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Via Electronic and U.S. Mail

Birmingham Water Works Board
PO Box 830269
Birmingham, AL 35283

Dear Birmingham Water Works Board:

My clients, the Cahaba Riverkeeper and Cahaba River Society, would like to meet with the Executive Committee to continue the conversation with the Birmingham Water Works Board regarding the lands that protect our drinking water. We presented to the Water Works Board on October 14, 2020. At that meeting, the board voted to discuss our issue and concerns at the Executive Committee. We have not heard from the Board about a potential date for this meeting but feel it would be useful, especially given that so many of the board members are new.

For over three years we have patiently sought to find a mutual and cooperative solution to protecting these lands. In June of 2018 and then again in May of 2019, we met with the Board and staff leadership because we are concerned that the Water Works' undeveloped lands that surround Lake Purdy, the Little Cahaba, and Cahaba River are not sufficiently protected. We wish to work with the Birmingham Water Works to create true easements that protect these lands effectively. However, as a result of the feedback we received from Board members at the October 2020 meeting, it appears that legal action may be needed in order to create these easements. Please respond to us in thirty days from the date of this letter about a potential meeting date.

As you know, this undeveloped land catches stormwater and buffers our drinking water source, protecting water quality, recharging water supply, and keeping treatment costs low. This land cleans the water for free and is crucial to keeping rates low for all residents. Because this land is not well-protected from future development, the quality and cost of the drinking water is also in jeopardy.

In a 2001 settlement agreement with the Attorney General, the Birmingham Water Works Board agreed to permanently protect the Board's land holdings in the Cahaba and Lake Purdy watershed with conservation easements.¹ In October of 2017, the Board finally established and recorded a "conservation easement agreement"; however, what it recorded were not conservation easements.² These purported easements are more akin to deed restrictions and do not fulfill the

¹ Settlement Agreement, signed by Bill Pryor, Attorney General of Alabama and Anthony Barnes, Water Works and Sewer Board, City of Birmingham, Jan. 29, 2001. (Settlement Agreement)

² Conservation Easement Agreement, AL040 Inst. No. 2017104066, Judge Alan King, Oct. 6, 2017. (Conservation Easement)

requirements of the settlement agreement, nor do they ensure protection of the watershed for the following reasons:

- 1. The restrictions do not permanently protect the land; they sunset in 30 years.**
- 2. The Board and the Attorney General can amend the deed restrictions at any time for any purpose.**
- 3. The deed restrictions are not protective to the level required by the settlement agreement.**
- 4. The Board did not record true conservation easements. In Alabama, conservation easements have to be held by a third-party and cannot be held by the Board alone.**

1. The restrictions do not permanently protect the land.

First, though the settlement agreement specified that the land was to be “permanently protected,” the recorded deed restrictions sunset in 2051.³ The Board must assign and record conservation easements providing for permanent protection of the lands in order to meet the requirements of the settlement agreement. We understand the desire for flexibility, in case one day the Cahaba and Lake Purdy are no longer needed as a drinking water source. However, the purported easements are already written to provide for that flexibility as they state that they will terminate “at such time as the Water Works Board ceases to use Lake Purdy/and or the Cahaba River as a source of water supply.” As long as this is a major drinking water source, why would the Board not want to protect these lands?

2. The Board and the Attorney General can amend the deed restrictions at any time for any purpose.

Additionally, the Board and the Attorney General can amend the deed restrictions at any time and for any reason, whether or not the amendment is consistent with the settlement’s stated conservation goal of “permanent protection” from all harmful land development activities.⁴ It is standard practice for conservation easements to contain provisions granting the holder the discretion to agree to the amendment, but only if such amendments are consistent with or further the conservation purpose of the easement.⁵ In this case, the language of the instrument allows any type of amendment to be made whether or not it is consistent with the easements’ purpose or the requirements of the settlement agreement. For instance, a future Board could amend the easements to expand what is permitted on the land or remove protections for land it wished to sell for development.

³ Conservation Easement at 5, ¶ 8.

⁴ Conservation Easement at 5, ¶ 10.

⁵ For a sample amendment provision, see, e.g., Elizabeth Byers & Karen Marchetti Ponte, *Conservation Easement Handbook* 9 (2d ed. 2005) at 377 (“Grantor and Holder have the right to agree to amendments and discretionary consents ...[however] the Holder and Grantor have no right or power to consent to any action or agree to any amendment that would [insert standards based on the purpose of the easement]...”)

3. The deed restrictions are not protective to the level required by the settlement agreement.

What is allowed under the permitted uses is less restrictive than what was required in the settlement agreement. In the settlement agreement, the Board agreed to place a conservation easement as described in paragraph 7 of the Acquisition Agreement between the Board and the City. This Acquisition Agreement then references an Exhibit J which then references an Exhibit A. Exhibit A states that the holder of the easements can construct roads and maintain bridges “to provide reasonable public access...and any other activities which may be necessary or appropriate to carry out the purpose of this easement.” The recent recorded invalid easements however, give the Water Works Board the authority to carry out any activity necessary for “the purposes of the Water Works Board.” Fulfilling the purposes of the Water Works Board is much broader and potentially more damaging than simply fulfilling the purpose of the easement. For example, at times the Water Board may see its mission as including the facilitation of development in order to increase the number of customers on the water system. This would be inconsistent with the requirement to protect the land in order to protect the water source.

4. The Board did not record true conservation easements. In Alabama, conservation easements have to be held by a third-party and cannot be held by the Board alone.

The settlement agreement required that another entity such as a land preservation organization co-hold the easement. The Water Works Board agreed to place a “conservation easement” on its land.⁶ In the settlement agreement, the Board agreed to place a conservation easement on the real estate as described in paragraph 7 of the Acquisition Agreement (Environmental Assurances for System Assets) between the Board and the City.⁷ Paragraph 7 of the Acquisition Agreement instructs the Board to enter into an agreement with a “land preservation trust such as the Alabama Forever Wild Land Trust or the Nature Conservancy of Alabama.”⁸ The Acquisition Agreement even provides example agreements with blanks for the land preservation trust that would be chosen.⁹ This makes sense, since a conservation easement under Alabama law is by definition a “nonpossessory interest” of a holder in real property. Ala. Code § 35-18-1. A “nonpossessory interest” is an interest that gives certain definite clear-cut rights that always fall short of possession of the land. Black’s Law Dictionary defines an easement as “An interest in land *owned by another person*, consisting in the right to use or control the land...” EASEMENT, Black's Law Dictionary (10th ed. 2014) (emphasis added).

⁶ Settlement Agreement at 5, ¶ 7.

⁷ Settlement Agreement at 5, ¶ 7.

⁸ Settlement Agreement at 5, ¶ 7; Acquisition Agreement by and between the Water Works and Sewer Board of the City of Birmingham and the City of Birmingham, signed by William Bell, City Council President, and Anthony Barnes, Chairman-President of the BWWB, Feb. 23, 2001 at 13 ¶ 7. (Acquisition Agreement)

⁹ Acquisition Agreement, Exhibit J.

The Board cannot be the only holder of the easements as well as the only holder of the dominant estate because this arrangement extinguishes the easement. When an owner of a dominant estate acquires title to a servient estate, the two interests merge and the servitude, the conservation easement, is extinguished. “[A] person cannot have an easement to his or her own property.” *Gonzalez v. Naman*, 678 So. 2d 1152, 1154 (Ala. Civ. App. 1996); *see also, Roberts v. Monroe*, 261 Ala. 569, 574, 75 So. 2d 492, 496 (1954) (“It is a familiar principle that if the title in fee to dominant and servient estates is vested in one individual owner, all rights are merged in the title in fee, terminating subordinate easements or rights of use.”) At some point, an adversary party could argue that the Board no longer has to protect the easements because their greater and lesser interests have merged in the same person, at the same time, with the same rights.

Under the law of most states, if the holder of a conservation easement becomes the owner of the restricted property, the right to enforce the restrictions “merges” with the rights of ownership, and the easement is automatically extinguished. The result is logical and necessary, since it would be unrealistic to expect the holder-owner to enforce restrictions against itself, and in any event, it could agree with itself to release the restrictions, as discussed above.¹⁰

The only way to ensure against merger is for the Board to create true conservation easements that are co-held by a land preservation trust. If a land preservation trust did co-hold the easements, this would not affect the Attorney General’s ability to have a third party right of enforcement.

Additionally, the Board cannot hold conservation easements because the Birmingham Water Works is not an entity allowed to hold conservation easements under Alabama law. Under the Alabama’s Uniform Conservation Easement Act, only a governmental body or a charitable corporation whose purpose is “retaining or protecting the natural, scenic, or open-space values of real property” can hold conservation easements. Ala. Code § 35-18-1. The Birmingham Water Works is neither. It is a public corporation, which is not a governmental body. Ala. Code § 11-50-231; *Limestone Cty. Water & Sewer Auth. v. City of Athens*, 896 So. 2d 531, 536 (Ala. Civ. App. 2004) (“a public corporation is an ‘instrumentality of the state’ in the sense that it is created pursuant to the laws of the State and for the public benefit, but it is ‘independent’ of the State and ‘is not an agency of the state’ because the State does not own or operate the corporation.”); *Coxe v. Water Works Bd.*, 261, So. 2d 12, 16 (Ala. 1972) (citing *Opinion of the Justices*, 49 So. 2d 175, 180 (Ala. 1950) (holding that that various public corporations, including water works boards were not subdivisions of either state, city or county)). Further, the Board is not a nonprofit whose goal is to retain or protect land; rather, its purpose is to “operating a water works plant and system.”¹¹ The purpose of preserving the open space value of real property is not one of the Board’s purposes.

¹⁰ Elizabeth Byers & Karen Marchetti Ponte, *Conservation Easement Handbook* 9 (2d ed. 2005) at 196.

¹¹ Certificate of Incorporation of the Water Works Board of the City of Birmingham, Nov. 21 1950.

Boards can change. While this Board may have no desire to sell the land for development, other boards in the past have been interested in doing so, and other boards in the future may as well. Permanent protections are needed for the land that in turn protects the region's drinking water. For instance, New York City recently bought more land surrounding the city's primary drinking water source in order to protect it.¹² As a result of this land preservation, 90% of the city's drinking water does not require treatment at a filtration plant, saving the city over \$8 billion by avoiding the need to build an additional plant.

On a smaller scale, the City of Birmingham could reap cost savings while serving the public interest if these improved easements were recorded. As drafted, the purported easements recorded by the Board violate the plain language and purpose of the 2001 settlement; they are not permanent or effective, and they provide no assurance of protection for the undeveloped buffer areas around Lake Purdy and the Cahaba River.

We ask that the Board create permanent easements as outlined above in order to keep our drinking water clean, which in turn keeps rates reasonable for residents. We look forward to meeting with you further to discuss these issues and work towards revised and improved protective easements. If a meeting is not scheduled within thirty days, we will have exhausted our options for a cooperative effort with the Board, and will be pursuing legal action. Please feel free to contact us at with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Sarah Stokes". The signature is written in black ink and is positioned above a solid black horizontal line.

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¹² Hu, Winnie, *A Billion-Dollar Investment in New York's Water*, New York Times, Jan. 18, 2018 available at <https://www.nytimes.com/2018/01/18/nyregion/new-york-city-water-filtration.html> .