the City's attorney fees. Without limiting Grantor's liability therefore, Grantee, in its sole discretion, may apply any damages recovered to the cost of undertaking any corrective action on the Property. Grantee's rights under this paragraph apply equally in the event of either actual or threatened violations of the terms of this Easement, and Grantors agree that Grantee's remedies at law for any violation of the terms of this Easement are inadequate and that Grantee shall be entitled to the injunctive relief described in this paragraph, both prohibitive and mandatory, in addition to such other terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's remedies described in this paragraph shall be cumulative and shall be in addition to all remedies now or hereafter existing at law or in equity.

**6.1 Costs of Enforcement.** Any costs incurred by Grantee in enforcing the terms of this Easement against Grantors, including, without limitation, costs of suit and attorneys' fees, and any costs of restoration necessitated by Grantor's violation of the terms of this Easement shall be borne by Grantors. If Grantors prevail in any action to enforce the terms of this Easement, Grantor's costs of suit, including, without limitation, costs of suit and attorneys' fees, shall be borne by Grantee.

**6.2 Grantee's Discretion.** Enforcement of the terms of this Easement shall be at the discretion of Grantee, and any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantors shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantors shall impair such right or remedy or be construed as a waiver.

**6.3 Waiver of Certain Defenses.** Grantors hereby waive any defense of laches, estoppel, or prescription.

**6.4 Acts Beyond Grantor's Control.** Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantors for any injury to or change in the Property resulting from causes beyond Grantor's control, including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Grantors under emergency conditions to prevent, abate or mitigate significant injury to the Property resulting from such causes.

**7. Access.** No right of access by the general public to any portion of the Property is conveyed by this Easement.

**8. Costs and Liabilities.** Grantors retain all responsibilities and shall bear all costs and liabilities of any

kind related to the ownership, operation, upkeep and maintenance of the Property, including the maintenance of adequate comprehensive general liability insurance coverage. Grantors shall keep the Property free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantors.

**8.1 Taxes.** Grantors shall pay before delinquency all taxes, assessments, fees and charges of whatever description levied on or assessed against the Property by competent authority (collectively “taxes”), including any taxes imposed upon, or incurred as a result of, this Easement, and shall furnish Grantee with satisfactory evidence of payment upon request.

**8.2 Hold Harmless.** Grantors shall hold harmless, indemnify, and defend Grantee and its members, directors, officers, employees, agents and contractors and the heirs, personal representatives, successors and assigns of each of them (collectively “Indemnified Parties”) from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorneys’ fees, arising from or in any way connected with: (1) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition or other matter related to or occurring on or about the Property, regardless of cause, unless due solely to the negligence of any of the Indemnified Parties; (2) the obligations specified in paragraphs 8 and 8.1; and (3) the existence or administration of this Easement.

**9. Extinguishment.** If circumstances arise in the future such as render the purpose of this Easement impossible to accomplish, this Easement can only be terminated or extinguished, whether in whole or in part, by judicial proceedings in a court of competent jurisdiction, and the amount of the proceeds to which Grantee shall be entitled, after the satisfaction of prior claims, from any sale, exchange or involuntary conversion of all or any portion of the Property subsequent to such termination or extinguishments, shall be determined, unless otherwise provided by Wisconsin law at the time, in accordance with paragraph 9.1. Grantee shall use all such proceeds in a manner consistent with the conservation purposes of this grant.

**9.1 Proceeds.** This Easement constitutes a real property interest immediately vested in Grantee, which, for the purposes of paragraph 9, the parties stipulate to have a fair market value determined by multiplying the fair market value of the Property unencumbered by the Easement (minus any increase in value after the date of this grant attributable to improvements) by the ratio of the value of the Easement at the time of this grant to the value of the Property, without deduction for the value of the Easement, at the time of this grant. The values at the time of this grant shall be those values used to calculate the deduction for federal income tax purposes allowable by reason of this grant, pursuant to Section 170(h) of the Internal Revenue Code of 1954, as amended. For the purposes of this paragraph, the ratio of the value of the Easement to the value of the Property unencumbered by the Easement shall remain constant.

**9.2 Amendment.** If circumstances arise under which an amendment to or modification of this Easement would be appropriate, Grantors and Grantee are free to jointly amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including Wisconsin Statutes or Section 170(h) of the Internal Revenue Code of 1954, as amended, and any amendment shall be consistent with the purpose of this Easement, and shall not affect its perpetual duration. Any such amendment shall be recorded with the Register of Deeds for Waukesha County, Wisconsin.

**10. Assignment.** This Easement is transferable, but Grantee may assign its rights and obligations under this Easement only to an organization that is a qualified organization at the time of transfer under Section

170(h) of the Internal Revenue Code of 1954, as amended (or any successor provision then applicable), and the applicable regulations promulgated thereunder, and authorized to acquire and hold conservation easements under the Uniform Conservation Easement Act Wisconsin Statutes Section 700.40 (or any successor provision then applicable). As a condition of such transfer, Grantee shall require that the conservation purposes that this grant is intended to advance continue to be carried out.

**10.1 Executory Limitation.** If Grantee shall cease to exist or to be a qualified organization under Section 170(h) of the Internal Revenue Code of 1954, as amended, or to be authorized to acquire and hold conservation easements under Wisconsin Statutes, and a prior assignment is not made pursuant to paragraph 10, then Grantee's rights and obligations under this Easement shall become immediately vested in Waukesha County, WI. If Waukesha County, WI is no longer in existence at the time the rights and obligations under this Easement would otherwise vest in it, or if Waukesha County, WI is not qualified or authorized to hold conservation easements as provided for an assignment pursuant to paragraph 10, or if it shall refuse such rights and obligations, then the rights and obligations under this Easement shall vest in such organization as a court of competent jurisdiction shall direct pursuant to the applicable Wisconsin law and with due regard to the requirements for an assignment pursuant to paragraph 10.

**Subordination.** At the time of conveyance of this Easement, the Property is subject to the mortgage identified in Exhibit C attached hereto and incorporated by this reference, the holder of which has agreed by separate instrument, which will be recorded immediately after this Easement, to subordinate its rights in the Property to this Easement to the extent necessary to permit the Grantee to enforce the purposes of the Easement in perpetuity and to prevent any modification or extinguishments of this Easement by the exercise of any rights of the mortgage holder. The priority of the existing mortgage with respect to any valid claim on the part of the existing mortgage holder to the proceeds of any sale, condemnation proceedings, or insurance or to the leases, rents and profits of the Property shall not be affected thereby, and any lien that may be created by Grantee's exercise of any of its rights under this Easement shall be junior to the existing mortgage. Upon request, Grantee agrees to subordinate its rights under this Easement to the rights of any future mortgage holders or beneficiaries of deeds of trust to the proceeds, leases, rents and profits described above and likewise to subordinate its rights under any lien and to execute any documents required with respect to such subordination, except that the priority of any lien created by Grantee's exercise of any of its rights under this Easement prior to the creation of a mortgage or deed of trust shall not be affected thereby, nor shall this Easement be subordinated in any other respect.

**11. Subsequent Transfers.** Grantors agree to incorporate the terms of this Easement in any deed or other legal instrument by which they divest themselves of any interest in all or a portion of the Property, including, without limitation, a leasehold interest. Grantors further agree to give written notice to Grantee of the transfer of any interest at least 20 days prior to the date of such transfer. The failure of Grantors to perform any act required by this paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

**12. Estoppel Certificates.** Upon request by Grantors, Grantee shall within 30 days execute and deliver to grantors any document, including an estoppel certificate, which certifies Grantors' compliance with any obligation of Grantors contained in this Easement and otherwise evidences the status of this Easement as may be requested by Grantors.

**13. Notices.** Any notice, demand, request, consent, approval or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by first class mail, postage prepaid, addressed as follows:

To Grantor: [NAME]  
[ADDRESS]  
[CITY, STATE ZIP]

To Grantee: City of New Berlin  
Dept. of Community Development  
3805 S. Casper Drive  
New Berlin, WI 53151

Or to such other address as either party from time to time shall designate by written notice to the other.

**14. Recordation.** Grantee shall record this instrument in a timely fashion with the Register of Deeds for Waukesha County, Wisconsin and may re-record it at any time as may be required to preserve its rights in this Easement.

**15. General Provisions.**

- a) Controlling Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Wisconsin.
- b) Liberal Construction. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the purpose of this Easement and the policy and purpose of Wisconsin Uniform Conservation Easement Act, Wisconsin Statute 700.40. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.
- c) Severability. If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.
- d) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Easement, all of which are merged herein. [No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that is signed by all parties and approved by the Common Council of the City of New Berlin.]
- e) No Forfeiture. Nothing contained herein will result in a forfeiture or reversion of Grantor's title in any respect.
- f) Joint Obligation. The obligations imposed by this Easement upon Grantors shall be joint and several.
- g) Successors. The covenants, terms, conditions and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal

representatives, heirs, successors and assigns and shall continue as a servitude running in perpetuity with the Property.

- h) Termination of Rights and Obligations. A party’s rights and obligations under this Easement terminate upon transfer of the party’s interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer.
- i) Captions. The captions in this instrument have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.
- j) Counterparts. The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.
- k) Grantor and Grantee agree that the baseline documentation is an accurate representation of the Property at the time of this grant.

TO HAVE AND TO HOLD unto Grantee, its successors and assigns forever.

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

Grantor:  
[PROPERTY OWNER]

By: \_\_\_\_\_  
[NAME, TITLE]

STATE OF WISCONSIN    )  
  )SS.  
WAUKESHA COUNTY     )

Personally came before me this \_\_\_ day of \_\_\_\_\_ [YEAR], the above named [NAME] to me known to be the persons who executed the foregoing instrument and acknowledge the same.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission expires \_\_\_\_\_

Grantee:  
City of New Berlin

By: \_\_\_\_\_  
David A. Ament, Mayor

STATE OF WISCONSIN    )  
  )SS.  
WAUKESHA COUNTY     )

Personally came before me this \_\_\_\_ day of \_\_\_\_\_ [YEAR], the above named David A. Ament, to me known to be the persons who executed the foregoing instrument and acknowledge the same.

\_\_\_\_\_  
Notary Public, State of Wisconsin  
My Commission expires \_\_\_\_\_

**SCHEDULE OF EXHIBITS**

- A.     Legal Description of Property Subject to Easement
- B.     Site Description/Map
- C.     Consent of Mortgage

**Exhibit A**  
**Legal Description of Property Subject to Easement**

**Exhibit B**  
**Site Description/Map**

**Exhibit C**  
**Consent of Mortgage**

**CERTIFICATION**

I, Rubina Medina , duly appointed as City Clerk for the City of New Berlin, do hereby certify that the attached plans and maps are true and correct copy of the original and if they are not legible or readable, a copy of the original is available at the City of New Berlin Department of Community Development.

Document: Conservation Easement

File Number: \_\_\_\_\_

Date: \_\_\_\_\_

Name: Rubina Medina

Signature: \_\_\_\_\_

Title: City Clerk