

MAINTENANCE AGREEMENT FOR THE HAWK'S LANDING GOLF CLUB PLAT ENVIRONMENTAL CORRIDOR

Between the City of Madison, Hawks Golf Land, LLC and Hawks Landing Golf Corp.

THIS AGREEMENT for the Maintenance of the Hawk's Landing Golf Club Plat Environmental Corridor (hereafter "Agreement") is made and entered into by the City of Madison ("City"), a Wisconsin municipal corporation located in Dane County, Wisconsin, Hawks Golf Land, LLC, a Wisconsin limited liability company, and Hawks Landing Golf Corp., a Wisconsin corporation. The City, Hawks Golf Land, LLC and Hawks Landing Golf Corp. may be collectively referred to herein as the "Parties". This Agreement is effective as of the execution by the Parties hereto.

RECITALS

WHEREAS, Hawks Golf Land, LLC, and Hawks Landing Golf Corp. (collectively referred to as "Owner") are the owners of the following described property (the "Property"):

Lots 16, 17, 41 and 234, Hawk's Landing Golf Club Plat, located in Sections 33 and 34, Town 7 North, Range 8 East, City of Madison, Dane County, Wisconsin; and,

WHEREAS, Hawks Landing was annexed into the City in 1999 to facilitate the development of a "golf course and residential housing community". Initial plans called for the incorporation of portions of the public drainage ways and detention ponds serving the development and the watershed directly into the golf course design as environmental features to the golf course. As a result of this proposed private use of the public stormwater system, the developer sought more control over the public stormwater improvements than would normally exist. In order to allow for this unique use of the City's stormwater system, as a condition of plat approval by the City the developer was required to "provide a maintenance agreement for the greenways and ponds within the golf course to the City", with the City "retain[ing] a storm water easement over these ponds" while the developer "shall be responsible for the maintenance"; and,

WHEREAS, the Hawk's Landing Golf Club Plat (the "Plat") was recorded on June 7, 2000 in Vol. 57-150B of Plats on pages 605-614, as Dane County Register of Deeds Document No. 3219695. Lots 16, 17, 41 and 234 of the Plat, where the private golf course now sits, were designated as "environmental corridor for private open space and public drainage purposes". In addition, the Plat noted that the "owner intends to record a joint maintenance agreement with the City of Madison for storm water drainage ways and detention ponds"; and,

WHEREAS, on July 25, 2000, the City and Hawks Landing Golf Corp. entered into the "Public Storm Water Drainage Way and Retention Pond Maintenance Agreement: Hawk's Landing Golf Club" (the "Maintenance Agreement"), as required by the conditions of plat approval, which document is recorded as Dane County Register of Deeds Doc. No. 3235353. The Maintenance Agreement addressed each party's responsibility over the drainage ways, retention ponds and vegetated buffers on the Property; and,

WHEREAS, the Maintenance Agreement has been the subject of ongoing disputes and litigation between the City and the Owner. In 2008 Owner sued the City for a declaratory judgment interpreting certain portions of the Agreement, the court ultimately ruling in part for the City and in part for Owner. A copy of the decision and order in Dane County Case 08CV2767 is recorded as Dane County Register of Deeds Doc. No. 4668740; and,

WHEREAS, following recent flooding on the Property and downstream of portions of the Property, the Parties worked together to make some drainage improvements to the Property, the City providing the designs and the Owner performing the work, despite such improvements not being addressed by the Maintenance Agreement; and,

WHEREAS, based upon the foregoing and in light of the new drainage improvements being made to the Property, the Parties agree that the Maintenance Agreement as drafted and interpreted by the courts does not sufficiently or adequately address each party's respective obligations regarding the storm water and drainage improvements located on the Property and now wish to replace the Maintenance Agreement with a new agreement to better address these issues.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby mutually acknowledged, the Parties agree as follows:

1. Purpose. The purpose of this "Maintenance Agreement for the Hawk's Landing Golf Club Plat Environmental Corridor" (the "Agreement") is to update and replace the Maintenance Agreement entered into by the Parties in 2000 and better address each party's respective obligations over the drainage improvements located on the Property.
2. Prior Agreement and Decision. The Maintenance Agreement, recorded as Dane County Register of Deeds Doc. No. 3235353, is hereby terminated and replaced by this Agreement. It is also the intent of the Parties that the Decision and Order in Dane County Case No. 08CV2767, recorded as Dane County Register of Deeds Doc. No. 4668740, has no further effect and no bearing upon the interpretation of this Agreement.
3. Improvements. The drainage ways (greenways and channels), retention ponds and vegetated buffers, and all components thereof that are part of the public drainage system (the "Improvements") that are subject to this Agreement are depicted on Exhibit A and described on Exhibit B, attached hereto. Exhibit A and Exhibit B may be amended, from time-to-time, upon written agreement of the Parties. It is not the intent of the Parties that this Agreement extend to private stormwater discharges onto the Property from adjoining properties, or from the Owner's private stormwater features. Notwithstanding the preceding sentence, it is the intent of the Parties that this Agreement extend to stormwater discharges from public streets.
4. Future Improvements. The City shall complete construction of public drainageway sediment capture systems (PSCS) at the locations of public pipe discharge points to the drainage ways as identified on Exhibit A. The PSCS shall consist of a physical structure constructed of concrete or organic materials that is suitable for capturing larger sediment particles (nominally sand). PSCS are commonly referred to as catchbasins or bio-retention

devices. The City shall have until December 31, 2022 to construct these improvements. Once complete, these public drainageway sediment capture systems shall become Improvements subject to this Agreement. Additional future improvements may be made upon the written agreement of the Parties.

5. City Access & Restoration. Consistent with the City's easement over the Property for public drainage purposes, the Parties agree as follows:

a. Right Granted. Owner agrees to grant the City, including its employees, agents and contractors, access to the Property to perform the maintenance, repair, inspection, construction and reconstruction of the Improvements as required by Sections 5.b. and 6 of this Agreement. This right of access shall include the right to cross the Property with vehicles or heavy machinery. The City shall take reasonable efforts to minimize any impact its actions may have on the use of the Property by golfers. Access for pond dredging shall be limited to the dates November 1 through April 30, except in cases of emergency as noted below or as otherwise agreed to by the Parties.

b. Procedure.

(1) Standard Access. Except for emergencies and urgent needs, before accessing the Property under this Section for construction or maintenance activities, the City shall provide adequate notice to the property, generally 72 hours prior to entering the property, however, at a minimum, the City shall provide email notification to the Owner 48 hours prior to entering the Property.

For inspection, the City shall provide adequate notice to the property, generally 24 hours prior to entering the property, however there is no requirement for notice unless the inspection would disrupt golf operations.

Debris build up on the grates where storm water enters the pipes is considered an urgent need that does not require notice.

(2) Emergency Access. In the case of a drainage related emergency, the City shall have the right to access the Property with no advance notice. A drainage related emergency is a situation where an elevated risk of flooding damage to the Improvements, or adjacent, upstream or downstream properties exists in the opinion of the City Engineer. In the case of an emergency, the City shall notify Owner of its access to the Property as soon as practicable and in any event within 12 hours after the access occurs.

(3) Access Routes. During operations where entry to the property is required, the City shall, to the extent practicable, use access routes identified on Exhibit A.

- (4) Contacts. For the purposes of providing notification under this subsection:

The Owner designates the following as a contact:

Name – Jeff Haen
Email – jeff@haenrealestate.com
Phone – 608-845-1550

The City designates the following as a contact:

Name – CITY ENGINEER
Email – engineer@cityofmadison.com
Phone- 608-266-4430

- c. Impediments to Access. Neither the Owner nor the City shall construct or place any structure, landscaping or object in the Property that obstructs or unreasonably interferes with access, including vehicular access, to the Improvements. Notwithstanding the foregoing, in the event the Owner determines that it is necessary to construct or place a structure or object on the Property such that it obstructs or interferes with vehicular access to an Improvement, the Owner may proceed with such construction or placement upon providing a suitable alternative means, acceptable to the City Engineer in writing, by which the City can access and maintain the Improvement as agreed to by the Parties.
- d. Restoration. Following the use of the Property to access the Improvements under this Agreement, or following any maintenance, repair, construction or reconstruction activity by the City, its agents, employees and contractors, the City agrees that it shall repair or restore the Property as follows:
- (1) Turf/Forbes. Upon completion of operations that necessitated access to the Property, damage to turf areas that may have occurred during access shall be repaired, by the City.
 - (2) Paths. If during the operations that necessitated access to the Property cart paths are used for access, the City shall:
 - (a) At its option, complete a video of the area to be used for access prior to access and again at the completion of operations.
 - (b) If damage exceeding minor incremental damage to the access route has occurred, City Engineering shall repair the area to conditions equal or better than those existing prior to the City's access.
 - (3) Other. If other damage occurs to Property that is not covered by Subsections (1) and (2), the Parties shall agree to make good faith efforts to resolve the issue within a reasonable amount of time, which resolution shall be generally consistent with the principles set forth in this subsection.

6. Maintenance Requirements. The Parties agree that the Property, and Improvements thereon, as shown on Exhibit A and described on Exhibit B shall be maintained by the Parties as follows:
 - a. Owner's Responsibility. Owner agrees to complete the following maintenance as needed, or as may be reasonably requested by the City, within the Property and as identified on Exhibit A:
 - (1) Drainage ways.
 - (a) Routine mowing;
 - (b) Noxious weed destruction and removal, as defined by Madison General Ordinances (MGO) 23.29;
 - (c) Trash removal;
 - (d) Sediment removal and stabilization.
 - (2) Private Pipes. Owner agrees to be responsible for the maintenance, including repair of erosion at the outlet structures, cleaning, repair and replacement, of all pipes within the Property that are not part of the public drainage system as described in Section 3 and identified on Exhibit A.
 - (3) Retention Ponds.
 - (a) Routine mowing;
 - (b) Noxious weed destruction and removal, as defined by Madison General Ordinances (MGO) 23.29;
 - (c) Trash and surface debris removal of the general area around the ponds except at the outlet grates; and
 - (d) Periodic removal of pond and shoreline vegetation such that minimal plant material may float downstream during a large storm event.
 - (4) Vegetated Buffers.
 - (a) Locations. The locations of the public vegetated buffers (the "Vegetated Buffers") surrounding portions of the retention ponds, are identified on Exhibit A.
 - (b) Mowing. The Vegetated Buffers are intended to have long grass or other low plant materials. Owner shall not mow vegetated buffers to a height shorter than twelve (12) inches.

- (5) Landscaping.
 - (a) Repair and replacement of paving or landscape materials;
 - (b) Repair and replacement of plantings; and,
 - (c) Trimming, pruning and replacement of plants, shrubs, trees and other landscaping.
 - (6) Graffiti or Vandalism. Owner shall remove or repair graffiti or vandalism to the Improvements, except for the public fencing surrounding outlet structures.
- b. City's Responsibility. The City agrees to complete the following maintenance as needed, or as may be reasonably requested by the Owner, within the Property:
- (1) Public Drainageway Sediment Capture Systems. As noted in Section 4 above, the City shall construct treatment devices to limit, to the extent practicable, the amount of sediment entering the public drainage way system within the Property. The City shall maintain these public drainageway sediment capture systems in accord with the design of each specific device (typically this means one (1) to two (2) maintenance operations per year. Regardless of the design standard, these devices shall be inspected annually by the City. If the amount of sediment in the device has reached a level requiring maintenance then that maintenance shall be scheduled by the City within two (2) weeks.
 - (2) Public Pond Outlet Structures. The City shall maintain the outlet structures indicated on Exhibit A and described on Exhibit B, including the periodic removal of debris on the grates. The City shall repair erosion and/or scour that occurs at the outlet structures provided it reaches level of professional concern, within a reasonable amount of time. The City has the right to replace and modify the design of the outlet structures at its expense.
 - (3) Public Pipes. The City shall maintain the public pipes indicated on Exhibit A and described on Exhibit B. The City shall conduct public pipe maintenance for pipes covered by this agreement in the same manner and frequency as it does for other publicly owned pipes.
 - (4) Other Routine Pond Maintenance. The City shall perform the following routine pond maintenance:
 - (a) Maintenance and cleaning of pond outlet grates;
 - (b) Repair and replacement of pond outlet control structures as deemed necessary by the City Engineer; and,

- (c) Repair and replacement of public fencing surrounding outlet structures.
 - (5) Pond dredging. The City shall complete depth measurements of the ponds shown on Exhibit A and described on Exhibit B minimum of every five (5) years. When the depth of the permanent pool is on average (based on surface area) 3.5 feet or less below the low elevation of the outlet structure, the City shall, within a reasonable amount of time and consistent with Section 5.a above, dredge the pond so as to be in compliance with Wisconsin Department of Natural Resources (WDNR) Conservation Practice Standard 1001.
 - c. Shared Responsibility. The Parties agree to share equally the costs to repair or replace containment berms following a structural failure.
 - d. Uncertain Responsibility. It is the intent of the Parties that the respective maintenance responsibilities of the City and Owner regarding the drainage ways and any improvements located therein are covered by this Section. However, the Parties recognize that currently unforeseeable circumstances may arise in the future. Hence, consistent with the intent of this Agreement, if the maintenance responsibility for any drainage improvements on the Property is uncertain under this Agreement, the Parties shall exercise good faith in addressing any maintenance needs that may arise, until such time as the Parties can reach an agreement on the matter. In the event that the 8th green sustains damage attributable to flooding in less than a 100-year storm event, the Parties agree to look at ways to reduce the risk of future damage from similar storm events.
 - e. Timing of Maintenance Work. If City maintenance other than sediment removal is necessary, the City shall perform the maintenance in a timely manner, consistent with Section 5.a above and any public bidding requirements that may apply, and subject to permitting restrictions and budgetary approval by the City of Madison Common Council. Efforts shall be made by the City to coordinate any such work with Owner. If Owner maintenance is necessary, the Owner shall perform the maintenance within a reasonable amount of time that is agreeable to the Parties.
7. Inspections.
- a. Periodic Inspections. The City shall have the right to periodically enter the Property to perform inspections of specific Improvements on the Property. The City shall inform Owner of the results of any such periodic inspection.
 - b. Annual Inspection. The City shall have a right to enter the Property at least once per calendar year for a full inspection of the drainage area and Improvements. Owner may accompany City on said annual inspection. The City shall inform Owner of the results of the annual inspection.
 - c. Drainage Ways and Ponds. The Owner shall inspect the ponds, drainage ways and outlet structures on a monthly basis during the months of April through November.

The Owner shall keep a log of these inspections using the City's inspection log, attached to this Agreement as Exhibit C, and shall provide a summary report to the City Engineer by the 10th of each month for the previous month's inspections. This report shall include dated pictures sufficient to document the condition of each part of the drainage system and any diary notes to indicate repairs and maintenance needed and when those repairs and maintenance were scheduled and completed.

8. Other Conditions.

- a. Fertilizer and Chemical Applications. No fertilizer or chemical applications shall be permitted within the vegetated buffers or drainage ways, excepting that chemicals may be used to control noxious weeds and that fertilizer and chemical applications shall be permitted within those areas where the drainage ways cross the fairways for golf course holes 6, 7, 9, 13, 15, 17 and 18 (as such holes are numbered as of the date of this Agreement), unless otherwise prohibited by WDNR.
- b. Owner Improvements. The Owner shall not construct any structures or plant any landscaping (except turf) in the areas of City maintenance and access routes depicted in Exhibit A, without written approval of the City Engineer.
- c. Approved Plans. No material changes to the any Outlet Structures, drainageways, Ponds, earthen berms, public pipes, or PSCS systems shown on Exhibit A and described on Exhibit B shall be made by the Owner without the prior written approval of the City Engineer.
- d. Grade Change. No material change in the Property's grade shall be made without the prior written approval of the City Engineer.
- e. Permits and Approvals. The Parties shall obtain all necessary permits and approvals prior to constructing, reconstructing or maintaining any drainage improvement within the Property.
- f. Contracting. Nothing in this Agreement shall prohibit either party from contracting with third parties to comply with its responsibilities under this Agreement.
- g. Future Disputes. To the extent that any disputes arise about the maintenance, repair, construction or reconstruction of any drainage improvements on the Property under this Agreement, and such issues are not covered by this Agreement, the Parties shall exercise good faith in addressing any immediate maintenance needs that may arise, consistent with past practice, until such time as the Parties can reach an agreement on the issue.

9. Status of Parties. It is agreed that the Parties are not employees or representatives of the other, and that any persons who the City or the Owner contracts with to perform the maintenance work required under this Agreement are not employees, agents or volunteers of the other.

10. Non-Discrimination. In the performance of work under this Agreement, the Owner agrees not to discriminate against any employee or applicant for employment because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs or student status. Owner further agrees not to discriminate against any subcontractor or person who offers to subcontract on this Agreement because of race, religion, color, age, disability, sex, sexual orientation, gender identity or national origin.
11. Liability. Each party shall be responsible for the consequences of its own acts, errors, or omissions and those of its employees, boards, commissions, agencies, officers, and representatives and shall be responsible for any losses, claims, and liabilities which are attributable to such acts, errors, or omissions including providing its own defense. In situations including joint liability, each party shall be responsible for the consequences of its own acts, errors, or omissions and those of its employees, agents, boards, commissions, agencies, officers and representatives. It is not the intent of the parties to impose liability beyond that imposed by state statutes.
12. Notice. Any notice or offer or demand required to be sent hereunder shall be sent by United States mail at the Parties' respective addresses set forth below. Each notice shall be deemed to have been received on the date of postmark, if sent by certified mail, postage prepaid, addressed to:

Name	Address
City of Madison	City Engineer 210 MLK Jr. Blvd., Room 115 Madison, WI 53703
Owner	Hawks Golf Land, LLC Attn: Jeff Haen 8201 Mayo Dr., Suite 111 PO Box 44129 Madison, WI 53744

13. Default. In the event either Party shall default in any of the covenants, agreements, commitments, or conditions herein contained, or fails to fully perform and carry out any term or condition of this Agreement to the satisfaction of the other, and any such default shall continue unremedied for a period of thirty (30) days after written notice thereof, the non-defaulting Party may exercise all rights and remedies which it may have at law or in equity against the other, including expressly the specific enforcement hereof. In addition, if Owner defaults in any of its maintenance responsibilities and said default presents an elevated risk of local flooding or damage to the Improvements, the City shall have the authority to perform the work for the Owner, and recover the costs of this work as a special charge under Wis. Stat. Sec. 66.0627 and MGO Sec. 4.09(13).

14. Construction. The Parties acknowledge that this Agreement is the product of negotiations between the Parties and that, prior to the execution hereof, each Party has had full and adequate opportunity to have this Agreement reviewed by, and to obtain the advice of, its own legal counsel with respect hereto. Nothing in this Agreement shall be construed more strictly for or against, any Party because that Party's attorney drafted this Agreement or any part hereof.
15. Final Agreement. This Agreement entered into by the Parties on this date constitute the entire agreement of the Parties with respect to the subject matter hereof, and may only be modified or supplemented by an additional writing between the Parties. This Agreement shall be governed by, construed, interpreted, and enforced in accordance with the laws of the State of Wisconsin. The invalidity of any provision of this Agreement shall not impair or affect in any manner the validity, enforceability or effect of the rest of this Agreement.
16. Runs with the Land. All the terms, conditions, covenants and other provisions contained in this Agreement, including the benefits and burdens, shall run with the Owner's Property and shall be binding upon and inure to the benefit of and be enforceable by the Owner and the City and their respective successors and assigns.
17. Compliance with Applicable Laws. The Parties shall become familiar with, and shall at all times comply with and observe, all federal, state and local laws, ordinances and regulations which in any manner affect the services or conduct of the Parties and their agents and employees in the performance of this Agreement.
18. No Waiver. No failure to exercise, and no delay in exercising, any right, power or remedy hereunder on the part of the City or Owner shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or remedy preclude any other or further exercise thereof or the exercise of any other right, power or remedy. No express waiver shall affect any event or default other than the event or default specified in such waiver, and any such waiver, to be effective, must be in writing and shall be operative only for the time and to the extent expressly provided by the City or Owner therein. A waiver of any covenant, term or condition contained herein shall not be construed as a waiver of any subsequent breach of the same covenant, term or condition.
19. Severability. It is mutually agreed that in case any provision of this Agreement is determined by any court of law to be unconstitutional, illegal or unenforceable, it is the intention of the Parties that all other provisions of this Agreement remain in full force and effect.
20. Miscellaneous.
 - a. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same Agreement.
 - b. All addenda and exhibits attached to this Agreement shall be considered part of this Agreement and the terms and conditions in such addenda and exhibits shall be binding upon all parties.

- c. This Agreement is intended to benefit the parties hereto and their respective officials and shall not be construed to create any right or benefit on behalf of any person, firm, corporation or other entity not a party hereto.
21. Authority. Owner represents that it has the authority to enter into this Agreement and that the person signing on behalf of Owner represents and warrants that he or she has been duly authorized to bind Owner and sign this Agreement on Owner's behalf.

IN WITNESS WHEREOF, the parties hereto have set their hands at Madison, Wisconsin.

HAWKS GOLF LAND, LLC and HAWKS LANDING GOLF CORP.

Jeff Haen, _____

Date

CITY OF MADISON

Satya Rhodes-Conway, Mayor

Date

Maribeth Witzel-Behl, City Clerk

Date

Countersigned:

David P. Schmiedicke, Finance Director

Date

Approved as to form:

Michael P. May, City Attorney

Date

Eric Veum, Risk Manager

Date

Execution of this Agreement by City was authorized by Resolution Enactment No. RES - _____, ID No. _____, adopted by the Common Council of the City of Madison on _____, 2019.

EXHIBIT A
Map of Improvements

EXHIBIT B
Description of Improvements

EXHIBIT C
Inspection Log