

CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT ("**Easement**") is made this ____ day of _____, 2004, by and between Sydney's Bend, LLC, an Ohio limited liability company, its successors and assigns ("**Owner**") having a notice address of 2144 Bambridge Court, Miamisburg, Ohio 45342, and The U.S. Army Corps of Engineers, an agency of the United States government, its successors and assigns ("**Holder**").

WITNESSETH:

WHEREAS, Owner possesses both a fee simple title to certain real estate (Lot 6986) and an easement to neighboring real estate (Lots 6984, 6985) located in the Sydney's Bend Subdivision in the City of Miamisburg, County of Montgomery, Ohio as more fully described on attached Exhibit A incorporated herein by reference ("**Property**"); and

WHEREAS, the property will be platted in Montgomery County, City of Miamisburg for single family homes in multiple phases.

WHEREAS, this Easement will be transferred to the lot owners.

WHEREAS, the Property contains a relocated unnamed tributary to Clear Creek and attached wetlands herein by reference ("**Stream**"); and

WHEREAS, Owner and Holder desire to protect the ecological value and boundaries of the of the relocated unnamed tributary to Clear Creek and attached wetlands.; and

NOW THEREFORE, the parties hereto agree as follows:

1. Ownership. The 3950 Medlar road property (Lot 6986) is currently owned in fee simple by Owner. The 3940 Medlar road property (Lots 6984, 6985) is covered under a drainage ditch easement filed and recorded in Montgomery on February 6, 2004 by Owner.
2. Warranty. Owner hereby warrants to Holder a perpetual Easement over the Property. The scope of the Easement shall be as set forth herein.
3. Purposes of Easement and Commitments of Owner.
 - a. Owner is implementing the Mitigation Project pursuant to the requirements of a permit issued to Owner by Holder on June 22, 2004, designated as Department of the Army Permit No. 200301255-cmh ("**Permit**"). Owner commits to the relocation and rerouting of the unnamed tributary to Clear Creek and attached wetlands pursuant to the requirements of the Mitigation Project.
 - c. This Easement assures that the unnamed tributary to Clear Creek and attached wetlands shall be perpetually preserved in its natural, ecological condition as relocated and rerouted pursuant to the Mitigation Project.

d. The purposes of this Easement are to protect the natural resource and watershed values of the unnamed tributary to Clear Creek and attached wetlands, to maintain and enhance biodiversity, to provide a quality habitat for native plants and animals, and to maintain and enhance the natural features of the unnamed tributary to Clear Creek and attached wetlands. Any uses of the Property that impair or interfere with the aforementioned purposes are prohibited by this Easement.

e. Owner commits to preserving the conservation values of the unnamed tributary to Clear Creek and attached wetlands. Owner further agrees to limit uses of the Property to those activities that are consistent with the purposes of this Easement and with the preservation of the relocated and rerouted unnamed tributary to Clear Creek and attached wetlands.

4. Prohibited Activities. Any activities upon, or uses of, the Property or the unnamed tributary to Clear Creek and attached wetlands which are inconsistent with the purposes of this Easement or are detrimental to the Mitigation Project are prohibited. By way of example only, and not by way of limitation, the following activities and uses of the Property and the unnamed tributary to Clear Creek and attached wetlands are forbidden:

a. *Commercial Use.* The Property shall not be used for commercial activities

b. *Industrial Use.* The Property shall not be used for industrial activities.

d. *Construction.* Owner shall not place or construct, or permit to be placed or constructed, any man-made improvement on the Property, including, but not limited to, buildings, fences, roads or parking surfaces.

e. *Vegetation Removal.* Owner shall not remove, cut, prune or trim any trees or other vegetation; provided, however, Owner may remove, cut, prune or trim trees or other vegetation which pose a threat to human safety or property, or as may be required or permitted pursuant to the Mitigation Project;

f. *Land Surface Alteration.* Owner shall not grade, alter or mine the surface of the Property, including the extraction of any substance that must be quarried or removed by methods that consume or deplete the surface estate. Such prohibited activities also include the removal or alteration of topsoil, sand, gravel, rock or peat, and the exploration, development and extraction of oil, gas, hydrocarbons or petroleum products.

Provided, however, that certain minimized activities, such as the construction of water retention berms, the blockage of drainage ditches, the installation of groundwater monitoring piezometers, the placement of soil evaluation borings, the excavation of vernal pools, and other similar activities associated with the Mitigation Project or future scientific research projects, shall be permitted on the Property with the written consent of Owner.

g. *Dumping.* Waste and unsightly or offensive materials, including but not limited to grass clippings, are not permitted and shall not be allowed to accumulate on the Property.

h. *Water Courses, Ground Water.* Natural water courses, wetlands, or other bodies of water may not be altered or modified and water from ground or surface sources shall

not be diverted, except as may be permitted or required by the Mitigation Project.

i. *Off-Road Recreational Vehicles.* Motorized off-road vehicles including, but not limited to, snowmobiles, dune buggies, all-terrain vehicles, and motorcycles shall not be operated on the Property.

j. *Signs and Billboards.* Signs and billboards are prohibited

6. Permitted Uses. Owner shall retain all rights of ownership which are not expressly limited by this Easement. The following rights, among others, are reserved by Owner:

Right to Convey. Owner retains the right to sell, rent, mortgage, bequeath, or donate the Property. In the event Owner conveys the Property to a third party, the Property shall remain subject to the terms of this Easement and the subsequent owner shall be bound by all of the obligations and duties provided for in this Easement. This Easement shall run with the land.

Right of Exclusive Possession. Nothing in this Easement shall be construed as granting a right of entry to the public, and nothing herein shall be construed as a dedication of the Property for public use.

7. Rights Of Holder. Owner confers the following rights upon Holder pursuant to the Mitigation Project:

Right to Enter. Holder shall have the right to enter the Property at reasonable times to monitor the progress of the Mitigation Project. Holder shall provide Owner with three (3) days prior written notice of Holder's intention to enter the Property. Holder shall not unreasonably interfere with Owner's use and quiet enjoyment of the Property. Holder shall have no right or authority to permit third parties to enter the Property without the prior written consent of Owner.

Right to Require Restoration. Holder shall have authority to require Owner to restore areas or features of the Property or the Stream which are damaged by any activity inconsistent with the Mitigation Project to the condition required by the Mitigation Project during the monitoring and maintenance period of the Mitigation Project.

Signs. Holder shall have the right to erect signs on the Property identifying the Property as being protected by the Easement during the Mitigation Project. The number and location of such signs shall be subject to Owner's approval.

8. Remedies and Limitations.

Acts Beyond Owner's Control. Holder (and any other person or entity who may have rights as a third-party enforcer) may not bring an action against Owner for damage, alterations, or modifications to the Property or the Stream resulting from causes beyond Owners' control. Such causes include, but are not limited to, unauthorized actions or trespasses by third parties, natural disasters, fires, floods, storms, natural earth movement, or acts of Owner reasonably taken in response to an emergency.

Notice and Demand. If Holder, in good faith, determines that Owner is in violation of this Easement, or that a violation is threatened, Holder shall provide written notice to

Owner. The written notice shall specifically identify the violation and the corrective action required to cure the violation. In the event the Property has been damaged, the written notice shall specifically identify the actions required to restore the Property pursuant to the Mitigation Project; provided, however, if Holder determines, in its sole discretion, that the violation constitutes immediate and irreparable harm, no written notice to Owner shall be required. Holder may immediately pursue its remedies to prevent or limit such harm to the Property.

9. Notification Provision. Owner shall be entitled to sixty (60) days written notice whenever Owner's approval is required pursuant to this Easement. If Owner fails to respond within sixty (60) days after receipt of the written notice, then Owner's approval shall be deemed to be given. Such implied approval shall not extend to any activity contrary to this Easement or activity which impairs a conservation value.
10. Costs and Expenses of Ownership. Owner shall remain liable for all costs, expenses, taxes, and insurance associated with ownership of the Property. Owner hereby holds harmless the Holder from any and all liability arising from personal injury or death to any person or physical damage to property, if such injury, death, or damage arises from activities conducted pursuant to the Mitigation Project.
11. Hazardous Materials. Owner warrants to Holder that Owner possesses no knowledge of any release of hazardous substances or hazardous wastes into or upon the Property or the Stream.
12. Cessation of Existence. If Owner shall cease to exist, or if Holder fails to remain a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3), or if Holder otherwise becomes no longer authorized to acquire and hold conservation easements, then this Easement may be assigned and vested in another entity ("**Successor Entity**"). The Successor Entity shall be a "qualified organization" for purposes of Internal Revenue Code Section 170(h)(3). The Holder's rights and responsibilities pursuant to this Easement may be assigned to any Successor Entity having similar conservation purposes to which such rights and responsibilities may be assigned pursuant to the doctrine of cy pres.
13. Termination. This Easement may be terminated and cancelled only upon the happening of an unexpected change in the condition of the Property causing the achievement of the purposes of this Easement to fail for impossibility, or by the exercise of eminent domain.

Unexpected Change in Conditions. If future circumstances make the purposes of this Easement impossible to achieve, then this Easement may be partially or wholly terminated pursuant to judicial proceedings.

Eminent Domain. If the Property is taken, in whole or in part, by power of eminent domain, the Owner shall be entitled to receive the award of compensation pursuant to IRC Treasury Regulations Section 1.170A-14(g)(6)(ii).

15. Notices. Written notices shall be provided to the parties hereto by personal delivery, first class United States mail, or overnight courier, at the notice addresses of the parties as set out in the preamble of this Easement.

