# CITY OF WEST DES MOINES
# CITY COUNCIL MEETING COMMUNICATION

**DATE: February 19, 2024**

**ITEM:** Resolution – Approval of 28E Intergovernmental Agreement with the Des Moines Metropolitan Wastewater Reclamation Authority for Sugar Creek - Phase 2 Improvements Project

**FINANCIAL IMPACT:** The initial installation and maintenance costs for the first 20 years will be the responsibility of the Des Moines Metropolitan Wastewater Reclamation Authority pursuant to the 28E Agreement.

**SYNOPSIS:** The City of West Des Moines and the Des Moines Metropolitan Wastewater Reclamation Authority have negotiated a 28E Agreement for the purpose of constructing, establishing, maintaining, and conserving a sustainable and natural stream corridor that supports stream stability, water quality, and ecological functions, particularly including a riparian buffer with permanent vegetative cover and other stream corridor improvements along Sugar Creek from Stagecoach Drive to Mills Civic Parkway.

**RECOMMENDATION:** City staff recommends adopting a Resolution approving the 28E Intergovernmental Agreement between the City of West Des Moines and Des Moines Metropolitan Wastewater Reclamation Authority.

**Lead Staff Member:** Brian J. Hemesath, City Engineer

**STAFF REVIEWS**

| | |
|---|---|
| Department Director | Brian J. Hemesath, P.E., City Engineer |
| Appropriations/Finance | Tim Stiles, Finance Director |
| Legal | Greta Truman, City Attorney |
| Agenda Acceptance | |

**PUBLICATION(S)** (if applicable)

| | |
|---|---|
| Published In | |
| Dates(s) Published | |

**SUBCOMMITTEE REVIEW** (if applicable)

| | | | |
|---|---|---|---|
| Committee | None | | |
| Date Reviewed | | | |
| Recommendation | | | |

**RESOLUTION NO. _____**

**RESOLUTION APPROVING AND AUTHORIZING THE EXECUTION OF 28E INTERGOVERNMENTAL AGREEMENT BY AND BETWEEN THE CITY OF WEST DES MOINES AND THE DES MOINES METROPOLITAN WASTEWATER RECLAMATION AUTHORITY – SUGAR CREEK – PHASE 2 IMPROVEMENTS PROJECT**

**WHEREAS**, the City of West Des Moines (West Des Moines) and the Des Moines Metropolitan Wastewater Reclamation Authority (WRA) desire to enter into an agreement under the provisions of Chapter 28E of the Code of Iowa, whereunder the WRA will construct, establish, maintain, and conserve a sustainable and natural stream corridor that supports stream stability, water quality, and ecological functions, particularly including a riparian buffer with permanent vegetative cover and other stream corridor improvements along Sugar Creek from Stagecoach Drive to Mills Civic Parkway; and

**WHEREAS**, under Chapter 28E of the Code of Iowa, West Des Moines agrees to formalize its responsibilities by entering into a 28E Agreement with the WRA for the WRA Sugar Creek - Phase 2 Improvements Project.

**NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA,** that the Iowa Code Chapter 28E Intergovernmental Agreement between the City of West Des Moines and the Des Moines Metropolitan Wastewater Reclamation Authority pertaining to the WRA Sugar Creek - Phase 2 Improvements Project, a copy of which is hereto attached, be duly approved and is authorized to be filed in the office of the Iowa Secretary of State and all things necessary to place said 28E Agreement in full force and effect in accordance with Chapter 28E, Code of Iowa is herewith authorized.

**PASSED AND APPROVED** on the **19th day** of **February 2024**.

_____
Russ Trimble, Mayor

ATTEST:

_____
Ryan T. Jacobson, City Clerk

# 28E AGREEMENT BETWEEN THE CITY OF WEST DES MOINES, IOWA AND THE DES MOINES METROPOLITAN WASTEWATER RECLAMATION AUTHORITY FOR CONSERVATION ON WRA SUGAR CREEK - PHASE 2 IMPROVEMENTS PROJECT

This Agreement is entered by and between the City of West Des Moines, Iowa, a municipal corporation, (hereafter "CITY") and the Des Moines Metropolitan Wastewater Reclamation Authority, a political subdivision organized under Chapters 28E and 28F of the Iowa Code, (hereafter "WRA").

**WHEREAS**, the WRA requires and CITY desires to grant three easements for conservation (hereafter collectively "Easement") within certain real estate located along Sugar Creek between Mills Civic Parkway and Stagecoach Drive, locally known as a part of Courtyards at Kings Landing Outlot 'X', and a part of District/Parcel 690000/1615353082 (hereafter "Area 1"), locally known as a part of Tiburon Outlot 'W', and a part of District/Parcel 690000/1615301001 (hereafter "Area 2"), locally known as a part of Tiburon Outlot 'Z', and a part of District/Parcel 69000/1615301002 (hereafter "Area 3"), West Des Moines, Iowa, and all legally described as follows, as further depicted on the exhibit attached hereto as "WRA Access/Maintenance Exhibit – Phase 2 Project Area":

<u>AREA 1 – EASEMENT FOR CONSERVATION</u>
OULOT "X", COURTYARDS AT KINGS LANDING, AN OFFICIAL PLAT NOW INCLUDED IN AND FORMING A PART OF THE CITY OF WEST DES MOINES, DALLAS COUNTY, IOWA

<u>AREA 2 – EASEMENT FOR CONSERVATION</u>
OUTLOT "W", TIBURON, AN OFFICIAL PLAT NOW INCLUDED IN AND FORMING A PART OF THE CITY OF WEST DES MOINES, DALLAS COUNTY, IOWA.

<u>AREA 3 – EASEMENT FOR CONSERVATION</u>
OUTLOT "Z", TIBURON, AN OFFICIAL PLAT NOW INCLUDED IN AND FORMING A PART OF THE CITY OF WEST DES MOINES, DALLAS COUNTY, IOWA.

(hereinafter collectively "Easement Area"); and

**WHEREAS**, the WRA needs the Easement Area for the purpose of the WRA Sugar Creek Improvements – Phase 2 Project (hereinafter "Project"), which Project shall include constructing, establishing, maintaining, and conserving a sustainable and natural stream corridor that supports stream stability, water quality, and ecological functions, particularly including a riparian buffer with permanent vegetative cover and other stream corridor improvements; and

**WHEREAS,** for Easement Area, the CITY shall grant the Easement to the WRA to allow the WRA to complete the Project; and

**WHEREAS,** upon completion of the Project, including twenty (20) years of maintenance of the Project improvements by the WRA, the WRA shall release the Easement for all of the Easement Area to the CITY; and

**WHEREAS**, granting the Easement to the WRA to allow the WRA to complete the Project will not adversely affect the use of adjoining real estate by the CITY for municipal purposes.

**NOW, THEREFORE**, the WRA and the CITY (hereinafter collectively "the Parties") hereby agree as follows:

1. Purpose of Agreement. Pursuant to Chapter 28E of the 2021 Code of Iowa, the Parties have entered into this Agreement to set forth the terms by which the WRA will acquire Easements for the Project, and the WRA will release all rights as to all of the Easement Area to the CITY upon completion of the Project, which shall include twenty (20) years of maintenance by the WRA. This Agreement is a voluntary undertaking by the Parties.

2. Effective Date. The Parties agree that this Agreement shall be effective, after its approval by the respective governing bodies of the CITY and the WRA, upon execution by the Parties and its filing with the Iowa Secretary of State.

3. Administration. The Parties hereby agree that the WRA Director shall be designated as administrator for purposes of this Agreement, as provided by Section 28E.6 of the Code of Iowa, that the WRA Director shall administer this Agreement on behalf of the WRA, and the CITY Manager shall administer this Agreement on the behalf of the CITY. No separate entity or joint board is created by this Agreement. Each party will be responsible for financing and budgeting for their respective obligations.

4. Duration. This Agreement shall remain in effect for a fixed term from the execution of this Agreement by the CITY until such time as the WRA releases its interest in all Easement Area, or until terminated prior to the end of this fixed term as provided for herein below.

5. Easement and Terms and Conditions. The CITY agrees to grant the Easement in the form attached as Exhibit "A" to the WRA. The parties hereby agree the Easement shall include but not be limited to the following minimum terms and conditions:

   A. Erection of Structures Prohibited. Except the Project improvements, the Parties shall not erect any structure over or within the Easement Area that is reasonably likely to substantially obstruct or impede the normal flow of surface water over the Easement Area. The WRA understands the CITY intends to, pursuant to a different easement, construct a bike trail with associated improvements within the Easement Area in the future and hereby acknowledges said bike trail and associated improvements shall not be a violation of this provision so long as said bike trail and associated improvements are not detrimental to the function of the Project and the natural floodplain.

   B. Plantings Prohibited. Except the Project improvements, the Parties shall not plant trees or shrubs within any part of Easement Area which are reasonably likely to materially obstruct or impede the normal flow of surface water over the Easement Area. In no

event shall any planting inconsistent with the native species for the geographic region be allowed within the Easement Area.

C. Obstructions Prohibited. Except the Project improvements, the Parties shall not erect or cause to be placed on the Easement Area any structure, material, device, thing, or matter which are reasonably likely to obstruct or impede the normal flow of surface water over the Easement Area.

D. Change of Grade Prohibited. Except the Project improvements, the Parties shall not change the grade, elevation, or contour of any part of the Easement Area without obtaining the prior written consent of the WRA Director, which consent shall not be unreasonably delayed or denied.

E. Row Crops Prohibited. The Parties shall not perform row crop production within the Easement Area.

F. Dumping Prohibited. The Parties shall not dump refuse, waste, sewage, or other debris within the Easement Area.

G. Alterations Prohibited. The Parties shall not make any alterations to the Easement Area that conflict with the purpose of this Agreement, including any actions, intentional or accidental, that would adversely impact the established riparian best management practices or stability of the stream channel.

H. Right of Access. WRA, its agents, contractors, employee, 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. The Easement allow WRA, its agents, contractors, employees, and assigns the right to enter in, upon, and onto the Easement Area at any time to perform any and all activities reasonably related to or reasonably necessary for the construction, reconstruction, repair, conservation, or maintenance of the Easement Area. This right of access shall begin on the date that the WRA accepts the Easement. Prior to performing any work in the Easement Area, the WRA shall give the CITY thirty (30) days notice. Any closures of any future trails in the Easement Area shall be coordinated with the CITY to minimize the time the trail is closed.

I. Maintenance. The objective of the Easement is to reduce creek bank erosion and improve water quality through the preservation of a deep-rooted vegetated stream buffer. Unless approved in writing by the WRA Director and the CITY, CITY shall not mow, fertilize, or otherwise maintain the immediate streambank area located within the Easement Area. The WRA and assigns shall be allowed to engage in all activities reasonably necessary to maintain the immediate streambank area located within the Easement Area. The WRA shall bear the responsibility to maintain the streambank erosion control improvements included in the Project for a period of twenty (20) years, commencing when construction of the Project has been completed. The WRA shall perform routine inspections and monitoring of the Project improvements.

J. Wetlands Mitigation. The Easement Area contains some existing wetland area. The WRA will be responsible for mitigation of any wetland area that is disturbed as part of the Project.

K. Approval by the WRA Board. The Easement shall not be binding until they have received final approval and acceptance by the WRA Board by Resolution which approval and acceptance shall be noted on the Easement by the WRA Board.

L. Restoration of the Easement Area. Upon completion of the initial installation of the Project improvements, the WRA shall promptly restore and grade the Easement Area pursuant to the Project grading plans. Upon completion of initial installation of the Project improvements, the WRA shall seed the Easement Area with weed free, full vegetative coverage of all the disturbed area. The WRA shall also plant and maintain project landscaping for one (1) year. The WRA shall restore to the reasonable satisfaction of the CITY any subsequent damage to the Easement Area directly caused by the WRA, its employees, or its contractors within a reasonable time after the damages are incurred, following written notice to the WRA.

M. Security. The WRA agrees that it will provide any and all security and safety measures reasonably necessary for the Easement Area during the course of any work.

N. Conservation. The Easement Area shall be dedicated and maintained as open space for the conservation of natural floodplain functions for at least the duration of the Project, including twenty (20) years of maintenance. The WRA understands the CITY intends to construct a bike trail and associated improvements within the Easement Area in the future and hereby acknowledges said bike trail and associated improvements shall not be a violation of this provision so long as said bike trail and associated improvements are not detrimental to the function of the Project and the natural floodplain.

6. Insurance.

A. Definition of WRA for Part 6. For purposes of Part 7 of this Agreement, the term "WRA" shall mean the Des Moines Metropolitan Wastewater Reclamation Authority and its Operating Contractor, the City of Des Moines, Iowa, including their respective elected and appointed officials, employees and volunteers.

B. Insurance Requirements. The CITY and the WRA shall, respectively, purchase, and maintain the following insurance coverages throughout the duration of this Agreement. Said insurance shall be provided by an insurance company(ies) or an insurance equivalent provided by a local governmental risk pool pursuant to Section 670.7 of the Iowa Code, "admitted" and "nonadmitted" to do business in the State of Iowa, having no less than an A.M. Best Rating of "B+" or equivalent Demotech rating. A self-insurance/excess insurance program may satisfy these requirements if approved by the other Party. The WRA may, from time to time, review the insurance requirements of this Agreement and require reasonable changes as deemed necessary to protect the CITY and the WRA from loss.

1) Worker's Compensation & Employer's Liability Insurance: Worker's Compensation Insurance, including *Employer's Liability Coverage*, in accordance with all applicable statutes of the State of Iowa. The coverage limits for Employer's Liability Insurance shall be $500,000 each accident for Bodily Injury by Accident, $500,000 each accident for Bodily Injury by Disease, and $500,000 policy limit for Bodily Injury by Disease.

2) Commercial General Liability Insurance: Commercial General Liability insurance on a per occurrence basis with limits of liability not less than $2,000,000 per occurrence and/or aggregate combined single limit covering Personal Injury, Bodily Injury and Property Damage. Coverage shall include the following extensions: (a) Premises and Operations, (b) Products and Completed Operations, (c) Personal and Advertising Injury and (d) Explosion, Collapse and Underground (XCU). Coverage shall be no less comprehensive and no more restrictive than the coverage provided by a standard form Commercial General Liability Policy (ISO CG 0001 or any subsequent ISO equivalent or a non-ISO equivalent form).

3) Automobile Liability Insurance: Automobile Liability Insurance with limits of liability of not less than $2,000,000 per occurrence combined single limit including Bodily Injury and Property Damage. Coverage shall include all owned vehicles, all non-owned vehicles, and all hired vehicles.

4) Umbrella/Excess Insurance: The General Liability and Automobile Liability Insurance requirements above may be satisfied with a combination of primary and Umbrella/Excess Insurance. The Umbrella/Excess Insurance shall also be written on a per occurrence basis. If the Umbrella/Excess Liability Insurance policy does not follow the form of the primary policy(ies), it shall include the same endorsements as required of the primary policy(ies).

5) Directors & Officers or Public Officials Liability Insurance: Directors and Officers or Public Officials Liability Insurance with limits of liability of not less than $1,000,000 per loss and $1,000,000 aggregate per policy period all losses.

6) Governmental Immunity: Liability insurance policies shall include an endorsement that preserves governmental immunity granted under Code of Iowa Section 670.4 by stating that the purchase of the liability insurance and including the WRA as an Additional Insured shall not waive any of the defenses of governmental immunity available to the City or WRA under Code of Iowa Section 670.4 as it now exists or as it may be amended from time to time and that the insurance policy only covers those claims not subject to the defense of governmental immunity under Code of Iowa Section 670.4 and the policy shall not deny any of the rights and benefits accruing to the City or WRA under the policy for reasons of governmental immunity unless and until a court of competent jurisdiction has ruled in favor of the defense(s) of governmental immunity asserted by the City or WRA.

7) Cancellation & Material Change Endorsement: The insurance policies shall include a thirty (30) day advance written notification of Cancellation, forty-five

(45) days advance written notification of Nonrenewal and ten (10) days advance written notification for cancellation due to nonpayment.

8) Proof of Insurance: The CITY and the WRA shall, respectively, submit to the other, a Certificate(s) of Insurance demonstrating compliance with the above insurance requirements. A letter of self-insurance may be submitted in lieu of a Certificate of Insurance if the limits of self-insurance are equal to or exceed those required above.

C. Waiver of Subrogation. To the extent permitted by law, the WRA and the CITY hereby release one another, their respective elected and appointed officials, its agents, employees, and volunteers and others working on their behalf, from and against any and all liability or responsibility to each other or anyone claiming through or under the others by way of subrogation or otherwise, for any loss or damage to property caused by fire or any other casualty and for any loss due to occupational injury. This provision shall be applicable and in full force and effect only with respect to loss or damage arising out of this Agreement. The policies of insurance of each shall contain a clause or endorsement to the effect that such release shall not adversely affect or impair such policies or prejudice the right of each to recover thereunder.

7. Federal, State, and Local Laws for Construction. The WRA shall follow all applicable federal, state, and local laws and regulations for the construction of the Project.

8. Notices. All notices which the Parties are authorized or required to give one another pursuant to this Agreement shall be in writing and may be personally delivered or sent by ordinary mail to the addresses hereinafter provided. Mailed notices shall be deemed to be received by the Party to whom directed when they are postmarked. Such notices shall be delivered or mailed to the following persons at the addresses listed:

Notices to the WRA:
WRA Director
3000 Vandalia Road
Des Moines, Iowa 50317

Notices to CITY:
City Manager, City of West Des Moines
4200 Mills Civic Parkway
West Des Moines, IA 50265

9. Declaration of Default and Notice. In the event that either party determines that the other has defaulted in the performance of its obligations hereunder, the aggrieved party may declare that default has occurred and given notice thereof to the defaulting party. Notice of default shall be given in writing, shall specify the nature of the default and the provision of this Agreement involved, and shall specify what action is required of the defaulting party to correct the default. The defaulting party shall have thirty (30) days from the date of its receipt of the notice of default to correct the default. If an end of said thirty-day period the default has not, in the opinion of the aggrieved party, been corrected, and if such default shall constitute a material breach of this Agreement, that party may then take action it determines necessary or appropriate to enforce or obtain performance of the provisions of this Agreement.

10. Remedies. In addition to any other remedies available under applicable law, the WRA and CITY shall have the right to the equitable remedy of specific performance to enforce compliance with any provision of this Agreement.

11. Amendment of Agreement. This Agreement may be amended only by written agreement signed by both Parties.

12. Assignment of Agreement. Neither party may assign this Agreement to a third party without the written consent of the other party.

13. No Third-Party Beneficiaries. Nothing in this Agreement shall be construed to create in any third party, or in favor of any third party, any right(s), license(s), power(s), or privilege(s).

14. Severability. If any section, provision, or part of this Agreement shall be found to be invalid or unconstitutional, such finding shall not affect the validity of the Agreement as a whole or any section, provision, or part thereof not found to be invalid or unconstitutional.

15. Governing Law; Jurisdiction. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Iowa. Lawsuits brought by either party in connection with this Agreement shall be heard and tried in Polk County District Court, Des Moines, Iowa.

16. Entire Agreement. This Agreement represents the entire agreement between the WRA and the CITY regarding this matter. Any subsequent change or modification to the terms of this Agreement shall be in the form of a duly executed addendum to this Agreement.

17. Execution of Agreement. This Agreement shall be executed in two counterparts, each of which so executed shall be deemed to be an original.

**DES MOINES METROPOLITAN WASTEWATER RECLAMATION AUTHORITY**

By: _____
Sara Kurovski, Chair

Attest: _____
Chelsea Huisman, Secretary

Approved as to Form:

_____
Jeffrey G. Baxter, Attorney for WRA's Operating Contractor

STATE OF IOWA )
)
COUNTY OF POLK )

On this ____ day of _____, 20__, before me, the undersigned, a Notary Public in and for the State of Iowa, personally appeared Sara Kurovski and Chelsea Huisman, to me personally known, and, who, being by me duly sworn, did say that they are the Chair and Secretary, respectively of the DES MOINES METROPOLITAN WASTEWATER RECLAMATION AUTHORITY, a legal entity created and existing under the laws of the State of Iowa; that the seal affixed to the foregoing instrument is the seal of said Authority, and that the instrument was signed and sealed on behalf of said Authority, by authority of its Board, and said Chair and Secretary acknowledged the execution of the instrument to be the free act and deed of said Authority by it voluntarily executed.

_____
Notary Public in and for the State of Iowa

**CITY OF WEST DES MOINES, IOWA**

By: _____
Russ Trimble, Mayor

Attest: _____
Ryan Jacobson, City Clerk

Approved as to Form:

_____
West Des Moines City Attorney's Office

STATE OF IOWA )
) ss:
COUNTY OF POLK )

On this _____ day of _____, 20___, before me, a Notary Public in and for the State of Iowa, personally appeared Russ Trimble and Ryan Jacobson, to me personally known, and, who being by me duly sworn, did say that they are the Mayor and City Clerk of the City of West Des Moines, Iowa, a Municipal Corporation, created and existing under the laws of the State of Iowa, and that the seal affixed to the foregoing instrument is the seal of said Municipal Corporation by authority and resolution of its City Council, and said Mayor and City Clerk acknowledged said instrument to be the free act and deed of said Municipal Corporation by it voluntarily executed.

_____
Notary Public in and for the State of Iowa

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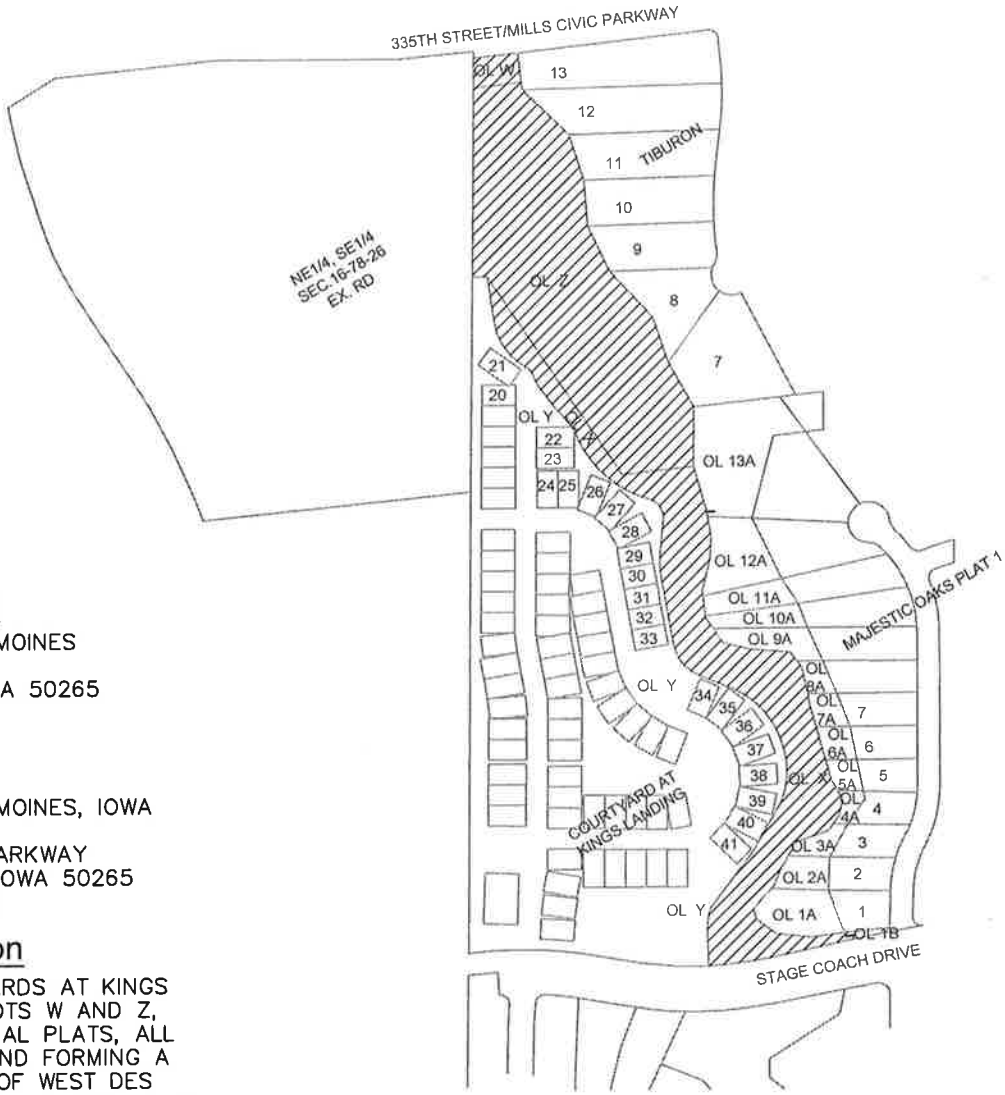
| Index Legend | |
|---|---|
| City: | West Des Moines |
| County: | Dallas County |
| Parcel ID: | Ex: 1615301001, 1615301002 and 1615353082 |
| Description: | Outlot X, Courtyards at Kings Landing and Outlots W and Z, Tiburon Section 15, Township 78 North, Range 26 West |
| Proprietor: | City of West Des Moines |
| Surveyor: | Erin D. Griffin |
| Company: | Snyder & Associates, Inc. |
| Return To: | 2727 SW Snyder Boulevard<br>Ankeny, IA 50023 \| (515) 964-2020 |

# PERMANENT ACCESS/MAINTENANCE EASEMENT BEING CONVEYED TO THE DES MOINES WASTEWATER RECLAMATION AUTHORITY WRA SUGAR CREEK IMPROVEMENTS - PHASE 2




1" = 500'

## Property Owner

CITY OF WEST DES MOINES
PO BOX 65320
WEST DES MOINES, IA 50265
(OUTLOT X)

AND

CITY OF WEST DES MOINES, IOWA
CITY HALL
4200 MILLS CIVIC PARKWAY
WEST DES MOINES, IOWA 50265
(OUTLOTS W AND Z)

## Legal Description

OUTLOT X, COURTYARDS AT KINGS LANDING AND OUTLOTS W AND Z, TIBURON, ALL OFFICIAL PLATS, ALL NOW INCLUDED IN AND FORMING A PART OF THE CITY OF WEST DES MOINES, DALLAS COUNTY, IOWA AND CONTAINING 276,182 S.F.

WRA ACCESS/MAINTENANCE EXHIBIT

PHASE 2 PROJECT AREA

SURVEY FOR:
CITY OF WEST DES MOINES
4200 MILLS CIVIC PKWY
WEST DES MOINES, IA 50265
PHONE: (515) 222-3475

SNYDER PROJECT NO. 121.0603

SNYDER & ASSOCIATES

**Snyder & Associates, Inc.**
2727 SW Snyder Boulevard
Ankeny, IA 50023
Phone: 515-964-2020 Fax: 515-964-7938

SHEET
1 OF 1