

Green Infrastructure Ten-Year Maintenance Covenant for **North Sherman Boulevard Bioswales**

This Ten-Year Maintenance Covenant (Covenant) is granted by the City of Milwaukee, Department of Public Works (Milwaukee), 841 North Broadway, Milwaukee, Wisconsin 53202, to the Milwaukee Metropolitan Sewerage District (District), 260 West Seeboth Street, Milwaukee, Wisconsin 53204.

INTRODUCTION

- 1. The Green Infrastructure.** Milwaukee installed ten bioswales along North Sherman Boulevard between West North Avenue and West Locust Street (the green infrastructure). Exhibit A show the locations of the green infrastructure. Exhibit B shows an example of the green infrastructure. By capturing stormwater in place, the bioswales will reduce the quantity and improve the quality of runoff. The total area of bioswales is 5,026 square feet. The bioswales provide a retention capacity of 56,392 gallons. This Covenant applies only to this green infrastructure.
- 2. Baseline Documentation.** The condition of the green infrastructure is documented in a Baseline Report at the office of the District and incorporated into this Covenant by reference. The Baseline Report consists of reports, maps, photographs, and other documentation and provides an inventory of relevant features, characteristics, and conservation values. The Baseline Report provides an accurate representation of the condition of the green infrastructure at the time of the conveyance of this Covenant. The Baseline Report is an objective, but not exclusive, reference for monitoring compliance with the terms of this Covenant.
- 3. Conservation Intent.** Milwaukee and the District share the common purpose of preserving the green infrastructure for a period of at least ten years. Milwaukee intends to protect the green infrastructure. In addition, Milwaukee intends to convey to the District and the District agrees to accept a right to monitor and enforce these restrictions.
- 4. Funding Provided by the District.** The District has provided funding to Milwaukee for the installation of the green infrastructure. Milwaukee acknowledges the receipt and sufficiency of this funding.

MAINTENANCE COVENANT

In consideration of the facts recited above, Milwaukee grants and the District accepts a Maintenance Covenant for a period of ten years for the green infrastructure. This Covenant consists of the following terms, rights, and restrictions.

- 1. Purpose.** The purpose of this Covenant is to require Milwaukee to keep, preserve and maintain the green infrastructure, as described above.

2. Effective Dates. This Covenant becomes effective when signed by both Milwaukee and the District. This Covenant terminates on July 31, 2027.

3. Operation and Maintenance. Milwaukee will maintain the green infrastructure so that it remains functional for the entire term of this Covenant. Milwaukee is solely responsible for operation, maintenance and evaluating performance.

4. Additional Reserved Rights of Milwaukee. Milwaukee 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 the Covenant or inconsistent with the purpose of the Covenant. However, Milwaukee may not exercise these rights in a manner that would adversely affect the green infrastructure.

Milwaukee expressly reserves the right to sell, give, bequeath, mortgage, lease or otherwise encumber or convey the green infrastructure, if:

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

4.2 Milwaukee incorporates the terms of this Covenant by reference in any subsequent deed or other legal instrument by which Milwaukee transfers any interest in all or part of the green infrastructure.

4.3 Milwaukee notifies the District of any conveyance in writing within fifteen days after the conveyance and provides the District with the name and address of the recipient of the conveyance and a copy of the legal instrument transferring rights.

4.4 Failure of Milwaukee to perform any act required in Subparagraphs 4.2 or 4.3 does not impair the validity of this Covenant or limit its enforceability in any way.

5. District Rights and Remedies. To accomplish the purpose of this Covenant, Milwaukee expressly conveys to the District the following rights and remedies:

5.1 Preserve Conservation Values. The District has the right to preserve and protect the green infrastructure.

5.2 Prevent Inconsistent Uses. The District has the right to prevent any activity or use of the green infrastructure that is inconsistent with the purpose of this Covenant and to require the restoration of areas or features of the green infrastructure that are damaged by any inconsistent activity or use, pursuant to the remedies set forth below.

5.3 Inspection. The District has the right to: inspect and monitor compliance with the terms of this Covenant; obtain evidence for use in seeking judicial or other enforcement of the Covenant; and otherwise exercise its rights under the Covenant. The District will: provide prior notice to Milwaukee before inspecting the green

infrastructure, comply with the safety rules of Milwaukee, and avoid unreasonable disruption of the activities of Milwaukee.

6. Remedies for Violations. The District has the right to enforce the terms of this Covenant and prevent or remedy violations through appropriate legal proceedings.

6.1 Notice of Problems. If the District identifies problems with the green infrastructure, then the District will initially attempt to resolve the problems collaboratively. The District will notify Milwaukee of the problems and request remedial action within a reasonable time.

6.2 Notice of Violation and Corrective Action. If the District determines that a violation of the terms of this Covenant has occurred or is threatened, then the District will give written notice of the violation or threatened violation and allow at least thirty (30) days to correct the violation. If Milwaukee fails to respond, then the District may initiate judicial action. The requirement for an initial notice of violation does not apply if, in the discretion of the District, immediate judicial action is necessary to prevent or mitigate significant damage to the green infrastructure or if good faith efforts to notify Milwaukee are unsuccessful.

6.3 Remedies. When enforcing this Covenant, the remedies available to the District 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 its condition at the time of the conveyance of this Covenant, specific performance, declaratory relief and recovery of damages resulting from a violation of the Covenant or injury to the green infrastructure.

6.4 Non-Waiver. A delay or prior failure of the District 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.

6.5 Waiver of Certain Defenses. Milwaukee waives any defense of laches, such as failure by the District to enforce any term of the Covenant, and estoppel, such as a contradictory statement or action by the District.

6.6 Acts Beyond the Control of Milwaukee. The District may not bring any action against Milwaukee for any injury or change in the green infrastructure resulting from causes beyond the control of Milwaukee, including, but not limited to, natural disasters such as fire, flood, storm, natural earth movement and natural deterioration, or prudent actions taken by Milwaukee under emergency conditions to prevent or mitigate damage from such causes, provided that Milwaukee notifies the District of any occurrence that has adversely affected or interfered with the purpose of this Covenant.

7. Amendment. At any time, Milwaukee and the District may jointly amend this Covenant in a written instrument executed by both parties. However, no amendment will be allowed if, in the judgment of the District, it:

7.1 diminishes the green infrastructure,

7.2 is inconsistent with the purpose of the Covenant,

7.3 affects the duration of the Covenant, or

7.4 affects the validity of the Covenant.

8. Assignment. The District 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. 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. The District will notify Milwaukee of any assignment at least thirty (30) days before the date of such assignment. However, failure to give such notice does not affect the validity of assignment or limit its enforceability in any way.

9. 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.

10. Controlling Law and Liberal Construction. The laws of the State of Wisconsin govern the interpretation and performance of this Covenant. Ambiguities in this Covenant will be construed in a manner that best effectuates the purpose of the Covenant and protection of the green infrastructure.

11. Counterparts. Milwaukee and the District may execute this Covenant in two or more counterparts, which will, in the aggregate, be signed by both parties. Each counterpart is an original document.

12. Entire Agreement. This Covenant sets forth the entire agreement between Milwaukee and the District with respect to this Covenant and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Covenant.

13. Extinguishment. This Covenant may be terminated or extinguished before the expiration of its term, in whole or in part, only through judicial proceedings in a court of competent jurisdiction. Furthermore, the Covenant may be extinguished only if Milwaukee and the District agree that a subsequent unexpected change in the condition of or surrounding the green infrastructure makes accomplishing the purpose of the Covenant impossible.

14. Ownership Responsibilities, Costs, and Liabilities. Milwaukee 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:

14.1 Operation, upkeep, and maintenance. Milwaukee is responsible for the operation, upkeep and maintenance of the green infrastructure.

14.2 Control. In the absence of a judicial decree, nothing in this Covenant establishes any right or ability in the District 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 Milwaukee 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.

14.3 Permits. Milwaukee 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, Milwaukee will comply with all applicable federal, state and local laws, regulations, and requirements.

14.4 Indemnification. Milwaukee releases and will hold harmless, indemnify and defend the District and its members, directors, officers, employees, agents and contractors and the heirs, personal representatives, successors and assigns of each of them (collectively “Indemnified Parties”) from and against any and all liabilities, penalties, fines, charges, costs, losses, damages, expenses, causes of action, claims, demands, judgments or administrative actions, including, without limitation, reasonable attorney fees, arising from or in any way connected with:

- a. injury to or the death of any person, or physical damage to the green infrastructure resulting from any act, omission, condition, or other matter related to or occurring on or about the green infrastructure, regardless of cause, unless due solely to the negligence of any of the Indemnified Parties;
- b. the violation or alleged violation of, or other failure to comply with, any state, federal or local law, regulation, including without limitation, CERCLA, by any person other than the Indemnified Parties, in any way affecting, involving, or related to the green infrastructure; or
- c. the presence or release in, on, from, or about the green infrastructure, at any time, of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or

soil, or in any way harmful or threatening to human health or the environment, unless caused solely by any of the Indemnified Parties.

Nothing in this agreement waives or estops the limitations, defenses, and immunities contained within Wisconsin law, including those contained within Wisconsin Statutes, secs. 893.80, 895.52, and 345.05. To the extent that indemnification is available and enforceable, Milwaukee or its insurer will not be liable in indemnity or contribution for an amount greater than the limits of liability for municipal claims established by Wisconsin Law.

- 15. 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.
- 16. Successors.** This Covenant is binding upon and inures to the benefit of Milwaukee and the District 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.
- 17. Terms.** Wherever used in this Covenant, the terms "Milwaukee" and "District" include the respective personal representatives, heirs, successors, and assigns of Milwaukee and the District.

**MILWAUKEE METROPOLITAN
SEWERAGE DISTRICT**

**CITY OF MILWAUKEE
DEPARTMENT OF PUBLIC WORKS**

By: _____
Kevin L. Shafer, P.E.
Executive Director

By: _____
Ghassan Korban, P.E.
Commissioner

Date: _____

Date: _____

Approved as to Form

By: _____
Attorney for the District

Exhibit A

N Sherman Blvd - W North Ave to W Locust St



Exhibit B



Finished Bioswale – Looking south