

MEETING DATE: May 26, 2016

TITLE: Approval of Agreement with US Homes, DBA Lennar, for Wetland Restoration in Victoria, MN.

RESOLUTION NUMBER: 16-054

PREPARED BY: Anna Brown

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REVIEWED BY: Administrator Counsel Program Mgr. (Name): James Wisker
 Board Committee Engineer Other

WORKSHOP ACTION:

<input type="checkbox"/> Advance to Board mtg. Consent Agenda.	<input type="checkbox"/> Advance to Board meeting for discussion prior to action.
<input type="checkbox"/> Refer to a future workshop (date): _____	<input type="checkbox"/> Refer to taskforce or committee (date): _____
<input type="checkbox"/> Return to staff for additional work.	<input type="checkbox"/> No further action requested.
<input checked="" type="checkbox"/> Other (specify): _Final approval at May 26, 2016 Board meeting	

PURPOSE or ACTION REQUESTED:

Authorization to enter into an agreement with Lennar Corporation for wetland restoration to fulfill wetland replacement under permit 15-266.

PROJECT/PROGRAM LOCATION:

The property is located along the southern boundary of the City of Victoria north of Marsh Lake Rd between Victoria elementary and the Wassermann woods development (PID 650260300)

PROJECT TIMELINE:

Agreement Execution: May 26, 2016
Replacement Plan submittal for agency review: June 10, 2016
Notice period complete and approvals reached: July 1, 2016

PROJECT/PROGRAM COST:

Fund name and number: Six Mile Creek 300-3139
Current budget: \$175,000
Expenditures to date: \$31,000
Requested amount of funding: \$0

PAST BOARD ACTIONS:

**DRAFT for discussion purposes only and subject to Board approval and the availability of funds.
Resolutions are not final until approved by the Board and signed by the Board Secretary.**

- August 27, 2015 Approval of permit 15-266 for Laketown 9th Development in Victoria and authorization, through motion, to work with Lennar Corporation to develop a partnership for wetland restoration to meet replacement plan requirements for the development

SUMMARY:

The 2007 Comprehensive Plan identified the wetland complexes along Six Mile Creek between Marsh and Wassermann lakes as opportunities for restoration to reduce phosphorus pollution. Wassermann Lake, which receives inflow from Marsh Lake, is on the State List of Impaired Waters due to excessive nutrients. Two capital improvement projects were identified in the Marsh-Wassermann corridor which were not advanced beyond feasibility.

Since the 2007 plan, the District has achieved significant natural resource improvements through partnership and strategic focus in the Urban Corridor. This approach was memorialized by the District Board of Managers in the policy framework *In Pursuit of a Balanced Urban Ecology*. This policy approach calls for the integration of land-use and water planning through partnerships, flexibility and innovation, and through increased geographic focus in areas of high need and opportunity. One mechanism of integration is early involvement in the development process. In March of 2015, the City of Victoria and the District executed a Memorandum of Understanding (MOU) which identifies planning and regulatory coordination to support and foster integrated water and natural resources management into development planning.

Through advanced coordination with the City of Victoria and Lennar Corporation under the framework of the recently adopted MOU and Board policy, staff identified an opportunity to achieve restoration of 12 acres of wetland in the City of Victoria that both fulfills Lennar's regulatory obligation and achieves the previously contemplated capital improvement project.

In the spring of 2015 Lennar submitted a permit application to the District to complete a 99 unit residential development on 164 acres. The development as proposed includes the improvement of an old farm road on the southern end of the property which fulfills the City of Victoria's connectivity plans. The road as proposed would impact .87 acres of wetland and would therefore require mitigation under the Wetland Conservation Act (WCA). Lennar initially proposed fulfilling its regulatory obligation through the purchase of bank credits. Given that the District does not have any wetland banks within its boundaries, the proposal would have resulted in a net loss of wetland acreage in the District.

Working in coordination with Victoria City staff and Lennar, the District identified an opportunity to restore 12 acres of wetland on an adjacent 59-acre parcel and an additional 5 acres of upland buffer as a project specific mitigation. The partnership will result in 6-8 acres of restored wetland beyond what is necessary to meet Lennar's regulatory requirements. The approach has been met with substantial support from other regulatory agencies, receiving letters of support from the Department of Natural Resources, the US Army Corps of Engineers, the Carver County Soil and Water Conservation District, the MN Board of Water and Soil Resources, and the City of Victoria.

Under the agreement framework, the District is responsible for acquiring property rights necessary to complete the restoration and for performing maintenance and monitoring requirements under WCA through the five year establishment period. Lennar is responsible for completing the replacement plan application, including the outlet and restoration design, and for construction. Preliminary feasibility has already been completed by the District.

Next Steps:

On April 28, 2016 the Board of Managers authorized staff to negotiate with the landowners to purchase an easement over the wetland and upland buffer area necessary to fulfill the District's obligation under this agreement. The District has developed draft terms to be approved by the landowners and to be submitted with the replacement plan application. As the replacement plan is being reviewed, staff will continue to work with the landowners towards closing on the property rights. The Board of Managers will review the Purchase Agreement for easement acquisition at a subsequent meeting.

RESOLUTION

RESOLUTION NUMBER: 16-054

TITLE: **Approval of Agreement with US Homes, DBA Lennar, for Wetland Restoration in Victoria, MN.**

WHEREAS, the Minnehaha Creek Watershed District Board of Managers has adopted a balanced urban ecology policy that recognizes the multi-sector value of integrating natural systems and land use planning; and

WHEREAS, this approach incorporates geographic focus, facilitating a greater understanding of the threats and opportunities within a system and allowing the District to develop relationships with municipalities and other partners; and

WHEREAS, pursuant to Resolution 14-047 the MCWD Board of Managers has identified the Six Mile Creek subwatershed as a priority area for focusing District planning activities and coordination efforts with subwatershed partners; and

WHEREAS, the District recognizes that, through partnership, the District can achieve outcomes greater than those achieved through regulatory compliance enforcement alone; and

WHEREAS, on March 26, 2015 the Board authorized the District to enter a Memorandum of Understanding with the City of Victoria, outlining opportunities to collaborate and integrate mutual efforts in the realms of coordinated planning of local water and land use plans, assessment of specific water management issues, and coordinated regulatory review of water and land development; and

WHEREAS, Lennar Corporation submitted an application for Wetland Conservation Act sequencing, as well as the District's Erosion Control, Floodplain Alteration, Waterbody Crossing & Structures, and Stormwater Management Rules, for a 99 unit residential development in the City of Victoria in Carver County that would impact 0.87 acres (37,840 square feet) of one wetland in one location for the improvement of an existing farm road; and

WHEREAS, through advanced coordination between Lennar, the City of Victoria, and the District an alternative, preferred strategy to bank credit purchase was identified to meet USACE, MN DNR, WCA and MCWD wetland replacement requirements through a partnership with MCWD to restore degraded wetlands adjacent to the development, portions of which are on a property owned by a third party (the Property); and

WHEREAS, on August 27, 2015, the Board approved sequencing, as well as District erosion and sediment control, and, the following day, issued a notice of conditional approval of the floodplain alteration, waterbody crossing & structures, and stormwater management, pending the completion of a Wetland Conservation Act replacement plan for either banking or project-specific replacement; and

WHEREAS, the District has received letters of support from the US Army Corps of Engineers, the Board of Soil and Water Resources, the MN Department of Natural Resources, and the Carver County Soil and Water Conservation District for the proposed partnership approach to mitigation; and

WHEREAS, on August 27, 2015, the Board further authorized District staff to work with Lennar Corporation to develop an agreement to complete the wetland restoration as a project specific mitigation; and

WHEREAS, the parties to this agreement have assessed the value of the consideration to be exchanged under this agreement and each determines that the exchange of consideration, as follows, is fair and beneficial to its goals:

- Lennar will design and construct the restoration project;
- MCWD, based on feasibility assessment, will acquire the land-use rights necessary to complete the restoration project and perform the necessary maintenance, monitoring and reporting for the restoration project; and

WHEREAS, On April 28, 2016, the Board authorized staff to negotiate with the landowners for easement acquisition in order to fulfill a condition of the agreement herein, and have now reached substantial agreement on terms of the easement acquisition;

NOW, THEREFORE, BE IT RESOLVED that the Minnehaha Creek Watershed District Board of Managers authorize the Board President, on advice of counsel, to execute an agreement with US Homes, DBA Lennar, for wetland restoration in the City of Victoria, MN.

Resolution Number 16-054 was moved by Manager _____, seconded by Manager _____.
Motion to adopt the resolution ___ ayes, ___ nays, ___ abstentions. Date: _____.

Secretary Date: _____

DRAFT Agreement for Wetland Restoration Project

Minnehaha Creek Watershed District and US Home Corporation

This agreement is made by and between the Minnehaha Creek Watershed District, a special purposes unit of government with purposes and powers as set forth at Minnesota Statutes chapters 103B and 103D (hereinafter, MCWD), and US Home Corporation, DBA Lennar, a private Delaware corporation (hereinafter, US Home).

1 Recitals

- 1.1 This agreement is entered by the parties to advance mutual interests in development of the Six Mile Creek Subwatershed in a manner that protects and improves its uniquely valuable wetlands and other natural resources. These recitals are incorporated into the agreement and are binding terms thereof.
- 1.2 The MCWD Board of Managers has identified the Six Mile Creek subwatershed of the Minnehaha Creek watershed as a focal area for its water-resources protection efforts, and has identified retention and improvement of wetland functions and values in the subwatershed as an organizational goal and has established wetland restoration in the Wasserman Lake area as a project in its capital improvements program.
- 1.3 US Home owns property within the City of Victoria, Carver County, consisting of six contiguous parcels of record (The Laketown Property), as follows:

Property Identification Numbers

650250300
650231200
650260310
653170740
653150150
653170720

- 1.4 US Home has completed plans and designs for development for residential purposes of the Laketown Property (the Development) and has worked with MCWD staff to minimize impact from the Development to wetlands on the Laketown Property. US Home has secured final plat approval from the City of Victoria, and has received the necessary permit under the Erosion and Sediment Control Rule from MCWD's regulatory program for mass grading for the Development, and conditional approval under MCWD's Stormwater Management, Waterbody Crossings & Structures, and Floodplain Alteration and Wetland Protection rules. In addition, MCWD implements the state Wetland Conservation Act (WCA) for Victoria. In its capacity as WCA administrator, MCWD issued a wetland boundary and type determination for the Laketown Property in June 2015. MCWD also has determined that the plans for the Development avoid and, where unavoidable, properly minimize impacts to wetlands, and accordingly approved US Home's WCA sequencing application. The Development will

result in the filling or draining of 0.87 acres of wetland, and a plan for replacement of the wetland functions and values lost from the Development must be submitted to and approved by MCWD, acting in its regulatory capacity.

- 1.5 US Home has not yet applied for approval by the MCWD regulatory department of its wetland-replacement plan, but has determined – and MCWD’s regulatory program has informally concurred – that sufficient wetland replacement on the Laketown Property is not reasonably available, and US Home could potentially replace the .87 acres of wetlands loss caused by the Development via purchase of wetland bank credits. At the execution of this agreement, there are no available bank credits within the District boundaries.
- 1.6 US Home and MCWD have collaborated on the development of an alternative approach for replacement of the wetland impacts from the Development for purposes of compliance with WCA and state Public Water Wetland regulations as well as federal Clean Water Act requirements implicated by the Development. The collaboration prompted MCWD to prepare a feasibility study that determined that a limited area of degraded wetland could be restored on the Laketown Property and that sufficient additional acreage of wetlands likely could be restored on the adjacent 59-acre parcel in Victoria owned by James and Jane Ann Hesse (the Hesses) south and west of the Laketown Property (the Restoration Property, indexed in Carver County property records under property identification number 650260300) to meet US Home wetland-replacement requirements for the Development. The feasibility study found potential to restore wetland function and value that would create approximately 10 acres of wetland-replacement credit, an additional 2 acres of non-creditable restored wetland, and 5 acres of upland buffer (Attached to and incorporated into this agreement as a term thereof is a map designated as Exhibit A and showing the Laketown Property and the Restoration Property).
- 1.7 MCWD has entered into a memorandum of understanding with the Hesses and their land-disposition consultant Pentom Land Co., under which terms will be developed providing MCWD with the rights necessary to use the Restoration Property to restore wetlands and create upland buffer areas, some of which could be used to replace loss of wetland function and value from the Development and all of which would accrue to the benefit of MCWD’s water-resources conservation and improvement purposes in the Six Mile Creek subwatershed (the Restoration Project), preliminary plans and designs for which are attached and incorporated as Exhibit B.
- 1.8 “MCWD,” as used herein, refers to the Minnehaha Creek Watershed District acting in its entrepreneurial, project-development and -implementation capacity and does not refer to or express any obligation, commitment, determination or representation of the Minnehaha Creek Watershed District acting in its regulatory capacity, unless referenced as “MCWD regulatory”. The exercise of regulatory authority by the MCWD Board of Managers and, as delegated, MCWD staff may not be and is not modified in any way by this agreement.

- 1.9 The parties to this agreement have assessed the value of the consideration to be exchanged under this agreement and each determines that the exchange of consideration is fair and beneficial to its goals. The exchange is as follows:
- a US Home will design and construct the Restoration Project;
 - b MCWD has completed the feasibility study for the Restoration Project and will acquire the land-use rights necessary to complete the Restoration Project and perform the necessary maintenance, monitoring and reporting for the Restoration Project.

Accordingly, the parties agree that this agreement specifies an exchange of valuable consideration and is legally binding.

Agreement

MCWD and US Home enter this agreement to document their understanding as to the scope of the Project, assume legally binding commitments as to the tasks to be undertaken and costs to be paid by the parties, provide for contingencies in the event that expected results are not achieved despite the parties' good faith efforts and facilitate communication and cooperation to successfully complete the Project.

- 2 **Components of the Project.** The project is defined and specified for the purposes of this agreement and the parties' implementation thereof as consisting of the following:
- 2.1 Property Acquisition. MCWD will acquire from the Hesses, in coordination and with such support as may be provided by the City of Victoria, all land-use rights necessary for the Project.
 - 2.2 Restoration Design and Execution.
 - a *Design.* Site plans and design for the Restoration Project will include outlet-structure construction, site preparation, seeding, live planting and all other activities determined necessary to restore wetland and create upland buffer, as well as establishment of the necessary performance standards to achieve regulatory approval of the restored wetlands as replacing and mitigating for wetland losses on the Laketown Property (the Restoration Design). The Restoration Design will also include preparation of the site plans, drawings, instructions and construction specifications needed for integration into the construction documents for the Development. By action of its governing Board of Managers September 24, 2015, MCWD waived the relevant conflict-of-interest provision in its agreement engaging Wenck Associates Inc. (Wenck) as the MCWD engineer to allow Wenck to contract with US Home for the Restoration Design. The US Home-Wenck contract will provide for the development of final construction documents for construction of the Restoration Design for US Home and MCWD approval that include specifications designed to achieve the performance standards necessary to achieve compliance with regulatory requirements applicable to the Development.

- i The Project specifications will include a three-year warranty on plantings included in the Restoration Design and will require that the selected contractor extend the warranty to MCWD.
- ii MCWD staff will assist with the development of the Restoration Design as requested.
- b *Construction.* US Home will incorporate the Restoration Design as approved in accordance with paragraphs 2.2a and 3.1c and 3.2d into the construction documents for the Development. US Home will contract for the construction of the Restoration Project and will ensure that the Restoration Project is constructed so as to achieve a confirmation of acceptable construction completion from the MCWD regulatory program in accordance with Minnesota Rules 8420.0800, subpart 1.
- c *Construction oversight and management.* US Home will oversee construction of the Restoration Project, with informal assistance and technical support from MCWD as may be requested by US Home, except that US Home will notify MCWD of and secure MCWD's concurrence on any material construction change order to the Restoration Design.
- d On completion of construction of the Restoration Project, US Home will notify MCWD's regulatory program, submit as-built drawings of the constructed Restoration Project, and request confirmation of acceptable completion of construction and provide the necessary documentation and notice for such other regulatory approvals as may be determined to be necessary.
- e *Monitoring and maintenance, reporting.* On submission to MCWD of as-built drawings of the constructed Restoration Project by US Home and all necessary regulatory approval of completion of construction, MCWD will commence monitoring and maintenance of wetlands restored for the Project and reporting in accordance with Minnesota Rules 8420.0810. MCWD's responsibilities under this provision will commence when MCWD's regulatory program issues a confirmation of acceptable completion of construction or at the outset of the first full growing season following confirmation of acceptable completion of construction, whichever occurs first.
- f US Home will have first right to utilize replacement-wetland credits created by construction of the Restoration Design for purposes of compliance of the Development with applicable regulatory requirements.

2.3 Regulatory compliance facilitation. Without representation or warranty as to any regulatory approval secured or to be secured for purposes of the Development, MCWD has facilitated and will continue to facilitate compliance with wetlands-related regulatory requirements for the Development, including but not limited to:

- a Submitting the Project to and convening collaborative review of the Project by regulatory entities with jurisdiction over wetlands on the Laketown Property and Restoration Property for review;
- b Soliciting a waiver of jurisdiction by the state Department of Natural Resources to the MCWD regulatory program over replacement of impacts to public waters wetlands,

as defined in Minnesota Statutes chapter 103G and associated regulations, on the Laketown Property;

- c Assisting US Home's effort to secure the approval of the applicable regulatory authorities of the performance standards in the Restoration Design;
- d Communicating with regulatory entities as needed and requested to facilitate approval of the Project for purposes of compliance of the Development with applicable wetland-related legal requirements.

2.4 Project completion. The Project will be complete and the agreement terminated when:

- a The Technical Evaluation Panel for the Project concurs in a determination and Certificate of Compliance issued by MCWD's regulatory program that the performance standards in the approved Restoration Design have been achieved and monitoring may be discontinued, in accordance with 8420.0820, subpart 2; and
- b The United States Army Corps of Engineers (USACE) concurs in writing that compensatory mitigation for the Development has met the applicable objectives and no additional monitoring reports are required.
- c The standard monitoring period for replacement wetlands is 5 years and may be extended for up to 10 years or may be shortened if all performance standards are met earlier than 5 years.

3 Specific duties. To successfully complete the Project as described in section 2 of this agreement, the parties further agree to undertake the following.

3.1 US Home Corporation will:

- a Work in good faith and partnership with MCWD to develop and implement the Project and address any nonattainment of necessary performance standards.
- b As between the parties and with the facilitation of MCWD as described in 2.3, US Home retains responsibility to obtain all permits, licenses and other necessary approvals for the Development and the Project from entities with regulatory authority, including but not limited to:
 - i WCA boundary and type determination, sequencing and replacement plan approvals, including recordation of any required deed restriction on the Laketown Property
 - ii Confirmation of acceptable construction of the Restoration Design to MCWD regulatory;
 - iii Certificate of Compliance for successful replacement in accordance with Minnesota Rules 8420.0820, subpart 2;
 - iv MCWD permits;
 - v Department of Natural Resources permit;
 - vi City of Victoria permits and approvals;

vii USACE permits.

US Home will ensure that the Development and the Project are completed in accordance with permits, approvals and other applicable law and regulatory standards and criteria.

- c Contract with Wenck for the development of the Restoration Design, along with the plans and specifications and all other necessary construction documentation. In contracting with Wenck, US Home will submit 90 percent complete design plans and specifications for the Restoration Design to MCWD for concurrence in accordance with paragraph 3.2.d below. On concurrence in the plans by MCWD and US Home, Wenck will prepare contract documents for the Restoration Design. At US Home's discretion, the designs, plans and specifications for the Restoration Design may be incorporated into the construction documents for the Development.
- d Notify MCWD no fewer than 60 days prior to the commencement of land-disturbing activities for the Development that would affect a wetland or wetlands in a manner regulated by state or federal law.
- e Contract for the construction and implementation of the Restoration Project. US Home will enter a contract for the construction of the Restoration Project that will:
 - i Name MCWD as an intended beneficiary.
 - ii Provide that plans, designs and specifications for construction and implementation of the Restoration Design may be adjusted during construction with notice to MCWD as long as the revisions do not diminish the total acreage of wetland-restoration and associated buffer area created or require MCWD to exceed the scope of the rights granted under this agreement or create maintenance obligations not anticipated hereunder, and are subject to material changes only with MCWD's concurrence.
 - iii Require the contractor to indemnify, defend and hold harmless MCWD, its managers, employees and agents from any and all actions, costs, damages and liabilities of any nature arising from the contractor's negligent or otherwise wrongful act or omission, or breach of a specific contractual duty, or a subcontractor's negligent or otherwise wrongful act or omission, or breach of a specific contractual duty owed by the contractor to MCWD. The contract will require that for any claim subject to indemnification by an employee of selected contractor or a subcontractor, the indemnification obligation is not limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the contractor or a subcontractor under workers' compensation acts, disability acts or other employee benefit acts.
 - iv Required that the contractor maintain commercial general liability insurance on a concurrent basis with a limit of at least \$1.5 million for work and completed operations, and including contract liability coverage.
 - v Require that the contractor name MCWD an additional insured with primary coverage for commercial general liability and completed operations on a noncontributory basis for both ongoing work and completed operations to the extent of MCWD's statutory liability limit.

- vi Extend the contractor's warranties under the agreement to MCWD, including but not limited to a three-year warranty on plantings for the implementation of the Restoration Project.
- vii Require the contractor to certify construction of the Restoration Project as substantially complete for the purposes intended and provide such certification to MCWD.
- viii Require that the contractor provide as-built drawings of the constructed Restoration Project to MCWD within 90 days of substantial completion.
- f US Home will notify MCWD of all pre-construction and construction meetings for the Restoration Project, which MCWD may attend.
- g Consult and collaborate on production and dissemination of public education and outreach materials, as well as public meetings for the Project, cooperate with MCWD in preparing publicity, and acknowledge the contributions of MCWD in publicity and outreach materials for the Project, including signage.

3.2 MCWD will:

- a Work in partnership with US Home to develop and implement the Project.
- b Subject to the contingency in subsection 5.1 herein, obtain an easement or other land-use rights sufficient for the parties to fulfill their obligations under this agreement for the Project, including the right to assign to US Home rights to access, construct and implement the Restoration Project on the Restoration Property. MCWD will notify US Home within 48 hours of closing on a purchase agreement for the land-use rights described herein.
- c Assist US Home's submission of necessary documentation and requests for approval from the MCWD regulatory program and other regulatory bodies.
- d Within 10 business days of receipt of the 90 percent complete Restoration Design in accordance with paragraph 2.2a and 3.2c, review and concur in the Restoration Design. Failure to act timely will constitute approval. MCWD's right to review and approve the Restoration Design will not be unreasonably exercised.
- e Provide observation, support and assistance for the construction and implementation of the Restoration Project, and review and concur in any material changes to the Restoration Design within 5 business days of submission, such concurrence not to be unreasonably withheld. MCWD may observe construction of the Restoration Project, but MCWD will not direct the contractor.
- f Record declarations and covenants on the Restoration Property for purposes of US Home's compliance with wetland replacement and mitigation requirements.
- g In performing replacement-wetland maintenance and monitoring in accordance with paragraph 2.2e of this agreement, prepare and submit reports to the MCWD regulatory program and WCA Technical Evaluation Panel, as well as the USACE, in accordance with Minnesota Rules 8420.0810, subpart 4.

- h Work in partnership with US Home to address any nonattainment of the Project with approved performance standards.
- i Consult and collaborate on production and dissemination of public education and outreach materials, as well as public meetings for the Project, cooperate with US Home in preparing publicity materials related to the Project, and acknowledge the contributions of US Home in publicity and outreach materials for the Project, including signage, except that MCWD's role and participation in all education, outreach and publicity for the Project is subject to the approval of and a determination by the MCWD Board of Managers that MCWD's participation comports with MCWD's role, responsibilities and legal requirements for a public governmental entity.

4 **Costs**

4.1 MCWD is responsible for all costs of:

- a acquisition of land-use rights necessary for the Restoration Project in accordance with paragraphs 2.1 and 3.2b;
- b Monitoring, maintenance and reporting in accordance with paragraphs 2.2e, 3.2e, 3.2f and 3.2g, except as provided in paragraph 5.2.

4.2 US Home is responsible for all costs of:

- a Design in accordance with paragraphs 2.2a and 3.1c;
- b Construction and implementation and construction oversight and management in accordance with paragraphs 2.2b and 3.1e;
- c Regulatory compliance for the Development.

4.3 Each party is responsible for the internal and incidental costs of its participation in the Project not otherwise specified herein, including but not limited to costs incurred in the event that MCWD is unable to complete its obligations under the agreement through operation of the contingency in subsection 5.1 of this agreement.

4.4 In the event of termination of the agreement, each party is responsible for costs incurred, except as may be subject to reimbursement under terms of agreement.

5 **Contingencies**

5.1 Acquisition of Land-Use Rights. MCWD will use all reasonable and diligent efforts to timely acquire the land-use rights necessary for the Project, as described herein in paragraphs 2.1 and 3.2b. In the event MCWD has failed or elected not to close on the purchase of such rights 30 days prior to the date US Home intends to commence land-disturbing activities for the Development that would affect wetland(s) in a manner regulated by state or federal law, this agreement will be terminated.

- a In the event US Home submits a wetland replacement plan relying on purchase of wetland bank credits to the MCWD regulatory program for approval for purposes of compliance of the Development with WCA more than 30 days prior to the date US

Home intends to commence land-disturbing activities for the Development that would affect wetland(s) in a manner regulated by state or federal law and after US Home has been notified that MCWD has purchased the necessary land-use rights for the project in accordance with paragraph 3.2b, this agreement will not be terminated and US Home will not be released from its obligations hereunder.

- 5.2 Failure of Restoration. In the event any necessary regulatory approval that wetland-replacement or –mitigation is not secured for the wetland losses on the Laketown Property from the Development within five years of confirmation of acceptable completion of construction, US Home and MCWD will jointly determine whether to request from the relevant regulatory authorities an extension of the period to meet performance standards necessary for regulatory approval or to pursue alternative plans to achieve compliance with wetland-replacement or –mitigation requirements. If the parties elect to seek an extension of the establishment period and the extension is approved, MCWD will continue monitoring, maintenance and reporting in accordance with paragraph 2.2e for a sixth year. If at the end of the sixth year any relevant regulatory approval has not been secured, MCWD and US Home will share equal responsibility for the costs of monitoring, maintenance and reporting for up to four additional years of the extension period.
- a If there is a final regulatory determination of nonattainment of performance standards at any point or US Home and MCWD agree to discontinue efforts to establish replacement wetlands, MCWD and US Home will equally share costs of replacing or mitigating impacts wetlands from the Development through alternative means (e.g., purchase of bank credits).

6 General terms; indemnification and insurance

- 6.1 MCWD does not warrant and will not be liable for the actions of or failure to act by any third-party regulatory entity or otherwise. Notwithstanding MCWD’s assumption of obligations herein, US Home remains responsible for regulatory compliance of the Development in accordance with Minnesota Rules 8420.0810, subpart 2A.
- 6.2 If US Home conveys any part of the property so as to shift, in whole or part, responsibility for compliance with District approvals for the Project, it will be responsible to timely request and obtain a transfer of approvals. Among other conditions of transfer, MCWD may require that the transferee accept an assignment of this agreement, exclusive or non-exclusive, and of appropriate rights and responsibilities hereunder.
- 6.3 Except as specifically encompassed with the scope of the Project, US Home’s land-disturbing work outside of the restoration area is not encompassed within or a subject of this agreement.
- 6.4 Each party agrees to hold harmless, defend and indemnify the other parties from and against that portion of any and all liability, loss, claim, damage or expense (including reasonable attorney fees, costs and disbursements) that the indemnified party may incur as a result of the performance of this agreement due to any negligent or willful act or

omission of the indemnifying party or its breach of any specific contractual duty. Notwithstanding, this agreement creates no right in and waives no immunity, defense or liability limit of MCWD as a public body under law, with respect to any third party or another party.

- 6.5 Only contract remedies are available for a breach of this agreement. No party will be liable for special, indirect, incidental, punitive, exemplary or unforeseeable consequential damages arising out of or in connection with its obligations under this agreement. Specific performance and *quantum meruit* explicitly are available remedies for the failure of a party to perform any obligation hereunder and do not require a demonstration that other remedies are inadequate. Remedies are non-exclusive.
- 6.6 Venue for any action hereunder is Hennepin County, Minnesota.
- 6.7 This agreement is effective on the date of execution by the parties and will remain in effect for eight years from that date or until all obligations hereunder have been fulfilled, whichever sooner. Obligations under paragraphs 6.4 and 6.5 above will survive expiration.
- 6.8 Each notice required under this agreement will be in writing and made to the following representatives:

MCWD:

Anna Brown, Project Manager
Minnehaha Creek Watershed District
15320 Minnetonka Boulevard
Minnetonka MN 55345

US Home Corporation:

Paul Tabone, Land Entitlement Manager
16305 36th Ave N, No. 600
Plymouth, MN 55446

Receipt of notice must be documented. Party representatives will confirm receipt promptly on request. Contact information will be kept current. A party may change its contact by written notice to the other parties.

- 6.9 An amendment to this agreement must be in writing and executed by the parties.
- 6.10 Authority to Contract. The person or persons executing this agreement on behalf of US Home represent that he, she or they are duly authorized to execute this agreement on behalf of US Home and represent and warrant that this agreement is a legal, valid and binding obligation enforceable according to its terms.

(Signature page follows.)

Agreeing to be bound,

MINNEHAHA CREEK WATERSHED DISTRICT

By Sherry White, President

Date:

Approved for form and execution:

MCWD Counsel

US HOME COMPANY

By [NAME], [TITLE]

Date:

By [NAME], [TITLE]

Date:

Exhibit A

The Development Property and the Restoration Property



Exhibit B

Conceptual Design

