



STAFF REPORT

DATE: April 18, 2023
REGULAR

AGENDA ITEM: Cardinal Ridge Watermain Extension Alternatives

SUBMITTED BY: Jack Griffin, City Engineer

REVIEWED BY: Kristina Handt, City Administrator
Sarah Sonsalla, City Attorney
Marty Powers, Public Works Director
Mark Scholle, Project Engineer

ISSUE BEFORE COUNCIL: City staff is seeking council direction regarding the watermain extension design alternatives for the Cardinal Ridge neighborhood should the HOA choose not to provide a drainage and utility easement over HOA Outlot C for the installation of 3 watermain services.

BACKGROUND: The City of Lake Elmo received grant funding from the Minnesota Pollution Control Agency (MPCA) under the 2018 3M Settlement Agreement as an expedited project to extend municipal water and connect each of the 62 properties, including 17 properties located in the Cardinal Ridge subdivision. The grant is in the amended amount of \$5,645,000 after approving a change order to install the watermain along Ivy Avenue in the Cardinal Ridge subdivision through open cut trench installation.

T.A. Schifsky & Sons, Inc. was awarded a construction contract on April 6, 2022, to complete the Parkview-Cardinal Street and Utility Improvements. The amended construction contract completion dates are Substantial Completion date of July 31, 2023, and Final Completion date of August 15, 2023.

PROPOSAL DETAILS/ANALYSIS: The original project design includes the extension of 3 private water services across HOA owned Outlot C to serve the properties located at 1545, 1571, and 1589 Ivy Avenue (see attached Outlot C Exhibit). The installation of the services requires the acquisition of a drainage and utility easement over Outlot C. Following the start of construction, in August 2022, the city submitted a request to the HOA to grant the Outlot C easement. In September, 2022 the HOA formally declined to grant the easement citing various concerns.

After working through the open cut change order issues with the contractor and obtaining additional grant funding to cover the added project costs, the design team explored alternatives for constructing the improvements and addressing the 3 private water services across Outlot C. Two (2) implementation options were developed as outlined below (see OPTIONS below).

A neighborhood meeting was conducted on March 8, 2023 to review the options with the 17 HOA properties and to answer questions. Following the neighborhood meeting the Cardinal Ridge Homeowners' Association submitted the attached letter dated March 14, 2023, once again declining to grant the requested easement. The City Administrator and City Engineer subsequently met with HOA representatives on April 5, 2023 to continue discussions and answer questions. At the meeting, the city advised the HOA representatives that staff would be requesting council direction at the April 18 council meeting. At the HOA request the City submitted the attached letter dated April 6, 2023 to address the HOA concerns regarding the Open Space Easement.

OPTIONS:

- 1) **OPTION 1:** Construct the improvements in accordance with the approved Project Plans and approved Change Order No. 3. With no easement granted over Outlot C, install the water service stubs for the properties at 1545, 1571, and 1589 Ivy Avenue to the right-of-way boulevard on the west side of the center landscaped island (see attached Exhibit 1). Service stubs would be installed across Outlot C and stubbed to each property by the city contractor if the HOA grants the requested easement before the contractor has completed the watermain installation work in the immediate area of these services.

At the time of adopting the Final Assessment Roll the properties at 1545, 1571, and 1589 Ivy Avenue would be removed from the watermain assessment roll, for each property that has not yet connected to city water, if the service stubs remain on the west side of the Outlot C median. The street and storm sewer assessments would remain for each property that has not connected to city water.

The service stubs would be in place to allow for future connection by the property owner should an easement be granted at some point in the future, either to the city or to the individual property owner. This connection could be made with MPCA Grant reimbursement funds if completed prior to the connection deadline requirements, or the connection could be made at property owner's cost if completed at a later date.

- 2) **OPTION 2:** Direct staff to revise the design to include a secondary watermain extension further east along 16th Street, then south along Ivy Avenue on the east side of the Outlot C median, with service stubs extended to 1545, 1571, and 1589 Ivy Avenue (see attached Exhibit 2). Furthermore, direct the city engineer to prepare a revised Feasibility Report and Preliminary Assessment Roll to assess the secondary watermain costs to the 17 Cardinal Ridge HOA properties (estimated unit assessment of \$10,300).

A design change order will be prepared for future council approval to include the secondary watermain improvements. A revised feasibility report will be prepared for council approval and a public improvement hearing will be scheduled and noticed for the purpose of adopting a revised preliminary assessment roll. The secondary watermain assessments would not be forgivable with the connection to city water as they would remain outside the scope of the MPCA Grant Agreement.

- 3) **OPTION 3:** Provide direction to staff to proceed with either OPTION 1 as amended by the City Council, or OPTION 2 as amended by the City Council.

FISCAL IMPACT: OPTION 1 would have no fiscal impact to the city or grant agreement. Future water service costs may be incurred by the properties at 1545, 1571, and 1589 Ivy Avenue should they elect to connect to city water after the termination of the MPCA grant agreement.

OPTION 2 would increase the total project costs in the estimated amount of \$175,000 which would be assessed to the 17 Cardinal Ridge HOA properties.

RECOMMENDATION: Staff is recommending that the City Council approve OPTION 1 to construct the improvements in accordance with the approved Project Plans and approved Change Order No. 3, unless the Cardinal Ridge HOA provides documentation in support of OPTION 2 either prior to or at the April 18, 2023 city council meeting. The recommended motion for the action is as follows:

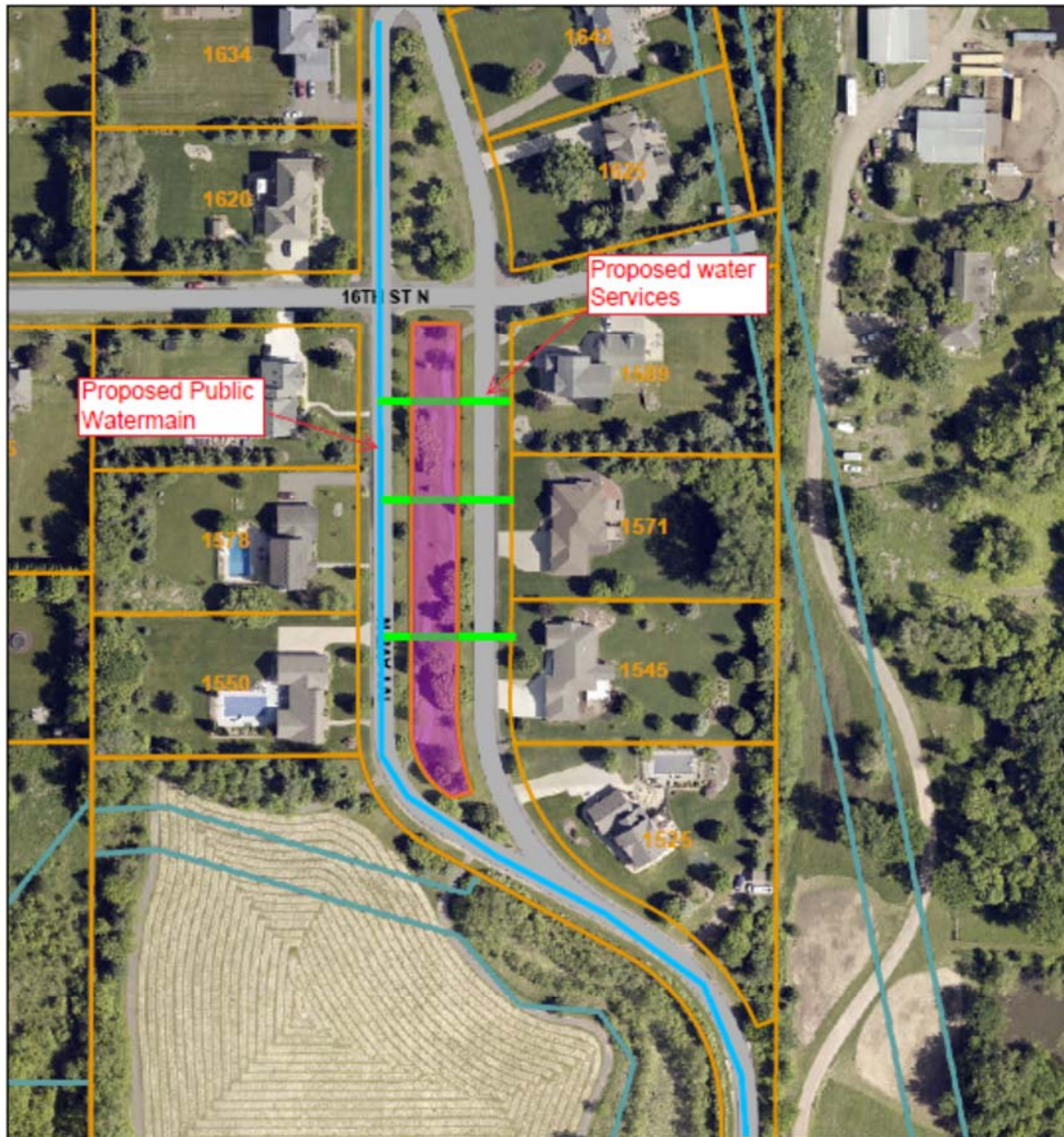
“Move to approve OPTION 1 to construct the improvements in accordance with the approved Project Plans and approved Change Order No. 3 as detailed in this agenda report, and to direct the city engineer to remove the properties at 1545, 1571, and 1589 Ivy Avenue from the final watermain assessment, for each property that has not yet connected to city water at the time of the final assessment roll adoption.”.

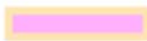
ATTACHMENTS:

1. Outlot C Easement Exhibit.
2. Cardinal Ridge Homeowners’ Association letter dated March 14, 2023 to the City of Lake Elmo.
3. City of Lake Elmo letter dated April 6, 2023 to the Cardinal Ridge Homeowners’ Association.
4. Exhibit 1 – OPTION 1. Three (3) water services stubbed to the west island right-of-way.
5. Exhibit 2 – OPTION 2. Secondary watermain extension.

**EXHIBIT B TO
DRAINAGE AND UTILITY EASEMENT**

Depiction of the Easement Area



 Easement Area



Cardinal Ridge Homeowners' Association

LakeElmoCardinalRidgeHOA@gmail.com

Tuesday, March 14, 2023

Lake Elmo City Council:

Mayor Charles Cadenhead
Councilwoman Lisa McGinn
Councilman Jeff Holtz
Councilwoman Katrina Beckstrom
Councilman Matt Hirn

3800 Laverne Avenue North
Lake Elmo, Minnesota 55042

CC: City Administrator, City Engineer, City Attorney, FOCUS Engineering, and other interested parties

Dear Mayor Cadenhead and members of the Lake Elmo City Council, and all other interested parties:

On September 1st, 2022, the Cardinal Ridge Homeowners' Association ("HOA"), after very careful consideration, declined to grant the City of Lake Elmo an easement across an outlot in our community ("Outlot C"). This easement was requested because the Parkview-Cardinal Neighborhood Street and Utility Improvement project had planned, in its design of the project, to cut across Outlot C to service three homes on the east side of Ivy Avenue. The easement was not requested until August 16th, 2022, despite knowledge that the easement would be necessary to complete the project as designed. Outlot C is governed by a conservation easement granted to the City of Lake Elmo.

For the following reasons, the request for the easement was denied:

1. The Protective Covenants and Easements that run with and bind all properties within Cardinal Ridge do not allow the Board to grant such an easement without "an affirmative vote of two-thirds (2/3rds) majority of all the owners of said lots at a special meeting called for that purpose..." The proposed Easement grants the City permanent control over the parcel to the degree necessary to maintain the infrastructure. All other issues aside, the HOA cannot in good faith consent to such a request without adhering to proper procedure.
2. It appears that the City's plan for installing water across Outlot C runs afoul of the spirit and letter of the OPEN SPACE EASEMENT CARDINAL RIDGE already granted to the City of Lake Elmo. *See* Paragraph 1 of the OPEN SPACE EASEMENT. The HOA has an affirmative duty to uphold this agreement. *See* Paragraph 11.B of the Protective Covenants and Easements. *See* Article 23 of the Protective Covenants and Easements.
3. The OPEN SPACE EASEMENT specifically prohibits installation of new utilities, including water, in Outlot C, unless prior approval is granted by the City. The HOA has made no such request, and any such request, if the HOA were to make it, would need to adhere to regular procedural

Cardinal Ridge HOA
LakeElmoCardinalRidgeHOA@gmail.com



Cardinal Ridge Homeowners' Association

LakeElmoCardinalRidgeHOA@gmail.com

requirements such as notice and presentation to the City Council. *See* Paragraph 6 of the OPEN SPACE EASEMENT.

4. The OPEN SPACE EASEMENT also specifically states that “the owner shall not remove, destroy, cut, mow, or alter trees, shrubs, and other vegetation...” except as allowed in Paragraph 5, Paragraph 7, or otherwise specified in the agreement. As the OPEN SPACE EASEMENT both specifically prohibits the HOA or individual owners from installing water, and further specifically prohibits the destruction of trees on the common property, it is clear that the very purpose and intent of the OPEN SPACE EASEMENT is to prevent disturbances to the open space exactly like the disturbance proposed by the City.
5. The proposed Easement grants the City permanent control over the parcel to the degree necessary to maintain the infrastructure, in exchange for “just compensation.” No compensation has been offered.

If the HOA grants the City of Lake Elmo an easement over Outlot C to complete the construction, three trenches will be dug across Outlot C and each will be, at minimum, 20 feet wide. Many of our large, mature trees will be lost, and will not be able to be replanted due to the nature of the utilities that will now be buried there, aside from the fact that no replacement of trees was budgeted for in the construction. This results in a significant loss of privacy to the residents who live to the east and west of Outlot C, as well as loss of enjoyment of one of our open spaces which we have maintained since our development's inception.

During a neighborhood Zoom meeting with Mr. Griffin of FOCUS Engineering, Mr. Griffin indicated that additional funding has already been secured from the MPCA to assist in unforeseen costs associated with this project. These additional funds will not, however, be sufficient to fund an alternative to cutting across Outlot C, thereby effectively destroying the conservation nature of the OPEN SPACE EASEMENT. Mr. Griffin indicated that he did not seek additional funds to pay for such an alternative because he did not think that the MPCA would fund them. Mr. Griffin further indicated that if the proposed easement across Outlot C is not granted, and the residents on the east side of Ivy wished to be included in the water service, all residents of our HOA would be assessed close to \$10,000 to pay for an alternative design.

Respectfully, it seems that our residents are being penalized for a lack of foresight that was completely outside their control. The easement across Outlot C was a necessary component of the project from the very beginning, but was not obtained before the project was approved in 2021, was not obtained as part of the feasibility report, and in fact, the easement across Outlot C was not even requested until nearly the end of the construction season last year. This is not our residents' failure or mistake, and they ought not be penalized for it. Instead, funding to address this lack of foresight should be obtained from the MPCA or from the City's general fund. Our residents, after a Special Meeting and vote, are unanimously requesting that the City of Lake Elmo authorize Mr. Griffin to seek an additional amendment to the MPCA grant for funds to complete



Cardinal Ridge Homeowners' Association

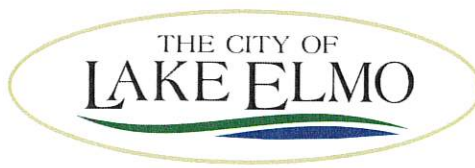
LakeElmoCardinalRidgeHOA@gmail.com

the project with an alternative design, that the City Council elect to pay for the alternative design from the general fund, or some combination of the two.

We intend to bring this matter before the Council during the Public Comment section of the Tuesday, March 21, 2023 meeting. It is our hope that the City Council will schedule this matter to be heard and addressed by the City Council as soon as is feasible.

Very truly yours,

Cardinal Ridge Homeowners' Association



April 6, 2023

Cardinal Ridge Homeowners' Association
1578 Ivy Avenue N.
Lake Elmo, MN 55042

Via Email only:
(LakeElmoCardinalRidgeHOA@gmail.com)

RE: Parkview-Cardinal Neighborhood Street and Utility Project

Dear HOA Members:

As you are aware, the City is in need of an easement over Outlot C in order to install water service infrastructure into the Cardinal Ridge neighborhood. The Cardinal Ridge Homeowners' Association (the "HOA") is the owner of Outlot C. It is my understanding that HOA has been hesitant to grant the City an easement over Outlot C that is needed by the City for the water service infrastructure due to there being an Open Space Easement over Outlot C.

The City is well aware that there is an Open Space Easement that encompasses the entire Outlot C (a copy of the recorded Open Space Easement is enclosed for your records). The Open Space Easement runs in favor of the City. There are no other beneficiaries of the Open Space Easement. Section 6 of the Open Space Easement states that no new utility systems are to be installed within the easement area *without written approval of the City*. This means that unless the City approves a utility system, it cannot be installed within the easement area. In this case, the City is willing to approve the installation of the water service infrastructure. If the Open Space Easement did not allow for these types of installations, it would have said that they were not permitted under any circumstances and not provide for them to be installed with the written approval of the City. Furthermore, because the City is the beneficiary of the Open Space Easement, it is the only enforcer of it. Therefore, the only party that has the authority to enforce the terms of the Open Space Easement in the event that something is done within the easement area in violation of the Open Space Easement would be the City. There is no one else that would be able to bring an action. Since the water service infrastructure improvements would belong to the City, there is no risk that the City would take enforcement action to remove these improvements.

I am hoping that this explanation provides the HOA with the comfort that it needs to move forward and grant the City an easement for the water service infrastructure over Outlot C. Please let me know if you have any questions or if you need any other information. Thank you.

Sincerely,

Kristina Handt
City Administrator

CC: Mayor and Council (via email)
Paul Paulos, HOA President (via email)

3133745



OPEN SPACE EASEMENT
CARDINAL RIDGE

THIS OPEN SPACE EASEMENT is entered into this 12th day of December, 29.50
2000, by and between D&T Development, LLP, a Minnesota Limited Liability Partnership,
whose address is 2297 Stillwater Road, St. Paul, MN 55119 ("**Owner**") and the City of Lake
Elmo, a Minnesota statutory city ("**City**").

WITNESSETH:

- A. Owner is the sole owner in fee simple of the following described property, together with buildings and other improvements located in Washington County, Minnesota ("**Protected Land**"):

Outlots, A, B and C, Cardinal Ridge.

- B. The Protected Land is primarily farmland, woodland, and open space as defined in the City's Comprehensive Use Plan and Open Space Preservation District Regulations (both herein "**City Development Regulations**").

- C. The natural, scenic and agricultural qualities, forested and open space character ("**Conservation Values**") of the Protected Land are described in the City's Development File for the Cardinal Ridge Development ("**Development File**"). The City intends to use the description of the Protected Property as contained in the City's Development File in monitoring the subsequent uses of the Protected Land and enforcing the terms of this Open Space Easement. Notwithstanding this, the parties may use all other relevant evidence to establish the present condition of the Protected Land in the event of a disagreement as to whether a subsequent activity or use is consistent with the terms of this Open Space Easement.

- D. Owner intends to convey to the City the right to preserve and protect the Conservation Values of the Protected Land in perpetuity and to prevent or remedy subsequent activities or uses that are inconsistent with the terms of this Open Space Easement.

- E. The grant of this Open Space Easement will further the purpose and intent of the City's Development Regulations.

ENTERED IN TRANSFER RECORD
WASHINGTON COUNTY, MINNESOTA

1

Dec. 13 2000
VIRGINIA R. ERDAHL, AUDITOR-TREASURER

BY

J. Ann Mc Kenzie
DEPUTY

- F. The parties acknowledge that, as a local unit of government, the City has a direct interest in the enforcement of the terms of this Open Space Easement and is in a position to monitor compliance with the terms of this Open Space Easement.

NOW, THEREFORE, in consideration of their mutual covenants and pursuant to the provisions of the City's Development Regulations, Owner conveys and warrants to the City and the City accepts a perpetual open space easement on the Protected Land of the character and to the extent set forth herein.

1. **Intent.** The parties intend to permanently retain the Protected Land in its predominantly natural, scenic, agricultural, forested, and open space condition and to prevent or remedy any subsequent activity or use that significantly impairs or interferes with the Conservation Values of the Protected Land. Owner intends to restrict all subsequent use of the Protected Land to activities consistent with the terms of this Open Space Easement.

2. **City's Rights.** To accomplish the parties' intent, Owner conveys the following rights to the City as specified below:

- a. To preserve and protect the Conservation Values of the Protected Land pursuant to the terms of this Open Space Easement.
- b. To enter the Protected Land at reasonable times to monitor subsequent activities and uses and to enforce the terms of this Open Space Easement. The City shall give reasonable notice to Owner of all such entries and shall not unreasonably interfere with Owner's use and quiet enjoyment of the Protected Land.
- c. To act, pursuant to Paragraph 19, to prevent or remedy all subsequent activities and uses of the Protected Land not consistent with the terms of this Open Space Easement.

3. **Prohibited Uses.** Owner shall not perform or knowingly allow others to perform acts on the Protected Land that would significantly impair or interfere with the Conservation Values of the Protected Land. This general restriction is not limited by the more specific restrictions set forth in Paragraphs 4-14. The parties acknowledge that the present use of the Protected Land is consistent with the terms of this Open Space Easement and the City's Development Regulations. The owner may, subject to the restrictions set forth in Paragraphs 4-14, continue making such use of the Protected Land.

4. **Residential, Commercial & Industrial Uses.** Owner shall not subdivide all or part of the Protected Lands for residential, commercial or industrial development. Owner shall not subdivide, either legally or physically, the Protected Land for any other reason without the prior written approval of the City. Owner shall not engage in commercial or industrial activities on the Protected Land, other than the activities relating to agricultural operations as set forth in Paragraph 7. Owner shall not engage in the exploration or extraction of soil, sand, gravel, rock minerals, hydrocarbons or any other natural resource on or from the Protected Land. Owner shall not grant rights of way on the Protected Land in conjunction with commercial or industrial activities or residential development on lands other than the Protected Land, except for access to adjacent parcels owned by Owner.

5. **Construction.** Owner shall not construct or install additional buildings or improvements of any kind including, without limitation, fences, driveways, parking lots, and roads, on the Protected Land, except as specified herein. Owner may maintain, repair, and replace existing roads but shall not widen them unless doing so lessens the environmental impact of the road on the Protected Land and Owner has obtained the prior written approval of the City. Owner may maintain, renovate, expand or replace existing agricultural and related buildings or improvements in substantially their present location. Any expansion or replacement of an existing building or improvement shall not substantially alter its character or function, and shall not exceed its current square footage, without the prior written approval of the City.

6. **Utility Systems.** Owner may maintain, repair, and replace existing utility systems on the Protected Land including, without limitation, water, sewer, power, fuel, and communications lines and related facilities. Owner shall not install new utility systems or extensions of existing utility systems on the Protected Land including, without limitation, water, sewer, power, fuel, and communications lines and related facilities, without the prior approval of the City. Owner may install, maintain, and replace irrigation systems used on the Protected Land. Owner may install sewage systems on or under the Protected Land which comply with all existing federal, state and local regulations regarding water quality and other environmental concerns, and which do not disrupt other activities permitted under the terms of this Open Space Easement.

7. **Agricultural Use.** Owner may conduct agricultural operations on the Protected Land provided that such use is in compliance with the City's Development Regulations.

8. **Surface Alteration.** Owner shall not alter the surface of the Protected Land including, without limitation, the filling, excavation, or removal of soil, sand, gravel, rocks,

or other material except as reasonably required in the course of activities or uses permitted under the terms of this Open Space Easement or as reasonably required during the initial development of the adjacent property owned by Owner. Such initial development period shall expire no later than the 30th day of June, 2001.

9. **Soil and Water Degradation.** Owner shall not engage in activities or uses that cause or are likely to cause soil degradation, erosion, or water pollution, either on the surface or underground, except for activities or uses reasonably required in the course of Agricultural Operations permitted by Paragraph 7.

10. **Waste Removal.** Owner shall not dump or dispose of refuse or other waste material on the Protected Land although, subject to applicable laws and regulations, Owner may dispose of brush and other plant material from the Protected Land by burning or composting if such material results from Agricultural Operations permitted by Paragraph 7 or other activities or uses permitted by this Open Space Easement. Subject to the applicable laws and regulations, Owner may store and make use of agricultural products and by-products including, without limitation, crops, silage, fertilizers, lime, and manure on the Protected Land if such material results from or is to be used in agricultural operations permitted by Paragraph 7.

11. **Water Bodies and Courses.** Owner shall not alter existing bodies of water or water courses or construct new bodies of water or water courses on the Protected Land except as reasonably required for the activities or uses permitted by the terms of this Open Space Easement or to enhance wildlife habitat or water quality.

12. **Trees, Shrubs, and Vegetation.** Owner shall not remove, destroy, cut, mow, or alter trees, shrubs, and other vegetation except (i) for areas immediately adjacent to buildings or improvements permitted by Paragraph 5 (ii) as reasonably required for agricultural operations permitted by Paragraph 7, (iii) to prevent or control insects, noxious weeds, diseases, fire, personal injury, or property damage, (iv) for firewood or construction material intended for residential use on the protected Land or adjacent land (v) as reasonably required to construct and maintain the trails permitted in Paragraph 13 (vi) selective cutting for harvest pursuant to sound forest management practices, and (vii) for other activities or uses permitted by the terms of this Open Space Easement.

13. **Recreational Use.** Owner may establish and maintain trails for fire breaks, walking, horseback riding, cross-country skiing, and other non-motorized recreational activities on or across the Protected Land. Owner shall not use or allow others to use motorcycles, all-terrain vehicles, or other motorized vehicles on the Protected Land except

as reasonably required for other activities or uses permitted by the terms of this Open Space Easement.

14. **Signs.** Owner shall not erect or install any signs or billboards on the Protected Land without consent of the City.

15. **City's Approval.** The Owner may not change the use of the Protected Land as described in the City's Development File without prior written approval of the City so that the City can determine if the proposed change is consistent with this Open Space Easement and maintains or enhances the Conservation Values of the Protected Land. Owner shall submit a request in writing to the City at least ninety days prior to the proposed date of commencement of the use in question. The request shall set out the use for which approval is sought, its design and location, the impact of the proposed use on the Conservation Values of the Protected Land, and other material information in sufficient detail to allow the City to make an informed judgment that the proposed use is or is not consistent with this Open Space Easement or would adversely effect the Conservation Values of the Protected Land. The City shall notify Owner in writing of its decision within sixty days of its receipt of Owner's request. Where the proposed use or modification of use requires a development permit or other approval from the City pursuant to the City's Development Regulations, the Owner shall follow the process described in such regulations and the City shall notify the Owner of its decision within sixty (60) days of receipt of a completed application from the Owner. The City may withhold its approval only on a reasonable determination that the proposed use would be inconsistent with this Open Space Easement, impairs the Conservation Values of the Protected Land, results in violation of any applicable law or regulation or that it lacks information in sufficient detail to reach an informed judgment that the proposed use is or is not consistent with this Open Space Easement. The City may condition its approval on the Owner's acceptance of modifications which, in the City's judgment, would make the proposed use, as modified, consistent with this Open Space Easement or protects the Conservation Values of the Protected Land.

16. **Public Access.** No right of access by the public to any portion of the Protected Land is conveyed by this Open Space Easement.

17. **Reserved Rights.** Owner reserves all rights accruing from its ownership of the Protected Land including, without limitation, the right to engage in or allow others to engage in all activities or uses of the Protected Land that are not prohibited or limited by this Open Space Easement or the City's Development Regulations, the right to exclude all or any of the public from the Protected Land and to sell or transfer all or part of the Protected Land subject to this Open Space Easement. Owner shall inform all others who exercise any right

by or through it on the Protected Land of the terms of this Open Space Easement. Owner shall incorporate by reference the terms of this Open Space Easement in all deeds or other legal instruments by which they transfer any interest, including a leasehold interest, in all or part of the Protected Land. Owner shall give sixty (60) days prior written notification to the City of a transfer of all or any part of fee title to the Protected Land.

18. **Costs and Liabilities.** Owner retains all obligations and shall bear all costs and liabilities of any kind accruing from their ownership of the Protected Land including the following responsibilities:

- a. Owner shall remain solely responsible for the operations, upkeep, and maintenance of the Protected Land. Owner shall keep the Protected Land free of all liens arising out of work performed for, materials furnished to, or obligations incurred by Owner.
- b. Owner shall pay all taxes, special assessments and other assessments levied against the Protected Land.
- c. Owner shall remain solely responsible for maintaining liability insurance for its uses of the Protected Land and the Protected Land itself. Liability insurance policies maintained by the Owner covering the Protected Land will name the City as an additional named insured. Owner shall hold harmless, indemnify, and defend the City from and against all liabilities, penalties, costs, losses, damages, expenses, causes of action, claims, demands, or judgments, including, without limitation, reasonable attorney's fees, arising out of or relating to (i) personal injury, data or property damage resulting from an act, omission, or condition on or about the Protected Land unless due solely to the negligence or willful act of the City (ii) the obligations retained by Owner to maintain the Protected Land and pay taxes in Paragraphs 18(A) and (B), and (iii) the existence of this Open Space Easement.

19. **Enforcement.** If the City finds at any time that Owner has breached or may breach the terms of this Open Space Easement, the City may give written notice of the breach to Owner and demand action to cure the breach including, without limitation, restoration of the Protected Land. If Owner does not cure the breach within thirty days of notice, the City may commence an action to (i) enforce the terms of this Open Space Easement (ii) enjoin the breach, ex parte if needed, either temporarily or permanently, (iii) recover damages, (iv) require restoration of the Protected Land to its condition prior to Owner's breach, and (v) pursue any other remedies available to it in law or equity. If the City

determines that immediate action is needed to prevent or mitigate significant damage to the Protected Land, the City may pursue its remedies under this Paragraph without written notice or giving Owner time to cure the breach.

20. **Costs of Enforcement.** If the City prevails in an action brought under Paragraph 19, Owner shall reimburse the City for all costs incurred by the City in enforcing the terms of this Open Space Easement including, without limitation, costs of suit, reasonable attorney's fees, and costs of restoration. If Owner prevails and the District Court finds that the City brought the action without reasonable cause or in bad faith, the City, as determined by the Court, shall reimburse Owner's costs of defense including, without limitation, costs of suit and reasonable attorney's fees.

21. **Waiver.** The enforcement of the terms of this Open Space Easement is subject to the City's discretion. A decision by the City not to exercise their respective rights of enforcement in the event of a breach of a term of this Open Space Easement shall not constitute a waiver by the City of such term, or of any subsequent breach of the same or any other term, or any of the City's rights under this Open Space Easement. The delay or omission by the City to discover a breach by Owner or to exercise a right of enforcement as to such breach shall not impair or waive its rights of enforcement against Owner.

22. **Acts Beyond Owner's Control.** The City shall not exercise their respective rights of enforcement against Owner for injury or alteration to the Protected Land resulting from causes beyond the reasonable control of Owner including, without limitation, fire, flood, storm, and earth movement, or from any prudent action taken by Owner under emergency conditions to prevent, abate, or mitigate significant injury or alteration to the Protected Land resulting from such causes.

23. **Extinguishment.** If, in the judgment of the City, subsequent unexpected changes in the conditions surrounding the Protected Land make it impossible to preserve and protect the Conservation Values of the Protected Land, this Open Space Easement can be extinguished, either in full or in part by proceedings in a court having jurisdiction.

24. **Assignment of Easement.** The City may transfer its rights and obligations in this Open Space Easement only to a qualified conservation organization, as provided in Section 170(h) of the Internal Revenue Code, which may hold Open Space Easements, as provided in Minnesota Statutes Sec. 84C.01(2) (1992). As a condition of such transfer, the City shall require the continued enforcement of this Open Space Easement unless the Open Space Easement has been extinguished.

25. **Notices.** Any notice or other communication that either party wishes to or must give to the other shall be in writing and either served personally or sent by first class mail, postage prepaid, to the following addresses or such other address as either party shall designate by written notice to the other:

OWNER:

D&T Development, LLP
2297 Stillwater Road
St. Paul, MN 55119

CITY:

City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, MN 55042
ATTN: City Administrator

26. **Governing Law and Construction.** This Open Space Easement shall be governed by the laws of the Minnesota. Nothing contained in this Open Space Easement shall be construed to allow any use or development of the Protected Land in a manner which is not in compliance with the City's Development Regulations or to allow the use or development of the Protected Land without obtaining all permits required by the City's Development Regulations. Where inconsistencies occur between the provisions of state law, city regulations, or the terms of this Open Space Easement, the most restrictive regulation shall apply.

27. **Entire Agreement.** This Open Space Easement sets forth the entire agreement of the parties and supersedes all prior discussions.

28. **Amendment.** The parties may amend this Open Space Easement provided that such amendment shall not impair or threaten the Conservation Values of the Protected Land and shall not affect the perpetual duration of this Open Space Easement.

29. **Binding Effect.** The covenants, terms, conditions, and restrictions of this Open Space Easement shall bind and inure to the benefit of the parties, their personal representatives, heirs, successors, assigns, and all others who exercise any right by or through them and shall run in perpetuity with the Protected Land.

OWNER:

D&T Development, LLP,
a Minnesota Limited Liability Partnership

By: Thom M. Wa.
Its Partner

STATE OF MINNESOTA)
COUNTY OF Washington) ss.

On this 12th day of December, 2000, before me, a notary public within and for said county, personally appeared Thomas Wa. to me known to be a Partner of D&T Development, LLP, and he/she executed the foregoing instrument and acknowledged that he/she executed the same by authority of and on behalf of D&T Development, LLP.

Cynthia L. Young
Notary Public



CITY OF LAKE ELMO, a
Minnesota statutory City Of Lake Elmo

By: Lee S. Hunt
Lee Hunt, Mayor

STATE OF MINNESOTA)
COUNTY OF Washington) ss.

On this 12th day of December, 2000, before me, a notary public within and for said county, personally appeared Lee Hunt, to me known to be the Mayor of the above described corporation, and he executed the foregoing instrument and acknowledged that he executed the same by authority of and on behalf of the City of Lake Elmo.

Cynthia L. Young
Notary Public



Drafted by
Chad E Lemons
444 Cedar St
St Paul, MN 55101

Return to

D&T Development
2297 Stillwater Rd
Maplewood MN 55119

Office of the
County Recorder
Washington County, MN

Certified filed and/or recorded on:
2000/12/13 2:29:00 PM

3133745



Cindy Koosmann
County Recorder

By: Cindy Koosmann

29.50

