

**Green Infrastructure Maintenance Covenant  
for the Department of Public Works of the City of Milwaukee  
P-2885**

**14 Bioswale Project, Right-of-Way, N. Sherman Blvd.**

GH 10-13-2020, CAO DOC 266760

This Ten-Year Maintenance Covenant (**Covenant**) is granted by the City of Milwaukee (**City**), 809 N. Broadway, Milwaukee, WI, Milwaukee, WI 53202, to the Milwaukee Metropolitan Sewerage District (**MMSD**), 260 West Seeboth Street, Milwaukee, Wisconsin 53204, and is dated as of \_\_\_\_\_, 2020 (the **Effective Date**). City and MMSD hereby agree as follows.

**A. INTRODUCTION**

**1. The Green Infrastructure/Project.** City will install 14 bioswales in the median, terrace, and clover leaf interchange, public right-of-way (**ROW**), areas of North Sherman Boulevard between West Custer Avenue and West Florist Avenue (herein called the **Green Infrastructure** and sometimes also called the **Project**). Approximately 16,000 square feet of bioswales will be constructed as part of the Project. The bioswales will capture runoff from the street ROW to reduce the quantity, and improve the quality, of runoff. The bioswales provide a retention capacity of 219,852 gallons. This Covenant applies only to this Green Infrastructure.

**2. Conservation Intent.** The Conservation Intent is 14 bioswales with a total retention capacity of 219,852 gallons of stormwater per storm event.

**3. Funding Provided by MMSD.** MMSD will provide funding to City for the installation of the Green Infrastructure in an amount not to exceed **\$20,000** (from this Green Infrastructure funding source), inclusive of all costs and materials. City acknowledges the sufficiency of this funding from Green Infrastructure funds.

**B. MAINTENANCE COVENANT**

In consideration of A.1-3 above, City grants and MMSD accepts a Maintenance Covenant on the terms and conditions set forth below.

**1. Purpose.** The purpose of this Covenant is to require City to keep, preserve and maintain the Green Infrastructure.

**2. Term.** This Covenant became effective as of the Effective Date above and terminates at noon on the **10-year anniversary** of that date.

**3. Operation and Maintenance.** Upon completion of the Project and receipt of funds from MMSD, City will operate and maintain the Green Infrastructure so that it remains

functional for its Conservation Intent for the entire Term. City will take all actions necessary to preserve the Conservation Intent, and will prohibit all actions that would impede or restrict the Green Infrastructure from functioning as set forth in the Conservation Intent. City is solely responsible for operation, maintenance and evaluating performance.

**Additional Reserved Rights of City.** City retains all rights associated with the Green Infrastructure, including the right to use it and invite others to use it in any manner that is not expressly restricted or prohibited by this Covenant. City expressly reserves the right to sell, give, bequeath, mortgage, lease or otherwise encumber or convey the Green Infrastructure or land upon which it exists, if:

3.1 The encumbrance or conveyance is subject to the terms of this Covenant.

3.2 City incorporates the terms of this Covenant by reference in any subsequent deed or other legal instrument by which City transfers any interest in all or part of the Green Infrastructure.

3.3 City notifies MMSD of any conveyance in writing within 15 days after the conveyance and provides MMSD with the name and address of the recipient of the conveyance and a copy of the legal instrument transferring rights.

3.4 Failure of City to perform any act required in Subparagraphs 3.2 or 3.3 does not impair the validity of this Covenant or limit its enforceability in any way.

**4. MMSD Rights and Remedies.** City expressly conveys to MMSD the following rights and remedies:

4.1 **Prevent Inconsistent Uses.** MMSD has the right to require the restoration of areas or features of the Green Infrastructure that are damaged by any activity or use reasonably determined to be inconsistent with the purpose of this Covenant pursuant to the remedies set forth below.

4.2 **Inspection.** MMSD has the right to: inspect and monitor compliance with the terms of this Covenant, and otherwise exercise its rights under the Covenant. To the extent the Green Infrastructure is located somewhere not open to the general public, MMSD will provide prior notice to Milwaukee of at least 5 days before inspecting the Green Infrastructure, In all case, MMSD will comply with the safety rules of City, and avoid unreasonable disruption of the activities of the City.

**5. Remedies for Violations.** Both parties have the right to enforce the terms of this Covenant and prevent or remedy violations through appropriate legal proceedings.

5.1 **Notice of Problems.** If MMSD identifies problems with the Green Infrastructure functioning to achieve the Conservation Intent, then MMSD will initially attempt to resolve the problems collaboratively with City. MMSD will notify City of the problems and request remedial action within a reasonable time.

5.2 **Notice of Violation and Corrective Action.** If either party determines that a violation of the terms of this Covenant has occurred or is threatened, then the non-violating party will give written notice of the violation or threatened violation and allow at least 30 days to correct the violation. If the violating party fails to correct (or for matters requiring more than 30 days to correct, fails to take and diligently pursue corrective action), then the non-violating party may initiate judicial action.

5.3 **Remedies.** When enforcing this Covenant, the remedies available to either party include: temporary or permanent injunctive relief for any violation or threatened violation of the Covenant; the right to require restoration of the Green Infrastructure to a condition reasonably similar to the condition at the time of the conveyance of this Covenant; specific performance, and declaratory relief resulting from a violation of the Covenant or injury to the Green Infrastructure.

5.4 **Non-Waiver.** A delay or prior failure of either party to discover a violation or initiate enforcement proceedings does not waive or forfeit the right to take any action necessary to assure compliance with the terms of this Covenant.

5.5 **Acts Beyond the Control of City.** MMSD may not bring any action against City for any injury or change in the Green Infrastructure resulting from causes beyond the control of City, including, but not limited to, natural disasters such as fire, flood, storm, natural earth movement and natural deterioration, or actions taken by City under emergency conditions to prevent or mitigate damage from such causes, provided that City notifies MMSD of any occurrence that has adversely affected or interfered with the purpose of this Covenant prior to or within a reasonable time after the occurrence of such a cause.

6. **Amendment.** At any time, City and MMSD may jointly amend this Covenant in a written instrument executed by both parties.

7. **Assignment.** MMSD may convey, assign, or transfer its interests in this Covenant to a unit of federal, state or local government or to an organization that is qualified within the meaning of Section 170(h)(3) of the Internal Revenue Code and in the related regulations or any successor provisions then applicable with the prior written consent of City. As a condition of any assignment or transfer, any future holder of this Covenant is required to carry out its purpose for the remainder of its Term. MMSD will notify City of any assignment at least 30 days before the date of such assignment.

**8. Captions.** The captions in this Covenant have been inserted solely for convenience of reference and are not part of the Covenant and have no effect on construction or interpretation.

**9. Controlling Law and Venue.** The laws of the State of Wisconsin govern the interpretation and performance of this Covenant. Venue for any action arising out of or in any way related to this Covenant shall be exclusively in the Milwaukee County Circuit Court for matters arising under state law and in federal district court in the eastern district of Wisconsin for matters arising under federal jurisdiction.

**10. Counterparts.** City and MMSD may execute this Covenant in one or more counterparts, which when taken together, shall constitute one and the same document. Signatures sent by email (PDF or photograph) and/or by facsimile shall be acceptable as originals.

**11. Entire Agreement.** This Covenant sets forth the entire agreement between the City and MMSD with respect to this Covenant and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Covenant.

**12. Extinguishment.** This Covenant may be terminated or extinguished before the expiration of its Term, in whole or in part, through judicial proceedings in a court of competent jurisdiction, or by written agreement signed by City and MMSD due to a subsequent unexpected change in the conditions or surroundings of the Green Infrastructure which make accomplishing the purpose of the Covenant impossible or impractical.

**13. Ownership Responsibilities, Costs, and Liabilities.** City retains all responsibilities and will bear all costs and liabilities related to the ownership of the Green Infrastructure, including, but not limited to, the following:

13.1 **Operation, Upkeep, and Maintenance.** City is responsible for the operation, upkeep and maintenance of the Green Infrastructure.

13.2 **Control.** In the absence of a judicial decree, nothing in this Covenant establishes any right or ability in MMSD to:

- a. exercise physical or managerial control over the day-to-day operations of the Green Infrastructure;
- b. become involved in the management decisions of City regarding the generation, handling or disposal of hazardous substances; or
- c. otherwise become an operator of the Green Infrastructure within the meaning of the Comprehensive

Environmental Response, Compensation, and Liability Act of 1980, as amended (**CERCLA**), or similar laws imposing legal liability on the owner or operator of the Green Infrastructure.

13.3 **Permits.** City is solely responsible for obtaining applicable government permits and approvals for any construction or other activity or use permitted by this Covenant. During construction or any other activity, City will comply with all applicable federal, state and local laws, regulations, and requirements.

**14. Severability.** If any provision or specific application of this Covenant is found to be invalid by a court of competent jurisdiction, then the remaining provisions or specific applications of this Covenant will remain valid and binding.

**15. Public Records.** City and MMSD are bound by the Wisconsin Public Records Law, and as such, all of the terms of this Covenant are subject to the provisions of Wis. Stat.19.21 et. sec. The parties agree to cooperate with one another concerning responding to requests under the Public Records Law, and to retain documents (including this Covenant and records produced or collected hereunder) in compliance with Wis. Stat.19.36 (3), and failure to do so shall constitute a material breach of this Covenant.. Except as otherwise authorized, those records shall be maintained for a period of 7 years after expiration of this Covenant.

**16. Conflict of Interest.** No officer, employee, or agent of City who exercises any functions or responsibilities in connection with the carrying out of any services or requirements to which this Covenant pertains, shall have any personal interest, direct or indirect, in this Covenant. No member of the governing body of City and no other public official of City who exercises any functions or responsibilities in the review or approval of the carrying out of this Covenant shall have any personal interest, direct or indirect, in this Covenant. MMSD covenants that it presently has no interest, and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of its duties hereunder. MMSD further covenants that in the performance of this Covenant no person having any conflicting interest shall be employed by MMSD. An interest on the part of MMSD or its employee must be disclosed to City.

**17. Non-Discrimination.** MMSD agrees not to discriminate against any qualified employee or qualified applicant for employment because of sex, race, religion, color, national origin or ancestry, age, disability, lawful source of income, marital status, sexual orientation, gender identity or expression, victimhood of domestic abuse of sexual assault, past or present membership in the military service, HIV status, domestic partnership, genetic identity, homelessness, familial status, or an individual's affiliation or perceived affiliation with any of these categories. City and MMSD will comply with all requirements imposed by or pursuant to the regulations of the appropriate federal agency effectuating Title VI of the Civil Rights Act of 1964. MMSD agrees to comply with all applicable requirements of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101, *et seq.* MMSD will cause the foregoing provisions to

be inserted in all subcontracts, if any, for any work covered by this Covenant so that such provisions will be binding upon each of MMSD’s subcontractors, provided that the foregoing provisions shall not apply to contracts or subcontracts for standard commercial supplies or raw materials.

**18. Audit.** At any time during normal business hours and as often as City, or if federal or state grants or aids are involved, as the appropriate federal or state agency may deem necessary, there shall be made available to City or such agency for examination all of MMSD’s records with respect to all matters covered by this Covenant and MMSD shall permit City or such agency to audit, examine and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to all matters covered by this Covenant.

**19. Successors.** This Covenant is binding upon and inures to the benefit of City and MMSD and their respective personal representatives, heirs, successors and assigns and will continue as a servitude running with the Green Infrastructure for the Term of the Covenant.

**20. Terms.** Wherever used in this Covenant, the terms "City" and "MMSD" include the respective personal representatives, heirs, successors, and assigns of City and MMSD.

**21. Notice.** For purposes of this Covenant, notices shall be sent to the following persons (or to such other persons as may from time to time be designated per this Section).

<p><b><u>If to City:</u></b>  Nader Jaber  Milwaukee DPW  841 N. Broadway, Room 820  Milwaukee, WI 53202</p> <p>Ph 414-286-0514  Email: njaber@milwaukee.gov</p> <p><b><u>With Copy to:</u></b>  Gregg Hagopian  City Attorney’s Office  841 N. Broadway, 7<sup>th</sup> Floor  Milwaukee, WI 53202</p> <p>Ph 414-286-2620  Email: ghagop@milwaukee.gov</p>	<p><b><u>If to MMSD:</u></b>  Joe Ganzer  MMSD  260 W. Seeboth St.  Milwaukee, WI 53204-1446</p> <p>Ph 414-225-2200  Email: jganzer@mmsd.com</p>
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Dated as of the date first written above.

<p><b>CITY ATTORNEY APPROVAL</b></p> <p>Gregg Hagopian, a member in good standing of the State Bar of Wisconsin, hereby approves the signatures of the City signatories per M.C.O. 304-21.</p> <p>By: _____ Gregg Hagopian, Assistant City Attorney State Bar No. 1007373</p> <p>Date: _____</p> <p><b>City Common Council Resolution File No.</b> _____</p>	<p><b>CITY: CITY OF MILWAUKEE</b></p> <p>By: _____ Jeffrey S. Polenske, Commissioner Dept. of Public Works</p> <p><b>CITY CLERK</b> _____ James R. Owczarski, City Clerk</p> <p><b>Countersigned:</b></p> <p>By: _____ Aycha Sawa, Comptroller</p>
<p><b>MMSD APPROVAL</b></p> <p>The undersigned, as a member in good standing of the State Bar of Wisconsin, hereby approves the signature of the MMSD signatory and this document as to form.</p> <p>By: _____</p> <p>Name Printed: _____</p> <p>Title: Attorney for MMSD</p> <p>State Bar No.: _____</p> <p>Date: _____</p>	<p><b>MMSD: METROPOLITAN MILWAUKEE SEWERAGE DISTRICT</b></p> <p>By: _____ Kevin L. Shafer, P.E. Executive Director</p>

Figure 1: Bioswale Locations



# Sherman Bioswales



Figure 2: Bioswale Cross Section

