



Bassett Creek Watershed Management Commission

MEMO

To: BCWMC Commissioners and Alternate Commissioners
From: Laura Jester, Administrator
Date: July 12, 2023

Recommendation: Approve agreement with the City of Plymouth for final design, construction, and long-term maintenance of Four Seasons Area Water Quality Improvement Project

This [BCWMC CIP project](#) has a long history of different designs and agreements but no implementation for a variety of reasons. The project was originally developed as two new stormwater ponds and restoration of a tributary to North Branch of Bassett Creek (and Northwood Lake just downstream). That project was conditionally approved by the Commission in 2013 but based on neighborhood feedback regarding tree removal, the project was not constructed.

In 2017 and 2020, the Commission approved project designs and agreements with two different private developers to incorporate stormwater management features into their designs for the redevelopment of the Four Seasons Mall site that removed an additional 100 pounds of total phosphorus (above and beyond applicable requirements). Neither of those projects were built due (mostly) to changing market forces. The mall property remains vacant.

In 2021, the City of Plymouth purchased the mall site and has been developing a mechanism to build the CIP project components since then. The mall was demolished late last year and the city is pursuing the site's redevelopment.

At the August 2021 meeting, the Commission approved a TAC recommendation including:

- The Commission enter an agreement with the city of Plymouth to construct the previously approved BMPs, provide CIP-fund reimbursement for construction of structures that capture the first 100 pounds of TP, and allow future redevelopment to utilize any TP removals above 100 pounds to meet BWCMC water quality treatment requirement.
- No BCWMC funding should be used to create storage or water quality benefits that would be required of any proposed development.
- The current impervious surface area of 11.93 acres be set as the "existing condition" upon which future stormwater management requirements would be based, with a sunset clause of 20 years.

At the time, circumstances were changing for the site; the Commission did not enter an agreement with the city (as contemplated above), and the city did not pursue further planning.

At the December 2022 meeting, the Commission approved the city's 90% design plans for the CIP project, which include wetland restoration, wet ponding, and sumps, and the Commission again revisited the terms of a potential agreement with the city. The Commission also discussed recommendations from the TAC and Commission staff regarding the agreement to construct the CIP project and allow future developers to utilize stormwater treatment above the CIP project's intended 100 pounds of total phosphorus removal. At that meeting, the following action was taken:

Commissioner Welch moved to authorize the Commission Attorney to work with the city of Plymouth and Commission Administrator to draft an agreement for construction of the CIP project (NL-2) components with an allocation of 18 pounds of total phosphorus removal as a credit to the city commensurate with city funding, no allowance for wetland banking, and development of a chloride management plan for the site. Commissioner Gwin-Lenth seconded the motion. Upon a vote, the motion carried 7-0, with the cities of Robbinsdale and St. Louis Park absent from the vote.

At this meeting, Commission staff recommend that the Commission approve the attached agreement with the City of Plymouth for reimbursement of CIP funds used to design and construct the CIP project components similar to agreements with other member cities for CIP project implementation. This agreement was drafted by the Commission Attorney and language was approved by Plymouth staff. Additionally, this agreement allows the city to offer a future developer stormwater treatment capacity utilization that is in excess of the 100 pounds of total phosphorus removed by the CIP project but only to the extent such capacity is commensurate with the city's contribution toward the CIP project's cost. In other words, the agreement provides clearly that no BCWMC CIP funding can or will be utilized for the treatment capacity that might be utilized by a future developer. The agreement also states that no wetland banking credits will be created by the project.

The project design will change since the previously approved 90% design plans. Revised 90% plans will be submitted to the Commission by the City later this year. This design will be similar to what the Commission approved in 2022, but includes a smaller pond footprint (through the combination of the main pond and forebay area) and resulting in an increase in wetland restoration area. The project still involves stormwater treatment above the CIP project's intended 100 pounds of total phosphorus removed but that additional amount is likely to be closer to 10 pounds of total phosphorus rather than the 18 pounds in previous plans.

This agreement does not include a requirement that a chloride management plan be developed by a future developer of the site. That does not preclude the city from requiring a chloride management plan of a future developer. However, there is still much uncertainty about how/if the site will be redeveloped, and although the Commission encourages chloride management plans, it does not require them in its development standards. For those reasons, the city is reluctant to include this provision as an absolute requirement but has made clear that it is committed to chloride reduction throughout the city and will work with any future developer on appropriate winter maintenance.

COOPERATIVE AGREEMENT
(Four Seasons Area Water Quality Project NL-2)

This Cooperative Agreement (“**Agreement**”) is made as of this ___ day of _____, 2023 by and between the Bassett Creek Watershed Management Commission, a joint powers watershed management organization (“**Commission**”), and the City of Plymouth, a Minnesota municipal corporation (“**City**”). The Commission and the City 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 (“**Plan**”), a watershed management plan within the meaning of Minnesota Statutes, section 103B.231.
- B. The Plan includes a capital improvement program (“**CIP**”) that lists a number of water quality capital improvements.
- C. One of the water quality projects identified in the CIP is the Four Seasons Area Water Quality Project in the 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 original Four Seasons Mall Area Water Quality Project did not proceed, but multiple developers have since proposed to construct alternative stormwater projects on the former Four Seasons Mall site (“**Site**”) which would have met the requirements of the original project.
- E. The aforementioned developers did not proceed with their proposed redevelopment plans and the City recently acquired the Site so that it could control redevelopment and facilitate water quality improvements.
- F. The City now proposes to construct an alternative water quality project (the “**Project**”) which meets the goals and requirements of the originally identified CIP project.
- G. Notwithstanding the longstanding challenges of redeveloping the Site, the City desires to construct the Project in advance of site redevelopment to provide an immediate water quality benefit within the watershed.
- H. The Commission desires to provide CIP funding, on a reimbursement basis, to the City for the Project in accordance with the terms and conditions of this Agreement, and likewise, the City 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 covenants and agreements hereinafter set forth, and intending to be legally bound, the parties hereby agree as follows:

1. Project Scope. The Project generally consists of wetland restoration, wet ponding and sumps, along with other improvements, that will be collectively designed to provide for water quality treatment that will remove no less than 100 pounds of phosphorus annually from the Site. Although the Project will involve on-site wetland mitigation, it may not result in the creation of a wetland bank.
2. Design and Plans. The City 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 the above pollutant removal estimates are achieved, as further detailed in section 7 below. 90% plans and specifications for the Project were previously submitted to the Commission and approved in accordance with the Commission's CIP project review process, and any changes to such plans and specifications shall be submitted to the Commission for approval. Minor change orders, however, may be approved by the City without requiring additional approval 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.
3. Contract Administration. The City will advertise for bids and award contracts for the Project in accordance with the requirements of applicable law. The City will award such contracts and supervise and administer the construction of the Project to ensure that it is completed in accordance with the approved plans and specifications. The contracts may only be let to one or more responsible contractors in accordance with Minnesota Statutes, section 16C.285 and the City will require the contractors to provide all payment and performance bonds required by law. The City will further require the contractors to name the Commission as additional insured on all liability policies required by the City and the Commission shall be given the same notification of cancellation or non-renewal as is given to the City. The City will require the contractors to defend, indemnify, protect and hold harmless the Commission and the City, their agents, officers, and employees, from all claims or actions arising from negligent acts, errors or omissions of the contractors. The City will supervise the work of the contractors. However, the Commission may observe and review the work of the Project until it is completed. The City will display a sign at the construction site stating "Paid for by the Taxpayers of the Bassett Creek Watershed."
4. Contract Payments. The City will pay all contractors and all other expenses related to the construction and implementation of the Project and keep and maintain complete records of such costs incurred.
5. Commission Reimbursement. The Commission agrees to reimburse the City for eligible Project-related costs it incurs as provided in this section. The total amount of CIP funds the Commission presently has available for Project reimbursement is \$793,551.94, less the Commission's out-of-pocket costs related to the Project incurred after the effective date of this Agreement, including, but not limited to, Commission Engineer's review and inspection costs. A condition precedent of the Commission's obligations under this Agreement is that the City fund from other sources as needed all Project costs not being reimbursed by the Commission under this Agreement, including, but certainly not limited to, any costs required for property or easement acquisition

necessary for the City to construct and maintain the Project (herein, the “City Contribution”). The portion of Commission CIP funds in excess of future out-of-pocket costs of the Commission shall be available for reimbursement to the City for costs incurred by or on behalf of the City in the planning, design and construction of the Project. The City may seek up to monthly reimbursements from the Commission as it incurs and pays costs to design and construct the Project. Reimbursement to the City will be made as soon as funds are available, provided a request for payment has been received from the City that contains such detailed information as may be requested by the Commission to substantiate costs and expenses. The City shall complete and submit with its final reimbursement request to the Commission a final report on the Project using the Commission’s final reporting form and providing such other information as may be requested by the Commission.

6. Limits on Reimbursement. Reimbursement to the City will not exceed the amount specified in section 5 above, again 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. Reimbursement will not exceed the total eligible costs and expenses incurred by the City for the Project, less any amounts the City receives for the Project as grants from other sources. All costs of the Project incurred by the City in excess of such reimbursement, i.e. the City Contribution, shall be borne by the City or secured by the City from other sources.
7. Excess Treatment Capacity; Future Site Development. The Project’s total treatment capacity, as contemplated in the CIP, was to provide 100 pounds of total phosphorous removal from the Site per year. The City’s Project design estimates the removal of 110 pounds of total phosphorous from the Site per year, a number that is subject to modification depending on final Project implementation. Following Project completion, the City will provide the Commission Engineer with record drawings of the constructed Project, which will be reviewed by the Commission Engineer and compared with final Project plans to determine the Project’s total achieved treatment capacity in pounds of annual phosphorous removal from the Site (the “Final Substantiated Annual Phosphorous Removal”).

Given the longstanding difficulties with redeveloping the Site and moving the Project toward construction, the Commission understands and agrees that the City may allow a future developer of the Site to utilize any excess stormwater treatment capacity achieved by the Project, i.e. the pounds of annual phosphorous removal in excess of 100, similar to a regional treatment approach. However, the Commission needs assurances that any such treatment capacity made available by the City to a future Site developer is not funded by Commission CIP funds. To that end, the total treatment capacity allocated to any such Site developer, in pounds of annual phosphorous removal and when divided by 100, may not exceed the number achieved by dividing the City Contribution by the total substantiated cost of the Project. Additionally, the City agrees to provide the Commission with any information or records related to the Project that are deemed necessary by the Commission to accurately determine and confirm the Final Substantiated Annual Phosphorous Removal, the total Project cost, the City Contribution, and adherence to this section 7.

8. Audit. All City books, records, documents, and accounting procedures related to the Project are subject to examination by the Commission and either the State Auditor or the Legislative Auditor for at least six years after completion of the Project.

9. Environmental Review. The City will perform all necessary investigations of site contamination and secure all necessary local, state, or federal permits required for the construction of the Project and will not proceed with the Project until any required environmental review and remediation of site contamination is completed or a plan for remediation is approved by appropriate regulatory agencies.
10. Ongoing Maintenance. Upon completion of the Project, the City shall be solely responsible for its sustainability and ongoing maintenance. The City agrees to perform, at its cost, such maintenance as may be required to sustain the proper functioning of the improvements constructed as part of the Project for their useful life. Although the City is the owner of the real property where the Project is being constructed, it reserves the right to transfer such property to any prospective Site developer, provided, however, that prior to any such conveyance, the City shall ensure that all necessary public easements are in place to ensure the Project is inspected and properly maintained by the City in perpetuity to ensure its long-term viability. Should any future developer propose to modify any element of the Project in a manner that quantifiably reduces the amount of pollutant removal captured by the Project, the City shall expressly and unequivocally require said developer to construct alternative improvements on the Site as part of its project so that, at the very least, an equal amount of such pollutant removal reduction is captured through alternative means, in addition to and beyond any and all other applicable water quality requirements that the developer may be subject to.
11. Data Practices. The City shall retain and make available data related to the letting of contracts and construction of the Project in accordance with the Minnesota Government Data Practices Act.
12. Term. 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 its reimbursement payments to the City as provided herein, provided, however, that the requirements contained in section 11 shall survive any such termination.
13. Entire Agreement. The above recitals and the exhibits attached hereto are incorporated in 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.

[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 by: _____
Its Secretary

Date: _____

CITY OF PLYMOUTH

By: _____
Its Mayor

And by: _____
Its City Manager

Date: _____