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## MEMO

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**TO: Mayor and City Council**  
**FROM: Bridget Nason, City Attorney**  
**DATE: November 4, 2019**  
**RE: East Oaks PDA Analysis**

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In 1999, the City of North Oaks entered into an extensive agreement with the North Oaks Company related to the development of over 1,600 acres of land owned by the North Oaks Company (East Oaks Development, East Oaks PDA Area, or Subject Property). The 1999 Planned Unit Development Agreement for the East Oaks Project (1999 PDA, 1999 East Oaks PDA, PDA or Agreement) was made by and between the City of North Oaks and the North Oaks Company, LLC (Developer) with an effective date of February 11, 1999.<sup>1</sup> The 1999 PDA contains a number of important provisions which guide the development of the various development sites identified as part of the East Oaks Development throughout the City which are to be developed in conformity and compliance with the terms of the PDA. This memo will provide an overview of the terms of the 1999 PDA, relevant amendments, and respond to several questions raised during the recent Decennial Review.

### 1. Key Provisions of the 1999 PDA

**Text of the PDA.** The 1999 PDA was executed over twenty years ago, and has been amended seven times over the past two decades, most recently in 2010. In reviewing the 1999 PDA, it is helpful to note that many of the terms used in the 1999 PDA are defined terms. Relevant definitions found in the 1999 PDA include the following<sup>2</sup>:

- **Concept Plan:** “Concept Plan” means an optional concept plan authorized by the Zoning Ordinance, approved by the Council, for a Development Site.
- **Conceptual Street and Access Plan:** “Conceptual Street and Access Plan” means **Exhibit B-2**, and any changes thereto requested by the Developer and approved by the Council.
- **Default:** “Default” means and includes, but is not limited to “[f]ailure by the Developer to develop the Subject Property according to the PUD Controls.”

- **Development Guidelines:** “Development Guidelines” means the Findings and Development Guidelines attached hereto as **Appendix 1** which address purpose, land use, Development regulations, performance standards, and findings for the East Oaks PUD project incorporated by reference and made a part of this Planned Development Agreement.
- **East Oaks Project Master Development Plan:** “East Oaks Project Master Development Plan” means all those plans, drawings, and surveys identified on the attached **Exhibit B**, and hereby incorporated by reference and made a part of and including this Planned Development Agreement.
- **East Oaks PUD Project:** “East Oaks PUD Project” means the Development of the Subject Property in accord with the PUD Controls.
- **Future Land Use Plan:** “Future Land Use Plan” means **Exhibit B-1**. Future Land Use Plan also includes any additions or changes thereto requested by the Developer and approved by the Council.
- **Official Controls:** “Official Controls” means ordinances and regulations which control physical development of the City or any part thereof, or any detail thereof and implement the general objectives of the City’s Comprehensive Plan. Official Controls may include ordinances establishing zoning, subdivision controls, site plan regulations and official maps, however, for purposes of this Planned Unit Development Agreement, Official Controls does not include, sanitary codes, building codes and other present or future Ordinances regulating public safety and health generally.
- **Phase Plan.** “Phase Plan” means **Exhibit B-5**. Phase Plan also includes any additions or changes thereto requested by the Developer and approved by the Council.
- **Planned Development Agreement.** “Planned Development Agreement” means this Planned Unit Development Agreement between the City and Developer, and consented to and joined in by NOHOA, and all Exhibits and Appendix 1 attached to or referenced herein.
- **Preliminary Plan:** “Preliminary Plan” means that Preliminary Plan required by the Subdivision Ordinance.
- **Primary Trails:** “Primary Trails” means those trails depicted as such on the Trail Plan.
- **PUD Controls:** “PUD Controls” means and includes, jointly and severally, the following:
  - This Planned Development Agreement including without limitation the Development Guidelines.
  - PUD Ordinance
  - East Oaks Project Master Development Plan
  - Final Plan
  - Subdivision Ordinance
  - Zoning Ordinance
- **PUD Ordinance:** “PUD Ordinance” means Section 7.12 of the Zoning Ordinance of the City of North Oaks and the action of the Council authorizing a Planned Unit District for the Subject Property pursuant thereto which ordinance sets forth the performance standards

flexibility and other zoning devices relating to the Subject Property permitted pursuant to this Planned Development Agreement.

- **Restricted Trails:** “Restricted Trails” means those trails depicted as such on the Trail Plan.
- **Subject Property:** “Subject Property” means in the aggregate and jointly and severally all of the real estate legally described and depicted in the attached **Exhibit A**.
- **Trail Plan:** “Trail Plan” means **Exhibit B-4**, and any changes approved by the Developer and the Council.
- **Zoning Ordinance:** “Zoning Ordinances” means Ordinance 94 of the North Oaks Code of Ordinances.

The 1999 East Oaks PDA including a number of articles which set forth the parameters of the Agreement, a summary of which is found below.

- **Article 1: Findings and Covenants:**
  - The PDA approves the East Oaks Project Master Development Plan which is found to be consistent with the City’s comprehensive plan.
  - The Developer proposed to “create an interconnected system of trails available to members of the NOHOA, all of whom own lots within the City.”
  - The Council approved the East Oaks Project Master Development Plan for the Subject Property.
    - **The East Oaks Project Master Development Plan is defined as “all those plans, drawings, and surveys identified on the attached Exhibit B.”**
  - The City prepared an Environmental Assessment Worksheet and adopted a negative declaration for the Project.
  - The Developer and City agree that the Subject Property will be developed and used as the East Oaks PUD Project in accordance with PUD Controls
    - **PUD Controls are defined, as noted above, as “[t]his Planned Development Agreement including without limitation the Development Guidelines, PUD Ordinances, East Oaks Project Master Development Plan, Final Plan, Subdivision Ordinance, [and] Zoning Ordinance.”**
      - The “Development Guidelines” are defined as “the Findings and Development Guidelines attached hereto as Appendix 1 which address purpose, land use, Development regulations, performance standards, and findings for the East Oaks PUD Project.”
  - The Subject Property is found to consist of “approximately 1,650 acres,” and “each development site shall be developed in accord with PUD Controls.”
  - Each development site will be submitted for “Concept Plan, Preliminary Plan, and Final Plan for each particular Development Site, portion of a Development Site, or combination of Development Sites.”
  - **Nothing contained in this Planned Development Agreement is deemed Final Plan approval for any of the Development Sites at this time.**

- Notwithstanding that Preliminary and Final Plan Approval must be obtained for each Development Site, the Parties understand and agree that by this Planned Development Agreement, the City is granting a Planned Unit Development zoning designation pursuant to the PUD Ordinance for the Development Sites and ... and is approving the East Oaks Project Master Development Plan
- **The Parties acknowledge and agree that the East Oaks Project Master Development Plan will have to be supplemented and refined for Development Site Development and Preliminary Plan and Final Plan approval will have to be obtained from the City before any Development can occur on a particular Development Site.**
- **The parties understand, agree, and intend that the Concept Plan, Preliminary Plan, and Final Plan for each Development Site shall be controlled by the East Oaks Project Master Development Plan pursuant to this Planned Development Agreement.**
- The Developer agrees to comply with the PUD Controls.
- **Article 2: PUD Zoning, Open Space Zoning, and Shoreland Variances**
  - The Development Sites are rezoned to Planned Unit Development District.
  - **No Development or use shall be made of the Subject Property or any portion thereof unless such Development or use is consistent with the PUD Controls and consensual amendments thereto.**
  - **Except as provided in Section 5.2 hereof or unless the Council by separate action approves otherwise, no Development or use shall occur on any Development Site, until the Preliminary Plan and Final Plan for that Development Site have been approved by the Council. Concept Plan, Preliminary Plan or Final Plan consistent with this Planned Development Agreement shall be approved by the Council**
  - **Density: The maximum density of each Development Site shall be in accord with the Future Land Use Plan attached hereto as Exhibit B-1 and the Development Guidelines. Development Site Development, overall density, density transfers and use conversion shall be determine SOLELY by reference to this Planned Development Agreement, including the East Oaks Project Master Plan, and Table 1 of the Development Guidelines. (Emphasis added)**
- **Article 3: East Oaks Project Master Development Plan and PUD Controls**
  - **Development Conformity: Development of the Subject Property shall conform to this Planned Development Agreement, including the East Oaks Project Master Development Plan, and the Concept Plan, Preliminary Plan, and Final Plan for each Development Site, unless the City approves otherwise.**
  - **PUD Controls: Subject to such compliance by the Developer, the City agrees to allow Development of the Subject Property in accord with the East Oaks Project Master Development Plan, and consensual amendments thereto.**

- The duration of the 1999 East Oaks PDA is thirty years from the Effective Date of the PDA (February 11, 1999).
- **Article 5: Relationship of East Oaks Project Master Development Plan to Concept Plans, Preliminary Plans, and Final Plan**
  - The procedure and substance ... of approval for each Development Site shall be subject to compliance with this Planned Development Agreement, the Subdivision Ordinance, the Zoning Ordinance, and the Development Contract for the Development Site.
  - No Development shall occur on any Development Site until the City approves the Preliminary Plan and Final Plan for that Development Site.
  - The Final Plan shall conform **in material respects** to this Planned Development Agreement, the East Oaks Project Master Development Plan and Preliminary Plan for the Development Site, unless otherwise approved by the Council. It is the intent of the City and the Developer that all PUD Controls other than this Planned Development Agreement shall be consistent with this Planned Development Agreement. **If an inconsistency develops by agreement of the City and the Developer, then a consensual amendment to this Planned Development Agreement shall be executed.**
  - **To the extent an inconsistency or conflict exists among the PUD Controls after approval of the Final Plan by the Council and in the absence of a consensual amendment addressing the inconsistency, the following documents in descending order shall govern:**
    - **Final Plan**
    - **Preliminary Plan**
    - **Concept Plan**
    - **Planned Development Agreement**
    - **East Oaks Project Master Development Plan**
    - **PUD Ordinance**
    - **Subdivision Ordinance**
    - **Comprehensive Plan**
  - **Change of Ordinances: If certain conditions are met, then for thirty years from the Effective date of this Planned Development Agreement with respect to the Subject Property, except to the extent required by state, county, or federal law, regulation, or order, or by order or judgment of a court with jurisdiction over the matter, the City will not without the consent of the Developer for any particular Development Site ... change the City's Comprehensive Plan or "Official Controls" for that Development Site or the entire East Oaks PUD Project in a manner which is inconsistent with the terms of this Planned Development Agreement with respect to [a number of conditions including] development density.**

- Notwithstanding the restrictions stated above, the Developer may request a modification to the PUD Controls for a specific Development Site within the East Oaks PUD Project and the City may grant the modification.
- **Article 7: Streets**
  - Location and Creation of Streets: The Conceptual Street and Access Plan shows the neighborhood streets and other roads within the Subject Property that will serve the East Oaks PUD Project.
  - Plans: Street layout, right-of-way and pavement widths shall conform to the Performance Standards within the Development Guidelines, unless otherwise requested by the Developer and approved by the Council.
- **Article 12: Park Dedication**
  - Park Dedication – Contribution Requirement: The parties agree that all park dedication requirements for the East Oaks PUD Project and its Development Sites ... shall be and are satisfied by the Developer in the form of ... rough grading of park and trail areas and construction of those trails depicted on the Trail Plan.
- **Article 13: Trails**
  - The Trail Plan depicts three types of Trails: Existing NOHOA Trails, Primary Trails, and Restricted Trails. Portions of the Primary Trails and Restricted Trails as shown on Exhibit C-1 will be open for use within sixty (60) days of execution of this Agreement. To the extent other portions of the Primary Trails or the Restricted Trails are shown on the Trail Plan, then such trails shall be constructed, conveyed and open for use at the times and as depicted on Exhibit C-1.
  - The Primary Trails and Restricted Trails depicted on the Trail Plan will be conveyed to NOHOA pursuant to the Primary Trail Easements and the Restricted Trail Easement, subject to the restrictions set forth in Section 13.5 hereof.
- **Article 19: Miscellaneous**
  - No Third Party Recourse or Rights: This Planned Development Agreement may be enforced solely by the Developer, the City and, to the extent applicable, NOHOA.
  - **Amendment and Waiver: With respect to the Development Sites, the City and the Developer for each Development Site hereto may by mutual written agreement amend this Planned Development Agreement IN ANY RESPECT for that Development Site. Either party may extend the time for the performance of any of the obligations of the other, waive any inaccuracies in representations by another contained in this Planned Development Agreement, which inaccuracies would otherwise constitute a breach of this Planned Development Agreement, waive compliance by another with any of the covenants contained in this Planned Development Agreement and performance of any obligations by the other or waive the fulfillment of any condition that is precedent to the performance by the other party of any of its obligations under this Planned Development Agreement. (Emphasis added.)**

- Major amendments (defined as an amendment which changes the permitted land use within the Subject Property or increases the total number of permitted housing units within the East Oaks PUD Project by more than ten percent (10%)) require a 2/3 vote of the Council; minor amendments require a simple majority vote of all members of the Council.
- **Consent and Joinder by North Oaks Home Owner’s Association**
  - NOHOA “hereby consents to and joins in this Planned Development Agreement for the following and only the following purposes:
    - (1) [T]erminating the 1972 Recreation Proposal;
    - (2) [I]f any part of the East Oaks PUD Project is or becomes subject to NOHOA controls, consenting to the use of any such portion of the East Oaks PUD Project for open houses or events for the purposes of displaying residential units or subdivisions and their amenities; and
    - (3) [C]onsent to and accept the provisions of[:]
      - a. Article 12 [Park Dedication]
      - b. Article 13 [Trails] and
      - c. Sections:
        - i. 2.4 [Home Owners’ Associations and Restrictive Covenants]
        - ii. 7.9 [Maintenance of Streets] [Note: this is handwritten in the version of the document I have and I do not know when or how it was added and if that was added before or after the other parties executed the document]
        - iii. 19.1 [No Third Party Recourse or Rights]
        - iv. 19.4 [Binding Agreement]

## 2. Exhibit B Documents

Exhibit B to the 1999 East Oaks PDA is comprised of five separate exhibits as follows:

- **B-1: Future Land Use Plan:** Exhibit B-1 identifies the various Development Sites (A-L) and notes the future land use designations for all Development Sites (single family detached, mixed use, limited mixed residential, etc.) Exhibit B-1 specifically references “645 future households” in the development area.
- **B-2: Conceptual Street & Access Plan:** Exhibit B-2 shows proposed street configurations and access plans for the various Development Sites, although each Development Site is not shown on the exhibit itself.
- **B-3: Park & Open Space Plan:** Exhibit B-3 shows the development areas, development area boundaries, as well as agricultural land, conservancy land, allowable building area within agricultural land, and active and passive private open space.

- **B-4: Trail Map:** Exhibit B-4 shows existing NOHOA trails, Primary Trails, Restricted Trails, Trail Easement, a potential Deer Hills connection, and trail head parking.
- **B-5: Generalized Plan for Phasing and Timing of Developments:** Exhibit B-5 is labeled “Generalized Plan for Phasing and Timing of Developments.” It identifies and names the twelve (12) Development Sites within the Development Area and contains a column titled “Site Total” and a “Total of all Sites” of 645.

### **3. Exhibit C Documents**

**Exhibit C** contains an Open Space Creation/Conveyance Schedule and includes **Exhibit C-1, Trail Conveyance Schedule** as well as **Exhibit C-2, Temporary Trail**.

### **4. Exhibit D Documents**

**Exhibit D** contains a “Form of Development Contract for Development Sites” document. **Exhibit D** includes within its defined terms section a reference to a Preliminary Plan and a Final Development Plan. There is no specific reference in the Form Development Contract for Development Sites to any concept plan submissions or approvals.

### **5. Exhibit E Documents**

**Exhibit E** includes three Open Space easements as follows: **Exhibit E-1: Conservancy Land, Exhibit E-2: Agricultural Land, Exhibit E-3: Agricultural Land Allowable Building Area.** **Exhibit E-1** includes **Exhibit E1A** which depicts the Conservancy Boundary and also shows “Forest Management Roads and Walking Trails.”

### **6. Exhibit F Documents:**

**Exhibit F** includes **Exhibit F-1, Primary Trail Easement**, as well as **Exhibit F-2, Restricted Trail Easement**, along with **Exhibit F1A, Primary & Misc. Trails** (which is comprised of three separate sheets that include depictions of trails titled “Existing NOHOA Trail,” “Primary Trail,” and “Trail Easement” (use to be determined by NOHOA).

### **7. Exhibit G Documents:**

**Exhibit G** is comprised of two letters from the DNR (G-1 and G-2), which are letters of support dated November 2, 1998, and January 12, 1999 for the concept of the PUD project.

### **8. Declaration of Restrictions (No Exhibit Number) Located after Exhibit G are the following Declaration of Restrictions, labeled in the Table of Contents as follows:**

- a. **Exhibit H-Declaration of Restrictions-Conservancy Land**
- b. **Exhibit I-Declaration of Restrictions-Agricultural Land**
- c. **Exhibit J-Declaration of Restrictions-Agricultural Land Allowable Building Area**
- d. **Exhibit K-Declaration of Restrictions-Primary Trails**

e. **Exhibit L-Declaration of Restrictions-Restricted Trails**

**9. Appendix 1: Findings and Development Guidelines**

While the body of the Master Development Plan and Planned Unit Development Agreement contains a number of crucial provisions related to the development of the Subject Property, perhaps none are more crucial than the terms of the Development Guidelines found in Appendix 1. As noted in Section 2.3 of the 1999 East Oaks PDA in a section titled “Density,” the Agreement states that “[t]he maximum density of each Development Site shall be in accord with the Future Land Use Plan attached hereto as Exhibit B-1 and the Development Guidelines. Development Site Development, overall density, density transfers, and use conversion **shall be determined solely by reference to this Planned Development Agreement, including the East Oaks Project Master Development Plan, and Table 1 of the Development Guidelines.**”

Appendix 1 provides further development guidance for each of the individual Development Sites. Table 1 of Appendix 1, titled “Development Sites” contains a table of each of the Development Sites, along with the zoning for the site, planned number of dwelling units, and information regarding use types, density, and height limits. This includes language related to density increases for each site, such as “density increase of 30% allowed.” There is no definition of a “density increase” in the 1999 PDA or the zoning ordinance, but a “density increase” is generally understood as the ability to transfer “unused” density from one site to another, provided all other zoning requirements for development on the site (such as setbacks) are met.

With respect to density, density transfers, and use conversion, Exhibit B-1 and Appendix 1 (Development Guidelines) are the portions of the 1999 East Oaks PDA which are identified as guiding these crucial components of development of the Subject Property. Appendix 1 includes a statement of purpose as well as findings sections (Sections 1 and 2) before turning in Section 3 to the land use regulations that apply to the subject property, namely the identification of four separate types of uses:

- a. Residential Uses:
  1. RSL-PUD, Residential Conservancy Homes Lots
  2. RSM-PUD, Residential Detached Open Space Home Lots
  3. RMM-PUD, RMH-PUD, and RCM-PUD, Residential Detached and Attached Open Space Home Lots, including various types of multi-family dwellings
- b. Commercial Uses:
  1. Identified as per City Zoning Ordinance, Section 7.10 for residential commercial mixed district (RCM), ... as further limited in Table 1 of Section 5 hereof
- c. Active and Passive Open Space (to be used only for five specified uses)
- d. Protected Land (to be used only as permitted in the Open Space Easements and Trail Easements and the Conservation Easements)

Section 4 of Appendix 1 next establishes performance standards for each type of permitted development before establishing the types of permitted development on the Subject Property.

Section 5 starts by noting that “[t]he Comprehensive Plan currently provides for a maximum of 645 dwelling units and the commercial development of 21 acres within the Subject Property.” Section 5 goes on to identify five types of Development within the Development Sites on the Subject Property identified as follows:

- A. Single Family Detached. These Development Sites will consist entirely of Residential Conservancy Lots and Residential Detached Open Space Home Lots. Zoning: RSL-PUD, RSM-PUD.
- B. Limited Mixed Residential. These Development Sites will include Residential Detached Open Space Lots and/or Residential Attached Open Space Home Lots. Zoning: RMM-PUD and RMH-PUD.
- C. Mixed Residential. These Development Sites will include Residential Detached Open Space Lots and/or Residential Attached Open Space Home Lots including various types of multi-family dwellings. Zoning: RMH-PUD.
- D. Limited Mixed Use. These Development Sites will include Residential Detached Open Space Lots and/or Residential Attached Open Space Home Lots including various types of multi-family dwellings and/or Commercial/Service uses other than food, liquor, gas or video sales. Zoning: RCM-PUD.
- E. Mixed Use: These Development Sites will include Residential Detached Opens Space Lots and/or Residential Attached Open Space Home Lots including various types of multi-family dwellings and/or Commercial/Service uses. Zoning: RCM-PUD

**Table 1 indicates the type of development, numbers and types of dwelling units, and other Development Site Performance Standards.**

Table 1 found in Appendix 1 includes the identified Development Sites A-M, and includes the zoning classification, planned number of dwelling units, and use types, density and height limitations, including allowable density increase and maximum Floor Area Ratios. Following Table 1 is the following language related to the number of dwellings permitted, the number of commercial acres permitted, and the conversion of permitted uses.

***Number of Dwellings Permitted:*** The number of dwelling units planned for each Development Site is shown in Table 1. Where the number of approved dwelling units in an individual Development Site varies from the number of dwelling units that is specified in Table 1, the aggregate number of proposed dwelling units in remaining undeveloped Development Sites shall be adjusted by the same number. Concurrent with each application for Development which includes such variation in number of dwelling units, the Developer shall provide the City with its best estimate as to the future allocation of remaining units to specific underdeveloped Development Sites.

***Number of Commercial Acres Permitted.*** The number of commercial use acres permitted within the Development Sites is 21. These acres may be located in any or all of the Development Sites with a Zoning Designation of RCM-PUD.

**Conversion of Permitted Uses:** The limits of 645 dwelling units and 21 commercial use acres may be varied as follows:

- a. Should the Developer elect to forego Development of some or all of the 21 commercial acres, the number of permitted dwelling units within the Development Sites will be increased at the rate of 5 dwelling units for each full acre of commercial Development forgone.
- b. Should the Developer elect to forego Development of the full 645 dwelling units, the number of permitted acres for commercial Development within the Mixed Use Development Sites will be increased at the rate of one acre of commercial use for each 5 dwelling units foregone, except that if the increased use is office then 2.5 dwelling units shall be foregone for each additional acre of office use.

#### **10. Ordinance 93: Subdivision Ordinance**

Immediately following Appendix 1 is a copy of Ordinance 93, the title of which is the “Subdivision Ordinance.” While dated for signature in 1998, the Ordinance appears to have been adopted on February 11, 1999, along with the approval of the PDA. Ordinance 93 repealed several previously-existing ordinances. The stated purpose of Ordinance 93 is to “implement the Comprehensive Plan as adopted by the City Council and to effect the purposes set forth in Minnesota Statutes, Section 462.351.” Included in the salient definitional terms found in Ordinance 93 are the following:

- **Dwelling Unit:** One (1) or more rooms connected together, constituting a separate, independent housekeeping unit for owner occupancy, rental or lease on a weekly, monthly, or longer basis, and physically separate from any other rooms or Dwelling Units which may be in the same Structure, and containing independent cooking, sleeping and sanitation facilities.
- **Useable Area:** The area of a Lot, **excluding all required Setbacks, Easements, and Wetlands**, where the topographic and soil conditions and configuration are suitable for each of the following in some section of the area: construction of a Dwelling, future additions, Accessory Structure, well site, two Individual Sewage Treatment System areas (for an unsewered Lot), yard, driveways and required parking areas. During the Subdivision process only, when calculating the Usable Area of a proposed Lot, the Subdivider may include any trail Easement area of over 2,000 square feet per Lot and may be given partial credit for other Easements where there is area available for normal residential Use as defined for Usable Area.

Ordinance 93 establishes a two-stage process for obtaining approval of a Plat for a Major Subdivision, namely submission of a Preliminary Plan with a review and approval process by the Planning Commission and Council; following approval of the Preliminary Plan, the subdivider may file a Plat with the City, which the Council may submit to the Planning Commission for review, and which ultimately must be acted upon by the City Council. **Nowhere within Ordinance 93 is there a specific requirement for submission of a “Concept Plan,” and**

likewise there is no requirement for review and/or approval of a Concept Plan prior to submission of a Preliminary Plan.

#### **11. Ordinance 94: Zoning Ordinance.**

Simultaneously with the adoption of Ordinance 93 on February 11, 1999, the City Council adopted Ordinance 94, the title of which is “Zoning Ordinance,” the purpose and intent of the which was to “divide the City into Use Districts and establish regulations in regard to location, erection, construction, reconstruction, alteration, and Use of Structures and Land” and to, among several purposes, “protect such Use Districts[,] to promote orderly Development and redevelopment.” Ordinance 94 repealed a number of existing ordinances, and includes the following relevant definitions:

- **Dwelling Unit:** One (1) or more rooms connected together, constituting a separate, independent, housekeeping unit for owner occupancy, or rental or lease on a weekly, monthly, or longer basis, and physically separated from any other rooms or Dwelling Units which may be in the same Structure, and containing independent cooking, sleeping and sanitation facilities.
- **Floor Area Ration (FAR):** The ratio of Total Floor Area to Gross Lot Area, excluding two-thirds (2/3) of any DNR and/or VLAWMO designated Wetland areas except that the determination of the FAR for Lots lawfully existing on July 1, 1996 shall exclude two thirds (2/3) of only DNR designated Wetlands.
- **Gross Lot Area:** Total area of a Platted Lot excluding Road Easement(s).
- **Lot Area:** The area of a horizontal plan within the Lot Lines.
- **Plat:** A map, plan or layout of a city, town, section or Subdivision indicating the locations and boundaries, Streets, Roads and Easements of individual properties and includes Registered Land Surveys. The Plat shall be in the form  capable of being filed with the Registrar of Titles of Ramsey County as a Registered Land Survey (RLS) showing the Subdivided parcel’s boundaries and Lot or tract boundaries.
- **Usable Area:** The area of a Lot, **excluding all required Setbacks, Easements, and Wetlands** where the topographic and soil conditions and configuration are suitable for each of the following in some section of the area: construction of a Dwelling Unit, future additions, Accessory Structures . . . . During the Subdivision process only, when calculating the Usable Area of a proposed Lot, the Subdivider may include any trail Easement area of over 2,000 square feet per Lot and may be given partial credit for other Easements where there is area available for normal residential Use as defined for Usable Area.

Section 7.12 of Ordinance 94 establishes the PUD – Planned Unit Development District, including requirements for a PUD Master Development Plan and a Planned Development Agreement, the terms of which “shall be binding on the City and the Owner/applicant and their successors and assigns to the extent and for the duration provided in the Planned Development Agreement. Section

7.12.2.B establishes the process for application for final development plans for phases in a PUD, and states that “[a]pproval of the Final Development Plans for Phases shall be subject to procedures in the Subdivision Ordinance, and as agreed to in the PDA.” Subpart 7.12.2.B.1 contains the following relevant language regarding concept plans: “In order to receive guidance on the design of a PUD phase prior to submission of an application for Final Development Plan approval for a Phase, an Applicant may submit a Concept Plan for review and comment by the Planning Commission and City Council. **Submission of a Concept Plan is optional for a phase.**” Ordinance 94 further notes that “[c]omments by the Planning Commission and the City Council shall be for guidance only and, shall not be considered binding upon the Planning Commission, City Council, or Applicant regarding the approval of the Final Development Plans for a Phase.” Subpart 7.12.2.B.2 further provides that “[f]or all Development within a PUD or Phase of a PUD, a Preliminary Plan must be submitted to the City for review by the Planning Commission and approval of the City Council. ... The Applicant shall provide proof that the Preliminary Plan and Site Plan (if required) are consistent with the approved Master Development Plan and agreed upon PDA.” Section 2(c) states “[i]n considering the Preliminary Plan and Site Plan the Council shall consider the following: Consistency with the approved Master Development Plan and agreed upon PDA; impacts on existing and anticipated traffic; parking; pedestrian and vehicular movements; ingress and egress; Building locations, height and size; architectural and engineering features; Landscaping; lighting; provisions for utilities; site grading and drainage; Green Space ... and other related matters.” Finally, the section notes that “[p]rocedures for Amendments to the PUD Master Development Plan or Final Development Plans for phases shall be set forth in the PDA.” Area requirements including gross density, FAR, and Lot Coverage are established within each of the various PUD Districts. Note that while Ordinance 94 does not contain a requirement for submission of a Concept Plan as part the development process for PUD phases, Ordinance 129, adopted on May 9, 2019, does required the submission of a Concept Plan prior to application of a plan for final development of a phase in a PUD.

## **12. West Black Lake Development Agreement Amendment.**

The final two documents contained within the 1999 PDA are an Amendment to the previously executed Development Agreement for West Black Lake along with an Amendment to Wilkinson Lake Control Structure Agreement and a Right of First Refusal. In the early 1990’s, the City approved Phases I, II, and III of the West Black Lake Development, which was proposed as a five-phase development.<sup>3</sup> In conjunction with the execution of the PDA, those areas designated as Phases 4 and 5 were removed from the coverage of that agreement.<sup>4</sup>

## **13. 1998 EAW for the East Oaks Planned Unit Development.**

In 1998, the City, as the Responsible Governmental Unit (RGU), completed an EAW for the East Oaks Development, as required by Minn. R. P. 4410.4300, subd. 19(D)(An EAW is required for “250 unattached units or 375 attached units in a city within the seven-county Twin Cities metropolitan area that has adopted a comprehensive plan. ...”) The EAW found that there was no need for an EIS, and a negative declaration was issued. Once a negative declaration is issued, a new EAW is required only if, “after a negative declaration has been issued but before the proposed project has received all approvals or been implemented, the RGU determines that a substantial change has been made in the proposed project or has occurred in the project’s circumstances, which change may affect the potential for significant adverse environmental effects that were not

addressed in the existing EAW.” The City of North Oaks is the RGU for the East Oaks Development.

The EAW describes the project as “a multiple-phased development ... to provide 645 residential units and approximately 109,770<sup>5</sup> square feet of commercial development distributed among 12 Development Sites that encompass 780 acres [and] [t]he entire project area encompasses about 1,666 acres.” The EAW further states “[f]uture market conditions will dictate the types of homes constructed, but the number of residential units will not exceed 645. ... **Concept Plans discussed in this EAW may be subject to revisions involving the types of residential units, the specific locations of buildings, and the distribution of commercial development among Development Sites E, G, and H.**” The EAW includes a table identifying the various Development Sites, size (acreage), zoning, proposed residential units. The EAW identifies and lists the physical impacts on Water Resources, including wetland impacts anticipated for each Development Site. It is further noted that “[r]oadways will need to be constructed within each Development Site to provide access to the developments. The effects of these improvements are described throughout this EAW as integral parts of the Development Sites that they will serve. **There are no known infrastructure improvements proposed on lands immediately adjacent to the project area that would exceed environmental review thresholds.**” The EAW further notes that “[s]ignificant adverse environmental effects are not expected to result from the cumulative effect of development within the City of North Oaks. **The preservation and management of 886 acres of Protected Land proposed as part of the East Oaks Planned Unit Development is expected to maintain a relatively rich natural resource base in the project area.**” Finally, Exhibit 3 of the EAW titled Environmental Assessment Worksheet: Open Space, Parks, and Trails shows potential trails, proposed trails, and existing trails, and notes that “Final Trail and rec. area locations to be determined at the time of development. This map represents general locations.”

#### **14. Amendments to the 1999 East Oaks PDA.**

Since its adoption, the 1999 PDA has been amended seven times. A summary of those amendments is provided below.

**a. First Amendment to the PDA:**

- i. Effective date: June 14, 2001
- ii. Type of Amendment: Minor
- iii. Parties to Amendment: City and North Oaks Company
- iv. Substance of Amendment: Extended the time period for the Developer to deliver evidence of title to August 1, 2002.

**b. Second Amendment to the PDA:**

- i. Effective Date: July 11, 2001
- ii. Type of Amendment: Minor
- iii. Parties to Amendment: City and North Oaks Company
- iv. Substance of Amendment: Table 1 of Appendix 1 of the Agreement is amended by adding a new sentence to the end of the most right-hand column for Use Types, Density and Height Limitations for Site L as follows: “Floor

Area Ratio to be calculated in the aggregate, except, no single dwelling unit shall exceed 6,000 square feet in size.”

**c. Third Amendment to the PDA:**

- i. Effective Date: July 11, 2001
- ii. Type of Amendment: Minor
- iii. Parties to Amendment: City and North Oaks Company
- iv. Substance of Amendment: Extended time period for the Developer to deliver evidence of title to February 1, 2003.

**d. Fourth Amendment to the PDA:**

- i. Effective Date: March 25, 2003
- ii. Type of Amendment: Major
- iii. Parties to Amendment: City and North Oaks Company
- iv. Substance of Amendment: Appendix 1 of the Agreement is “amended consistent with the blacklined version of Appendix I to the Agreement dated January 31, 2002, as amended by the Council of the City of North Oaks on February 14, 2002. A clean copy of Appendix 1 of the Agreement consistent with the blacklined changes shown in Exhibit “A” shall be substituted for the existing Appendix 1 to the Agreement.”

1. Specific Changes to Appendix 1 included the following:

- a. Section 3-Land Use Regulations: Added RCM-PUD, Senior Residential Attached Dwellings as an allowable residential use within the Development Sites of the Subject Property.
- b. Section 4(A)-Performance Standards: Added subpart 4, performance standards for RCM-PUD: Senior Residential Attached. Performance standards include minimum setbacks, and area restrictions including a site area requirement of 8 acres, FAR of .72, and building lot coverages of .28.
- c. Section 4(B): Retail, Services, and Offices: Amended to add language related to setbacks for certain buildings on Site E-1 from the northern boundary of Site E-2
- d. Table 1: Development Sites
  - i. Divided Site E into two sites, E-1 and E-2.
  - ii. Site E-2 is zoned RCM-PUD, with a planned number of Dwelling Units of 150, and uses, types, and density standards. It is noted that there is no density increase for site E-2.

- iii. **Number of Dwellings Permitted:** Amended to add language related to density allowances in remaining undeveloped sites and it is noted that “[p]ermitted density increase percentages shall be applied before any permitted conversion or transfer of units.”
- iv. **Number of Commercial Acres Permitted:** The number of permitted commercial acres decreased from 21 acres to 13 acres.
- v. **Conversion of Permitted Uses:** Language is updated to read as follows: “The limits of 645 dwelling units plus 150 dwelling units of senior attached residential housing and 13 commercial use acres may be varied as follows.” The remaining language references 13 commercial acres instead of 21 and adds language exempting out the 150 senior attached residential housing units from the allowed residential-to commercial conversion formula.

**e. Fifth Amendment to the PDA:**

- i. Effective Date: May 8, 2003.
- ii. Type of Amendment: Major
- iii. Parties to Amendment: City and North Oaks Company
- iv. Substance of Amendment: Appendix 1 of the Agreement is “amended consistent with the blacklined version of Appendix I to the Agreement which was approved by the Council of the City of North Oaks on May 8, 2003, a true and correct copy of which is attached as Exhibit “A”. A clean copy of Appendix 1 of the Agreement consistent with the blacklined changes shown in Exhibit “A” shall be substituted for the existing Appendix 1 to the Agreement.”
  - 1. **Specific Changes to Appendix 1** included the following: Amendment to language regarding uses, types, density, and height limits for Site E-1, specifically to allow a restaurant and a wellness center/care center as a conditional use. Various setbacks were also revised.

**f. Sixth Amendment to the PDA:**

- i. Effective Date: October 13, 2005.
- ii. Type of Amendment: Major
- iii. Parties to Amendment: City and North Oaks Company

- iv. Substance of Amendment: Appendix 1 of the Agreement is “amended consistent with the blacklined version of Appendix I to the Agreement which was approved by the Council of the City of North Oaks on October 13, 2005, a true and correct copy of which is attached as Exhibit “A”. A clean copy of Appendix 1 of the Agreement consistent with the blacklined changes shown in Exhibit “A” shall be substituted for the existing Appendix 1 to the Agreement.”
  1. Specific Changes to Appendix 1 are unknown, as no blacklined version is included with the amendment. It is unknown what if any changes were made to Appendix 1, which appears to match Appendix 1 with the approved changes from the Fifth Amendment.

**g. Seventh Amendment to the PDA:**

- i. Effective Date: June 10, 2010
- ii. Type of Amendment: Major
- iii. Parties to Amendment: City and North Oaks Company

The Seventh Amendment made substantial revisions to the 1999 East Oaks PDA. Referencing 2007 approvals for the site plans for the Mews and Phase 2-North Addition as modifications to site plans previously approved in 2003, which approvals were made subject to the amendment of the PDA, and also referencing the 2009 Decennial Review, the City and the Developer approved the following revisions to the 1999 PDA which were deemed to constitute a Major Amendment:

1. Added definitions for “City Ordinances” and “Pool Ordinances.”
2. Amended the definitions of “Shoreland Ordinance,” “Subdivision Ordinance,” and “Zoning Ordinance” to mean Ordinance 153, 152, and 151 respectively, and “any and all amendments or revisions thereto or replacements thereof.”
3. Amended the definition of “Planned Development Agreement” to read “Planned Development Agreement means this Planned Unit Development Agreement between the City and Developer, consented to and joined by NOHOA, and all Exhibits and Appendix 1 attached to or referenced herein and any and all amendments to any of the foregoing.”
4. Amended the definition of “PUD Controls” to includes the pool ordinance, comprehensive plan, and concept plan, and amended Section 5.4 related to inconsistencies among PUD Controls.
5. Adopted an amended version of Appendix 1 dated June 22, 2010, which included the following significant changes:
  - A. Revised the permitted Commercial Uses to reference City Ordinance Section 151.054.
  - B. Revised Section 4: Performance Standards to list “District Standards” which all development in the Subject Property is required to meet, as applicable according to the zoning designation for the area being developed.
  - C. Revised setback requirements for driveways, parking, and swimming pools.

- D. Revised how maximum building height is calculated.
- E. Amended Section 4 to remove the reference to RCM-PUD Senior Residential Attached, and divided the RCM-PUD into two sections, one for Sites E-1 and E-2 and a second section for Site E-3.
  - i. Under the section addressing Sites E-1 and E-2, added language that for Site and Building Plan review now references City Ordinance Section 151.054(L).
  - ii. Adds letter (f) which reads “All permitted, conditional, and accessory uses pursuant to Section 151.054 of the City Ordinance.”
- F. Added a new section referencing Site E-3 which included the following:
  - i. Added minimum setbacks and maximum building height restrictions, as well as minimum parking requirements
  - ii. Revised language that read “Site Area 8 acres” to read “Site Area Restriction: 15.27 acres”
- G. Added a new section regarding the designation of a single setback line in final plans.
- H. Amended language under Section 5, types of development to change the reference to permitted dwelling units and commercial development acreage within the Subject Property, reducing the maximum number of dwelling units from 795 to 645 and increasing the total allowed commercial development from 13 acres to 21 acres.
- I. Amended Table 1, Development Sites as follows:
  - i. Reduced the planned number of dwelling units in Site E-1 from 110 to 45.
  - ii. Added language regarding the calculation for Floor Area Ratio, noting it will be calculated in the aggregate and that no single dwelling shall exceed 6,000 square feet in size.
  - iii. Added in a new category titled “Senior Housing Sites” which lists Site E-2 (which was formerly located under the residential sites section of the development sites table) and lists the Planned Number of dwelling units for that site as 65, with a density increase of 50% allowed. References “All permitted, conditional and accessory uses pursuant to City Code section 151.054” under the uses section and includes various setback-related references.
  - iv. Added a new category titled “Commercial” which lists Site E-3. Under Acreage, states “n/a: buildings to consist of varying unit count. Senior residential unit count must be contained within stated allowable square footage.” Under the uses, types, density, and height limits section, adds significant language including a reference to “senior residential comprising approximately 450,000 square feet in connected buildings, consisting of independent living, assisted living, and skilled nursing.” Notes that there is

no density increase. Provides for a variety of different setbacks, and modifies the setback from the OHWL for Wilkinson Lake.

- v. **Specifically notes that “total dwelling units and allowed density increase for sites E-1 and E-2 combined is 110 dwelling units with a 50% density increase. Units can be allocated between sites E-1 and E-2 in any manner so long as the total does not exceed the total allowed.**
  - vi. Amends the total number of commercial use acres from 13 to 21, commercial use areas are allowed in any of the development sites zoned RCM-PUD (which are Sites E-1, E-2, G, and H).
  - vii. Updates the references to the total dwelling units to reflect the 645 maximum dwelling unit number and 21 commercial acreage references.
  - J. **Exhibit B-1: Consists of an updated Future Land Use Map with updated housing counts**
  - K. **Exhibit B-1.1: Identifies the property which comprises Site E-1.**
  - L. **Exhibit B-1.2: Identifies the property which comprises Site E-2.**
  - M. **Exhibit B-1.3: Identifies the property which comprises Site E-3 and state on the bottom of the exhibit “Total Developed Commercial Acreage = 15.27 Acres.”**
  - N. **Exhibit B-5.1: Lists updated dwelling unit counts for each site**
- 6. **Amended Exhibit B-1.1 to be added in the form of the document attached as Exhibit C-2 hereto, to show further detail of Site E-1 from that shown on Exhibit B-1.**
  - 7. **Added a new Exhibit B-1.2 to be added in the form of the document attached as Exhibit C-3 to further show the detail of Site E-2 from that shown on Exhibit B-1.**
  - 8. **Added a new Exhibit B-1.3 in the form of the document attached as Exhibit C-4 to further show the detail of Site E-3 from that shown on Exhibit B-1.**
    - A. **Note: On the bottom of this exhibit, which shows Site E-3, are the words “Total Developed Commercial Acreage = 15.27 Acres.”**
  - 9. **Added a new Exhibit B-5.1 in the form of the document attached as Exhibit, “to supplement Exhibit B-5 of the agreement and to reflect the current status of and plan for Development.” The Parties further agree that “further supplements to Exhibit B-5 shall be appended to the Agreement from time to time as Development occurs.”**
    - A. **Exhibit B-5.1 lists the PDA designated dwelling units, lists the actual units constructed from 1999-2006 and again from 2007-2009, shows proposed development units in five-year increments from 2010-2048, shows proposed density shifts, and lists permitted density increases. Lists 21 acres of allowed commercial acreage and states that 15.27 actual acres have been developed. Does not specifically list Site E-3 in the development table.**

## **15. Analysis of Questions Raised at or in Conjunction with the Decennial Review**

Per the 1999 PDA, a decennial review shall be conducted in order for the City and the Developer

to meet and discuss matters related to the PDA. In the summer of 2019, that decennial review was completed. During that process, several questions were raised regarding the status of the 1999 PDA and development of the Subject Property. Listed below are the identified questions and areas of concern raised during this decennial review process.

- a. Was there a mutual mistake of fact related to the calculation of developed commercial acreage for Site E-3 which resulted in the inclusion of references to 15.27 acres of commercial development on Site E-3?**

The PDA is a Contract between the City and the Developer, portions of which are consented to and joined by the NOHOA. A “contract” is “an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”<sup>6</sup> “A contract is formed when two or more parties exchange bargained-for promises, manifest mutual assent to the exchange, and support their promises with consideration.”<sup>7</sup> “There is a presumption of validity of contracts under Minnesota law and its courts are generally reluctant to invalidate contracts on the grounds of indefiniteness, especially when both parties have completed extensive performance.”<sup>8</sup> “A valid contract “requires a meeting of the minds concerning its essential elements. The parties must agree with reasonable certainty about the same thing and on the same terms.”<sup>9</sup>

The Minnesota Practice Series provides the following analysis regarding the formation of a contract:

Minnesota courts utilize an objective standard to evaluate evidence of the manifestation of mutual assent. For example, where one party leads another to assume (reasonably) that he assents to the terms of an offer by words, conduct, or both, there is an objective manifestation of assent, despite the first party's subjective intent. A valid contract “requires a meeting of the minds concerning its essential elements.” The parties must agree with reasonable certainty about the same thing and on the same terms. If an alleged contract is so uncertain as to any of its essential terms that it cannot be carried into effect without new and additional stipulations between the parties, it is not a valid agreement. Contracts must be certain in terms, and not so indefinite and illusory as to make it impossible to say just what is promised. At trial, the standard is not what a party meant subjectively, but what the words and actions exchanged would lead a reasonable person to assume. As explained by the Minnesota Supreme Court:

The requisite mutual assent for the formation of a contract ... does not require a subjective mutual intent to agree on the same thing in the same sense, but may be based on objective manifestations whereby one party by his words or by his conduct, or by both, leads the other party reasonably to assume that he assents to and accepts the terms of the other's offer.

When deciding disputes in contract formation, the surrounding facts and circumstances of the transaction in its entirety may be considered in addition to the words used.<sup>10</sup>

A valid contract requires consideration, which the Minnesota Practice Series discusses as follows:

A contract must be supported by “consideration,” which is something of value given in return for a performance or a bargained for promise of performance. Lacking consideration, a valid contract is not formed. Consideration requires the voluntary assumption of an obligation by one party on the condition of an act or forbearance by the other. Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party, and need not pass directly from the promisee to the promisor to be valid. Functionally, consideration is what distinguishes a contract from a gift because only a promise supported by consideration constitutes a contract. Procedurally, where no consideration is evident in an agreement, the party charging its sufficiency bears the burden of proving the sufficiency of consideration.

Consideration must be the result of a bargain,” and generally, any performance that is bargained for is consideration. As the Minnesota Supreme Court explained in *Baehr v. Penn-O-Tex Oil Corp.*:

“[B]argain” does not mean an exchange of things of equivalent, or any, value. It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other. Consideration thus insures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation.<sup>11</sup>

Minnesota law “follows the long-standing contract principle that a court will not examine the adequacy of consideration as long as something of value has passed between the parties.” “The amount of consideration is irrelevant so long as some benefit or detriment is proved.” Where a contract is supported by valuable consideration, such as a detriment incurred in exchange for a promise, a right of one party to terminate it at will does not render it invalid for lack of mutuality of consideration. The Minnesota Supreme Court has explained that “[t]he concept of mutuality has been widely discredited ... and it is now generally recognized that the obligations of the parties need not be substantially equal for there to be a binding contract.”<sup>12</sup>

During discussion at the August 21<sup>st</sup> continued Decennial Review meeting, questions were raised regarding a potential mutual mistake of fact in calculating the developed commercial acreage on Site E-3.

A “mutual mistake” consists of a clear showing of a misunderstanding, reciprocal and common to both parties, with respect to at least some substantial part of the terms and subject matter of a contract.” ... A “material mistake of fact” is one that goes to the very nature of the transaction or purchase. In contrast, “[a] mistake

relating merely to the attributes, quality, or value of the subject of a sale does not warrant a rescission. Neither does a mistake respecting something which was a matter of inducement to the making of the contract, where the means of information were open alike to both parties, and each was equally innocent, and there was no concealment of facts and no imposition.”<sup>13</sup>

“A party seeking reformation of a contract on the ground of mutual mistake bears a heavy burden.” “Proof of the parties' actual intent is fundamental to a claim for reformation.” Reformation of a contract contemplates altering or amending its terms “to reflect the true intent of the parties at the time of its inception.” For reformation of a contract, the “contract is modified to reflect the parties' true intent”; whereas under rescission, “the entire contract is voidable.” As to the elements required to establish a prima facie case of reformation, “[a] party seeking reformation must prove that: ‘(1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.’”

A written instrument can be reformed by a court if the following elements are proved: (1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party. These facts must be established by evidence which is clear and consistent, unequivocal and convincing. ... Furthermore, “[w]hen both parties acted in good faith and neither misled the other, but nevertheless each party was mistaken and thought he was making a different contract from what the other party supposed he was making, reformation is not an appropriate remedy.” “Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation.”<sup>14</sup>

Following that discussion, the North Oaks Company submitted a letter to the City dated October 30, 2019, which advised the City that it did not view the commercial acreage calculation found in the 7<sup>th</sup> Amendment to constitute a mutual mistake of fact, and that rather it was a bargained-for term of the Agreement.<sup>15</sup> A unilateral mistake may also justify rescission of a contract in certain circumstances:

The Eighth Circuit has summarized Minnesota's law regarding unilateral mistake by noting that, under Minnesota law, rescission of a contract for mistake is ordinarily founded on either mutual mistake or a “mistake by one [party] induced or contributed to by the other.” Generally, a party cannot avoid a contract based on a unilateral mistake “unless there is ambiguity, fraud, or misrepresentation.” Even when there is no ambiguity, fraud, or misrepresentation, relief from a unilateral mistake is available where enforcement is an “oppressive burden” and rescission would impose no substantial hardship on the other

party. However, a party may not escape contract liability based on unilateral mistake when “the party bears the risk of that mistake.” “A party bears the risk of mistake if it is aware, at the time of contracting, that it has limited knowledge of facts to which the mistake relates, but treats that knowledge as sufficient.” A court may also allocate risk to a party where reasonable.

If only one party makes a mistake, “the contract is still voidable, provided the mistaken party does not bear the risk of mistake and ‘the effect of the mistake is such that enforcement of the contract would be unconscionable or the other party had reason to know of the mistake.’” “A party bears the risk of mistake when the risk is allocated to him by the agreement, by the court on the ground that it is reasonable to do so, or if ‘he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.’” Courts “examine[] evidence of mistake with particular care and only reluctantly allows a party to avoid a contract on the ground of mistake.”

Applying the principles contained in the *Restatement*, if, at the inception of the contract one party is mistaken as to a basic assumption on which she entered into the contract and the mistake has a materially adverse effect on the agreed exchange of performances, the contract is voidable by her so long as she can prove that:

1. She does not bear the risk of the mistake and the effect of the mistake is such that enforcement of the contract would be unconscionable; or
2. The other party had reason to know of the mistake or the other party's fault caused the mistake.

Reliance by one party may make enforcement of a contract proper, even though requiring compliance would otherwise be unconscionable. If the mistake is discovered and the other party notified before he has relied on the contract, the mistaken party may avoid the contract because the other party is only deprived of the expectation of the “benefit of the bargain.” If, however, the other party has relied on the contract in some substantial way, avoidance may produce adverse reliance. In such a case, enforcement of the contract would not be unconscionable. Nevertheless, if the court can adequately protect the party by compensating him for his reliance under the rules of the *Restatement*(§ 158, “Relief Including Restitution”), the court need not order enforcement. According to the Minnesota Supreme Court:

[I]f the contract as written, is the result of mistake so fundamental that the minds of the parties have never met, or if an unconscionable advantage has been gained by mistake or misapprehension of the party defendant, and the parties can be restored to their original status, a court administering equity will not enforce the contract.

If the other party had reason to know of the mistake, the mistaken party can avoid

the contract regardless of whether its enforcement would be unconscionable.<sup>16</sup>

Limited historical background information related to the preparation and approval of the 7<sup>th</sup> Amendment to the PDA has been received and reviewed. Documents reviewed as part of this review process include the following:

1. Memo to City from North Oaks Company, dated October 10, 2007
2. Memo from City Administrator to Planning Commission, dated May 24, 2010
3. Minutes of several council meetings in 2007 and 2010

Negotiations between the City and the Developer regarding the 7<sup>th</sup> Amendment to the PDA began in 2007 and culminated with the 2010 execution of the 7<sup>th</sup> Amendment to the PDA. Based on the limited City records available regarding the execution of the 7<sup>th</sup> Amendment, it appears that it was approved by the City and Developer following a significant period of discussion/negotiation.<sup>17</sup> Information regarding the content, scope, or deliberative process employed as part of those negotiations was not provided for review as part of the PDA review process. A review of the limited information provided does not offer any specific information regarding how the commercial acreage calculation of 15.27 acres was made or agreed upon by the City.

It appears that discussions occurred between representatives of the City and the Developer that resulted in the preparation of the 7<sup>th</sup> Amendment which included, among a number of substantial changes, a recognition by the City of 15.27 acres of existing commercial development on Site E-3. As noted above, Council minutes from November 8, 2007, state that “[t]he City attorney and the attorney for North Oaks Company are working on some items. Tom Dougherty, North Oaks Company president, explained the seven proposed amendment changes that are being formalized as a result of the April 12 Council meeting.”<sup>18</sup> At the December 13, 2007 Council Meeting, the minutes reflect that a summary of the latest draft of the 7<sup>th</sup> Amendment to the PDA was provided to the Council, and that the “council has concerns over several of the items under consideration.”<sup>19</sup> A motion was made and unanimously adopted to “table the discussion of the 7<sup>th</sup> Amendment to the PDA to a future meeting to be agreed upon.”<sup>20</sup>

Over three years later, the Minutes of the June 10, 2010 council meeting reflect that then-City Administrator Melinda Coleman “presented the North Oaks Company application for approval of the proposed Seventh Amendment to the Planned Unit Development Agreement and Accompanying Exhibits (A-D) [which] include seven areas of proposed change.”<sup>21</sup> The Council unanimously approved “application 10-04, the Seventh Amendment to Planned Unit Development for the East Oaks Project” with two listed conditions. Based on the very limited available information regarding that negotiation and revision process, there is no information in the record reviewed to date which would provide any concrete insight into how the developed commercial acreage for Site E-3 was calculated or what information the City had or did not have regarding the actual acreage of Site E-3 and the approved commercial acreage.

#### **b. Possible Acreage Calculations for Site E-3, Waverly Gardens**

Site E-3 is credited with containing 15.27 acres of commercial development per the 7<sup>th</sup> Amendment

to the PDA. This 15.27-acre figure is found in the 7<sup>th</sup> Amendment in at least two places, namely on Exhibit B.1-3 and in Appendix 1, on p. 6 of 11. Questions have been raised regarding this figure based on the fact that the GIS records for Ramsey County<sup>22</sup> show a total acreage for the four separate parcels (tracts) which comprise Site E-3 which are identified as follows with the following acreages:

i. 043022210010	Acres: 3.13
ii. 043022210019	Acres: 7.6
iii. 043022210008	Acres: 0.58
iv. 043022210011	Acres: 4.98

**Total Acreage per Ramsey County GIS:                    16.29 acres**

It is unknown at this time how the Ramsey County acreage is calculated. It is assumed, for purpose of this discussion, as being calculated off the full acreage of the combination of the various RLS tracts that comprise Site E-3. Additionally, it is worthwhile to note that when looking at Exhibits B.1-1, B.1-2, and B.1-3, only exhibit B.1-3 shows the site itself (in this case Site E-3) not extending into Centerville Road (in other words, not showing the full extent of the property which comprises Site E-3 by apparently failing to show the area of the property which is encumbered by a right-of-way easement, while the other exhibits show Sites E-2 and E-1 extend into Centerville Road.) Additionally, Exhibit B.1-3 is the only exhibit that shows an acreage for the site.

As noted above, a portion of Site E-3 is encumbered with a road easement for the benefit of Ramsey County. Per RLS 586, that easement is 60 feet wide over a portion of Tracts A, E, and D. In its August 16, 2019 letter, the North Oaks Company asserts that “The 15.27 acres [of attributed commercial development for Site E-3] is the area depicted on Exhibit C-4 of the Seventh Amendment (which is Exhibit B.1-3 of the PDA). Exhibit C-4 does not include all of Tract D and Tract E of Registered Land Survey No. 586. The portion of Tract D and Tract E that underlie Centerville Road are not included on Exhibit C-4 as they are not [sic] subject to easement for public use and are not available for commercial use. This is why the gross acreage of the Registered Land Survey tracts are not the same as the Seventh Amendments calculation of commercial use area.”<sup>23</sup>

No specific calculation is shown on the RLS of the easement area, but it is shown as a 60-foot-wide easement, the total length of which is shown on Tracts E and D (Tract A is a part of Site E-1) and appears to be somewhere between approximately 700 and 750 feet long (the length of the various segments shown on the RLS is unclear. Review of a more legible copy of the survey might assist with determining with specificity the length of the easement). Taking the length times the width of the easement area on tracts E and D (700 x 60 or 750 x 60) results in a total square footage for the easement area of 42,000 to 45,000 square feet, or 0.964 to 1.033 acres. If the Ramsey County GIS calculations are correct, and the actual acreage of Site E-3 is 16.29 acres,  $16.29 - 0.964 = 15.326$ , and  $16.29 - 1.033 = 15.257$ . It appears that the total commercial acreage attributed to Site E-3 may be the result of taking the total acreage of the real property that comprises Site E-3 and reducing that total acreage by the amount of property encumbered by the road easement. This result may have stemmed from the definitions found in Ordinance 93 and Ordinance 94 (now Chapters 151 and 152 of the City Code) which define the “usable area” of a lot as “the area of a lot, excluding all required setbacks, easements, and wetlands, where the topographic and soil

conditions and configuration are suitable for each of the following in some section of the area: construction of a dwelling unit, future additions, accessory structures, well site, 2 individual sewage treatment system areas (for an unsewered lot), yard, driveways, and required parking areas,” and “gross lot area” of a site which is defined as the “[t]otal area of a platted lot excluding road easement(s).”<sup>24</sup> While no specific information was found to support a claim that the total acreage of the site as established in the 7<sup>th</sup> Amendment may have been reduced by the area on Site E-3 that was encumbered by the easement for Centerville Road, it is possible that that accounts for the discrepancy between the site acreage as listed in the Seventh Amendment and as shown on Ramsey County GIS records.

Additionally, a review of the approved site plan and preliminary plan sheets for The Gardens of North Oaks, dated April 25, 2002, reviewed 6-04-02, shows the following area calculation for Area E (which, as shown is comprised of Tracts C and B, identified as Sheet 3 of 7, reflects the following acreage for what will eventually become Site E-3:

- |            |             |
|------------|-------------|
| a. Tract B | Acres: 7.31 |
| b. Tract C | Acres: 8.0  |

**Total Acres per Approved Site Plan: 15.31**

Finally, it is worthwhile to note that any impact on future density transfers as a result of the development on Site E-3 is not specifically addressed in the 7<sup>th</sup> Amendment to the PDA.

**c. Is the City bound by the 7<sup>th</sup> Amendment to the PDA?**

Unless a condition exists that would make the 7<sup>th</sup> Amendment void or voidable, or terms of the PDA are further revised by mutual agreement of the parties, the City is bound by the terms of the 7<sup>th</sup> Amendment to the PDA, including the unit counts and attributed commercial acreage amount.

**d. Can the terms of the PDA be revised by the parties?**

The PDA can be amended at any time, in writing, by mutual agreement of the parties.

**e. Must the PDA be amended?**

Per Section 13 of the 7<sup>th</sup> Amendment to the PDA, it is contemplated that the PDA will be amended, specifically Exhibits B-5 and B-5.1 to reflect current housing counts. The PDA was last amended in 2010, prior to the development of Rapp Farms. It is recommended that Exhibits B.1.5 of the PDA be amended to reflect the current dwelling unit counts in preparation for future development of the remaining development sites in the City.

**f. Is NOHOA bound by the terms of the 7<sup>th</sup> Amendment to the PDA?**

No. NOHOA is not a signatory to any of the seven amendments to the PDA. Therefore, NOHOA has not technically consented to any of the amendments to the PDA. That said, no specific analysis has been completed with respect to what practical impact the lack of NOHOA’s consent to the various amendments to the PDA has on the future development of the remainder of the Subject

Property.

**g. Can the City deny future development applications for the East Oaks property that are not in conformity with the PDA as amended?**

Yes. The City retains the legal ability to deny applications that are not in conformity with the requirements of the PDA, including development density maximums.

**h. Do the 235 dwelling units on the Waverly Gardens site (Site E-3) count against the 645 dwelling unit maximum for the East Oaks Development?**

It appears that, per the 7<sup>th</sup> Amendment to the PDA, only the commercial acreage was attributed to the development on Site E-3, and none of the dwelling units were “counted” against the 645 dwelling unit maximum for the East Oaks Development. Based on the language in the 7<sup>th</sup> Amendment, Site E-3 was treated as Commercial Development, which does count toward the 21-acre commercial development allotment for the Subject Property. The individual dwelling units are not counted (right or wrong) towards the 645 dwelling unit maximum; rather the development is “counted” only against the 21 acres of commercial development allocated to the East Oaks Development. Thus the reported 235 previously-constructed dwelling units<sup>25</sup> on Site E-3 are not explicitly identified as being included in the dwelling unit counts for the Subject Property.

**i. Is the City required to “count” future mixed use commercial development in the same way that it counted the commercial development in Site E-3?**

No. The PDA contains no “formula” for counting and allocating mixed use commercial and residential development between commercial acreage and residential dwelling units. Future developments may be “counted” differently, including with respect to allowable density increases, counting of dwelling units, and calculation of commercial acreage development.

**j. Could an updated EAW be required before additional development occurs in the East Oaks Project area?**

Potentially. An EAW was completed in 1998 for the East Oaks Project. Minn. R. P. 4410.1000, subd. 1 defines an EAW as follows: “The EAW is a brief document prepared in worksheet format which is designed to rapidly assess the environmental effects which may be associated with a proposed project. The EAW serves primarily to: A. aid in the determination of whether an EIS is needed for a proposed project; and B. serve as a basis to begin the scoping process for an EIS.” A new EAW is required “if, after a negative declaration has been issued but before the proposed project has received all approvals or been implemented, the RGU determines that a **substantial change** has been made in the proposed project or has occurred in the project’s circumstances, **which change may affect the potential for significant adverse environmental effects** that were not addressed in the existing EAW.”<sup>26</sup> The terms “substantial change” and “significant adverse environmental effects” are not defined in Minn. R. P. 4410. However, Minn. R. P. 4410.1700, subp. 7 establishes the following criteria for determining whether a project has the potential for significant environmental effects:

In deciding whether a project has the potential for significant environmental effects, the following factors shall be considered:

- A. type, extent, and reversibility of environmental effects;
- B. cumulative potential effects. The RGU shall consider the following factors: whether the cumulative potential effect is significant; whether the contribution from the project is significant when viewed in connection with other contributions to the cumulative potential effect; the degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and the efforts of the proposer to minimize the contributions from the project;
- C. the extent to which the environmental effects are subject to mitigation by ongoing public regulatory authority. The RGU may rely only on mitigation measures that are specific and that can be reasonably expected to effectively mitigate the identified environmental impacts of the project; and
- D. the extent to which environmental effects can be anticipated and controlled as a result of other available environmental studies undertaken by public agencies or the project proposer, including other EISs.

Should the City determine that a “substantial change” has been made in the proposed project or has occurred in the project’s circumstances which may affect the potential for significant environmental effects that were not addressed by the 1998 EAW, then a new EAW is required for the Project.

**k. What version of City Ordinances controls development of the East Oak PDA Area?**

Section 6.2 of the PDA notes that if certain conditions are met, then “for thirty (30) years from the Effective Date of this Planned Development Agreement with respect to the Subject Property, except to the extent required by state, county, or federal law, regulation or order, or by order or judgment of a court with jurisdiction over the matter, the City will not without the consent of the Developer for any particular Development Site or the entire East Oaks PUD Project as shown on the East Oaks Project Master Development Plan in which the Developer has such an ownership interest change the City’s Comprehensive Plan or “Official Controls” for that Development Site or the entire East Oaks PUD Project in a manner which is inconsistent with the terms of this Planned Development Agreement with respect to the following: permitted, conditional and accessory uses ... development density [or several other listed conditions].” “Official Controls” are defined as “ordinances and regulations which control physical development of the City or any part thereof ...” and specifically include “ordinances establishing zoning, subdivision controls [and] site plan regulations.” However, in Section 3 of the 7<sup>th</sup> Amendment to the PUD, the definitions of Shoreland Ordinance,” “Subdivision Ordinance,” and “Zoning Ordinance” are amended to mean Ordinance 153, 152, and 151 respectively, and “any and all amendments or revisions thereto or replacements thereof.” It appears that the Developer, by its execution of the Seventh Amendment to the PUD, may have consented to all future changes to City Code Chapters

151, 152, and 153, subjecting them to current Zoning Ordinance and Subdivision Ordinance requirements.

**l. How many “dwelling units” have been constructed to date at the Rapp Farms Site?**

157 separate lots have been developed on the Rapp Farms site, 156 with residential dwellings and 1 lot with a pool and clubhouse. Because the City and Developer have not updated Exhibit B.5, there has been no written agreement between the parties regarding the actual unit count for the Rapp Farms Site, or any other development that has occurred since the adoption of the 7<sup>th</sup> Amendment in 2010.

**m. What outstanding issues need to be addressed in the near term?**

**i. Reference to 90 units built in Site E-2 in Amended and Restated Exhibit B-1.5 (7<sup>th</sup> amendment)**

Exhibit B-1.5 shows 90 units have been developed on Site E-2. However, only 76 actual units have been constructed, and the Developer has indicated that Presbyterian Homes owns Tract Q, RLS 603, and has the “option” to build 14 additional dwelling units on that Tract. It is not clear at this time what specific approval for 14 additional dwelling units to be built on Tract Q has been granted. The “actually built” numbers in Exhibit B-1.5 should reflect actual dwelling units constructed. To the extent that the Developer has specifically assigned its right to construct a specific number of dwelling units to Presbyterian Homes to be built on a portion of Site E-2 (assuming solely for purposes of this paragraph that all other requirements of the PDA related to the Zoning Ordinance are met such that 14 dwelling units could be built on Tract Q, located on Site E-2, and that Presbyterian Homes intends to construct all 14 allocated dwelling units), Exhibit B-1.5 should be updated via an amendment executed by, at a minimum, the City, Presbyterian Homes, and the Developer, or in the alternative, an assignment of the Developer’s right to construct 14 out of the remaining residential dwelling units for the East Oaks Development to Presbyterian Homes should be provided to the City.

**ii. Update of housing counts**

Exhibit B.1-5 has not been updated since the adoption of the 7<sup>th</sup> Amendment in 2010, despite the development of a number of dwelling units, primarily on the Rapp Farm site. The City and Developer should adopt an updated version of Exhibit B.1-5 in order to update that exhibit to reflect actual development to date, including addressing the calculation of the Rapp Farm development to date.

**Conclusion**

The 1999 East Oaks PDA, as subsequently amended, establishes a framework for the development of the East Oaks area. Moving forward, it is recommended that the City address the outstanding issues identified above. It is further recommended that the City and Developer update the PDA as necessary as future developments are approved in order to ensure that all parties and stakeholders in the development of the East Oaks Area are kept apprised of the status of the development and current dwelling unit counts.

- <sup>1</sup> 1999 East Oaks PDA, p. 1.
- <sup>2</sup> All definitions found in Article 19, Section 19.13
- <sup>3</sup> **Three Bold Ventures**, Joan C. Brainerd and Richard E. Leonard, p. 158 (2007).
- <sup>4</sup> Amendment to Development Agreement, City of North Oaks, Subdivision 92-2, West Black late, Executed by the North Oaks Company 1/28/99, included in East Oaks PDA materials.
- <sup>5</sup> 109,770 square feet = 2.5199 acres ([www.unitconverters.net](http://www.unitconverters.net))
- <sup>6</sup> Minn. Practice Series, Business Law Deskbook, § 7.1(a) (2019).
- <sup>7</sup> Minn. Practice Series, Business Law Deskbook, § 7.1(a) (2019).
- <sup>8</sup> Minn. Practice Series, Business Law Deskbook, § 7.1(e) (2019).
- <sup>9</sup> Minn. Practice Series, Business Law Deskbook, § 7.4(b) (2019).
- <sup>10</sup> Minn. Practice Series, Business Law Deskbook, § 7.4(b) (2019).
- <sup>11</sup> Minn. Practice Series, Business Law Deskbook, § 7.30 (2019)
- <sup>12</sup> Minn. Practice Series, Business Law Deskbook, § 7.31 (2019)
- <sup>13</sup> Minn. Practice Series, Business Law Deskbook, § 7.50 (2019)
- <sup>14</sup> Minn. Practice Series, Business Law Deskbook, § 7.50 (2019)
- <sup>15</sup> See October 30, 2019 Letter from Tom Bray re North Oaks Company – Decennial Review of Master Development Plan and Planned Unit Development for East Oaks Project
- <sup>16</sup> Minn. Practice Series, Business Law Deskbook, § 7.52 (2019)
- <sup>17</sup> See minutes from council meetings in 2007 and 2010.
- <sup>18</sup> Minutes of the Regular Council Meeting of the City Of North Oaks from the November 8, 2007 council meeting.
- <sup>19</sup> Minutes of the Regular Council Meeting of the City of North Oaks from the December 13, 2007 council meeting.
- <sup>20</sup> Minutes of the Regular Council Meeting of the City of North Oaks from the December 13, 2007 council meeting.
- <sup>21</sup> Minutes of the Regular Council Meeting of the City of North Oaks from the June 10, 2010 council meeting.
- <sup>22</sup> ([www.maps.co.ramsev.mn.us](http://www.maps.co.ramsev.mn.us)), last accessed 11/07/19.
- <sup>23</sup> August 16, 2019 Letter from North Oaks Company to the City of North Oaks.
- <sup>24</sup> City Code, Section 151.005 (2019).
- <sup>25</sup> Housing Counts per Ramsey County Property Records, Parcel ID 043022210019, [www.maps.co.ramsey.mn/us](http://www.maps.co.ramsey.mn/us), last accessed 11/07/19.
- <sup>26</sup> Minn. R. P. 4410.1000, subd. 5 (2019).

**\*= Based on draft updated Exhibit B-5.1 dated 8/16/19, prepared by the North Oaks Company.**

**\*\*=This number shows the total number of dwelling units permitted in each site if the permitted density increase were applied. Under the PUD, the maximum dwelling unit count is 645, meaning all of the density increases shown could not occur on each site. Site-specific dwelling unit calculations provided for informational purposes only.**

**\*\*\*= Rapp Farm consists of 157 lots, one of which contains a clubhouse and pool and not a dwelling unit. Only Dwelling Units are counted toward the dwelling unit maximum. How the lot with the pool and clubhouse is counted is not explicitly spelled out in the PUD. The City will need to address this clubhouse/pool lot development when it updates Exhibit B-5.1., and must determine if the Pool and Clubhouse meets the definition of a Dwelling Unit. If the clubhouse and pool meet the definition of a Dwelling Unit, then it should be counted in the Rapp Farms count and the housing count should be updated to 157.**

**\*\*\*\*= Commercial Acreage number taken from references to the same throughout the 7th Amendment. See memo for additional detail regarding calculations related to developed commercial acreage.**

**\*\*\*\*\*=Per 7th Amendment, the total number of dwelling units for sites E-1 and E-2 is 110. Dwelling units can be located on either site.**

**\*\*\*\*\*= August 16, 2019 correspondence from North Oaks Company states that Site E-2 is developed with 76 independent living apartments, each of which is counted as one housing unit, and notes that "Waverly Gardens retains the right to develop 14 additional housing units on the site (RLS 603, Tract Q) it owns west of Wilkinson Lake Boulevard, which is a total of 90 housing units." Units which are not yet built should not be included in the "already built" unit count, but are included for this site only based on the representation that Presbyterian Homes has the right to construct 14 additional dwelling units on Site E-2.**

**\*\*\*\*\* = It is unclear if four units for Anderson Woods/Wilkinson Villas have been constructed. This table reflects the 8.16.19 correspondence from the North Oaks Company that no dwelling units have been constructed on Site F (Anderson Woods/Andersonville).**

**EAST OAKS PROJECT**



- ⊙ AREA IDENTIFIER
- 648 FUTURE HOUSING
- ▨ ROAD USE
- ▭ UNIMPROVED LAND
- ▨ PARKING GARAGE WITH SPACE
- ▨ SINGLE-FAMILY RESIDENTIAL
- ▨ LIMITED HOUSING DEVELOPMENT
- ▨ ROAD DEVELOPMENT
- ▨ LIMITED COMMERCIAL USE
- ▨ COMMERCIAL DEVELOPMENT
- ⊕ LAND POTENTIAL



**EXHIBIT "B1"**  
**FUTURE LAND USE**  
**, 2010**

# THE GARDENS OF NORTH OAKS EXHIBIT "B-1.1"

, 2010

ANOKA COUNTY

CO. RD.

CONSERVATION  
AREA

WILKINSON LAKE

186422

CENTERVILLE ROAD  
WHITE BEAR TOWNSHIP





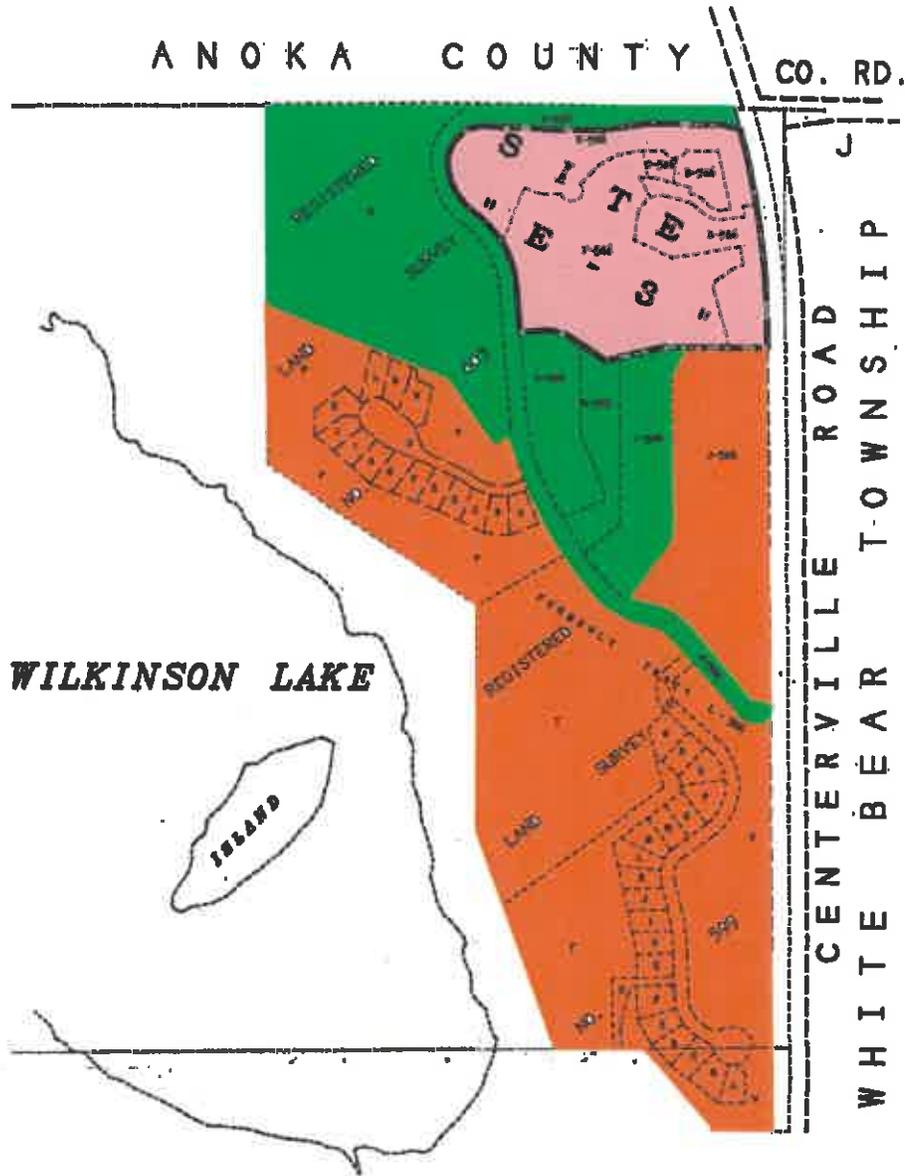
# THE GARDENS OF NORTH OAKS EXHIBIT "B-1.3"

, 2010

ANOKA COUNTY

CO. RD.

CONSERVATION  
AREA



WILKINSON LAKE

ISLAND

CENTERVILLE ROAD  
WHITE BEAR TOWNSHIP

Total Developed Commercial Acreage = 15.27 Acres

