

Lessard-Sams Outdoor Heritage Council

MEMO: Agenda Item #7
DATE: August 3, 2018
SUBJECT: ML 2014, subd 5(c) Habitat Protection in Dakota County, Phase 5 - \$1,190,000
Mark Johnson, Executive Director

Background

Dakota County is seeking Council's approval to release an OHF Notice of Funding Restriction (NOFR) on a 7.4 acre conservation easement parcel in Lakeville, MN that was intended to be purchased with ML2014 appropriation funding. A subsequent survey of the adjoining property showed an easement boundary issue due to an inaccurate GIS based MN DNR public waters data layer. Because of this, the County believes the most beneficial course of action for all parties involved is to remove the conservation easement and OHF NOFR and instead utilize fee title ownership of the easement area. The County has not requested reimbursement of OHF funds for the conservation easement acquisition. Therefore, with no OHF funds expended, the County is seeking Council approval to remove the OHF NOFR.

Main Summary Points from Dakota County

Basis for Dakota County's request to vacate an easement and rescind a recorded NOFR:

1. The Mikell Smith natural area conservation easement boundary was positioned and configured based on a GIS-identified, Vermillion River channel location, using a MN DNR public waters data layer. Essentially, a 150-foot wide buffer area is calculated on both sides of the river, using the river centerline, or if possible, the actual edge of the riverbank.
2. The Smith easement was purchased, initially with Dakota County funding, and recorded, as was a Notice of Funding Restriction (NOFR). To date, the County has not requested reimbursement of acquisition expenses from the OHF.
3. A physical survey by a private surveying company for anticipated development of adjacent land revealed that there are two river channels on this portion of the Smith property; and the Vermillion River flows in one, the other, or both. This discovery was brought to the County's attention.
4. Dakota County researched the impacts of this dual-channel discovery. The County determined that if the easement area was shifted to meet the County 150-foot wide buffer requirement, less developable land would be included in the reconfigured easement area, thus reducing the value of the easement. See items 5 and 6 for more detail.
5. No value is assigned, or was paid to the landowner, for easement area within designated wetlands, the floodplain, or the 100-foot wide buffer area required by the watershed organization. This resulted in payment only for a 1.3-acre developable area (\$21,000/acre X 1.3 acres = \$27,300).

6. If the easement area was shifted to address the dual-channel of the river, it would reduce the developable area from 1.3 acres to 0.5 acres, resulting in a reduced cost ($\$21,000/\text{acre} \times 0.5 \text{ acres} = \$10,500$).
7. The County wants to take the opportunity to reposition the protected area, to save money and to protect the appropriate buffer area to meet its 150-foot wide program buffer requirement. In essence, the County believes it overpaid for a less appropriate easement area.
8. Pre-negotiations with the landowner to address this issue resulted in the following offer components from Mr. Smith:
 - a. Mr. Smith will return the \$27,300 paid to him for the conservation easement.
 - b. Mr. Smith will agree to a repositioned buffer area along the river on his property.
 - c. Mr. Smith will donate fee title to the reconfigured buffer area at no cost to the County.
9. To accept Mr. Smith's offer, the County would like to vacate the recorded easement and rescind the recorded NOFR. The County needs LSOHC approval to do these things.

Reasons to vacate the existing easement area and rescind the recorded NOFR:

10. The County's research of the impacts of this discovery present an opportunity to not only correct the position of the protected area to meet the most beneficial buffer width requirements possible for this area, but to achieve permanent land protection at no initial cost to the public.
11. The fact that no grant dollar reimbursement has occurred for this easement acquisition to date, alleviates the need to calculate refund amounts and transfer funding back to the OHF.
12. The main issue involved in approving this request is how the documents must be rescinded to properly follow State and County legal requirements to take these actions.
13. The original placement of the easement was an unfortunate product of the MN DNR data layer the County has used to calculate and position easement areas since its Land Conservation programs began. This is something that can and will be corrected in the future.

Results of Dakota County's request to vacate an easement and rescind a recorded NOFR:

14. The appropriate and required area along the Vermillion River will be permanently protected under County fee title ownership, at no initial cost to the public.
15. Ongoing maintenance and management of the protected area would be at Dakota County's expense.
16. Costs associated with restoration activities for the protected area would be paid for with OHF and County grant-match restoration funds.
17. If approved, vacation of the easement and the resulting donation of fee title by the landowner will be achieved through written agreement between the County and the landowner, approved as to form by the County Attorney's Office.

A detailed memo from Dakota County is attached with maps and a historic summary of events.

Considerations:

MS 97a.056, subd 15 (excerpt printed below) addresses OHF land acquisition restrictions and refers to “an interest in real property, ...that is acquired with money appropriated from the outdoor heritage fund...”

In this case, no money has been sought by the county for reimbursement of expenses toward the purchase, activity of purchase, or purchase related expenses. However, within section 1.7 (State Funding) of the filed easement it identifies, “Funding for this Easement has been provided by the Outdoor heritage Fund.....M.L. 2014, Chap. 256, Article 1, Subd. 5©, under grant number 3-61298, for purposes of acquiring permanent conservation easements and enhance habits...”

LSOHC Staff asked DNR Lands and Minerals staff for their opinion of the request to remove the NOFR. DNR staff indicated that this did not appear to be a simple issue and as such the opinion of professional real estate legal council should be enlisted.

Additional questions to consider:

- Is the state’s “interest” activated due to the purchase activity being within the intent of the appropriation and the fiscal contract? Or,
- Is the state’s “interest” only dependent upon whether OHF monies were expended?
- If a filed NOFR is deemed to have no state “interest,” what is necessary for the state to provide to allow relinquishment of the NOFR?

Staff Recommendation: LSOHC staff recommends that the Council direct LSOHC staff work with legislative legal staff to seek an opinion from a real estate attorney as to:

1. Does the state have an “interest” in the property?
2. If the state is deemed to NOT have an “interest,” what is the appropriate release to be used by Council for notification to the County Recorder.
3. Direct staff to obtain a proper and recordable “Release of Notice of Funding Restriction” document removing OHF interest in the subject property.

Attachments: 1) Dakota County Memo

[Subd. 15.Land acquisition restrictions.](#)

(a) An interest in real property, including, but not limited to, an easement or fee title, that is **acquired with money appropriated from the outdoor heritage fund** must be used in perpetuity or for the specific term of an easement interest for the purpose for which the appropriation was made. The ownership of the interest in real property transfers to the state if: (1) the holder of the interest in real property fails to comply with the terms and conditions of the grant agreement or accomplishment plan; or (2) restrictions are placed on the land that preclude its use for the intended purpose as specified in the appropriation.

(b) A recipient of funding that acquires an interest in real property subject to this subdivision may not alter the intended use of the interest in real property or convey any interest in the real property acquired with the appropriation without the prior review and approval of the Lessard-Sams Outdoor Heritage Council or its successor. The council shall notify the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the outdoor heritage fund at least 15 business days before approval under this paragraph. The council shall establish procedures to review requests from recipients to alter the use of or convey an interest in real property. These procedures shall allow for the replacement of the interest in real property with another interest in real property meeting the following criteria:

(1) the interest must be at least equal in fair market value, as certified by the commissioner of natural resources, to the interest being replaced; and

(2) the interest must be in a reasonably equivalent location and have a reasonably equivalent useful conservation purpose compared to the interest being replaced, taking into consideration all effects from fragmentation of the whole habitat.

(c) A recipient of funding who acquires an interest in real property under paragraph (a) must separately record a notice of funding restrictions in the appropriate local government office where the conveyance of the interest in real property is filed. The notice of funding agreement must contain:

(1) a legal description of the interest in real property covered by the funding agreement;

(2) a reference to the underlying funding agreement;

(3) a reference to this section; and

(4) the following statement: "This interest in real property shall be administered in accordance with the terms, conditions, and purposes of the grant agreement controlling the acquisition of the property. The interest in real property, or any portion of the interest in real property, shall not be sold, transferred, pledged, or otherwise disposed of or further encumbered without obtaining the prior written approval of the Lessard-Sams Outdoor Heritage Council or its successor. The ownership of the interest in real property transfers to the state if: (1) the holder of the interest in real property fails to comply with the terms and conditions of the grant agreement or accomplishment plan; or (2) restrictions are placed on the land that preclude its use for the intended purpose as specified in the appropriation."

Dakota County

TO: Lessard-Sams Outdoor Heritage Council

FROM: Al Singer, Dakota County

RE: Proposed Extinguishment of a Permanent Natural Area Conservation Easement on the Mikell D. Smith Irrevocable Trust Property in Lakeville

DATE: July 17, 2018

Background

On November 2, 2010, the Dakota County Board of Commissioners (County Board) approved the Vermillion River Corridor Plan, which includes a shared vision and strategies that integrate the protection and improvement of water quality and wildlife habitat, with increased opportunities for outdoor recreation throughout the Vermillion River watershed.

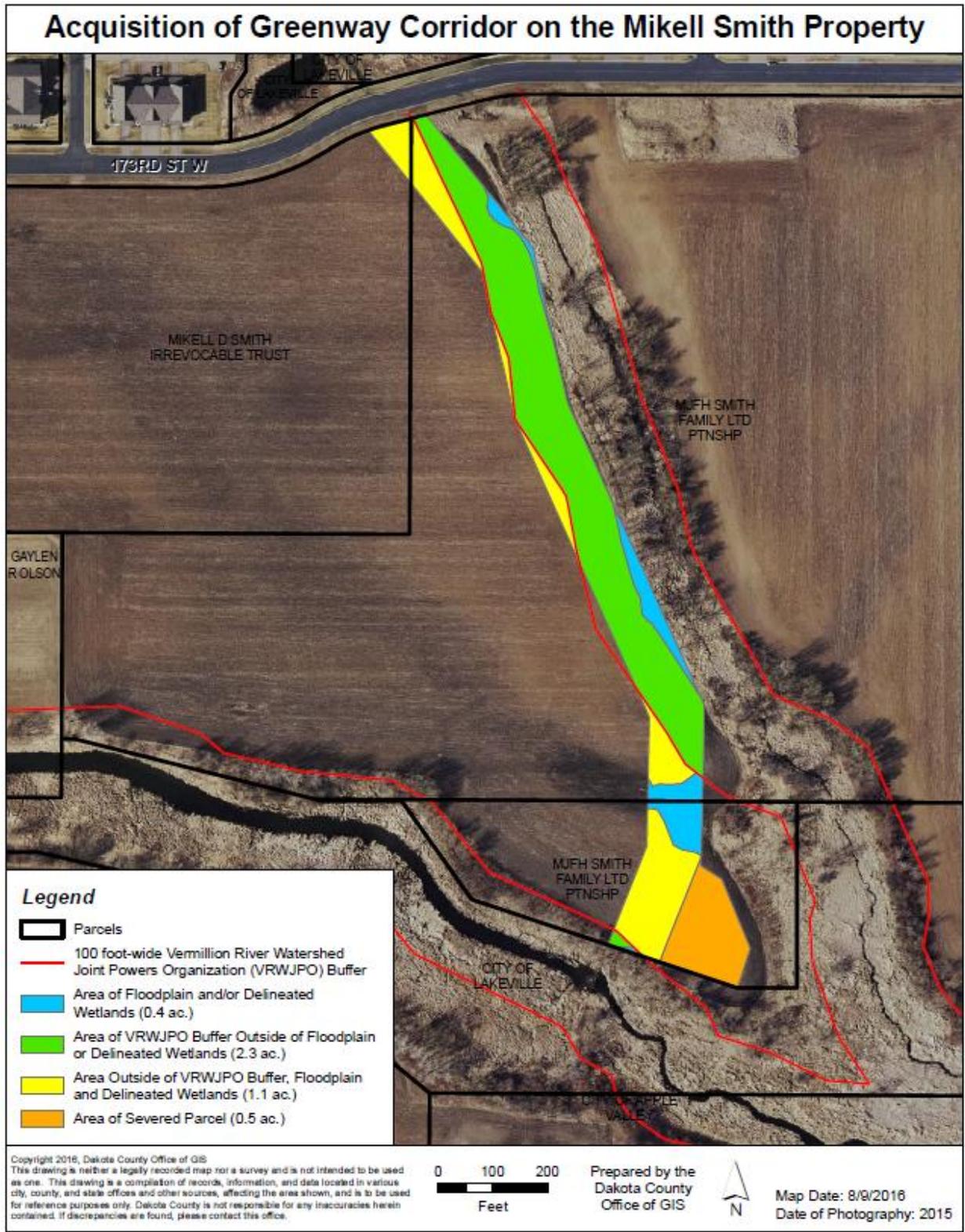
On October 18, 2011 (Resolution No. 11-517), the County Board adopted the North Creek Regional Greenway (Regional Greenway) Master Plan. North Creek is a tributary of the Vermillion River that connects Eagan, Apple Valley, Lakeville, Farmington and Empire Township. The 14-mile long Regional Greenway will connect important regional destinations, including Lebanon Hills Regional Park, the Minnesota Zoo, downtown Farmington, the Vermillion River, and Whitetail Woods Regional Park.

The Mikell D. Smith Irrevocable Trust (Smith Trust) and the MJFH Smith Family Limited Partnership owned approximately 103 acres of land (Smith Property) in the City of Lakeville. The Smith Property is bisected by a 1,500-foot long section of North Creek of the Vermillion River and a main tributary to North Creek. On July 8, 2014 (Resolution No.14-330), the County Board authorized an appraisal and negotiations with the Smith Trust for acquisition of a greenway corridor and an adjacent natural area conservation easement (Easement).

The appraisals for the separate Regional Greenway corridor and Easement area were based on different fair market values associated with different land use zoning:

- Designated wetland and floodplain: Not eligible for residential development, park dedication or density credits (essentially no fair market value)
- Vermillion River Watershed Joint Powers Organization (VRWJPO) 100-foot wide designated buffer from the channel outside of the delineated wetland/designated floodplain: Not eligible for development, but eligible for park dedication and density credits (market value based on credits could be negotiated with the city)
- Land outside the VRWJPO buffer: Eligible for development (highest market value)

The different appraised valuation components of the Regional Greenway corridor are depicted and calculated below:



The adjacent Easement area to the east of the Regional Greenway corridor is depicted below:

Note: The two stream “channels” in the north portion of the Easement area.

Acquisition of the Conservation Easement on the MJFH Smith Family Limited Partnership Property

PLS Section 12, 114-20
Total Easement Acres 7.4



N ○ Section Corner ● Quarter Corner □ Easement Area ▨ Exception Area □ Access Easement □ Parcels — Roads

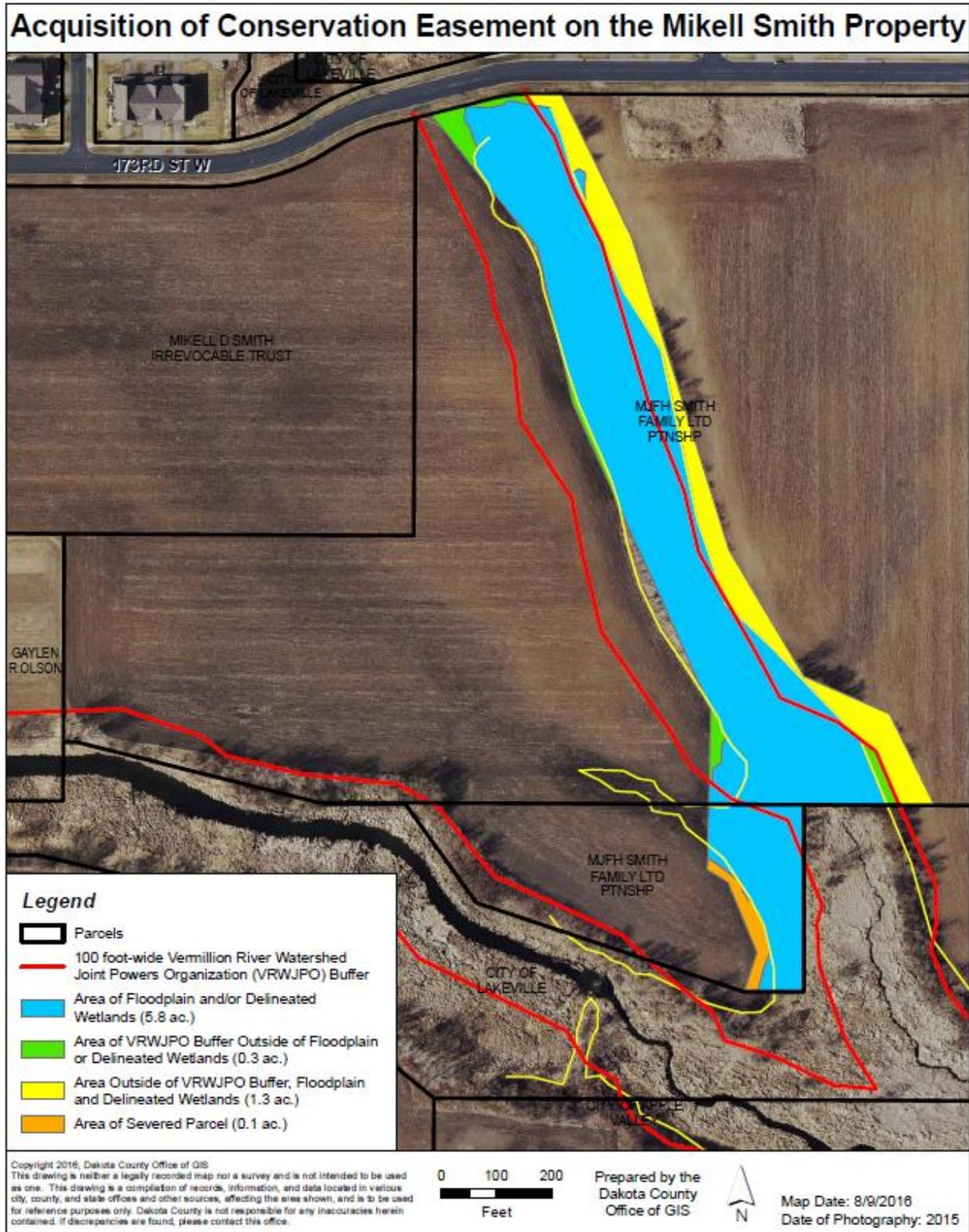


Map Date: 6/5/2017

1 inch = 250 feet

The different appraised valuation components of the Easement area are depicted and calculated below:

Note: The stream channel used as reference for establishing the 100-foot wide buffer was the “west “channel that was designated within the Vermillion River Watershed Plan and included in the County’s GIS data base.



On March 21, 2017 (Resolution No. 17-169), the County Board authorized the Physical Development Division Director to execute purchase agreements with the Smith Trust to acquire a 4.5-acre Regional Greenway corridor and an adjacent 7.4-acre Easement; authorized the County Board Chair to sign a Restrictive Covenant for the Regional Greenway corridor, the Easement deed and a Restrictive Covenant for the Easement area as required for state Outdoor Heritage (OH) funding; and authorized the expenditure of up to \$21,975 in Minnesota Law 2014 (ML14) OH funds.

On August 2, 2017, the County used its own funds to acquire the Regional Greenway corridor and the Easement from the Smith Trust. The County used a combination of Metropolitan Council and County funds to acquire the Regional Greenway corridor.

The Notice of Funding Restriction (NOFR) for the easement on the Smith Trust property was recorded as Document No. 3233592 on January 25, 2018.

Conservation Easement Valuation

The appraised value of the 7.4-acre easement was \$27,300 with an estimated \$2,000 in closing costs. This valuation was based on:

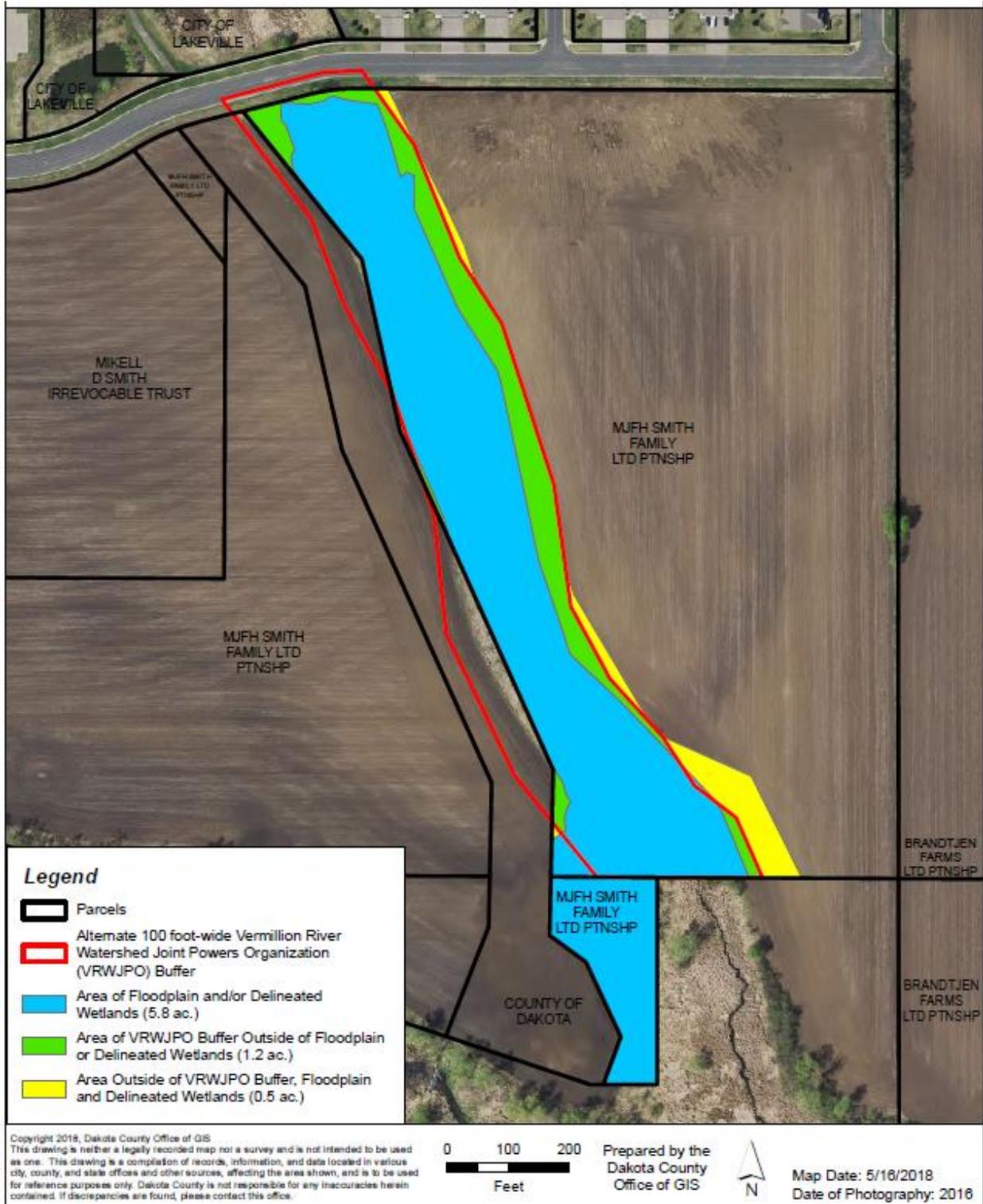
- 1.3 acres of non-restricted development land
- \$70,000 per acre Before Value for non-restricted development land
- 70 percent loss of value due to no residential development , but retention of park dedication and density credits resulting in a \$21,000 per acre Easement value
- \$21,000/acre x 1.3 acres = \$27,300

The Easement purchase agreement also included a provision for the Smith Trust or subsequent landowner to donate fee title to the Easement Area at the time of residential development.

Natural Resource Management Plan A Natural Resource Management Plan was completed for the Easement area with initial implementation scheduled for Spring 2018.

Proposed Extinguishment of the Easement

In early 2018, the Smith Trust began discussions with a residential developer to acquire the Smith Trust property which included the Easement area. During the development planning process, the developer correctly noted that the 100-foot wide VRWJPO should have been based on the “east” stream channel which had become the more prominent flow of the two channels. This resulted in the buffer moving east and reducing the non-restricted development land from 1.3 acres to 0 .5 acres. See following Exhibit.



Using the same valuation method, the “new” value of the Easement should have been \$10,500, not \$27,300.

The Smith Trust has proposed the following:

- Extinguishing the existing Easement
- Return 100 percent of the County payment for the Easement
- Forego the \$10,500 value of the newly configured Easement
- Retain the same amount of acreage, but reduce the width of the existing Easement at the southern end and add equivalent acreage in the center of the Easement
- Donate fee title to the newly configured area

The County proposes the following:

- Extinguishing the existing Easement
- Accept donated fee title to 7.4 acres of a slightly reconfigured area from the Smith Trust
- Designate the 7.4 acres as a County Park Conservation Area with no improvements other than to implement the NRMP as originally intended.

The County has been very vigilant about upholding the permanence of conservation easements. However in this case, the proposed extinguishment of the Easement on the Smith Trust property would:

- Still result in the permanent protection of the same habitat area at essentially no public cost
- Avoid the issues associated with the same entity being the fee title owner and holding the easement.

The County had prepared, but has not submitted a reimbursement request of \$21,975 to the Lessard-Sams Outdoor Heritage Council (LSOHC) for acquisition, closing, appraisal, and development of the NRMP.

Since the County has not submitted nor received OH reimbursement funding for the Easement on the Smith Trust property, the County does not believe that the LSOHC has any role in extinguishing the Easement on the Smith Trust property. The County also believes that the OH-related terms of the Easement Extinguishment section of the Easement deed, such as disposition of the proceeds from the sale of the property or reimbursement of sale proceeds to the LSOHC, based on the proportional amount of initial OH funding, are not applicable.

However, LSOHC staff have indicated that since a NOFR for the Smith Trust was recorded, the LSOHC is required to notify the Legislature of its approval to rescind the NOFR, contingent on County Board approval, scheduled for August 7, 2018.

The County requests that the LSOHC approves rescission of the NOFR for the Easement on the Smith Trust property, contingent on County Board approval, and that it duly notify the Legislature as required.