

CONFIDENTIAL LEGAL MEMORANDUM

ATTORNEY-CLIENT PRIVILEGED

TO: Village of Elm Grove Trustees and Staff

FROM: von Briesen & Roper, s.c.
By: William Taibl and Hector de la Mora 

DATE: September 29, 2015

RE: Daylighting of Underwood Creek Within Area Commonly Known as the Park and Shop Retail Complex

This memorandum was requested by President Palmer to provide an outline of legal options and related considerations identified during the course of a meeting held on September 14, 2015 attended by President Palmer, Dave De Angelis, Casey Griffiths and Attorneys William Taibl and Hector de la Mora from von Briesen & Roper, s.c.

BACKGROUND

In 2005, the Wisconsin DNR required the Village, as a condition of issuing a Chapter 30 permit to allow general flood management work along Underwood Creek, to enter into a Memorandum of Understanding ("MOU") providing that:

The Village will undertake the coordination and planning for the daylighting of the Underwood Creek. It is understood by the parties, that any such work undertaken by the Village will only be performed to the extent that funds are available. However, such project, including any land acquisitions, engineering, and construction that may be performed by the Village shall not be funded by general tax revenue from the Village.¹

It was further agreed:

The Department shall work cooperatively with the Village to secure and provide outside sources of funds for the purpose of funding the daylighting project. The Department also understands that the Village will proceed with the project only if it can be directly coordinated with the Village's replacement of the Watertown Plank Road bridge and the secured funding for the

¹ See Memorandum of Understanding, Attachment 1.

project from the Wisconsin Department of Transportation (WDOT). The Village shall include the Department in all discussions with the WDOT which pertain to scheduling of this project.²

The MOU was required by the DNR because the Underwood Creek had been channelized and confined, at some point in the 1960's, within a large concrete culvert installed beneath a lengthy paved portion of the Park and Shop parking lot commencing a few feet south of Watertown Plank Road and proceeding south and tunneling under a portion of the Sendiks Food Market on its east side until reaching an area northeast of the 890 retail/office complex ("890 Building") where it virtually abuts the entire eastern side of the 890 Building and then continues south under the Wall Street bridge as an open stream. See Attachment 2.

The Underwood Creek has not always existed at the location where it was channelized as demonstrated by Attachment 3 which is a photograph showing the area now occupied by Park & Shop when it was vacant.

The DNR recognized that the channelized portion of the Underwood Creek was located entirely on private property where the Village has "no control."³

The DNR became concerned because there are no records reflecting the granting of authorization for the construction of an enclosure of the Underwood Creek, which as an unpermitted structure, violated Wisconsin Statutes, Chap. 30.⁴ Therefore, the DNR made it clear that it would not permit any future repairs or modifications to the enclosure except "temporary repairs or modifications"⁵ with the ultimate intent of pursuing "removal of the enclosure."⁶

The DNR also became concerned because the enclosure constitutes an obstruction to flood flow capacity.⁷

The Village concurred that there could be a long term benefit to "overall public interest in the elimination of the Underwood Creek enclosure."⁸ And, in that connection the Village agreed that there was a need for it to "coordinate" the effort of daylighting Underwood Creek as the "local governmental agency."⁹ Thus, the Village accepted the responsibility as "project coordinator" for coordinating and planning for the daylighting of Underwood Creek.¹⁰ This was done, however, with wording that "any land acquisition, engineering or construction work performed" would not obligate the Village to use general tax revenue.¹¹

² Ibid.

³ See MOU, 5th Whereas clause.

⁴ See MOU, 6th Whereas clause.

⁵ See MOU, 9th Whereas clause.

⁶ See MOU, 10th Whereas clause.

⁷ See MOU, 8th Whereas clause.

⁸ See MOU, 13th Whereas clause.

⁹ See MOU, 15th Whereas clause.

¹⁰ See MOU, Section 4.

¹¹ See MOU, Section 2.

Another condition agreed to made it clear that the Village would proceed with the "project only if it could be directly coordinated with the Village's replacement of the Watertown Plank Road bridge and with funding for the project secured from the Wisconsin Department of Transportation (WDOT)."¹²

The Village recently received notification that it has been awarded a Seventy-Five Thousand Dollar (\$75,000) *matching grant* from the Fund for Lake Michigan for needed engineering work for the project which is estimated to cost in the range of \$150,000-\$175,000. As announced at the June 25, 2015 Board of Trustees meeting, the Village is continuing to review other funding sources.

Preliminary plans that exist contemplate the shifting of the current location of the Underwood Creek within the Park & Shop mall area to its eastern edge away from the businesses predominantly located on the western side of the Park & Shop.¹³

LEGAL CONSIDERATIONS

While the Village has committed to potentially undertake the project under certain conditions, it does not have ownership control over any of the land that might be affected/impacted. The property lines are very unconventional as shown on Attachment 4.

Although the MOU states in a whereas clause that the Village will "not utilize its power of eminent domain for the purpose of a non-voluntary acquisition to accomplish the daylighting of the Underwood Creek",¹⁴ nothing in the body of the MOU specifically incorporates any of the whereas clauses or makes them an obligation of the Village under the MOU.

Thus, there are three ways that the Village can gain access to the proposed route for the establishment of an open 50-foot wide daylighted creek bed area¹⁵:

1. Unrestricted GIFT of Ownership of the needed land.
 - A. Advantages
 - Village gains ownership of an area which it can improve and modify as it deems appropriate.
 - A new space/amenity becomes available for public functions and enjoyment.
 - Village gains naming rights for the area.
 - Village fulfills obligations under the MOU.
 - Village-installed improvements will likely increase surrounding properties' taxable values.

¹² See MOU, Section 3. Currently the Village has authorized engineering design work in an amount not to exceed \$ ___?___, but no WDOT funding has been allocated for the Watertown Plank Road bridge replacement.

¹³ See Attachment 2.

¹⁴ See MOU, 12th Whereas clause.

¹⁵ See Attachment 2 which shows the 50-foot wide channel cross section.

B. Disadvantages

- Village assumes all future maintenance costs/obligations.
- Area acquired is removed from tax base.
- Village is exposed to potential liability for activities within the daylighted area.
- Village is exposed to potential liability if environmental problems remain or new ones arise.

2. Gift of a PERMANENT EASEMENT for relocation of stream bed and unrestricted access to the public for its use and enjoyment.

A. Advantages

- The arrangements agreed upon run with the land and can be very broad and comprehensive and are permanent unless modified by mutual written agreement.
- The costs of improvements associated with daylighting can be allocated among all of the benefitting parties.
- The improved area is not removed from the tax base.
- The benefitting property owners can be made responsible for future maintenance of the daylighted area not unlike their present obligations for the deteriorating enclosed culvert.
- The risk of collapse while the public drives over the enclosed culvert is eliminated.
- The owners of the enclosed culvert are able to infill the area beneath the existing parking in a manner that avoids future restorative expenses.
- The relocation of the creek to the east edge of the Park & Shop site allows the reconfiguration and maximization of the parking spaces.
- The relocation of the creek allows a redirection of traffic flow within the Park & Shop that is more efficient, safer and enhances the flow of traffic on Watertown Plank Road by fostering greater coordination and compatibility with the future redevelopment of the entire Reinders' site immediately across the street to the north.

B. Disadvantages

- The scope of the easement needs to be broad in order to accommodate all foreseeable future uses within the daylighted area.
- Often the grantee of an easement is burdened by the grantor to maintain it, although this is negotiable.

3. Comprehensive SITE DEVELOPMENT AGREEMENT coupled with COVENANTS, CONDITIONS & RESTRICTIONS allowing the relocation of stream bed and perpetual grant to public for access and enjoyment.

A. Advantages

- The arrangements agreed upon run with the land and can be very broad and comprehensive and are permanent unless modified by mutual written agreement.
- The costs of improvements associated with daylighting can be allocated among all of the benefitting parties.
- The improved area is not removed from the tax base.
- The benefitting property owners can be made responsible for future maintenance of the daylighted area not unlike their present obligations for the deteriorating enclosed culvert.
- The risk of collapse while the public drives over the enclosed culvert is eliminated.
- The owners of the enclosed culvert are able to infill the area beneath the existing parking in a manner that avoids future restorative expenses.
- The relocation of the creek to the east edge of the Park & Shop site allows the reconfiguration and maximization of the parking spaces.
- The relocation of the creek allows a redirection of traffic flow within the Park & Shop that is more efficient, safer and enhances the flow of traffic on Watertown Plank Road by fostering greater coordination and compatibility with the future redevelopment of the entire Reinders' site immediately to the north.

B. Disadvantages

- The scope of the agreement, covenants and conditions and restrictions needs to be detailed in order to accommodate all foreseeable future uses and concerns within the daylighted area.
- The cost of maintaining the property among the parties will have to be negotiated.
- Part of the area needed for the relocation and daylighting of the creek is currently occupied by a dry cleaning business whose subsoil is contaminated. The owner's attorney recently reported that test wells monitoring on the site were near completion and inquired about Village plans. While none currently exist, those listed above are possible options for the Village to consider.

Before options available to the Village can be identified in this regard, the Village first needs to obtain copy of all reports regarding the existing contamination and needs to seek from the owner copy of all proposed remediation plans and their respective costs as this will have an impact upon each of the options described.

**Memorandum of Understanding
Relating to the Modification and Naturalization of
Underwood Creek, Elm Grove, WI**

The Department of Natural Resources (Department) and the Village of Elm Grove (Village), hereinafter collectively called the "Parties", enter into this memorandum of understanding (MOU) for the purpose of implementing a systems wide approach to managing flood waters and recognizing the need to protect overall public interest in Wisconsin's waters, more specifically a portion of the Underwood Creek in downtown Elm Grove, and thus achieving permit compliance for a project relating to flood management in the Village of Elm Grove.

Whereas, the Parties have had numerous discussions pertaining to the relationship between the Village's Underwood Creek Flood Management Project and the daylighting of the enclosure of Underwood Creek in the Village's downtown, and

Whereas, the Department is reviewing the Village's Underwood Creek Flood Management Project as a systems level project, and

Whereas, the Department believes that daylighting of the enclosure is necessary to mitigate potential environmental impacts of the Village's Flood Management Project, and

Whereas, the Department is requiring, as a condition of issuing a Chapter 30 permit to the Village for flood management work along Underwood Creek, that the Village enter into a MOU with the Department regarding daylighting Underwood Creek, and

Whereas, the Department recognizes that the enclosed portion of the Underwood Creek is not owned or controlled by the Village, and

Whereas, the Parties understand that the Department considers the enclosure to be an unpermitted structure and therefore a violation of Wisconsin State Statute Chapter 30, and

Whereas, the Village understands that any work, including repairs or modifications, done to enclosure requires Department authorization, and

Whereas, the Department views the enclosure to be a detriment to public interest, an obstruction to navigation and an obstruction to flood flow capacity, and

Whereas, the Village understands that the Department intends to not permit any future repairs or modifications to the enclosure. The Department may approve temporary repairs or modifications outside of routine day to day maintenance under emergency circumstances for the purpose of maintaining public safety and business access, and

Whereas, the Village understands that it is the intention of the Department at the time of any necessary repairs or modifications to pursue removal of the enclosure, and

Whereas, the Department understands and accepts the timing, property acquisition and funding restrictions of accomplishing the removal of the enclosure and daylighting the Underwood Creek, and

Whereas, the Department has been advised that the Village will not utilize its power of eminent domain for the purpose of a non-voluntary acquisition to accomplish the daylighting of the Underwood Creek, and

Whereas, the Village does not dispute the potential of long term benefit to overall public interest in the elimination of the Underwood Creek enclosure, and

Whereas, the Village understands the necessity of cooperation with the Department in permitting the daylighting of the Underwood Creek as a public entity, and

Whereas, the Village recognizes the need to coordinate this effort as the local governmental agency, and

Whereas, the Village agrees to continue, through its best efforts, negotiating a process for daylighting Underwood Creek with the current and future landowners of the subject property, and

Whereas, the Village agrees, through its best efforts, to keep the Department informed of discussions with the subject property owner, and

Now Therefore, in an effort to achieve the goals of the Department in daylighting Underwood Creek, the protection of private and public property through the flood management project and protecting the long term economic viability of the Village's downtown area the Parties to this MOU do hereby agree as follows:

- 1. All parties shall work cooperatively in proceeding to a final design of the daylighting and relocation of Underwood Creek in the approximate configuration as detailed in Attachment A. Final stream design will depend on flow, space, water quality, fish and wildlife habitat and overall public interest. Final design of the stream shall meet applicable state permit standards. It is further understood that the profile under Attachment A provides the maximum amount of green space and vegetative buffers in this area of the Underwood Creek. Furthermore the profile limitations may be modified for the express purpose of maximization of use of the adjoining property owners.**
- 2. The Village will undertake the coordination and planning for the daylighting of the Underwood Creek. It is understood by the parties, that any such work undertaken by the Village will only be performed to the extent that funds are available. However, such project, including any land acquisitions, engineering, and construction that may be performed by the Village shall not be funded by general tax revenue from the Village.**

3. The Department shall work cooperatively with the Village to secure and provide outside sources of funds for the purpose of funding the daylighting project. The Department also understands that the Village will proceed with the project only if it can be directly coordinated with the Village's replacement of the Watertown Plank Road bridge and the secured funding for the project from the Wisconsin Department of Transportation (WDOT). The Village shall include the Department in all discussions with the WDOT which pertain to scheduling of this project.
4. The Parties will work to secure funding for the planning and engineering portion of the daylighting. Once funding is secured the Parties will work diligently toward the goal of daylighting the Underwood Creek with the Village being project coordinator. All staff time shall be considered as financial contribution toward this project for the purpose of computing financial commitment. The Parties will work to have a project plan in place no later than December 31, 2008.
5. The Parties shall work cooperatively to secure financing for the final construction portion of the project through all practical means including grants from various agencies, in kind contributions; direct monetary contributions from the parties within the parameters of the previous restrictions outlined in numbers 2 and 3 above
6. When all financial and project components are in place the Village agrees to either individually or cooperatively with the property owner be the permit applicant and cause to have performed all the necessary construction for completion of the project, in a timely manner.
7. The Village shall notify, in writing, all of the current property owners along the current enclosure and the proposed open stream bed of this MOU and provide copies of the agreement and the current plans.
8. This MOU is effective upon the date of signature by all Parties. This MOU constitutes the total agreement as it relates to this matter and may only be modified in writing upon the agreement of all Parties.
9. This MOU shall be governed by and construed in accordance with the laws of the State of Wisconsin and shall be binding on all Parties and their heirs and assigns. Signatures of officials constitute a certification that the signature has been appropriately authorized.

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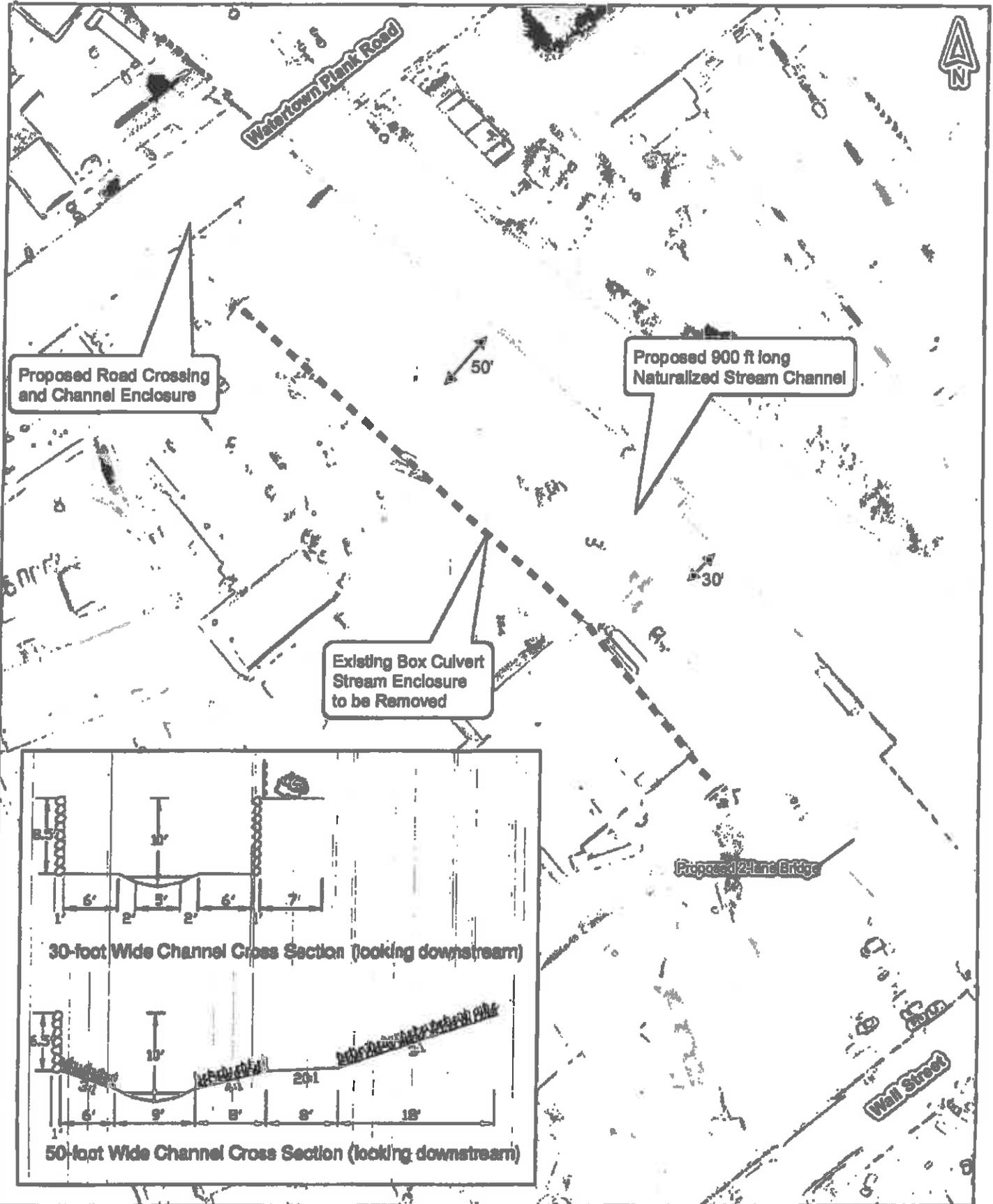
**IN WITNESS HEREOF, the Parties have caused this Memorandum of Understanding
to be signed by:**


Department of Natural Resources
Scott Haasett, Secretary

Date: 11/9/05

Village of Elm Grove
Neil H. Palmer, Village President

Date: _____

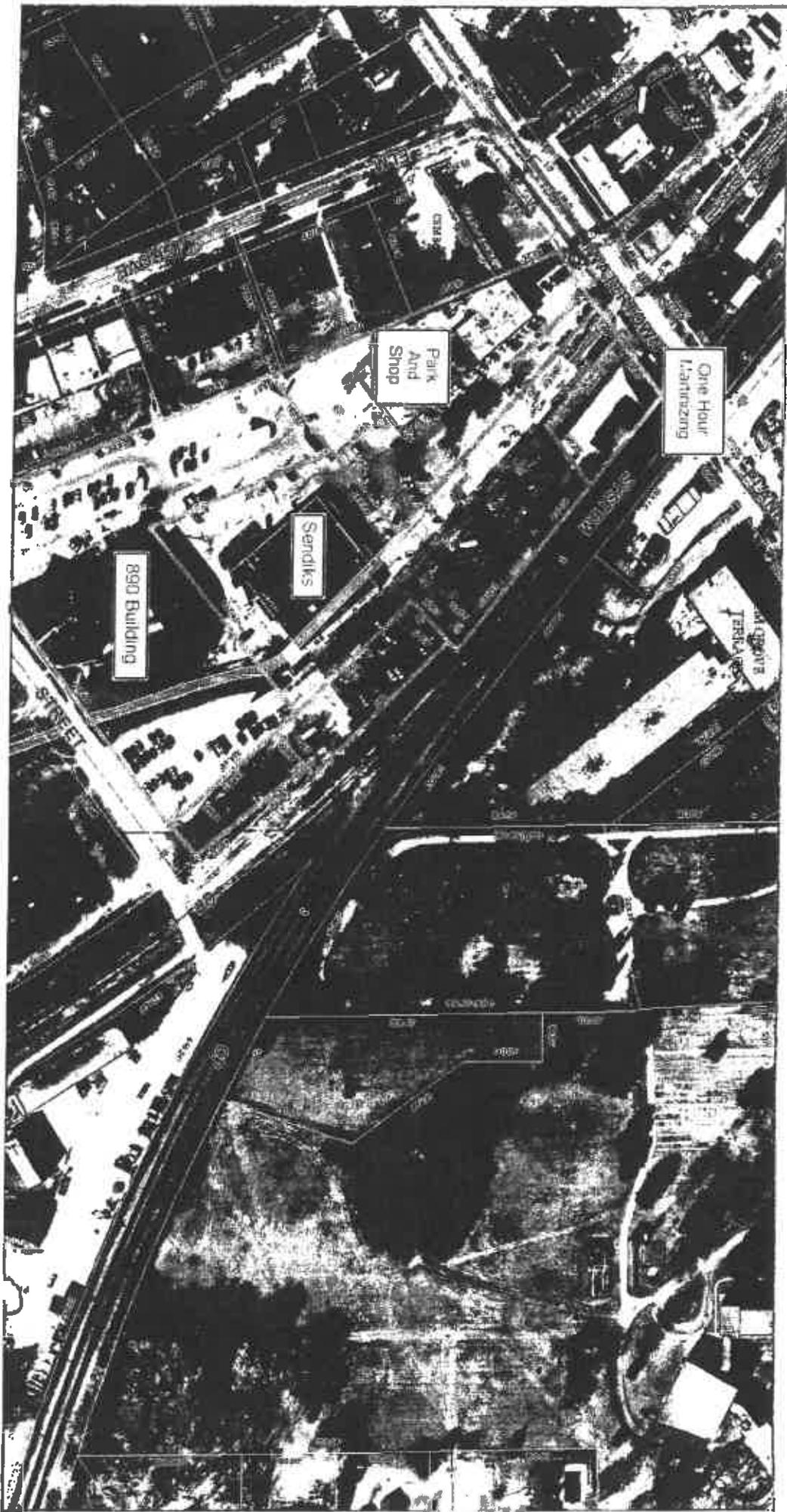


AECOM



**Proposed Underwood Creek
Naturalization and Realignment**





Attachment 4