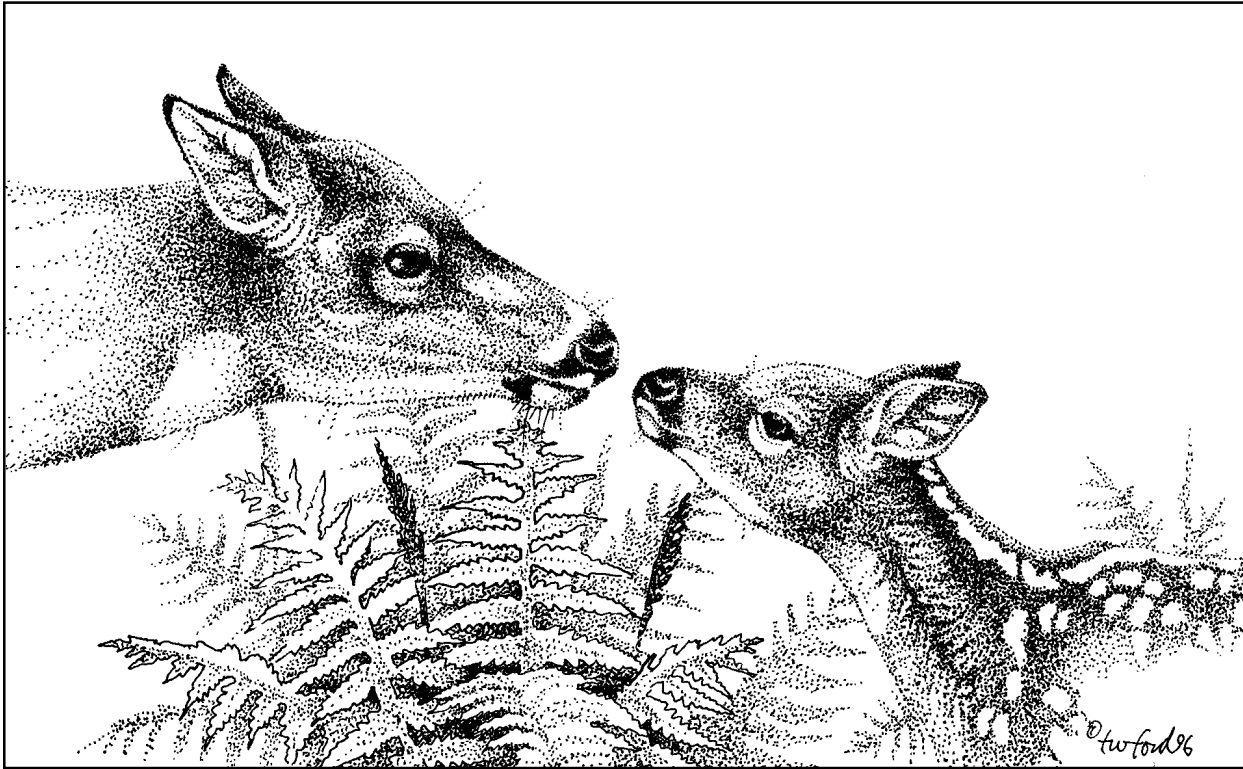


Voluntary Protection Options

CHAPTER 6



Because of their love for the land, many property owners want to permanently protect their wetlands. Donations or sale of property to a conservation organization, or the creation of what is known as a conservation easement, can effectively protect wetlands in perpetuity, allowing landowners to pass on a legacy of bountiful natural resources to their children and grandchildren. In addition to benefiting your family, society benefits from the voluntary and permanent protection of wetlands. Because of this, provisions in the tax codes allow for financial benefits in the form of income and property tax reductions. Wetland regulations exempt many activities that impact wetlands. Voluntary protection options can serve to protect wetlands to a greater extent than regulations. This chapter describes the primary methods of voluntary wetland protection.

PERMANENT PROTECTION OPTIONS

The methods of voluntary wetland protection can be divided into two categories: those that offer permanent protection and those that serve as nonbinding protection agreements. Permanent protection options serve to ensure that your management goals for your wetland will be met in perpetuity.

Donation

Donation of land has long played an important role in the protection of natural areas. It continues to be important because it is the most effective and simple way to protect land. It can also offer financial benefits to the landowner. By execution of a deed, the owner gives his or her land (or a specified part of it) to a qualified nonprofit organization or governmental agency for conservation purposes. A donor's gift of land is tax deductible. Each donation of land has different tax advantages for different individuals. Different types of taxes (e.g., real property taxes, gift taxes, estate taxes, or income taxes) are affected differently in each

situation. Landowners considering donation of wetland property are encouraged to retain a tax attorney or accountant to analyze the tax consequences of his or her particular situation.

There are several variations on the donation theme: outright donation, bargain sale, donation with a reserved life estate, and a bequest. With a bargain sale, the land is conveyed at a price below fair market value, which may be attractive to a landowner who can not afford to convey the land without some compensation. A bargain

sale is part gift and part sale. The sale price is determined jointly by the landowner and the recipient. For federal income tax purposes, it can result in both a taxable sale and a charitable contribution deduction, depending on the particular circumstances.

A donation with a reserved life estate is a donation in which the donor retains possession and use of the property for his or her lifetime. An income tax deduction is allowed for the value of a charitable contribution, which is the difference between the property's fair market value and its value under the provisions of the donation with a reserved life estate. The Internal Revenue Service takes into account the number of years that a donor with a reserved life estate is likely to enjoy the use of the property. Thus, such a donation will yield greater tax benefits to an older donor.

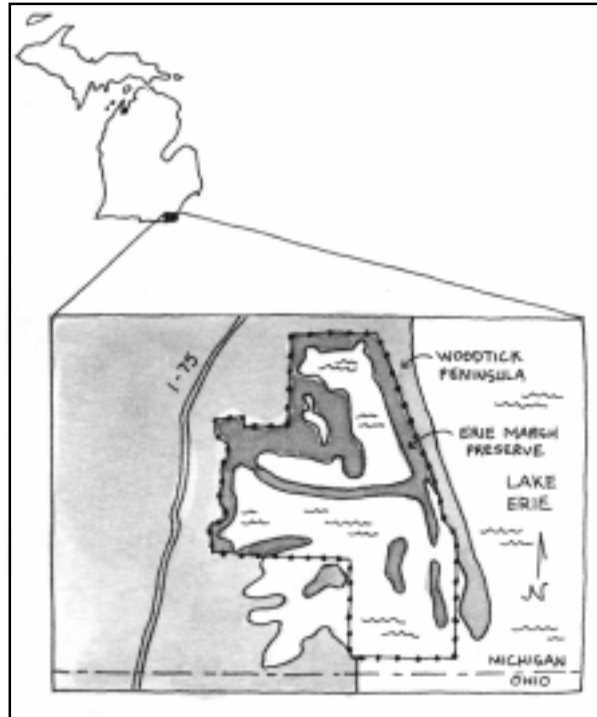
Erie Marsh Preserve

The Erie Shooting and Fishing Club was established in the 1870s to capitalize on the natural abundance of the Lake Erie marshes near the town of Erie, just north of Toledo. Over time, and under the name of the Ottawa Bay Development Company, this group of concerned sportsmen assembled 2,168 acres of woods and wetlands, including some of the most productive marshes in all of southeast Michigan.

Recognizing the ecological significance of the marshes and their importance to all kinds of waterfowl, the Club turned to The Nature Conservancy in 1978. They donated the entire tract of land to the Conservancy to be used and maintained as a Conservancy preserve. The Conservancy recognized that duck hunting would

not jeopardize the wetland characteristics of the marsh, and the Club, interested in continuing their long-standing tradition of duck hunting in the marsh, received a license to continue duck hunting on approximately one-half of the property. The Club continues to maintain the property, at Club expense, and pays a fee for the license agreement and right to use the property during hunting season. At all other times of the year, the property is open to the public for bird watching, hiking, and nature photography.

Out of this creative agreement, the Club received the right to continue to hunt the property during duck hunting season; received a tax deduction for the value of the gift of land donated to The Nature Conservancy; and was secure in the knowledge that the property would continue to be maintained as a nature sanctuary. The Nature Conservancy received a gift of 2,168 acres of productive marshland, and now owns and manages one of the best birding sites in the lower Great Lakes.



A bequest is a donation of land in an owner's will. Although such a donation does not enable the donor to realize an income tax deduction, the value of the bequest is deductible in determining the donor's taxable estate, which can benefit heirs by reducing estate taxes.

Donation of natural land has a number of potential income and estate tax advantages. Such donation may also significantly reduce the costs of land ownership, such as real estate taxes. However, the extent of those financial benefits will depend upon the kind of donation, the donor's particular financial situation, and

prevailing federal tax law at the time the donation occurs. The major incentive for donation of natural land is that it offers the most simple and effective tool available to the landowner who wants to protect his or her wetland. When contemplating donating your land to a nonprofit organization or a governmental entity, it is important to have a solid understanding of how the recipient organization will manage the property. You should find out how the organization might manage the property and make sure that the potential uses correspond to your desires. If the organization wants to reserve the right to sell the property in the future, you may want to consider granting a conservation easement to a third party to ensure that the land will be protected by future owners.

Conservation Easements

A conservation easement is a voluntary agreement that is used to transfer certain rights concerning the use of land to a qualified nonprofit organization, governmental body, or other legal entity without transferring title to the land. Conservation easements are permanent restrictions that run with the land in perpetuity. In Michigan, Part 21 of the Michigan Natural Resources and Environmental Code (Act 451 of 1994) (formerly the Conservation and Historic Preservation Easement

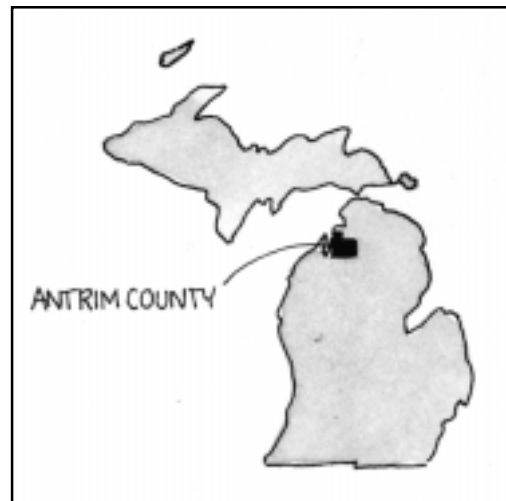
Act; Public Act 197 of 1980), authorizes the creation of voluntary conservation easements. A conservation easement under this statute can provide limitations on the use of, or can prohibit certain acts on, a parcel of land. The easement is considered a conveyance of real property and must be recorded with the registrar of deeds in the appropriate county to be enforceable against a subsequent purchaser of the property.

Conservation easements are flexible, effective, and allow the landowner to maintain ownership of the property. A common misconception about conservation easements is that the land must be open to public access. The public does not have access to property protected by a conservation easement unless the landowner who grants the easement specifically allows it. Conservation easements may be drafted to meet particular circumstances and objectives of an individual landowner. They

Lake Bellaire Wetland Easement

A conservation easement is a very flexible tool which allows a landowner to protect the natural resource values of their property while maintaining ownership. The size of the property under easement and the limitations placed on the property can all vary depending on the wishes of the landowner, the goals of the conservation organization, and the statutory guidelines.

There are hundreds of conservation easements in Michigan which protect wetland and other valuable habitats. Thanks to Marilyn Fisher and her family, 89 acres of forest, the majority of which is wetland, along 4,000 feet of shoreline on Lake Bellaire in Antrim County will forever be protected under a conservation easement signed with the Grand Traverse Regional Land Conservancy. The conservation easement allows selective harvesting of cedar for the family's use on their property adjacent to the easement and recreational uses such as hunting, fishing, and hiking.



The wetland protected by Mrs. Fisher's conservation easement has long been a concern of the Michigan Loon Preservation Society and the Three Lakes Association. The Common Loon, a threatened species in Michigan, uses the wetland for nesting and safety cover. The large forested wetland system on the property serves as a filtration system for nutrients and sediments that otherwise would enter Lake Bellaire and potentially lead to long-term water quality problems if degraded.

Mrs. Fisher is a former member of the Board of Trustees of the Grass River Natural Area and has had a keen interest in land and water conservation for many years. Establishing the conservation easement was a way for Mrs. Fisher to take an active role in protecting the natural resources of her community. "These lakes are very special and we can't afford to take them for granted," said Fisher.

can allow for uses compatible with wetland protection (e.g., bird watching, hunting, fishing, or other low-impact outdoor recreation activities). They can identify areas on a property that will be reserved for future development. They can protect the easement area against disturbances that are not covered by wetland regulations, such as vegetation clearing. In short, conservation easements are a powerful tool that enable you to manage your land in a particular way well into the future. As with donation of land, a conservation group or governmental entity will only accept conservation easements if it meets their criteria.

To be eligible for a tax deduction, conservation easements must be granted in perpetuity by the landowner. Several tax benefits may be available to the grantor, including deduction of the value of an easement as a charitable contribution, as determined by the amount by which the easement reduces the market value of the property. The Internal Revenue Code normally allows an itemized deduction of up to 30 percent of an individual's adjusted gross income for such contributions. Amounts in excess of the 30 percent limitation may be carried over and deducted during the next five years (this applies to donations of land also). The easement may reduce the value of the property if it is included in the individual's taxable estate. In addition, the development restrictions placed on a property by a conservation easement may also result in reducing property taxes. As with land donations, if you are considering granting a conservation easement, you should contact an attorney or accountant for an analysis of possible tax benefits based on your financial situation.

Due to changes in federal tax laws in 1997 and 1998, conservation easements can also play an important role in reducing estate taxes and providing heirs with an opportunity to maintain land in its natural state. Since 1976, tax law has recognized the deductibility of conservation easements made during a landowner's lifetime or in a will. But landowners who died without having made such plans often left their families no choice but to sell family lands to pay estate taxes. With the 1997 and 1998 tax law changes, heirs to the estate can elect to donate a conservation easement even if this is not provided for in the will. An additional reduction in the taxable value of the estate (up to 40% of the land's remaining market value) may be available for properties that meet certain qualifications. Please consult a tax advisor for details.

Deed Restrictions and Covenants

Deed restrictions are clauses placed in deeds restricting the future use of land. When property containing wetlands is transferred, deed restrictions can prohibit uses or activities by the new owners that would destroy, damage, or modify wetlands. A covenant is a contract between a landowner and another party stating that the landowner will use, or refrain from using, their land in a certain manner. Like a deed restriction, a covenant can require that landowners refrain from activities that will damage wetlands. Once placed in deeds, covenants become deed restrictions.

Mutual covenants involve agreements between nearby or adjacent landowners to control the future use of their land through restrictions agreed upon by all participating landowners. The fact that multiple landowners participate in the covenant provides greater incentive to comply with the terms of the covenant. However, getting numerous property owners to voluntarily agree on certain management practices can be very challenging.

Although deed restrictions and covenants have been used across the country to protect wetlands, their use in Michigan is not as effective as conservation easements. This is primarily for two reasons. First, unlike a conservation easement that is granted to and signed by an organization that has a commitment and responsibility to resource protection, the enforcement of deed restrictions and covenants is less reliable. Because deed restrictions are placed in the deed and run with the land,

there is no continuity of oversight, unlike the continuous ownership of an easement holder. Hence, with a deed restriction, you're relying on the concern and commitment of some unidentified body to provide the oversight. Second, it is relatively easy for a future landowner to petition the courts to vacate a particular deed restriction. Although it is theoretically possible to modify a conservation easement, many changes are prohibited by federal regulations where income tax deductions are involved and all signatories to the easement must agree to proposed changes. It is unlikely that a qualified organization would agree to modifications of a conservation easement that would result in adverse wetland impacts. Another major difference between conservation easements and deed restrictions or covenants is that the loss in market value due to deed restrictions and covenants cannot be claimed as a charitable deduction on income tax returns.

Sale

Sometimes a landowner is in a situation where they must sell their wetland for financial or other reasons. In regard to protecting wetlands, the values and land use interests of the person who purchases the wetland are of paramount concern. If you must sell your wetland, but are concerned about its future protection, you can consider using some of the tools described above to permanently restrict activities that degrade wetlands before you sell. For example, prior to listing the property for sale, the wetland portion of the property may be protected by a conservation easement granted to a local conservancy or other qualified entity. Given that conservation easements are permanent restrictions that run with the title in perpetuity, all future owners of the property will be bound to your wishes to protect the wetlands.

Another way to help ensure protection of your wetland after it is sold is to seek a purchaser who shares your values and goals regarding wetland protection and property management. If the area provides wildlife habitat, then advertising its availability in hunting magazines will get you in touch with individuals who may want to manage it for hunting purposes. Don't limit your search for a buyer to individuals. Nonprofit organizations such as The Nature Conservancy, local land conservancies, Michigan Audubon Society, and many others own property and may be interested in yours. In addition, local units of government may be interested in your property for the purpose of preserving community open space and passive recreation areas. Contact these organizations and entities to gauge their interest in purchasing your property. Don't be discouraged if your offer to sell them your wetland is not immediately accepted. These entities have limited budgets for property acquisition and most have fairly specific guidelines that must be met before they can justify purchasing a parcel. Another option is to sell your property to your local unit of government. The Michigan Natural Resources Trust Fund provides grants to local units to assist in purchase of significant natural lands.

If you identify a willing organization or agency that you would like to see purchase your property in the future, you may consider granting a right of first refusal to that organization. A right of first refusal binds you to giving the conservation organization or agency the option to match the purchase offer and acquire the land if you are approached by another buyer. This gives the conservation organization extra time to acquire funds necessary to purchase the land.

Another way to generate income from the wetland is to rent or lease the land to a conservation or hunting organization for a specified purpose and period of time. Certain restrictions can be incorporated into the lease to guide the activities of the lessee, including provisions to terminate the lease if the property is not used in an appropriate manner.

Uplands of Scio Ridge

Wetlands in residential environments can serve as important visual and recreational amenities, function as stormwater storage and cleansing systems, and provide spatial definition of the landscape. In Southeast Michigan, an area dominated by agricultural and built environments, wetlands are frequently the only "natural" features remaining on properties to be developed or redeveloped with housing.



Courtesy of Johnson, Johnson, and Roy, Inc.

In the case of one development, the Uplands of Scio Ridge located just west of Ann Arbor, wetlands serve as a natural structure that organizes and defines neighborhoods. Wetland areas and drainage corridors are also planned to be incorporated in future phases of the project as the focus of passive recreational activity. Trails, boardwalks, and observation platforms will provide access along the wetland perimeter, and in selected locations, into the interior of the wetland. Preservation of the wetlands and drainage corridors, buffer zones, and the adjacent upland forest provides a rural character for the site and protects the ability of these systems to function naturally.

As more detailed planning and engineering studies are prepared for this project, methods can be investigated to further protect the wetlands. These include approaches such as native landscaping in community open spaces, managing stormwater with grassed swales rather than pipes, use of stormwater infiltration basins to recharge the ground water, and restoring wetland and stream areas previously impacted by agricultural activities. Protecting the integrity of the natural systems enhances the values of these features and those of the residential development as a living environment.

Designing Development to Protect Wetlands

For those landowners who desire to develop their property for residential and commercial use, wetland protection can be integrated into your development plan. In many cases across Michigan, residential lots adjacent to a protected wetland fetched higher sale prices than nearby lots not adjacent to the wetland.

To plan development to protect wetlands, you must first conduct an assessment of the wetland that would include (at a minimum): wetland boundaries, wetland size, wetland type, connections to other bodies of water, and critical upland habitat that should be protected along with the wetland. Once this is determined, the next step is to determine what type of development is compatible with protecting the wetlands on the site while still meeting your financial desires. The layout for the buildings and roads should be designed in a way that avoids wetlands and minimizes wetland crossings as much as possible. How the upland adjacent to a wetland will be devel-

oped has important implications for the long-term health of the wetland. Important considerations include the establishment of greenbelts and buffer zones around wetlands, managing the quantity and quality of the stormwater that will be generated in a way that does not harm the wetland, human access and use of the wetland, and

land use practices (e.g., fertilizer and pesticide use) that will be in place once the property is fully developed.

After a plan for the property has been developed that will protect the wetland over time, you have many options to help put that plan into place. Implementing the protection measures through a conservation easement can result in substantial tax benefits. Likewise, donating the portion of the property that is to be protected to a qualified organization may result in tax benefits depending on its development potential. Ensuring that upland practices such as lawn maintenance are compatible with wetland protection often provide the largest challenge when attempting to design developments to protect wetlands. The best way to do this depends on the pattern of ownership in the development. With a condominium-type ownership pattern, the developer retains responsibility to manage the property.

However, in a traditional subdivision ownership pattern, unacceptable land use practices may need to be prohibited through deed restrictions or covenants. A neighborhood or property owner's association can serve to enforce the deed restrictions.

This is a very brief sketch of what's involved when a property owner desires to integrate wetland protection into a development. If you plan to take this course, it is highly recommended that you hire a reputable consultant who is knowledgeable about wetland ecology, wetland law, land use planning, and local planning and zoning requirements. Some helpful hints on how to select a consultant who will best meet your needs are included in Chapter 10.

The Nature Conservancy's Registry Program

In 1995, Bruce and Raven Wallace approached The Nature Conservancy because they had recently bought a beautiful and wild piece of coast within the project boundary of the Northern Lake Huron Bioreserve in the Upper Peninsula. With 400 acres and over a mile of shoreline, they wanted to explore ways to protect their property and the bay that surrounds them.

Bruce is an attorney in Ann Arbor and has always been supportive of conservation. Raven is a computer scientist at University of Michigan, and together they are kept busy raising three children. Their property is nestled in the foot of a 2,500 acre bay and is dotted by marshes, a small island, beaver dams, cedar swamps, and an inland lake and bog. It adjoins the National Forest to the west and a preserve owned by the Little Traverse Conservancy to the east. They recently built a small cabin back from the shoreline, but theirs is the only cabin on the bay.



The Wallaces wanted to protect the unique habitat of the bay and the species that use it. They have healthy populations of Hughton's goldenrod, a federally threatened plant, along the bay's outer shoreline. Loons nest on the inland lake and feed in the bay waters. Bruce has watched Bald Eagles fishing from the trees around their home and the calls of peepers, wood frogs, chorus frogs, tree frogs and toads are so loud on spring nights that it is hard to sleep.

Because they still have many years of work and parenting ahead of them, the best protection option for them is the Registry program. They receive information about their property from the Conservancy and in turn agree to protect those values to the best of their ability. If they ever decide to sell their property, they agree to contact the Conservancy. The Conservancy, in turn, calls them once or twice a year to say hello, answer any questions, and pass on any new information they have about the area.

The Registry is a voluntary agreement. Until a time when the Wallaces may be willing and able to consider a donation of a conservation easement or possibly even a gift of land, the Registry is a great way for the Wallaces and the Conservancy to keep in touch and ensure that, through the efforts of the private landowner, an important part of Michigan's landscape is managed in a way that protects its ecological values.

VOLUNTARY NONBINDING PROGRAMS

The tools listed above provide landowners with mechanisms to protect wetlands for the long term. However, some landowners are not comfortable with committing to permanent protection of their property. For these individuals, there are several approaches that encourage wetland protection in a nonbinding and nonregulatory manner. These programs provide technical assistance and show that there is public support for landowner wetland protection activities.

Michigan Natural Areas Registry

The Michigan Chapter of The Nature Conservancy promotes the preservation of important natural areas, including wetlands, through voluntary nonregulatory agreements between landowners and The Nature Conservancy. The Michigan Natural Features Inventory (MNFI), a program partially supported by funds from The Nature Conservancy, provides a listing of significant natural areas in the state. The Nature Conservancy staff provides outreach to the landowners of significant areas to develop positive relationships and voluntary protection agreements. To qualify for the Registry, a property must be either ecologically significant, (such as an unusual wetland or old growth forest), be a relict plant community (survivors from climates and ecosystems of the past), or be habitat for rare, threatened, or endangered plants or animals. If you think you have wetlands that qualify, contact The Nature Conservancy for information on how you can nominate your land to be entered in their Michigan Natural Areas Registry.

Natural Heritage Stewardship Program

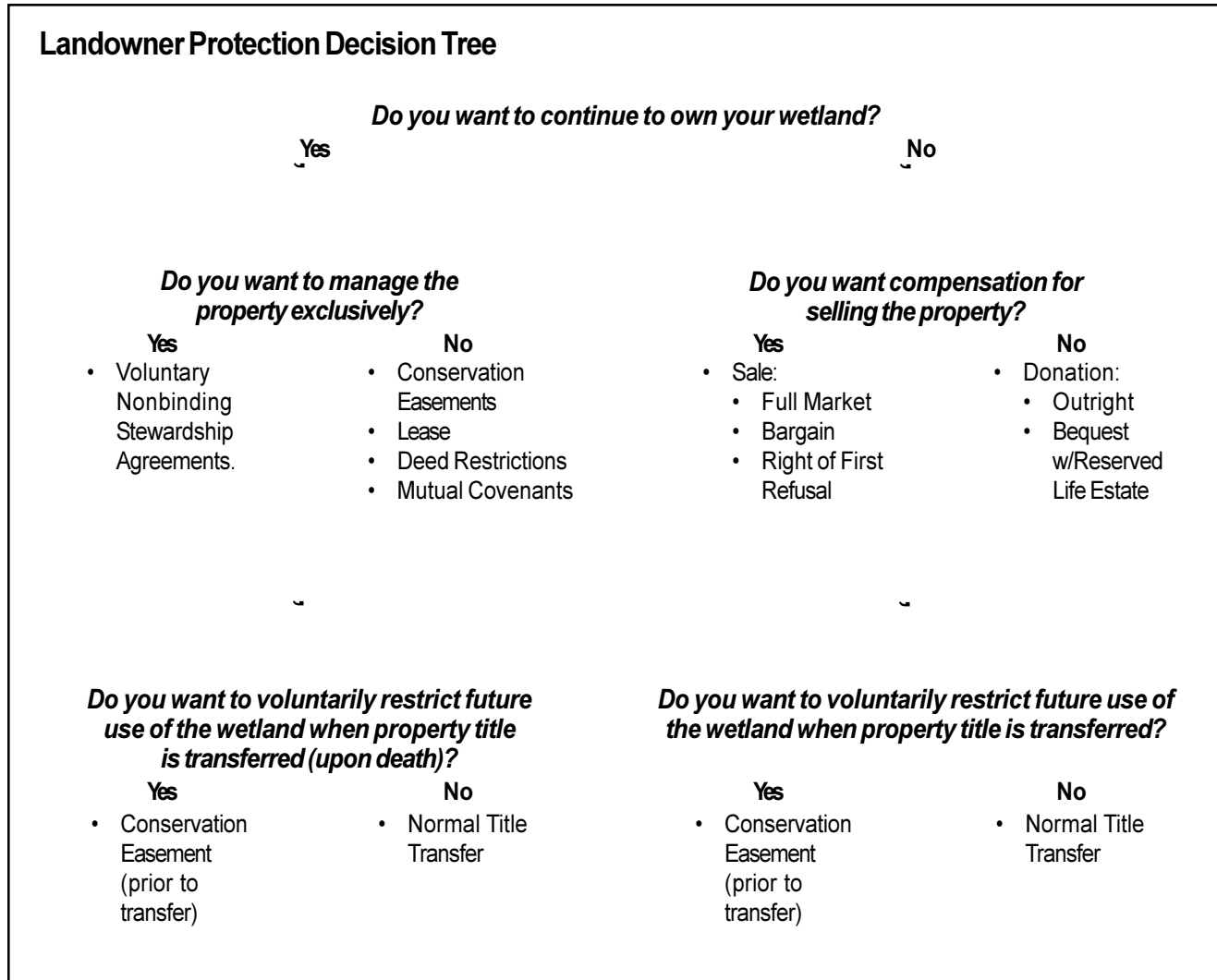
Coordinated by the Michigan Natural Features Inventory, this program promotes the voluntary preservation of endangered or threatened species and their habitats. Currently, the program focuses on threatened species that inhabit the Great Lakes shoreline and interdunal swale wetlands, including Houghton's goldenrod, dwarf lake iris, Piping Plover, and Pitcher's thistle. The program uses information from the MNFI to target properties which may have significant habitat. The purpose of the project is to contact landowners and provide information regarding how to protect and enhance significant habitat areas either on their property or on nearby state land. Landowners who participate in voluntary stewardship activities receive a certificate of recognition and a limited edition wildlife print. Since wetlands are the home for more endangered and threatened species than any other landform, this program helps to raise awareness and encourage proper stewardship of wetlands.

Wetland Stewardship Programs

Many local organizations coordinate wetland stewardship programs. For example, in northern lower Michigan, the Tip of the Mitt Watershed Council has developed a Wetland Stewardship Program to involve landowners in wetland protection who may not be ready to commit to permanent protection. The Watershed Council has identified wetland owners in their service area and encouraged them to become wetland stewards. The goal of the program is to protect wetlands through voluntary commitments from the owners of the resource.

The Wetland Stewardship Program promotes the protection of wetlands through voluntary, nonbinding agreements between wetland owners and the Watershed Council. The wetland steward agrees not to drain, dredge, fill, or in any other way destroy his or her wetland. They also agree to notify the Watershed Council when they plan to sell the land or if they decide not to participate any longer in the Stewardship Program. In return for becoming a Wetland Steward, the Watershed

Council provides assistance regarding land management, advice on other protection measures, and a certificate of appreciation. Hopefully, the wetland stewards also receive the satisfaction and pride which come from knowing they have helped protect Michigan’s wetlands. If you are interested in this sort of program, contact the conservation organizations that serve your area. If they do not currently have such a program, help them develop one!



WHAT’S RIGHT FOR ME?

The options listed above can be used individually or in combination. The decision as to what options are right for you depend on a variety of factors that were introduced in the last chapter. For the purposes of this chapter, the best options can be determined by answering four questions:

- 1) Do you want to continue to own your wetland?
- 2) Do you want to manage the property exclusively?
- 3) Do you want compensation for selling the property?
- 4) Do you want to restrict future use of the wetland when property title is transferred?

The decision tree above provides a step-through process incorporating these questions. It is important to note that any transaction (conservation easement, sale, or bargain sale) involving a land conservancy or governmental body must be

arranged in advance with the appropriate representatives to be sure that the project is acceptable to the organization or agency. Land conservancies, other conservation organizations, and agencies each have their own criteria regarding accepting conservation easements or acquiring properties. It would be very frustrating for you to make decisions, hire attorneys and tax advisors, etc. based on an assumption that the organization or agency would be interested, only to find out that your project does not meet their specific criteria.

Voluntary protection efforts have grown substantially in Michigan over the last decade. The growth in the number of donations, conservation easements, and wetland purchases by conservation organizations and agencies has been phenomenal. Although income and property tax reductions have served as an incentive, the greater driving force is the heart of the landowner. Landowners who voluntarily protect their land beyond what is required by regulation do it because they want to preserve their property in its natural state for the long term. Their sense of stewardship is so strong that they want the property to be cared for long after they are gone. This commitment is exemplary and will serve as a model for others who care about preserving the opportunities of future generations to enjoy the benefits of wetlands.