

**Dedicating an Irrevocable Term License, and
Committing to Convey a Maintenance Easement
Between Patrick Rooney and Jody Rooney and
Brown's Creek Watershed District**

This agreement is made by and between Patrick Rooney and Jody Rooney, individuals married to each other (together, Rooneys), and Brown's Creek Watershed District, a special purposes governmental entity of the State of Minnesota with purposes and powers set forth at Minnesota Statutes chapters 103B and 103D (BCWD), for purposes of conveyance by Rooneys to BCWD of temporary and ongoing property rights necessary for construction and maintenance of a creek-improvement project.

RECITALS

A. Rooneys are the owners in fee simple of 3.3 acres of certain real property at 13033 McKusick Road North in the City of Stillwater, Washington County, designated by county property identification number 20 030 20 32 0021(the Rooney Property).

B. Whereas Brown's Creek Watershed District has an approved and adopted watershed resources management plan in fulfillment of Minnesota Statutes section 103B.231 including policies committing BCWD to the improvement of the water quality and ecological integrity of Brown's Creek and its tributaries, including maintaining a viable cold-water fishery and maintaining the hydrology and geomorphology of Brown's Creek and its tributaries required for stream equilibrium and health, and the capital improvements program in the plan includes creek-restoration projects addressing impairments of Brown's Creek for turbidity and fish-bioassessments identified in the Brown's Creek Total Maximum Daily Load Plan (2012) and the Brown's Creek Thermal Study (2016), including improvement of reaches categorized as having degraded stream channel geomorphology by addressing lack of buffer, stream width, overhanging banks, and profile and alignment;

C. Whereas at the direction of the BCWD Board of Managers to address the impairments and improve the ecological health of Brown's Creek, the BCWD staff and engineer developed a conceptual design for restoration of roughly 2,000 feet of the creek from McKusick Road just upstream of Brown's Creek Park to just downstream of the Brown's Creek State Trail in Stillwater, and the design includes:

- reconnection of cutoff meanders, pattern adjustments to increase stream sinuosity, and grade control to reconnect the floodplain adjacent to the creek;
- reconnect the floodplain and remove invasive species from the bank and upstream areas along the reach;
- bank shaping and selective tree thinning to promote herbaceous understory growth;
- restoration of fish habitat with rock riffles and pools to increase spawning opportunities and provide stable refuge for macroinvertebrates;

- establishment and maintenance of vegetation; and
- improved access to the creek from Brown’s Creek State Trail.

(Altogether, the elements listed here constitute and are referred to as “the Project” for purposes of this agreement.) The Project will also include the development and implementation of a plan for post-construction maintenance and repair of the Project (the Maintenance Plan).

D. Whereas the Project includes work on the Rooney Property, among others, and the Rooneys have agreed to provide rights to access and use the Rooney Property to facilitate implementation and maintenance of the Project; and

E. Construction of the Project will benefit Rooneys by improving the health of vegetation on and stabilizing the Rooney Property, securing it against loss from erosion, and benefitting the public generally by mitigating risk of flooding and improving the ecological health of the creek and wildlife habitat. The parties acknowledge in executing this agreement that sufficient mutual consideration is exchanged under 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. Approval of design and plans. BCWD has contracted with the BCWD engineer, Emmons & Olivier Resources Inc., for the preparation of a design and plans for the Project, attached hereto and incorporated herein as Exhibit A. By their signature hereunder, Rooneys approve the plans and design in Exhibit A. BCWD makes no warranty to the Rooneys regarding the BCWD engineer’s or another third party’s performance in design, construction or construction management for the Project.

Commented [MW1]: This will need to include the plans for the Rooney property.

2. License

a. **Grant of license.** Rooneys hereby grant and convey to BCWD, its contractors, agents, successors and assigns, an irrevocable term license over, under, upon and across that portion of the Rooney Property shown and labeled “Construction Area” on Exhibit B, attached hereto and incorporated herein, for purposes of access to and construction on the Rooney Property to construct the Project (the License). The License includes the right of ingress and egress and to pass over and through the Construction Area on foot and using motorized equipment for staging of construction, construction and implementation of the Project and the right to plant, install stabilization techniques, alter existing grades and perform grading and filling within the Construction Area necessary 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

Commented [MW2]: Will need this from EOR. I trust that access will be from the project area to the south or ROW that we already have rights to use?

surface of the Construction Area for purposes of implementation and construction of the Project.

- b. **Restrictions on Rooneys' use of the Construction Area.** During the term of the License, Rooneys will not use the Construction Area in any manner that would damage or interfere with the Project. Specifically, any grading, filling or alteration of the surface of the Construction Area by any party other than BCWD, its contractors, agents, successors or assigns, or the construction of any hard-surfaced areas, fences, sheds, structures or similar improvements within the Construction Area is prohibited. Rooneys may use and enjoy the Rooney Property and the Construction Area for all purposes, but such use and enjoyment is subject to the restrictions stated herein and the temporary right of BCWD to use the same for the purposes herein expressed.
- c. **No public access or use.** No right of access or use of the Rooney Property is granted to the general public by this License.

3. Property Condition. On completion of construction of the Project, BCWD will restore the Rooney Property to materially the same condition as existed prior to the commencement of construction, except to the degree that the Rooney Property is improved by the Project. In the event the Rooney Property is damaged by the activities of BCWD or its contractors, agents or assigns pursuant to the exercise of any of BCWD's rights under this agreement, BCWD will promptly repair or restore the Rooney Property to the extent reasonably practicable or to a condition agreed to by BCWD and Rooneys. BCWD will repair, seed or plant disturbed or damaged areas with vegetation suitable for Rooneys' intended uses of the Rooney Property.

4. BCWD's ongoing specific rights and duties. In addition to its rights and responsibilities for fulfillment of the terms of this agreement as provided herein, BCWD has rights and duties as follows:

- a. BCWD will contract with the BCWD engineer for construction oversight and otherwise manage the implementation of the Project in accordance with the design and plans in Exhibit A.
- b. BCWD acknowledges that the conduct of the Project on the Rooney Property is potentially hazardous, and BCWD is aware of and knowledgeable about the risks inherent in conducting work on the Rooney Property, including risks of unknown conditions on the Rooney Property. BCWD assumes all risks of conducting Project work on the Rooney Property, including risk of injury from slips, falls, exposure to hazardous materials, objects or persons falling on persons, equipment failure, injury from sharp equipment, improperly administered first aid, lightning strikes or drowning. BCWD recognizes that Rooneys make no representations as to whether the Rooney Property is safe, and BCWD acknowledges the hazards and risks associated with conduct of the Project on the Rooney Property and chooses to assume them.

- c. In contracting for the construction of the Project, BCWD will require that:
- i. The contractor restrict all of its activities to the Construction Area of the Rooney Property as specified in section 3 herein.
 - ii. The contractor name the Rooneys as an additional insured for general liability with primary and noncontributory coverage and provide a certificate showing same prior to start of construction.
 - iii. The contractor indemnify, defend and hold harmless the Rooneys 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 BCWD.
 - iv. The contractor extend all warranties applicable to the Rooney Property to the Rooneys.
 - v. The contractor assess the need for and obtain all permits and other regulatory approvals applicable to the Project on behalf of BCWD and the Rooneys.
- d. BCWD will notify Rooneys at least 10 calendar days prior to commencement of construction of the Project on the Rooney Property, and within 10 days of substantial completion of construction. (For purposes of this agreement and the Project generally, "substantial completion" is defined as completion of all elements of the Project as described herein for the intended purposes of the Project, except establishment and maintenance of vegetation, and implementation of the Maintenance Plan, as described in paragraph 5c herein, all of which will continue after substantial completion.)
- e. BCWD will provide Rooneys with as-built drawings of the portion of the Project on the Rooney Property and a draft Maintenance Plan within 60 days of substantial completion of construction.
- f. BCWD will commence performance or contract for the performance of maintenance of the Project on receipt of the executed Maintenance Easement and approval of a draft of the Maintenance Plan, as specified and defined in paragraphs 5b and 5c, respectively, herein. As between BCWD and Rooneys, BCWD will retain responsibility for establishment of vegetation and implementation of the Maintenance Plan.
- g. Until substantial completion of the Project, if BCWD, in its judgment, should decide that the Project is infeasible, BCWD, at its option, may declare the agreement rescinded and annulled. If BCWD so declares, all obligations herein, performed or not, will be void and, if land-disturbing activities for the Project

Commented [MW3]: It would be good not to include these, since they would require further amendment of the contract.

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have commenced, BCWD will return the Rooney Property materially to its prior condition or to a condition agreed to in writing by Rooneys and BCWD.

5. **Rooneys' ongoing specific rights and duties.** In addition to its rights and responsibilities for fulfillment of the terms of this agreement as provided herein, Rooneys have rights and duties as follows:
- a. Rooneys will cooperate with efforts undertaken by BCWD and its contractors to obtain permits and approvals needed for the Project, and by their execution below Rooneys authorize BCWD to apply for such permits and approvals on their behalf.
 - b. *Commitment to execute maintenance easement.* When BCWD notifies the Rooneys of substantial completion of construction of the Project and provides Rooneys with final construction drawing(s) of the portions of the Project on the Rooney Property, Rooneys will attach the final construction drawing(s) provided by BCWD and execute a maintenance easement substantially in the form attached to and incorporated herein as Exhibit C (the Maintenance Easement). The Maintenance Area, as defined in the Maintenance Easement, will not extend outside of the Construction Area as shown in Exhibit B, and the Maintenance Area defined in the Maintenance Easement will encompass no greater area than that described as the Construction Area in this license, as shown in Exhibit B.
 - c. *Review and approval of the Maintenance Plan.* In accordance with paragraph 5b, BCWD will timely provide a draft of the Maintenance Plan to Rooneys for their cooperation in the development of the Maintenance Plan. In addition, Rooneys will have 60 days from receipt to review and approve the final draft Maintenance Plan submitted in accordance with paragraph 4e herein. Failure to act within the specified time will constitute approval. Rooneys' approval will not be unreasonably withheld.
6. **Costs.** As between the parties, BCWD will be responsible for all costs of design, specification, construction, construction oversight and management for the Project, and development and implementation of the Maintenance Plan. Rooneys will dedicate the License and the Maintenance Easement pursuant to the terms of this agreement at no cost to BCWD. In addition, the parties each will bear their own incidental costs of determination and completion of their responsibilities and exercise of their rights hereunder.
7. **Insurance.** BCWD 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 caused by the performance of the Project. Rooneys will remain solely responsible for maintaining liability and other insurance for their own use of and authority over the Rooney Property.

8. **Term.** The License granted hereunder will expire two years from the date of execution of this agreement or on recordation in the office of the Washington County Recorder by BCWD of the Maintenance Easement, whichever occurs sooner. Rooneys may revoke the License prior to its expiration only on written concurrence of BCWD. All other rights, obligations and duties hereunder will survive termination of the License, including but not limited to Rooneys' obligation under paragraph 6b hereunder.

9. **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 Rooneys: Patrick and Jody Rooney
13033 McKusick Road North
Stillwater, MN

If to BCWD: Brown's Creek Watershed District
Attn: Administrator
455 Hayward Ave North
Oakdale, MN 55128
KKill@mnwcd.org
651-330-8220

10. **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.

11. **Venue; governing law.** Venue for any adjudication arising from this agreement will be in the district court of Washington County, Minnesota, and the agreement will be construed and governed by the laws of the State of Minnesota.

12. **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 BCWD, all such immunities and limitations being expressly reserved by BCWD.

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.

Rooneys

Date: _____

By Jody Rooney

Date: _____

By Patrick Rooney

Brown's Creek Watershed District

Date: _____

By Karen Kill
Its administrator

Approved as to form and execution

BCWD counsel

DRAFT

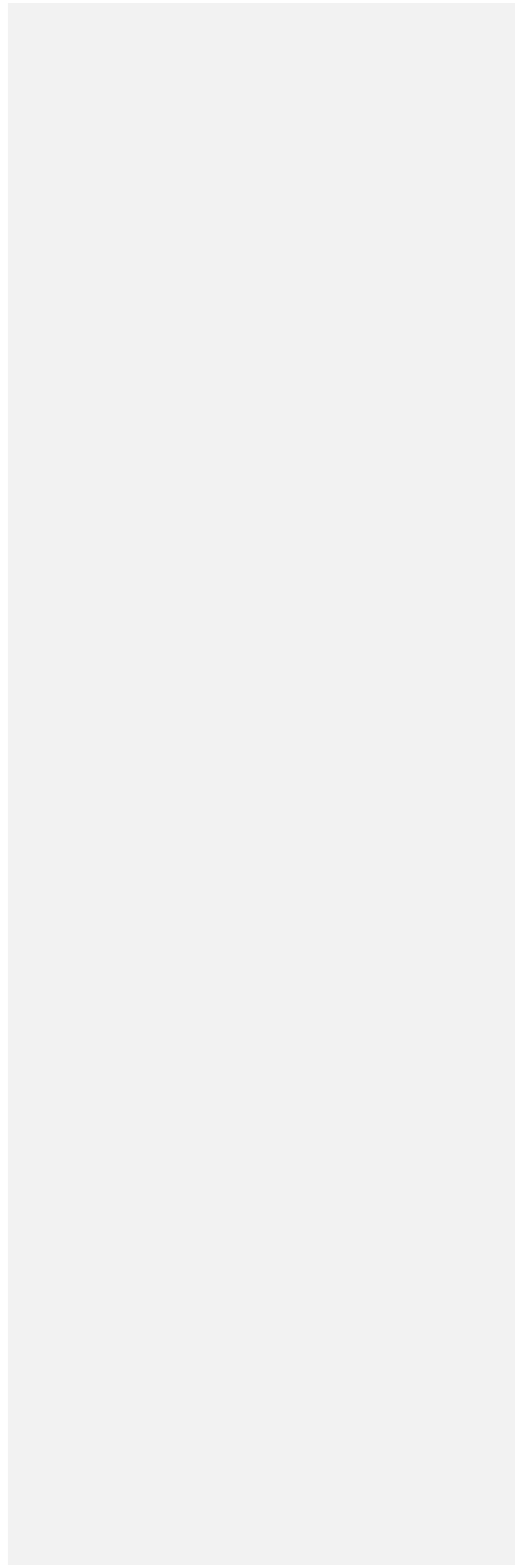


EXHIBIT A

Project Design & Plans

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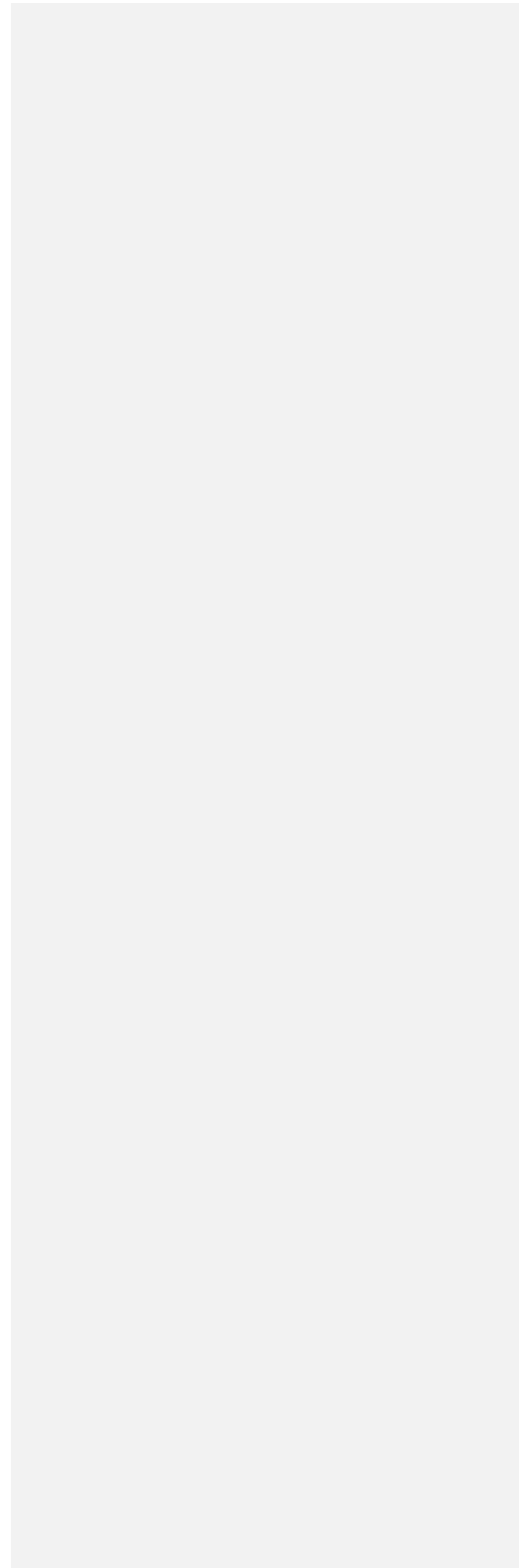


EXHIBIT B

Site Plan - Construction Area

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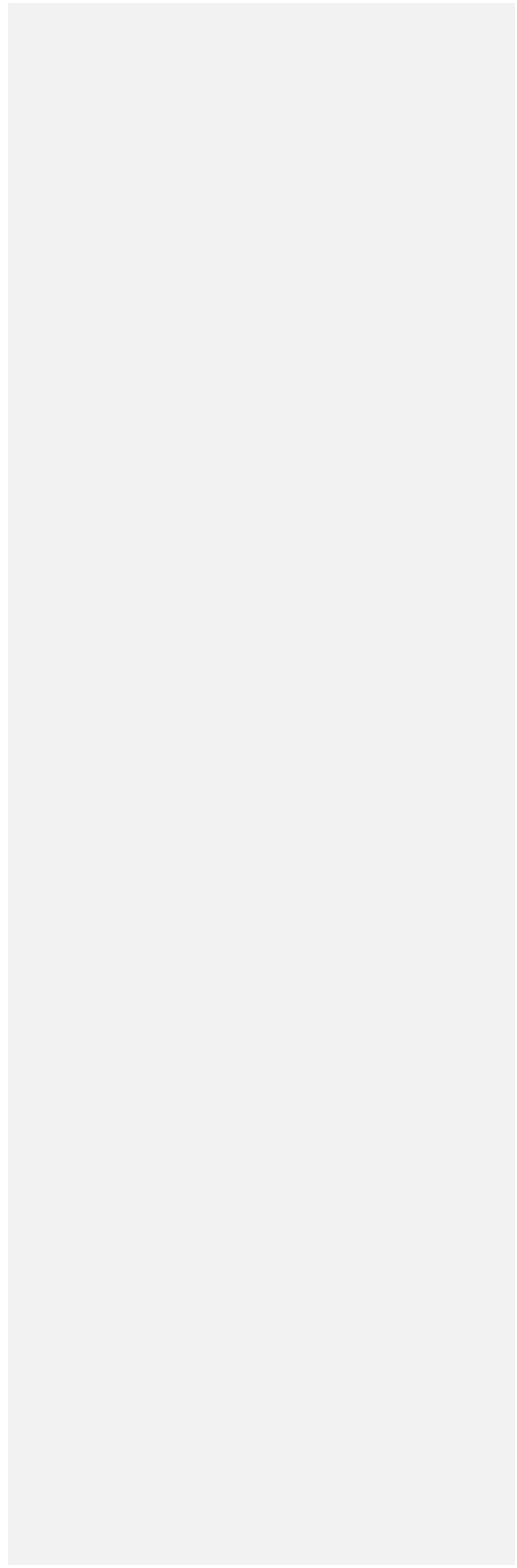
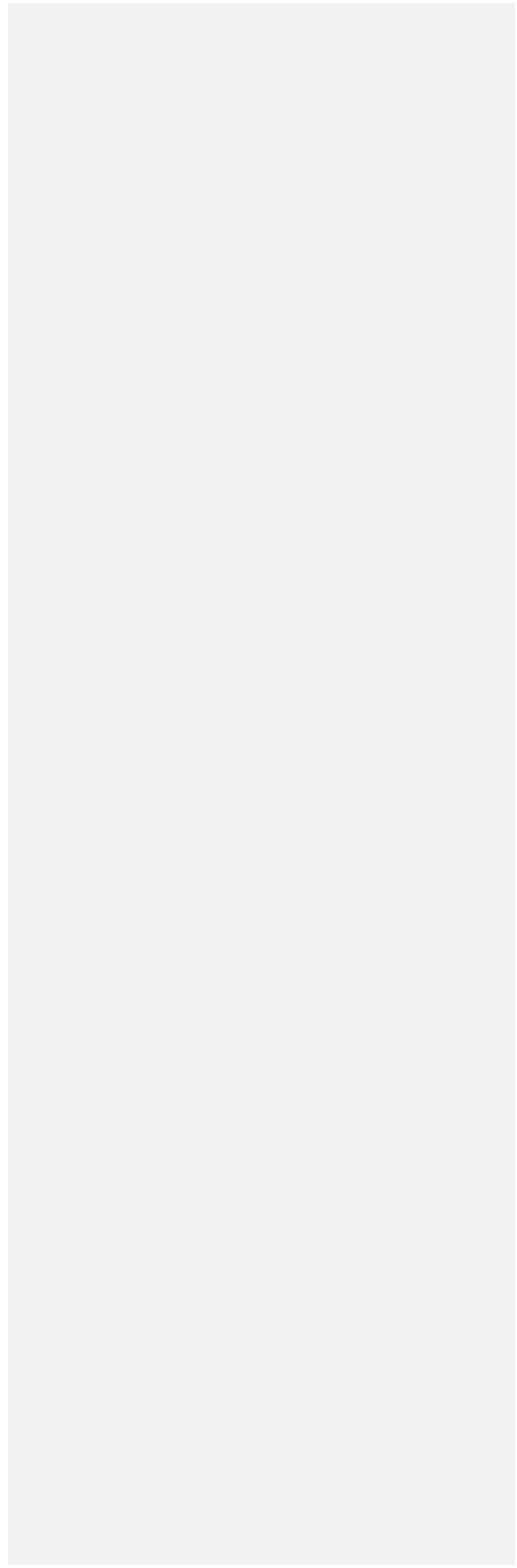


EXHIBIT C

Maintenance Easement

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[MAINTAIN 3-INCH MARGIN]

**MAINTENANCE EASEMENT
On the Rooney Property at 13033 McKusick Road North
Washington County, Minnesota**

THIS EASEMENT is granted by Patrick Rooney and Jody Rooney, individuals married to each other (together, Rooneys) to the Brown's Creek Watershed District, a special purposes district of the State of Minnesota with powers set forth at Minnesota Statutes chapters 103B and 103D (BCWD).

WITNESS:

A. Rooneys own in fee simple certain real property consisting of 4.6 acres of land, more or less, at 13033 McKusick Rd North in the City of Stillwater, Washington County, legally described as:

(the Rooney Property).

B. BCWD has undertaken a construction project reconnecting floodplain, stabilizing eroded and eroding creek banks, reshaping banks, constructing in-stream riffles and pools, thinning tree cover to improve habitat and prevent erosion, removing invasive species and replacing with native vegetation, and improving access to the creek on public property from the Brown's Creek State Trail (the Project). The Project has been constructed on city-owned land, county right-of-way, state property (including along Brown's Creek State Trail), and on the Rooney Property, benefitting Rooneys by stabilizing and improving the Rooney Property and securing against soil loss from erosion, and will contribute to the realization of the public purposes for which BCWD was established;

Commented [MW5]: Needed from Rooneys.

(Washington County public:) Section 20 Township 030 Range 020 PT NW1/4-SW1/4 BEING THAT PT OF W 315FT OF NW1/4-SW1/4 LYING NLY OF NLY R/W LN OF BN RR FORMERLY NP RR CO EXC PT NW1/4-SW1/4 BEING PRCL #1 WACO HWY R/W PLAT 85 ALSO EXC THAT PT LYING SLY OF FOLL DESC LN:COM AT NW COR SD NW1/4-SW1/4 THN S00DEG01'56"W ALG W LN SD NW1

C. BCWD has requested and Rooneys have agreed to grant to BCWD an easement over the Rooney Property providing BCWD with the right to access and use the Rooney Property to maintain the Project after construction.

NOW, THEREFORE, for one dollar and other good and valuable consideration, the sufficiency of which the parties hereby acknowledge, the parties agree as follows:

1. Grant of Easement. Rooneys hereby grant and convey to BCWD, its contractors, agents, successors and assigns a perpetual easement over, under, upon and across that portion of the Rooney Property delineated and labeled on Exhibit 1, attached hereto and incorporated herein (the Maintenance Area), for purposes of access for maintenance of the Project in accordance with the Maintenance Plan developed for and approved by the Rooneys as part of the Project. The easement includes the right of ingress and egress and to pass over and through the Maintenance Area on foot and using motorized equipment to conduct maintenance of the Project, including the right to inspect, monitor, reconstruct and otherwise maintain the Project on the Rooney Property, including but not limited to correction of erosion and structural problems observed to ensure stability of the Maintenance Area, maintenance or replacement of plantings; seeding and reseeding to maintain ecological health and function; removal of invasive species and weeds as necessary 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 Maintenance Area for purposes of maintenance of the Project.

2. Restrictions on Rooneys' Use of Maintenance Area. Rooneys will not use the Maintenance Area or permit the construction of any improvements within the Maintenance Area in any manner that would damage or interfere with the function or physical structure of the Project. Specifically, Rooneys will not alter or allow alteration of any grade-control structures or any filling or grading of land or construction of structures within the Maintenance Area to ensure the Project continues to protect water quality and moderate flow in the creek. Weeds may be hand-pulled or spot-treated with herbicide according to instructions on the herbicide label. Rooneys will not mow or otherwise disturb vegetation, apply fertilizer to, or dispose of yard or other waste in the Maintenance Area.

3. No Public Access or Use; Rooneys' Reserved Rights. No right of access or use is granted to the general public to the Rooney Property by this easement. Rooneys may use and enjoy the Maintenance Area for any purposes and engage in or allow others to engage in all activities or uses and enjoy all rights accruing from their ownership of the Rooney Property, subject to the restrictions stated herein and the right of BCWD to use the Maintenance Area for the purposes herein expressed. Rooneys retain the right to sell or transfer all or part of the Rooney Property subject to the easement. Rooneys will inform all others who exercise any right on the Rooney Property by or through Rooneys of the requirements and constraints imposed by the easement, and will take any other steps as necessary to ensure that the terms of the easement are met.

4. Conduct of the Project Maintenance; Property Condition. All activity by BCWD on the Rooney Property will be conducted in a safe and workmanlike manner at BCWD's sole cost. In the event the Maintenance Area or Rooney Property is damaged by the activities of BCWD or its contractors, agents or assigns pursuant to the exercise of any of BCWD's rights under the easement, BCWD will promptly repair or restore the Rooney Property to the extent reasonably practicable. BCWD will repair, seed or plant disturbed or damaged areas with vegetation suitable for the intended uses of the Rooney Property.
5. Inspection and Enforcement. BCWD representatives, agents and contractors may enter the Maintenance Area at reasonable times to monitor activities on and uses of the Maintenance Area. In acting under this paragraph, BCWD will not unreasonably interfere with Rooneys' use and quiet enjoyment of the Rooney Property. BCWD may act to prevent or remedy all activities and uses of the Maintenance Area not consistent with the terms of the easement. BCWD will remain responsible for its legal fees and related expenses for any unlawful action taken by BCWD, its employees, agents or contractors.
6. Notice. BCWD may access the Maintenance Area and undertake work in accordance with and under the terms of the easement at any time, but after completion of construction of the Project, BCWD will notify Rooneys by telephone or email at least 24 hours prior to commencement of any exercise of BCWD's further rights under the easement.
7. Regulatory Authorities Not Affected. The easement does not replace or diminish the regulatory authority of BCWD or any other public body, as may apply to the Rooney Property or any activity within it.
8. Insurance. Rooneys remain solely responsible for maintaining liability and other insurance for its own uses of and authority over the Rooney Property.
9. Running with the Land. This easement, rights and privileges hereby granted, the restrictions and obligations hereby imposed, and the agreements contained in this easement will be easements, restrictions and covenants running with the land in perpetuity and will inure to the benefit of and be binding on the parties hereto and their respective heirs, successors and assigns including but not limited to all subsequent owners of any portion of the Rooney Property and all persons claiming under them.
10. Notices. Except as otherwise specifically provided herein, all notices required or permitted under this easement 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 appearing below or to such other address as each party may designate by a written notice to the other.

If to Rooneys: Jody & Patrick Rooney
13033 McKusick Road
Stillwater MN 55082

If to BCWD: Brown's Creek Watershed District
Attn: Administrator
455 Hayward
Oakdale MN 55128
KKill@mnwcd.org

11. Severability. If any one or more of the provisions of this easement, or the applicability of any such provision to a specific situation, will be 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.

12. Governing Law; Venue. This easement will be construed and governed by the laws of the State of Minnesota. Venue for any action taken under or related to the Easement will be in the district court of Washington County, Minnesota.

13. No Waiver of Immunity. No provision of this easement will be interpreted as a waiver of any statutory or common law immunity from or limitation of liability available to BCWD, all such immunities and limitations being expressly reserved by BCWD.

14. Recording. BCWD may, at its expense, record and rerecord this easement.

{Signature page follows.}

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

Rooneys

_____ Date: _____
By Jody Rooney

_____ Date: _____
By Patrick Rooney

STATE OF MINNESOTA
COUNTY OF WASHINGTON

This instrument was acknowledged before me this ____ day of _____, 202__, by Jody Rooney and Patrick Rooney, individuals married to each other.

Notary Public

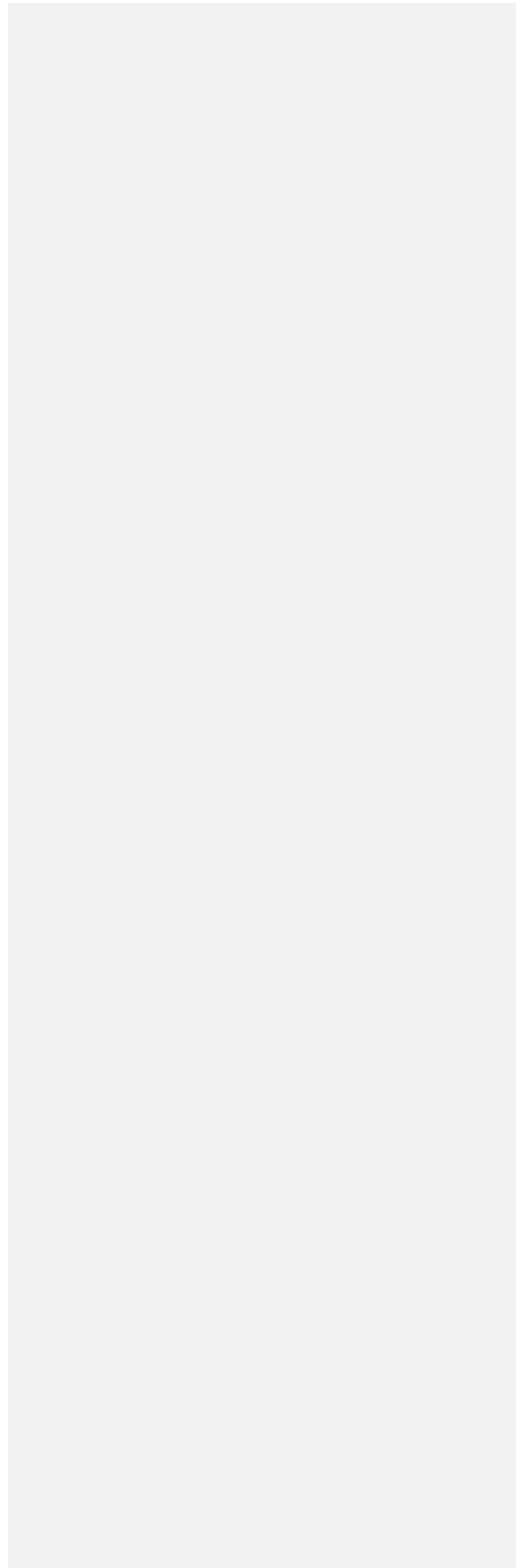
Brown’s Creek Watershed District

_____ Date: _____
By Karen Kill
Its administrator

STATE OF MINNESOTA
COUNTY OF WASHINGTON

This instrument was acknowledged before me this ___ day of _____, 202__, by Karen Kill, as administrator of the Brown’s 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 district.

Notary Public



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

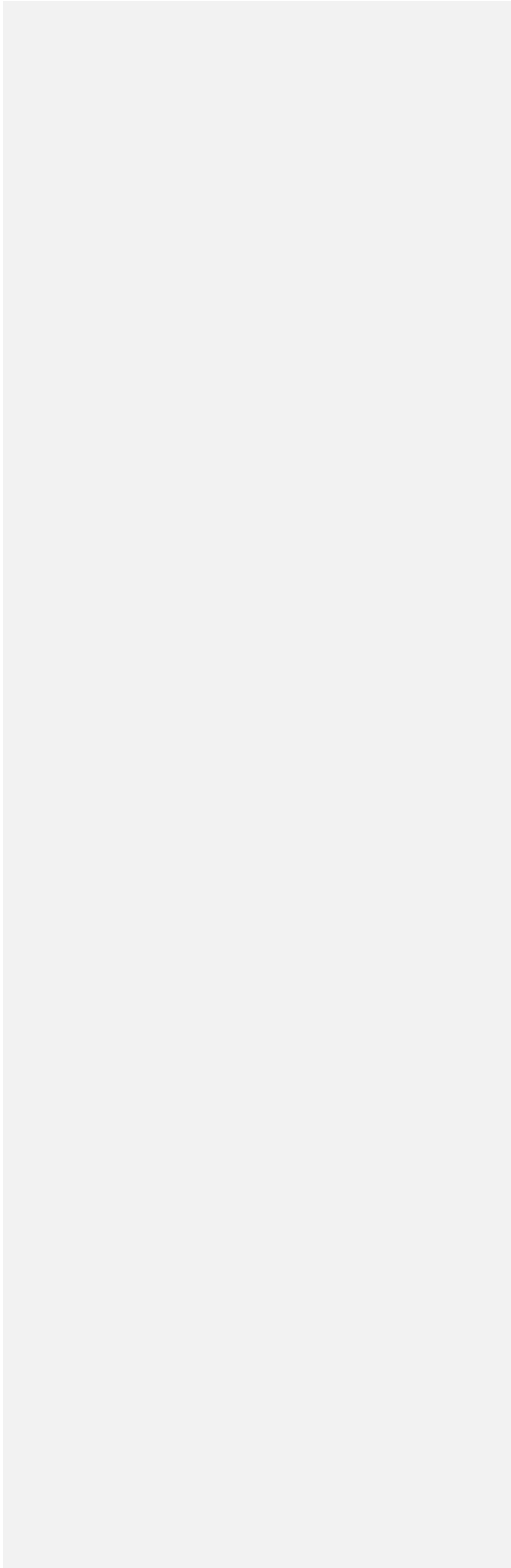


EXHIBIT 1

Maintenance Area

