

RESOLUTION NO.: 13- 2007
INTRODUCED BY: MAYOR AND ALL OF COUNCIL

A RESOLUTION AUTHORIZING AN ENVIRONMENTAL COVENANT
RESTRICTION UPON A CITY STREAM AREA.

WHEREAS, a developer of a residential housing project in Beachwood, Ohio, Fairwood Glen, LLC, has offered to purchase from the City an environmental covenant to place environmental restrictions upon the stream area on the City's properties on Highland Road at the corner of Richmond Road and easterly to the City Park in order to preserve the scenic, natural, aesthetic and educational resource of the stream area as part of an approved U.S. Army Corps of Engineers' mitigation project necessitated by the relocation of a stream in Beachwood by the developer – both streams being located within the Euclid Creek Watershed; and

WHEREAS, this Council has determined that the acquisition by Fairwood Glen, LLC, for appropriate consideration, of an environmental covenant on the City's stream area that is enforceable by the Ohio Environmental Protection Agency (OEPA) on said area as described in Exhibit 1 hereto, furthers the public health, safety and general welfare of the City and its citizens;

NOW, THEREFORE, be it Resolved by the Council of the City of Richmond Heights, State of Ohio, that:

Section 1: The Mayor is hereby authorized to execute an environmental covenant document which also grants to the OEPA enforcement authority with respect to restrictions on lands owned by the City of Richmond Heights, as described in Exhibit 1 attached hereto and incorporated herein, and in a form similar to said Exhibit 1, for the sum of \$35,000.00 payable to the City by Fairwood Glen, LLC.

Section 2: It is found and determined that all formal actions of this Council concerning and relating to the adoption of this Resolution were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees that resulted in such formal action, were in meetings open to the public, in compliance with all legal requirements, including Section 121.22 of the Ohio Revised Code.

Section 3: This Resolution shall take effect and be in force from and after the earliest period allowed by law.

PASSED: _____

DANIEL J. URSU, MAYOR

APPROVED: _____

ATTEST: _____

BETSY TRABEN
Clerk of Council

DAVID H. ROCHE
President of Council

ENVIRONMENTAL COVENANT

This Environmental Covenant is made by the City of Richmond Heights, Ohio, an Ohio municipal corporation, whose address is 457 Richmond Road, Richmond Heights, Ohio 44143 (the "City"), and the Ohio Environmental Protection Agency ("Ohio EPA"), as a non-holder agency, pursuant to Ohio Revised Code ("R.C.") §§5301.80 to 5301.92, for the purpose of subjecting certain property to the activity and use limitations set forth herein.

WHEREAS, the City is the owner in fee simple of certain real property, which contains the Covenant Area, described herein, and is situated in Richmond Heights, Cuyahoga County, Ohio.

WHEREAS, Fairwood Glen, LLC ("Fairwood") is a developer of residential real property and had developed the subdivision known as the Fairwood Glen Subdivision in the City of Beachwood, which project impacted certain surface water features located on the Fairwood property and the approvals for which project required that Fairwood obtain a water quality certification pursuant to Section 401 of the Clean Water Act, 33 U.S.C. §1344 from the Ohio EPA and Nationwide Permit ("NWP") coverage from the Army Corps of Engineers ("the Army Corps"); and

WHEREAS, in order to mitigate such impacts on the Fairwood property and as a condition of being issued Nationwide Permit No. 39 on July 19, 2005 from the Army Corps, which included the Section 401 water quality certification, Fairwood was required to obtain mitigation property and to protect this property in perpetuity with an environmental covenant; and

WHEREAS, Fairwood has paid valuable consideration to the City to induce the City to execute and record this Covenant and to perform the obligations thereunder in order to protect the Covenant Area in perpetuity; and

WHEREAS, the Covenant Area is located within the Euclid Creek Watershed and possesses substantial value in conserving and protecting the physical, biological and chemical integrity of the Euclid Creek and is important in the protection of existing or designated use of the waters of the state pursuant to §303 of the Clean Water Act, 33 U.S.C. §1313 and §6111.041 of the Ohio Water Pollution Control Act; and

WHEREAS, the City recognizes the aforesaid conservation values and proposes to prevent the use or development of the Covenant Area for any purpose or in any manner that would conflict with such values, except as specifically set forth herein.

NOW, THEREFORE, for and in consideration of the premises and the foregoing recitations, and other good and valuable consideration in hand paid, and in further consideration of the covenants, terms, conditions, and restrictions hereinafter set forth, the City and Ohio EPA do hereby state and covenant as follows:

EXHIBIT 1

1. Environmental Covenant. This instrument is an Environmental Covenant developed and executed pursuant to R.C. " 5301.80 to 5301.92.
2. Covenant Area. The "Covenant Area" is a tract of real property located in the City of Richmond Heights, Cuyahoga County, Ohio; legally described in Exhibit "A" and further depicted on Exhibit "B", both of which exhibits are attached hereto and made a part hereof.
3. The City is the fee simple owner of the Covenant Area.
4. The City is the "Holder" of this Environmental Covenant.
5. Activity and Use Limitations. As part of the conditions set forth in the 401 Certification issued to Fairwood, the City hereby imposes and agrees to comply with the following activity and use limitations on the Covenant Area:
 - 1.a Division: Any division or subdivision of the Covenant Area is prohibited.
 - 1.b Commercial Activities: Commercial development or industrial activity on the Covenant Area is prohibited.
 - 1.c Construction: The placement or construction of any man-made modifications, including but not limited to buildings, structures, fences, roads, parking lots, billboards or advertising of any kind, camping accommodations and mobile homes on the Covenant Area is prohibited. Notwithstanding anything to the contrary contained herein, the City reserves the right to maintain, repair, strengthen, reconstruct and replace the roads, driveways, bridges and utility crossings existing within the Covenant Area as of the date of the execution of the Covenant, so long as the City restores the areas that may be disturbed by such activities to such natural condition as existed prior to such activities. Walking and biking trails may be installed, along with benches, for the public to have access to the Covenant Area. The location of any walking and biking trails and benches shall be located a sufficient distance from the stream banks so as not to adversely disturb the stream or its banks.
 - 1.d Cutting and Other Control of Vegetation: Any cutting of trees, ground cover or vegetation, or destroying by means of herbicides or pesticides on the Covenant Area is prohibited, other than the removal or control of invasive and noxious species.
 - 1.e Dumping: There shall be no dumping of soil, trash, ashes, garbage, waste, or other unsightly or offensive material, or any placement of underground storage tanks, on or in the Covenant Area, and no changing of its topography through the placing of soil or other substance or material such as land fill or dredging spoils.

- 1.f Water Courses: Natural water courses and streams and adjacent riparian buffers may not be dredged, straightened, filled, channelized, impeded, diverted or otherwise altered on the Covenant Area.

6. Reserved Rights. The City reserves the right to continue to maintain certain currently-existing lawn areas on the Covenant Area as maintained lawn areas and to maintain and enhance other areas within the Covenant Area, all as set forth in Exhibit "C" attached hereto and made a part hereof.

7. Running with the Land. This Environmental Covenant shall be binding upon the City and all assigns and successors in interest, including any Transferee, and shall run with the land, pursuant to R.C. '5301.85, subject to amendment or termination as set forth herein. The term "Transferee" as used in this Environmental Covenant, shall mean any future owner of any interest in the Covenant Area or any portion thereof, including, but not limited to, owners of an interest in fee simple, mortgagees, easement holders, and/or lessees.

8. Compliance Enforcement. Compliance with this Environmental Covenant may be enforced pursuant to R.C. '5301.91 or other applicable law. Failure to timely enforce compliance with this Environmental Covenant or the use limitations contained herein by any party shall not bar subsequent enforcement by such party and shall not be deemed a waiver of the party's right to take action to enforce any provision of this Covenant. Nothing in this Environmental Covenant shall restrict Ohio EPA from exercising any authority under applicable law in order to protect public health or safety or the environment.

9. Rights of Access. The City hereby grants to Ohio EPA, its agents, contractors, and employees the right of access to the Covenant Area at all reasonable times in connection with the implementation or enforcement of this Environmental Covenant.

10. Compliance Reporting. The City and any Transferee shall submit to Ohio EPA, upon request by the Ohio EPA, written documentation verifying that the activity and use limitations remain in place and are being complied with.

11. Notice upon Conveyance. Each instrument hereafter conveying any interest in the Covenant Area or any portion of the Covenant Area shall contain a notice of the activity and use limitations set forth in this Environmental Covenant, and provide the recorded location of this Environmental Covenant. The notice shall be substantially in the following form:

THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL COVENANT, DATED _____, 2007, RECORDED IN THE DEED OR OFFICIAL RECORDS OF THE CUYAHOGA COUNTY RECORDER ON _____, 2007, IN [DOCUMENT _____, or BOOK____, PAGE _____]. THE ENVIRONMENTAL COVENANT CONTAINS THE FOLLOWING ACTIVITY AND USE LIMITATIONS:

In the notice, restate restrictions from Paragraph 5 of this Covenant.

The City shall notify Ohio EPA within ten (10) days after each conveyance of an interest in any portion of the Covenant Area. The notice shall include the name, address and telephone number of the Transferee, and a copy of the original document that imposed restrictions on the Covenant Area.

12. Representations and Warranties. The City hereby represents and warrants to Ohio EPA:

- a. that the City is the sole owner of the Covenant Area;
- b. that the City holds fee simple title to the Covenant Area that is free, clear and unencumbered and, for example, is not subject to any utility, road or other easement, except as otherwise set forth in Exhibit "C" and existing utility service to City facilities;
- c. that the City has the power and authority to enter into this Environmental Covenant, to grant the rights and interests herein provided and to carry out all obligations hereunder; and
- d. that this Environmental Covenant will not materially violate or contravene or constitute a material default under any other agreement, document or instrument to which the City is a party or by which the City may be bound or affected.

13. Amendment or Termination and Eminent Domain. This Environmental Covenant may be amended or terminated only by consent of all of the following: the Owner or a Transferee, the Holder[s], and the Ohio EPA, pursuant to R.C. '5301.90 and other applicable law. Amendment means any changes to the Environmental Covenant, including the activity and use limitations set forth herein, or the elimination of one or more activity and use limitations when there is at least one limitation remaining. Termination means the elimination of all activity and use limitations set forth herein and all other obligations under this Environmental Covenant. Amendment or termination shall not affect Fairwood's obligations pursuant to the 401 Certification.

This Environmental Covenant may be amended or terminated only by a written instrument duly executed by the Director of Ohio EPA, the Holder[s], and the Owner[s] or Transferee[s] of the Covenant Area or portion thereof, as applicable. Within thirty (30) days of signature by all requisite parties on any amendment or termination of this Environmental Covenant, the Owner[s] or Transferee[s] shall file such instrument for

recording with the Cuyahoga County Recorder's Office, and shall provide a true copy of the recorded instrument to Ohio EPA.

The City and Ohio EPA acknowledge that the City is a public entity with powers of appropriation and the likelihood of appropriation of the property which comprises the Covenant Area by a third party is remote. However, if all or a portion of the Covenant Area is taken by eminent domain, Ohio EPA may require the City, its successors or assigns, to use the proceeds of the portion of the Covenant Area so taken to replace that portion of the Covenant Area so taken by an area approved by Ohio EPA to be of equal size and quality.

14. Severability. If any provision of this Environmental Covenant is found to be unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

15. Governing Law. This Environmental Covenant shall be governed by and interpreted in accordance with the laws of the State of Ohio.

16. Recordation. Within thirty (30) days after the date of the final required signature upon this Environmental Covenant, the City shall file this Environmental Covenant for recording, in the same manner as a deed to the property, with the Cuyahoga County Recorder's Office.

17. Effective Date. The effective date of this Environmental Covenant shall be the date upon which the fully executed Environmental Covenant has been recorded as a deed record for the Covenant Area with the Cuyahoga County Recorder.

18. Distribution of Environmental Covenant. The City shall distribute a file-and date-stamped copy of the recorded Environmental Covenant to Ohio EPA.

19. Notice. Any notice to be given pursuant to the provisions of this Covenant shall be in writing and either served personally or sent by certified mail, postage prepaid, return receipt requested, addressed as follows:

If to the City:

City of Richmond Heights
c/o Mayor
457 Richmond Road
Richmond Heights, OH 44143

If to Ohio EPA:

[title or position]
Division of [_____]
Ohio EPA
P.O. Box 1049
Columbus, Ohio 43216-1049

The undersigned Owner and Holder represents and certifies that it is authorized to execute this Environmental Covenant.

CITY OF RICHMOND HEIGHTS, OHIO
correctness:

Approved as to legal form and

By: _____
Daniel J. Ursu, its Mayor

R. Todd Hunt, Director of Law
City of Richmond Heights

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above named City of Richmond Heights, Ohio, by Daniel J. Ursu, its Mayor, who acknowledged that he did execute the foregoing instrument and that the same is his free act and deed individually and in the capacity indicated and as the free act and deed of said municipal corporation.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at _____, Ohio this _____ day of _____, 2007.

Notary Public

The undersigned executes this Covenant as of the _____ day of _____, 2007 to acknowledge that the covenants, terms, conditions and restrictions set forth herein serve to satisfy, in part, certain requirements imposed by the Department of the Army, Corps of Engineers in order to issue Nationwide Permit #39 to Fairwood Glen, LLC.

OHIO ENVIRONMENTAL PROTECTION AGENCY

By: _____
Chris Korleski, Director

STATE OF OHIO)
) SS:
COUNTY OF FRANKLIN)

BEFORE ME, a Notary Public in and for said County and State, personally appeared the above-named Ohio Environmental Protection Agency by Chris Korleski, its Director, who acknowledged that she did execute the foregoing instrument and that the same is her own free act and deed as such Acting Director and the free act and deed of such Agency of the State of Ohio.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at Franklin County, Ohio this _____ day of _____, 2007.

Notary Public