

CAPITAL IMPROVEMENT CONSTRUCTION AGREEMENT

Four Seasons Mall Redevelopment

This Agreement is made as of this ____ day of _____, 2020, by and between the Bassett Creek Watershed Management Commission, a joint powers watershed management organization (the “Commission”), and Plymouth Leased Housing Associates IV, LLLP, a Minnesota limited liability limited partnership (the “Developer”). The Commission and the Developer may hereinafter be referred to individually as a “party” or collectively as the “parties.”

RECITALS

- A. The Commission adopted the Bassett Creek Watershed Management Commission Watershed Management Plan on September 17, 2015 (“WM Plan”), a watershed management plan within the meaning of Minnesota Statutes, section 103B.231;
- B. The WM Plan includes a capital improvement program (“CIP”) that lists a number of water quality project capital improvements;
- C. One of the water quality projects identified in the CIP is the Four Seasons Mall Water Quality Project in the City of Plymouth (“City”) that was funded as part of the 2013 CIP levy and collected by Hennepin County pursuant to Minnesota Statutes, section 103B.251;
- D. The Developer is in the process of acquiring certain real property that is to be platted as part of the current Four Seasons Mall Redevelopment (the “Redevelopment”). A depiction of said Redevelopment is attached hereto as Exhibit A, and the real property that the Developer is in the process of acquiring is depicted thereon as Lot 3, Block 1 (the “Developer Property”);
- E. The Developer Property is adjacent to certain other real property also to be platted as part of the Redevelopment and depicted on Exhibit A as Lots 2, 4, and 5, Block 1 (the “Other Property”), and said Other Property will be acquired by either the Developer or an affiliate thereof;
- F. The Other Property is intended to be conveyed in a series of one or more transactions to other owners, including a developer affiliated with the Developer, a retail developer not affiliated with the Developer, and the City (the “Other Developers”);
- G. The Developer Property is also adjacent to and to the north of a wetland parcel owned by the City, Hennepin County PID 1311822140008 (the “City Property”);
- H. The original Four Seasons Mall Water Quality Project did not proceed, but the Developer has proposed to construct an alternative stormwater project in addition to what it would otherwise be required to construct as part of the Redevelopment (the “Project”). The Project will be constructed partially on the Developer Property, partially on the Other Property, and partially on the City Property. The Project is described in detail on the attached Exhibit B and includes, without limitation, the construction or installation of stormwater pond WP with a sand filtration system, stormwater pond NP with a pre-treatment forebay and an iron-enhanced sand filtration system, and the restoration of the wetland within the City Property;

- I. The Other Developers will obtain any required approvals from the Commission in connection with private stormwater improvements that are not included within the Project but are located on the Other Property;
- J. The Developer will acquire from the respective owner(s) such temporary easements or agreements as may be required to construct portions of the Project on the Other Property and the City Property;
- K. The Project exceeds the Commission's stormwater treatment requirements for the Developer's proposed redevelopment and provides at least the level of treatment that was expected to be realized by construction of the original Four Seasons Mall Water Quality Project. The minimum above and beyond phosphorous removal requirement of the Project is specified in Section 4 of this Agreement;
- L. The City, through a separate agreement with the Commission, will provide for the ongoing maintenance of the Project elements constructed on the City Property;
- M. The City, through a separate development agreement with the Developer, will also ensure the ongoing maintenance by the Developer of the Project elements that are constructed on the Developer Property and on the Other Property;
- N. The Commission desires to provide CIP funding, on a reimbursement basis, to the Developer for the Project in accordance with the terms and conditions of this Agreement; and
- O. The Developer desires to utilize the CIP funds from the Commission to construct the Project in accordance with the terms and conditions of this Agreement.

AGREEMENT

In consideration of the mutual promises and agreements hereinafter set forth, and intending to be legally bound, the parties do hereby agree as follows:

- 1. Project Scope. The Project will consist of the construction and installation of all stormwater treatment features and improvements described in Exhibit B attached hereto. The site of the Project shall include the Developer Property, the City Property, and the Other Property.
- 2. Developer Property. The Developer's acquisition of fee title of the Developer Property is a condition precedent to the Developer being eligible for any reimbursement of Project costs from the Commission under this Agreement. The Developer shall provide the Commission proof of having acquired fee title to the Developer Property prior to the Developer submitting any reimbursement requests to the Commission.
- 3. City Property; Other Property.

- a. City Property. The Developer shall take such steps as may be required to obtain a construction easement or agreement from the City as may be needed to secure a right to construct the stormwater improvements identified within the Project on the City Property in accordance with the Plans. The rights obtained from the City shall include an agreement or similar authorization for the Commission and its agents to enter the City Property as may be needed to conduct inspections as provided in this Agreement if the Commission does not secure such authorization in its separate agreement with the City. The Developer's acquisition of such rights over the City Property shall occur before the Commission will reimburse any construction costs for the Project.
 - b. Other Property. The Developer shall take such steps as may be required to obtain a construction easement or agreement from the owner(s) of the Other Property as may be needed to secure a right to construct the stormwater improvements identified within the Project on the Other Property in accordance with the Plans. The rights obtained from the owner(s) of the Other Property shall include an agreement or similar authorization for the Commission and its agents to enter such Other Property as may be needed to conduct inspections as provided in this Agreement. The Developer's acquisition of such rights over such Other Property shall occur before the Commission will reimburse any construction costs for the Project.
4. Design and Plans. The Developer will design the Project, prepare plans and specifications for construction of the Project, and provide supporting information including, but not limited to, final pollutant removal information and other information to confirm pollutant removal estimates (collectively, the "Plans"). The 90% plans and specifications have already been submitted to the Commission engineers and approved in accordance with the Commission's CIP project review process. Once the Plans are fully finalized, they shall be submitted to the Commission engineer for final administrative review and written approval. Any changes to the fully finalized plans and specifications shall require written approval of the Commission's engineer following a reasonable review period, which shall be no less than 10 business days. Only minor change orders may be approved by the Developer, in consultation with the Commission administrator, without requiring additional approvals by the Commission. For purposes of this paragraph, "minor change orders" shall mean those changes to the approved plans that do not materially change either the effectiveness of the Project to meet its intended purposes, the aesthetics, form, or function of the Project, or the environmental impacts of the Project. The Plans shall be completed and submitted for approval prior to the distribution of any funds under this Agreement. Approval of the Plans shall not occur unless the Plans demonstrate that the Project will remove at least 100 pounds of total phosphorus more than the amount that is required for removal for the development itself. The Plans, once finalized and approved by the Commission engineer in accordance with this section, shall be incorporated in and made part of this Agreement by reference.
5. Contract Administration. The Developer shall be responsible for constructing the Project in accordance with the approved Plans. The Developer will award the contract to its selected contractor ("Contractor") and supervise and administer the construction of the Project to ensure that it is completed in accordance with the approved Plans. The Developer will

require the Contractor to name the Commission and its engineering firm, Barr Engineering Co., as additional insureds on all liability policies required by the Developer of the Contractor, and the Commission shall be given the same notification of cancellation or non-renewal of such liability policies as is given to the Developer. The Developer will require the Contractor to defend, indemnify, protect, and hold harmless the Commission and the Developer, their agents, officers, and employees, from all claims or actions arising from negligent acts, errors or omissions of the Contractor. The Developer will supervise the work of the Contractor, but the Commission shall perform construction inspections as provided herein.

6. Construction Inspections. The Commission's engineer ("Commission Engineer") shall perform periodic inspections of the Project as it is being constructed. The Developer and the Commission, through its engineer, agree to work cooperatively with one another and in good faith with the Contractor to develop a schedule for inspections that minimizes the amount of CIP funds spent on inspections while still providing sufficient inspections to ensure the Project is constructed in accordance with the approved Plans. The Commission Engineer may not direct the work of the Contractor, but the Developer and the Contractor will give due and reasonable consideration to issuance of such change orders, work directives, or field orders as necessary and appropriate to adjust the work as requested by the Commission Engineer to help ensure the Project is constructed in accordance with the Plans.
7. Communications and Outreach. During construction of the Project, the Developer will display a sign at the construction site stating "Stormwater Management Improvements paid for in part by the Taxpayers of the Bassett Creek Watershed," or such other language as approved by the Commission administrator. The Developer also agrees to work cooperatively with the Commission once the Project is constructed to develop, place, and maintain educational signage on the Developer Property, or, with the Commission's consent, on property adjacent to the Developer Property, to inform the public of the stormwater improvements constructed as part of the Project.
8. Contract Payments. The Developer shall be responsible for paying the Contractor and all other expenses related to the construction of the Project, and shall keep and maintain complete records of such costs incurred. The Developer shall not be responsible for paying, or keeping records of payments, to the Commission Engineer.
9. Commission Reimbursement. The Commission agrees to reimburse the Developer for costs it incurs to construct the Project as provided in this section. The total amount of CIP funds the Commission has available for the Project is \$808,596. Although the Commission has already reimbursed itself for its own out-of-pocket costs incurred through April 10, 2020, the above amount constitutes a maximum and includes the Commission's out-of-pocket costs related to the Project and incurred after April 10, 2020, including, but not limited to, Commission Engineer's review and inspection costs. The Commission's out-of-pocket costs to be incurred after April 10, 2020 are currently estimated at between \$20,000 and \$30,000 and, upon request by the Developer, the Commission shall provide itemized details regarding its future out-of-pocket costs. The portion of the CIP funds in excess of such

future out-of-pocket costs of the Commission are available for reimbursement to the Developer for costs incurred by or on behalf of the Developer in the planning, design and construction of the Project, which shall not include attorneys' fees and such fees are expressly outside the scope of costs that are reimbursable hereunder. The Developer may seek up to monthly reimbursements from the Commission as it incurs and pays costs to design and construct the Project. ~~— One fourth (25%) of the total amount available for reimbursement to the Developer under this Agreement may be withheld by the Commission unless and until the Developer completes the Project in its entirety in accordance with the Plans and the Commission Engineer has performed a final inspection and signed off on Project completion in writing. Such final approval by the Commission Engineer shall not be unreasonably withheld.~~

For a reimbursement request to be considered for approval at a Commission meeting, the request shall be submitted in writing, with a copy of all paid invoices for the amounts to be reimbursed, to the Commission administrator at least ten (10) days prior to the Commission meeting. Reimbursement requests received after that date shall be considered for reimbursement at the following Commission meeting. The Commission may require the Developer to submit additional information as may reasonably be required for the Commission to substantiate the amounts requested for reimbursement. Requests for additional information shall be made in writing and if the Commission does not request additional information regarding a reimbursement request submitted by the Developer within thirty (30) days of the date of submission, said reimbursement request shall be deemed approved.

The Commission desires reasonable assurances that the reimbursement contemplated herein will achieve construction of the entire Project and, to that end, in the event that the Project is not completed by the Developer in accordance with the Plans on or before December 31, 2024, then any and all amounts reimbursed by the Commission under this Agreement shall be remitted back to the Commission by the Developer within 30 days of a written request for such remittance by the Commission. For purpose of this paragraph, Project completion shall be determined by the Commission Engineer following a final inspection of the work and final approval shall not be unreasonably withheld. The December 31, 2024 deadline established herein shall be subject to any Commission-approved extensions, which may be granted in the sole discretion of the Commission in accordance with Section 17 of this Agreement.

10. Limits on Reimbursement. Reimbursement to the Developer will not exceed the amount specified above, less any amounts retained by the Commission for Commission expenses. Reimbursement will not be increased by grants or other revenues received by the Commission for the Project without appropriate and approved sub-grant agreements between the Developer and Commission. Reimbursement will not exceed the costs and expenses incurred by the Developer for the Project, less any amounts the Developer receives for the Project as grants from other sources. All costs of the Project incurred by the Developer in excess of such reimbursement, shall be borne by the Developer or secured by the Developer from other sources.

11. Audit. As required by Minnesota Statutes, section 16C.05, subdivision 5, all Developer books, records, documents, and accounting procedures related to the Project are subject to examination by the Commission, the state auditor, and the legislative auditor for a period of six years from the completion of the Project.
12. Environmental Review and Permitting. The Developer will perform all necessary investigations of site contamination, secure all necessary local, state, or federal permits required for the construction of the Project, and will not proceed with the Project until all required environmental review and remediation of site contamination is completed or a plan for remediation is approved by appropriate regulatory agencies.
13. Ongoing Maintenance. Once the Project is constructed in accordance with the Plans, as determined by the Commission Engineer, the Developer, at its own cost, shall be responsible for all ongoing maintenance of the Project stormwater improvements constructed on the Developer Property and the Other Property. The Developer agrees to maintain such stormwater improvements constructed on the Developer Property and the Other Property as part of the Project in perpetuity from the date of approval of the final reimbursement request for the construction of the Project. This obligation shall also be required through a separate recorded maintenance agreement entered into between the Developer and the City and a recorded operations and maintenance plan to provide for the ongoing maintenance of the stormwater improvements constructed on the Developer Property and the Other Property, which will include a chloride management plan. The Developer shall not be responsible for the ongoing maintenance of the stormwater improvements constructed as part of the Project on the City Property. The Commission intends to enter into a separate agreement with the City whereby the City agrees to provide for the ongoing maintenance of the City Property at its own cost.
14. Indemnification. The Commission's role under this Agreement is solely to provide funds to support the Project. Review by the Commission or the Commission Engineer of any design or installation of the stormwater improvements is solely for the purpose of establishing accountability for Commission CIP funds expended. The Developer remains fully responsible for the means, method, and manner of designing, constructing, and operating the Project. Neither the Developer nor the Developer's Contractor acts as the agent or representative of the Commission in any manner. The parties are responsible for their own acts under this Agreement and none of the parties agree to accept liability on behalf of another party. The Developer hereby agrees to indemnify, defend, and hold the Commission and its officials, employees, and agents harmless for all costs, damages, or expenses which the Commission may pay or incur, including attorneys' fees, in consequence of any claims arising out of or related the acts or omissions of the Developer in performing its obligations under this Agreement or the Contractor in constructing the Project, which shall include but not be limited to any preexisting contamination or other conditions on the aforementioned properties and any exacerbation thereof caused during the Project. This duty to indemnify does not extend to any claims arising from the Commission's own negligence. Nothing herein shall be construed as a waiver of, or limitation on, any immunity from or limitation on liability available to any party under law.

15. Notices. Any written communication required under this Agreement will be addressed to the other parties as follows, subject to written notice of a change of address:

To the Commission:

Laura Jester
BCWMC c/o Keystone Waters LLC
16145 Hillcrest Lane
Eden Prairie MN 55346

To the Developer:

Plymouth Leased Housing Associates IV, LLLP
2905 Northwest Blvd, Suite 150
Plymouth, MN 55441
Attn: Ryan Lunderby

16. Data Practices. The Developer shall retain and make available to the Commission data related to the letting of contracts, construction of the Project, and such other information as may reasonably be required by the Commission. The Developer shall manage data related to the Project in accordance with, and to the extent required by, the Minnesota Government Data Practices Act (“Act”) and shall notify the Commission administrator if it receives a request under the Act.
17. Term and Termination. This Agreement shall be in effect as of the date first written above and shall terminate once the Project is completed and the Commission has completed the reimbursements to the Developer as provided herein. The maintenance and indemnification duties under this Agreement shall survive termination. The Commission retains the right to terminate this Agreement if the construction of the Project is not completed in accordance with the Plans, or is not completed by December 31, 2024. After the Commission notifies the Developer that it intends to terminate this Agreement because of the Developers failure to complete the Project in accordance with the Plans or by the deadline established herein, the Developer shall no longer be eligible to receive reimbursements for work under this Agreement unless the Commission agrees, in writing, to a corrective-actions plan to bring the Project into compliance or to extend the construction-completion period.
18. Right of Entry. The Developer, with respect to the Developer Property, grants the Commission, the Commission Engineer, and the agents of the Commission an irrevocable license to enter the Project site at all reasonable times to conduct such inspections as the Commission determines is needed to ensure the Project is being constructed and maintained in accordance with the terms and conditions of this Agreement. In making such inspections the Commission agrees to use commercially reasonable efforts to avoid unreasonably interfering with the construction or operation of the project Developer intends to construct and operate on the Developer Property.

19. Nondiscrimination. In contracting for construction of the Project, the Developer will cause Contractor to 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.
20. Ownership. The Developer warrants and represents to the Commission that it will become the fee owner of the Developer Property prior to construction of the Project. The Developer understands and agrees that it becoming the fee title owner of the Developer Property is a condition precedent to being eligible to receive any reimbursements under this Agreement. Notwithstanding anything to the contrary in this Agreement, the Commission may immediately terminate this Agreement if the Developer fails to provide the Commission proof of fee title ownership of the Developer Property as required herein.
21. Legal Compliance. Each party shall be responsible for complying with all applicable federal, state, and local laws, rules, regulations, and ordinances in carrying out their respective duties under this Agreement.
22. Authority to Contract. The person or persons executing this Agreement on behalf of the Developer and the Commission represent that he, she, or they are duly authorized to execute this Agreement on behalf of their respective entities and represent and warrant that this Agreement is a legal, valid, and binding obligation enforceable according to its terms.
23. No Waiver. The Commission's failure to insist on the performance of any obligation under this Agreement does not waive its right in the future to insist on strict performance of that or any other obligation.
24. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be an original and shall constitute one and the same Agreement.
25. No Third-Party Rights; Assignment. This Agreement is solely for the benefit of the signatories hereto. This Agreement shall not create or establish any rights in, or be construed as being for the benefit of, any third party, and the assignment of either party's rights, obligations, or both shall require written approval from the other party which shall not be unreasonably withheld.
26. Severability. In the event that any provision of this Agreement shall be held invalid, illegal or unenforceable by any court of competent jurisdiction, such holding shall pertain only to such section and shall not invalidate or render unenforceable any other section or provision of this Agreement.
27. Entire Agreement. The above recitals and the exhibits attached hereto are incorporated into and made part of this Agreement. This Agreement contains the entire understanding between the parties regarding this matter and no amendments or other modifications of its terms are valid unless reduced to writing and signed by both parties.

28. Governing Law. This Agreement shall be governed by the laws of the State of Minnesota.

[signature page to follow]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized officers on behalf of the parties as of the day and date first above written.

**BASSETT CREEK WATERSHED
MANAGEMENT COMMISSION**

By: _____
Its Chair

And: _____
Its Secretary

Date: _____

**PLYMOUTH LEASED HOUSING ASSOCIATES IV,
LLLP**

By: Plymouth Leased Housing Associates IV, LLC
Its: General Partner

By: _____

Its: _____

Date: _____

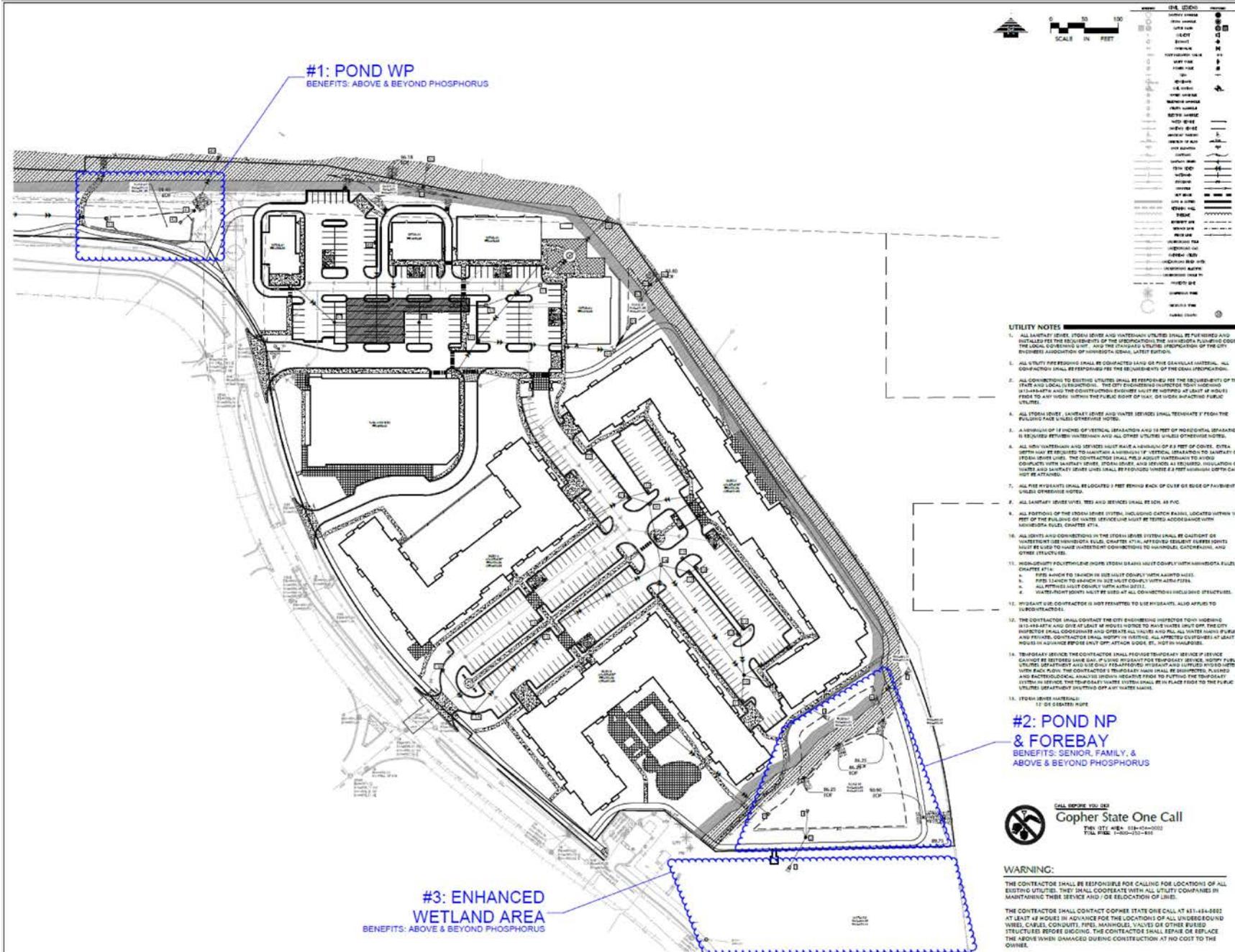
EXHIBIT B
Description of the Project



04/08/2020

**Four Seasons Mall Redevelopment
Stormwater Narrative**

1. Storm Pond with filtration bench – A pond on the north end, west of the retail designed with an excavated dead storage to provide sedimentation settlement and a sand filter to filter live storage within 48 hours. Together providing rate control to downstream waters. Primary and overflow outlets drain to the creek along the north side of the property.
2. Storm Pond and Forebay with enhanced filtration bench – Located on the south side before the wetland, these excavated areas are designed to provide sedimentation settlement and rate control released downstream. The forebay acts as pretreatment, receiving the runoff first and providing initial treatment of the stormwater. The storm pond then receives the stormwater for additional treatment and rate control to downstream receiving waters. An iron enhanced sand filter bench, located along the south side, has been added for additional phosphorus removal. All live storage is designed to draw down within 48 hours. The primary and overflow outlets drain to the wetland.
3. Wetland Restoration – The wetland, located on the south side of the property, will be restored and enhanced to provide stormwater treatment. By enhancing the wetland to function properly with proper vegetation, water storage, increased flow path and animal habitat, a higher level of stormwater treatment is achieved. Bassett Creek, whatever isn't directed to the storm pond and forebay, will outlet directly to the wetland and flow through to the outlet. The wetland piped outlet under Highway 169 and overflow over Highway 169 are directed to Northwood Lake.



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LOUCKS PROJECT NO. 196900
PROJECT TITLE
**FOUR SEASONS MALL
 REDEVELOPMENT**
 4100-4238 LANCASTER LN N
 PLYMOUTH, MN 55441



ISSUE # **DATE** **DESCRIPTION**

000000	01/05/2018	CITY SUBMITTAL
000001	01/05/2018	CITY SUBMITTAL
000002	01/05/2018	CITY SUBMITTAL
000003	01/05/2018	CITY RE-SUBMITTAL
000004	01/05/2018	CITY RE-SUBMITTAL
000005	01/05/2018	REVISIONS
000006	01/05/2018	REVISIONS

**NOT FOR
 CONSTRUCTION**

CERTIFICATION
 I hereby certify that this plan, specification or report was prepared by me or under my direct supervision and that I am a duly Licensed Professional Engineer under the laws of the State of Minnesota.

Michael J. St. Martin, PE
 24440 000000000
 License Number Date
 TITLE 000000
 DRAWN BY AM
 CHECKED BY JPT
 CITY PROJECT NUMBER 00000000
 SHEET TITLE

**OVERALL
 STORM SEWER
 PLAN**

SHEET NUMBER
C4-4

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Description	DOCSOPEN-#625179-v8-Dominium_Construction_Agreement
Rendering set	Standard

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<u>Insertion</u>	
Deletion	
Moved from	
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Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:

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