

Agreement Dedicating a Land-Use License for the Brown's Creek Restoration Project
Between the City of Stillwater and
Brown's Creek Watershed District

This agreement is made by and between the City of Stillwater, a Minnesota municipal corporation (Stillwater), and Brown's Creek Watershed District, a special purposes governmental entity of the State of Minnesota with purposes and powers set forth at Minnesota Statutes chapters 103B and 103D (BCWD), for purposes of conveyance by Stillwater to BCWD of property rights necessary for construction and maintenance of a creek-improvement project.

Recitals

A. Stillwater owns in fee simple the Brown's Creek Nature Preserve, 10.8 acres of certain real property in the southwest corner of McKusick Road North and Neal Avenue North in the City of Stillwater, Washington County, designated with the property identification number 19-030-20-41-0001 and legally described as:

[LEGAL DESCRIPTION (FROM THE CITY)]

(the Stillwater Property).

B. Brown's Creek Watershed District has an approved and adopted watershed management plan in fulfillment of Minnesota Statutes section 103B.231 including policies committing BCWD to the improvement of the water quality and ecological integrity of Brown's Creek and its tributaries, including maintaining a viable cold-water fishery and maintaining the hydrology and geomorphology of Brown's Creek and its tributaries required for stream equilibrium and health, and the capital improvements program in the plan includes creek-restoration projects addressing impairments of Brown's Creek for turbidity and fish-bioassessments identified in the Brown's Creek Total Maximum Daily Load Plan (2012) and the Brown's Creek Thermal Study (2016), including improvement of reaches categorized as having degraded stream channel geomorphology by addressing lack of buffer, stream width, overhanging banks, and profile and alignment;

C. At the direction of the BCWD Board of Managers to address the impairments and improve the ecological health of Brown's Creek, the BCWD staff and engineer developed a conceptual design for restoration of roughly 2,000 feet of the creek from McKusick Road just upstream of Brown's Creek Park to just downstream of the Brown's Creek State Trail in Stillwater, and the design includes:

- reconnection of cutoff meanders, pattern adjustments to increase stream sinuosity, and grade control to reconnect the floodplain adjacent to the creek;
- reconnect the floodplain and remove invasive species from the bank and upstream areas along the reach;

- bank shaping and selective tree thinning to promote herbaceous understory growth;
- restoration of fish habitat with rock riffles and pools to increase spawning opportunities and provide stable refuge for macroinvertebrates;
- establishment and maintenance of vegetation; and
- improved access to the creek from Brown's Creek State Trail.

(Altogether, the elements listed here constitute and are referred to as "the Project" for purposes of this agreement.) The Project will also include the development and implementation of a plan for post-construction maintenance of the Project (the Maintenance Plan);

D. The Project includes work on the Stillwater Property, among others, and the Stillwater has agreed to provide rights to access and use the Stillwater Property to facilitate implementation and maintenance of the Project;

E. After presentation by staff and the engineer of the concept for and assessment of the feasibility of the Project at its July 2023 regular meeting and a duly noticed public hearing pursuant to Minnesota Statutes section 103B.251, subdivision 3, at its September 2023 regular meeting, the managers adopted BCWD Resolution 23-04, ordering the Project;

F. BCWD has secured \$320,700 in federal water-quality grant funding administered by the Minnesota Pollution Control Agency for the Project, and construction will benefit Stillwater and its citizens by stabilizing and improving the Stillwater Property, securing it against loss from erosion, and benefitting the public generally by improving the ecological health of the creek and wildlife habitat. The parties acknowledge in executing this agreement that sufficient mutual consideration is exchanged under the terms hereof, and that this agreement sets forth obligations that are duly binding on the parties.

G. Stillwater and BCWD are authorized by Minnesota Statutes section 471.59 to enter into this agreement for purposes of the Project.

Agreement

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated into and made a part of this agreement, and to facilitate the Project for the benefit of the public, the parties agree as follows:

1. Approval of design and plans. BCWD has contracted with the BCWD engineer, Emmons & Olivier Resources Inc., for the preparation of a design and plans for the Project, attached hereto and incorporated herein as Exhibit A. By the signature of its authorized officials hereunder, Stillwater approves the plans and design in Exhibit A.

BCWD makes no warranty to Stillwater regarding the BCWD engineer's or another third party's performance in design, construction or construction management for the Project.

2. Maintenance Plan. The Project includes and the parties will collaborate on the development and implementation of a maintenance plan for the portions of the Project on the Stillwater Property as follows:

- a. BCWD will contract with the BCWD engineer for the development, in collaboration with Stillwater, of the Maintenance Plan, which will provide specific written procedures and protocols for maintenance and monitoring the Project. BCWD will submit the final draft Maintenance Plan for Stillwater's review and approval in accordance with paragraph 6b herein.
- b. BCWD will complete or contract for the implementation of the Maintenance Plan, once approved pursuant to paragraph 6b herein, for the duration of the License period.

3. Property-Use License

- a. Stillwater hereby grants and conveys to BCWD, its contractors, agents, successors and assigns, an irrevocable term license over, under, upon and across that portion of the Stillwater Property shown and labeled "Project Area" on Exhibit B, attached hereto and incorporated herein, for purposes of access to and construction on the Stillwater Property to construct the Project, and for purposes of maintaining the Project after construction (the License). The License includes the right of ingress and egress and to pass over and through the Project Area on foot and using motorized equipment for staging of construction, construction and implementation of the Project, and the right to plant, install stabilization techniques, alter existing grades and perform grading and filling within the Project Area necessary to achieve the intended purposes of the Project. The rights granted hereby include the right to lay and maintain temporary utilities across or above the surface of the Project Area for purposes of implementation, construction and maintenance of the Project.
- b. During the term of the License, Stillwater will not use or allow the use of the Project Area in any manner that would damage or interfere with the Project. Specifically, Stillwater will not undertake or allow any grading, filling or alteration of the surface of the Project Area by any party other than BCWD, its contractors, agents, successors or assigns, or the construction of any hard-surfaced areas, fences, sheds, structures or similar improvements within the Project Area, except that Stillwater may and is encouraged to undertake its own efforts, after substantial completion of the Project, to remove invasive species from the Project Area in coordination with BCWD. Stillwater may use and enjoy and may allow the public use and enjoyment of the Stillwater Property and the Project Area for all purposes, but such use and enjoyment are subject to the restrictions stated herein and the temporary right of BCWD to use the same for the purposes herein expressed. BCWD representatives, agents and

contractors may enter the Project Area at reasonable times to monitor activities on and uses of the Project Area. In acting under this paragraph, BCWD will not unreasonably interfere with Stillwater's use and operation of the Stillwater Property. BCWD may act to prevent or remedy all activities and uses of the Project Area not consistent with the terms of the License at BCWD's sole expense. BCWD, on reasonable notice to Stillwater, may temporarily restrict or preclude public access to a portion or portions of the Project Area to ensure safety while construction or maintenance activities are under way.

4. Property Condition. On completion of construction of the Project, BCWD will restore the Stillwater Property to materially the same condition as existed prior to the commencement of construction, except to the extent that the Stillwater Property is improved by the Project. In the event the Stillwater Property is damaged by the activities of BCWD or its contractors, agents or assigns pursuant to the exercise of any of BCWD's rights under this agreement, BCWD will promptly repair or restore the Stillwater Property to the extent reasonably practicable or to a condition agreed to by BCWD and Stillwater. BCWD will repair, seed or plant disturbed or damaged areas with vegetation suitable for Stillwater's intended uses of the Stillwater Property. Stillwater agrees and acknowledges that BCWD will not be responsible for any preexisting conditions on the Stillwater Property, environmental or otherwise, or for any damage to the Stillwater Property or liability arising out of or related to such preexisting conditions.

5. BCWD's specific rights and duties. In addition to its rights and responsibilities for fulfillment of the terms of this agreement as provided herein, BCWD has rights and duties as follows:

- a. BCWD will contract with the BCWD engineer for construction oversight and otherwise manage the implementation of the Project in accordance with the design and plans in Exhibit A.
- b. BCWD will obtain, at its expense, all required permits and approvals and will bear the costs and fees associated with complying with regulatory requirements applicable to the Project.
- c. BCWD will contract in accordance with state public procurement and other applicable law for the construction and implementation of the Project. In contracting for the construction of the Project, BCWD will require that:
 - i. The contractor restrict all of its activities to the Project Area of the Stillwater Property as specified in section 2 herein and Exhibit B.
 - ii. The contractor name Stillwater as an additional insured for general liability with primary and noncontributory coverage and provide a certificate showing same prior to start of construction.
 - iii. The contractor indemnify, defend and hold Stillwater harmless 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 BCWD.

- iv. The contractor extend any warranties applicable to the Stillwater Property to Stillwater.
 - v. The contractor assess the need for and obtain all permits and other regulatory approvals applicable to the Project on behalf of BCWD and Stillwater, except as may be obtained by BCWD.
 - d. BCWD will notify Stillwater at least 10 calendar days prior to commencement of construction of the Project, and within 10 days of substantial completion of construction. (For purposes of this agreement and the Project generally, "substantial completion" is defined as completion of all elements of the Project as described herein for the intended purposes of the Project, except establishment and maintenance of vegetation, and implementation of the Maintenance Plan, as specified and defined in section 2 herein, all of which will continue after substantial completion.)
 - e. BCWD will consult with Stillwater in advance of making any material change in the design and plans in Exhibit A.
 - f. BCWD will provide Stillwater with as-built drawings of the portion of the Project on the Stillwater Property and a draft Maintenance Plan within 60 days of substantial completion of construction.
 - g. BCWD will commence performance or contract for the performance of maintenance of the Project on approval of the draft Maintenance Plan by Stillwater, as provided in paragraph 6b herein. As between BCWD and Stillwater, BCWD will retain responsibility for establishment of vegetation and implementation of the Maintenance Plan.
 - h. Until substantial completion of the Project, if BCWD, in its judgment, should decide that the Project is infeasible, BCWD, at its option, may declare the agreement rescinded and annulled. If BCWD so declares, all obligations herein, performed or not, will be void and, if land-disturbing activities for the Project have commenced, BCWD will return the Stillwater Property materially to its prior condition or to a condition agreed to in writing by Stillwater and BCWD.
6. **Stillwater' specific rights and duties.** In addition to its rights and responsibilities for fulfillment of the terms of this agreement and the License as provided herein, Stillwater has rights and duties as follows:
- a. Stillwater will cooperate with efforts undertaken by BCWD and its contractors to obtain permits and approvals needed for the Project, and by the execution of its authorized officials below Stillwater authorizes BCWD to apply for such permits and approvals on its behalf. Stillwater, in its regulatory capacity, will

facilitate the proper and efficient processing of any permits and approvals needed for the Project.

- b. *Review and approval of the Maintenance Plan.* In accordance with paragraph 5f, BCWD will timely provide a draft of the Maintenance Plan to Stillwater staff for their review and comment. Stillwater will have 60 days from receipt to review and approve the final draft Maintenance Plan. Failure to act within the specified time will constitute approval. Stillwater' approval will not be unreasonably withheld.

7. **Costs.** As between the parties, BCWD will be responsible for all costs of design, specification, construction, construction oversight and management for the Project, and development and implementation of the Maintenance Plan. Stillwater conveys the License pursuant to the terms of this agreement at no cost to BCWD. In addition, the parties each will bear their own incidental costs of determination and completion of their responsibilities and exercise of their rights hereunder.

8. **Termination, Expiration of License.** The License granted hereunder will expire 25 years from the date of complete execution of this agreement, unless terminated earlier in accordance with the following:

- a. BCWD notifies Stillwater that the License is no longer needed, or,
- b. Stillwater conveys all or a portion of the Project Area to a third party, in which event Stillwater agrees to notify BCWD at least 90 days prior to such conveyance, to notify the buyer of the License, and to facilitate communication between the BCWD and the buyer to help ensure BCWD's continued ability to utilize the Project Area for the purposes specified herein.

On completion of implementation of the Project, all improvements made to the Stillwater Property thereby will become the property of Stillwater and BCWD will have no ownership interest in the improvements, notwithstanding BCWD's ongoing maintenance obligations under this agreement.

9. **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 omissions, 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. This agreement creates no right in and waives no immunity, defense or liability limitation with respect to any third party. Neither party will be liable for special, indirect, incidental, punitive, exemplary or unforeseeable consequential damages arising out of or in connection with its respective obligations under this agreement. Specific performance and quantum meruit explicitly are available remedies for the failure of a party to perform any obligation hereunder and do not require a demonstration that other remedies are inadequate. Remedies are non-exclusive.

Stillwater and BCWD enter this agreement solely to facilitate the construction, implementation and maintenance of the Project and to achieve and sustain its purposes. Nothing herein will be construed to constitute approval of any permit or other regulatory approval required by any party, nor does this agreement in any way modify or delegate any party's regulatory authority.

10. Insurance. BCWD will require its contractors, agents, successors and assigns to carry commercial general liability coverage for injury to or death of a person or persons and for damage to property caused by the performance of the Project. Stillwater will remain solely responsible for maintaining liability and other insurance for its use of and authority over the Stillwater Property.

11. Delivery of Notices. All notices required or permitted under this agreement will be in writing at the address or email below or to such other address as a party may designate by written notice to the other.

If to Stillwater: Director Public Works/Engineering
City of Stillwater
216 - 4th St. North
Stillwater MN 55082
ssanders@ci.stillwater.mn.us

If to BCWD: Brown's Creek Watershed District
Attn: Administrator
455 Hayward Ave North
Oakdale, MN 55128
KKill@mnwcd.org
651-330-8220

12. Severability. If any one or more of the provisions of this agreement, or the applicability of any such provision to a specific situation, is held invalid or unenforceable, such provision will be modified to the extent necessary to make it or its application valid and enforceable, and the validity and enforceability of all other provisions of this agreement and all other applications of any such provision will not be affected thereby.

13. Venue; governing law. Venue for any adjudication arising from this agreement will be in the district court of Washington County, Minnesota, and the agreement will be construed and governed by the laws of the State of Minnesota.

14. No waiver of immunity. No provision of this agreement will be interpreted as a waiver of any statutory or common-law immunity by or limitation of liability available to BCWD, all such immunities and limitations being expressly reserved by BCWD.

{Signature page follows.}

IN WITNESS WHEREOF, the undersigned have executed this agreement with the intent to be legally bound by its terms as of the date this agreement is fully executed by both parties.

City of Stillwater

By Ted Kozlowski
Its Mayor

Attest

By Beth Wolf
Its City Clerk

Brown's Creek Watershed District

By Klayton Eckles
Its President

Approved as to form and execution

BCWD counsel

EXHIBIT A

Project Design & Plans

DRAFT

EXHIBIT B

Site Plan - Project Area

DRAFT