

**MEETING DATE:** November 15, 2018

**TITLE:** Authorization to Execute Arden Park Maintenance Covenants

**RESOLUTION NUMBER:** 18-121

**PREPARED BY:** Laura Domyancich

**E-MAIL:** ldomyancich@minnehahacreek.org

**TELEPHONE:** 952-641-4582

**REVIEWED BY:**  Administrator  Counsel  Program Mgr.: Tiffany Schaufler  
 Board Committee  Engineer  Other:

**WORKSHOP ACTION:**

Advance to Board meeting Consent Agenda       Advance to Board meeting for discussion prior to action

Refer to a future workshop (date): \_\_\_\_\_       Refer to taskforce or committee (date): \_\_\_\_\_

Return to staff for additional work       No further action requested.

Other (specify): Final approval November 15, 2018

**PURPOSE or ACTION REQUESTED:**

Authorization to execute and record maintenance covenants for the long-term maintenance of features associated with the Arden Park Improvement project.

**PROJECT/PROGRAM LOCATION:**

Arden Park in Edina, MN.

**PROJECT TIMELINE:**

Construction of improvements: December 2018 – July 2019  
Maintenance of improvements: ongoing after final project completion

**PROJECT/PROGRAM COST:**

Fund name and number: Project Maintenance and Land Management, 2003  
Current budget: \$754,198  
Expenditures to date (2018): \$189,510  
Requested amount of funding: No specific funding request; ongoing maintenance to be funded through PMLM Maintenance Plan.

**PAST BOARD ACTIONS:**

- November 9, 2017: Arden Park Project Ordering, Edina Cooperative Agreement Approval, Consultant Contract Approval (17-069)
- October 11, 2018: Arden Park Final Design Approval and Authorization to Solicit Bids (18-105)

**DRAFT for discussion purposes only and subject to Board approval and the availability of funds.  
Resolutions are not final until approved by the Board and signed by the Board Secretary.**

## **SUMMARY:**

In 2016, MCWD and the City of Edina approved a Memorandum of Understanding to jointly develop a concept plan for Arden Park to integrate a creek restoration with City and community goals for the Park based on the following shared design objectives:

- Restoration of natural stream function and fish passage by actions including removing the grade control structure
- Water resource and riparian habitat improvements which enhance creek access and highlight the role of natural elements in the visual composition of the park
- Natural resources, surface water, soil stability, and drainage improvements which will provide opportunities to enhance existing and future park restoration value
- Public safety

With the ordering of the Arden Park Restoration Project in November 2017, the Board of Managers approved a Project Agreement with the City of Edina to jointly develop design of the Project. The various components of this project have been designed to advance water quality goals, improve habitat, and allow better public access.

To meet these goals and sustain the project's function, these elements require regular and long-term inspection and maintenance. Accordingly, the Project Agreement provided for the development of a maintenance plan to specify inspection and maintenance terms for the stormwater management improvements and native vegetation management. The maintenance plan was developed in coordination with the City, finalized with completion of the 90% design plans, and approved in draft form with Board and City Council approval of the final design plans. The maintenance plan will be finalized at project final completion and be responsive to the as-built condition of the project.

The Project Agreement also states that the District and the City will record mutual covenants under which the City will maintain the paths, trails, vegetation, and stormwater improvements, and the District will maintain the creek restoration improvements. The mutual covenants protect the improvements from disturbance and establish arrangements for the District to enter the park in order to perform maintenance work. The covenants will be in effect for a term of 40 years and are to be recorded on the title of the property, which protects the District's investment in the property and obligates the City to perform maintenance under the covenants. While the covenants are to be approved with authorization to award the bid for construction, recordation of the covenants will occur when project construction is completed and the delineated improvements can be incorporated as an attachment to the document in their as-built condition.

## **ATTACHMENTS:**

1. Maintenance Covenants – Arden Park Improvement Project

**RESOLUTION**

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**RESOLUTION NUMBER:**    18-121

**TITLE:**            **Authorization to Execute Arden Park Maintenance Covenants**

WHEREAS, the Minnehaha Creek Watershed District (MCWD) engages in regional capital improvement projects as described in its Water Resources Management Plan; and

WHEREAS, these facilities require routine inspection and regular maintenance to continue functioning as designed and to limit liability in areas with public access; and

WHEREAS, MCWD entered into a project agreement with the City of Edina establishing mutual roles and responsibilities to design, construct and maintain the Arden Park Restoration Project (“Project”), and the agreement provides, at paragraph 9, for preparation of a maintenance plan for stormwater management improvements and native vegetation and specifies, at paragraph 26, that on completion of construction, the parties will record mutual covenants for long-term maintenance of the project, pursuant to which the City will maintain paths, trails and vegetation, and the MCWD will maintain the creek restoration improvements; and

WHEREAS, the MCWD and the City have prepared Maintenance Covenants that provide for protection of the Project for a period of 40 years, and fulfill the terms of paragraphs 9 and 26 as cited above; and

WHEREAS, the Project Maintenance and Land Management (PMLM) Program annually budgets for, inspects, and maintains District projects, infrastructure, and lands; and

WHEREAS, through the PMLM Manual, regular maintenance is guided by inspection of specific project elements and annualized costs associated with this maintenance is budgeted for through the annual PMLM budget process.

NOW, THEREFORE, BE IT RESOLVED, that the Minnehaha Creek Watershed District Board of Managers hereby authorizes the Board President, on the advice of District Counsel and with any further non-material changes, to execute the Arden Park Maintenance Covenants; and

BE IT FURTHER RESOLVED, that the Administrator shall provide for the recording of the Maintenance Covenants on the affected property.

Resolution Number 18-121 was moved by Manager \_\_\_\_\_, seconded by Manager \_\_\_\_\_.  
Motion to adopt the resolution \_ ayes, \_ nays, \_ abstention. Date: November 15, 2018

\_\_\_\_\_  
Secretary

Date: November 15, 2018

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**MAINTENANCE COVENANTS**  
**City of Edina and Minnehaha Creek Watershed District**

**ARDEN PARK IMPROVEMENT PROJECT**

Subject Property:

The Southwest Quarter of the Northeast Quarter of Section 20, Township 117, Range 21, except that part thereof platted as "Meadowbrook Manor" and except that part platted as "Creek Terrace Addition."

Also, Beginning at the Southeast Corner of RLS No. 1045, then west along the South Line Thereof to the East Line of the West 1012 Feet of the Southeast Quarter of the Northwest Quarter, then south along said East Line 130 Feet, then southeast to a Point 250 Feet south and 150 Feet west of the Point of Beginning, then east to the East Line of the Southeast  $\frac{1}{4}$  of the Northwest  $\frac{1}{4}$ , then north to the Point of Beginning.

These Covenants are entered into by the Minnehaha Creek Watershed District, a watershed district with purposes and powers as set forth at Minnesota Statutes Chapters 103B and 103D ("District"), and the City of Edina, a statutory city and political subdivision of the State of Minnesota ("City").

**Recitals**

A. The City owns and manages Arden Park (the "Park"), a public park through which Minnehaha Creek flows.

B. Pursuant to a Project Agreement dated January 17, 2018 ("Agreement"), the District and the City are constructing the Arden Park Improvement Project ("Project") to restore the Minnehaha Creek channel and its riparian corridor for water quality and ecologic purposes; improve and construct park recreational elements including paths, bridges, overlooks and canoe landings; establish native vegetation; and install regional stormwater management facilities.

C. As paragraph 9 of the Agreement provides, the parties have developed a maintenance plan for the stormwater management facilities and the areas of native vegetation, as well as other Project elements. The maintenance plan is titled, Arden Park Restoration Project Operations and Maintenance Plan, and dated August 2018 (the "Plan").

D. Paragraph 26 of the Agreement states that the parties will record mutual covenants, under which the City will maintain the Paths, Trails & Vegetation improvements and the Stormwater Management improvements; and the District will maintain the Creek Restoration improvements, in accordance with the maintenance plan. It further states that the covenants will establish reasonable arrangements for the District to occupy the Park in order to perform the maintenance work that is under its authority.

E. The parties intend by these Covenants to fulfill the terms of paragraph 26 of the Agreement. These Covenants are for mutual valuable consideration and legally binding, and will remain effective for the period of time stated in paragraph 10 of these Covenants, below.

### **Terms**

1. Attachment A to these Covenants is a site plan that identifies and delineates Project elements. A party will not damage or disturb a Project element, except to maintain, repair, reconstruct or replace it pursuant to and in accordance with the Plan. This prohibition applies to each party and to anyone operating under its authority or permission. A party will promptly repair or restore any Project element that it disturbs or damages.

2. The City will maintain the Stormwater Management improvements, and the areas of native vegetation for which responsibility is assigned to it, as indicated in Attachment A, in accordance with the Plan. The District will maintain areas of native vegetation for which responsibility is assigned to it, as indicated in Attachment A, in accordance with the Plan. All other Project element maintenance will be within the judgment of the party to whom the Plan assigns authority for that Project element. Any such maintenance will be performed consistent with the Plan.

3. The District may park vehicles on parking surface within the Park, may enter and cross the Park, and may occupy it for the purpose of performing an activity authorized by these Covenants. Before operating a motor vehicle on a non-paved surface, entering the Park with self-propelled motorized equipment, or occupying the Park overnight, the District will provide 10 days' written notice to the City, and the parties will coordinate to designate ingress/egress and staging area appropriate and convenient for the work to be performed. If the District determines that an emergency exists, it need not provide 10 days' notice, but will provide notice as soon as practicable and will exercise reasonable care to minimize disturbance. The District will promptly repair or restore any injury or disturbance to the Park from its activity.

4. The parties may amend the Plan by a document that explicitly cites the Plan, states the intent to amend it, and contains the authorized signatures of the parties on each page. On adoption of an amendment, any reference in these Covenants to the Plan shall mean the Plan as amended. The Plan, as it may be amended, will not be interpreted so as to be in conflict with any term of these Covenants.

5. Each party agrees to hold harmless, defend and indemnify the other party from and against that portion of any and all liability, loss, claim, damage or expense (including reasonable attorney fees, costs and disbursements) that the indemnified party may incur as a result of the indemnifying party's activity under these Covenants due to any negligent act or omission of the indemnifying party or any other act or omission that subjects it to liability in law or equity. Notwithstanding,

Minnesota Statutes chapter 466 and other applicable law govern liability of the parties. These Covenants create no right in and waive no immunity, defense or liability limit with respect to any third party or the other party to these Covenants.

6. These Covenants are not a joint powers agreement under Minnesota Statutes §471.59 and nothing herein constitutes either party's agreement to be responsible for the acts or omissions of the other party pursuant to subdivision 1(a) of that statute. Each party is responsible for its own employees for any claims arising under the Workers Compensation Act.

7. Each communication provided for under these Covenants will be made to the following representatives:

Administrator, Minnehaha Creek Watershed District  
15320 Minnetonka Boulevard  
Minnetonka MN 55345  
Re: Arden Park Project, Edina

Manager, City of Edina  
4801 W 50th Street  
Edina MN 55424

Contact information will be kept current. A party may change its contact by written notice to the other party.

8. An amendment to these Covenants must be in writing and executed by the parties. A party's failure to enforce a provision of these Covenants does not waive the provision or that party's right to enforce it subsequently. All above Recitals are incorporated into these Covenants.

9. A party will not be in breach of these Covenants for injury or alteration to the Project elements or the Park resulting from: (a) a cause beyond the reasonable control of that party, including without limitation fire, flood, a precipitation event with a statistical recurrence interval of 100 years or more, storm, and earth movement resulting from natural forces or the act of a third party; or (b) any prudent action taken by the party under emergency conditions to prevent, abate or mitigate significant injury or alteration resulting from such a cause.

10. These Covenants are governed by the laws of the State of Minnesota. The parties may amend these Covenants only by a duly executed writing. The terms of these Covenants bind and benefit the parties and their respective successors and assigns, and run with the Subject Property for a period of forty (40) years from the date of full execution by the parties below. These Covenants do not constitute private covenants, conditions, or restrictions within the meaning of Minnesota Statutes §500.20, subdivision 2a. The District may record and re-record these Covenants, at its cost, at the Hennepin County Office of Property Records.

**CITY OF EDINA**

By \_\_\_\_\_ Date:  
Mayor

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

This instrument was acknowledged before me this \_\_\_ day of \_\_\_\_\_, 2018, by James Hovland as Mayor, City of Edina.

\_\_\_\_\_  
Notary Public

By \_\_\_\_\_ Date:  
City Manager

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

This instrument was acknowledged before me this \_\_\_ day of \_\_\_\_\_, 2018, by Scott Neal as City Manager, City of Edina.

\_\_\_\_\_  
Notary Public

**MINNEHAHA CREEK WATERSHED DISTRICT**

\_\_\_\_\_ Date:  
Sherry Davis White, President

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

This instrument was acknowledged before me this \_\_\_ day of \_\_\_\_\_, 2018, by Sherry Davis White as President of the Minnehaha Creek Watershed District.

\_\_\_\_\_  
Notary Public

This document prepared by:  
Smith Partners P.L.L.P.  
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Minneapolis MN 55401