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## MEMORANDUM

TO: Minnehaha Creek Watershed District Board of Managers  
Lars Erdahl, District Administrator

FROM: Louis N. Smith

DATE: August 8, 2017

RE: Big Island Conservation Easement: Review of Assignability

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### I. Introduction

At its meeting of July 27, 2017, the Board of Managers received a request from Mr. Gabriel Jabbour that the District explore sharing the Big Island conservation easement with another party such as the Minnesota Land Trust. The Board of Managers requested our review of the conservation easement to assist the Board in considering this request.

### II. Terms of Conservation Easement

Section 9.1 of the Conservation Easement provides that

[if] the District finds that it has become impractical or impossible to hold, monitor, and/or enforce this Easement, this Easement may be assigned or transferred by the District with the concurrence of the City, which shall not be unreasonably withheld, or through court order.

The Easement further provides that the transfer shall only be to a qualified conservation organization, which shall have all of the rights conveyed to the District and shall be required to carry out the conservation purposes of the Easement in perpetuity. Id. The District is required to inform Orono of a potential assignment with at least 90 days prior notice. The City is to communicate its decision on

concurring with this assignment within 45 days of receiving such written notice, and failure to respond within 45 days is deemed concurrence. Id.

Section 9.2 of the Conservation Easement provides that the Easement may be amended or modified “under appropriate circumstances,” but places important conditions on such changes to preserve the purposes and conservation values of the Easement in the “sole and exclusive judgment of the District.” A copy of the Easement is attached to this memorandum for reference.

### **III. Discussion**

There is no suggestion that the District has found it “impractical or impossible to hold, monitor, and/or enforce” the Easement, which is the precondition of a potential assignment. Nevertheless, the terms of the Easement would not preclude a proposed assignment of a non-exclusive interest in the Easement to a qualified conservation organization for the purposes of promoting ongoing attention to the Easement’s purposes and conservation values. Any communication to the City about such an assignment would of course explain the intent and purpose of such a non-exclusive conveyance.

A conservation organization such as Minnesota Land Trust acquires conservation easements, creates a baseline property report to record the benchmark condition of the conservation property, and then conducts regular inspection (typically annually) to confirm ongoing compliance with the terms of the easement. There may be costs incurred for such documentation and monitoring.

The District has done extensive restoration work at Big Island, and continues a regular inspection program at the site through its project maintenance and land management program. It would be important for the District and the City to evaluate the costs and benefits of assigning a non-exclusive interest in the Conservation Easement to an organization such as the Land Trust.

We would be pleased to provide any further information you may require.

## CONSERVATION EASEMENT

This is a CONSERVATION EASEMENT granted by the City of Orono, a political subdivision of the State of Minnesota, ("Orono") to the Minnehaha Creek Watershed District, a governmental body created under Minnesota Statutes Chapter 103D (the "District").

### RECITALS:

- A. **ORONO.** Orono is the current fee owner of three adjacent parcels totaling approximately 56.461 acres located in the City of Orono, Hennepin County, Minnesota. That real property is more fully described below as the "Protected Property."
- B. **PROTECTED PROPERTY.** The Protected Property is that real property legally described in Exhibit A and generally depicted on the "Property Map" in Exhibit B. Both exhibits are attached to this Easement and incorporated by this reference.

The Protected Property is currently used for low impact recreational use and nature observation. Existing improvements on the Protected Property include those structures shown on Exhibit B and noted on Exhibit C.

- C. **MINNEHAHA CREEK WATERSHED DISTRICT.** The Minnehaha Creek Watershed 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 related lands. The District is an organization qualified to hold conservation easements under Minnesota law and Section 170(h) of the Internal Revenue Code and related regulations.
- D. **CONSERVATION VALUES.** The Protected Property has the following natural, scenic and open space qualities of significant importance:
- i. Approximately 7,500 feet of undeveloped frontage on Lake Minnetonka, that help protect the water quality of the Lake from impacts of non-point source pollution and provide habitat for flora and fauna. Lake Minnetonka is an important natural resource and recreation area in the Twin Cities metropolitan area;
  - ii. Approximately 7.59 acres of wetlands providing valuable habitat and also deemed important by the District for the protection and enhancement of water quality in Lake Minnetonka;
  - iii. Undeveloped vegetated buffers and uplands, including significant stands of maple-basswood forest, that provide habitat for flora and fauna and protect the property's wetlands from non-point source pollution impacts that could be associated with future development, or other uses of surrounding land including the Protected Property;

- iv. A bald eagle nesting site. Bald eagles are considered a Minnesota Special Concern Species by the Minnesota Department of Natural Resources. and
- v. Offers the general public opportunities to experience, appreciate, and learn about the natural environment through sustainable outdoor recreation and educational opportunities.

Collectively, these natural, scenic and open space qualities of the Protected Property constitute its "Conservation Values."

These Conservation Values have not been and are not likely to be adversely affected to any substantial extent by the continued use of the Protected Property as described above or as authorized below or by the use and maintenance of the existing improvements on the Protected Property or construction of those structures and improvements that are authorized below.

E. **CONSERVATION POLICY.** Preservation of the Protected Property will further those governmental policies established by the following:

- i. Minnesota Statutes Chapter 84C, which recognizes the importance of private conservation efforts by authorizing conservation easements for the 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.
- ii. 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.
- iii. Minnesota Statutes Section 103D which provides for the establishment of watershed districts to conserve the natural resources of the State.
- iv. Minnehaha Creek Watershed District Comprehensive Water Resources Management Plan (January 1997 and as amended) which includes the following policies, programs, and projects implementing the Metropolitan Surface Water Act:
  - a. Land Conservation Program (Section IV. H.)
  - b. Regional Wetland Restoration (p.159)
- v. In May, 1972, the Orono Village Council declared via Resolution No. 446 that "the long range highest and best use of Big Island is for park purposes". The 1980 Orono Comprehensive Plan again encouraged public ownership of Big Island for park use. The 2000-2020 Comprehensive Plan supports the passive character of the existing Three Rivers Park District's wildlife sanctuary on Big Island, and suggests that any expansion of parkland on the Island be for the purpose of park uses that are more passive than active.

- vi. Suburban Hennepin Regional Park District Master Plan for a System of Parks (adopted July 23, 1998) which calls for public use of the Protected Property.

F. **CONSERVATION INTENT.** Orono and the District are committed to protecting and preserving the Conservation Values of the Protected Property in perpetuity. Accordingly, it is their intent to create and implement a conservation easement that is binding in perpetuity upon the current owner and all future owners of the Protected Property and that conveys to the District the right to protect and preserve the Conservation Values of the Protected Property for the benefit of this generation and generations to come.

**CONVEYANCE OF CONSERVATION EASEMENT:**

Pursuant to the laws of the State of Minnesota and in particular Minnesota Statutes Chapter 84C and in consideration of the facts recited above and the mutual covenants contained herein and in further consideration of the sum of eight hundred fifty thousand dollars (\$850,000) and other valuable consideration, Orono hereby conveys to the District a perpetual conservation easement over the Protected Property. This conservation easement consists of the following rights, terms and restrictions (the "Easement"):

1. **CONSERVATION PURPOSE.** The purpose of this Easement is to preserve and protect in perpetuity the Conservation Values of the Protected by confining the development, management and use of the Protected Property to activities that are consistent with the preservation of these Conservation Values, by prohibiting activities that significantly impair or interfere with these Conservation Values, and by providing for remedies in the event of any violation of this Easement.

The terms of this Easement are specifically intended to provide a significant public benefit, including, but not limited to:

- a. The protection of a relatively natural habitat of fish, wildlife, and plants as that term is used in section 170 (h) of Internal Revenue Code and related regulations;
  - b. The protection of the water quality of Lake Minnetonka, pursuant to the public policies set forth above.
  - c. Preserving the open and natural character of the Protected Property for scenic enjoyment by the general public including from Lake Minnetonka and substantial parts of its shoreline.
2. **EASEMENT AREAS.** For purposes of creating land use restrictions and identifying permitted uses on the Protected Property, the Protected Property has been divided into two (2) areas. These are:
    - a. "Recreation Area", consisting of those improvements shown on Exhibit B and noted on Exhibit C for which Orono prohibited and permitted uses are described herein in Sections 3, 4.3, and 5; and

- b. "Natural Area", consisting of natural upland, open space, and wetland areas outside of the Recreation Area, for which Orono prohibited and permitted uses are described herein in Sections 3, 4.4, and 5.

These Areas are specifically depicted on the "Property Map" attached hereto as Exhibit B and incorporated herein by reference.

3. **LAND USE RESTRICTIONS.** Except for affirmative rights retained by District under Section 6 of this Easement for the protection and enhancement of the Conservation Values of the Protected Property, the following constraints shall apply to the use of the Protected Property and to Orono and all persons acting under authority or control of Orono.

Specifically, any activity on or use of the Protected Property that would contribute to the destruction of the Conservation Values is prohibited.

Except as specifically permitted in Sections 4 and 5 below and without limiting the general prohibition above, restrictions imposed throughout the entirety of the Protected Property expressly include the items listed immediately below. Additional Orono land use restrictions are further enumerated by Easement Area in Section 4 of this Easement.

- 3.1. Industrial Activity. No industrial use of the Protected Property is allowed.
- 3.2. Events. No organized events may take place which could impair the Conservation Values of the Protected Property. Limitations on organized events may be further developed in the Management Plan, as described in section 4.1.
- 3.2. Residential Development. No residential use or development is allowed except as specifically permitted in Section 4 below.
- 3.3. Introduction Of Non-Native Animals. No introduction of non-native animals or unconfined household pets is allowed. This does not apply to pastured domesticated animals such as horses or other livestock subject to a Management Plan approved by the District in writing. Dogs may be allowed as permitted and conditioned in a Management Plan approved by the District and the City of Orono in writing.
- 3.4. Right of Way. No right of way shall be granted across the Protected Property in conjunction with any use of any land other than the Protected Property.
- 3.5. Mining. No mining, drilling, exploring for or removing of any minerals from the Protected Property is allowed. Land disturbance is permitted as reasonably necessary to prepare a site for an improvement permitted under this Conservation Easement.

- 3.6. Subdivision. The Protected Property may not be divided, subdivided, or partitioned. The Protected Property may be conveyed only in its entirety as a single parcel, regardless of whether it consists of or was acquired as separate parcels or is treated as separate parcels for property tax or other purposes. This provision does not, however prohibit the division of the Protected Property when a portion of the Protected Property is being conveyed to a conservation organization described in paragraph 9.1 of this Easement.
- 3.7. Density. No portion of the Protected Property may be used to satisfy land area requirements for property other than the Protected Property for purposes of calculating building density, lot coverage or open space under otherwise applicable laws, regulations or ordinances controlling land use. No development rights which have been encumbered or extinguished by this Conservation Easement shall be transferred to any other lands pursuant to a transferable development rights scheme or cluster development arrangement or otherwise; provided, however, that with prior written permission of the District, this Section shall not preclude such transfer of development rights resulting from the voluntary extinguishment of any reserved development rights as provided for in Section 4.1 of this Easement.
- 3.8. Water. There shall be no pollution, alteration, depletion or extraction of surface water, natural water courses, lakes, ponds, marshes, wetland, subsurface water or any other water bodies, nor shall there be activities conducted on the Protected Property that cause erosion or which would be detrimental to water quality or purity, or which could alter natural water level and/or flow in or over the Protected Property, 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 water bodies on and off of the property.
  - b. Activities undertaken in the exercising of rights reserved under item 4.1 of this Easement that might cause erosion or impact water quality on a temporary basis, provided that efforts are undertaken to limit the impacts of those activities. This does not allow activities that alter natural water bodies, lakes, ponds, marshes or wetlands. All activities permitted hereunder remain subject to the permitting requirements of the District and other governmental bodies.
  - c. Activities approved in writing by District for the repair, construction, and/or replacement of wells and septic systems pursuant to section 5.3 below. However prior approval shall not be required in the case of maintenance and/or repair of existing wells and septic systems that do not materially alter the size and/or design of said systems.
- 3.9. Dumping. No trash, non-compostable garbage, hazardous or toxic substances or unsightly material may be dumped or accumulated on the Protected Property.

This does not prohibit burning, composting, or placement of excess brush or other plant material resulting from activities permitted by this Easement provided that said burning or composting is located at least seventy-five feet from the edge of any wetland or lakeshore and is consistent with the property Management Plan.

3.10. Storage Tanks. There shall be no placement of underground storage tanks on, in, or under the Protected Property.

4. **PERMITTED AND PROHIBITED USES:** Orono and all persons acting under authority or control of Orono; all lessees, agents, personal representatives, successors and assigns; and all other parties entitled to possess or use the Protected Property are subject to the following terms regarding use of the Protected Property.

4.1 Permitted Uses Limited. Permitted uses on the Protected Property are limited to those uses specifically and explicitly permitted in this Conservation Easement, as those uses may be elaborated and conditioned in a written Management Plan agreed to and executed by Orono and the District, which plan may be revised or supplemented from time to time ("Management Plan"). Any Management Plan will be consistent with the following principles:

- a. The Management Plan will authorize no activity that would materially impair a Conservation Value set forth in Recital D.
- b. The Management Plan will authorize no activity prohibited by this Conservation Easement.
- c. The Protected Property will be open to the general public for public uses consistent with the Conservation Values set forth in Recital D, specifically including passive, low-impact and non-motorized recreation; watercraft access; and public education.
- d. Structures and other improvements reasonably necessary for permitted uses, including facilities for access by water, will be accommodated, provided they are designed to avoid material impairment to a Conservation Value set forth in Recital D.
- e. Orono or its designee will retain the responsibility and authority to manage and maintain the Protected Property on a day-to-day basis, and the Management Plan will accommodate activities and improvements reasonably required by Orono to do so.
- f. Orono and the District will work cooperatively and in good faith to develop any Management Plan.

4.2 Existing Improvements. Exhibits B and C to this Conservation Easement, attached and incorporated herein, locate and specify existing improvements on the Protected Property and Orono's rights and responsibilities relating to the



maintenance, replacement and removal of those improvements. Orono has the right to maintain and replace, without increase in dimension, any improvement not listed in Exhibit C and not otherwise explicitly addressed in this Conservation Easement.

4.3 Permitted and Prohibited Uses in Recreation Area.

- a. New structures. New structures may be constructed, maintained and replaced within the Recreation Area only in accordance with the terms of a Management Plan. Said Management Plan shall specifically allow the construction of a single office/residence for a property caretaker which shall not exceed a building footprint of 1,500 square feet.
- b. Roads and Trails. Existing trails may be maintained or improved but may not be widened, lengthened, or relocated without the prior written approval of the District. Unpaved paths or foot trails may be established in the Recreation Area for recreational uses. No other roads or other rights of way may be established or constructed on the Protected Property without the prior written approval of the District and in accordance with the terms of a Management Plan.
- c. Fences. Fences may be constructed, maintained, improved, replaced or removed within the Recreation Area.
- d. Docks. Pursuant to the Management Plan, docks are permitted within the dock envelope identified in Exhibit B.
- e. Additional Structures and Improvements. No temporary or permanent buildings, structures, roads or other improvements of any kind may be placed or constructed on the entire Protected Property except as specifically set forth in this Section and as consistent with the terms of a Management Plan.
- f. Vehicles. Within the Recreation Area there shall be no operation of mountain or other bicycles, dune buggies, motorcycles, all-terrain vehicles, snow mobiles, hang gliders, aircraft, or any other types of motorized vehicles. This prohibition shall also not apply to the use of vehicles in the Recreation Area by the City or its designees as necessary for park operations and maintenance. Nor shall this prohibition apply to the use of emergency vehicles for matters of safety. This provision shall also not apply to the use of personal motorized handicapped vehicles, such as those that would be considered durable medical equipment, on all weather trails as may be permitted in a Management Plan. A golf cart-type vehicle may be operated for handicapped access only on the concrete trail referred to in 4.4 b. above and noted on Exhibit B, pursuant to any limitations set forth in the Management Plan.

- g. Notice. Orono will give the District notice as set out in Section 9.8 of this Easement before beginning any construction activities permitted under this Section 4.3.

#### 4.4 Permitted and Prohibited Uses in Natural Area.

- a. Agricultural Use. No agricultural use is allowed within the Natural Area. This includes tilling, plowing, commercial cultivation of row crops, livestock or horse grazing or production, haying, feedlots, or gardening. Grazing animals may be used as a habitat management tool if pursuant to a property Management Plan approved in writing by the District.
- b. Roads and Trails. If pursuant to a Management Plan, unpaved paths or foot trails may be established and maintained in the Natural Area for non-motorized recreational uses in a manner that does not negatively impact the Conservation Values of the Protected Property. Pursuant to a Management Plan, selected trails may be constructed of crushed limestone or similar all weather surface capable of supporting handicapped access. As existing paved trails deteriorate, Orono may replace the existing surface material with non-bituminous materials such as crushed limestone or similar all weather surface capable of supporting handicapped access. The existing partial concrete sidewalk/trail leading from the planned dock area up a steep slope to the pavilion building, as noted on Exhibit B, may be reconstructed and/or expanded within the existing trail corridor with concrete or similar material to prevent erosion on the steep slope and/or to provide handicap access to the pavilion building. No other roads or other rights of way may be established or constructed within the Natural Area.
- c. Fences. Within the Natural Area, fences may be constructed and maintained, improved, replaced or removed to mark boundaries, to secure the Protected Property, or as needed in carrying out activities permitted by Section 4.2 of this Easement. Notwithstanding, no fences may be located or constructed in a manner that interferes with the use of the Protected Property as habitat for flora and fauna.
- d. Structures and Improvements. With the exception of fences pursuant to paragraph 4.2.c above, and utilities pursuant to paragraph 5.3 below, no temporary or permanent buildings, structures, roads, rights of way, parking areas, effectively impervious surfaces, or other improvements of any kind may be placed or constructed in the Natural Area.
- e. Vegetation Management. Within the Natural Area, the Protected Property may be used to maintain, restore or enhance habitat for wildlife and native biological communities in accordance with a Management Plan. Orono may remove timber and other wood products and otherwise manage the vegetation within the Natural Area in accordance with said Management Plan, except that such approval shall not be required in the case of emergency fire breaks.

Beyond the foregoing, there shall be no removal, cutting, pruning, trimming or mowing of any trees or other vegetation, living or dead, and no introduction of non-native species is allowed within the Natural Area except as follows:

- i. In conjunction with a Management Plan as specifically provided for above;
  - ii. As reasonably required, subject to District prior and written approval per Section 9.8 of this Easement, to prevent or control insects, noxious weeds, invasive vegetation, or disease. However, said Management Plan shall not be required in the event of emergency situations; or
  - iii. As reasonably required to prevent fire, personal injury, or property damage.
- f. Topography and Surface Alteration. No alteration or change in the topography of the surface of the Protected Property is allowed within the Natural Area. This includes no ditching, draining, diking or filling and no excavation, dredging, mining or drilling, or removal of soil, sand, gravel, rock, minerals, or other materials, except to the degree absolutely necessary in order to effect a use permitted under Section 4.2 of this Easement. Notwithstanding, with prior written approval of the City and the District, archeological digs may occur in a manner that does not impair the Conservation Values.
- g. Vehicles. Within the Natural Area there shall be no operation of mountain or other bicycles, dune buggies, motorcycles, all-terrain vehicles, snow mobiles, hang gliders, aircraft, or any other types of motorized vehicles. This prohibition shall also not apply to the use of vehicles for habitat restoration and property management subject to a Management Plan. Nor shall this prohibition apply to the use of emergency vehicles for matters of safety. This provision shall also not apply to the use of personal motorized handicapped vehicles, such as those that would be considered durable medical equipment, on all weather trails as may be permitted in a Management Plan. A golf cart-type vehicle may be operated for handicapped access only on the concrete trail referred to in 4.4 b. above and noted on Exhibit B, pursuant to any limitations set forth in the Management Plan.
- h. Chemicals. Except as specifically authorized for habitat restoration and management in a Management Plan, within the Natural Area there shall be no use of pesticides or biocides, including but not limited to insecticides, fungicides, rodenticides, and herbicides, and no use of devices commonly known as "bug-zappers".
- i. Notice. Orono will give the District notice as set out in Section 9.8 of this Easement before beginning any construction activities permitted under this Section 4.4.

5. **RESERVED RIGHTS.** Orono retains all rights associated with Ownership and use of the Protected Property that are not expressly restricted or prohibited by this Easement. Orono may not, however, exercise these rights in a manner that would adversely impact the Conservation Values of the Protected Property. Additionally, Orono must give notice to the District before exercising any reserved right that might have an adverse impact on the Conservation Values associated with the Protected Property.

Without limiting the generality of the above, the following rights are expressly reserved throughout the entirety of the Protected Property and Orono may use and allow others to use the Protected Property as enumerated immediately below. Additional reserved rights are further enumerated by Easement Area in Section 4 of this Easement.

- 5.1. Right to Convey. Orono may sell, give, lease, bequeath, devise, mortgage or otherwise encumber or convey the Protected Property, provided written notice is provided to the District in accordance with Section 9.8 of this Easement.
- a. Any conveyance or encumbrance of the Protected Property is subject to this Easement.
  - b. Orono will reference or insert the terms of this Easement in any deed or other document by which Orono conveys title to all or a portion of the Protected Property. Orono will also specify to what extent reserved rights have been exercised, if at all, and are no longer available for use by the new Orono and which reserved rights are specifically allocated to the property being conveyed in accordance with other provisions of this Easement.

Orono will notify the District of any conveyance within fifteen (15) days after closing and will provide the District with the name and address of the new Orono and a copy of the deed transferring title.

The enforceability or validity of this Easement will not be impaired or limited by any failure of Orono to comply with this subparagraph.

- 5.2. Recreational and Educational Uses. The Protected Property may be used for hiking, cross-country skiing, camping, nature observation or study, and other similar low impact, non-motorized, recreational and educational programs or activities.
- 5.3. Utilities. Utility systems and facilities may be installed, maintained, repaired, extended and replaced within the Protected Property only to serve uses and activities on the Protected Property specifically permitted by this Easement. This includes, without limitation, all systems and facilities necessary to provide power, fuel, water, waste disposal and communication.

The location of all wells and septic systems, including future replacement wells and septic systems, shall require the approval of the District, said approval not to

be unreasonably withheld. Utility systems and facilities shall be installed or constructed with minimal grading and disturbance to vegetation. Following installation or construction, the surface shall be timely restored to a condition consistent with the conservation purposes of this Easement.

6. **DISTRICT'S RIGHTS AND REMEDIES.** In order to accomplish the purposes of this Easement, the District has the following rights and remedies. The District may not; however, exercise these rights in a manner that would adversely impact the Conservation Values of the Protected Property.

6.1. Preserve and Protect Conservation Values. The right to preserve and protect the conservation values of the Protected Property through the rights and remedies set forth below.

6.2. Right to Enter. The District, its agents, and authorized representatives, have the right to enter the Protected Property at reasonable times and in a reasonable manner for the following purposes:

- a. To inspect the Protected Property, to monitor compliance with the terms of this Easement, and to enforce the terms of this Easement.
- b. To obtain evidence for use in seeking judicial or other enforcement of this Easement.
- c. To survey or otherwise mark the boundaries of all or part of the Protected Property. Any survey or boundary demarcation completed under this provision will be at the District's expense.
- d. To make scientific and educational observations and studies and taking samples in such a manner as will not disturb the quiet enjoyment of the Protected Property by Orono.
- e. The right to manage the wetlands, shoreland, and waterbodies on the Protected Property subject to applicable laws and regulations. Said management may consist of, but not be limited to: vegetative maintenance and management and hydrologic modifications. The District shall provide Orono with advance notice of any need to utilize heavy equipment for such management.

In addition to any rights of entry it has under statute, the District and its authorized agents shall have, in perpetuity, the right at reasonable times to cross and recross, on foot or by vehicle, and to transport equipment across the Protected Property or otherwise to exercise any right or responsibility under this Easement. The District will pay for or repair any actual damage to the Protected Property caused by its exercise of rights under this Section.

6.3. Right of Enforcement. The District has the right to prevent or remedy violations of this Easement through appropriate judicial action brought against Orono or other responsible party in any court of competent jurisdiction.

- a. Notice. The District may not initiate judicial action until Orono has been given notice of the violation, or threatened violation, of this Easement and the time in which to correct the situation has been provided and has elapsed. This provision shall not apply if, in the sole discretion of the District, immediate judicial action is necessary to prevent or mitigate significant damage to the Protected Property or if reasonable, good faith efforts to notify Orono are unsuccessful.
- b. Remedies. Remedies available to the District in enforcing this Easement include the right to request temporary or permanent injunctive relief for any violation or threatened violation of this Easement, to require restoration of the Protected Property to its condition at the time of this conveyance or as otherwise necessitated by a violation of this Easement, to seek specific performance or declaratory relief and to recover damages resulting from a violation of this Easement or injury to any Conservation Values protected by this Easement.

These remedies are cumulative and are available without requiring the District to prove actual damage to the Conservation Values protected by this Easement. The District and Orono also recognize that restoration, regardless of cost, may be the only adequate remedy for certain violations of this Easement.

The District is entitled to seek expedited relief, ex parte if necessary, and shall not be required to post any bond applicable to a petition for such relief.

Notwithstanding Section 6.2.c, if such court determines that Orono has failed to comply with this Conservation Easement, Orono shall reimburse District for any reasonable costs of enforcement, including costs of restoration, court costs, in addition to any other payments ordered by such court. If such court determines that Orono has not failed to comply with this Conservation Easement, District shall reimburse Orono for any court costs, in addition to any other payments ordered by such court.

- c. Discretionary Enforcement. Enforcement of the terms of this Easement is solely at the discretion of the District. The District does not waive or forfeit the right to take any action necessary to assure compliance with the terms of this Easement by any delay or prior failure of the District in discovering a violation or initiating enforcement proceedings.
- d. Acts Beyond Orono's Control. The District may not bring any action against Orono for any change to the Protected Property resulting from causes beyond

Orono's control, such as changes caused by fire, flood, storm, natural deterioration or the unauthorized acts of persons other than Orono or Orono's agents, employees or contractors or resulting from reasonable actions taken in good faith under emergency conditions to prevent or mitigate damage resulting from such causes.

- e. **Right to Report.** In addition to other remedies, the District has the right to report any environmental concerns or conditions or any actual or potential violations of any environmental laws to appropriate regulatory agencies.

6.4. **Signs.** The District has the right to place on the Protected Property signs that identify the land as protected by this Easement and/or advise of limitations on public use in accordance with applicable law. The number and location of any signs are subject to Orono's approval, such approval shall not be unreasonably withheld.

6.5. **Limitation on Rights.** Nothing in this Easement gives the District the right or ability to exercise physical control over day-to-day operations on the Protected Property or to become involved in management decisions involving the use, handling or disposal of hazardous substances in day-to-day operations or to otherwise become an operator of the Protected Property within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act.

7. **PUBLIC ACCESS.** The Protected Property shall be open to the general public on a non-discriminatory basis for public uses consistent with this Conservation Easement. Orono shall remain responsible for the management and maintenance of the Protected Property and public use thereof, and in its discretion may prescribe terms for the times, locations and conditions of public use, provided they are consistent with this Conservation Easement.

8. **DOCUMENTATION.** The current uses of the Protected Property, the state of any existing improvements, and the specific Conservation Values of the Protected Property that are briefly described in this Easement are more fully described in a property report, titled Easement Documentation Report – Big Island, City of Orono and dated February 8, 2006, on file at the office of the District. Orono and the District acknowledge that this property report accurately represents the condition of the Protected Property at the time of this conveyance and may be used by the District in monitoring future uses of the Protected Property, in documenting compliance with the terms of this Easement and in any enforcement proceeding. This property report, however, is not intended to preclude the use of other information and evidence to establish the present condition of the Protected Property in the event of a future controversy.

9. **GENERAL PROVISIONS.**

9.1. **Assignment.** If the District finds that it has become impractical or impossible to hold, monitor, and/or enforce this Easement, this Easement may be assigned or

transferred by the District with concurrence of the City, which shall not be unreasonably withheld, or through court order. Such assignment or transfer shall only be to a conservation organization which is a qualified organization under Section 170(h) of the Internal Revenue Code and related regulations and which 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 will inform Orono in writing of a potential interest in assignment at least 90 days before an assignment is effective, and thereafter will meet with Orono at the request of either party to discuss issues related thereto. Orono will communicate its decision on concurrence to the District within 45 days of written notice from the District of an intent to assign that includes the identity and address of the assignee. Orono's failure to respond within 45 days will be deemed concurrence.

- 9.2. Amendment. Under appropriate circumstances, this Easement may be modified or amended. However, no amendment or modification will be allowed if, in the sole and exclusive judgment of the District, it: (i) does not further the purposes of this Easement, (ii) will adversely impact the Conservation Values protected by this Easement, (iii) affects the perpetual duration of the Easement, or (iv) 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 and recorded in the same manner as this Easement.

- 9.3. Extinguishment. This Easement may be extinguished 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 Protected Property makes the continued use of the Protected Property for the conservation purposes set out above impossible or impractical or (ii) pursuant to the proper exercise of the power of eminent domain.
- b. Orono recognizes that uses of the Protected Property prohibited by this Easement may, in the future, become more economically viable than those uses permitted by the Easement. Orono also recognizes that neighboring properties may, in the future, be put entirely to uses not permitted on the Protected Property by this Easement.

Orono and the District believe that such changes will increase the public benefit provided by this Easement. 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.

- 9.4. Proceeds. Orono hereby agrees that at the time of the conveyance of this Easement to the District, this Easement gives rise to a real property right, immediately vested in the District, with a fair market value of said Easement as of the date of the conveyance that is at least equal to the proportionate value that this Easement at the time of the conveyance bears to the fair market value of the Protected Property as a whole at that time. If this Easement is extinguished or terminated in whole or in part, the District is entitled to a portion of any proceeds of a sale, exchange or involuntary conversion in an amount determined on the basis of the proportion of value that the easement bears to the remaining fee interest at the time the easement is conveyed. The District shall use its share of any proceeds in a manner consistent with the conservation purposes of this Easement.
- 9.5. Warranties. Orono represents and warrants as follows:
- a. Orono is the sole Orono of the Protected Property in fee simple and has the right and ability to convey this Easement to the District.
  - b. The Protected Property is free and clear of all encumbrances other than those subordinated to this Easement, including but not limited to mortgages.
  - c. Orono has no actual knowledge of any use or release of hazardous waste or hazardous substances on the Protected Property for which a landowner may be subject to liability under the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, or Minnesota Statutes 115B.02 (collectively referred to herein as "Hazardous Substances") except as may be indicated in the Phase I Environmental Site Assessment prepared for the Big Island Board of Governors by Braun Intertec Corporation dated February 2, 2005, attached as Exhibit C to the Purchase Agreement governing this transaction. Orono warrants that it has no actual knowledge of any underground storage tanks located on the Protected Property. Orono will unconditionally defend, indemnify and hold the District harmless from and against and shall reimburse the District with respect to any and all claims, demands, causes of action, loss, damage, liabilities, costs and expenses (including attorneys' fees and costs) asserted against or incurred by the District by reason of or relating to the presence of Hazardous Substances on the Protected Property.
- 9.6. Real Estate Taxes. Orono shall pay all real estate taxes and assessments levied against the Protected Property, including any levied against the interest of the District created by this Easement. The District may, at its discretion, pay any outstanding taxes or assessments and shall then be entitled to reimbursement from Orono.

If Orono becomes delinquent in payment of said taxes or assessments, such that a lien created against the land is to be executed upon, the District, at its option, shall, after written notice to Orono, have the right to purchase or acquire Orono's interest in said Protected Property by paying funds to discharge said lien or delinquent taxes or assessments, or to take such other actions as may be necessary to protect the District's interest in the Protected Property and/or to assure the continued enforceability of this Conservation Easement.

- 9.7. Ownership Costs and Liabilities. Orono 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, including the maintenance of adequate comprehensive general liability insurance coverage. The preceding sentence shall not apply to any improvements constructed by the District under Section 6.2. Orono shall be responsible for the day-to-day management and maintenance of the Protected Property with respect to, but not limited to, its public use. Orono agrees to release, hold harmless, defend and indemnify District from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees which District may suffer or incur as a result of or arising out of the activities of Orono on the Protected Property. District agrees to release, hold harmless, defend and indemnify Orono from any and all liabilities including, but not limited to, injury, losses, damages, judgments, costs, expenses and fees which Orono may suffer or incur as a result of or arising out of the activities of District on the Protected Property. Orono shall keep the District's interest in the Protected Property free of any liens arising out of any work performed for, materials furnished to or obligations incurred by Orono. Nothing in this paragraph 9.7 of this Easement creates any right in any third party, or waives or otherwise affects any protections or immunities of Orono or the District with respect to any claims of third parties.

- 9.8. 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 personally 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 Orono:  
City Administrator  
City of Orono  
2750 Kelley Parkway  
Crystal Bay, MN 55323

To the District:  
Minnehaha Creek Watershed District  
18202 Minnetonka Boulevard  
Deephaven, MN 55391

- b. Timing. Unless otherwise specified in this Easement, any required notice or request for approval must be delivered at least 30 days prior to the date proposed for initiating the activity in question.
- c. Content. The notice or request for approval must include sufficient information to allow the District to make an informed decision on whether any proposed activity is consistent with the terms and purposes of this Easement. At a minimum this would include (i) the location, nature and scope of the proposed activity, (ii) the proposed use, design and location of any building, structure or improvement and (iii) the potential impact on the Conservation Values of the Protected Property.
- d. Approval. District's consent for activities otherwise prohibited under Sections 3 and/or 4 above, or for any activities requiring District's consent under this Easement, may be given under the following conditions and circumstances. If, owing to unforeseen or changed circumstances, any of the activities listed in Sections 3 and/or 4 above are deemed desirable by Orono and District, District may, in its sole discretion, give permission for such activities, subject to the limitations herein. District may give its permission only if it determines, in its sole discretion, that such activities (1) do not violate the purpose of this Conservation Easement and (2) either enhance or do not impair any significant conservation interests associated with the Protected Property. The District may condition its approval on Orono's acceptance of modifications, which would, in the District's judgment, make the proposed activity consistent with the Easement or otherwise meet any concerns. Notwithstanding the foregoing, the District and Orono have no right or power to agree to any activities that would result in the termination of this Conservation Easement or to allow any residential, commercial or industrial structures or any commercial or industrial activities not provided for above.

- 9.9. Binding Effect. This Easement shall run with and burden the Protected Property in perpetuity. The terms of this Easement are binding and enforceable against the current owner of the Protected Property, 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. The fair market value of the District's interest is at least equal to the proportionate value that the easement at the time of the donation bears to the value of the unrestricted property as a whole at the time of the conveyance of the easement, and this proportionate value shall remain constant.

- 9.10. Subsequent Transfers. Orono agrees that the terms, conditions, restrictions and purposes of this grant or reference thereto will be inserted by Orono in any subsequent deed or other legal instrument by which Orono divests either the fee

simple title or possessory interest in the Protected Property; and Orono further agrees to notify District of any pending transfer at least thirty (30) days in advance.

- 9.11. Merger. Orono and District agree that the terms of this Conservation Easement shall survive any merger of the fee and easement interest in the Protected Property.
- 9.12. Definitions. Unless the context requires otherwise, the term "Orono" includes, jointly and severally, the current owner or owners of the Protected Property identified above and their personal representatives, heirs, successors and assigns in title to the Protected Property. The term "District" includes the Minnehaha Creek Watershed District and its successors or assigns to its interest in this Easement.
- 9.13. 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.
- 9.14. Recording. The District will record this Easement in a timely manner in the official records for the county in which the Protected Property is located. The District may re-record this Easement or any other documents necessary to protect its rights under this Easement or to assure the perpetual enforceability of this Easement. Orono will cooperate as necessary to accomplish and effectuate acts of recordation under this Section.
- 9.15. 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.
- 9.16. Permits and Applicable Laws. Orono and District acknowledge that the exercise by Orono of any reserved right enumerated herein or uses of the Protected Property even if consistent with the conservation purposes of this Easement shall not relieve Orono from complying with or obtaining any permit from any applicable governmental authority, including the District, prior to the exercise thereof.
- 9.17. 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.

- 9.18. Captions. The captions herein have been inserted solely for convenience of reference and are not a part of this Conservation Easement and shall have no effect upon construction or interpretation.
- 9.19. Additional Documents. Orono agrees to execute or provide any additional documents reasonably needed by the District to carry out in perpetuity the provisions and the intent of this Easement, including, but not limited to any documents needed to correct any legal description or title matter or to comply with any federal, state, or local law, rule or regulation.
- 9.20. Entire Agreement. This document sets forth the entire agreement of the parties with respect this Easement and supersedes all prior discussions or understandings.

IN WITNESS WHEREOF, Orono has voluntarily executed this Conservation Easement on the 23<sup>rd</sup> day of March, 2006.

ORONO:



Barbara Peterson, Mayor

STATE OF MINNESOTA    )  
  ) ss  
COUNTY OF Hennepin  )

The foregoing instrument was acknowledged before me this 23<sup>rd</sup> day of March, 2006, by Barbara Peterson, the Mayor of the City of Orono.



Notary Public  
My Commission Expires: Jan. 31, 2010



ACCEPTANCE

The Minnehaha Creek Watershed District hereby accepts the foregoing Conservation Easement this 27 day of March, 2006.

MINNEHAHA CREEK WATERSHED DISTRICT

By *[Signature]*  
L. Eric Evenson, District Administrator

STATE OF MINNESOTA     )  
   ) SS  
COUNTY OF Hennepin     )

The foregoing instrument was acknowledged before me this 27<sup>th</sup> day of March, 2006, by L. Eric Evenson, the District Administrator of the Minnehaha Creek Watershed District, a governmental body created under Minnesota Statutes Chapter 103D, on behalf of said governmental body.

*[Signature]*  
Notary Public  
My Commission Expires:

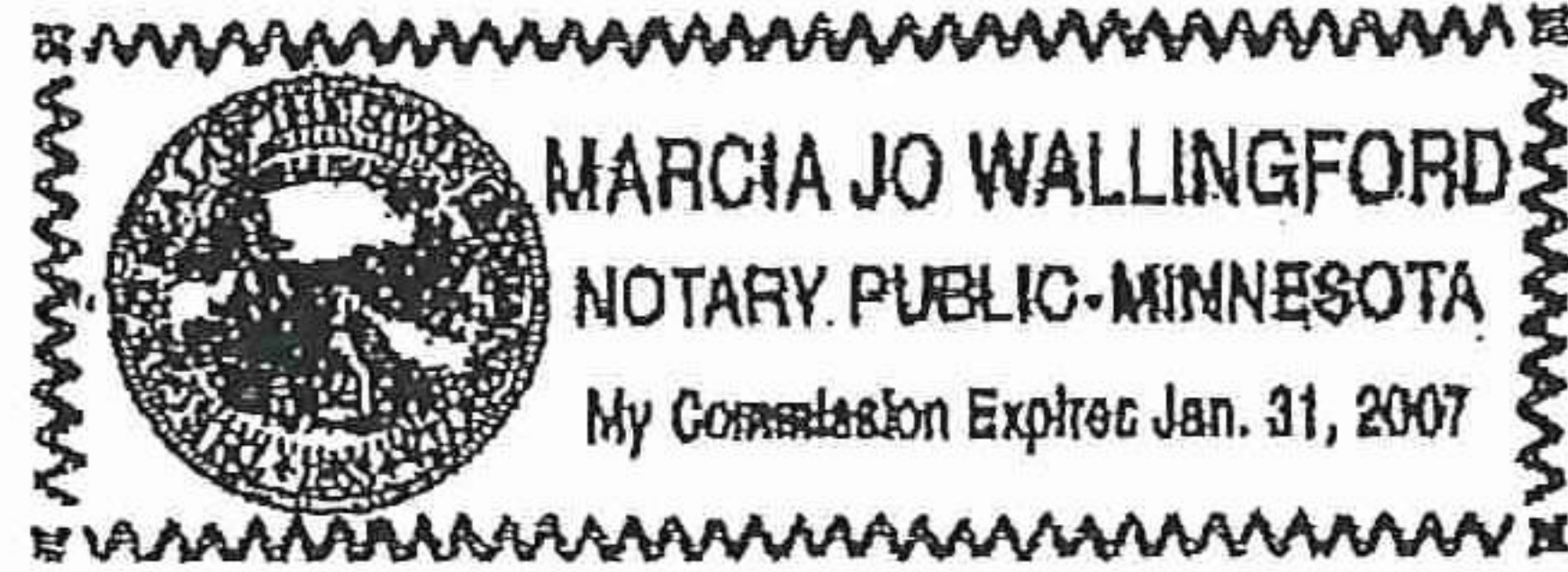


Exhibit A  
Property Description

Government Lot One (1), Section Fourteen (14), Township One Hundred Seventeen (117), Range Twenty-three (23);  
Government Lot Two (2), Section Twenty-three (23); Township One Hundred Seventeen (117) Range Twenty-three (23); and that part of Government Lot Three (3), Section Twenty-Three (23), Township One Hundred Seventeen (117), Range Twenty-three (23), commencing at the Northeast corner of said Government Lot Three (3), Section Twenty-three (23); thence Southwesterly along the lake shore to the Northeast corner of Lot A, Morse Island Park; thence South 350 feet to Lake Minnetonka; thence East along the shore of Lake Minnetonka to the East line of said Lot Three (3); thence North to the place of beginning.

Hennepin County, Minnesota.

Abstract Property.

Having Property Identification Numbers:

PID 14-117-23-34-0001 (approx. 46.123 acres)

PID 23-117-23-21-0001 (approx. 5.668 acres)

PID 23-117-23-22-0001 (approx. 4.67 acres)

Exhibit B  
Property Map



**Schoell Madison**  
 Professional Surveyors  
 1100 University Ave. S.  
 Minneapolis, MN 55415  
 Phone: 612-338-1100  
 Fax: 612-338-1101  
 E-mail: info@schoellmadison.com

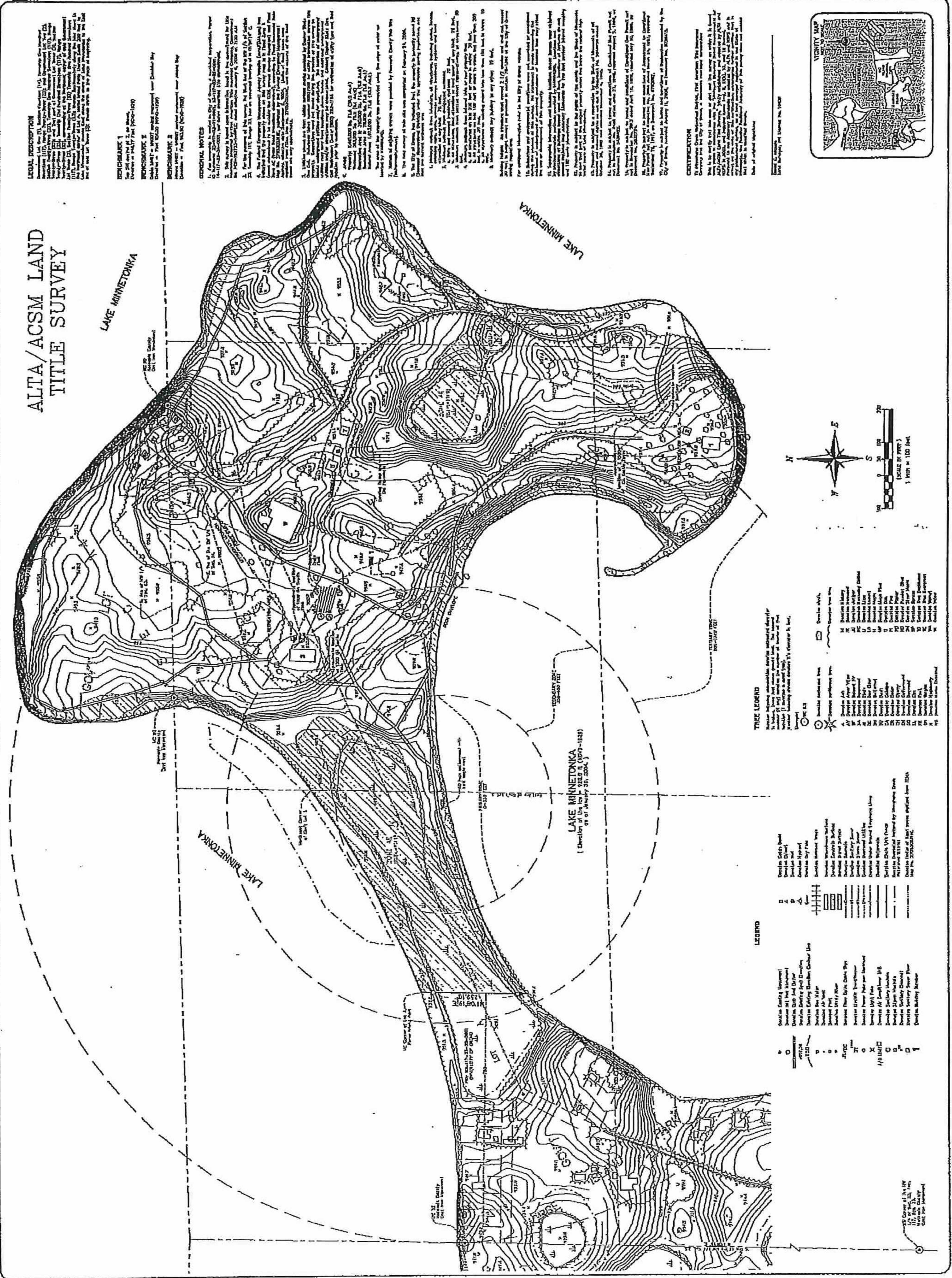
NO.	PART	DESCRIPTION
1	1	17
2	2	18
3	3	19
4	4	20
5	5	21
6	6	22
7	7	23
8	8	24
9	9	25
10	10	26
11	11	27
12	12	28
13	13	29
14	14	30
15	15	31
16	16	32
17	17	33
18	18	34
19	19	35
20	20	36
21	21	37
22	22	38
23	23	39
24	24	40
25	25	41
26	26	42
27	27	43
28	28	44
29	29	45
30	30	46
31	31	47
32	32	48
33	33	49
34	34	50
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36	36	52
37	37	53
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68	68	84
69	69	85
70	70	86
71	71	87
72	72	88
73	73	89
74	74	90
75	75	91
76	76	92
77	77	93
78	78	94
79	79	95
80	80	96
81	81	97
82	82	98
83	83	99
84	84	100

JOB BOOK NUMBER: (144-99)  
 FIELD BOOK: 605 PAGE: 64  
 This drawing has been checked and prepared by:  
 Date: \_\_\_\_\_  
 Checked by:  
 Date: \_\_\_\_\_

**CERTIFICATION**  
 I hereby certify that the survey was made by the State of Minnesota.  
 I am a duly Licensed Professional Surveyor.  
 My License No. is 12345  
 Date: \_\_\_\_\_

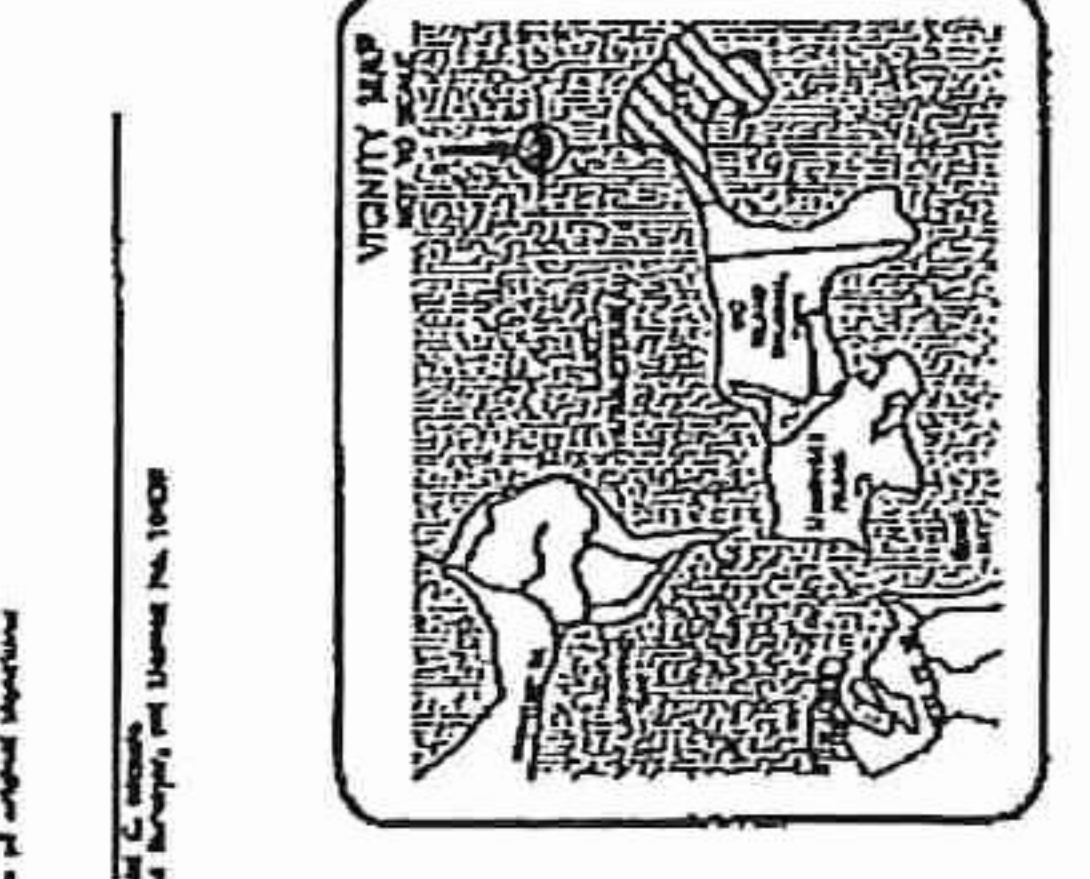
**LOCATION**  
 Big Island  
 Lake Minnetonka  
 Minnesota

**CLIENT**  
 Minnetonka Creek  
 Watershed District  
 SHEET NO. 1 OF 1  
 S.W. PROJECT NO. 64110-001



# ALTA/ACSM LAND TITLE SURVEY

LAKE MINNETONKA



VICINITY MAP  
 Lake Minnetonka, Minnesota  
 Scale: 1 inch = 100 feet

**GENERAL NOTES**  
 1. This survey was made in accordance with the provisions of the Minnesota Land Surveying Act, Chapter 360, Minnesota Statutes.  
 2. The survey was made by the use of the following instruments and methods:  
 a. A Leica Total Station Model 1200, with a distance measurement accuracy of  $\pm 2$  mm + 2 ppm.  
 b. A Leica Auto Level Model 1100, with a leveling accuracy of  $\pm 1$  mm + 1 ppm.  
 c. A Leica GPS Receiver Model 1200, with a horizontal accuracy of  $\pm 2$  cm + 2 ppm.  
 3. The survey was made on the day of the week of \_\_\_\_\_, 2004.  
 4. The survey was made at a temperature of \_\_\_\_\_ degrees Fahrenheit.  
 5. The survey was made at a pressure of \_\_\_\_\_ mm Hg.  
 6. The survey was made at a humidity of \_\_\_\_\_ percent.  
 7. The survey was made at a wind speed of \_\_\_\_\_ mph.  
 8. The survey was made at a visibility of \_\_\_\_\_ miles.  
 9. The survey was made at a time of day of \_\_\_\_\_.  
 10. The survey was made at a time of year of \_\_\_\_\_.

**REVISIONS**

**LEGEND**

**THREE LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

**LEGEND**

Exhibit C  
Existing Improvements

Improvement #	Description	Retention Plan
1	South Pavilion	Keep
2	Bathroom	Keep
3	North Pavilion	Keep
4	Office	Keep
5	Barn 1	Keep only 1 of three sheds – which one to be determined
6	Barn 2	Keep only 1 of three sheds – which one to be determined
7	Barn 3	Keep only 1 of three sheds – which one to be determined
8	Temporary Trailer	Keep – consider relocating
9	Mess Hall	Remove
10	Cottage	Remove
11	Cottage	Remove
12	Cottage	Remove