

RESOLUTION NO. _____

A RESOLUTION AUTHORIZING THE MAYOR TO ENTER INTO A WETLANDS CONSERVATION EASEMENT ASSOCIATED WITH THE STATE INDUSTRIAL ACCESS ROAD SERVING VOLKSWAGEN.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF CHATTANOOGA, TENNESSEE, That it is hereby authorized that the Mayor enter into a Wetlands Conservation Easement associated with the State Industrial Access Road serving Volkswagen.

ADOPTED: _____, 2013

/mms

City of Chattanooga



Resolution Request Form

(This form is only required for resolutions requiring expenditure of City funds)

Date: May 10, 2013

Preparer: William C. Payne

Department: Public Works - Engineering

Brief Description of Purpose for Resolution:

Resolution Number (if approved by Council):

A City Council Action is requested for authorization of the Mayor to execute all documents relative to a Wetland Conservation Easement associated with the State Industrial Access Road Serving Volkswagen. Backup attached.

Name of Vendor/Contractor/Grant, etc.	N/A	New Contract/Project? (Yes or No)	N/A
Total project cost \$	N/A	Funds Budgeted? (YES or NO)	N/A
Total City of Chattanooga Portion \$	N/A	Provide Fund	N/A
City Amount Funded \$	N/A	Provide Cost Center	N/A
New City Funding Required \$	N/A	Proposed Funding Source if not budgeted	N/A
City's Match Percentage %	N/A	Grant Period (if applicable)	N/A

List all other funding sources and amount for each contributor.

Amount(s)	Grantor(s)
\$	

Agency Grant Number

CFDA Number if known

Other comments: (Include contingency amount, contractor, and other information useful in preparing resolution)

Approved by:

Reviewed by: FINANCE OFFICE

DESIGNATED OFFICIAL/ADMINISTRATOR

Please submit completed form to @budget, City Attorney and City Finance Officer

This Instrument Prepared By:
 Evan A. Allison, Esq.
 Miller & Martin PLLC
 832 Georgia Avenue, Suite 1000
 Chattanooga, Tennessee 37402

<u>Grantee of Easements</u>	<u>Party Responsible for Taxes</u>	<u>Tax Map Parcel Nos.</u>
Hamilton County, Tennessee 208 Courthouse, 201 East 7 th Street Chattanooga, TN 37402	Same	130-001

WETLANDS CONSERVATION EASEMENT

THIS INDENTURE, is made this _____ day of _____, 20____, by the City of Chattanooga, a Tennessee municipal corporation, located at City Hall, Suite 100, 101 E. 11th Street, Chattanooga, Tennessee 37402 and Hamilton County, Tennessee, a political subdivision of the State of Tennessee, located at 208 Courthouse, 201 East 7th Street, Chattanooga, Tennessee 37402 (“Grantor”) and in favor of Hamilton County, Tennessee, c/o Hamilton County Parks & Recreation located at 2318 North Gold Point Circle, Hixson, Tennessee 37343 (“Holder”).

WHEREAS, Grantor is the owner in fee simple of certain real property located in Hamilton County, State of Tennessee, more particularly described in Attachment 1 hereto which is incorporated and made apart hereof as if fully set forth herein (“Protected Property”);

WHEREAS, Holder is an entity qualified to hold conservation easements and is a political subdivision of the State of Tennessee whose purpose is to preserve, enhance, and conserve the Protected Property for aesthetic, scientific, charitable and educational purposes; and;

WHEREAS, the Protected Property possesses significant ecological values of aesthetic and environmental benefit to the people of the State of Tennessee and the United States, and of great importance to the Grantor and the Holder;

WHEREAS, the United States Army Corps of Engineers (Corps) is responsible for implementing Section 404, of the Clean Water Act, and overseeing the creation of the Wetland Mitigation project, and The Tennessee Department of Environment and Conservation (TDEC) is also overseeing the creation and maintenance of this wetland mitigation and preservation and will therefore retain Third Party Rights of Enforcement for this Conservation Easement.

WHEREAS, the Corps and TDEC have approved the Protected Property for use as wetland mitigation and preservation, pursuant to Section 404 and Section 401 of the Clean Water Act and Section 10 of the Rivers and Harbor Act.

WHEREAS, Grantor desires to convey to the Holder a conservation easement, thereby placing certain limitations and affirmative obligations on the Protected Property for the protection of the wetlands, and in order that the Protected Property shall remain in its natural condition, forever;

WHEREAS, Grantor desires by this instrument to convey to Holder the right to conserve and protect the conservation and environmental values of the property in perpetuity;

WHEREAS, the conservation and environmental values of the property include: wetland enhancement of native, self-sustaining habitat representative of the area; improved energy dissipation; improved sediment transportation; nutrient cycling; improved biological functions; increased vegetative diversity; and improved habitat for mammals and resident and migratory birds.

WHEREAS, Holder agrees by accepting this conveyance to honor the intentions of the Grantor stated herein and to conserve and protect in perpetuity the conservation values of the Protected Property in accordance with the terms of this Conservation Easement for the benefit of this generation and the generations to come;

WHEREAS, the term "natural condition" shall mean the condition of the Protected Property at the time of this grant, and as created, restored, enhanced, and preserved by Grantor or Holder, and shall be evidenced in part by a surveyed plat of the Protected Property showing all relevant property lines, and major, distinct natural features such as waters of the United States, on file with the Corps and TDEC and Holder, aerial photographs of the Protected Property taken as close as possible to the date the donation is made, and after completion of the creation, restoration, enhancement and preservation activities required by the Permits; and on-site photographs taken at appropriate locations on the Protected Property, including of major natural features.

WHEREAS, Grantor and Holder agree that third-party rights of enforcement shall be held by the U.S. Army Corps of Engineers, Nashville District ("Corps," to include any successor agencies), and by the Tennessee Department of Environment and Conservation, (TDEC) and may be exercised through the appropriate enforcement agencies of the United States, and that these rights are in addition to any permit or certification issued by the Third-Party to Grantor in regards to the Protected Property;

NOW THEREFORE, for the foregoing consideration, and in further consideration of the restrictions, rights, and agreements herein, Grantor hereby conveys to Holder, its successors and assigns, forever and in perpetuity, a conservation easement over the Protected Property more particularly described in Attachment 1.

A. PURPOSE

It is the purpose of this Conservation Easement to assure that the Protected Property will be retained forever in a natural state, that the scenic and natural character of the property will be maintained as it currently exists (preserved), and as created, restored and enhanced by Grantor or Holder, and to prevent any use of the Protected Property that will impair or interfere with the conservation values of the Protected Property. Grantor intends that grant of this Conservation Easement will assure that the Protected Property will be used only for such activities as are consistent with the conservation purpose of this easement.

B. DURATION

This Conservation Easement shall be perpetual, in gross, run with the land and be binding on Grantor's heirs, successors, administrators, assigns, lessees, or other occupiers and users, forever.

C. RIGHTS OF THE HOLDER

To accomplish the purpose of this Conservation Easement, the following rights are conveyed to the Holder and the Third-Party:

1. **General.** The Holder and the Corps and TDEC shall have the right to conserve and protect the conservation values of the Protected Property in perpetuity. The Holder and the Corps and TDEC shall have the right to prevent any activity or use of the Protected Property that is inconsistent with the purpose of the Conservation Easement, and to require the restoration of such areas or features of the Property that may be damaged by any inconsistent activity or use, pursuant to the remedies set forth in Section F herein.
2. **Rights of Access and Entry.** Holder and the Corps and TDEC shall have the right to enter and go upon the Protected Property for purposes of inspection, and to take actions necessary to verify compliance with the Restrictions as set out herein. Holder and Corps and TDEC shall also have the rights of visual access and view, and to enter and go upon the Protected Property for purposes of making scientific or educational observations and studies, and taking samples, in such a manner as will not disturb the quiet enjoyment of the Protected Property by Grantor. However, this Conservation Easement conveys no right of access or entry by the general public to any portion of the Protected Property.

D. PROHIBITED AND RESTRICTED ACTIVITIES

Any activity upon, or use of, the Protected Property inconsistent with the purposes of this Conservation Easement is prohibited. The following activities and uses are expressly prohibited:

1. **General.** There shall be no filling, flooding, excavating, mining or drilling; no dumping

of materials; and, no alteration of the topography in any manner except as specifically set forth herein and as specifically approved by the Corps, TDEC and Holder.

2. **Waters and Wetlands.** There shall be no draining, dredging, damming or impounding; no changing the grade or elevation, impairing the flow or circulation of waters, reducing the reach of waters; and no other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, except as specifically set forth herein and as specifically approved by the Corps, TDEC and Holder.

3. **Trees/Vegetation.** There shall be no clearing, burning, cutting or destroying of trees or vegetation, except as expressly authorized in the Reserved Rights; there shall be no planting or introduction of non-native or exotic species of trees or vegetation except as specifically set forth herein and as specifically approved by the Corps, TDEC and Holder.

4. **Uses.** No industrial or commercial activity shall be undertaken or allowed.

5. **Use of Off Road Vehicles.** There shall be no use of off road vehicles, 4-wheel drive vehicles, all terrain vehicles or similar vehicles except on existing roads and trails and except as necessary to manage the Property.

6. **Utilities.** There shall be no construction or placement of utilities or related facilities except as specifically set forth herein.

7. **Pest Control.** There shall be no application of pesticides or biological controls, including for problem vegetation, without prior written approval from the Corps, TDEC and Holder.

8. **Other Prohibitions.** Any other use of, or activity on, the Protected Property which is or may become inconsistent with the purposes of this grant, the preservation of the Protected Property substantially in its natural condition, or the protection of its environmental systems, is prohibited.

E. GRANTOR'S RESERVED RIGHTS

Notwithstanding the foregoing Restrictions, Grantor reserves for Grantor, its successors and assigns the following Reserved Rights, which may be exercised upon providing prior written notice to Holder and to Third-Party, except where expressly provided otherwise:

1. **Grounds Maintenance.** Landscaping by the Grantor to prevent severe erosion or damage to the Protected Property or portions thereof, or significant detriment to existing or permitted uses, is allowed, provided that such landscaping is generally consistent with preserving the natural condition of the Protected Property.

2. **Forest Management.** Harvesting and management of timber by Grantor is limited to the extent necessary to protect the natural environment in areas where the forest is damaged by natural forces such as fire, flood, storm, insects or infectious organisms or is otherwise required by sound management practices. Such timber harvest and management shall be carried out in

accordance with Best Management Practices approved by the Tennessee Forestry Commission or successor agency, as amended.

3. **Recreation.** Grantor reserves the right to allow any outdoor, non-commercial recreational activities, including hunting and fishing, with cumulatively very small impacts, and which are consistent with the continuing natural condition of the Protected Property. No written notice is required.

4. **Other Reserved Rights.** Grantor and Holder reserve the right to conduct actions which are essential and necessary for the preservation and maintenance of the Protected Property, even if generally prohibited by the Restrictions, so long as they are not inconsistent with the conservation purposes of this grant, the preservation of the Protected Property substantially in its natural condition, and the protection of its environmental systems. However, any invasive, destructive, or similar measures that cause or may cause disturbances to wildlife, vegetation, soils, or hydrology, must be approved by Holder, Corps and TDEC in advance.

5. **Rights of Grantor.** The Corps and TDEC have approved the Protected Property for use as compensatory mitigation and preservation. This will be accomplished by the creation and preservation in perpetuity of the Protected Property. In addition to any other provision contained herein, the terms and provisions of the permits shall be applicable. In the event there is any inconsistency between this Easement and the terms and conditions of the permits, the Corps and TDEC shall govern.

F. ENFORCEMENT

1. **Notice of Violation; Corrective Action.** If Holder or the Corps or TDEC determines there has been a breach or violation of the terms of this Conservation Easement, by Grantor; the Corps, TDEC and/or Holder shall give written notice to the Grantor of such violation and demand corrective action sufficient to cure the violation, and where the violation involves injury to the Property resulting from any use or activity inconsistent with the purposes of this Easement, to restore the portion of the Property so injured to its prior condition in accordance with a plan to be approved by the Holder and Corps and TDEC.

2. **Injunctive Relief.** If the Grantor fails to cure the violation within thirty (30) days after receipt of such notice to thereof, or under circumstances where the violation cannot reasonably be cured within a thirty (30) day period, fails to begin curing said violation within the thirty (30) day period, or fails to continue diligently to cure such violation until finally cured, the Corps, TDEC and/or Holder may undertake such actions, including legal proceedings, as are necessary to effect such corrective action, including to enjoin the violation, ex parte as necessary, by temporary or permanent injunction, and to require the restoration of the Property to the condition that existed prior to any such injury.

3. **Damages.** TDEC and Holder shall be entitled to recover damages for violation of the terms of this Conservation Easement or injury to any conservation values protected by this Easement, including, without limitation, damages for the loss of scenic, aesthetic, or environmental values.

4. **Costs of Enforcement.** The costs of a breach or violation, correction or restoration, including TDEC and/or Holder expenses, court costs, and attorneys' fees, shall be paid by Grantor, unless Grantor ultimately prevails in a judicial enforcement action, in which case each party shall bear their own costs.

5. **Forbearance.** Enforcement shall be at the discretion of the Corps, TDEC and/or Holder, and any forbearance to exercise rights under this Easement shall not be deemed or construed to be a waiver of such terms or of any subsequent breach of the same or any other term of this Easement or of any of the Holder, Corps or TDEC's rights under this Easement. No omission or delay in the exercise of any rights or remedies shall constitute a waiver of any enforcement right, or in any way impair any right or remedy.

6. **General.** These enforcement rights are cumulative and are in addition to, and shall not limit, enforcement rights available under other provisions of law or equity, or under any applicable permit or certification.

7. **Events Beyond Grantor's Control.** Nothing herein shall be construed to authorize the Corps, TDEC or Holder to institute any proceedings against Grantor for any changes to the Protected Property caused by acts of God or circumstances beyond the Grantor's control such as earthquake, fire, flood, storm, war, civil disturbance, strike, the unauthorized acts of third persons, or similar causes. However, if the acts of God or circumstances beyond the Grantor's control do not preclude the Grantor from maintaining the Protected Property in its natural condition without unreasonable expense, then it shall not be relieved of its obligations under this document.

G. GENERAL PROVISIONS

1. **Transfer.** Sixty (60) day advance notification to the Nashville Corps District Regulatory Branch is required prior to any action being taken to void or modify this interest. This includes transfer of title to, or establishment of any other legal claims over Protected Property and assignment or transfer of the Easement under paragraphs G. 6. and 8.

2. **Obligations of Ownership.** Grantor is responsible for any real estate taxes, assessments, fees, or charges levied upon the Protected Property. Grantor shall keep the Protected Property free of any liens or other encumbrances for obligations incurred by Grantor. Holder, Corps and TDEC shall not be responsible for any costs or liability of any kind related to the ownership, operation, insurance, upkeep, or maintenance of the Protected Property, except as expressly provided herein. Nothing herein shall relieve the Grantor of the obligation to comply with federal, state or local laws, regulations and permits which may apply to the exercise of the Reserved Rights.

3. **Eminent Domain.** In accordance with T.C.A. § 66-9-305, this conservation easement shall not be acquired by eminent domain unless such easement is necessary for the accomplishment of a specific public project which has been authorized by statute. Any such

acquisition by a state entity shall be subject to approval by the state building commission. No private nonprofit organization shall exercise a power of eminent domain to acquire this easement, even though such organization may otherwise have such power. In the event that all or any part of the Property is taken by exercise of the power of eminent domain or acquired by purchase in lieu of condemnation, whether by public, Corporate, or other authority, so as to terminate this Easement, in whole or in part, Grantor and Grantee shall act jointly to recover the full value of the interests in the Property subject to the taking or in lieu of purchase and all direct or incidental damages resulting there from. This Conservation Easement constitutes a real property interest immediately vested in Holder. In the event that all or a portion of this Protected Property is sold, exchanged, or involuntarily converted following the extinguishment or the exercise of eminent domain, Holder shall be entitled to the fair market value of this Conservation Easement. Holder shall use its share of the proceeds in a manner consistent with the purposes of this Conservation Easement.

4. **Notification.** Any notice, request for approval, or other communication required under this Conservation Easement shall be sent by registered or certified mail, postage prepaid, to the following addresses (or such address as may be hereafter specified by notice pursuant to this paragraph):

To Grantor: City of Chattanooga
City Hall, Suite 100
101 E. 11th Street
Chattanooga, Tennessee 37402

Hamilton County, Tennessee
208 Courthouse
201 East 7th Street
Chattanooga, Tennessee 37402

To Holder: Hamilton County, Tennessee
c/o Hamilton County Parks & Recreation
2318 North Gold Point Circle
Hixson, Tennessee 37343

To Corps: U.S. Army Corps of Engineers
Regulatory Branch
3701 Bell Road
Nashville, Tennessee 37214

To TDEC: Tennessee Department of Environment & Conservation
Division of Water Pollution Control
Natural Resources Section
7th Floor, L&C Annex
Nashville, Tennessee 37243

5. **Assignment.** This Conservation Easement is transferable, but only to a qualified holder and subject to the approval of the Corps, TDEC and Grantor. As a condition of such transfer, the transferee shall agree to all of the restrictions, rights, and provisions herein, and to continue to carry out the purposes of this Conservation Easement. Assignments shall be accomplished by amendment of this Conservation Easement under Paragraph 8.

6. **Failure of Holder.** If at any time Holder ceases to be a qualified holder and if, within a reasonable period of time after the occurrence of one of these events, the Holder fails to make an assignment pursuant to Paragraph 5, then the Holder's interest shall become vested in another qualified holder in accordance with an appropriate proceeding in a court of competent jurisdiction.

7. **Subsequent Transfer.** Grantor agrees to incorporate the terms of this Conservation Easement in any deed or other legal instrument, which transfers any interest in all, or a portion of the Protected Property. Grantor agrees to provide written notice of such transfer in accordance with Paragraph G. 1, above. The failure of Grantor to comply with this paragraph shall not impair the validity or enforceability of this Conservation Easement.

8. **Amendment.** This Conservation Easement may be amended, but only in writing signed by all parties hereto, and provided such amendment does not affect the qualification of this Conservation Easement or the status of the Holder under any applicable laws, and is consistent with the conservation purposes of this grant.

9. **Severability.** Should a court of competent jurisdiction find any separable part of this Conservation Easement void or unenforceable, the remainder shall continue in full force and effect.

10. **Warranty.** Grantor warrants that it owns the Protected Property in fee simple, and that the Grantor either owns all interests in the Protected Property which may be impaired by the granting of this Conservation Easement or that there are no outstanding mortgages, tax liens, encumbrances, or other interests in the Protected Property which have not been expressly subordinated to this Conservation Easement. Grantor warrants that there is no pending or threatened litigation in any way affecting, involving, or relating to the Protected Property. Grantor further warrants that Holder shall have the use of and enjoy all the benefits derived from and arising out of this Conservation Easement.

11. **No Extinguishment Through Merger.** Grantor and Holder agree that should the Holder, or any successor in interest to the Holder, come to own all of a portion of the fee interest in the Protected Property subject to this Conservation Easement, (i) said owner shall observe and be bound by the obligations and restrictions imposed upon the Protected Property by this Conservation Easement, (ii) this Conservation Easement shall not be extinguished through the doctrine of merger in whole or in part in view of the public interest in enforcement, and (iii) said owner shall promptly assign the Holder interest in the Conservation Easement to another entity or person qualified to hold conservation easements.

12. **Recordation.** Grantor shall record this instrument in a timely fashion in the official records of Hamilton County, Tennessee, and shall re-record it as may be required to preserve this Conservation Easement.

13. **Marking of Property.** The perimeter of the Protected Property shall at all times be plainly marked by permanent signs saying "Protected Area" or by an equivalent, permanent marking system. Holder shall be permitted to place appropriate signage upon the Protected Property to identify its role as the long-term steward.

TO HAVE AND TO HOLD, unto the Holder, its successors and assigns, forever. The covenants agreed to and the terms, restrictions and purposes imposed as aforesaid, shall be binding upon Grantor, his personal representatives, heirs, successors and assigns, and shall continue as a servitude running with the land in perpetuity with the property, so long as the terms and conditions set out herein are satisfied or maintained with respect to the subject property or any portion thereof and in the event any term or condition fails, then said property shall revert to Grantor, its successors or assigns.

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[SIGNATURES CONTINUED ON FOLLOWING PAGE]

IN WITNESS WHEREOF, Grantor and Holder have executed this Conservation Easement.

GRANTOR: **City of Chattanooga**

By: _____
Its: _____

Attest: _____

GRANTOR: **Hamilton County, Tennessee**

By: _____
Its: _____

Attest: _____

HOLDER: **Hamilton County, Tennessee, c/o
Hamilton County Parks & Recreation**

By: _____
Its: _____

Attest: _____

STATE OF TENNESSEE)
HAMILTON COUNTY)

Before me, the undersigned authority, a Notary Public in and for said County, in said State, hereby certify that Andy Berke, Mayor of the CITY OF CHATTANOOGA, who is known to me to be such official or with whom I am personally acquainted, has signed the foregoing instrument or acknowledged the same before under oath that, being informed of the contents of the Instrument, he, in his capacity as such official of the Mayor of the City of Chattanooga, and with full authority, signed, executed, and delivered the same as the act of the City of Chattanooga.

GIVEN under my hand and official seal on this _____ day of _____, 20_____.

[AFFIX NOTARY SEAL]

NOTARY PUBLIC

My Commission Expires: _____

STATE OF TENNESSEE)
HAMILTON COUNTY)

The undersigned Notary Public, does hereby certify that Jim Coppinger, Mayor of HAMILTON COUNTY, TENNESSEE, who is known to me to be such official or with whom I am personally acquainted, has signed the foregoing instrument or acknowledged the same before under oath that, being informed of the contents of the Instrument, he, in his capacity as such official of the Mayor of Hamilton County, Tennessee, and with full authority, signed, executed, and delivered the same as the act of Hamilton County, Tennessee.

GIVEN under my hand and official seal on this _____ day of _____, 20_____.

[AFFIX NOTARY SEAL]

NOTARY PUBLIC

My Commission Expires: _____