

COOPERATIVE AGREEMENT

Between City of Bloomington and Nine Mile Creek Watershed District for the Normandale Lake Water-Quality Improvement Project

This cooperative agreement is made by and between the City of Bloomington, a Minnesota municipal corporation (Bloomington), and the Nine Mile Creek Watershed District, a watershed district created pursuant to Minnesota Statutes chapters 103B and 103D (NMCWD), to achieve shared water-resource protection and improvement goals through design, construction and implementation, and maintenance of the Normandale Lake Water-Quality Improvement Project.

Recitals

WHEREAS in 2005 NMCWD completed a scientific assessment of Normandale Lake's physical, chemical, and biological condition that called for protective and remedial measures for improve water quality in the lake;

WHEREAS on July 26, 2007, the Bloomington petitioned Nine Mile Creek Watershed District to undertake a basic water management project to improve water quality in Normandale Lake (the Petition), which is wholly located within Bloomington, in accordance Minnesota Statutes section 103D.605, the goals of which were to improve water quality; to facilitate recreational uses of the lake, in part by improving the fishery; to diversify and improve the quality of vegetation in the lake; and to improve the aesthetics of Normandale Lake;

WHEREAS on October 18, 2017, after review and approval by the Board of Water and Soil Resources, an updated watershed management plan (Plan) was adopted by the NMCWD Board of Managers pursuant to Minnesota Statutes section 103B.231;

WHEREAS, the Plan articulates NMCWD's approach to collaborating with cities and others to implement the capital improvements program in the Plan under the statutory procedures and funding authority provided in Minnesota Statutes chapter 103B generally and section 103B.251 specifically;

WHEREAS, in response, in part, to strong citizen support expressed in the development of the Plan for improvement of Normandale Lake, the capital improvements program in the Plan includes a multicomponent project to improve water quality in Normandale Lake that would fulfill the intent, purposes and goals of the 2007 petition;

WHEREAS Bloomington and NMCWD agree that implementation is most effectively and efficiently undertaken as a capital project under the Plan, including drawdown of the lake and application of alum to and herbicide treatment of lake waters, followed by consideration of additional herbicide treatments, aquatic plant harvesting, aeration and other watershed projects (the Project);

WHEREAS, except for potential watershed projects in coming years, the Project will be entirely constructed and undertaken on property owned by Bloomington, as shown in Exhibit 1 (the Project Area);

WHEREAS, Bloomington and NMCWD agree that the Petition is resolved by the execution of this agreement, and neither entity has further obligations under Minnesota Statutes chapter 103D or otherwise with regard to the Petition;

WHEREAS the NMCWD Engineer and Bloomington water-resources staff concur that the Project will not adversely affect the drainage capacity of Hennepin County Ditch 1, which runs through Normandale Lake; and

WHEREAS Bloomington and NMCWD are authorized by Minnesota Statutes section 471.59 to enter into this cooperative agreement for the Project.

Agreement

NOW, THEREFORE, BLOOMINGTON AND NMCWD enter into this agreement to document their understanding as to the scope of the Project, reaffirm their commitments as to responsibility for tasks to be undertaken by the parties, dedicate the necessary rights to use property owned by Bloomington for the Project, and facilitate communication and cooperation to successfully complete the Project.

1 **Project.** The Project is defined and specified for purposes of this cooperative agreement and the parties' implementation thereof as consisting of the following elements:

1.1 ELEMENTS

- A. A **drawdown** of lake water levels in the fall and winter 2018-19, including:
 - i. Installation of a temporary water-level control structure at the inlet to Normandale Lake to maintain normal water level in Nine Mile Creek north of the lake consistent with that achieved by the existing weir outlet ;
 - ii. Use of the existing weir outlet and 18-inch outlet bypass pipe at the Project Area to drain water from the lake to expose its bed and decommissioning of the bypass pipe after installation of a replacement outlet bypass pipe;
 - iii. Installation of a new outlet bypass pipe to increase and improve capacity to drain the lake; and
 - iv. Pumping of lake water;
- B. **Herbicide treatment** of the water of the lake in spring 2019 to reduce the extent and growth of aquatic invasive plants such as curly-leaf pondweed;
 - i. Possible treatment in spring 2020;
 - ii. Possible treatment in spring 2021;
 - iii. Possible treatment in spring 2022;
 - iv. Possible treatment in spring 2023;
- C. Application of **alum** compounds to the lake in spring 2019;

D. Consideration and determination of whether to undertake additional measures, including:

- i. Mechanical aquatic plant harvesting;
- ii. Oxygenation of the lake;
- iii. Other capital projects within the watershed tributary to Normandale Lake.

(Items A through D above are referred to collectively as the Project Elements and individually as Project Element A, Project Element B, Project Element C, and Project Element D.) The Project, as defined herein and for the purposes of this agreement, specifically does not include undertaking Project Element D. The parties may agree to implement Project Element D in the future by separate agreement or amendment to this agreement. The Project will be undertaken under an adaptive management framework, wherein the parties will consider the cost, effectiveness and results of measures taken as well as evolving site conditions (including but not limited to rainfall and other weather) and optimal sequencing before commencing any and each component of the Project Elements.

1.2 **DESIGNS AND SPECIFICATIONS.** Design and preparation of all necessary construction and implementation documents (drawings, technical specifications) for each of Project Elements A through C will be completed in accordance with the NMCWD Engineer's report dated April 2018. The design for Project Element B will include but not be limited to a lake vegetation management plan.

1.3 **CONSTRUCTION AND IMPLEMENTATION.** Construction and/or implementation of each of Project Elements A through C will be undertaken by a contractor or contractors under contract to NMCWD and with construction/implementation oversight and management by the NMCWD Engineer. Construction and implementation will include advance determination of the need for and the procurement of permits and other regulatory approvals necessary for each Project Element, and compliance with all permits and other regulatory approvals, and will give due consideration to wildlife-protection measures recommended by the state Department of Natural Resources.

1.4 **MAINTENANCE.** In collaboration with Bloomington, NMCWD will develop and implement a plan for the post-construction maintenance of the Project (the Maintenance Plan). The Maintenance Plan will identify reporting to be completed and delineate protocols for monitoring the ongoing effectiveness of the Project, as well as routine maintenance and repair of the Project. The Maintenance Plan will establish that work to maintain the effectiveness of the Project falling outside the scope of what is defined as routine maintenance will be major maintenance and repair of the Project, and will articulate a process for the parties to determine how to fund and complete major maintenance and repair.

1.5 **CONSIDERATION OF ADDITIONAL WORK.** At such times and with such frequency as deemed appropriate by the parties, but for the first time no later than January 17, 2020, the parties will consider amending this agreement to provide the necessary terms and specifics for completing one or more of the measures described in paragraph 1.1D herein.

2 Cost-sharing and compliance credit

2.1 In accordance with subsection 4.3 herein, Bloomington will contribute the Project Area land-use rights needed for the Project at no out-of-pocket cost to either party.

2.2 NMCWD will pay 100 percent of the costs for design, construction and implementation and construction and implementation oversight and management for Project Elements A, B and C, and development of the Maintenance Plan, as described herein, except that Bloomington will:

- A. complete or contract for, at its sole expense, preparation of the existing 18-inch outlet bypass pipe for use in drawing down water levels in the lake;
- B. reimburse NMCWD 50 percent of the contracted costs for application of herbicide as described in paragraph 1b in accordance with subsection 4.4 herein.

2.3 Bloomington will perform or contract for the performance of routine maintenance, as defined and specified in the Maintenance Plan. The parties will work in good faith to determine cost-sharing for major maintenance and repairs of the Project.

2.4 Each party will pay its own costs of education, outreach and publicity work associated with the Project, except that the parties may separately agree to share costs of contracted goods and services for education, outreach and publicity associated with the Project.

2.5 Stormwater-management or nutrient-reduction capacity created by the Project, if any, may be utilized by Bloomington in accounting for compliance with federal and/or state regulatory obligations. Bloomington will determine, at its cost, available credit from the Project. NMCWD makes no representation or warranty as to credit that will be available from or results that will be achieved by the Project.

2.6 Each party will pay the internal and incidental costs of its participation in the Project not otherwise specified as subject to cost-sharing as specified in herein, including but not limited to costs incurred in the event NMCWD does not order the Project.

3 Specific rights & duties – NMCWD

3.1 NMCWD will timely consider ordering the Project.

3.2 NMCWD will contract with the NMCWD Engineer to prepare a design, along with plans and specifications and all other construction and implementation documentation necessary for soliciting quotes or bids, for each of Project Elements A, B and C. Notwithstanding the foregoing, NMCWD makes no warranty to Bloomington regarding the NMCWD Engineer's or another third party's performance in design, construction, implementation or construction/implementation management for the Project. The NMCWD Engineer will submit 90 percent complete designs to Bloomington for approval in accordance with paragraph 4.1 below. On approval of the designs by Bloomington, the NMCWD Engineer will prepare contract plans and specifications and other

documentation necessary for solicitation of bids or quotes under the direction of the NMCWD administrator and in accordance with applicable state procurement law.

3.3 NMCWD will contract for the construction and/or implementation of each of Project Elements A, B and C in accordance with applicable law. NMCWD will award and enter a contract or contracts for the construction and implementation of Project Elements A, B and C that will, in each case:

- A. Require the contractor to agree to indemnify, defend and hold harmless Bloomington, its officers, council members, employees and agents from any and all actions, costs, damages and liabilities of any nature arising from the contractor's negligent or otherwise wrongful act or omission, or breach of a specific contractual duty, or a subcontractor's negligent or otherwise wrongful act or omission, or breach of a specific contractual duty owed by the contractor to NMCWD. The contract will require that for any claim subject to indemnification by an employee of selected contractor or a subcontractor, the indemnification obligation is not limited by a limitation on the amount or type of damages, compensation or benefits payable by or for the contractor or a subcontractor under workers' compensation acts, disability acts or other employee benefit acts.
- B. Require that the contractor name Bloomington an additional insured with primary coverage for general liability on a noncontributory basis for both ongoing work and completed operations to the extent of NMCWD's statutory liability limit, and for pollution liability as applicable to each Project Element.
- C. Extend all product warranties and workmanship guaranties to Bloomington.

3.4 As between the parties and with the assistance and cooperation of Bloomington, NMCWD will obtain all permits, licenses and other necessary approvals for itself and on behalf of Bloomington from entities with regulatory authority, as determined by NMCWD, except that Bloomington will obtain United States Army Corps of Engineers' approval for Project Element B. NMCWD will ensure that Project Elements A, B and C are completed in accordance with applicable law and regulatory standards and criteria, and that due consideration is given to wildlife-protection measures recommended by the state Department of Natural Resources. NMCWD may place signage in the Project Area to facilitate protection of wildlife and such signage may refer the public to contact Bloomington Animal Control for assistance with wildlife-related concerns.

3.5 NMCWD, or the NMCWD Engineer on NMCWD's behalf, will oversee the construction and implementation of Project Elements A, B and C, as well as preparation of the Maintenance Plan. NMCWD may adjust the plans and specifications during construction or implementation of a Project Element with notice to Bloomington, as long as the revised plans or specifications do not require NMCWD to exceed the scope of the rights granted under this agreement or create maintenance obligations not anticipated hereunder. Until commencement of construction and/or implementation of a Project Element, if NMCWD, in its judgment, should decide that the Project Element is infeasible, NMCWD, at its option, may cancel construction or implementation of the

Project Element. If NMCWD so declares before commencement of construction and implementation of Project Element A, all obligations herein, performed or not, will be voided.

3.6 On completion of Project work that causes collateral disturbance of Bloomington property, NMCWD or its contractor will restore Bloomington property accessed and improved as provided in subsection 4.2 of this agreement and for purposes of the Project to a condition materially equivalent to pre-existing conditions, except to the extent that such property is improved through construction of the Project. Within 90 days of certification of all constructed components of Project Element A as substantially complete for the intended purposes, NMCWD will provide as-built construction drawings of constructed components to Bloomington.

4 Specific rights & duties – Bloomington

4.1 On submission by NMCWD of the 90 percent design for each Project Element, Bloomington will have 15 days to review and approve, except for Project Element A, for which Bloomington will have seven days to review and approve the design. Failure to timely act will constitute approval. Bloomington's right to review and approve designs will not be unreasonably exercised.

A. In the case of Project Element B, Bloomington will timely obtain regulatory approval from the United States Army Corps of Engineers, as applicable, and Bloomington and NMCWD will coordinate the review and assessment of the results of each year's application of herbicide to the lake and jointly determine each year whether to undertake applications of herbicide in 2020, 2021, 2022 and 2023.

4.2 Bloomington will cooperate with NMCWD's efforts to obtain permits and approvals needed for the Project and act to facilitate proper and efficient processing of applications for approvals for the Project, including but not limited to executing, as property owner, documentation necessary to obtain state regulatory approval for application of herbicide to the lake.

4.3 LAND-USE RIGHTS.

A. Bloomington hereby grants to NMCWD, its contractors, agents and assigns a nonexclusive license to access and use the Bloomington-owned properties shown and labeled in Exhibit 1, and adjacent city streets for purposes of accessing and using the Project Area for purposes of and the duration necessary for construction and implementation of Project Elements A, B and C, and otherwise as necessary to fulfill NMCWD's obligations and exercise its rights under this agreement. NMCWD, on reasonable notice to and with the assistance of Bloomington, may temporarily restrict or preclude public access to the Project Area or portions thereof to ensure safety while construction or implementation activities are under way.

- B. Bloomington will forbear from any activity that unreasonably interferes with NMCWD's ability to exercise its rights or meet its obligations under this agreement, including the transfer of ownership of any Bloomington-owned property within the Project Area. Subject to its interest in preserving public safety, Bloomington will facilitate NMCWD's reasonable exercise of its rights under this agreement with regard to access to and use of the Bloomington-owned property shown in Exhibit 1, including but not limited to the right to place signage within the Project Area to facilitate effective implementation of the Project. Bloomington will not take any action within or adjacent to the Project Area that could reasonably be expected to diminish the effectiveness or function of the Project for the purposes intended.
- C. On completion of construction of the Project, Bloomington will retain ownership of constructed components of the Project, and will retain responsibility for the functional and operational condition of such components independent of any relevant assignment of responsibilities in the Maintenance Plan.

4.4 Bloomington will reimburse NMCWD in accordance with subsection 2.2B of this agreement for its portion of contracted expenditures for application of herbicide to the lake as described in paragraph 1.1B.

4.5 Bloomington will work in collaboration with NMCWD to develop the draft Maintenance Plan and will comment on and approve the final draft Maintenance Plan within 45 days of receipt of the final draft, such approval not to be unreasonably withheld. Failure by Bloomington to timely act on its rights and obligations under this paragraph will constitute approval of the Maintenance Plan. On approval of the Maintenance Plan, Bloomington will perform routine maintenance and monitoring of the Project, in accordance with specifics the Maintenance Plan. Bloomington will notify NMCWD of any need for major repair or maintenance of the Project, and the parties in good faith will develop a collaborative approach to designing and implementing major repairs or maintenance.

5 General Terms

5.1 Terms

- A. "Lake" as used in this agreement refers unless specifically stated otherwise to Normandale Lake, City of Bloomington, Hennepin County, Minnesota.
- B. "NMCWD Engineer" is the Nine Mile Creek Watershed District consulting engineer, currently Barr Engineering Co.

5.2 INDEPENDENT RELATIONSHIP; LIABILITY. This agreement does not create a joint powers board or organization within the meaning of Minnesota Statutes § 471.59, and neither party agrees to be responsible for the acts or omissions of the other. Only contractual remedies are available for the failure of a party to fulfill the terms of this

Agreement. Bloomington and NMCWD enter this agreement solely for the purposes of improving the ecological health and condition of Normandale Lake in Bloomington. Accordingly, with respect to any and all activity undertaken pursuant to this agreement, Bloomington and NMCWD each agree to hold the other harmless, and defend and indemnify the other, its officers, employees and agents for all claims, damages, liabilities, losses and expenses asserted against the other party at any time by any third party, including any governmental body. Notwithstanding the foregoing or any other provision of this agreement, Bloomington's and NMCWD's obligations under this paragraph will survive the termination of the agreement.

This agreement creates no right in and waives no immunity, defense or liability limitation with respect to any third party. As between the parties, only contract remedies are available for a breach of this agreement. Notwithstanding the foregoing, NMCWD will not be deemed to have acquired by entry into or performance under this agreement, any form of interest or ownership in or to any portion of the land that is the site of the construction of the Project or adjacent property. NMCWD will not by entry into or performance under this agreement be deemed to have exercised any form of control over the use, operation or management of any portion of the Project Area or adjacent property so as to render NMCWD a potentially responsible party for any contamination under state and/or federal law, except that NMCWD will be liable to the degree such contamination is caused or exacerbated by NMCWD.

5.3 PUBLICITY AND ENDORSEMENT. Any publicity regarding the Project must identify Bloomington and NMCWD as the sponsoring entities. For purposes of this provision, publicity includes notices, informational pamphlets, press releases, research, reports, signs, and similar public notices prepared by or for Bloomington or NMCWD individually or jointly with others, or any subcontractors, with respect to the Project. NMCWD and Bloomington will collaborate on the development of educational, outreach and informational signage pertinent to the Project, and each party, at its cost, may develop, produce and, after approval of the other party, distribute educational, outreach and publicity materials related to the Project.

5.4 DATA MANAGEMENT. All designs, written materials, technical data, research or any other work-in-progress will be shared between the parties to this Agreement on request, except as prohibited by law. As soon as is practicable, the party preparing plans, specifications, contractual documents, materials for public communication or education will provide them to the other party for recordkeeping and other necessary purposes.

5.5 DATA PRACTICES. All data created, collected, received, maintained or disseminated for any purpose in the course of this agreement is governed by the Data Practices Act, Minnesota Statutes chapter 13, any other applicable state statute, or any state rules adopted to implement relevant state law, as well as federal regulations on data privacy.

5.6 ENTIRE AGREEMENT. This agreement, as it may be amended in writing, contains the complete and entire agreement between the parties relating to the subject matter hereof, and supersedes all prior negotiations, agreements, representations and understandings, if

any, between the parties respecting such matters. The recitals stated at the outset are incorporated into and a part of the agreement.

5.7 WAIVERS. The waiver by Bloomington or NMCWD of any breach or failure to comply with any provision of this agreement by the other party will not be construed as nor will it constitute a continuing waiver of such provision or a waiver of any other breach of or failure to comply with any other provision of this agreement.

5.8 NOTICES. Any notice, demand or communication under this agreement by either party to the other will be deemed to be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid to:

Bloomington
Water Resources Specialist (Steve Gurney)
1700 West 98th St.
Bloomington, MN 55431
sgurney@BloomingtonMN.gov
952-563-4606

NMCWD
Program Manager (Erica Sniegowski)
12800 Gerard Drive
Eden Prairie, MN 55346
esniegowski@ninemilecreek.org
952-358-2276

5.9 TERM; TERMINATION. This agreement is effective on execution by both parties and will terminate five years from the date of execution of the latest amendment hereto or on the written agreement of both parties.

IN WITNESS WHEREOF, the parties have caused the agreement to be duly executed intending to be bounded thereby.

CITY OF BLOOMINGTON

NINE MILE CREEK WATERSHED DISTRICT

Gene Winstead, Mayor

Steven Kloiber, President

Date: _____

Date: _____

Approved as to form & execution:

James D. Verbrugge, City Manager

Date: _____







District counsel

Reviewed and approved by the City Attorney.

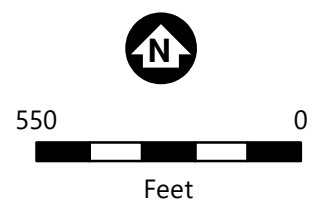
City attorney

EXHIBIT 1
Project Area



-  Nine Mile Creek
-  Normandale Lake (Project Area)
-  Park Boundary
-  Parcel Boundary¹
-  City of Bloomington Parcel¹
-  Riparian Property Owner¹

¹Parcel Information dated 5/1/2017.



Imagery Source: NearMap, 10/19/2017

RIPARIAN PROPERTY OWNERS
 Normandale Lake Engineer's Report
 Bloomington, Minnesota

Exhibit 1