

**MEMORANDUM**

To: MCWD Board of Managers
From: Tiffany Schaufler
Date: September 24, 2018
Re: 555 Bushaway Road Easement Update

Purpose:

At the September 27, 2018 Policy & Planning Committee (PPC) meeting staff will update the committee on a conservation easement opportunity at 555 Bushaway Road in Wayzata.

Background:

In May 2018 District staff were approached by a prospective buyer of 555 Bushaway Road as they were interested in potentially donating a conservation easement to the District.

At the May 24, 2018 PPC meeting, staff briefed the committee on the potential conservation easement opportunity and possible conservation values of the property. Following that discussion the committee directed staff to continue the conversation with the prospective buyer as it related to the District serving as a potential conservation easement holder. Since the May 24, 2018 PPC meeting the buyer has closed on the property and confirmed their interest in donating a conservation easement to the District.

At the July 26, 2018 PPC meeting, staff briefed the committee on conversations with the property owner and discussed next steps. Following the July 26, 2018 update the committee asked that staff continue to update the PPC on the easement process and to review any draft documents with the PPC.

At the August 23, 2018 PPC meeting staff reviewed a draft concept landscape plan with the committee, which identified the preliminary easement boundary and vegetation restoration goals for the property.

Next Steps:

At the September 27, 2018 PPC meeting staff will review the terms of the draft conservation easement document (attached), review the District's stormwater analysis for the site, and provide the PPC an update on recent discussions with the property owner.

If there are any questions in advance of the meeting, please contact Tiffany Schaufler at 952-641-4513 or at tschaufler@minnehahacreek.org.

Attachment: Draft Conservation Easement Document

We collaborate with public and private partners to protect and improve land and water for current and future generations.

This instrument prepared by and after recording return to:

Todd M. Phelps, Esq.
Stinson Leonard Street LLP
50 South Sixth Street, Suite 2600
Minneapolis, MN 55402

Tax Parcel Identification Numbers:

08-117-22-22-0001
08-117-22-22-0002
08-117-22-23-0006
08-117-22-23-0007

(Space reserved for recording information)

CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT (this "Easement") is granted and accepted on _____, 2018 (the "Effective Date"), by LAKE PROPERTIES LLC, a Delaware limited liability company (the "Grantor" and, together with any successors and assigns, "Owner"), to the MINNEHAHA CREEK WATERSHED DISTRICT, a governmental body created under Minnesota Statutes Chapter 103D (the "District").

RECITALS

A. OWNER. The Grantor is the fee simple owner of real property, commonly known as 555 Bushaway Road, in the City of Wayzata (the "City"), Hennepin County, Minnesota, which is legally described in Exhibit A attached hereto (the "Protected Property"). The Grantor desires to protect and preserve a portion of the Protected Property, legally described on Exhibit B-1 attached hereto (the "Easement Area"), and identified as Outlots ____ and ____ on the site plan attached hereto as Exhibit B-2 (the "Site Plan").¹

B. EASEMENT AREA. The Easement Area is approximately ____ acres,² and contains lakeshore on Lake Minnetonka, a public water under Minnesota Statute § 103G.005, wetlands, floodplain and mature tree canopy.

C. MINNEHAHA CREEK WATERSHED DISTRICT. The District is a governmental body created and operated exclusively for the purposes of water resource protection, conservation and management, including the protection, conservation, and management of lands to serve those purposes. The District is an organization qualified to hold conservation easements under Minnesota Statutes Chapter 84C and Section 170(h) of the Internal Revenue Code and related regulations.

¹ **Note:** Once agreed upon and finalized, the legal description and Site Plan of the Easement Area will be prepared by the landscape architect and surveyor.

² **Note:** Once finalized, the total area of the Easement Area will be prepared by the landscape architect and surveyor.

D. CONSERVATION POLICY. Preservation of the Easement Area will further those governmental policies established by the following:

1. Minnesota Statutes Chapter 84C, which recognizes the importance of private conservation efforts by authorizing conservation easements for the retention or protection of natural, scenic, or open space values of real property, assuring its availability for agriculture, forest, recreational, or open space use, protecting natural resources, and maintaining or enhancing air or water quality.

2. The Metropolitan Surface Water Act, Minnesota Statutes Section 103B, which specifically identifies the importance of protecting the natural surface waters and groundwaters of the Metropolitan Area.

3. Minnesota Statutes Section 103D which provides for the establishment of watershed districts to conserve the natural resources of the State of Minnesota.

4. Minnehaha Creek Watershed District watershed management plan (as amended) which includes the policies, programs, and projects implementing the Metropolitan Surface Water Act.

5. The City of Wayzata 2030 Comprehensive Plan, which provides for (a) valuing redevelopment to protect natural and physical resources, (b) preserving and protecting the sensitive natural resource areas, and (c) preserving trees and wetlands, particularly within the Bushaway Road area.

6. The Lake Minnetonka Conservation District Code of Ordinances, which provides that the goals and policies include (a) preserving and promoting Lake Minnetonka as a recreational and natural resource for all the citizens of the State; (b) preventing pollution of the Lake and preserve the ecological balance by carrying out a comprehensive program of environmental control and management; (c) achieving a balance between the interest of public use and the conservation of the Lake as a natural resource; and (d) providing for the health, safety, order, convenience and general welfare by ordinances not inconsistent with the laws of the State of Minnesota.

E. CONSERVATION INTENT. The parties are committed to protecting and preserving the Easement Area in perpetuity. Accordingly, it is their intent to create and implement a conservation easement that is binding in perpetuity upon the Grantor and all future owners of the Protected Property and that conveys to the District the right to protect and preserve the Easement Area for the benefit of this generation and generations to come, pursuant to the terms of this Easement.

F. DOCUMENTATION. The current condition of the Protected Property will be described and documented in a property report, titled "Lake Properties Conservation Easement Property Report". The Property Report contains: (1) an accurate representation of the natural resources and physical condition of the Protected Property at the time of this conveyance, (2) a description of the current and historical uses of the Protected Property, and (3) a statement signed by the Grantor and a representative of District as required by Treasury Regulations §1.170A-

14(g)(5)(i). The Grantor and the District each acknowledge that they will consider the Property Report to accurately represent the condition of the Protected Property at the time of this conveyance, except as the Property Report explicitly may provide otherwise, and that the Property Report may be used by the parties in monitoring future uses of the Easement Area, in documenting compliance with the terms of this Easement and in any enforcement proceeding. This paragraph does not preclude the use of other information and evidence to establish the present condition of the Protected Property in the event of a future controversy.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

GRANT OF CONSERVATION EASEMENT:

Pursuant to the laws of the State of Minnesota and in particular Minnesota Statutes Chapter 84C and in consideration of the Recitals above, which are incorporated herein by reference, and the mutual covenants contained herein, and in further consideration of the sum of one dollar and other valuable consideration, the Grantor hereby grants to the District a perpetual, nonexclusive conservation easement over the Easement Area. This Easement consists of the following rights, terms and restrictions applicable within the Protected Property:

1. CONSERVATION PURPOSE. The purpose of this Easement is to (a) preserve and protect in perpetuity the Easement Area, which in its present state, has significant natural, aesthetic, scientific and conservation values as a “relatively natural habitat of fish, wildlife, or plants or similar ecosystem,” as that phrase is used in Section 170(h)(4)(A)(ii) of the Internal Revenue Code, as that section may be amended from time to time, and in the regulations promulgated thereunder, and (b) preserve and protect in perpetuity the open space created by the Easement Area, because such preservation permits for the scenic enjoyment of the general public from both Bushaway Road and Lake Minnetonka and is supported by clearly delineated Federal, State, and local governmental conservation policies (collectively, “Conservation Purpose”). It is the Grantor’s intent to create and implement a conservation easement that is binding in perpetuity upon the Grantor and all future owners of the Protected Property and that conveys to the District the right to protect and preserve the Easement Area for the benefit of this generation and generations to come, pursuant to the terms of this Easement.

The Easement Area includes scenic views to and from Lake Minnetonka. However, the existing condition of the Easement Area is degraded in that it is overgrown with invasive species and there is significant shoreline erosion. The northern portion of the Easement Area is predominately Ash, Boxelder and Buckthorn. There are few significant trees in the area. At the far northwest portion of the Easement Area there are invasive species up to the lakeshore of Lake Minnetonka. In the northern portion of the Easement Area, there exists a low-quality wetland area with numerous poor quality Cottonwood trees. The eastern portion of the Easement Area runs north and south along Bushaway Road, which contains a modest elevated knoll, bisected by the existing driveway. On either side of the driveway is a stand of Maple and Oak trees. In the southern ½ of this portion of the Easement Area there exists a narrow band of predominately Ash and Buckthorn that parallels Bushaway Road. In the southeast portion of the Protected Property sits a deteriorating asphalt tennis court. The southern Easement Area consists of a few Maple and Willow trees, with the majority of the vegetation being Buckthorn. At the far southwest

corner the invasive species go to lakeshore of Lake Minnetonka. A small play house sits in the southwest corner of the Protected Property.

2. PRESERVATION AND RESTORATION.

2.1 In conjunction with the redevelopment of the Protected Property into either one or two single family residential lakeshore homes, the Grantor will complete the installation of the natural resources on portions of the Protected Property identified on the Site Plan as the "Restoration Area," and as specified in the Land Stewardship Plan ("LSP"), by and between Grantor and the District, which as may be amended from time-to-time by the parties, is incorporated herein by reference.

2.2 Once the initial restoration plantings are established within the Restoration Area pursuant to the LSP, the Grantor shall maintain the Restoration Area in accordance with the LSP.

2.3 Within thirty (30) days of the mutual execution, delivery and recordation of this Easement, Grantor may fund an endowment (the "Endowment") in an amount to be determined, in Grantor's sole discretion, to be held by the District, and to be used by the Grantor for the purposes set forth in the LSP.

3. USES WITHIN THE CONSERVATION EASEMENT. In furtherance of the intent of this Easement, from and after the completion of the Restoration Plan, the terms of this Section 3 shall apply to the Grantor and all persons acting under the Grantor's authority or control.

3.1 Industrial and Commercial Activity. No industrial or commercial use of the Easement Area is allowed.

3.2 Right of Way. No right of way shall be granted across the Easement Area.

3.3 Mining. No mining, drilling, exploring for or removing of any minerals from the Easement Area is allowed. The foregoing notwithstanding, prior to completing the restoration within the Restoration Area, the Grantor may remove material within the Easement Area for use in the redevelopment of the Protected Property, in which case the Grantor will protect and restore the disturbed area in accordance with the LSP.

3.4 Subdivision. The Easement Area may not be divided, subdivided, or partitioned. Any adjustment to the boundary of a lot within the Easement Area requires District approval. Any such adjustment will be evidenced by the recording of an Amendment to this Easement to redefine the Easement Area. Notwithstanding the foregoing, the District acknowledges that the remainder of the Protected Property may be subdivided, in Grantor's sole and absolute discretion, into two separate lots for redevelopment of single family residential homes.

3.5 Water. No activity shall be conducted in the Easement Area that would pollute, alter, deplete, or extract surface water or groundwater; cause erosion; or be detrimental to water quality, except as follows:

a. Activities approved in writing by District that restore or enhance wildlife habitat or native biological communities or that improve or enhance the function and quality of existing wetlands and surface waters on and off of the property.

b. Activities undertaken in the exercise of rights reserved under Section 3 of this Easement, if any, that might cause erosion or impact water quality on a temporary basis, provided that all reasonable erosion and sediment control measures are undertaken to limit the impacts of those activities. All activities permitted hereunder remain subject to any applicable permitting requirements of the District and other governmental bodies.

c. The Grantor shall have the right to install, repair, maintain and replace wells within the Easement Area for purposes of providing irrigation for plantings and landscaping within the Protected Property.

d. The Grantor shall have the right to utilize the Easement Area for stormwater management for the benefit of the remainder of the Protected Property.

e. The Grantor shall have the right to install, repair, maintain and replace fountains, pumps and related piping and equipment within and around the ponds within the easement area in furtherance of the purposes set forth herein.

3.6 Dumping. No trash, garbage, organic material for composting, hazardous or toxic substances or unsightly material may be dumped or placed within the Easement Area.

3.7 Storage Tanks. There shall be no placement of underground storage tanks on, in, or under the Easement Area; provided however, Grantor may install underground storage tanks within the Easement Area for water management.

3.8 Agricultural Use. No agricultural use or cultivation, except for vegetation management permitted under subsection 3.12, below, is allowed within the Easement Area unless approved by the District.

3.9 Recreational Use. Owner retains the right to access the Easement Area for recreational use. This includes but is not limited to the following:

a. Owner may establish and maintain private turf, wood plank, woodchip, brick, stone or paved trails for fire breaks and other safety measures, walking, cross-country skiing, and other non-motorized recreational activities over or across the Easement Area, as generally identified on the Site Plan.

b. Owner may use the beach area and shoreline along Lake Minnetonka for pedestrian access to and from the Lake, but shall not include the ability to install dockage or store boats or other watercraft within the Easement Area.

3.10 Fences. No fence may be located or constructed within the Easement Area, except along the boundary of the Protected Property, the Easement Area, or as agreed to by both parties. Notwithstanding this limitation, the existing fencing may be repaired, maintained or replaced as described in the Plan.

3.11 Structures and Improvements. No temporary or permanent building, structure, sign or other improvement of any kind may be placed or constructed within the Easement Area, with the following exceptions: (a) signage to mark the boundaries of the Easement Area and to mark wetland buffer boundaries, or (b) as agreed to by the parties. Notwithstanding the foregoing, incidental placement of temporary structures within the Easement Area associated with the permitted use of the Protected Property not part of the Easement Area (e.g., weddings or parties in the formal gardens), is permitted, provided that there is no land alteration or damage to vegetation. Grantor will restore soil and vegetation if disturbed.

3.12 Vegetation Management. Vegetation may be altered in accordance with the LSP or if such alteration is conducted in order to maintain, restore or enhance habitat for wildlife and native biological communities; prevent or control noxious weeds, invasive vegetation, or disease; improve the water quality or stabilize areas of potential erosion; or improve the water quality of Lake Minnetonka. The District must approve an alteration that would deviate materially from the LSP. The foregoing notwithstanding, emergency action may be taken as necessary to prevent or abate fire or any other condition causing or threatening injury or substantial property damage. Additionally, Grantor may, at its sole discretion, remove downed, diseased or dead trees within the Easement Area.

3.13 Topography and Surface Alteration. Grantor may not alter or change the topography or surface of the Easement Area after the restoration as identified within the LSP is completed, unless approved by the District. This includes no ditching, draining, diking, filling, excavation, dredging, mining, drilling or removal of soil, sand, gravel, rock, minerals, or other materials. Notwithstanding the foregoing, with the District's written approval, surface disturbance including excavation and fill may occur for the purpose of restoring previously disturbed areas on the Protected Property.

3.14 Vehicles. No motorized vehicle may be operated within the Easement Area except (a) as required for the restoration of the Easement Area, (b) to perform maintenance and management as identified within the LSP, (c) for public safety; or (d) as required for maintenance and management of any trails.

3.15 Chemicals. Except as authorized by subsection 3.13 above or the LSP, within the Easement Area there shall be no use of pesticides or biocides, except that the Owner may control mosquitoes and other insects in accordance with best selective control practices.

4. RESERVED RIGHTS. The Owner retains all rights associated with ownership and use of the Protected Property and the Easement Area except as expressly restricted or prohibited by this Easement. Such rights include, but may not be limited to, (a) the right to sell, give, lease, bequeath, devise, mortgage or otherwise encumber or convey the Protected Property and the Easement Area, (b) use the Protected Property as one or two single family residential properties, including without limitation, repairing, maintaining, constructing and replacing the existing improvements, fences, paths, gardens, landscaping, and utilities, (c) use the Protected Property as one or two single family lakeshore residences, including without limitation, swimming, boating and other recreational activities commonly associated with lakeshore property, and (d) all uses and activities necessary to implement and satisfy the obligations of the LSP.

5. DISTRICT'S RIGHTS AND REMEDIES. In order to accomplish the purposes of this Easement, the District has the following rights and remedies, which it will exercise consistent with the LSP.

5.1 Right to Enter. No more than two (2) times per year and for no longer than two (2) hours per entry, the District, its agents and authorized representatives may, upon no less than one (1) week prior written notice, enter the Protected Property at a mutually agreeable time, Monday – Friday between 9:00 am and 5:00 pm, in a reasonable manner for the purpose of, and may engage in, the following activities, at its sole cost and expense:

a. To inspect the Easement Area, monitor compliance with the terms of this Easement, and enforce the terms of this Easement as set forth herein. The District shall not unreasonably interfere with the legal and appropriate use and quiet enjoyment of the Protected Property by the Owner, and any “Permitted Users” (defined below), so long as such use is in a manner consistent with this Easement. To further the purposes as set out in this Easement, Owner hereby grants to the District a perpetual non-exclusive easement for the purpose of access to the Protected Property by reasonable means, on, over, and across all trails, public and private roads, rights of way and platted drainage and utility easements within the Protected Property, subject to the conditions set forth in this Section 5.1. The foregoing notwithstanding, the easement granted in this subsection 5.1.a. shall expressly not encumber or be located over, under or on any portion of the Protected Property containing buildings, pools, tennis courts, gardens or other improvements or structures.

b. To survey or otherwise mark the boundaries of all or part of the Easement Area. Any survey or boundary demarcation completed under this provision will be at the District’s expense.

c. Management of the Easement Area to advance applicable laws and regulations to protect or enhance the conservation purpose as stated at Section 1 above. Management may consist of, but not be limited to, planting, removing and maintaining native vegetation; modifying hydrology or soils; altering and stabilizing land; installing improvements for water quality and flood management purposes; erecting fencing or other measures to protect against intentional or unintentional impact; and installing and maintaining educational or informational signage. The District’s actions under this paragraph are subject to the Owner’s prior written approval, which approval may be withheld in Owner’s sole and absolute discretion.

d. The District shall not have the right to access any buildings, improvements or structures on the Protected Property and the District’s entry shall not interfere unreasonably with the Owner’s or the Permitted Users’ quiet use and enjoyment of the Protected Property.

5.2 No Grant of Public Right. Nothing in this Easement shall be construed as: (a) a public dedication; or (b) a grant of right to persons other than the District to enter or use the Easement Area as provided in this Conservation Easement. Nothing in this Easement constitutes a general right of public entry onto or across the Protected Property.

5.3 Right of Enforcement.

a. Enforcement. If the District finds at any time that the Owner has breached the terms of this Easement, the District, itself or in conjunction with the City, will notify the Owner of the alleged breach and direct the Owner to take action to cure the default. If such action is not taken, the District may give written notice detailing the breach to the Owner and demand action to cure the breach including, without limitation, restoration of the Easement Area as required in this Easement. If the Owner does not cure the breach within thirty (30) days from receipt of such written notice, or such longer time as may be reasonably required (provided that the Owner's efforts to cure the breach are commenced within said thirty (30) day period and are diligently pursued toward completion), the District may commence an action to obtain one or more available remedies including but not limited to: (i) enforcing the terms of this Easement, (ii) enjoining the breach, or (iii) requiring restoration of the Easement Area to its condition prior to the Owner's breach. Specific performance is an available remedy without demonstration that it is the only adequate remedy. Further, notwithstanding the foregoing, the City shall be granted a third-party right of enforcement as described in Minnesota Statutes Chapter 84C, following the applicable notice and cure periods provided for herein. Notwithstanding anything to the contrary, the Owner is not liable for damages to the District for acts of trespassers.

b. Waiver of Jury Trial. The District and Grantor each hereby irrevocably, knowingly and voluntarily waive trial by jury in any action, proceeding or counterclaim brought by either of the parties against the other or their successors in respect to any matter arising out of or in connection with this Easement, the relationship of the District and Grantor, the use or occupancy of the Protected Property and the Easement Area, or any claim for injury or damage, or any emergency or statutory remedy.

c. Discretionary Enforcement. The District does not, by any delay or prior failure of the District to discover a violation or initiate enforcement proceedings, waive or forfeit any enforcement right.

d. Acts Beyond Owner's Control. The District will have no claim against the Owner for any change to the Protected Property: (i) not caused in whole or part by an action of the Owner or a party acting under the Owner's authority, (ii) to the extent caused by an action of the Owner, or of a party acting under the Owner's authority, taken reasonably and in good faith under emergency conditions to prevent or mitigate substantial damage from such conditions, (iii) resulting from natural events or natural causes, including, without limitation, fire, flood, storm, infestations, natural deterioration, earth movement, or climate change, (iv) from any prudent action taken by the Owner under emergency conditions to prevent, abate, or mitigate significant injury to the Protected Property, (v) from acts of any animals beyond the Owner's possession, custody or control, or (vi) the acts of third parties other than the Owner, Owner's agents, employees, lessees, invitees, family members or contractors (the "Permitted Users").

6. SIGNIFICANT PUBLIC BENEFIT. Notwithstanding that this Easement does not give or grant to the public a right to enter upon or to use the Protected Property, the Easement Area, or any portion thereof, the District hereby acknowledges and agrees that this Easement provides a significant public benefit resulting from: (a) the uniqueness of the Protected Property to the surrounding area; (b) the intensity of land development in the vicinity of the Protected Property (both existing development and foreseeable trends of development); (c) the consistency of the proposed open space use with public programs (whether Federal, state or local) for conservation in the region, including programs for outdoor recreation, irrigation or water supply protection, water quality maintenance or enhancement, flood prevention and control, erosion control, shoreline protection, and protection of land areas included in, or related to, a government approved master plan or land management area; (d) the consistency of the proposed open space use with existing private conservation programs in the area, as evidenced by other land, protected by easement or fee ownership by organizations referred to in Section 1.170A-14(c)(1) of the Internal Revenue Code Regulations, in close proximity to the property; (e) the likelihood that development of the Protected Property would lead to or contribute to degradation of the scenic, natural, or historic character of the area; (f) the opportunity for the general public to appreciate its scenic values from Bushaway Road and Lake Minnetonka; (g) the importance of the property in preserving a local or regional landscape or resource that attracts tourism or commerce to the area; (h) the likelihood that the District will acquire equally desirable and valuable substitute property or property rights; (i) the cost to the District of enforcing the terms of this Easement; (j) the population density in the area of the Protected Property; and (k) the consistency of the proposed open space use with a legislatively mandated program identifying particular parcels of land for future protection.

7. SECTION 2031(c) FEDERAL ESTATE TAX EXCLUSION. The Grantor desires to qualify this Conservation Easement for estate tax exclusion under § 2031(c) of the Internal Revenue Code. Notwithstanding anything herein to the contrary, to qualify this Conservation Easement for treatment under Internal Revenue Code § 2031(c)(8)(B) any use of the Protected Property for more than a *de minimis* use for a commercial recreational activity is prohibited.

8. GENERAL PROVISIONS.

8.1 Assignment. This Easement, and any rights or responsibilities hereunder, may be assigned or transferred by the District to, or shared by the District with, a conservation organization that is a qualified organization under Section 170(h) of the Internal Revenue Code and related regulations and that is authorized to hold conservation easements under Minnesota law. Any future holder of this Easement shall have all of the rights conveyed to the District by this Easement. As a condition of any assignment or transfer, the District shall require any future holder of this Easement to continue to carry out the conservation purposes of this Easement in perpetuity. The District shall provide no less than thirty (30) days written notice to the Owner of the Protected Property and the City before any such transfer or assignment shall be effective.

8.2 Amendment. Under appropriate circumstances, this Easement may be modified or amended. However, no amendment or modification will be allowed if, in the reasonable judgment of the District, it: (a) does not further the purposes of this Easement, (b) affects the perpetual duration of the Easement, or (c) affects the validity of the Easement under Minnesota law or under Section 170(h) of the Internal Revenue Code.

Any amendment or modification must be in writing, signed by the Owner and the District and must be recorded in the same manner as this Easement.

8.3 Extinguishment. This Easement may be extinguished without the consent of the District and the Owner only through judicial proceedings and only under the following circumstances:

a. This Easement may be extinguished only (i) if unexpected change in the conditions of or surrounding the Easement Area makes the continued use of the Easement Area for the conservation purposes set out above impossible or impractical or (ii) pursuant to the proper exercise of the power of eminent domain.

b. The Owner recognizes that uses of the Easement Area prohibited by this Easement may, in the future, become more economically viable than those uses permitted by the Easement.

Changes to the surrounding area or other circumstances may cause the public benefit provided by this Easement to change. Therefore, such changes are not considered unexpected changes and shall not be deemed to be circumstances justifying the extinguishment of this Easement as otherwise set forth above.

If a subsequent unexpected change in the conditions of or surrounding the Protected Property makes impossible or impractical the continued use of the Protected Property for the conservation purposes described herein, and if the restrictions of this Easement are extinguished by judicial proceedings (including, but not limited to, eminent domain proceedings), then upon the sale, exchange or involuntary conversion of the Protected Property, the District shall be entitled to a portion of the proceeds at least equal to the proportionate value of the Easement described above. Pursuant to Section 1.70A-14(g)(6)(i) and (ii) of the Internal Revenue Code Regulations, Grantor hereby agrees that the donation of this Easement gives rise to a property right, immediately vested in the District, with a fair market value that is at least equal to the proportionate value that the grant of this Easement bears to the value of the Protected Property as a whole as of the date of this Easement. The District will use its share of any and all proceeds received for such sale, exchange or involuntary conversion in a manner consistent with the conservation purposes of this Easement or for the protection of a “relatively natural habitat of fish, wildlife, or plants or similar ecosystem,” as that phrase is used in Section 170(h)(4)(A)(ii) of the Internal Revenue Code, as that section may be amended from time to time, and in regulations promulgated thereunder.

8.4 Real Estate Taxes. The Owner shall pay all real estate taxes and assessments levied against the Protected Property as and when such taxes and assessments become due and payable.

8.5 Ownership Costs and Liabilities. The Owner retains all responsibilities and shall bear all costs and liabilities of any kind related to the ownership, operation, upkeep and maintenance of the Protected Property, as described in the LSP, including the maintenance of such comprehensive general liability insurance coverage as the Owner deems adequate. The Owner agrees to hold harmless, defend and indemnify the District from any and all liabilities

arising out of any waste or contaminant on the Protected Property as of the date of this Easement, which terms are to be understood in their broad common meaning and not as defined by any specific statute, as well as any and all liabilities, including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees that the District may suffer or incur, to the extent they result from the activities of Owner on the Protected Property. The District agrees to hold harmless, defend and indemnify the Owner from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees that the Owner may suffer or incur, to the extent they result from work or improvements of the District on the Protected Property. Each party shall keep the Protected Property free of any liens arising out of any work performed for, materials furnished to or obligations incurred by that party. Nothing in this paragraph or this Easement creates any right in any third party or diminishes any immunity, defense or liability limitation of the Owner or District as against any third party.

By assuming its rights and responsibilities under this Easement, the District is not assuming the role of owner or operator, or otherwise of a potentially responsible party, under any law with respect to any preexisting environmental condition on the Protected Property.

8.6 Notice and Approval. Any notice or request for approval required by this Easement must be written and is subject to the following:

a. Delivery. Any required notice or request for approval must be delivered or sent by first class mail or other nationally recognized delivery service to the appropriate party at the following addresses (or other address specified in writing):

To the Owner:

Lake Properties LLC
Attention: Michael L. O’Shaughnessy
6423 City West Parkway
Eden Prairie, MN 55344

With copy to:

Stinson Leonard Street LLP
Attention: Todd M. Phelps
50 South Sixth Street, Suite 2600
Minneapolis, MN 55402

To the District:

Minnehaha Creek Watershed District
15320 Minnetonka Blvd.
Minnetonka, MN 55345

With copy to:

Smith Partners PLLP
Attention: Charles B. Holtman
88 South 10th Street, Suite 1200
Minneapolis, MN 55401

b. Timing. Unless otherwise specified in this Easement, any required notice or request for approval must be in writing and delivered at least 30 days prior to the date proposed for initiating the activity in question, provided that in the event the party who receives notice does not respond within 30 days of the documented day of delivery, the proposed activity shall be deemed approved by that party so long as the request states prominently in a top heading “Response Required Within 30 Days” and the activity is not inconsistent with the conservation purpose of this Easement and is not otherwise prohibited by the Easement. The District shall communicate a final decision within 60 days of a request.

c. Content. The notice or request for approval must include sufficient information to allow the approving party to make an informed decision on whether any proposed activity is consistent with the terms and purposes of this Easement.

d. Approval. The approving party may consent to any activity under this Easement only if it reasonably determines that the activity (1) will not violate the conservation purpose of this Easement, and (2) will either enhance or not impair any significant water resource or associated ecological element associated with the Protected Property, including the following: restoring and protecting the water quality, habitat value and ecological integrity of surface waters and wetlands, as well as associated riparian land, floodplain and supporting groundwater. The approving party may condition its approval on the requesting party's acceptance of modifications that, in the approving party's reasonable judgment, would allow the proposed activity to meet these criteria. Unless provision is made for a specific time period, each response to a request for approval or consent required to be considered pursuant to this Easement shall be given by the party to whom directed within thirty (30) days after receipt thereof. Any disapproval shall be in writing and, subject to this subsection 8.6.d., the reasons therefor shall be clearly stated. With respect to all requests for approval under this Easement, the requesting party will not unreasonably withhold, delay or condition approval.

8.7 Binding Effect; Immediate Vesting. This Easement will run with and burden the Protected Property in perpetuity. The terms of this Easement are binding and enforceable against the Owner, its lessees, agents, personal representatives, successors and assigns, and all other parties entitled to possess or use the Protected Property. This Easement creates a property right immediately vested in the District and its successors and assigns that cannot be terminated or extinguished except as set out herein.

8.8 Merger. The Owner and the District agree that the terms of this Easement shall survive any merger of the fee and easement interest in the Protected Property.

8.9 Definitions. Unless the context requires otherwise, the term "Owner" means the Grantor and its representatives, successors and assigns in title to the Protected Property. The term "District" means the Minnehaha Creek Watershed District and its successors, assigns and partners to any interest it holds in this Easement.

8.10 Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon the transfer or termination of that party's interest in this Easement or the Protected Property, provided, however, that any liability for acts or omissions occurring prior to the transfer or termination will survive that transfer or termination.

8.11 Recording. The District will record or register this Easement in a timely manner in the official records for Hennepin County. Following reasonable written notice to the Owner, the District may re-record or re-register this Easement or any other document reasonably necessary to protect its rights under this Easement or to assure the perpetual enforceability of this Easement. The Owner will cooperate as necessary to accomplish and effect acts of recordation.

8.12 Controlling Law and Construction. This Easement shall be governed by the laws of the State of Minnesota and construed to resolve any ambiguities or questions of validity of specific provisions in favor of giving maximum effect to its conservation purposes and to the policies and purposes of Minnesota Statutes Chapter 84C.

8.13 Permits and Applicable Laws. The Owner and the District acknowledge that the exercise of any reserved right herein or other use of the Protected Property is not by this Easement relieved from complying with or obtaining any permit from any applicable governmental authority, including the District, prior to the exercise thereof.

8.14 Severability. A determination that any provision or specific application of this Easement is invalid shall not affect the validity of the remaining provisions or any future application.

8.15 Captions. The captions herein have been inserted solely for convenience of reference and are not a part of this Easement and shall have no effect upon construction or interpretation.

8.16 Additional Documents. The District and Owners agree to execute or provide any additional documents reasonably needed by the parties to carry out in perpetuity the provisions and intent of this Easement, including, but not limited to any documents reasonably needed to correct any legal description or title matter or to comply with any federal, state, or local law, rule or regulation.

8.17 Entire Agreement. This document states the entire agreement of the parties with respect to this Easement and supersedes all prior discussions or understandings.

8.18 Estoppel Certificate. Owner and District agree upon written request by the other party agree to issue, within thirty (30) days after receipt of such request to such party, or its prospective mortgagee or successors or assigns, an estoppel certificate stating to the best of the issuer's knowledge as of such date:

- a. Whether it knows of any default under this Easement by the requesting party, and if there are known defaults, specifying the nature thereof in reasonable detail.
- b. Whether this Easement has been assigned, modified or amended in any way by it and if so, stating the nature thereof in reasonable detail.
- c. Whether this Easement is in full force and effect.

8.19 Excusable Delays. Whenever performance is required by a party hereunder, such party shall use all due diligence to perform; provided, however, if completion of performance is delayed at any time by reason of acts of God, war, civil commotion, terrorism, riots, strikes, picketing, labor disputes, unavailability of labor or materials, damage to work in progress by reason of fire or other casualty, or any cause beyond the reasonable control of such party, then the time for performance as herein specified shall be appropriately extended by the amount of the delay actually so caused.

[The remainder of this page is intentionally blank. Signature pages follow]

DRAFT

IN WITNESS WHEREOF, on the basis of mutual valuable consideration, and intending to be legally bound, the Grantor and the District voluntarily execute this Conservation Easement on the _____ day of _____, 2018.

GRANTOR:

LAKE PROPERTIES LLC, a Delaware limited liability company

By: _____
Michael L. O'Shaughnessy
Its: Chief Manager

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

On this __ day of _____, 2018, before me appeared Michael L. O'Shaughnessy as Chief Manager of Lake Properties LLC, a Delaware limited liability company, to me personally known to be the person described in and who executed the foregoing instrument and acknowledged that each executed the same on behalf of the company.

Notary Public

DRAFT

ACCEPTANCE

The Minnehaha Creek Watershed District hereby accepts the foregoing Conservation Easement this _____ day of _____, 2018.

MINNEHAHA CREEK WATERSHED
DISTRICT

By: _____

Title: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me this _____ day of _____, 2018 by _____, the _____ of the Minnehaha Creek Watershed District, a governmental body created under Minnesota Statutes Chapter 103D, on behalf of said governmental body.

Notary Public
My Commission Expires:

DRAFT

MORTGAGEE'S CONSENT AND SUBORDINATION

For Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the undersigned owner and holder of a that certain Mortgage, Security Agreement, Fixture Financing Statement and Assignment of Rents (the "Mortgage"), encumbering the real property described in the Conservation Easement to which this Subordination and Consent is attached, which Mortgage was filed for record on July 3, 2018, in the Office of the Registrar of Titles, Hennepin County, Minnesota, as Document No. T05542060, the undersigned hereby consents to the said Conservation Easement and subordinates the Mortgage to the rights and interests of the Minnehaha Creek Watershed District, a governmental body created under Minnesota Statutes Chapter 103D, its successors and assigns, arising under and by virtue of the Conservation Easement, and covenants and agrees that, in the event of a foreclosure, deed in lieu of foreclosure or other enforcement of the said Mortgage, the Conservation Easement, as it may be modified from time to time, shall remain undisturbed and shall be binding upon the undersigned and any other person or entity that acquires any interest in the said real property as the result of any such foreclosure, deed in lieu of foreclosure or other enforcement of the said Mortgage, and upon such acquirer's successors and assigns.

[The remainder of this page is blank. This instrument continues on the next page.]

DRAFT

[SIGNATURE PAGE FOR MORTGAGEE]

MORTGAGEE:

CROWN BANK,
a Minnesota banking corporation

By: _____

Name: _____

Title: _____

Date Signed: _____, 20__

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me this _____ day of _____, 2018 by _____, the _____ of the Crown Bank, a Minnesota banking corporation, on behalf of said corporation.

Notary Public
My Commission Expires:

EXHIBIT A

LEGAL DESCRIPTION OF PROTECTED PROPERTY

Parcel 1:

Lots D and E, "Carpenter's Point, Hennepin County Minn.," according to the recorded plat thereof, Hennepin County, Minnesota.

Parcel 2:

That part of Lot F, "Carpenter's Point, Hennepin County Minn.," according to the recorded plat thereof, Hennepin County, Minnesota, described as follows, to-wit: Commencing at the Southeast corner of said Lot F; thence North on the East boundary line thereof to a point 60 feet from said point of beginning which point is marked by a Judicial Landmark set pursuant to district court case no. 4922; thence in a straight line Westerly to a point marked by a Judicial Landmark set pursuant to district court case no. 4922, on the shore of Wayzata Bay, Lake Minnetonka, which point is 40 feet along said shore, North of the Southwest corner of said Lot F; thence Southerly along said shore of Wayzata Bay to the South boundary line of said Lot F; thence East along said South boundary line to the point of beginning.

Parcel 3:

That part of Lot F, "Carpenter's Point, Hennepin County Minn.," according to the recorded plat thereof, Hennepin County, Minnesota, described as follows: Beginning at a judicial landmark set pursuant to district court case no. 4922 in the Easterly line of said Lot F, distant 60 feet Northerly, measured along the Easterly line of said lot from the Southeast corner thereof; thence Westerly in a straight line to the shore of Wayzata Bay, Lake Minnetonka, said line passing through a point marked by a judicial landmark set pursuant to district court case no. 4922 in the Westerly line of said Lot F, distant 40 feet Northerly, measured along said Westerly line from the Southwest corner of said Lot F, said last described course being hereinafter designated and referred to as Line "A"; thence Northerly along the shore of said lake to its intersection with a line drawn parallel with and distant 25 feet Northerly of, measured at a right angle to, the above mentioned Line "A"; thence Easterly parallel with said Line "A" to the Easterly line of said Lot F; thence southerly along said Easterly line to the point of beginning.

Being Registered land as is evidenced by Certificate of Title No. _____.

EXHIBIT B-1

LEGAL DESCRIPTION OF CONSERVATION EASEMENT AREA

[to be attached]

DRAFT

EXHIBIT B-2

SITE PLAN

[to be attached]

DRAFT