

PROFESSIONAL SERVICES AGREEMENT FOR
STREAM MITIGATION CONSTRUCTION SERVICES

This Professional Services Agreement for Stream Mitigation Construction Services (“Agreement”) is entered into as of the ____ day of _____, 2016, by the City of Westfield, Indiana (“City of Westfield”) and Cardno, Inc. (“Cardno”) for professional environmental consulting and other services related to the construction and monitoring of stream mitigation on certain real property located in Hamilton County, Indiana.

RECITALS

A. CITY OF WESTFIELD is completing a transportation improvement project in Hamilton County, Indiana referred to by CITY OF WESTFIELD as “Westfield Boulevard Extension Project,” a site plan of which is attached hereto as Exhibit A (the “CITY OF WESTFIELD Site”).

B. Pursuant to a delineation performed by Cardno, approximately 280 linear feet of streams (the “Streams”) were to be impacted by the proposed development of the CITY OF WESTFIELD Site.

C. Cardno, on behalf of CITY OF WESTFIELD, submitted applications to the Indiana Department of Environmental Management (“IDEM”) for a Clean Water Act (CWA) Section 401 water quality certification and the Army Corps of Engineers (“COE”) for a CWA Section 404 permit to discharge fill into the Streams as part of the proposed development of the CITY OF WESTFIELD Site (together, the “Permits”).

D. On behalf of CITY OF WESTFIELD, Cardno submitted a Mitigation Plan (the “Plan”), attached hereto as Exhibit B, to IDEM and the COE. Pursuant to the Plan, CITY OF WESTFIELD will create on a certain parcel of land that is depicted in the survey and drawing attached hereto as Exhibit D and is located in the same eight digit watershed as the CITY OF WESTFIELD Site (the “Mitigation Parcel”), 280 linear feet of stream mitigation or enhancement within a 0.9 acre mitigation area, as mitigation for the impacts to the Streams on the CITY OF WESTFIELD Site. The required wetland mitigation described in the Plan is not a part of this Agreement.

E. Approval of the Plan was received from the COE by issuance of permit dated February 29, 2016 and from IDEM on December 31st 2015. Copies of the Permits are attached hereto as Exhibit C.

F. The Mitigation Parcel is part of a larger parcel (Cool Creek Park) that is owned by Hamilton County Parks and Recreation Department (the “Mitigation Parcel Owner”).

G. April 29, 2016, Cardno entered into a written Agreement with Mitigation Parcel Owner (the “Mitigation Parcel Agreement”), in which Mitigation Parcel Owner agreed to

encumber the Mitigation Parcel with a perpetual conservation easement (the “Conservation Easement”). A copy of the Mitigation Parcel Agreement is attached hereto as Exhibit E and a copy of the agreed upon form of Conservation Easement is attached hereto as Exhibit F.

H. Subject to and in accordance with the terms of this Agreement, Cardno proposes to construct stream mitigation consisting of 280 linear feet of stream enhancement on the Mitigation Parcel and thereafter monitor the Mitigation Parcel in accordance with the Scope of Work described in the Plan and specifications approved by IDEM and the COE and as described in Section 1 of this Agreement, to ensure that CITY OF WESTFIELD is in compliance with the Plan and the Permits, (collectively the “Mitigation Project”).

AGREEMENT

In consideration of the mutual rights and obligations of the parties under this Agreement and the payments to be made under it the receipt and sufficiency of which consideration are acknowledged by the parties, the parties agree as follows:

1. ***CONSTRUCTION AND MONITORING OF STREAM MITIGATION.*** Cardno shall perform activities on the Mitigation Parcel necessary to implement the Mitigation Project in accordance with the Plan, the Permits, Laws (defined below) and the terms of this Agreement (collectively, the “Scope of Work”), including but not limited to:

1.1 Providing necessary site investigations, surveys, title insurance, legal descriptions, layouts and other materials.

1.2 Providing site preparation, fencing installation and planting work including herbicide application, grading, trenching, and planting activities necessary to construct the stream and the buffer area contemplated by the Mitigation Project.

1.3 Providing periodic written or oral progress reports detailing the work accomplished and projected schedule to complete the work required under this Agreement.

1.4 Preparing and providing reports, including an as-built report, to IDEM and/or the COE, as necessary, regarding the status of stream and buffer area construction and/or monitoring.

1.5 Preparing a formal request for release from maintenance and monitoring after successful completion of the Mitigation Project in accordance with regulatory permits.

1.6 Providing annual post-construction maintenance and stream and buffer area mitigation compliance monitoring, and taking corrective measures necessary to ensure that the stream and buffer area on the Mitigation Parcel meet the requirements of the Plan and the Permits. Corrective measures shall include supplemental plantings as necessary. Annual maintenance and monitoring shall be performed until the Mitigation Project is deemed successful and a formal release from monitoring is granted, or six months after release from monitoring is requested from the Regulatory Agencies in the absence of response from said Regulatory Agencies.

1.7 Causing the Conservation Easement to be executed and delivered by the Mitigation Parcel Owner and recorded against the Mitigation Parcel and causing the holders of any mortgages, easements or other liens of record against the Mitigation Parcel whose rights in the Mitigation Parcel would be superior to the rights granted under the Conservation Easement to consent to and subordinate their respective interests in the Mitigation Parcel to the rights granted by the Conservation Easements. Cardno represents and warrants that, as of the date of this Agreement, Cardno has, in its possession, a draft, unrecorded Conservation Easement that otherwise satisfies the requirements of this Section 1.6. Cardno will cause that draft to be become a fully executed original Conservation Easement to be recorded against the Mitigation Parcel within thirty (30) days after the COE gives notice to record. Cardno will provide CITY OF WESTFIELD with a copy of that recorded Conservation Easement for CITY OF WESTFIELD' records.

2. **COMPLETION OF SCOPE OF WORK.** Cardno will be deemed to have satisfied its obligations under this Agreement to perform the Scope of Work at such time as Cardno has obtained a permanent and unconditional release from IDEM and the COE of monitoring and other duties and obligations under the Plan and the Permits (the "Final Plan Release") and has delivered true, correct and complete copies of the Final Plan Release to CITY OF WESTFIELD ("Project Completion"). Cardno shall give CITY OF WESTFIELD notice (as defined in Section 9.1) and a true, correct and complete copy of the Final Plan Release within 10 days after it is received by Cardno.

3. **PERFORMANCE UNDER CONSERVATION EASEMENT.**

3.1 Cardno, as Grantee of the Conservation Easement, represents, covenants and warrants that it will timely perform all of its duties and obligations under the Conservation Easement and will not violate the terms of the Conservation Easement.

3.2 Cardno represents, covenants and warrants that if Cardno, CITY OF WESTFIELD, IDEM, COE or any governmental authority with jurisdiction over the Mitigation Parcel determines that Mitigation Parcel Owner or any other person or entity, is in material violation of the terms of the Conservation Easement, then Cardno shall take any and all legal actions necessary to enforce the terms of the Conservation Easement. As used in this Section, the term "material violation" will include, without limitation, any violation of the terms of the Conservation Easement that could result in a violation of the terms and conditions of the Permits or the Plan or is otherwise in violation of Laws.

3.3 Notwithstanding anything in the Conservation Easement to the contrary, Cardno hereby assigns to CITY OF WESTFIELD, on a non-exclusive basis, all of Cardno's rights under the Conservation Easement, including without limitation the right to perform monitoring, corrective measures and other activities necessary to implement the Mitigation Project (collectively, the "Easement Rights"). CITY OF WESTFIELD will have no duty or obligation to perform any of the Easement Rights unless CITY OF WESTFIELD, in CITY OF WESTFIELD' sole and absolute discretion, elects to do so; provided, however, that if CITY OF WESTFIELD does exercise any of the Easement Rights hereunder and such exercise of the

Easement Rights is not in accordance with the terms of Section 7 hereof, then Cardno will not be liable for any loss or damage caused by CITY OF WESTFIELD or its employees, consultants, subcontractors, agents or representatives, that results from such exercise.

3.4 Notwithstanding anything in the Conservation Easement to the contrary, until such time as Project Completion has occurred, (a) Cardno will not, (i) assign, transfer or otherwise convey any of its rights or delegate any of its duties or obligations under the Conservation Easement to Hamilton County Parks and Recreation or any other entity or individual, or (ii) agree to or permit any modification or amendment of the Conservation Easement or grant any consent or approval thereunder without CITY OF WESTFIELD' prior written consent, and (b) Cardno will promptly provide CITY OF WESTFIELD with copies of any notices received under the Conservation Easement.

4. **PAYMENT FOR MITIGATION COSTS.** In consideration for Cardno's performance, and covenant and agreement to perform in the future, of all of Cardno's duties and obligations under this Agreement, CITY OF WESTFIELD agrees to pay Cardno the total amount of \$165,500.00 (the "Mitigation Cost") in three lump sum payments as follows; one-third of the total amount to be paid within thirty (30) days after the receipt by both Cardno and CITY OF WESTFIELD of a fully executed counterpart of this Agreement; one-third of the total amount to be paid within thirty (30) days after the Mitigation Project construction is complete and; one-third of the total amount to be paid after the first year of annual monitoring and maintenance is completed. The Mitigation Cost will be the only payment required of CITY OF WESTFIELD to Cardno under this Agreement in connection with Cardno's performance of its duties and obligations hereunder.

5. **STANDARD OF CARE.** Cardno agrees that its services in the Scope of Work shall be performed in accordance with Laws, in a good and workmanlike manner, consistent with the level of professionalism, care and skill exercised by professional consultants and contractors in the Indianapolis, Indiana area under similar circumstances and time periods. CITY OF WESTFIELD and Cardno acknowledge and agree that Cardno shall be an independent contractor and shall have sole responsibility for and control over the means of providing services, including responsibility for acts of any employees, consultants, subcontractors, agents or representatives of Cardno. Cardno shall have the right to use qualified and insured subcontractors to perform services customarily performed by subcontractors. Cardno shall be solely responsible for the preparation and review of all plans, specifications, drawings and designs required pursuant to this Agreement. Cardno will be solely responsible for the accuracy of all information used in the preparation of such plans, specifications, drawings and designs. To the extent information is supplied by Cardno under this Agreement, Cardno shall be liable for any loss or damage arising from any inaccuracy in such information. Cardno will, after its receipt of the Mitigation Payment, promptly commence performance of its duties and obligations under this Agreement and will diligently pursue the performance of those duties and obligations, in accordance with the requirements of this Agreement, until those duties and obligations have been completed.

6. **INSURANCE.** From the date hereof until the Project Completion, Cardno will satisfy the insurance requirements described on Exhibit G, attached hereto and made a part hereof.

7. ***EVENT OF DEFAULT/REMEDIES.***

7.1 For the purposes of this Agreement, the term “Event of Default” shall mean the failure to timely observe or comply with any provision or covenant in this Agreement, and such default is not cured to the reasonable satisfaction of the non-defaulting party within 30 days of the date Notice of such default is given. Due to the seasonality of mitigation implementation, in the event that such failure cannot reasonably be cured within the aforementioned 30 day period, then that 30 day period will be extended for a commercially reasonable period of time as long as (a) a written response is delivered by the defaulting party within that 30 day period, which response describes a plan of action to cure such failure and includes a schedule for implementation thereof, (b) that plan (and the schedule for implementation thereof) is reasonably acceptable to the non-defaulting party, and (c) the defaulting party diligently pursues the cure of such failure in accordance with the terms of the agreed upon plan. Notwithstanding anything in this Section 7 to the contrary, in no event will any cure period described above exceed the period of time permitted by applicable governmental authorities.

7.2 If an Event of Default occurs, the party not in default may seek the following remedies, which shall be cumulative and are not mutually exclusive:

7.2.1 All legal and equitable remedies available;

7.2.2 The reasonable attorneys’ fees, expenses and costs incurred in connection with an Event of Default; and

7.2.3 In the event of a default by Cardno, the right to enter upon the Mitigation Parcel to cure such default, at Cardno’s sole cost and expense.

7.3 The parties agree that it may be impossible to measure in money the damages which will accrue to a party by reason of a failure to perform any of the obligations under this Agreement. Therefore, if a party institutes any action or proceeding against the other party to specifically enforce the provisions of this agreement, the party against whom such action or proceeding is brought shall be deemed to waive the claim or defense that such party has an adequate remedy at law.

7.4 The failure to enforce a breach of this Agreement shall not be construed as a waiver of the right to enforce such breach at a later time or to enforce any other breach.

7.5 Notwithstanding anything in this Agreement to the contrary, as long as CITY OF WESTFIELD has paid the Mitigation Cost to Cardno, Cardno will have no right, under any circumstances, to terminate this Agreement for any reason.

8. ***INDEMNIFICATION.*** Cardno agrees to indemnify, defend and hold harmless CITY OF WESTFIELD and all of its officers, directors, mortgage lenders at the Mitigation Parcel, representatives, agents, employees, successors and assigns against any and all claims,

losses, penalties, forfeitures, expenses, amounts paid in settlement, judgments, (including reasonable litigation costs and attorneys' costs and fees) (collectively, "Losses"), which result from (i) any act or omission constituting negligence, willful misconduct or breach of fiduciary duty by any manager, agent, representative, subcontractor or employee of Cardno in connection with Cardno's performance under this Agreement, or (ii) any violation of the terms of the Permits, the Laws or the Conservation Easement caused by or arising out of any act or omission by Cardno or any manager, agent, representative, subcontractor or employee of Cardno, or (iii) any claims for personal injury, death property damage or mechanics' or materialmens' liens arising out of any act or omission by Cardno or any manager, agent, representative, subcontractor or employee of Cardno pursuant to this Agreement. Cardno's obligations under this Paragraph 8 specifically exclude Losses caused by the negligence or willful misconduct of CITY OF WESTFIELD or any of CITY OF WESTFIELD' officers, directors, representatives, agents and employees.

Cardno's indemnification obligations in this Agreement are not limited by any limitation on the amount or type of damages, compensation or benefits payable by or for a subcontractor or subcontractors under (a) worker's compensation acts, (b) disability benefit acts, (c) other employees benefits acts, or (d) insurance required to be carried by Cardno or any of its contractors, subcontractors, agents, representatives or assigns. Cardno expressly waives the benefits of any liability cap recognized by the State of Indiana. Cardno's failure to procure specific contractual liability and other types of insurance for the benefit of CITY OF WESTFIELD, as required under this Agreement will not render the foregoing indemnification provisions unenforceable under Laws.

CITY OF WESTFIELD agrees to indemnify, defend and hold harmless Cardno and all of its officers, directors and employees, representatives and agents against any and all Losses which result from any act or omission constituting negligence, willful misconduct or breach of fiduciary duty by any manager, agent, representative, subcontractor or employee of CITY OF WESTFIELD in connection with CITY OF WESTFIELD's performance under this Agreement unless such Losses are covered by insurance, in which event Cardno shall be indemnified only to the extent of any uninsured Losses. CITY OF WESTFIELD' obligations under this Paragraph 8 specifically exclude Losses caused by the negligence or willful misconduct of Cardno or any of Cardno's officers, directors, representatives, agents and employees.

9. ***NOTICES.***

9.1 Any notice, designation, consent, approval, offer, acceptance, statement, request, or other communication required or allowed under this Agreement (each, as "Notice") shall be in writing. Any action required under this Agreement that is a term within the definition of "Notice" also shall be in writing.

9.2 Notice to a party shall be given at the Party's address stated below or at such other address as a party may designate in a Notice to the other party:

If to CITY OF WESTFIELD:

Attn: Jeremy Lollar, Director
City of Westfield
2706 E. 171st Street
Westfield, IN 46074

with a copy to:

Phil Sundling, Engineer
City of Westfield
2706 E. 171st Street
Westfield, IN 46074

If to Cardno:

Mr. Sean Clauson, Regional Manager
Cardno, Inc.
3901 Industrial Blvd.
Indianapolis, Indiana 46254

9.3 Notice shall be deemed given when:

9.3.1 Personal service of the Notice is made on the party to be notified (but the party need not be at the address designated under Section 9.2):

9.3.2 The Notice is mailed to the party to be notified by means of certified or registered U.S. mail, return receipt requested, postage prepaid: or

9.3.3 The Notice is sent to the party to be notified by express courier such as “Federal Express”, “United Parcel Service”, or such other similar carrier guaranteeing next day delivery.

9.3.4 Refusal by a party to accept a Notice shall not affect the giving of the Notice.

10. **AUTHORITY TO SIGN.** Each person signing this Agreement in a representative capacity on behalf of a party warrants and represents to each other party that:

10.1 The person executing this Agreement has the actual authority and power to so sign, and to bind the person’s respective principal to the provisions of the Agreement; and

10.2 All corporate or other entity action necessary for the making of this Agreement has been duly taken.

11. **MISCELLANEOUS.**

11.1 Binding Agreement. This Agreement shall bind and inure to the benefit of the parties and their respective legal representatives, heirs, successors, and, subject to the limitations specifically described herein, assigns.

11.2 Invalid Provision/Severability. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions of it; and this Agreement shall be construed in all respects as if such invalid or unenforceable provision was omitted.

11.3 Assignment. This Agreement shall not be assignable by Cardno without the written consent of CITY OF WESTFIELD, which consent may be withheld by CITY OF WESTFIELD in CITY OF WESTFIELD' sole discretion. Any such attempted assignment by Cardno without first obtaining CITY OF WESTFIELD' consent shall be null and void, and of no force or effect. Notwithstanding the forgoing, in the event Cardno merges into or is acquired by another entity, this Agreement shall be assigned to the successor entity subject in each instance to the satisfaction of each of the following conditions: (a) the assignee has a tangible net worth equal to or greater than the tangible net worth of Cardno as of the date of this Agreement, as evidenced by financial statements reasonably acceptable to CITY OF WESTFIELD and provided to CITY OF WESTFIELD at least ten (10) business days prior to the date of the proposed transfer; (b) the assignee can legally perform the duties and obligations of Cardno under this Agreement in the State of Indiana, and (c) within five (5) business days after the effective date of the assignment. CITY OF WESTFIELD receives a written instrument reasonably acceptable to CITY OF WESTFIELD whereby the assignee assumes Cardno's duties and obligations under this Agreement.

Cardno acknowledges and agrees that (a) this Agreement, and the rights hereunder, will be freely assignable by CITY OF WESTFIELD, (b) CITY OF WESTFIELD may collaterally assign its rights under this Agreement to providers of financing secured by liens on the CITY OF WESTFIELD Site, (c) CITY OF WESTFIELD may assign its rights under this Agreement to successor owners of the CITY OF WESTFIELD Site, and (d) Cardno will, at CITY OF WESTFIELD' request, execute and deliver such commercially reasonable forms of acknowledgement and consent to such assignments requested by CITY OF WESTFIELD' assignees from time to time.

11.4 Amendments. No amendments, modifications, alterations, or additions to this Agreement shall be binding unless made in writing and signed by both CITY OF WESTFIELD and Cardno.

11.5 Gender. Whenever reasonably necessary, pronouns of any gender shall be deemed synonymous, as shall singular and plural pronouns.

11.6 Governing Law. This Agreement shall be governed in all respects whether as to validity, construction, capacity, performance, or otherwise by the laws of the State of Indiana.

11.7 Headings. The section headings in this Agreement are included solely for convenience, and shall in no event affect or be used in connection with the interpretation of this Agreement.

11.8 Counterparts; Facsimile and Electronic Signatures. This Agreement may be executed in several counterparts, each of which shall be deemed an original, but together the counterparts shall constitute one and the same document. Any party hereto may rely upon a facsimile or electronic copy of an executed counterpart of this Agreement and this Agreement will be enforceable against the party executing such counterpart.

11.9 Entire Agreement. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof (but not the wetlands mitigation described in the Plan which is the subject of a separate agreement between CITY OF WESTFIELD and Cardno), all prior negotiations and agreements, whether written or oral, having been merged into this Agreement. This Agreement supersedes all prior or contemporaneous communications, representations, undertakings or understandings of the parties, whether oral or written, relating to the Scope of Work and subject matter of this Agreement, except to the extent that such prior communications have explicitly been incorporated into the Agreement or one of the attached Exhibits. Should any conflict in contract interpretation exist between this Agreement and the Exhibits attached hereto, the language of the Agreement shall control.

11.10 Time of Essence. Time is of the essence in this Agreement. The parties shall have the right to treat all time deadlines contained in this Agreement as material and to terminate this Agreement or exercise such other remedies as may be provided in this Agreement in the event such time deadlines are not met.

11.11 Computation of Time. In computing a time period prescribed in this Agreement, the day of the act or event shall not be counted. All subsequent days, including intervening weekend days and holidays, shall be counted in the period. The last day of the period so computed is to be included unless it is a weekend day or a legal holiday under Indiana law, in which case the period is to be extended to the next day that is not a weekend day or legal holiday.

11.12 Recitals. All recitals set forth at the outset of this Agreement are incorporated by reference in it and are true.

11.13 Review by Counsel. Each party has had the opportunity to have this Agreement reviewed by independent counsel before signing it.

11.14 Survival of Obligations. Anything in this Agreement to the contrary notwithstanding, no revocation, termination or expiration hereof will release Cardno or CITY OF WESTFIELD from any liability or obligation (whether of indemnity or otherwise) which may have accrued prior to or at the time of such revocation, termination or expiration.

11.15 Attorneys' Fees. In the event of any litigation or judicial action in connection with this Agreement or the enforcement hereof, the substantially prevailing party or parties in any such litigation or judicial action will be entitled to recover all reasonable costs and expense of any such judicial action or litigation (including, without limitation, reasonable costs and attorneys' fees) from the other party or parties. Litigation or judicial action in connection with this Agreement shall be limited to proceedings within the courts of Hamilton County, Indiana.

11.16 No Waiver. No waiver by CITY OF WESTFIELD or Cardno of any breach of any term, covenant or condition of this Agreement shall be deemed a waiver of any subsequent breach of the same or any other covenant or condition and no covenant, term or condition of this Agreement shall be deemed waived by CITY OF WESTFIELD or Cardno unless waived in writing.

11.17 Written Assurances. Upon a written request from CITY OF WESTFIELD from time to time, Cardno will either (a) execute and deliver a "Written Assurance" (as defined below) to a prospective owner or mortgage lender regarding the Mitigation Parcel, or (b) request a Written Assurance from the Mitigation Parcel Owner under the Conservation Easement. A "**Written Assurance**" is a writing which states that, except as otherwise provided in that Written Assurance: (i) the Conservation Easement has not been amended or modified in any manner not of record with the Hamilton County, Indiana Records; (ii) there are no defaults presently existing under this Agreement or the Conservation Easement by person or entity executing and delivering the Written Assurance; and (iii) to the best knowledge of the person or entity executing and delivering the Written Assurance there are no defaults presently existing under the Conservation Easement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to have been executed and delivered as of the day and year first above written.

CITY OF WESTFIELD

By: _____
Name: _____
Title: _____

CARDNO, INC.

By: _____
Sean J. Clauson, Regional Manager

STATE OF _____)
) SS:
COUNTY OF _____)

Before me, the undersigned, a Notary Public, in and for said County and State, on this _____ day of _____, 2016 personally appeared _____, the _____ of City of Westfield and acknowledged the execution of the foregoing for and on behalf of said company.

My Commission Expires:

(Signature)

(Printed/Typed Name)

County of Residence:

Notary Public

STATE OF INDIANA)
) SS:
COUNTY OF)

Before me, the undersigned, a Notary Public, in and for said County and State, on this _____ day of _____, 2016 personally appeared Sean J. Clauson, Regional Manager of Cardno, Inc. and acknowledged the execution of the foregoing for and on behalf of said company.

My Commission Expires:

(Signature)

(Printed/Typed Name)

County of Residence:

Notary Public

EXHIBIT A
CITY OF WESTFIELD SITE PLAN

EXHIBIT B
MITIGATION PLAN

EXHIBIT C
PERMITS

EXHIBIT D
MITIGATION PARCEL

EXHIBIT E
MITIGATION PARCEL AGREEMENT

EXHIBIT F
CONSERVATION EASEMENT

EXHIBIT G
INSURANCE REQUIREMENTS