

**Cooperative Agreement Between
City of Edina and
Nine Mile Creek Watershed District for the
ROSLAND PARK CLEAN WATER PROJECT**

This cooperative agreement is made by and between the City of Edina (Edina), a Minnesota municipal corporation, and Nine Mile Creek Watershed District (NMCWD), a watershed district with purposes and powers set forth in Minnesota Statutes chapters 103B and 103D, to achieve shared goals for improving water quality in Lake Cornelia and Lake Edina through design, construction and operation and maintenance of the Rosland Park Clean Water Project.

RECITALS

Whereas NMCWD has authority under chapters 103B and 103D to design and implement projects to improve water quality and protect water resources within the Nine Mile Creek watershed;

Whereas Edina owns and operates Rosland Park, a recreational and natural area that borders Lake Cornelia and is upstream of Lake Edina, both of which have been listed by the Minnesota Pollution Control Agency as “impaired” for the designated use of aquatic recreation due to excess nutrients (phosphorus);

Whereas Edina and NMCWD executed a memorandum of understanding on September 17, 2019, memorializing the parties’ commitment to collaborating on development and implementation of water-resource protection and improvement projects in that portion of the city within the Nine Mile Creek watershed;

Whereas NMCWD has completed and approved an update to the use-attainability analysis for Lake Cornelia and a use-attainability analysis for Lake Edina, which supported NMCWD’s application of alum compounds to reduce phosphorus levels in Lake Cornelia in spring 2020, and Edina also has undertaken efforts to improve water quality in the lake by managing curly-leaf pondweed, a significant source of phosphorus;

Whereas NMCWD has an approved water-resources management plan pursuant to Minnesota Statutes chapter 103B, and in fulfillment of a goal of the plan, NMCWD completed in June 2020 – with the benefit of input and guidance from Edina engineering, public works and parks staff – a study of the feasibility of various additional options for improving water quality in Lake Edina and Lake Cornelia, and the study recommended design, construction, and operation and maintenance of an above-ground three-chambered filtration system in Rosland Park, drawing water from Swimming Pool Pond, which is also in Rosland Park and owned by Edina, and discharging to Lake Cornelia (the Project) at a cost of approximately \$744,000, and the NMCWD engineer estimates that the Project would reduce phosphorus loading to the lakes by an average of approximately 22 pounds each year;

Whereas the NMCWD Board of Managers, pursuant to Minnesota Statutes section 103B.251, subdivisions 3 and 4, duly noticed and conducted a public hearing on July 15, 2020, on the Project, to provide all interested parties with an opportunity to comment on the Project, and no comments were provided;

Whereas NMCWD is pursuing grant funding for the Project;

Whereas on August 19, 2020, the NMCWD Board of Managers ordered, in accordance with Minnesota Statutes section 103B.251, the construction of the Project, and designated that NMCWD's portion of the costs of the Project should be secured through a levy on property within the Nine Mile Creek watershed pursuant to Minnesota Statutes section 103B.241;

Whereas in conjunction with and simultaneously with the construction of the Project, NMCWD will complete analysis of rough fish management in Lake Cornelia and upstream lakes Nancy and Otto, as well as internal phosphorus loading in upstream Lake Nancy and Lake Otto, and will develop for NMCWD board consideration options for fisheries management in Lake Cornelia and the upstream lakes and reduction of internal loading in the upstream lakes, as well as other water-quality improvement practices in the Lake Edina watershed; and

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

Now, therefore, in consideration of the foregoing recitals, which are incorporated into and made a part of this agreement, and other good and valuable consideration, Edina and NMCWD enter into this cooperative agreement to document their understanding as to the scope of the Project, affirm their commitments as to responsibility for tasks to be undertaken, grant and assign the property rights necessary, establish procedures for performing these tasks and fulfilling responsibilities, and facilitate communication and cooperation to ensure successful completion of the Project to improve water quality in Lake Cornelia and Lake Edina.

AGREEMENT

1. **DEVELOPMENT AND IMPLEMENTATION OF THE PROJECT** – construction, operation and maintenance of a filtration system in Rosland Park
 - A. *Project design and specification.* NMCWD will contract with the NMCWD engineer, Barr Engineering, for the preparation of a design, plans and specifications for acquisition and installation of the necessary material for and construction of the filtration system and related monitoring equipment in Rosland Park, and the contract will require the NMCWD engineer, in consultation with Edina staff, to assess options to minimize the potential for the Project to affect water levels in Lake Otto and the assessment will inform the 90 percent complete plans and specifications, which NMCWD will provide to Edina for review and approval in accordance with paragraph 2A of this agreement. The

plans and specifications will serve as the primary technical specifications in the contract documents prepared in accordance with this subsection 1A for purposes of solicitation of bids for acquisition and installation of materials necessary for and construction of the Project. The design, plans and specifications will provide for:

- i. Mobilization and site preparation;
- ii. Delineation of definitive geographic and temporal limitations on the nature and extent of clearing and grubbing and other land-disturbing activities in Rosland Park;
- iii. Specification, acquisition and installation of the piping, control valves, utilities, pump and related infrastructure, and filtration media necessary to draw and filter water from Swimming Pool Pond and discharge treated water into the existing storm sewer system between Swimming Pool Pond and Lake Cornelia, as well as the vault structure containing the treatment media and associated infrastructure (altogether referred to herein as “the Filtration System”), and all devices and equipment necessary to allow NMCWD and Edina to monitor performance of the Filtration System;
- iv. Restoration of Rosland Park, including seeding/planting and establishment of turf, replacement of pavement and other steps as necessary to ensure continued compatibility and functionality in keeping with the continued use of Rosland Park for its intended and customary purposes.

The designs, plans and specifications also will include an exhibit delineating the access, construction and maintenance areas in Rosland Park for purposes of Edina’s grant of property-use rights for the Project as provided in paragraph 2B. The design, plans and specifications will include the design of the Filtration System, including the exterior of and landscaping around the vault structure, but will not include art, park signage, lighting or other accessory elements. The design, plans and specifications, when approved pursuant to paragraph 2A herein, define and are referred to herein as the Contracted Work, and are, on approval, incorporated into and become a term of this agreement. The Contracted Work is a part of and entirely incorporated into the Project.

- B. *Implementation of the Contracted Work.* On Edina’s approval of the design, plans and specifications as provided in paragraph 2A herein, NMCWD will contract, in accordance with applicable public procurement law, for the conduct of the Contracted Work.
 - i. NMCWD will require in contracting for the Contracted Work that:
 - a. The contractor restrict all of its activities to the portions of Rosland Park designated for access and construction by Edina in accordance with subsection 1A and paragraph 2B herein.

- b. The contractor name Edina as an additional insured for general liability with primary and noncontributory coverage for general liability and provide a certificate showing same prior to start of construction.
 - c. The contractor indemnify, defend and hold harmless Edina, its officers, 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.
 - d. The contractor and any manufacturers extend all warranties under the agreement to Edina.
 - e. The contractor determine and obtain all permits and other regulatory approvals applicable to the Contracted Work on behalf of NMCWD and Edina, except as may be specified in the contract documents as the responsibility of NMCWD, in collaboration with Edina.
 - f. The contractor timely provide NMCWD with certification of the Contracted Work as substantially complete for the intended purposes.
- ii. Either NMCWD or the NMCWD engineer on NMCWD's behalf will provide construction oversight for and otherwise oversee implementation of the Contracted Work. NMCWD may adjust the plans and specifications for the Contracted Work during implementation, as long as the revisions:
- a. Do not require NMCWD to exceed the scope of the rights granted to it under this agreement;
 - b. are made in consultation with Edina to ensure compatibility of the Contracted Work with Edina's continued use and operation of Rosland Park for its customary public recreational purposes; and
 - c. do not expand Edina's operations and maintenance responsibilities or its costs to fulfill same under this agreement;
- unless Edina approves any such changes in writing.
- iii. NMCWD will timely engage and consult Edina on material changes to the plans and specifications for the Contracted Work, if any.
- iv. Until substantial completion of the Contracted Work for the purposes intended, if NMCWD, in its judgment, should decide that the Project is infeasible, NMCWD, at its option, may declare the agreement rescinded

and annulled. If NMCWD so declares, all obligations herein, performed or not, will be voided and, if land-disturbing activities for the Project have commenced, NMCWD will return the Property materially to its prior condition or to a condition agreed to in writing by Edina and NMCWD.

- v. NMCWD will notify Edina within five business days of receipt of a certification of substantial completion from the contractor contracted to implement the Contracted Work.

C. *Operation and maintenance planning and implementation.* The Project includes and the parties will collaborate on the operation and maintenance of the Filtration System and associated monitoring equipment in accordance with the following:

- i. NMCWD will contract with the NMCWD engineer for the development, in collaboration with Edina, of specific written procedures and protocols for operation and maintenance and monitoring the performance of the Filtration System (the O&M Plan). The O&M Plan will provide, at a minimum, for:
 - a. Specification of routine operation and maintenance of the Filtration System, including electrical requirements, operation of the pump, operation of a skimmer and ongoing maintenance – but not replacement – of the treatment media in the Filtration System to maintain designed functionality;
 - b. Performance tracking and reporting of volumes treated by the Filtration System.

NMCWD, or the NMCWD engineer on NMCWD's behalf, will submit the final draft O&M Plan for Edina's review and approval in accordance with paragraph 2D herein.

- ii. Edina will complete or contract for the routine operation and maintenance of the Project in accordance with the O&M Plan, once approved pursuant to paragraph 2D herein, and will provide at its sole expense the electrical power necessary for the Project.
- iii. NMCWD will complete or contract for the completion of startup; monitoring of performance, functionality and effectiveness of the Treatment System; troubleshooting and adjustment of the functionality of the Filtration System in the first two years after certification of the Contracted Work as substantially complete.
- iv. NMCWD will complete or contract for the completion of major maintenance and repair of the Contracted Work, as necessary, for the two years after the date the Contracted Work is determined to be substantially complete for the intended purposes, and Edina will

complete or contract for the completion of major maintenance and repair of the Contracted Work thereafter.

a. "Major maintenance and repair," as used herein, is defined as removal and replacement of the treatment media in the Filtration System and all activities not encompassed within the O&M Plan's specification of routine operation and maintenance.

v. NMCWD will complete or timely contract for performance assurance, monitoring of the performance including functionality and effectiveness, troubleshooting and adjustment of the Filtration System starting two years after substantial completion of the Contracted Work.

D. *Education and outreach, publicity and endorsement.* Edina and NMCWD will collaborate on development and production of outreach, education and publicity materials regarding the Project. NMCWD and Edina will collaborate on the development of educational and informational signage pertinent to the Project, and either party, at its cost, may develop, produce and distribute educational, outreach and publicity materials related to the Project, and may install, maintain, replace or remove signage in Rosland Park related to the Project. All such signage and materials, whether produced by NMCWD or Edina, will include acknowledgement of the funding and participation of the other party in the Project and of any grant funding received for the Project. For purposes of this paragraph, "publicity" includes notices, informational printed materials, press releases, research reports, signs and other public notices, whether electronic or printed.

E. *Ownership of the Contracted Work.* On completion of the Contracted Work, ownership of all equipment and materials installed on and incorporated into Rosland Park for the Project will vest in Edina.

F. *Costs.* Except as specifically provided herein, each of the parties will bear the costs of enforcing its rights and fulfilling its responsibilities under this agreement, as well as incidental costs. And in the event of cancellation, the parties will bear all costs incurred by each of them prior to NMCWD's issuance of notice to Edina in accordance with paragraph 1B.iv herein.

i. NMCWD will be responsible for costs as follows:

a. All costs of design and construction management of the Project and development of the O&M Plan;

b. All costs of work for project startup and performance assessment, troubleshooting and adjustment in accordance with paragraph 1C.iii herein;

c. All costs of major maintenance and repair initiated in the first two years after the date of substantial completion and 30 percent of costs of major repair initiated two years or more after the date of substantial completion of the Contracted Work;

- d. All costs of startup, monitoring and performance adjustment of the Project in accordance with 1C.v herein in the first two years after substantial completion of the Contracted Work, and 70 percent of costs of performance monitoring, troubleshooting and adjustment of the Project starting two years after substantial completion of the Contracted Work.
- ii. Edina will be responsible for costs as follows:
 - a. All costs of routine operation and maintenance of the Project as defined by and in accordance with the O&M Plan, including the electrical power needed for Project operation;
 - b. 30 percent of the costs of monitoring and performance adjustment of the Project, and 70 percent of the costs of major repair of the Project initiated two years or more after substantial completion of the Contracted Work.

In addition, Edina will contribute the property access and use rights necessary for the Project at no out-of-pocket cost to NMCWD.

- iii. The party responsible for the majority of any cost identified herein will be reimbursed by the other party for the portion of such cost for which it is responsible, and will submit documentation of costs to support reimbursement, which will be rendered within 35 days of submission of all necessary documentation.

2. EDINA’S FURTHER RIGHTS AND RESPONSIBILITIES, AND GRANT OF RIGHTS FOR ACCESS, CONSTRUCTION AND MAINTENANCE

- A. Edina will have 15 days after receipt to review and approve the 90 percent complete design, plans and specifications for the Contracted Work provided in accordance with paragraph 1A herein. Failure to act within the specified time will constitute approval. In addition to its right to consult on the development of the O&M Plan, Edina will have 60 days from receipt to review and approve the final draft O&M Plan submitted in accordance with paragraph 1C.i herein. Failure to act within the specified time will constitute approval. Edina’s approvals under this agreement will not be unreasonably withheld.
- B. *Grant of easement.* Edina hereby grants to NMCWD, its contractors, agents and assigns a nonexclusive term easement to access and use the portions of Rosland Park necessary for access, construction and maintenance of the Project as delineated in the 90 percent design, plans and specifications for the Contracted Work prepared in accordance with paragraph 1X herein, 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 Edina, may temporarily restrict or preclude public access to portions of Rosland Park to ensure safety while construction or maintenance activities are under way.

- i. Notwithstanding that the grant of an easement specified above is nonexclusive, Edina agrees that it 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 Rosland Park. Subject to its interest in preserving public safety, Edina will facilitate NMCWD's reasonable exercise of its rights under this agreement with regard to access to and use of Rosland Park, including but not limited to the right to place signage within Rosland Park to facilitate effective implementation of the Project. Edina will not take any action within or adjacent to Rosland Park that could reasonably be expected to diminish the effectiveness or function of the Project for the purposes intended.
- C. The Project will include the basic design and construction of the Filtration System, but Edina will retain sole authority over and financial and other responsibility for the development and implementation of plans and specifications for art, park signage, lighting and other accessory elements in Rosland Park related to the Filtration System. Edina will forbear from any activity that interferes with the NMCWD's ability to exercise its rights or meet its obligations under this agreement, including but not limited to Edina's conveyance of ownership of the Rosland Park. Edina will facilitate NMCWD's reasonable exercise of its rights under this agreement with regard to access to and use of Rosland Park. Edina will not take any action within Rosland Park that could reasonably be expected to diminish the effectiveness or function of the Project for the purposes intended.
- D. Edina, as owner of Rosland Park, will cooperate with NMCWD's and its contractor's efforts to obtain permits and approvals needed for the Project and authorizes NMCWD to apply for such permits and approvals on its behalf. Edina, in its regulatory capacity, will facilitate the proper and efficient processing of any permits and approvals needed for the Project.
 - i. Beginning two years after the date of certification of substantial completion of the Constructed Work, Edina will be responsible for obtaining any new or renewed permits or approvals from the State of Minnesota required for continued operation of the Project.
- E. Edina may conduct data-collection and analysis on the performance of the Project or utilize data collected by either of the parties under the terms of this agreement with regard to reduction of loading of phosphorus and other pollutants to Lake Cornelia, and may apply any and all credit generated by the Project toward its obligations, goals and requirements imposed by state or federal regulatory programs, such as the National Pollutant Discharge Elimination System as applied to Edina.
- F. Edina will cooperate with NMCWD in all communications and outreach to property owners affected by the Project.

3. NMCWD'S FURTHER RIGHTS AND COMMITMENTS

- A. As between the parties and with the exception specified in paragraph 2D.i herein, NMCWD will obtain all necessary permits, licenses and approvals, and will ensure that the Project is completed in accordance with applicable law and regulatory standards and criteria.
- B. After approval by Edina of the 90 percent design, plans and specifications as provided in paragraph 2A herein, NMCWD will contract with the NMCWD engineer for the development of the final design, plans and specifications for the Construction Work and the Project. Notwithstanding the foregoing, NMCWD makes no warranty to Edina regarding the NMCWD engineer's or another third party's performance in design, construction or construction management for the Project.
- C. NMCWD will contract for the construction of the Contracted Work in accordance with applicable public-procurement law, as determined by NMCWD.

4. GENERAL TERMS

- A. Independent Relationship; Liability. This agreement does not create a joint powers board or organization within the meaning of Minnesota Statutes section 471.59. 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 and the results thereof. 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.
- B. Edina and NMCWD enter this agreement solely for the purposes of construction and maintenance of the Project to improve water quality in Lake Cornelia and Lake Edina. NMCWD does not have, has not had, and 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 Rosland Park. NMCWD does not exercise, has not exercised, and 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 Rosland Park or property adjacent to Rosland Park prior to the commencement of construction of the Project such as would render NMCWD a potentially responsible party for any contamination under state or federal law.
- C. Complete agreement. This agreement, as it may be amended in writing, constitutes the entire agreement between the parties for the Project. Any amendment to this agreement must be in writing and will not be effective until it has been executed

and approved by the same parties who executed and approved the original agreement or their successors in office.

- D. Notice; Coordination. The parties designate the following authorized representatives to serve as the liaison to the other party for purposes of coordination of all work involved in or related to the Project as provided in this agreement. Any written communication required under this agreement will be addressed to the other party as follows, except that either party may change its address for notice by so notifying the other party in writing:

To Edina: Director
Engineering
City of Edina
7450 Metro Blvd.
Edina MN 55439
952-826-0371

Director
Parks and Recreation
City of Edina
4801 West 50th St.
Edina MN 55424
952-826-0367

To NMCWD: Administrator
Nine Mile Creek Watershed District
12800 Gerard Drive
Eden Prairie, MN 55346
952-835-2078

- E. Waivers. The waiver by Edina 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.
- F. Term and termination. This agreement will remain effective when fully executed and will remain in force for 30 years from the date of complete execution, unless terminated by mutual agreement of the parties or otherwise in accordance with the terms of this agreement.

[Signature page follows.]

IN WITNESS WHEREOF, the parties have executed this agreement, intending to be legally bound.

Nine Mile Creek Watershed District
a political subdivision of the State of Minnesota

_____ Date: _____
By Robert Cutshall
Its President

Approved as to form and execution

NMCWD Counsel

City of Edina
a Minnesota municipal corporation

_____ Date: _____
By James Hovland
Its Mayor

_____ Date: _____
By Scott Neal
Its City Manager