



Nine Mile Creek Discovery Point
12800 Gerard Drive

Eden Prairie, MN 55346

(952) 835-2078

www.ninemilecreek.org

MEMO

TO: Nine Mile Creek Watershed District Board of Managers
FROM: Randy Anhorn
DATE: February 4, 2020
RE: Agreement with the City of Edina for Braemar SW Volume Retention Project

Background

As discussed at previous Board meetings, staff has been working with the City of Edina to partner on a city project at the Braemar cold storage site to pay for excess stormwater volume retention that goes above and beyond that required as part of NMCWD permit 2019-143.

To meet District stormwater management requirements, the city will be constructing an underground stormwater management system that will be enlarged to treat the whole site as opposed to just the area required by the permit.

The District has an opportunity to partner in the project to use stormwater facility funds to reimburse the City for the volume of stormwater retention that exceed compliance.

Request

Approve the draft agreement as present and Authorize the Administrator, on advice of counsel, to enter into an agreement with the City of Edina to use stormwater facility funds to reimburse the cost of construction of facilities providing stormwater volume management above that required to comply with NMCWD permit 2019-143. The authority delegated extends to the exercise of discretion, with advice of counsel, to determine whether any changes requested by the city amount to a substantive change in terms or raise a new policy consideration, such as would require review by the board of managers.

**AGREEMENT BETWEEN
THE CITY OF EDINA AND
NINE MILE CREEK WATERSHED DISTRICT**

Braemar Volume-Retention Project, Edina

This agreement is made by and between the City of Edina (Edina), a Minnesota municipal corporation, and the Nine Mile Creek Watershed District (NMCWD), a special purpose unit of local government with powers set forth in Minnesota Statutes chapters 103B and 103D, to achieve mutual stormwater-management goals through design, construction and operation of underground stormwater-infiltration capacity as part a reconstruction project to be undertaken by Edina.

Recitals and Statement of Purpose

WHEREAS Edina has constructed, owns and operates a public-works facility on property it owns in fee at 7600 Braemar Boulevard in Edina, Hennepin County, Minnesota (the Property);

WHEREAS in 2016 Edina applied for and received permit 2016-72 from NMCWD, providing for compliance with NMCWD regulatory requirements applicable to Edina's construction of a storage facility on the Property, and Edina completed the work that was the subject of permit 2016-72 in accordance with the terms thereof;

WHEREAS as part of its compliance efforts under permit 2016-72, Edina constructed three swales to provide stormwater management, and the swales provided 2,352 cubic feet of stormwater-volume retention;

WHEREAS in 2019, Edina advised NMCWD that it wished to reconstruct the impervious area of the Property in a manner that would require elimination of the three swales, and for purposes of meeting NMCWD stormwater-management regulatory requirements for the reconstruction of the Property, Edina proposed to construct a new underground treatment system (the Underground Facility);

WHEREAS on December 16, 2019, NMCWD approved permit 2019-143 for the reconstruction of the Property, in part based on the NMCWD engineer's determination that Edina needed to provide 2,500 cubic feet of stormwater volume retention to meet the applicable NMCWD requirement, and that the design of the Underground Facility, as submitted for purposes of the 2019-143 application, can be modified to provide not only the required stormwater-retention volume, but as estimated excess treatment volume of 432 cubic yards;

WHEREAS in 2008 and in accordance with duly adopted NMCWD Rule 4.0 – Stormwater Management, the NMCWD Board of Managers adopted Resolution 2008-04, establishing the NMCWD Stormwater Facilities Fund, which allows applicants for permits for projects on properties where stormwater infiltration is either technically infeasible or contrary to NMCWD water-protection goals (or both) to meet regulatory requirements by providing funds for construction of volume-retention facilities elsewhere in the watershed;

WHEREAS NMCWD has sufficient funds in the SFF to support Edina's design and construction of more stormwater-retention capacity for the 2019-143 reconstruction project (the Reconstruction) than is required by the permit.

NOW, THEREFORE, NMCWD commits to reimburse Edina in accordance with the terms and on satisfaction of the conditions of this agreement.

1. Scope of Work

Edina will construct the Underground Facility in accordance with the plans and specifications attached to and incorporated into this agreement as Exhibit A. Edina is responsible for obtaining all required permits and approvals, and for complying with all laws, including laws requiring location of buried utilities prior to land disturbance. Edina may adjust the plans or design for the Underground Facility during construction based on field conditions or other adaptive design considerations as in its judgment will more effectively achieve the Reconstruction purposes.

On substantial completion of the Reconstruction, Edina will submit to NMCWD a description of any changes made to the Underground Facility during construction and any changes to the Reconstruction made during the construction, with specificity as to any change in the amount of impervious surface constructed or reconstructed from the amounts shown and stated in plans submitted for purposes of Edina's application for permit 2019-143, along with as-built drawings of the Underground Facility. Edina must retain a copy of the site plan, design, specifications and other records concerning the Underground Facility for six years from the date Edina completes the Reconstruction. NMCWD may examine, audit or copy any such records on reasonable notice to Edina.

2. Contractor

Edina will select a contractor or contractors for the Underground Facility or construct the Underground Facility itself, and will ensure construction of the Underground Facility in accordance with Exhibit A. In contracting for construction of the Underground Facility, Edina will ensure that no person is excluded from full employment rights or participation in or benefits of any program, service, or activity on the grounds of race, color, creed, religion, age, sex, disability, marital status, sexual orientation, public-assistance status or national origin, and that no person protected by applicable federal or state laws, rules or regulations against discrimination is subject to discrimination.

3. Reimbursement

On substantial completion of the Reconstruction and approval by NMCWD of the documentation required under paragraph 1 herein, NMCWD will reimburse Edina \$11 per cubic yard or, on a pro rata basis, portion thereof of stormwater-retention capacity constructed in excess of capacity required to comply with permit 2019-143 and NMCWD Rule 2.0 – Stormwater Management. Determination of the amount of excess volume capacity will be determined by the NMCWD engineer. NMCWD may withhold any reimbursement due under the terms of this section 3 until NMCWD has confirmed the functionality of the Underground Facility. In addition; if construction of the Underground Facility is not completed within one year of the date this agreement is fully executed, subject to delays outside of Edina's control, NMCWD will not be obligated to provide reimbursement under this agreement and may declare this agreement rescinded and no longer of effect. Notwithstanding, the parties will consult before NMCWD makes a decision to deny reimbursement or rescind the agreement.

4. Right of Access

Edina will permit NMCWD representatives to enter the Property at reasonable times to inspect the work, ensure compliance with this agreement and assess the construction or performance of the Reconstruction and compliance with the terms of this agreement. If NMCWD finds that an obligation under this agreement is not being met, it will provide 30 days' written notice and opportunity to cure, and thereafter may declare this agreement void.

5. Maintenance

Edina will maintain the Underground Facility in perpetuity in accordance with the maintenance requirements applicable the Reconstruction under permit 2019-143. If Edina fails to maintain the Underground Facility, NMCWD will have a right of reimbursement of all amounts paid to Edina, unless NMCWD determines that the failure to maintain the Underground Facility was caused by reasons beyond Edina's control. If Edina conveys into private ownership a fee interest in all or any portion of the Property that is the location of the Project, Edina must require as a condition of sale, and enforce: (a) that the purchaser record a declaration on the property incorporating the maintenance requirements of this agreement; and (b) that recordation occur either before any encumbrance is recorded on the property or, if after, only as accompanied by a subordination and consent executed by the encumbrance holder ensuring that the declaration will run with the land in perpetuity. If Edina conveys into public ownership a fee interest in all or any portion of the Property, it must require as a condition of the purchase and sale agreement that the purchaser accept an assignment of all applicable obligations vested under this agreement.

6. Independent Relationship

NMCWD's role under this agreement is solely to provide funds to support the performance of voluntary work by Edina that furthers the purposes of NMCWD. Edina acts independently and selects the means, method and manner of constructing the Reconstruction and Underground Facility. Edina is not the agent, representative, employee or contractor of NMCWD. Any right to review or approve a design, work in progress or a constructed facility provided by the agreement to NMCWD is solely for NMCWD's purpose of accounting for NMCWD funds expended. This agreement is not a joint powers agreement under Minnesota Statutes section 471.59, and neither party agrees to be responsible for the acts or omissions of the other pursuant to subdivision 1(a) of the statute. Edina acts independently and selects the means, method and manner of constructing the Reconstruction and Underground Facility. Each party agrees that it will be responsible only for its own acts and the results thereof to the extent authorized by the law and will not be responsible for the acts or omissions of the other party or the results thereof.

7. Effective Date; Termination; Survival of Obligations

This agreement is effective when fully executed by the parties and expires three years thereafter. All obligations that have come into being before termination, specifically including obligations under paragraphs 3, 4 and 9, will survive expiration.

8. Subcontract and Assignment

Edina will not assign, subcontract or transfer any obligation, right or interest in this agreement without the written consent of NMCWD. Written consent to any subcontract will not relieve Edina of responsibility to perform under this agreement.

9. Indemnification

Edina will hold NMCWD, its officers, board members, employees and agents harmless, and will defend and indemnify NMCWD, with respect to any and all actions, costs, damages and liabilities of any nature arising from: (a) Edina's negligent or otherwise wrongful act or omission, or breach of a specific contractual duty; or (b) a subcontractor's negligent or otherwise wrongful act or omission, or breach of a specific contractual duty owed by Edina to NMCWD. No action or inaction of NMCWD or Edina under this agreement creates a duty of care on the part of NMCWD or Edina for the benefit of any third party.

10. Remedies; Immunities

Only contractual remedies are available for a party's failure to fulfill the terms of this agreement. Notwithstanding any other term of this agreement, NMCWD and Edina waive no immunities in tort. No action or inaction of a party under this agreement creates a duty of care for the benefit of any third party and this agreement creates no right in and waives no immunity, defense or liability limitation with respect to any third party.

11. Data management; data practices. 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. All data created, collected, received, maintained or disseminated for any purpose in the course of this agreement are governed by the Minnesota Data Practices Act, Minnesota Statutes chapter 13, and any state rules adopted to implement the act, as well as federal regulations on data privacy.

12. Notices. Any written communication required under this agreement shall be addressed to the other party as follows:

Edina
XXXXX
XXX
XXXX, MN
PHONE

NMCWD
Administrator
12800 Gerard Drive
Eden Prairie, MN 55346
952-835-2078

13. Venue and Jurisdiction. The agreement will be construed under and governed by the laws of the State of Minnesota. The appropriate venue and jurisdiction for any legal action hereunder will be Hennepin County, Minnesota.

Intending to be bound, the parties hereto execute and deliver this agreement.

City of Edina

MAYOR

By: _____

Title: _____

Date: _____

City of Edina Manager

By: _____

Title: _____

Date: _____

Approved as to form & execution:

Edina attorney

Nine Mile Creek Watershed District

By: _____

Title: _____

Date: _____

Approved as to form & execution:

NMCWD attorney

Exhibit A
Site Plans and Design – Braemar Salt Storage Facility

DRAFT