

COUNCIL WORKSHOP ITEM

ITEM: Orchard Brook Homeowners Association Agreement Amendment
DATE: December 3, 2002
PREPARED BY: Michael Baker, Assistant to the Village Manager
PURPOSE: Authorization of Amendment

DISCUSSION:

The Village and the Orchard Brook Homeowners Association entered into an agreement in 1998 to cooperate in the restoration of the wetlands within the Association's boundaries, and to provide stream bank stabilization to Lacey Creek, which connects those wetlands. An amendment to the agreement was most recently approved one year ago and expires on December 31, 2002. Staff recommends that Council adopt the attached amendment, thereby extending the agreement with the Homeowners Association under the same terms and conditions until December 31, 2003.

The partnership between the Homeowners Association and the Village has resulted in a unique environmental restoration project that has proven beneficial for the neighborhood and the larger community. Notable contributors to the project include DuPage County, the U.S. Fish and Wildlife Service, and the Illinois Environmental Protection Agency, who have agreed to contribute a combined \$437,000 in grant funding. Along with the \$40,500 pledged by the Homeowners Association and the Village contribution of \$140,000, this project represents a truly collaborative team effort. Perry Erhart, a resident of Orchard Brook and past president of the Homeowners Association, deserves a great deal of recognition for the project's success, as he has played a key role in actively pursuing these improvements for the past six years.

ATTACHMENT:

Resolution and Amendment to an Agreement with the Orchard Brook Homeowners Association

RECOMMENDATION:

Staff recommends that this item, to authorize an amendment to the agreement between the Village and the Orchard Brook Homeowners Association, be placed on the active agenda for the Council Meeting of December 10, 2002.

RESOLUTION NO. _____

**A RESOLUTION AUTHORIZING EXECUTION OF AN AMENDMENT TO
AN AGREEMENT BETWEEN THE VILLAGE OF DOWNERS GROVE
AND THE ORCHARD BROOK HOMEOWNERS ASSOCIATION**

BE IT RESOLVED by the Village Council of the Village of Downers Grove, DuPage County, Illinois, as follows:

1. That the form and substance of a certain Agreement (the "Agreement") entitled "*An Agreement between the Village of Downers Grove and the Orchard Brook Homeowners Association Regarding the Orchard Brook Wetlands Restoration Project*", between the Village of Downers Grove (the "Village") and the Orchard Brook Homeowners Association (the "Association"), for the planning, design, funding and construction of certain improvements to Lacey Creek and surrounding wetlands areas, as set forth in the form of the Amendment Agreement submitted to this meeting with the recommendation of the Village Manager, is hereby approved.

2. That the Mayor and Village Clerk are hereby respectively authorized and directed for and on behalf of the Village to execute, attest, seal and deliver the Agreement, substantially in the form approved in the foregoing paragraph of this Resolution, together with such changes as the Manager shall deem necessary.

3. That the proper officials, agents and employees of the Village are hereby authorized and directed to take such further action as they may deem necessary or appropriate to perform all obligations and commitments of the Village in accordance with the provisions of the Agreement.

4. That all resolutions or parts of resolutions in conflict with the provisions of this Resolution are hereby repealed.

5. That this Resolution shall be in full force and effect from and after its passage as provided by law.

Mayor

Passed:

Attest: _____
Village Clerk

**AMENDMENT TO AN AGREEMENT BETWEEN THE VILLAGE OF DOWNERS GROVE
AND THE ORCHARD BROOK HOMEOWNERS ASSOCIATION**

WHEREAS, the Village of Downers Grove, an Illinois Municipal Corporation (hereinafter referred to as the "Village") and the Orchard Brook Homeowners Association (hereinafter referred to as the "Association") have previously entered into an agreement entitled "An Agreement between the Village of Downers Grove and the Orchard Brook Homeowners Association Regarding the Orchard Brook Wetlands Restoration Project" which was authorized by the Downers Grove Village Council on July 6, 1998 as Resolution 98-40 and authorized by the Orchard Brook Homeowners Association by Resolution passed August 6, 1998; and

WHEREAS, by the terms of this agreement, the Village and the Association are to cooperate in the planning, design, funding and construction of certain improvements to Lacey Creek and surrounding wetlands areas; and

WHEREAS, this agreement is due to expire on December 31, 2002; and

The parties have agreed to modify the agreement and to extend its term until December 31, 2003.

NOW, THEREFORE, in consideration of the mutual promises, covenants and conditions, the parties agree as follows:

1. The provisions set forth in the preamble of this agreement are hereby incorporated into and made a part hereof.
2. Wherever the date "December 31, 2002" appears in the agreement such date shall be amended and revised to read "December 31, 2003".
3. That except as set forth herein, the terms and the provisions shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their designated and authorized officers.

VILLAGE OF DOWNERS GROVE

BY: _____
Mayor

ATTEST:

Village Clerk

ORCHARD BROOK HOMEOWNERS
ASSOCIATION

BY: _____
(Title)

ATTEST:

RESOLUTION NO. 98-40

**A RESOLUTION AUTHORIZING EXECUTION OF AN AGREEMENT
BETWEEN THE VILLAGE OF DOWNERS GROVE AND
ORCHARD BROOK HOMEOWNERS ASSOCIATION FOR
THE ORCHARD BROOK WETLANDS RESTORATION PROJECT**

BE IT RESOLVED by the Village Council of the Village of Downers Grove, DuPage County, Illinois, as follows:

1. That the form and substance of an Agreement (the "Agreement"), between the Village of Downers Grove (the "Village") and Orchard Brook Homeowners Association (the "Association") for the Orchard Brook Wetlands Restoration Project, as set forth in the form of the Agreement submitted to this meeting with the recommendation of the Village Manager, is hereby approved.

2. That the Mayor and Village Clerk are hereby respectively authorized and directed for and on behalf of the Village to execute, attest, seal and deliver the Agreement, substantially in the form approved in the foregoing paragraph of this Resolution, together with such changes as the Manager shall deem necessary.

3. That the proper officials, agents and employees of the Village are hereby authorized and directed to take such further action as they may deem necessary or appropriate to perform all obligations and commitments of the Village in accordance with the provisions of the Agreement.

4. That all resolutions or parts of resolutions in conflict with the provisions of this Resolution are hereby repealed.

5. That this Resolution shall be in full force and effect from and after its passage as provided by law.

Betty M. Cheever
Mayor

Passed: July 6, 1998

Attest: April N. Hold
Village Clerk

June 30, 1998

AGREEMENT BETWEEN THE VILLAGE OF DOWNERS GROVE AND ORCHARD BROOK HOMEOWNERS ASSOCIATION REGARDING THE ORCHARD BROOK WETLANDS RESTORATION PROJECT

THIS AGREEMENT, made and entered into this first day of June, 1998, by and between the Village of Downers Grove (the "Village") and the Orchard Brook Homeowners Association (the "Association"). The Village and the Association are hereinafter together referred to as the "Parties."

WITNESSETH:

WHEREAS, the Village is an Illinois Municipal Corporation and home rule unit pursuant to the laws and constitution of the State of Illinois with general powers as a unit of local government within its corporate limits; and,

WHEREAS, Orchard Brook is a neighborhood comprised of various subdivisions within the Village; and

WHEREAS, the Orchard Brook Home Association (the "Association") is an Illinois not-for-profit corporation which has certain duties and responsibilities with respect to Orchard Brook pursuant to declarations of covenants, conditions and restrictions running with the Orchard Brook subdivisions; and

WHEREAS, within the Orchard Brook subdivisions are located certain land areas which are owned by the Association for the benefit of its homeowner members (the "Common Areas"); and,

WHEREAS, included within the Common Areas is a portion of a creek known as Lacey Creek as well as various adjoining wetlands areas (the "Wetlands Areas"); and,

WHEREAS, among the duties and responsibilities of the Association is the maintenance and control of the Common Areas, including the Wetlands Areas; and,

WHEREAS, Lacey Creek and the Wetlands Areas are in need of certain improvements to enhance stream flow and to restore and enhance the functioning of the Wetlands Areas; and

WHEREAS, the Parties have agreed to cooperate in the planning, design, funding and construction of such improvements (the "Orchard Brook Wetlands Project"); and,

WHEREAS, the Orchard Brook Wetlands Project will enhance property values, improve

aesthetics, improve the functioning of the Wetlands Areas, decrease the potential for flooding and insect breeding, and otherwise benefit and protect the health safety and welfare of the residents of the Village, including but not limited to the residents of Orchard Brook.

NOW, THEREFORE, in consideration of the mutual covenants, conditions, and agreements herein set forth, and other good and valuable consideration, the Parties agree as follows:

1. Preamble and Exhibits:

1.1. The provisions of the preamble are incorporated into and made a part of this Agreement by reference.

1.2. The following Exhibits are hereby made a part of this Agreement:

1.2.1. Exhibit 1 - Orchard Brook Homeowners Association - Restoration Plan for East Wetland, dated December, 1996, reduced copy attached.

1.2.2. Exhibit 2 - Northeastern Illinois Wetlands Conservation Account - The Conservation Fund Grant Agreement, Project Title Orchard Brook Wetland Restoration, Project Number 02-15-98-05, copy attached.

1.2.3. Exhibit 3 - Revised Proposal for funding to The Conservation Fund dated January 22, 1998, copy attached.

1.2.4. Exhibit 4 - Application for Financial Assistance to the Illinois Environmental Protection Agency, dated January 29, 1998.

1.2.5. Exhibit 5 - Plat of Subdivision - dated January 29, 19681, Orchard Brook West, reduced copy attached.

1.2.6. Exhibit 6 - Plat of Subdivision - Orchard Brook East, reduced copy attached.

1.2.7. Exhibit 7 - Plat of Subdivision - Orchard Brook North, reduced copy attached.

1.2.8. Exhibit 8 - Plat of Subdivision - Orchard Brook South, reduced copy attached.

1.2.9. Exhibit 9 - Plat of Subdivision - Orchard Brook, reduced copy attached.

1.2.10. Exhibit 10 - Proposal for professional services from Conservation Design Forum, dated April 1, 1998, copy attached.

2. *The Orchard Brook Wetlands Project:*

2.1. The Parties will cooperate in the design, funding, construction, maintenance and operation of the Orchard Brook Wetlands Project. The Parties acknowledge that, at the time of this Agreement, details regarding the Orchard Brook Wetlands Project are not final.

2.2. In general, the Orchard Brook Wetlands Project is expected to be divided into two phases, Phase I being enhancement and restoration of the Wetland Areas ("Wetland Restoration"), and Phase II being stream stabilization of Lacey Creek ("Lacey Creek stabilization"). The Orchard Brook Wetlands Project shall include the following:

2.2.1. Wetland Restoration, as set forth in Exhibits 1 through 3 is further divided into phases, with the Preliminary concept plans for the east wetlands portion of the Orchard Brook Wetlands Project having been prepared by Conservation Design Forum, Inc.. (Exhibit 1)

2.2.2. Lacey Creek stabilization within Orchard Brook.

2.3. The Orchard Brook Wetlands Project is to be constructed on the Common Areas as well as other properties. As regards the Common Areas, the Association shall provide to the Village or its designee all rights necessary or convenient to permit construction of the Orchard Brook Wetlands Project ("property rights"). As regards the non-Common Area properties, the Parties shall endeavor to secure such rights, on a voluntary basis, as may be necessary or convenient to permit construction of the Orchard Brook Wetlands Project. In the event such rights cannot be secured, the Parties may elect to proceed with partial construction of the Orchard Brook Wetlands Project. Under no circumstances shall this agreement be construed as requiring the Village to exercise its power of eminent domain to secure any additional rights.

2.4. Contingent upon funding sources being secured as provided in Section 3 of this Agreement, the Village shall solicit and engage the services of a qualified design firm(s) to prepare necessary plans to for the construction of the Orchard Brook Wetlands Project. The Orchard Brook Wetlands Project shall be considered a municipal project of the Village and applicable laws, including but not limited to the Illinois Public Improvement Bond Act (30 ILCS 550/0.01 et seq.) shall apply. The final design of the

Orchard Brook Wetlands Project as it affects the Common Areas shall be subject to the review and approval of both Parties. It is understood that the Village will be the contracting Party with the design engineer and will administer the design contract for the benefit of the Parties. The Village will consult with the Association to keep the Parties advised as to the progress of the design work and to address issues of mutual concern regarding details of such design work.

2.4.1. The Village shall solicit bids and/or proposals for the construction of the Orchard Brook Wetlands Project, including all equipment and appurtenances. The Village will solicit, award and administer all contracts for the project in the best interest and for the benefit of of the Parties and consult with, and keep advised, the Association regarding the progress of the work and any problems encountered or changes recommended. The Association shall have the right to review and approve the contract documents affecting the Common Areas, and the Parties must jointly agree to the award of any contract for such construction work. In the event the Parties cannot agree, this Agreement may be terminated as provided in Section 4.4, below. Upon approval by all Parties, the Village shall enter into contract with the selected contractor upon the approved terms, and shall administer such construction contract for the benefit of the parties in conformance with this Agreement. Both Parties will be designated as beneficiaries of any insurance, guaranty or warranty required by the construction contract.

2.4.2 Each contract for construction of any portion of the Orchard Brook Wetlands Project shall require the contractor to procure, and thereafter maintain and pay for insurance coverage of the types and with the limits set forth below:

2.4.2.1 Worker's Compensation and Employer's Liability Insurance at statutory limits as provided by the State of Illinois and Employer's Liability Insurance at a limit of not less than \$500,000 for all damages arising from each accident or occupational disease; and

2.4.2.2 General Liability Insurance, including comprehensive form policy; Premises-Operations Liability; Completed Operations; Independent Contractors; Blanket Contractual Liability; Blanket Explosion, Collapse and Underground Coverage; Broad Form Property Damage and Per Job site Aggregate Endorsement with Bodily Injury and Property Damage

Limits of not less than the following:

- (i) \$2,000,000 general aggregate;
- (ii) \$1,000,000 Products and Completed Operations;
- (iii) \$1,000,000 each occurrence;

2.4.2.3 Comprehensive Automobile Liability Insurance covering any auto, hired and non-owned vehicles, including the loading and unloading thereof, with Bodily Injury and Property Damage Limits of not less than

- (i) \$1,000,000 Combined Single Limit; or
- (ii) \$ 500,000 Bodily Injury Per Accident, and
- (iii) \$1,000,000 Bodily Injury Per Accident; and
- (iv) \$ 500,000 Property Damage per accident.

2.4.2.4 \$1,000,000 umbrella liability coverage excess of the coverages specified in subparagraphs 2.4.2.1, 2.4.2.2 and 2.4.2.3; and

2.4.2.5 Contractual assumed Liability: specifically covering the contractor for liability loss, cost and damages, including without limitation those damages assumed by the contractor in the construction contract.

2.4.2.6 The coverage itemized in this paragraph 2.4.2 shall be maintained by the contractor in form and with companies with a Best Guide rating of A-IV or better, acceptable to the Parties. The contractor shall be required to carry completed operation liability insurance for not less than 2 years after the completion of its work. Each policy of insurance shall name the Village and the Association and their employees and agents as additional insureds. The additional insured status shall extend to completed operations. The liability coverage of the additional insureds under the contractor's policy shall be primary to all other valid and collectable insurance available to the Village or the Association. If an additional insured has liability insurance which is applicable to the loss, such liability insurance shall be on an excess and non-contributory basis. The amount of the contractor's liability under its policy shall not be

reduced by the existence of such other insurance.

2.4.2.7 The contractor shall be required to furnish the Village and the Association with certificates of insurance evidencing the required coverages before commencing its work. Each certificate shall provide for binding thirty (30) days' notice of cancellation to the Village and the Association.

2.4.2.8 The contracts shall further provide that property insurance provided by the Village or the Association shall not cover any tools, apparatus, machinery, scaffolding, hoists, forms, staging, shoring or other personal property owned, rented or used by the contractor or anyone employed by it in the performance of the contractor's work. Damage or loss of any kind occasioned to equipment, fixtures or material prior to acceptance of the project by the Village and the Association shall be borne by and insured against by the contractor notwithstanding the manner in which the goods are shipped, which party pays freight or other transportation costs or the fact that title is transferred to the Village or the Association or that the Village or the Association has paid for such materials. In the event of a loss effecting only the contractor's work, the contractor shall bear the burden of the deductible

2.4.2.9 If required by the Association or the Village's insurance carriers, the contract documents shall provide that the contractor waives subrogation against the Village and the Association for damages caused by fire and other perils to the extent covered by the required insurance.

2.4.3. All work on the Common Areas of the Orchard Brook Wetlands Project shall be subject to inspection and approval by both Parties. In addition, any change order as well as final acceptance and approval of those portions of the Orchard Brook Wetlands Project affecting the Common Areas shall be subject to the approval of the Association.

3. *Funding:*

3.1. Funding for the Orchard Brook Wetlands Project is expected to be derived from several sources. The Parties acknowledge that, as of this agreement, all funding have not been identified or

confirmed. All commitments herein are subject to actual receipt by the Parties of complete funding for the Orchard Brook Wetlands Project. Under no circumstances shall either Party be obligated to budget, appropriate or expend any funds except as provided herein.

3.2. A grant in the amount \$84,875.00 has been awarded by The Conservation Fund to partially fund the east wetland area of Phase I of the Orchard Brook Wetlands Project as set forth in Exhibits 1 through 3 (the "Conservation Fund Grant").

3.3. The Village has submitted an application for financial assistance to the Illinois Environmental Protection Agency (the IEPA) to partially fund Phase II of the Orchard Brook Wetlands Project. A final decision regarding this application is expected before December 31, 1998. The amount requested is \$213,000.00.

3.4. The Parties will jointly submit a request to the DuPage County Stormwater Committee for funding of wetland construction work as part of the Orchard Brook Wetlands Project. The amount of this funding request is expected to be \$84,000.00.

3.5. The Village has included \$100,000 in its 1998/99 fiscal year budget to partially fund portions of the Orchard Brook Wetlands Project. The use of these funds shall be at the sole discretion of the Village and is subject to receipt of funding from other sources to permit construction of the Orchard Brook Wetlands Project.

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3.6. The Association has committed to provide \$40,500 (the "Association Contribution") to partially fund portions of the Orchard Brook Wetlands Project. The Parties acknowledge that the Association has expended approximately \$13,000 to cause the preparation of conceptual plans included with this agreement as Exhibit 1 - Orchard Brook Homeowners Association - Restoration Plan for East Wetland and shall be given a credit against the Association Contribution for such expenditure. Within 30 days of the execution of this Agreement, the Association shall provide the Village with an accounting of all funds expended to date for which the Association claims a credit against its total commitment of \$40,500. In the event the parties cannot agree as to such credit, this agreement may be terminated as

provided in Section 4.4. On or before December 31, 1999, the Association shall tender the Association Contribution to the Village, less the agreed upon credit.

3.7. In addition to the foregoing, the Parties will endeavor to locate and obtain other funding for the Orchard Brook Wetlands Project as appropriate and available.

3.8. On behalf of the Parties, the Village will act as lead Party in preparing grant applications and administering grant funds, including but not limited to the Conservation Fund Grant. The Association shall assist and cooperate as directed by the Village, including but not limited to the execution of all necessary documents. The Parties agree to take all steps necessary to secure, process and administer the funding grants described above.

4. *Miscellaneous Provisions:*

4.1 Following acceptance and approval of the Orchard Brook Wetlands Project, the Association shall be solely responsible to maintain those portions of the Orchard Brook Wetlands Project located on the Common Areas.

4.2 The parties agree to meet and cooperate in good faith throughout the term of this Agreement to implement the letter and spirit of the provisions set forth herein. The Parties agree and acknowledge that further details regarding the final plans for the Orchard Brook Wetlands Project may be subject to a future modification of this agreement. The Parties shall cooperate in the preparation and execution of all documents necessary to complete this project. The Parties agree to appoint, maintain and designate in writing to the other Party as often as necessary representatives and to confer as appropriate to coordinate activities and address any problems or issues which may arise in the course of this Agreement.

4.3 The Village represents and warrants that it has full authority and power, and has taken all steps required by law, to enter into this Agreement and to carry out the terms hereof. The Association represents and warrants that it has full authority and power, and has taken all steps required by law, to enter into this Agreement and to carry out the terms hereof.

4.4 Either party may terminate this Agreement on thirty (30) days written notice to the other Party in the following situations: (a) in the event that the parties fail to agree on the awarding of any

contract as provided in paragraph 2.4.1; (b) in the event the property rights for the Orchard Brook Wetlands Project are not secured on or before December 31, 1999; (c) In the event the Parties are unable to agree upon a final design for the Orchard Brook Wetlands Project on or before December 31, 1999; (d) In the event the Parties are unable to secure necessary funding on or before December 31, 1999; (e) In the event contracts are not awarded for construction for the Orchard Brook Wetlands Project on or before December 31, 1999. Upon termination, this Agreement shall be void and of no effect; provided, however, that the Parties shall remain responsible for their proportionate share of any fees, costs or expenses incurred by any party for the Orchard Brook Wetlands Project incurred prior to termination of this Agreement. In the event that, following service of such notice but before actual termination, the basis for such notice is corrected, the notice shall be considered void and of no effect, and this Agreement shall continue in full force and effect.

4.5. This Agreement may not be assigned by either Party, in whole or in part, without the prior written consent of the other Party.

IN WITNESS WHEREOF, the Parties hereto have set their hand and seal the day and date hereinabove written.

Village of Downers Grove

Betty M. Cheever
Mayor

Orchard Brook Homeowners Association

By: _____

Title: _____

Attest: April M. Hold
Village Clerk

Attest: _____

Title: _____