

Wilmington, Delaware
_____, 2023

#

Sponsor:

**Council
Member
Oliver**

WHEREAS, pursuant to City Charter Section 1-101, the City may acquire, hold, manage, and dispose of property on such terms as it deems proper for any municipal purpose; and

WHEREAS, City Code Section 2-621(a) generally authorizes the Department of Real Estate and Housing to conduct disposition proceedings of real property owned by the City; and

WHEREAS, City Code Section 2-628(a) authorizes the Department of Real Estate and Housing, subject to the approval of Council by resolution, to grant such easements as shall be deemed necessary and appropriate; and

WHEREAS, the City currently owns Tax Parcel Number 26-005.40-002 located adjacent to the Brandywine River (the “Property”); and

WHEREAS, Brandywine Shad 2020, Inc. has requested a temporary construction easement across the Property for it, its agents and contractors, the State of Delaware, and the United States Army Corps of Engineers to have access to the Brandywine River to deconstruct a dam known as “Dam 6” located on the Brandywine River for the purpose of aiding the reproduction of a certain species of fish as set forth in a proposed agreement between the City and Brandywine Shad 2020, Inc. (the “Temporary Construction Easement Agreement”), a copy of which, in substantial form, is attached hereto and incorporated herein as Exhibit A; and

WHEREAS, City Council deems it necessary and appropriate to approve the grant of the easement to Brandywine Shad 2020, Inc. as set forth in the Temporary Construction Easement Agreement.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF WILMINGTON that Council hereby approves the City's grant of an easement to Brandywine Shad 2020, Inc. in the Property (being Tax Parcel Number 26-005.40-002) pursuant to the terms of the Temporary Construction Easement Agreement, a copy of which, in substantial form, is attached hereto and incorporated herein as Exhibit A.

BE IT FURTHER RESOLVED that the Mayor, or his designee, is hereby authorized to execute any and all documents necessary to effectuate the grant of the easement, and the appropriate officers of the City are hereby authorized to take any and all further undertakings and assurances that may be appropriate.

Passed by City Council,

ATTEST: _____
City Clerk

SYNOPSIS: This Resolution approves the City's grant of a temporary construction easement in Tax Parcel Number 26-005.40-002 to Brandywine Shad 2020, Inc. to accommodate the removal of Dam 6 in the Brandywine River.

W0123186

EXHIBIT A

Tax Parcel No.: 26-005.40-002

Prepared By and Return To:
Elizabeth D. Power, Esquire
City of Wilmington Law Department
800 North French Street, 9th Floor
Wilmington, DE 19801

TEMPORARY CONSTRUCTION EASEMENT AGREEMENT

THIS TEMPORARY CONSTRUCTION EASEMENT (this “Agreement”) is entered into this _____ day of _____, 2023, by and between the CITY OF WILMINGTON, a municipal corporation of the State of Delaware (the “Grantor”), and BRANDYWINE SHAD 2020, Inc., a Delaware corporation (the “Grantee”).

WITNESSETH:

WHEREAS, the Grantor is the owner of that certain real property designated as New Castle County Tax Parcel Number 26-005.40-002 (the “Grantor Property”);

WHEREAS, the Grantee has requested a temporary construction easement across the Grantor Property for the Grantee, its agents and contractors, the State of Delaware, and the United States Army Corps of Engineers, to have access to the Brandywine River to deconstruct a dam known as “Dam 6” (“Dam 6”) located on the Brandywine River for the purpose of aiding the reproduction of a certain species of fish;

WHEREAS, the Grantor desires to provide a temporary construction easement across the Grantor Property as depicted on Exhibit A, which is attached hereto and incorporated herein, for the aforementioned purposes; and

WHEREAS, the Grantor and the Grantee have executed this Agreement to grant a temporary construction easement across the Grantor Property as described herein.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual covenants and conditions hereinafter set forth, the parties hereto, intending to be legally bound, do hereby covenant and declare for themselves, their successors and assigns, as follows:

1. **Grant of Temporary Construction Easement.** The Grantor hereby grants to the Grantee, its respective agents and contractors, the State of Delaware, and the United States Army Corps of Engineers, a temporary construction easement (the “Temporary Construction Easement”) for vehicular and pedestrian access over and across the Grantor Property and across the unnamed parcel that abuts the Grantor Property (the “Unnamed Parcel”), but only to the extent the Unnamed Parcel is owned by the Grantor (see Section 2 below), as depicted on Exhibit A, which is attached hereto and incorporated herein. The Temporary Construction Easement shall be used by the Grantee, its respective agents and contractors, the State of Delaware, and the United States Army Corps of Engineers, to gain access to the Brandywine River to remove Dam 6 and to temporarily store equipment for such purpose.

The Temporary Construction Easement described in this Section 1 shall terminate upon the completion of the removal of Dam 6, which in any event shall occur no later than December 1, 2024. The Grantee, at its sole cost and expense, shall restore the Temporary Construction Easement and other portions of the Grantor Property and the Unnamed Parcel that are damaged by the removal of Dam 6 to their pre-construction condition to the degree that is reasonably practicable. Upon the completion of any such restoration, the Grantee shall request that the Grantor review and inspect the restoration for compliance with this Agreement; if the inspection reveals any deficiencies, the Grantee shall, at its sole cost and expense, remedy the deficiencies. The restoration shall be undertaken and completed immediately after the construction is finished, which in any event shall be no later than December 31, 2024.

2. **Ownership of the Unnamed Parcel and Dam 6.** The Grantor makes no representations about the ownership of the Unnamed Parcel, Dam 6, or the land upon which Dam 6 is situated and is only granting rights to the Grantee, its respective agents and contractors, the State of Delaware, and the United States Army Corps of Engineers, to the extent that the Grantor has any ownership interests in the Unnamed Parcel, Dam 6, or the land upon which Dam 6 is located. It is the Grantee's sole responsibility to determine the ownership of the Unnamed Parcel, Dam 6, and the land upon which Dam 6 is situated and to seek the requisite permission from the owners of the Unnamed Parcel, Dam 6, or the land upon which Dam 6 is located to the extent that entities other than the Grantor own the Unnamed Parcel, Dam 6, and/or the land upon which Dam 6 is situated. The Grantee takes any action with respect to the Unnamed Parcel, Dam 6, and the land upon which Dam 6 is situated solely at its own risk.

3. **Mature Trees; Erosion Control.** The Grantee, its respective agents and contractors, the State of Delaware, and the United States Army Corps of Engineers shall make every effort to avoid removing large mature trees (i.e., those with a diameter of twenty (20) inches or greater) and to avoid driving machinery within the Critical Root Zones (as such term is defined by the Delaware Department of Natural Resources and Environmental Control) of mature trees, unless the only alternative is to remove the mature trees to enable access. Any trees removed regardless of size shall be replaced at the ratio of three (3) trees for every one (1) tree removed. Silt fencing should be placed at the edge of the Critical Root Zones to mark the boundaries and to prevent impacts from machinery. Materials that are biodegradable and that do not include plastic netting or have welded-joint poly-based matting shall be used for erosion control.

4. **Retained Rights.** The Grantor expressly retains for itself, any and all utilities, and members of the public full rights to the use of the Grantor Property for any lawful purposes that do not interfere with, or impede the use of, the Temporary Construction Easement granted to Grantee herein, including by way of example but not limitation, the right to utilize the Grantor Property for continued ingress, egress, and regress. The Grantor also expressly retains for itself the right to enter the Temporary Construction Easement to observe the construction.

5. **Termination of Temporary Construction Easement by the Grantor.** The Grantor shall have the right to terminate the Temporary Construction Easement upon ten (10) days' written notice to the Grantee for any public purpose deemed necessary by the Grantor's Commissioner of Public Works (the "Commissioner"). The ten-day notice requirement shall not apply to any situation deemed by the Commissioner to be an emergency.

6. **The Grantor's Potable Water Supply.** The Grantee, its respective agents and contractors, the State of Delaware, and the United States Army Corps of Engineers shall not take any action that could potentially threaten the Grantor's potable water supply. To the extent that any such action is taken, the Commissioner shall have the authority to immediately terminate the Temporary Construction Easement without notice and the Grantor shall have the right to seek any and all legal remedies against the Grantee, its respective agents and contractors, the State of Delaware, and the United States Army Corps of Engineers.

7. **No Encumbrances or Assignments.** The Grantee shall not encumber or assign the Temporary Construction Easement without the express prior written approval of the Grantor.

8. **No Third-Party Beneficiaries.** Notwithstanding anything contained in this Agreement to the contrary, this Agreement is solely for the benefit of the parties hereto, their successors and permitted assigns, and shall not benefit any third party or create or operate to create, either expressly or impliedly any rights, title, or interests hereunder in favor of any third party.

9. **Indemnification.** The Grantee shall defend, indemnify, and hold the Grantor, its officers, agents, and employees, safe and harmless from and against from any and all losses, costs, damages, claims, actions, or liabilities on account of the death or injury of any person or persons and/or any and all damage or destruction of any property on the Temporary Construction Easement or the Grantor Property whenever such death, injury, property damage or destruction arises from or grows out of the exercise of the Grantee's rights herein. This Section 9 shall survive any subsequent termination of this Agreement.

10. **Insurance.** The Grantee shall carry commercial general liability insurance with commercially reasonable limits of not less than Two Million Dollars (\$2,000,000.00) per occurrence and Five Million Dollars (\$5,000,000.00) in the aggregate with contractual liability sufficient to cover Grantee's obligations pursuant to Section 9 of this Agreement. The Grantee shall name the Grantor as an additional insured on Grantee's insurance policy. A copy of the certificate of insurance shall be provided to the Grantor.

11. **Contractual Requirements for the Grantee's Contractors.** The Grantee shall enter into a written contract with each and every contractor or other entity that enters the Temporary Easement requiring such contractor or entity to carry commercial general liability insurance with commercially reasonable limits of not less than Two Million Dollars (\$2,000,000.00) per occurrence and Five Million Dollars (\$5,000,000.00) in the aggregate. Any such contract shall further contain a full release of any

claims against the Grantor on account of the death or injury of any person or persons and/or any and all damage or destruction of any property that occurs in relation the removal of Dam 6.

12. **Permits.** The Grantee, at its sole cost and expense, shall obtain all required permits for the construction involved with the removal of Dam 6.

13. **Notices.** All notices under this Agreement shall be in writing and sent prepaid by (i) certified mail, return receipt requested, (ii) overnight courier of national or regional recognition (such as UPS or Federal Express) or (iii) personal delivery or courier. The written notice shall to the extent practicable cite to the applicable term of this Agreement and must in all cases be accompanied by a copy of the fully executed Agreement:

If intended for the City of Wilmington (the Grantor):

City of Wilmington
Department of Public Works
800 North French Street, Sixth Floor
Wilmington, DE 19801
Attn: Kelly A. Willaims, Commissioner

- with a copy to -

City of Wilmington
Law Department
800 North French Street, Ninth Floor
Wilmington, DE 19801
Attn: Robert M. Goff, Jr., City Solicitor

If intended for Brandywine Shad 2020, Inc. (the Grantee):

Brandywine Shad 2020, Inc.
1960 Superfine Lane
Unit 82
Wilmington, DE 19806

- with a copy to -

Parkowski, Guerke & Swayze, P.A.
909 Silver Lake Boulevard, 1st Floor
Dover, DE 19901
Attn: Michael W. Teichman, Esquire

14. **Due Authorization.** The Grantor and the Grantee each represent to the other that they are duly authorized to execute this Agreement, including, but not limited to, any approvals that may be required of the Grantor by the Wilmington City Council. The Grantee shall be solely responsible for obtaining approvals from New Castle County, the State of Delaware, the United States Army Corps of Engineers, and/or any other governmental authority with jurisdiction.

15. **Amendments; Waiver; Remedies; Damages.** Except as otherwise set forth herein, this Agreement may only be changed, modified, or amended in writing by the mutual consent of the Grantor and the Grantee. The provisions of this Agreement may only be waived in or by a writing signed by the party against whom enforcement of any waiver is sought. No waiver by either party hereto of any breach of any covenant, agreement, representation or warranty hereunder shall be deemed a waiver of any proceeding or succeeding breach of the same. The exercise of any right granted to either party herein shall not operate as a waiver of any default or breach on the part of the other party hereto. Each and all of the several rights and remedies of either party hereto under or contained in or by reason of this Agreement shall be construed as cumulative and no one as exclusive of the others, or by any right or priority allowed by law. Notwithstanding the foregoing, neither party shall be entitled to recover special, punitive, or consequential damages from the other party as a result of a breach of this Agreement.

16. **Severability.** If any clause or provision of this Agreement is held to be illegal, invalid, or unenforceable, then and in such event, it is the express intention of the parties hereto that the remainder of this Agreement shall not be affected thereby and each clause or provision of this Agreement other than those declared illegal, invalid or unenforceable shall be legal, valid and enforceable to the fullest extent permitted by law or in equity.

17. **Successors and Assigns.** This Agreement shall bind and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors and permitted assigns.

18. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware. All disputes in connection with this Agreement shall be resolved by a court of competent jurisdiction located New Castle County, Delaware.

19. **Miscellaneous.**

(a) The paragraph headings in this Agreement are for convenience only, do not define or limit the scope or content of this Agreement, and shall not be considered in any construction or interpretation of this Agreement or any part thereof.

(b) This Agreement constitutes the entire agreement between the parties, and any prior understanding or representation of any kind preceding the date of this Agreement shall not be binding on either party except to the extent incorporated in this Agreement.

(c) This Agreement shall be recorded in the office of the Recorder of Deeds for New Castle County, Delaware.

20. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same document. Counterparts to this Agreement may be executed and delivered by electronic means, including, without limitation, facsimile, email, .pdf or .tif transmission, and for purposes of this Agreement signatures transmitted by electronic means shall be deemed to be original signatures.

[Signature Pages Follow]

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Exhibit A

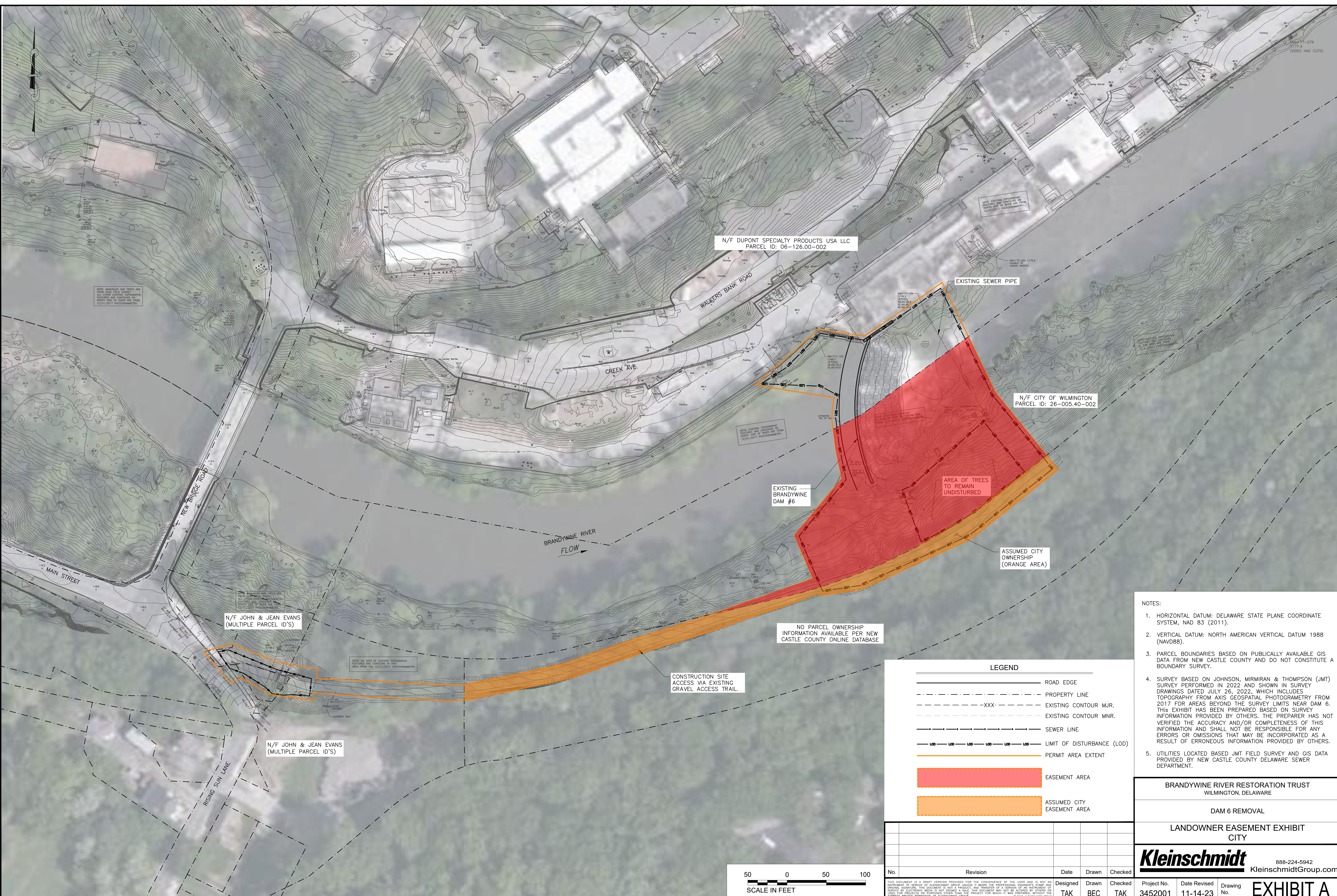
Depiction of Access Easement

DRAFT

24x36 = FULL SCALE

0 1" 2" 3"

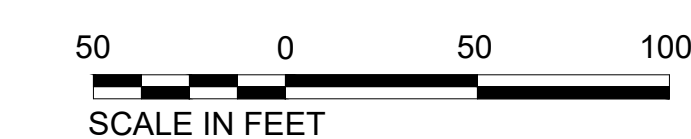
PRINTED: Nov. 14, 2023 - 2:53 PM J:\3452\001\Drawings\CAD\Dam 6\Sketches\Dam 6 Landowner Exhibits.dwg



- NOTES:
1. HORIZONTAL DATUM: DELAWARE STATE PLANE COORDINATE SYSTEM, NAD 83 (2011).
 2. VERTICAL DATUM: NORTH AMERICAN VERTICAL DATUM 1988 (NAVD88).
 3. PARCEL BOUNDARIES BASED ON PUBLICALLY AVAILABLE GIS DATA FROM NEW CASTLE COUNTY AND DO NOT CONSTITUTE A BOUNDARY SURVEY.
 4. SURVEY BASED ON JOHNSON, MIRMIRAN & THOMPSON (JMT) SURVEY PERFORMED IN 2022 AND SHOWN IN SURVEY DRAWINGS DATED JULY 26, 2022, WHICH INCLUDES TOPOGRAPHY FROM AXIS GEOSPATIAL PHOTOGRAMETRY FROM 2017 FOR AREAS BEYOND THE SURVEY LIMITS NEAR DAM 6. THIS EXHIBIT HAS BEEN PREPARED BASED ON SURVEY INFORMATION PROVIDED BY OTHERS. THE PREPARER HAS NOT VERIFIED THE ACCURACY AND/OR COMPLETENESS OF THIS INFORMATION AND SHALL NOT BE RESPONSIBLE FOR ANY ERRORS OR OMISSIONS THAT MAY BE INCORPORATED AS A RESULT OF ERRONEOUS INFORMATION PROVIDED BY OTHERS.
 5. UTILITIES LOCATED BASED JMT FIELD SURVEY AND GIS DATA PROVIDED BY NEW CASTLE COUNTY DELAWARE SEWER DEPARTMENT.

LEGEND

	ROAD EDGE
	PROPERTY LINE
	EXISTING CONTOUR M.J.R.
	EXISTING CONTOUR M.N.R.
	SEWER LINE
	LIMIT OF DISTURBANCE (LOD)
	PERMIT AREA EXTENT
	EASEMENT AREA
	ASSUMED CITY EASEMENT AREA



No.	Revision	Date	Drawn	Checked
			TAK	BEC
			TAK	TAK

BRANDYWINE RIVER RESTORATION TRUST
WILMINGTON, DELAWARE

DAM 6 REMOVAL

LANDOWNER EASEMENT EXHIBIT
CITY

Kleinschmidt 888-224-5942
KleinschmidtGroup.com

No.	Revision	Date	Drawn	Checked
3452001		11-14-23	TAK	BEC

Project No. 3452001 Date Revised 11-14-23 Drawing No. EXHIBIT A

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