

RECREATION, LIBRARIES, & AUTHORITIES COMMITTEE

13-0270R

RESOLUTION AUTHORIZING THE EXECUTION OF A TEMPORARY ACCESS AGREEMENT WITH THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES FOR ACCESS TO RADIO TOWER BAY ON THE ST. LOUIS RIVER IN THE GARY-NEW DULUTH AREA.

CITY PROPOSAL:

RESOLVED, that the proper city officers are hereby authorized to execute a temporary access agreement substantially in the form as filed with the city clerk as Public Document No. \_\_\_\_\_ with the Minnesota Department of Natural Resources (MnDNR) granting the DNR access across city property to Radio Tower Bay for removal of to remove wood waste from the bay and enhance fish and wildlife habitats in support of the St. Louis River Remedial Action Plan, at no cost to the city.

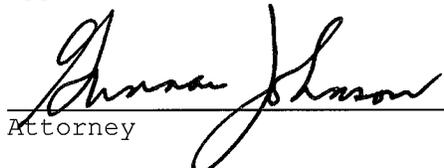
Approved:

  
Department Director

Approved for presentation to council:

  
Chief Administrative Officer

Approved as to form:

  
Attorney

Approved:

  
Auditor

P&R/PA KB:SW:le 05/15/2013

STATEMENT OF PURPOSE: This resolution authorizes a temporary access agreement between the city and the Minnesota Department of Natural Resources (MnDNR). This will allow access for MnDNR and their contractor across city property to Radio

Tower Bay. MnDNR, Duluth Area Fisheries, with assistance from the Minnesota Land Trust is completing a habitat restoration project in Radio Tower Bay on the St. Louis River. The objective of the restoration is to remove wood waste and enhance fish and wildlife habitats in support of the St. Louis River Remedial Action Plan. A restoration plan was developed to achieve the overall project goal of restoring ecological function to Radio Tower Bay. The basis for the plan was to remove wood waste from the bay, where environmentally and economically feasible to return to native substrates. In a limited area, broader St. Louis River Area of Concern goals of increased overwintering habitat for fish and other aquatic organisms were addressed by proposing to excavate below the limits of wood waste and into the native mineral soil to create deeper water habitat in the main St. Louis River channel. Additionally, establishment of wild rice beds and improved recreational opportunities in this shallow, sheltered bay were considered as project objectives. There is no cost to the city.

## Minnesota Department of Natural Resources

### TEMPORARY ACCESS AGREEMENT

THIS RIGHT OF TEMPORARY ACCESS (“Agreement”) is granted by the City of Duluth (“City”) to the Minnesota Department of Natural Resources (“DNR”).

WHEREAS, the City is the owner of the property that the DNR would like to use to stage and access certain portions of Radio Tower Bay for wetland restoration purposes (the “Project”). A map of the subject property is attached to this Agreement as Exhibit A and a description of the Project is attached to this Agreement as Exhibit B; and

WHEREAS, City and DNR want to set forth the terms and conditions under which DNR can use the Property for its Project.

NOW THEREFORE, the City does hereby grant the DNR a temporary and non-exclusive limited right of access to enter in and upon the right of access to the Property under the following terms and conditions.

1. Temporary Right of Access: For the term of this Agreement effective as of the last date of the execution of this Agreement (the “Effective Date”), the DNR and its agents and construction contractor(s) shall have the right to access to the Property for ingress and egress for its equipment including backhoes, dump trucks, dozers, and other heavy equipment as well as temporary equipment used for the Project. Except as provided for in the previous sentence, the permission granted herein shall not be transferrable or assignable to any third party.

All equipment shall arrive on and leave the Property in a clean condition free of mud, dirt and debris to reduce the likelihood of spreading invasive species. No fueling or oiling of equipment shall occur on the Property without a Spill Prevention Control and Containment Plan approved by the City’s Facility Manager or designee.

DNR shall be responsible for the costs of all labor, service, equipment and materials used in the Project and shall not permit any lien or encumbrance upon the Property resulting from its activities on the Property. In the event there shall be any lien or encumbrance filed against the Property, DNR shall pay to the City the amount of the lien immediately upon demand therefor.

DNR may construct one or more temporary access roads within the Property for ingress and egress to the Radio Tower Bay site. Such roads shall be constructed in a manner which minimizes long term damage to the Property. DNR shall maintain all temporary roads (grading and snow removal) within the Property at DNR's expense. All temporary roads shall be deemed to be part of the Property.

DNR shall not remove or modify any brush or woody vegetation on the Property except as may be required for establishing the temporary road or roads above as may be approved by the City's Property & Facilities Manager.

City shall have no liability to DNR for bodily injury, personal injury, death, illness, disease, or property damage, of any character, sustained by either of them; and their respective activities on the Property shall be conducted at their sole risk, loss, cost and expense, and in compliance with all applicable federal, state, county and municipal laws, rules, ordinance and regulations. This Temporary Right of Access is granted and accepted on an "as is" basis with respect to the Property and its condition.

2. Term and Termination. The Term of this Agreement shall be for a period of Eighteen (18) months from the last date of signature below. This Agreement may be terminated by either party for any reason or no reason upon the giving of fifteen (15) business days prior notice to the other party as hereinafter provided for.

3. Surrender of Possession, Restoration. Upon the expiration or other termination of this Agreement, DNR's rights to use the property shall cease and DNR shall promptly surrender the same to the City. DNR agrees that upon termination of this Agreement, it will have restored or repaired, to the reasonable satisfaction of the City's Facility Manager, all modifications of, or damage to, or destruction of the property which were altered, damaged or destroyed by DNR under the authority of this Agreement or a result of DNR's exercise of its rights under this Agreement, or in the alternative, to pay the City for the cost of returning them to said condition unless waived by the City's Facility Manager in writing..

4. Security

DNR shall be solely responsible for the security of all equipment, employees and the general public while DNR is located on the Property.

5. Indemnification and Insurance. DNR agrees to defend, indemnify, and hold harmless the City and its officers, agents, servants, employees and contractors from any and all liability, cost

and expense of any kind whatsoever, arising in any way out of DNR's occupation of, use of, or operations on the Property, and upon ten (10) days written notice from City, DNR will appear and defend any and all such parties.

DNR shall procure and maintain continuously in force Public Liability Insurance and Automobile Liability Insurance written on an "occurrence" basis under a Comprehensive General Liability Form in limits of not less than Two Million Dollars (\$2,000,000) aggregate per occurrence for personal bodily injury and death, and twice the limits provided when a claim arises out of the release or threatened release of a hazardous substance. If person limits are specified, they shall be for not less than Two Million Dollars (\$2,000,000) per person and be for the same coverages. The City shall be named as an additional insured therein.

6. Designees

In the Case of City:                      City of Duluth  
Property & Facilities Manager  
411 West 1<sup>st</sup> St.  
Duluth, Minnesota 55802  
218.730. \_\_\_\_\_

In the Case of DNR:                      Adam W. Fulton, AICP  
Project Manager  
5351 North Shore Drive  
Duluth, MN 55804  
[adam.w.fulton@state.mn.us](mailto:adam.w.fulton@state.mn.us)  
218.525.0583 ext. 226 (office)

7. Applicable Law. All questions concerning the interpretation or application of provisions of this early access shall be decided according to the laws of the State of Minnesota. The appropriate venue and jurisdiction for any litigation hereunder shall be those courts located in St. Louis County, Minnesota. Any incurred legal costs or fees in any way arising out of the Project or this Right of Access shall be borne by DNR.

8. Amendments; Counterparts. This Agreement may be amended only by a written instrument signed by both parties. This Agreement may be executed in counterparts, each of which shall be deemed to be original and all of which together shall constitute the binding and enforceable agreement of the parties hereto. This Agreement may be executed and delivered by

a party by facsimile or PDF transmission, which transmission copy shall be considered an original and shall be binding and enforceable against such party.

9. Entire Agreement. This Agreement, including any Exhibits, constitutes the entire agreement between parties and supersedes all prior written and oral agreements and negotiations between the parties relating to the subject matter.

This Temporary Right of Access granted is effective the last day and date of the signatures set forth below.

**CITY OF DULUTH**

**MINNESOTA DEPARTMENT OF  
NATURAL RESOURCES**

By: \_\_\_\_\_  
Its Mayor

By \_\_\_\_\_

Attest:

Its \_\_\_\_\_  
Title of Representative

By: \_\_\_\_\_  
City Clerk  
Date:

Date:

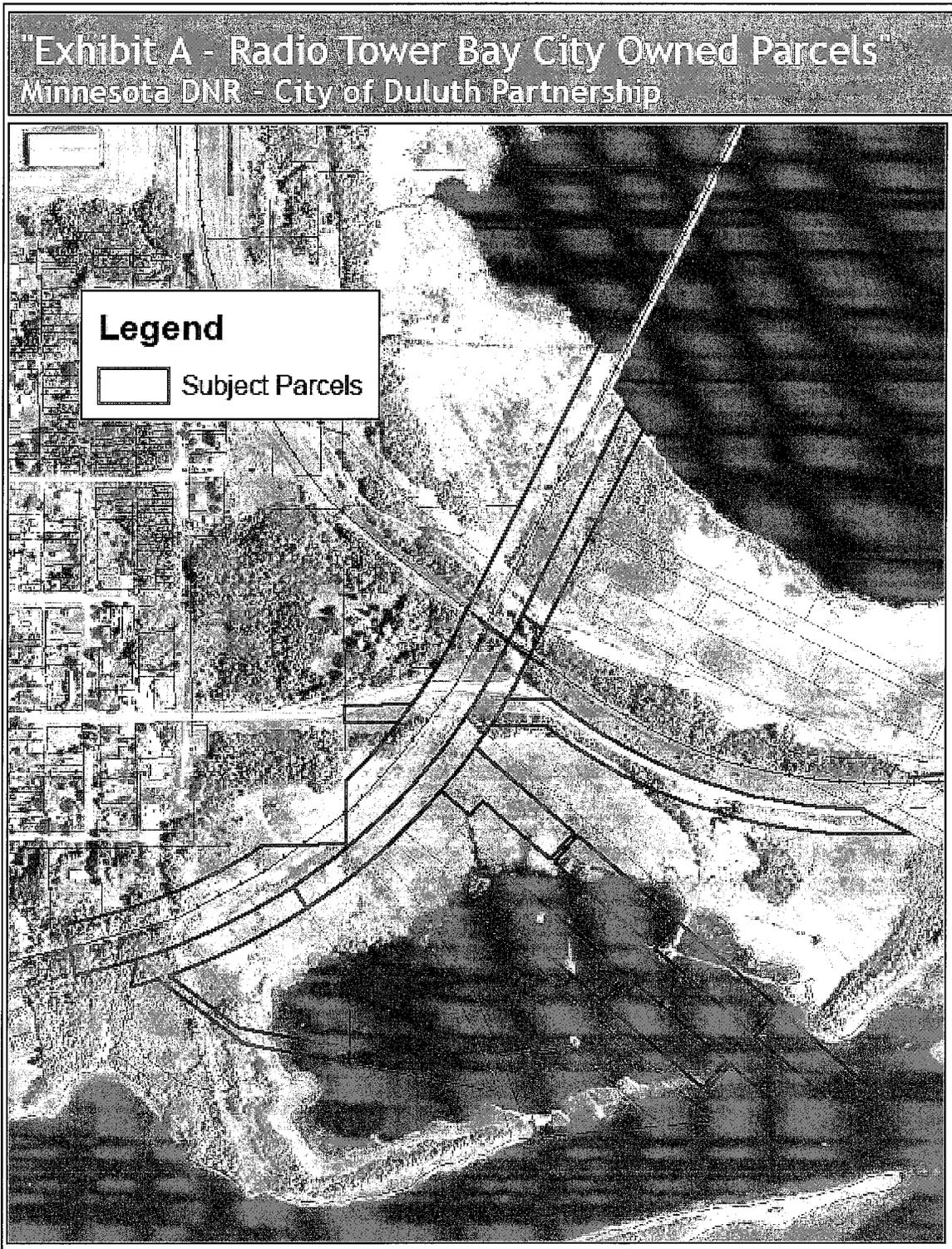
Countersigned:

\_\_\_\_\_  
City Auditor

Approved as to form:

\_\_\_\_\_  
City Attorney

**EXHIBIT A**



## **EXHIBIT B**

Radio Tower Bay is a 75-acre area within the St. Louis River Area of Concern on the St. Louis River near the neighborhood of Gary/New Duluth, in the City of Duluth, Minnesota. It was the site of two sawmills from 1891 to 1899. Wood waste ranging from saw dust and chips to large slabs from the milling operations were cast out into the bay reducing total depth, decreasing bathymetric variation, and covering the native substrates. Today, wood waste is present within 84% of the bay and has water depths ranging from several inches to a maximum depth of 3.4 feet.

The Minnesota DNR, Duluth Area Fisheries, with assistance from the Minnesota Land Trust is completing a habitat restoration project in Radio Tower Bay on the St. Louis River. The objective of the restoration is to remove wood waste and enhance fish and wildlife habitats in support of the St. Louis River Remedial Action Plan. A restoration plan was developed to achieve the overall project goal of restoring ecological function to Radio Tower Bay. The basis for the plan was to remove wood waste from the bay, where environmentally and economically feasible to return to native substrates. In a limited area, broader St. Louis River Area of Concern goals of increased overwintering habitat for fish and other aquatic organisms were addressed by proposing to excavate below the limits of wood waste and into the native mineral soil to create deeper water habitat of the main St. Louis River channel. Additionally, establishment of wild rice beds and improved recreational opportunities in this shallow, sheltered bay were considered as project objectives.