Interoffice - Memorandum

To: Trustees and Fiscal Officer

From: Judith C. Boyko, Township Administrator

Date: August 9, 2013

RE: **BUSINESS ITEM: MOTION TO APPROVE STATUTORY RESOLUTION NO. 13-2013 AUTHORIZING THE USE OF AND RIPARIAN RESTORATION ON THE WILDERMUTH PROPERTY AND APPROVING THE WILDERMUTH PROPERTY AND MAINTENANCE AGREEMENT BETWEEN THE WEST CHESTER TOWNSHIP BOARD OF TRUSTEES AND THE BOARD OF COUNTY COMMISSIONERS OF BUTLER COUNTY ACTING THROUGH THE BUTLER COUNTY WATER AND SEWER DEPARTMENT**

I have provided several reports, discussing or presenting the Butler County Water and Sewer Department's award of the OEPA 319 grant to make riparian improvements to the Mill Creek along property acquired by the Township (Wildermuth) adjacent to the creek. As the Board is aware, Butler County was awarded the grant and has been negotiating a property use and maintenance agreement with the Township to use and construct and maintain improvements on property owned and under jurisdiction of the Township.

The terms and conditions of the Agreement are consistent with and to similarly needed agreements and the Law Director authorized to form. It permits a five (5) year initial term with four (4) subsequent and automatic five (5) year terms unless interrupted by either party. The County may not terminate the Agreement prior to the improvements being constructed, and the County remains responsible for the maintenance of the improvements and must defend the Township should it terminate the Agreement and violate any grant requirements.

The Agreement does not limit the Township from improving the property as presented with its Clean Ohio grant application and award.

Thank you for your consideration.

STATUTORY RESOLUTION NO. 13 - 2013

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RESOLUTION AUTHORIZING THE USE OF AND RIPARIAN RESTORATION ON THE WILDERMUTH PROPERTY AND APPROVING THE WILDERMUTH PROPERTY AND MAINTENANCE AGREEMENT BETWEEN THE WEST CHESTER TOWNSHIP BOARD OF TRUSTEES AND THE BOARD OF COUNTY COMMISSIONERS OF BUTLER COUNTY ACTING THROUGH THE BUTLER COUNTY WATER AND SEWER DEPARTMENT

WHEREAS, the West Chester Township Board of Trustees, (hereinafter referred to as the Township) own what is commonly known as the Wildermuth property (hereinafter referred to as the Property); Property is identified on Exhibit A; and,

WHEREAS, the Board of County Commissioners of Butler County, acting through its Water and Sewer Department (hereinafter referred to as the County) desires to obtain access to and use of a portion of the Property (hereinafter referred to as the Project Area) for the construction of a stream restoration and stabilization project to improve water quality and stream habitat in the East Fork Mill Creek (the "Project"); Project and Project Area are identified on Exhibit B; and,

WHEREAS, the current use and maintenance of such Property is owned and under the jurisdiction of the Township, and subject to its power and authority, Township is willing to grant to the County the use of the Property, contained to the Project Area, for implementation of the Project and to grant the County continuing access to the Project Area for purposes of construction and maintenance of improvements to the Project Area in furtherance of the Project; and,

NOW THEREFORE, BE IT RESOLVED in consideration of the mutual covenants herein contained, and in the circumstances set forth above and other good and valuable consideration, the West Chester Township Board of Trustees hereby agree to:

SECTION 1. Approve the Use of and Riparian Restoration on the Wildermuth Property and Maintenance Agreement ("Agreement") between the West Chester Township Board of Trustees and the Butler County Board of Commissioners acting through the Butler County Water and Sewer Department.

SECTION 2. Authorize the use of and access to the Wildermuth property, owned and under the jurisdiction of West Chester Township, granting the County a license to construct and maintain the improvements within the Project Area, consistent with the terms and conditions outlined in the Agreement.

SECTION 3. Authorize the Township Administrator to make non-substantive changes to the Agreement with Law Director approval and to execute all necessary and required documents to effectuate execution and implementation of this resolution and the Agreement.

SECTION 4. Authorize the Township Administrator, if necessary, with Law Director approval to draft, authorize, and execute an access easement between the West Chester Township Board of Trustees and the Butler County Board of Commissioners and present to the Board of Trustees for subsequent approval for recording purposes.

PROPOSED

Adopted this 13th day of August, 2013.

Lee Wong, President	Yes / No
Catherine Stoker, Vice President	Yes / No
George Lang, Trustee	Yes / No

ATTEST:

Bruce Jones, Township Fiscal Officer

APPROVED AS TO FORM:

Donald L. Crain, Law Director

PROPOSED

USE OF AND RIPARIAN RESTORATION ON THE WILDERMUTH PROPERTY AND MAINTENANCE AGREEMENT

This agreement is made and entered into this _____ day of _____2013 by and between the Board of Trustees of West Chester Township, property owner, (hereinafter referred to as the Township) and the Board of County Commissioners of Butler County, acting through its Water and Sewer Department (hereinafter referred to as the County).

Whereas, the Township owns what is commonly known as the Wildermuth property (hereinafter referred to as the Property), said Property identified on Exhibit A; and

Whereas, the County desires to obtain access to and the use of a portion of the Property (hereinafter referred to as the Project Area) for the construction of a stream restoration and stabilization project to improve water quality and stream habitat in the East Fork Mill Creek (the "Project"). Said Project and Project Area identified on Exhibit B; and

Whereas, the current use and maintenance of such Property is under the jurisdiction of the Township, and subject to its power and authority, Township is willing to grant to the County the use of the Project Area for implementation of the Project and to grant the County continuing access to the Project Area for purposes of maintaining the Project Area in furtherance of the Project; and

Whereas, under an informal arrangement with the County, the Township currently accesses the Property through an access road located on adjacent property owned by the County (Butler County Auditor's Parcel Nos. M5610026000035 and M5810031000006) (the "County Property").

Now therefore, in consideration of the mutual covenants herein contained, and in the circumstances set forth above and other good and valuable consideration the Township and the County agree as follows:

Section 1. **<u>License to Use the Property.</u>** Subject to the terms and conditions contained herein, Township grants the County a license to construct the improvements within and to maintain the Project Area as depicted on Exhibit B. The construction and maintenance of improvements and the maintenance of the Project Area shall be in conformance with all requirements of the State of Ohio, Clean Ohio Grant as specified in the Declaration of Conservation Easement recorded in Bk 8129 Pg 1616 of the Butler County recorder and the Declaration of Restrictions recorded in Bk 1829 Pg 1622 of the Butler County Recorder. This license also includes the right of reasonable ingress and egress across the Property as is necessary to gain access to the Project Area and for maintenance purposes as described in this Agreement.

Section 2. **<u>Construction of Improvements.</u>** The County shall cause the design and construction of the proposed stream restoration and stabilization project on the Property at its expense. Said improvements shall be constructed on the Property consistent with the plan identified on Exhibit B. The County agrees to design and construct the improvements as presented in Exhibit B consistent and compliant with all laws, rules, and regulations governing such publicly constructed projects. Prior to commencement of construction, the County shall obtain the Ohio Public Works Commission's written consent to the County's

plans for the construction and maintenance of the Project, and shall present such a copy of such written consent to the Township.

Section 3. <u>Payment of Improvements.</u> All costs associated with the construction and implementation of the Project and with the maintenance or vegetation control as described in this Agreement shall be the sole responsibility of the County. The Township shall not be obligated to pay for any project expenses.

Section 4. <u>Maintenance of Improvements.</u> In furtherance of the Project, the County will provide maintenance for the Project Area during the term of this agreement. Maintenance shall consist of bush-hogging the Project Area not less than twice per calendar year as County determines is necessary in connection with the Project. County shall also have the right to take measures, other than the spraying of herbicides or pesticides, which County determines to be necessary or desirable to control invasive vegetation species in the Project Area.

The County may delegate maintenance responsibilities conferred by this agreement with the prior written approval of the Township, provided that such delegation shall not release the County from its responsibility to comply with all provisions of this Agreement.

Section 5. <u>No Limitation of Rights.</u> This Agreement is not intended to affect or limit the rights of the Township with respect to the Property. The Township reserves the right to use or make improvements to the Property during the term of this Agreement, including but not limited to the right to construct a bike path within the Project Area and the right to engineer and construct improvements to mitigate flooding to adjoining or nearby commercial properties and adjacent roadways. Notwithstanding the foregoing, if the Township's use of the Property would materially interfere with the continued viability of the Project or materially diminish the effectiveness of the Project, Township agrees to notify the County of such interference or diminishment and to cooperate with the County to mitigate the risk of such interference or diminishment.

Section 6. **<u>Compliance with Laws.</u>** The County, its officers, agents, employees, contractors and service providers shall comply with all present and future laws, ordinances, resolutions, rules and regulations of the Federal, State, County, Township and other local governmental bodies, and the rules and regulations promulgated thereunder (including without limitation environmental laws and regulations), applicable to or affecting directly or indirectly the County or its activities on or in connection with the improvements, including but not limited to its performance of the maintenance obligations. This Agreement is expressly made subject to all such laws, ordinances, resolutions, rules, and regulations and each and any subcontract shall contain a provision to this effect.

Section 7. <u>Assumption of Responsibility.</u> The County hereby assumes responsibility for and will defend the Township and its officials, officers, directors and employees against, all claims, arising from the County's failure to comply with any term of this Agreement or from County's negligence in the construction or maintenance of the Project or use of the Project Area. Because the Township has reserved the right to continue to use the Property (including the Project Area), the County shall not be responsible for any claims arising from the Township's use of the Property, and the Township shall defend the County, its officials, officers, and employees against any such claim. Township agrees to notify County in a timely manner of any claim asserted against the Township, its officers, directors or

employees for which the County has assumed responsibility as described above. In the event that the County fails to take adequate action to defend the Township against any such claim, the County shall be responsible for all reasonable and necessary costs and litigation expenses (including reasonable attorney fees) which the Township incurs in connection with the necessary defense of any such claim.

These covenants and any other covenants provided for in this Section 7 are intended to and shall be enforceable by each and every Township official, director, officer, and employee to the full extent permitted by law and shall survive the termination of this Agreement, but only with respect to matters occurring during, or arising from matters occurring during, the period prior to and through such termination.

Section 8. Term of Agreement. The initial term of this Agreement shall be five (5) years, beginning from the date of execution by both the Township and the County, and the term shall be automatically renewed for four (4) successive increments of five (5) years each, for a maximum term of twenty-five (25) years. Notwithstanding the foregoing:

a. Township shall not terminate this Agreement during the initial five year term unless County either fails to complete the Project within a reasonable time, or materially fails to comply with any term of this Agreement after receiving not less than thirty (30) days advance notice of noncompliance;

b. Otherwise, either party shall have the right to terminate this Agreement at any time upon ninety days' written notice to the other party; provided, however, that the County may not exercise such termination right until after its completion of the initial construction of the improvements in accordance with Section 2 of this Agreement.

Upon termination of the Agreement, the Township shall have no obligation to maintain the improvements following termination, and the County shall be solely responsible for and defend the Township against any claims by any entity based upon any grant agreements received by County for the construction and/or maintenance of the improvements. The foregoing obligation of the County shall survive the termination of this Agreement.

Section 9. **Severability.** In case any section or provision of this Agreement, or any covenant, agreement, stipulation, obligation, act or action, or part thereof, made, assumed, entered into or taken under this Agreement, or any application thereof, is held to be illegal or invalid for any reason, or is inoperable at any time, that illegality, invalidity or inoperability shall not affect the remainder thereof or any other section or provision of this Agreement or any other covenant, agreement, stipulation, obligation, act or action, or part thereof, made, assumed entered into or taken under this Agreement, all of which shall be construed and enforced at the time as if the illegal, invalid or inoperable portion were not contained herein.

Section 10. <u>Notices.</u> All notices required or permitted to be given under this Agreement shall be deemed given if delivered in person, mailed by certified mail, postage prepaid, or sent via nationally recognized overnight courier and addressed as follows:

If to County: Director, Butler County Water & Sewer Dept.
130 High St., 6th Floor
Hamilton, Ohio 45011

With copy to:
Butler County Administrator
315 High St., 6th Floor
Hamilton, Ohio 45011

If to Township: West Chester Township
9113 Cincinnati-Dayton Road
West Chester, Ohio 45069
Attn: Judith C. Boyko, Township Administrator

Section 11. Access through County Property. During the term of this Agreement, the County agrees not to prevent or interfere with the Township's access to the Property through the current access road located on the County Property. The Township may with notice to the County permit such access road to be used by a contractor performing work on the Property under a contract with the Township but Township shall not otherwise be permitted to assign or convey such right to any other person or entity. The right of access described herein shall not be binding on any person or entity which becomes the owner of the County's property and shall not, except as expressly described herein, inure to the benefit of any of the Township's successors or assigns.

IN WITNESS WHEREOF, the parties by their duly authorized representatives have caused this agreement to be executed as of the date first written above.

BOARD OF COUNTY COMMISSIONERS
OF BUTLER COUNTY, OHIO

By_____
Cindy Carpenter, President

By_____
T.C. Rogers, Vice-President

By_____
Donald Dixon, Commissioner

Approved As To Form Only:

_____
Assistant Prosecuting Attorney Date

BOARD OF TOWNSHIP TRUSTEES OF
WEST CHESTER TOWNSHIP

By_____
Judith C. Boyko
Township Administrator

Approved As To Form Only:

_____
Township Law Director Date

EXHIBIT A
(29.053 acres, Butler County, OH)

Situated in Section 32, Town 3, Range 2, West Chester Township, Butler County, Ohio and being all of a 29.053 acre parcel as conveyed to Neyer Land Holdings I, LLC, as recorded in Official Record 7925, Page 1439, of the Butler County Recorder's Office containing 29.053 acres of land being further described as follows:

Begin at the northeast corner of said section 32; thence, with said section line, South 03° 34' 05" West, 1564.66 feet to an existing 5/8" iron pin on the southeast corner of Walter W. Windisch, Jr. as recorded in Official Record 1761, Page 590 said pin being the true point of beginning;

thence from the true point of beginning thus found, departing said Windisch continuing with said section line, South 03° 25' 50" West, 1789.42 feet to a set 5/8" iron pin on the Northeast corner of Board of Butler County Commissioners, as recorded in Official Record 1295, Page 367;

thence departing said section line, with said Board of Butler County Commissioners, North 82° 09' 34" West, 909.50 feet to a set 5/8" iron pin;

thence departing said Board of Butler County Commissioners, with a new division line, North 16° 03' 22" East, 141.73 feet to an existing 5/8" iron pin on the southeast corner of Windisch Development Company, LLC as recorded in Official Record 6945, Page 1168;

thence departing said new division line, continuing with said Windisch, North 16° 03' 22" East, 1331.83 feet to an existing 5/8" iron pin on the southeast corner of Kanter Investments #3, LTD, as recorded in Official Record 6238, Page 828;

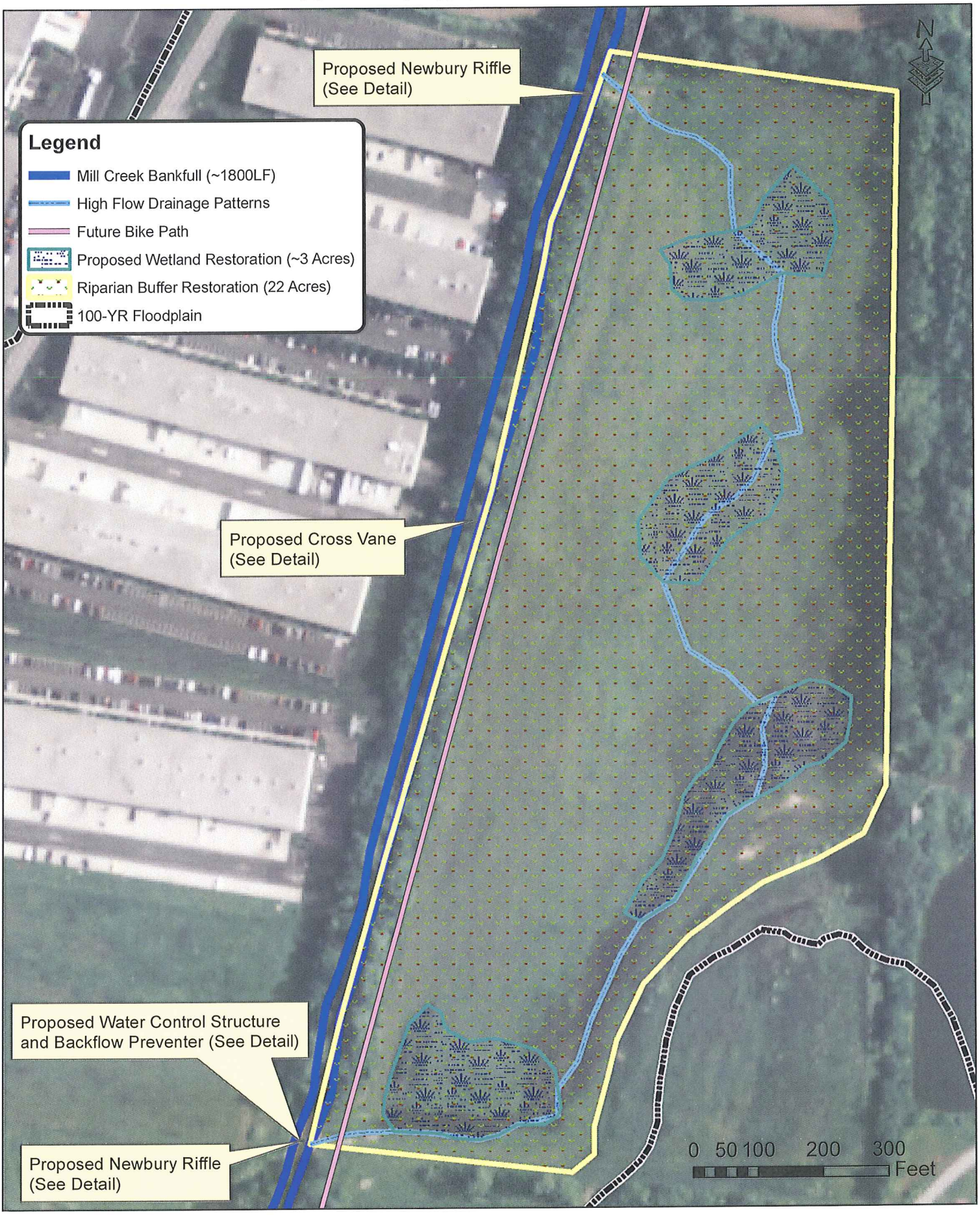
thence with said Kanter, North 19° 03' 35" East, 324.95 feet to an existing 5/8" iron pin on the southerly line of said Walter Windisch, Jr.;

thence departing said Kanter, with said Windisch, South 82° 57' 32" East, 498.17 feet to the true point of beginning containing 29.053 acres of land, subject to all easements and rights-of-way of record.

The above description was prepared from a survey prepared by Bayer Becker, Jeffrey O. Lambert, Registered Surveyor #7568 in the State of Ohio, July 12, 2007.

The Plat of which is recorded in Volume 51, Page 64, of the Butler County Engineer's Records.

Together with all easements of record benefiting the Property, including without limitation, the ingress, egress, utility, and drainage easements granted for the benefit of the Property in the Declaration and Easement Agreement, dated October 31, 2002 and recorded November 15, 2002 in Official Record Book 6945, Page 1176 of the Butler County, Ohio records.

EXHIBIT B

Upper Mill Creek Riparian Restoration - Wildermuth Site Plan