CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: September 16, 2019

ITEM: Three Fountains, 4520 University Avenue – Accept Storm Water Management Facility Maintenance Agreement – Shoppes at Three Fountains, LC – MML2-004479-2019

Resolution: **Approval and Acceptance of Storm Water Management Facility Maintenance Agreement**

FINANCIAL IMPACT: Undetermined.

BACKGROUND: A site plan modification request was received for the Chick-fil-A at 4502 University Avenue to add a second drive-thru lane with new canopies. During the Pre-Application meeting to discuss these modifications, it was noted by Engineering Services that the City doesn't have an executed Storm Water Management Facility Maintenance Agreement (SWMFMA) for the overall Three Fountains site, on which the Chick-fil-A is located. The owner of the Three Fountains development has submitted the SWMFMA as a part of Chick-fil-A's minor modification application.

Exhibit II is a copy of the Storm Water Management Facility Maintenance Agreement. For policy purposes, formal acceptance by the City Council of this agreement is required.

CITY COUNCIL SUBCOMMITTEE: Acceptance of this document by Council is a required formality; this item was not presented to the Development and Planning City Council Subcommittee.

OUTSTANDING ISSUES: There are no outstanding issues.

RECOMMENDATION: Adopt a resolution approving and accepting the Storm Water Management Facility Maintenance Agreement for the Shoppes at Three Fountains development provided to the City as part of the review of the Chick-fil-A Drive-thru Canopies Minor Modification.

Lead Staff Member: Brian S. Portz, AICP BP

STAFF REVIEWS

Department Director	
Appropriations/Finance	
Legal	
Agenda Acceptance	

PUBLICATION(S) (if applicable)

Published In		
Date(s) Published	N/A	
Letter sent to surrounding property owners		N/A

SUBCOMMITTEE REVIEW (if applicable)

Committee	N/A		
Date Reviewed			
Recommendation	Yes ☐	No ☐	Split ☐

ATTACHMENTS:

Exhibit I	-	Resolution
Exhibit II	-	Storm Water Management Facility Maintenance Agreement

EXHIBIT I

Prepared by: B. Portz Development Services, City of WDM, PO Box 65320, WDM, IA 50265-0320, 515-222-3620
When Recorded, Return to: City Clerk, City of West Des Moines, PO Box 65320, West Des Moines, IA 50265-0320

RESOLUTION

A RESOLUTION APPROVING AND ACCEPTING A STORM WATER MANAGEMENT FACILITY MAINTENANCE AGREEMENT FOR THE SHOPPES AT THREE FOUNTAINS DEVELOPMENT LOCATED AT 4502 UNIVERSITY AVENUE

WHEREAS, it is the policy of the City of West Des Moines, Iowa to approve and accept all agreements conveying property and other interests to the City; and

WHEREAS, the following document has been presented to the City for approval and acceptance; and

Storm Water Management Facility Maintenance Agreement for that property
locally known as The Shoppes at Three Fountains

WHEREAS, it is in the best interest of the citizens of the City to approve and accept the above-described document.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA THAT the document described above conveying property and other interests to the City of West Des Moines, Iowa, is hereby approved and accepted and shall be filed with the county recorder as appropriate.

PASSED AND ADOPTED this 16th day of September, 2019.

_____
Russ Trimble, Mayor Pro Tem

ATTEST:

_____
Ryan T. Jacobson
City Clerk

EXHIBIT II

Prepared by: Richard J. Scieszinski, City Attorney for the City of West Des Moines, (515) 222-3614
Return to: City Clerk, City of West Des Moines, 4200 Mills Civic Parkway, West Des Moines, IA 50265
Project Name: Shoppes at Three Fountains
Project File #: PA-004332-2019 (Chick-fil-A University Avenue Custom Project)

SHOPPES AT THREE FOUNTAINS, L.C. STORM WATER MANAGEMENT FACILITY MAINTENANCE COVENANT AND PERMANENT EASEMENT AGREEMENT FOR SINGLE PARCEL OWNERSHIP

THIS STORM WATER MANAGEMENT FACILITY MAINTENANCE COVENANT AND PERMANENT EASEMENT AGREEMENT is entered into between **SHOPPES AT THREE FOUNTAINS, L.C., an Iowa limited liability company** (hereinafter referred to as "Grantor") and the **City of West Des Moines, Iowa** (hereinafter referred to as "City"), in consideration for the approval by the City of West Des Moines, Iowa of the site plan for the University Avenue Chick-fil-A drive thru modifications. (Whenever the term "Grantor" is used herein, it shall mean Grantor and Grantor's successors and assigns unless otherwise specifically denoted).

Grantor is obligated by the Municipal Code of the City of West Des Moines to control storm water runoff for the proposed development as a part of the site plan approval for the Shoppes at Three Fountains development. In consideration for the City's approval of Chick-fil-A's drive thru modifications site plan, the parties enter into this Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement to control and address storm water runoff for the following described property:

See Exhibit A, attached hereto and incorporated herein by this reference,
(hereinafter referred to as the "Benefited Property").

PART I – COVENANTS ON THE BENEFITED PROPERTY

The following provisions are covenants running with the land to the City of West Des Moines, binding on all successors and assigns of the Benefited Property and shall only be amended or released with the written permission of the City.

1. Grantor hereby agrees that the storm water runoff for the site shall be and currently is being controlled through the installation, construction and maintenance of a Storm Water Management facility as detailed in the documents submitted for the Chick-fil-A drive thru modifications Site Plan upon, over, under, through and across the following described property:

See Exhibit B, attached hereto and incorporated herein by this reference,

(hereinafter referred to as the "Easement Area").

2. Grantor covenants and agrees that the design, construction and maintenance of the Storm Water Management Facility shall be in compliance with the Storm Water Management Plan now on file with the City of West Des

Moines and which is available for public inspection. The design, construction and maintenance of the Storm Water Management Facility shall meet the storm water runoff control requirements of the Municipal Code of the City of West Des Moines, Iowa.

3. It is hereby agreed and covenanted that the above described Benefited Property receives benefit from the Storm Water Management Facility by controlling runoff from the Benefited Property to meet the requirements of the Post-Construction Storm Water Management Ordinance of the Municipal Code of the City of West Des Moines, Iowa and the Subdivision Design requirements of Section 10-3-1 or succeeding legislation of the Municipal Code of the City of West Des Moines, Iowa.

4. It is hereby agreed that Grantor is solely responsible for constructing, installing and ensuring that the Storm Water Management Facility meets the standard set forth in the Post-Construction Storm Water Ordinance and Section 10-3-1 of the Municipal Code of the City of West Des Moines, Iowa.

5. Grantor hereby designates, appoints and agrees on behalf of Grantor and all successors and assigns that the Grantor is designated as the responsible party for replacement, reconstruction, repair, grading and maintenance of the Storm Water Management Facility.

6. Grantor hereby covenants and agrees that Grantor is hereby designated and authorized to accept notices and service of process as it relates to the inspection, replacement, reconstruction, repair, grading and maintenance of the Storm Water Management Facility or permanent easement or notice of assessment for replacement, reconstruction, repair, grading and maintenance of the Storm Water Management Facility.

7. Grantor shall be responsible for all maintenance, repair and replacement of the Storm Water Management Facility, including obligations set forth in Part II, paragraph 12. Grantor shall comply with all terms of the Easement set forth in Part II herein.

8. Grantor shall inspect the Storm Water Management Facility on an annual basis, including but not limited to all pipes, inlets and outlets for defects, obstructions or changes in the Storm Water Management Facility from the original design of the Facility. The inspection shall be documented with date stamped photographs of the Storm Water Management Facility. Grantor shall document such inspection by completing the Inspection Report Form available from the City of West Des Moines Public Works Department. Any deficiencies or defects noted by the inspection shall be corrected by Grantor. The Inspection photographs and Inspection Report Form shall be made available to the City for review upon request and shall be kept and maintained for a period of 5 years from the date of inspection.

9. Grantor hereby agrees and consents on behalf of itself and all successors and assigns of the Benefited Property to assessment of the costs of maintaining, reconstructing, repairing, grading or dredging the Easement Area and Storm Water Management Facility on all Benefited Property established by the Grantor pursuant to the obligations set forth in paragraph 10, below. Grantor, on behalf of itself and all successors and assigns of the Benefited Property, shall execute a Petition and Waiver in favor of the City to allow the City to recover any costs expended for action taken as set forth in paragraph 10, below, to address the maintenance, reconstruction, repair, grading or dredging of the Storm Water Management Facility or Easement Area.

10. Should Grantor fail to maintain, reconstruct, repair, grade or dredge the Storm Water Management Facility or the Easement Area upon notice from the City, the City may cause such action to be done and assessed to the Benefited Property. The assessments on the Benefited Property shall be immediately due and payable from Grantor to the City pursuant to the terms of the Agreement and Waiver (see **Exhibit A**, attached hereto and made a part hereof).

PART II – Easement for Storm Water Management Facility and Surface Water Flowage

The following provisions in Part II herein are for a permanent easement over the Easement Area running with the land to the City of West Des Moines and Grantor.

11. Grantor hereby grants to the City a Permanent Surface Water Flowage Easement and Storm Water Management Facility under, over, through and across the Easement Area described above for the purpose of constructing, reconstructing, repairing, grading and maintaining the Storm Water Management Facility and the surface of the Easement Area in a manner that will permit the free and unobstructed flow of surface water over the Easement Area described above.

12. It is the obligation of the Grantor and all subsequent owners of the above described easement area to maintain the Easement Area and the Storm Water Management Facility as set forth below. The Grantor and all subsequent owners of the Easement Area shall perform the maintenance obligations set forth below. The maintenance obligations for the Storm Water Management Facility are as follows:

Storm water detention and retention ponds or basins:

a. Mow on a regular basis to maintain the vegetation at the height designated on the original design to prevent erosion.
b. Remove all trash, litter, debris or obstructions in the basin in the Easement Area and any inlets or outlets located within the Easement Area.
c. Plant, maintain and replant as necessary permitted vegetation.
d. Inspect for any defects, obstructions, or any changes in the original design.
e. Inspect and determine the depth of the pond or basin on an annual basis.
f. Remove any accumulated sediment from the outlet structures and remove any sediment which may accumulate greater than 12 inches in ponds or basins and greater than 6 inches in an underground detention basin.
g. Till the soil at the bottom of the riparian buffer if it does not drain out within the time established in the design plan and replant vegetation as designated on the original design.
h. All repairs shall conform to the original design.
i. Maintaining the storm water and retention pond or basin to assure the effectiveness for storm water runoff for the subdivision/site.

Grass and Bioretention Swales:

a. Mow on a regular basis to maintain the vegetation at the height designated on the original design to prevent erosion.
b. Remove all trash, litter, debris or obstructions in the grass or bioretention swale and Easement area.
c. No chemicals or substances shall be applied to the Easement Area that shall harm or impair the effectiveness of the swale as a storm water runoff control measure.
d. Replant vegetation as soon as practical when any vegetation dies.
e. Inspect and determine the depth of the swale on an annual basis.
f. Remove any sediment accumulated greater than 6 inches which may accumulate in the swale.
g. Till the soil at the bottom of the swale if the grass swale does not drain out within the time established in the design plan and replant vegetation as designated on the original design.
h. All repairs shall conform to the original design.
i. Maintain the grass and/or bioretention swale to assure the effectiveness for storm water runoff for the subdivision/site.

Riparian Buffer:

a. Mow on a regular basis to maintain the vegetation at the height designated on the original design to prevent erosion.
b. Replant the vegetation in the Easement Area as soon as practical when any vegetation dies.
c. Remove all trash, litter, debris or obstructions in the Easement Area.
d. Inspect for erosion in the riparian buffer on an annual basis.
e. Inspect and determine the depth of the riparian buffer on an annual basis.
f. Remove any sediment accumulated greater than 25% of the original design depth.
g. Till the soil at the bottom of the riparian buffer if it does not drain out within the time established in the design plan and replant vegetation designated on the original design.

h. All repairs shall conform to the original design.
i. Maintain the riparian buffer to assure the effectiveness for storm water runoff for the subdivision/site.

13. No chemicals or any substance shall be applied to the storm water maintenance facility that shall harm or impair the effectiveness of the storm water maintenance facility as a storm water runoff control measure.

14. No structure shall be erected over or within the Easement Area without obtaining the prior written approval of the City Engineer.

15. No structure, material, device, thing or matter which could possibly obstruct or impede the normal flow of surface water over the Easement Area shall be erected or caused to be placed on the Easement Area without obtaining the prior written approval of the City Engineer.

16. No planting of trees and shrubs is allowed within the easement area (other than planting allowed and required pursuant to previously approved plans on file with the City of West Des Moines).

17. No change shall be made to the grade, elevation or contour of any part of the Easement Area without obtaining the prior written consent of the City Engineer.

18. The City and their agents, contractors, employees and assigns shall have the right of access to the Easement Area and have all rights of ingress and egress reasonably necessary for the use and enjoyment of the Easement Area as herein described, including, but not limited to, the right to remove any unauthorized plantings or structures placed or erected on the Easement Area and the right to do maintenance, repair, reconstruction, grading and dredging.

19. Grantor covenants on behalf of the Benefited Property that the Easement Area or any other area appurtenant to or necessary for the operation of the Storm Water Management Facility shall not be sold, transferred, donated or in any other manner conveyed in order to relieve the Grantor from complying with the requirements of this Agreement.

20. This Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement and Petition and Waiver shall be deemed to run with the land and shall be binding on Grantor and on Grantor's successors and assigns.

Grantor does hereby covenant with the City that Grantor holds said real estate described in this Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement by Title In Fee Simple; that Grantor has good and lawful authority to convey the same; and said Grantor covenants to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Each of the undersigned hereby relinquishes all rights of dower, homestead and distributive share, if any, in and to the interests conveyed by this Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement.

Words and phrases herein including acknowledgment hereof shall be construed as in the singular or plural number, and as masculine or feminine gender, according to the context.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

SHOPPES AT THREE FOUNTAINS, L.C.,
an Iowa limited liability company

By: **RRNGL, LLC, an Iowa limited liability company, Sole Member**

By: **R&R Real Estate Investors II, LLC, an Iowa limited liability company, Managing Member**

By: _____
Steven K. Gaer
Executive Vice President

STATE OF IOWA)
) ss
COUNTY OF POLK)

On this 8th day of August, 2019, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Steven K. Gaer, to me personally known, who being by me duly sworn, did say that he is the Executive Vice President of R&R Real Estate Investors II, LLC .

NOTARIAL SEAL IOWA
MICHELLE BRIDGEMAN
Commission Number 708310
My Commission Expires
February 14, 2022

Michelle Bridgeman
Notary Public

CITY OF WEST DES MOINES, IOWA

I, Ryan Jacobson, City Clerk of the City of West Des Moines, Iowa, do hereby certify that the within and foregoing Easement was duly approved and accepted by the City Council of said City of West Des Moines by Resolution and Roll Call No. _____ passed on the _____ day of _____, 2019 and this certificate is made pursuant to authority contained in said Resolution.

Signed this _____ day of _____, 2019.

_____
Ryan Jacobson
City Clerk of the City of West Des Moines, Iowa

EXHIBIT A

AGREEMENT AND WAIVER
POST CONSTRUCTION STORM WATER MANAGEMENT
SHOPPES AT THREE FOUNTAINS

THIS AGREEMENT made and entered into by and between the City of West Des Moines, Iowa, hereinafter referenced the CITY and **SHOPPES AT THREE FOUNTAINS, L.C., an Iowa limited liability company** hereinafter referenced as the PROPERTY OWNER or PROPERTY OWNERS.

WITNESSETH:

WHEREAS, the City desires to encourage orderly community development and provide for the regulation and control of the extension of public improvements, public services, and utilities, consistent with its Comprehensive Plan, adopted in December 1993, as amended, and in accordance with Iowa Code Chapter 354, Platting, Division and Subdivision of Land; and

WHEREAS, pursuant to U.S. EPA's National Pollutant Discharge Elimination System ("NPDES") permit program ("Program") administered by the Iowa Department of Natural Resources ("IDNR"), the City is required to obtain from the IDNR an NPDES permit for the discharge of storm water from a Municipal Separate Storm Sewer System (MS4); and

WHEREAS, as a condition of the City's MS4 Permit, the City is obliged to develop, implement, and enforce a program to address storm water runoff from new construction and reconstruction projects for which State NPDES General Permit #2 storm water permit coverage is required; and

WHEREAS, the Property Owner, as the developer and/or owner of a construction project in the City of West Des Moines, is subject to the program implemented by the City to address storm water runoff from the project; and

WHEREAS, in order to comply with the program implemented by the City, the Property Owner has executed an Offsite Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement (hereinafter "Agreement") with the City to address the rights and obligations of the parties regarding control of post-construction storm water runoff from the project; and

WHEREAS, a provision of the Agreement requires the Property Owner to execute this Agreement and Waiver in favor of the City to allow the City to recover any costs expended for action taken by the City, its consultants, contractors and assigns to address the maintenance, reconstruction, repair, grading or dredging of the Storm Water Management Facility or Easement Area if the Property Owner or the Property Owner's successors and assigns fail to do so; and

WHEREAS, this Agreement and Waiver is made in conjunction with the Offsite Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement located on:

See Exhibit B

and applies to the property described as:

See Exhibit A

NOW, THEREFORE, BE IT AGREED AMONG THE PARTIES AS FOLLOWS:

1. In the event the Property Owner or its successors and assigns fail to comply with the requirements of the Offsite Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement regarding any action necessary for the maintenance, reconstruction, repair, grading or dredging of the Storm Water Management

Facility or Easement Area, the City shall have the right to cause the above-described actions completed in accordance with such plans and specifications as it shall deem appropriate.

2. For the purpose of this Agreement, the City may elect to enter into a contract for the completion of such actions as a part of any contract(s) and assess the cost of such actions to the Property Owner or its successors and assigns pursuant to the formula established in the Offsite Storm Water Management Facility Maintenance Covenant and Permanent Easement Agreement.

3. In consideration for the completion of such actions by the City, the undersigned Property Owners hereby WAIVE the following:

   A. All legal formalities of whatsoever kind or character required by the laws of Iowa to be observed by cities in the completion of said actions where the expense of such Improvements is to be assessed against private property; and

   B. Each and every question of jurisdiction, the intention of the Property Owners being to authorize and direct said City to complete such actions without requiring any of the formalities or legal proceedings required of cities by the statutes of Iowa; and

   C. Any limitation of the amount of said assessment as a percentage of valuation as provided in the Code of Iowa; and

   D. Any right to defer or postpone the payment for any such action.

4. It is further agreed that:

   A. When said actions have been constructed or completed in accordance with the plans and specifications, the City may make assessments against the properties of the undersigned Property Owners, or their successors or assigns, for their pro-rata share of the entire cost of the construction and/or completion of said actions.

   B. Said assessments shall be due immediately and will be paid to the City of West Des Moines and shall constitute a lien upon the properties hereinafter described. Further, each of the undersigned Property Owners hereby agree to accept responsibility for the assessment which is thus assessed against the Owner's property.

   C. Said assessments shall have the same legal force and effect as if all the legal formalities provided by law in such cases had been fully and faithfully performed and observed.

5. The amount and proportion of the cost of the actions completed by the City to be paid shall be ascertained and determined by the Engineers and reported to the City Council, which shall make such changes or alterations as they may require. When said costs are determined and approved by the City Council, they shall constitute the assessments against the properties.

6. The Property Owners retain the right to request of the City a review of the mathematical calculations made to ensure their accuracy.

7. Property Owners hereby authorize the City Council to pass any Resolution requisite or necessary to order and secure said actions, to provide for the construction of the same and to make the assessments herein provided for, without further notice to said Property Owners or any of them. Any such resolution may contain recitals that said actions are ordered or made by the Council without petition of Property Owners, without in any way qualifying this Agreement or releasing the Property Owners from their obligation to pay the assessments levied against their property for the cost of said action.

8. Each Property Owner warrants that the real estate described below is free and clear of all liens and encumbrances other than for ordinary taxes, except for such liens as are held by lienholders hereinafter listed and designated as signers of this Agreement and Waiver. Each lienholder designated below, by execution of this Agreement and Waiver, consent to the subordination of its lien to the lien of the assessment levied pursuant hereto.

9. Each Property Owner further agrees that the terms of this Agreement and Waiver shall become a covenant which runs with the land of the below-referenced property, and shall be binding upon all successors and assigns. Furthermore, each Property Owner shall give a copy of this Agreement and Waiver to all successors and assigns.

10. The signatories and the City agree this document will be recorded in the office of the appropriate county recorder to ensure that any and all future purchasers of property are put on notice of the above conditions.

Description of Property: See Exhibit A

and

See Exhibit B

PROPERTY OWNER NAME: **SHOPPES AT THREE FOUNTAINS, L.C., an Iowa limited liability company, by RRNGL, LLC, an Iowa limited liability company, Sole Member by: R&R Real Estate Investors II, LLC, an Iowa limited liability company, Managing Member**

By _____

Name Steven K. Gaer, Executive Vice President

Date August 8, 2019

Witness Michelle Bridgeman

Name Michelle Bridgeman

LIENHOLDER'S NAME: (insert name) Freedom Financial

By _____

Name Alex Lambert Title Commercial Loan Officer

Date 8-8-2019

Witness Nicole Larsen

Name Nicole Larsen

LIENHOLDER'S NAME: (insert name)

By Wells Fargo Bank, N.A. John Rent

Name _____ Title Vice President

Date 8/14/19

Witness _____

Name Jason G. Rabel

LIENHOLDER'S NAME: (insert name)

By West Bank

Name _____ Title _____

Date _____

Witness _____

Name _____

LIENHOLDER'S NAME: (insert name)

By Wells Fargo Bank, N.A.

Name _____ Title _____

Date _____

Witness _____

Name _____

LIENHOLDER'S NAME: (insert name)

By West Bank

Name _____ Title Sr. Vice President

Date Kelly J. Smith August 9, 2019

Witness Barry J. Cropp

Name Barry J. Cropp

EXHIBIT A

Three Fountains Detention Pond
Benefitted Properties Map

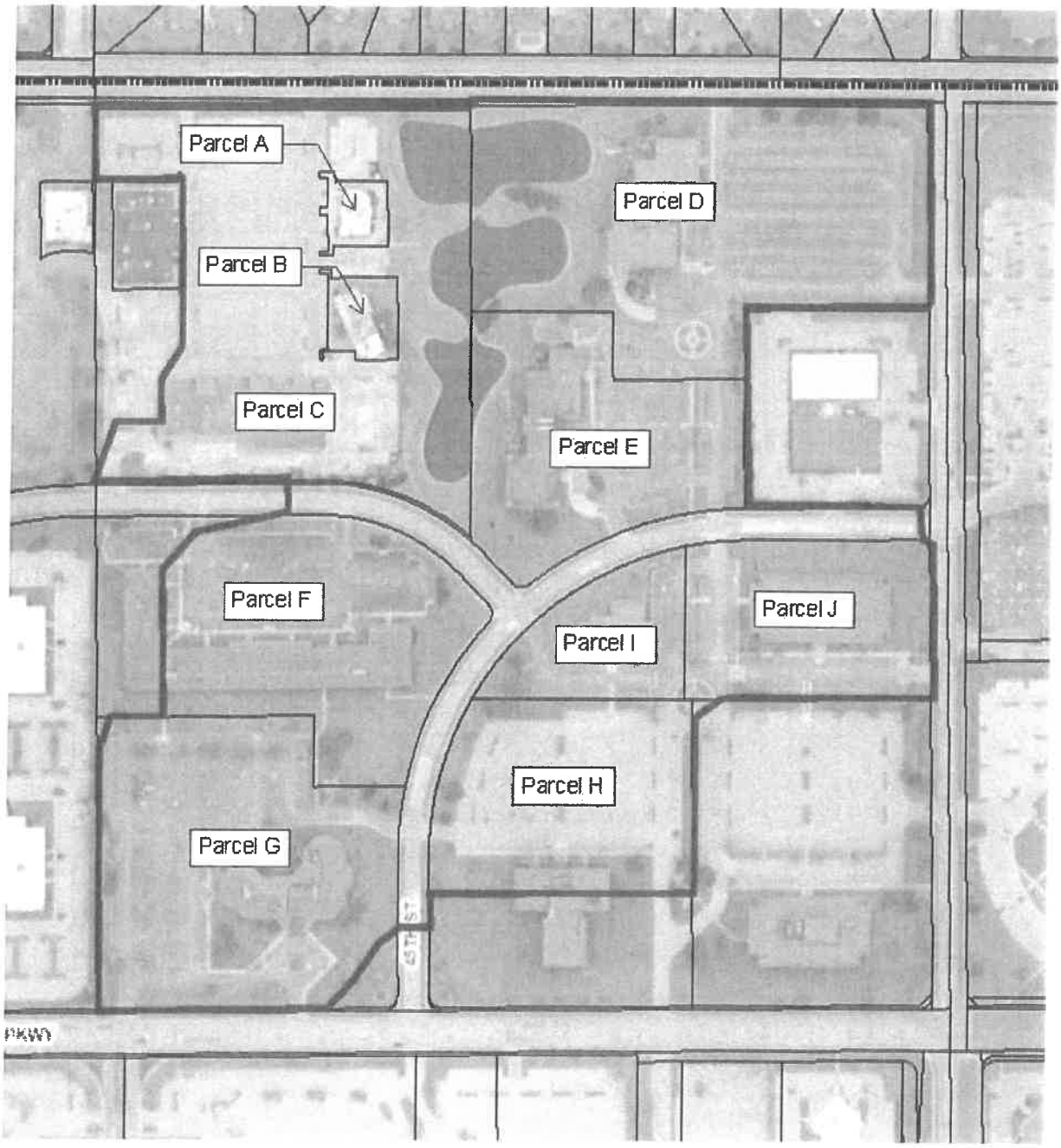

EXHIBIT B

Legal Description for Stormwater Facility Easement

Beginning at the northeast corner of Lot 2, Three Fountains Plat 3, an official plat, thence S 89° 02' 56" E for a distance of 256.34 feet along the southerly right-of-way of University Avenue, thence S 00° 20' 53" W for a distance of 150.86 feet, thence S 33° 20' 37" W for a distance of 76.38 feet, thence S 04° 49' 35" W for a distance of 134.55 feet, thence, S 63° 38' 33" W for a distance of 119.00 feet, thence, S 01° 20' 46" W for a distance of 101.28 feet, thence S 28° 14' 41" W for a distance of 123.03 feet, thence S 04° 13' 35" W for a distance of 112.77 feet, thence S 42° 39' 46" W for a distance of 84.66 feet, thence N 64° 59' 11" W for a distance of 110.81 feet, thence N 00° 20' 53" E for a distance of 533.54 feet, thence, N 24° 15' 23" W for a distance of 79.02 feet, thence N 07° 52' 06" W for a distance of 65.38 feet, thence N 00° 57' 04" E for a distance of 75.80 feet to a point on the southerly right-of-way of University Avenue, thence S 89° 02' 56" E a distance of 168.19 feet along said right-of-way to the point of beginning.

Described area contains approximately 4.96 acres.