

RESOLUTION 24-058

RILEY PURGATORY BLUFF CREEK WATERSHED DISTRICT
BOARD of MANAGERS

**Authorizing the administrator to enter land-use agreements for the Upper Riley
Creek Ecological Enhancement Project**

Manager _____ offered the following resolution and moved its adoption,
seconded by Manager _____:

Whereas the capital improvements program in the Riley Purgatory Bluff Creek Watershed District's 2018 10-Year Watershed Management Plan includes the Upper Riley Creek stabilization and restoration project (the Project), and after review of the RPBCWD engineer's analysis of the opportunities for resource protection and improvement presented by the Project and receiving supportive comments from the public in a duly noticed December 8, 2021, public hearing, the RPBCWD Board of Managers on January 5, 2022, adopted a resolution ordering the Project and directing the RPBCWD administrator to develop, with the assistance of RPBCWD legal counsel, a cooperative agreement with the City of Chanhassen and such other agreements as necessary to secure land-use rights necessary for successful completion of the Project; and

Whereas while the administrator has completed drafting of agreements with some of owners of the six private parcels for which land-use rights are needed for the Project, the administrator continues to develop a cooperative agreement for the Project with the City of Chanhassen and with the owners of additional private property needed for the Project, as well as the Minnesota Department of Transportation; and

Whereas the administrator wishes to ensure that private-property agreements can be efficiently completed and executed, and therefore recommends that the board authorize execution of same.

NOW, THEREFORE, BE IT RESOLVED that the board authorizes the administrator to execute, on advice of counsel, land-use agreements with private property owners for the Upper Riley Creek Ecological Enhancement Project, unless the administrator determines that a proposed agreement implicates policy considerations for the board or the terms of any such agreement deviates substantively from the Kerber agreement attached hereto.

The question was on the adoption of the resolution and there were ___ yeas and ___ nays as follows:

	<u>Yea</u>	<u>Nay</u>	<u>Absent</u>	<u>Abstain</u>
Crafton	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Duevel	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Nelson	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Pedersen	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ziegler	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Upon vote, the president declared the resolution adopted.

September 11, 2024.

* * * * *

I, Tom Duevel, secretary of the Riley Purgatory Bluff Creek Watershed District, do hereby certify that I have compared the above resolution with the original thereof as the same appears of record and on file with the District and find the same to be a true and correct transcription thereof.

IN TESTIMONY WHEREOF, I set my hand this _____ day of _____, 2024.

Tom Duevel, Secretary

Attachment A – Kerber Agreement

Irrevocable Term License for Access and Construction, and Agreement to Convey Maintenance Easement

THIS AGREEMENT is made by and between Kerber Holdings LLC, a private Minnesota corporation (Kerber), and the Riley-Purgatory-Bluff Creek Watershed District, a special purposes district of the State of Minnesota with powers set forth at Minnesota Statutes chapters 103B and 103D (RPBCWD).

RECITALS

A. Kerber is the owner in fee simple of certain real property at 1430 Park Court in the City of Chanhassen, Carver County, legally described as:

Lot 2, Block 1, Rome Park Addition

(the Property).

B. In partnership with the City of Chanhassen, RPBCWD intends to undertake a construction project to restore and stabilize Riley Creek to improve its ecological function, provide diverse habitat layers, reduce streambank erosion, improve soil health and enhance public access and understanding of the creek (the Project).

C. Completion of the Project will benefit Kerber by stabilizing and improving the Property, securing it against loss from erosion, and will contribute to the realization of the public purposes for which the RPBCWD was established by improving the creek and reducing pollutant loading to Lake Susan; and

E. The parties acknowledge in executing this agreement that sufficient consideration has been received by Kerber pursuant to the terms hereof, and that this agreement sets forth obligations that are duly binding on the parties.

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into and made a part of this agreement, and other good and valuable consideration, and to facilitate the Project for the benefit of the public, the parties agree as follows:

1. License

- a. **Grant of License.** Kerber hereby grants and conveys to RPBCWD, its contractors, agents, successors and assigns, an irrevocable term license (the License) over, under, upon and across that portions of the Property shown in and described by Exhibit A, attached hereto and incorporated herein, for purposes of implementation and construction of the Project (the License). The License includes the right to remove and plant vegetation, install stabilization techniques, alter the existing grades and perform grading and filling within the

construction areas described in Exhibit A (Construction Area) and the right to plant and establish vegetated buffer area to protect Riley Creek within the buffer area described in Exhibit A (Buffer Area), all to achieve the intended purposes of the Project. The rights granted hereby include the right to lay and maintain temporary utilities across or above the surface of the Construction Area for purposes of implementation and construction of the Project, and the right to erect signs designating and describing the Buffer Area.

- b. **Restrictions on Kerber's Use of Construction Area and Buffer Area.** During the term of the License, Kerber will not use the Construction Area in any manner that would damage or interfere with the Project, and will not use the Buffer Area in any manner that would prevent or inhibit the planting and establishment of vegetated buffer. Specifically, any grading, filling or alteration of the surface of the Construction Area or Buffer Area by any party other than RPBCWD, its contractors, agents, successors or assigns, or the construction of any hard-surfaced areas, fences, sheds, structures or similar improvements within the Construction Area or Buffer Area is prohibited. Kerber may use and enjoy the Property and the Construction Area and Buffer Area for other purposes, but such use and enjoyment is subject to the restrictions stated herein and the temporary right of RPBCWD to use the same for the purposes herein expressed.
 - c. **No Public Access or Use.** No right of access or use of the Property is granted to the general public by this License.
 - d. **Expiration of License.** The License granted hereunder will expire two years from the date of completion of execution of this agreement or on notification by RPBCWD in writing to Kerber of substantial completion of relevant construction, which will be timely issued, whichever occurs sooner. The License will also terminate in the event of sale of the Property, but Kerber agrees to notify RPBCWD at least 45 days before Kerber conveys fee title ownership of the Property, and to facilitate communication between the RPBCWD and the purchaser of the Property to help ensure RPBCWD's continued ability to utilize and maintain the Construction Area and Buffer Area for the purposes specified herein. The License is irrevocable by Kerber prior to completion of the term defined by operation of the terms of this agreement, and all other rights, obligations and duties hereunder will survive termination of the License, including but not limited to Kerber's obligation under paragraph 3.
2. **Notice.** RPBCWD will notify Kerber at least 10 days prior to commencement of construction of the Project.

3. **Commitment to Execute Maintenance Easement.** When RPBCWD notifies Kerber of substantial completion of construction of the Project and provides Kerber with final construction drawing(s) of the portions of the Project constructed and installed on the Property, Kerber will attach the final construction drawing(s) provided by RPBCWD and execute the Maintenance Easement attached to and incorporated herein as Exhibit B (the Maintenance Easement). RPBCWD agrees to commence performance or contract for the performance of maintenance of the Project on receipt of the executed Maintenance Easement provided for herein, and as between RPBCWD and Kerber RPBCWD will retain responsibility for maintenance of the Project, as deemed necessary by RPBCWD, in perpetuity. The Easement Area, as defined in the Maintenance Easement, will encompass no greater area than that of the Construction Area as shown in Exhibit A, and the additional area needed by RPBCWD, if any, to access the Construction Area and Buffer Area, along with the Buffer Area.
4. **Property Condition.** On completion of the Project, RPBCWD will restore the Property to materially the same condition as existed prior to the commencement of construction, except to the degree that the Property is improved by the Project. In the event the Property is damaged by the activities of RPBCWD or its contractors, agents or assigns pursuant to the exercise of any of right under this agreement, RPBCWD will promptly repair or restore the Property to the extent reasonably practicable, except to the extent the Property is improved by the Project. RPBCWD will restore the Property to facilitate continuation of the established uses of the Property.
5. **Title.** Kerber represents and covenants with RPBCWD that Kerber is the only owner of fee title to the Property; has the sole right to enter this agreement and convey the rights to use the Property described herein to RPBCWD; that there are no unrecorded mortgages, contracts for deed or other encumbrances that would prevent the granting of the License or the use thereof by the RPBCWD for the purposes described herein; and that Kerber will indemnify and hold the RPBCWD harmless for any breach of the foregoing covenants.
6. **Insurance; Indemnification.** RPBCWD will require its contractors, agents, successors and assigns to carry commercial general liability coverage for injury to or death of a person or persons and for damage to Property occasioned by the performance of the Project. Kerber will remain solely responsible for maintaining liability and other insurance for its own uses of and authority over the Property.

Kerber and RPBCWD enter this agreement solely for the purposes of improving the ecological health and condition of Riley Creek. With respect to any and all activity undertaken pursuant to this agreement, RPBCWD agrees to hold

harmless, defend and indemnify Kerber, its officers, employees and agents from and against any and all liability, loss, claim, damage or expense (including reasonable attorney fees, costs and disbursements) that Kerber may incur as a result of the Project due to any negligent or willful act or omission of RPBCWD, its contractors, agents or assigns, or RPBCWD's breach of any specific contractual duty. RPBCWD's obligations under this paragraph will survive the termination of the agreement.

RPBCWD will indemnify and hold Kerber and the Property harmless against any and all mechanics' and materialmen's liens that may arise as a result of the Project and will promptly remove and discharge any and all such liens. RPBCWD ensures that the exercise of its rights under the agreement and execution of the Project will not impede or impair at any time Kerber's or any lessee's or lessee's customers' access to the Property or the conduct of normal business operations on the Property.

This agreement creates no right in and waives no immunity, defense or liability limitation with respect to any third party. As between the parties, only contract remedies are available for a breach of this agreement. Notwithstanding the foregoing, Kerber agrees that RPBCWD will not be deemed to have acquired by entry into or performance under this agreement any form of interest or ownership in or to any portion of the Property. And RPBCWD will not by entry into or performance under this agreement be deemed to have exercised any form of control over the use, operation or management of any portion of the Property or adjacent property so as to render RPBCWD a potentially responsible party for any contamination under state and/or federal law.

7. **Delivery of Notices.** All notices required or permitted under this agreement will be in writing and will be deemed delivered when personally delivered, delivered by documented courier delivery or mailed by United States registered or certified mail, return receipt requested, at the address below or to such other address as a party may designate by a written notice to the other.

If to Kerber:

[NAME, TITLE]

3697 Larive Way

Chaska, MN 55318-4611

If to RPBCWD:

Riley-Purgatory-Bluff Creek Watershed District

Attn: Administrator

18681 Lake Drive East

Chanhassen, MN 55317
tjeffery@rpbcwd.org

8. **Severability.** If any one or more of the provisions of this agreement, or the applicability of any such provision to a specific situation, is held invalid or unenforceable, such provision will be modified to the extent necessary to make it or its application valid and enforceable, and the validity and enforceability of all other provisions of this agreement and all other applications of any such provision will not be affected thereby.
9. **Governing Law; Venue.** This agreement will be construed and governed by the laws of the State of Minnesota, and venue for any action arising under this agreement will be in the district court of Hennepin County, Minnesota.
10. **No Waiver of Immunity.** No provision of this agreement will be interpreted as a waiver of any statutory or common law immunity by or limitation of liability available to RPBCWD, all such immunities and limitations being expressly reserved by RPBCWD.

IN WITNESS WHEREOF, the undersigned have executed this agreement with the intent to be legally bound by its terms as of the date this agreement is fully executed by both parties.

Kerber Holdings LLC

[name], [title]

Date: _____

Riley-Purgatory-Bluff Creek Watershed District

Terry Jeffery
Administrator

Date: _____

Approved as to form and execution

RPBCWD counsel

EXHIBIT A
Construction Area & Buffer Area

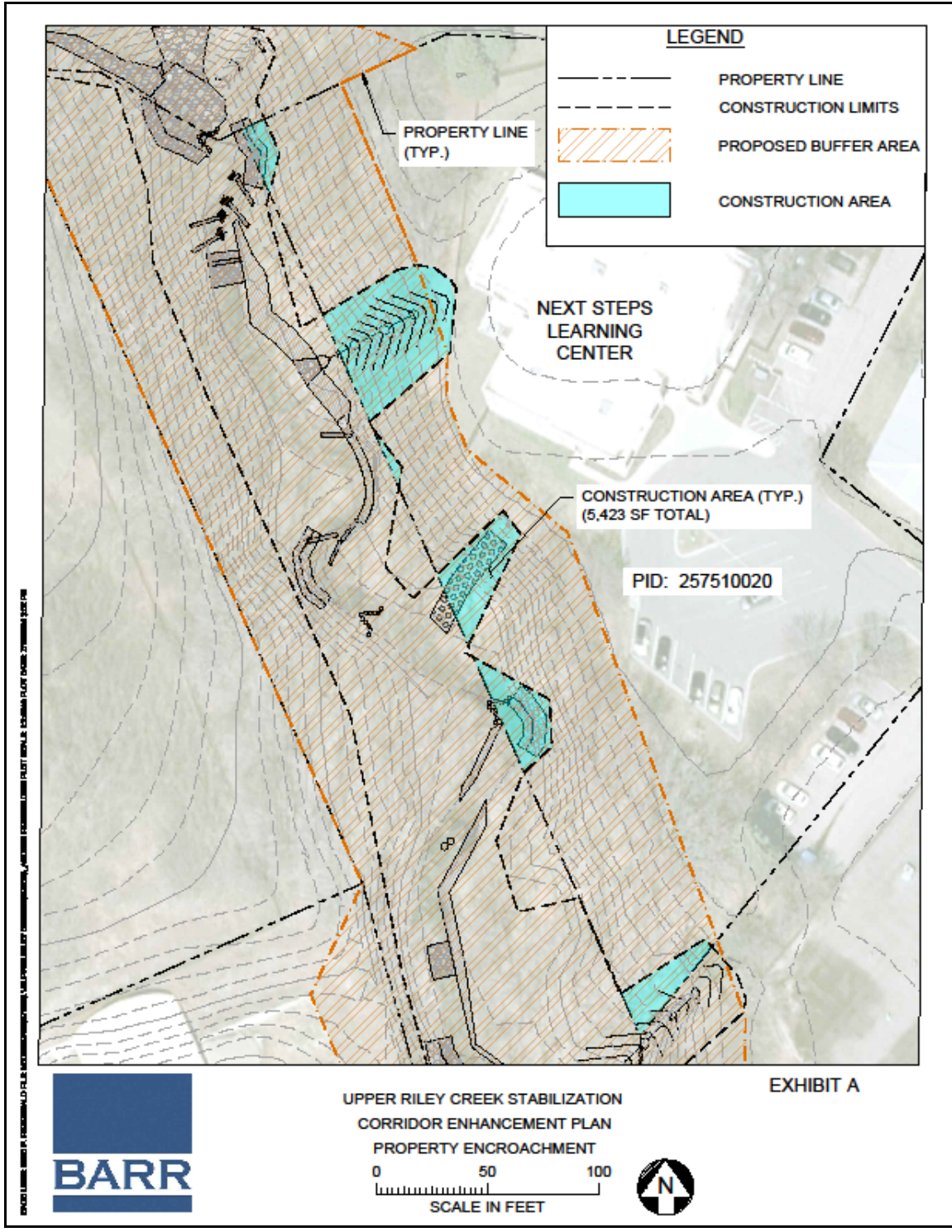


EXHIBIT B
MAINTENANCE EASEMENT

[MAINTAIN 3-INCH MARGIN]

MAINTENANCE EASEMENT

THIS EASEMENT is made by Holdings LLC, a private Minnesota corporation (Grantor), and the Riley-Purgatory-Bluff Creek Watershed District, a special purposes district of the State of Minnesota with powers set forth at Minnesota Statutes chapters 103B and 103D (Grantee).

RECITALS

A. Grantor is the owner in fee simple of certain real property at 1430 Park Court in the City of Chanhassen, Carver County, legally described as:

Lot 2, Block 1, Rome Park Addition

(the Property) and no one other than Grantor has any right title or legal interest in the Property;

B. Grantor has agreed to grant and Grantee has agreed to accept the easement rights described and granted herein, necessary to ensure the success of Grantee's work to stabilize the banks of Riley Creek as it passes adjacent to the Property;

C. Under an agreement between the parties, Grantee has installed hard armoring, plantings or a combination of these techniques to stabilize the streambank on and/or adjacent to the Property (the Project);

D. Grantee has requested and Grantor has agreed to record this maintenance easement on the Property to ensure the long-term effectiveness of the Project; and

E. Completion of the Project benefits Grantor by stabilizing and improving the Property and contributes to the purposes for which the Grantee was established and continues by improving Riley Creek and reducing pollutant loading to Lake Susan.

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into and made a part of this easement, and other good and valuable consideration, and to facilitate the Project for the benefit of the public, the parties hereto agree as follows, intending to be legally bound:

1. **Maintenance Easement**

- a. **Grant of Easement.** Grantor hereby grants and conveys to Grantee, its successors, contractors, agents and assigns, and Grantee accepts, a perpetual easement (the Maintenance Easement) for maintenance of the portion of the Project constructed on the Property and the vegetated buffer established on the Property as shown in the scaled site plan(s) attached to and incorporated into this easement as Exhibit A (the Easement Area). The Maintenance Easement includes the right to access, cross, and recross the Property, on foot and using mechanical equipment, within the Easement Area for the purpose of monitoring, inspecting, reconstructing and maintaining the Project and to access the vegetated buffer within the portion of the Easement Area the labeled "Buffer Area" on Exhibit A. Maintenance activities within the Easement Area will include but will not be limited to correction of erosion or structural problems observed to ensure stability of the Project, maintenance or replacement of plantings; seeding and reseeded to maintain ecological health and function, removal of invasive species and weeds, and repair or replacement of buffer-area signage. Grantee will repair any damage to the Property area resulting from entry thereon by Grantee or Grantee's employees, agents, contractors or assigns.
- b. **Restrictions on Grantor's Use of Maintenance Easement.** Grantor will not use the Easement Area or permit the construction of any improvements within the Easement Area in any manner that would damage or interfere with the Project. Specifically, any grading, filling or alteration of the surface of the Easement Area by any party other than Grantee, its successors or assigns, or the construction of any hard-surfaced areas, fences, sheds, structures or similar improvements within the Easement Area is prohibited to ensure the Project continues to protect water quality, shade the riparian edge, moderate flow into the creek, and provide wildlife habitat. Weeds may be hand-pulled or spot-treated with aquatic formulations of herbicide according to instructions on the herbicide label. Grantor will not mow or otherwise disturb vegetation, apply fertilizer to or dispose of yard or other waste in the Easement Area. Grantor may use and enjoy the Easement Area for any purpose, but such use and enjoyment is subject to the restrictions stated herein and the right of Grantee to use the same for the purposes herein expressed. Grantor will not use the Access Area in a manner that precludes, after reasonable notice, Grantee's exercise of its rights under this easement to access the Easement Area.
- c. **No Public Access or Use.** No right of access or use is granted to the general public to the Property by this Maintenance Easement.

2. **Notice.** Grantee may access the Property and undertake work in accordance with and under the terms of this Maintenance Easement at any time, but Grantee will notify Grantor at least 3 days prior to commencement of any exercise of Grantee's rights under this Maintenance Easement.
3. **Title.** Except as expressly stated otherwise herein, Grantor represents and covenants with the Grantee that Grantor is the only owner of fee title to the Property; has the sole right to grant and convey the Maintenance Easement to the Grantee; that there are no unrecorded mortgages, contracts for deed or other encumbrances that would prevent the establishment of the Maintenance Easement or the use thereof by the Grantee for the purposes described herein; and Grantor will indemnify and hold the Grantee harmless for any breach of the foregoing covenants.
4. **Liability.** In the event the Property is damaged by the activities of Grantee or its contractors, agents or assigns pursuant to the exercise of any of Grantee's rights under this Maintenance Easement, Grantee will promptly repair or restore any damage to the Property resulting therefrom to the extent reasonably practicable. Grantee will repair seed or plant disturbed or damaged areas with vegetation suitable for the intended uses of the Property and Easement Area.

With respect to any and all activity undertaken pursuant to this easement, Grantee agrees to hold harmless, defend and indemnify Grantor, its officers, employees and agents from and against any and all liability, loss, claim, damage or expense (including reasonable attorney fees, costs and disbursements) that Grantor may incur as a result of maintenance undertaken by Grantee to secure the performance and capacity of the Project due to any negligent or willful act or omission of Grantee, its contractors, agents or assigns, or Grantee's breach of any specific contractual duty.

Grantee will indemnify and hold Grantor and the Property harmless against any and all mechanics' and materialmen's liens that may arise as a result of the maintenance of the Project and will promptly remove and discharge any and all such liens. Grantee will ensure that the exercise of its rights under the Maintenance Easement will not impede or impair at any time Grantor's or any lessee's or lessee's customers' access to the Property or the conduct of normal business operations on the Property.

The Maintenance Easement creates no right in and waives no immunity, defense or liability limitation with respect to any third party. As between the parties, only contract remedies are available for a breach of this easement. Notwithstanding the foregoing, Grantee will not be deemed to have acquired by entry into or performance under this easement any form of interest or ownership in or to any

it or its application valid and enforceable, and the validity and enforceability of all other provisions of this agreement and all other applications of any such provision will not be affected thereby.

10. **Governing Law; Venue.** This Maintenance Easement will be construed and governed by the laws of the State of Minnesota. Venue for any legal action arising under this easement will be in the district court of Hennepin County, Minnesota.
11. **No Waiver of Immunity.** No provision of this Maintenance Easement will be interpreted as a waiver of any statutory or common law immunity from or limitation of liability available to Grantee, all such immunities and limitations being expressly reserved by Grantee.
12. **Recording.** Grantee may, at its expense, record and rerecord this Maintenance Easement.

(Signature page follows.)

IN WITNESS WHEREOF, the undersigned execute this easement, intending to be legally bound.

GRANTOR: Kerber Holdings LLC

_____ Date: _____
[name, title]

STATE OF MINNESOTA
COUNTY OF

This instrument was acknowledged before me this ___ day of _____, 202__, by _____, [REST OF FORM TO BE DRAFTED TO ACCORD WITH OWNERSHIP].

Notary Public

**GRANTEE:
Riley-Purgatory-Bluff Creek Watershed District**

_____ Date: _____
Terry Jeffery
Administrator

STATE OF MINNESOTA
COUNTY OF

This instrument was acknowledged before me this ___ day of _____, 202__, by Terry Jeffery, as administrator of the Riley-Purgatory-Bluff Creek Watershed District, a special purposes district of the State of Minnesota with powers set forth at Minnesota Statutes chapters 103B and 103D, on behalf of the municipal corporation.

Notary Public

Drafted by:
Smith Partners PLLP – MJW
250 Marquette Avenue South, Suite 250
Minneapolis Minn 55401

EXHIBIT A
FINAL CONSTRUCTION DRAWINGS
Easement Area and Buffer Area