

**FIFTH AMENDMENT TO THE INTERGOVERNMENTAL AGREEMENT BETWEEN
CITY OF NAPERVILLE, THE CITY OF AURORA, AND NAPERVILLE TOWNSHIP
TO REPLACE AND WIDEN THE EXISTING HIGHWAY
UNDERPASS ON NORTH AURORA ROAD AT THE
ELGIN, JOLIET, & EASTERN RAILWAY COMPANY'S RAILROAD CROSSING**

This FIFTH AMENDMENT TO THE INTERGOVERNMENTAL AGREEMENT BETWEEN CITY OF NAPERVILLE, THE CITY OF AURORA, AND NAPERVILLE TOWNSHIP TO REPLACE AND WIDEN THE EXISTING HIGHWAY UNDERPASS ON NORTH AURORA ROAD AT THE ELGIN, JOLIET, & EASTERN RAILWAY COMPANY'S RAILROAD CROSSING (hereinafter "**Fifth Amendment to the Intergovernmental Agreement**" or "**Agreement**") is entered into this _____ day of _____, 202____ (hereinafter "**EFFECTIVE DATE**"), between the City of Naperville, (hereinafter "**NAPERVILLE**"), a municipal corporation and home rule unit of local government with offices at 400 South Eagle Street, Naperville, Illinois 60540, the City of Aurora (hereinafter "**AURORA**"), a municipal corporation and home rule unit of local government with offices at 44 E. Downer Place, Aurora, Illinois 60507, and Naperville Township (formerly the Naperville Township Road District) (hereinafter "**TOWNSHIP**"), a body corporate and politic, with offices at 31W331 North Aurora Road, Naperville, Illinois 60563. NAPERVILLE, AURORA, and the TOWNSHIP may be referred to herein individually as "**Party**" or collectively as "**Parties**".

RECITALS

1. **WHEREAS**, on April 18, 2006 the Parties entered into an intergovernmental agreement between the City of Naperville, the City of Aurora, and the Naperville Township Road District to "Replace and Widen the Existing Highway Underpass on North Aurora Road at the Elgin, Joliet, & Eastern Railway Company's Railway Company's Railroad Crossing" (hereinafter "**Intergovernmental Agreement**"); and
2. **WHEREAS**, the Intergovernmental Agreement has been amended by the First, Second, Third, and Fourth Amendments to address various aspects of the first three phases of the PROJECT.
3. **WHEREAS**, the construction components of the PROJECT will include, but are not limited to: (i) demolition of the existing Wisconsin Central, Ltd. ("WCL") bridges, construction of an interim shoo-fly bridge, and construction of replacement bridges; (ii) the Enbridge Pipeline Relocation; (iii) the ComEd pole relocation; (iv) the ONEOK Pipeline Relocation; (v) widening North Aurora Road roadway from Pennsbury Lane to Frontenac Road; (vi) construction of retaining walls which will be adjacent to the replacement railroad bridge abutments and will be integral to the design and construction of the new North Aurora Roadway profile; (vii) construction of a pump station located south of North Aurora Road and east of the WCL bridge; (viii) construction of the sidewalk and multi-use pedestrian path adjacent to the roadway; and (ix) construction of drainage and related roadway appurtenances; and

4. **WHEREAS**, prior to undertaking construction of the PROJECT, and in order to proceed with the PROJECT, the Parties must address authorize performance of additional work prior to IDOT's approval of the PROJECT letting in 2024, including but not limited to: (i) relocation of an existing Commonwealth Edison Company electric transmission/distribution pole; (ii) relocation or modification of a portion of an existing natural gas pipeline owned by ONEOK Natural Gas Transmission Company; (iii) additional engineering to design an alternate sleeve option for the Enbridge Pipeline Relocation based upon a constructability review; and (iv) additional survey and technical coordination and PROJECT management; and
5. **WHEREAS**, funding for the PROJECT is supported by approximately thirty-five million, one hundred thousand dollars (\$35,100,000) ("**State and Federal Funding**") as well as local share funding from the Parties ("**Local Share Funding**" or "**Local Share Funds**"). In order to retain State and Federal Funding, the PROJECT must be let by the Illinois Department of Transportation ("**IDOT**") in 2024.
6. **WHEREAS**, time is of the essence in approving expenditures to enable the PROJECT to be let by IDOT in 2024 and to avoid loss of State and Federal Funding.
7. **WHEREAS**, to facilitate approval and expenditure of Local Share Funding for the PROJECT, the Parties agree that Local Share Funds shall be deposited as provided herein and that each Party's authority relative to expenditure of their share of Local Share Funds shall be delegated to an NAR Project Team as defined and described in Section 3 hereof.
8. **WHEREAS**, in addition, the Parties desire to specify future obligations regarding the repair, maintenance, and reconstruction of the PROJECT components described in (v) through (ix) in Recital 4 above as set forth in Section 4 hereof, and with respect to PROJECT liability as set forth in Section 5 hereof; and
9. **WHEREAS**, the Parties agree that if it becomes necessary to extend a temporary easement previously acquired by one of the Parties, the Party that originally acquired such easement shall be responsible for obtaining and paying for the extension thereof; and
10. **WHEREAS**, the terms of the Intergovernmental Agreement, the First Amendment to the Intergovernmental Agreement, the Second Amendment to the Intergovernmental Agreement, the Third Amendment to the Intergovernmental Agreement, and the Fourth Amendment to the Intergovernmental Agreement are incorporated herein in their entirety and shall remain in full force and effect except as previously modified or as modified herein. If there is any inconsistency between this Fifth Amendment to the Intergovernmental Agreement and the Intergovernmental Agreement as previously amended, this Fifth Amendment to the Intergovernmental Agreement shall control.

NOW THEREFORE, in consideration of the premises and mutual covenants contained herein, the Parties hereby agree that:

1.0 RECITALS INCORPORATED.

- 1.1 The foregoing Recitals are incorporated herein by reference as though fully set forth in this Subsection 1.1.

2.0 FUTURE PROJECT AGREEMENTS – AUTHORIZATION TO EXECUTE.

- 2.1 As Lead Local Agency for the PROJECT, NAPERVILLE has entered into certain agreements for the PROJECT which the Parties have agreed to share in the cost of as provided in the Intergovernmental Agreement and amendments thereto.

In order to proceed with the PROJECT, additional agreements (“**Future Project Agreements**”) will be required to be entered into by the Parties, including but not limited to a Construction and Maintenance Agreement (CMA) and temporary and permanent easement agreements with Wisconsin Central Ltd.; an Access Agreement, a Permanent Easement Agreement, and a Construction and Maintenance Agreement with BNSF; a Design and Construction Agreement with Enbridge Energy, Limited Partnership for relocation and modification of its pipeline, an Easement Agreement and Reimbursement Agreement with Commonwealth Edison (ComEd) for design and relocation of their facilities, and an agreement with ONEOK Pipeline for relocation or modification of its pipeline.

By this Agreement, each Party hereby authorizes their Mayor, City Manager or Township President (as applicable) to execute such agreements, and any others needed for the PROJECT, subject to review and approval by the NAR Project Team described in Section 3.2 hereof.

Certain easement agreements, which shall also constitute Future Project Agreements, and which may be specific to certain Parties, are described in Section 7 hereof.

3.0 AUTHORIZATION FOR DEPOSIT AND EXPENDITURE OF LOCAL SHARE FUNDS .

- 3.1 Local Share Funding. At this time, it is anticipated that a remaining total of \$7,130,756 of Local Share Funding shall be required for utility relocation, construction and construction engineering portion of the PROJECT.

3.1.1 AURORA hereby agrees that at this time \$3,136,378 represents its estimated remaining share of Local Share Funding for the PROJECT including a fifteen

percent contingency which shall be expended as provided in Section 3.2 hereof. AURORA agrees to pay NAPERVILLE for Actual Project Costs as defined and provided in Section 3.3 hereof.

3.1.2 NAPERVILLE hereby agrees that at this time \$3,136,378 represents its estimated remaining share of Local Share Funding for the PROJECT including a fifteen percent contingency which shall be expended as provided in Section 3.2 hereof for Actual Project Costs as defined in Section 3.3 hereof.

3.1.3 The TOWNSHIP hereby agrees that at this time *\$852,888 represents its estimated remaining share of Local Share Funding for the PROJECT which shall be expended as provided in Section 3.2 hereof. TOWNSHIP agrees to pay NAPERVILLE for Actual Project Costs as defined and provided in Section 3.3 hereof. (*\$852,888 represents a true-up of all payments due or owed by the TOWNSHIP for utility relocation, construction and construction engineering portion of this PROJECT as well as the two-party "Intergovernmental Agreement between the City of Naperville and the Naperville Township Road District to Reconstruct and Widen North Aurora Road between Frontenac Road and Weston Ridge (as amended to extend to Fairway Drive) for Phases III and IV of the Project").

[**Note:** The above Local Share Funding shall include a payment of \$80,203.33 by each Party for stormwater fees which include a Wetland Credit purchase to compensate for wetland impact caused by the Project; (ii) a payment of \$9,584 by each Party for the third party consultant constructability review of Enbridge's original relocation design; (iii) a payment of \$51,557.00 by each Party for design of the Enbridge Sleeve Design; and (iv) a payment of \$16,666.67 by each Party for the ComEd transmission pole relocation Phase 1 engineering design.]

3.2 Future Project Agreements; Expenditures of Local Share Funding- Delegation of Authority.

Future expenditure of each Party's remaining Local Share Funding, as well as execution of Future Project Agreements, shall be subject to approval by a team of authorized representatives of the Parties to be known as the **NAR Project Team**.

The NAR Project Team shall be comprised of designated representatives of each Party who have in-depth familiarity with the PROJECT. Each Party shall give written notification to the other Parties as to who their NAR Project Team members will be. Subject to monthly Project Reporting requirements specified in Subsection 3.2.1 below, NAPERVILLE, AURORA, and the TOWNSHIP hereby delegate limited authority to the NAR Project Team to: (1) authorize the execution of Future Project Agreements by their respective Parties (as reviewed and approved by their respective legal counsel); and (2) determine what expenditures of Local Share Funding should be made for the PROJECT and when

such expenditures should be made so that the PROJECT can proceed on a timely and efficient basis.

The NAPERVILLE designees of the NAR Project Team, in consultation with representatives of TranSystems Corporation, the Parties' consultant for the PROJECT, shall lead the NAR Project Team and make information available as needed for the NAR Project Team to make informed and responsible decisions.

At no time shall expenditures in excess of the remaining Local Share Funding specified in Sections 3.1 through 3.3 above be made without approval by the respective city councils and boards of the Parties taken at a public meeting.

3.2.1 Project Reporting. A monthly report ("**Monthly Project Report**") shall be prepared by NAPERVILLE and/or TranSystems setting forth actions taken by the NAR Project Team during the prior month, including but not limited to any agreements that have been entered into and any Local Share Funding that has been authorized. Said Monthly Project Report shall be provided to the City Manager of NAPERVILLE, the Director of Public Work/City Engineer of AURORA, and the TOWNSHIP Supervisor.

3.3 Project Payments. NAPERVILLE agrees to bill AURORA and the TOWNSHIP for their respective shares of Actual Project Costs, as "Actual Project Costs" as defined below, twice a year (on June 30th and December 31st) until Local Share Funding commitments as set forth in Sections 3.1.1 through 3.1.3 hereof have been expended to the extent needed to reach Project Completion as defined in Section 4.1 hereof. Payments shall be made by AURORA and the TOWNSHIP within sixty (60) days of receipt of an invoice unless a different timeframe is approved in writing by the NAPERVILLE City Engineer. For the purposes of this Agreement, "**Actual Project Costs**" shall mean PROJECT costs arrived at after calculation of the reimbursements anticipated to be made for said PROJECT costs from State and Federal funding ("Federal and State Reimbursements"). If full reimbursement of projected Federal and State Reimbursements is less than anticipated, NAPERVILLE shall invoice AURORA and the TOWNSHIP for their respective share of unreimbursed amounts of Actual Project Costs within sixty (60) days of an invoice therefor from NAPERVILLE, unless an alternative timeframe is agreed to by the NAPERVILLE City Engineer.

Payments made by the City of Aurora will follow a schedule as described below understanding that if a specified maximum payment in any one year as set forth below is insufficient to pay the invoices submitted by NAPERVILLE, , the balance shall carry over to the following year and be paid with the first invoice submitted by NAPERVILLE unless otherwise agreed to by NAPERVILLE:

- Aurora maximum cumulative payment made by 12/31/2024- \$500,000.00
- Aurora maximum cumulative payment made by 12/31/2025- \$2,000,000.00
- Aurora maximum cumulative payment made by 12/31/2026 – \$3,000,000
- Any outstanding balance payment will be made by 12/31/2027
- If the local obligation increases by more than \$2,000,000.00 (two million dollars) above the amount authorized in this agreement. The City of Aurora payment will be renegotiated based on the available budget at that time.

The foregoing dates may be modified by agreement of the NAR Project Team if construction of Project is delayed.

3.4 Failure to Make Required Payment. If AURORA or the TOWNSHIP fail to make required payments as provided herein, NAPERVILLE may, upon Notice given as provided herein and a reasonable opportunity to cure, terminate this Agreement as to one or all of the Parties and/or may take such action at law or in equity as it deems advisable to enforce such payment and shall be entitled to reimbursement in full for its in-house or outside legal counsel fees therefore. Upon termination of this Agreement, any remaining Local Share Funding shall be retained by NAPERVILLE for payment of PROJECT costs. If after completion of payment of PROJECT costs, there is remaining Local Share Funding, NAPERVILLE shall return said remaining Local Share Funding to AURORA, NAPERVILLE, and NAPERVILLE TOWNSHIP in proportion to the amounts they contributed.

4.0 REPAIR AND MAINTENANCE OF PROJECT COMPONENTS.

4.1 Upon completion of the PROJECT, as determined by the City of Naperville as Lead Local Agency for the PROJECT (herein “**Project Completion**”), the Parties hereto agree that the obligation to repair, maintain, and reconstruct certain components of the PROJECT shall be undertaken and paid for as set forth below.

4.1.1 North Aurora Road Roadway, Sidewalk, Multi-use Path, Drainage, Street Lighting and all related appurtenances, between Pennsbury Lane and Frontenac Road.

(a) NAPERVILLE shall be responsible for the repair, maintenance, and reconstruction, as deemed necessary by NAPERVILLE, of the North Aurora Road roadway, sidewalk, multi-use path, drainage, street lighting, and all related appurtenances, for the portion of the PROJECT located between the centerline of the new north and south bridge abutments as the west limit and Frontenac Road as the east limit.

(b) TOWNSHIP shall be responsible for the repair, maintenance, and reconstruction, as deemed necessary by TOWNSHIP, of the North Aurora Road roadway, sidewalk, multi-use path, drainage, street lighting and all related appurtenances, for the portion of the PROJECT located between the centerline of the new north and south bridge abutments as the east limit and the TOWNSHIP/AURORA jurisdictional line then existing (as affected by AURORA annexations) as the western limit.

(c) AURORA shall be responsible for the repair, maintenance, and reconstruction of the North Aurora Road roadway, sidewalk, multi-use path, drainage, streetlighting and all other related appurtenances, as deemed necessary by AURORA, for the portion of roadway located between the jurisdictional line described above as the east limit and Pennsbury Lane as the west limit.

4.1.2 Retaining Walls.

(a) NAPERVILLE shall be responsible for the repair, maintenance, and reconstruction of the northeast retaining wall (approximately 469-feet in length) as deemed necessary by NAPERVILLE.

(b) TOWNSHIP shall be responsible for the repair, maintenance, and reconstruction, as deemed necessary by TOWNSHIP, of the northwest and southwest retaining walls (approximately 79-feet and 87-feet in length respectively). [Note: Wisconsin Central, Ltd. shall be responsible for the repair, maintenance, and reconstruction as necessary of the southeast retaining wall (approximately 32-feet in length) as provided for in the WCL CMA with the Parties.

4.1.3 Pump Station. NAPERVILLE shall be responsible for the repair, maintenance, and reconstruction of the pump station and related appurtenances (together referenced herein as the “**Pump Station**”) as deemed necessary by NAPERVILLE, subject to fifty percent (50%) reimbursement for the costs thereof by AURORA within sixty (60) days of an invoice therefor submitted by NAPERVILLE to AURORA.

4.1.4 Traffic Signal Interconnect.

(a) NAPERVILLE shall be responsible for the repair, maintenance, and reconstruction, as deemed necessary by NAPERVILLE, of the traffic signal interconnect (“**Traffic Signal Interconnect**”) for the portion of the PROJECT located between the centerline of the new

north and south bridge abutments as the west limit and Frontenac Road as the east limit.

(b) AURORA shall be responsible for the Traffic Signal Interconnect, as deemed necessary by AURORA, for the portion of roadway located between the centerline of the new north and south bridge abutments as the east limit and Pennsbury Lane as the west limit.

5.0 LIABILITY.

5.1 NAPERVILLE and AURORA shall share any costs related to claims brought against any of the Parties related to any of the PROJECT work (e.g. railroad bridge demolition and replacement per construction and maintenance agreements entered into with Wisconsin Central, Ltd. and BNSF, the construction reimbursement agreement for the Enbridge pipeline relocation, all road widening work, pedestrian pathways, pump station, including but not limited to the costs of outside counsel who shall be chosen by agreement of the two cities, and including the costs of any judgment or agreed upon settlement resulting therefrom.) The method of cooperation and payment shall be determined by NAPERVILLE and AURORA in the event that any claim is brought. Any payment made by insurance to any Party relative to said claims shall be shared by the two cities as agreed by them based upon relative amounts paid by each of them. Notwithstanding the foregoing, each Party shall be individually liable and responsible for any repair, maintenance, and reconstruction obligations for the components of the PROJECT as described in Section 4 above. The provisions of this section shall survive the expiration or termination of this Agreement.

6.0 HOLD HARMLESS.

6.1 Except as otherwise provided herein, or if there is a dispute as to liability as provided in Section 5 above, the Parties shall hold each other harmless from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the any aspect of the PROJECT.

7.0 PROJECT EASEMENTS.

7.1 A permanent easement agreement and temporary easement agreement for the PROJECT with Wisconsin Central, Ltd. will require execution by all Parties. A permanent easement agreement with BNSF may require agreement only of the TOWNSHIP. These easements, and any others required for the PROJECT as agreed upon by the NAR Project Team shall be deemed Future Project Agreements as provided for herein.

- 7.2 Each Party shall be responsible to obtain extensions of any temporary easements acquired by them for the PROJECT, as needed, and to pay for such extensions out of their Local Share Funding. The cost of any extension of temporary easements granted by Wisconsin Central, Ltd., if needed, or any extension of the BNSF access agreement, if needed, will be shared equally by NAPERVILLE and AURORA.

8.0 TERM.

- 8.1 This Fifth Amendment to the Intergovernmental Agreement shall be in effect from the EFFECTIVE DATE set forth on page 1 through Project Completion and payment of all funds required therefor.

9.0 ENTIRE AGREEMENT.

- 9.1 The Intergovernmental Agreement, the First Amendment to the Intergovernmental Agreement, the Second Amendment to the Intergovernmental Agreement, the Third Amendment to the Intergovernmental Agreement, the Fourth Amendment to the Intergovernmental Agreement, and this Fifth Amendment to the Intergovernmental Agreement as provided herein, represents the entire agreement between the Parties as to the PROJECT and supersedes all other communications or understandings whether oral or written. If there is any inconsistency between this Fifth Amendment to the Intergovernmental Agreement and the Intergovernmental Agreement as previously amended, this Fifth Amendment to the Intergovernmental Agreement shall control.

10.0 NOTICES.

- 10.1 Any notice (“**Notice**”) required hereunder shall be deemed properly given to the Party to be notified at the time it is personally delivered, mailed by FedEx overnight mail, or mailed by certified mail, return receipt requested, to the Party’s address. The address of each Party is as specified below. Any Party may change their address for receiving notices by giving notice thereof in compliance with the terms of this Subsection 10.1.

FOR THE CITY OF NAPERVILLE

City Engineer
Naperville Municipal Center
400 South Eagle Street
Naperville, IL 60134

With a copy to:

City Attorney
City of Naperville
400 South Eagle Street
Naperville, IL 60540

FOR THE CITY OF AURORA

City Engineer
City of Aurora
44 E. Downer Place
Aurora, IL 60507

With a copy to:

City Attorney
City of Aurora
44 E. Downer Place
Aurora, IL 60507

Richard Veenstra, Esq.
Schain, Banks, Kenny & Schwartz, Ltd.
70 W Madison St. Suite 5400
Chicago, Illinois 60602-4213

FOR NAPERVILLE TOWNSHIP

Naperville Township Supervisor
Attention: Eddie Bedford
139 Water Street
Naperville, IL 60540

With a copy to:

Ross Secler, Esq.
Odelson, Sterk, Murphey, Frazier & McGrath. Ltd.
3318 West 95th Street
Evergreen Park, Illinois 60805-2233

11.0 GENERAL PROVISIONS.

11.1 Choice of Law and Venue. This Agreement shall in all respects be subject to and construed in accordance with and governed by the laws of the State of Illinois. Venue for any action arising out of the terms or conditions of this Agreement shall be proper only in the Circuit Court for the Eighteenth Judicial Circuit, DuPage County, Illinois.

11.2 Ambiguity. This Agreement shall be construed without regard to any presumption or other rule requiring construction against the Party causing this Agreement to be drafted.

11.3 No Waiver. No Party shall be deemed, by any act of omission or commission, to have waived any of its rights or remedies hereunder unless such waiver is in writing and signed by the waiving party and, then only to the extent specifically set forth in the writing. A waiver with reference to one event shall not be construed as continuing or as a bar to or waiver of any right or remedy as to a subsequent event.

11.4 Severability. In the event any provision of this Fifth Amendment to the Intergovernmental Agreement is held to be unenforceable or invalid for any reason, the enforceability thereof shall not affect the remainder of the said Agreement. The remainder of the Agreement shall be construed as if not containing the particular provision and shall continue in full force, effect, and enforceability, in accordance with its terms.

11.5 Survival. The following terms herein shall survive the expiration or termination of this Agreement: Section 1.1, Section 3.1 and each subsection thereof, Section 3.3, Section 3.4, Section 4 and each subsection thereof, Section 5, Section 6, Section 7, Section 9, Sections 11.1 through Section 11.6, and Section 11.9 through Section 11.11.

11.6 Amendment. This Fifth Amendment to the Intergovernmental Agreement may be amended by written agreement of each Party hereto.

11.7 Counterparts. For convenience, this Fifth Amendment to the Intergovernmental Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of such counterparts when taken together shall constitute one and the same document.

11.8 Assignment. This Agreement may not be assigned by either party without the written consent of the other party.

11.9 Third-Party Beneficiaries. This Agreement is not intended to and does not confer or create any rights, benefits, privileges, claims, actions, or remedies of any nature in favor of any person or entity as a third-party beneficiary hereunder; the benefits and obligations provided herein are solely for the use and benefit of the Parties hereto.

11.10 Captions and Paragraph Headings. Captions and paragraph headings are for convenience only and are not a part of this Agreement and shall not be used in construing it.

11.11 Authority. The undersigned warrant and represent that have read and understand this Fifth Amendment to the Intergovernmental Agreement and that they are authorized to execute said Agreement.

The Parties hereto by their signatures acknowledge they have read and understand this Fifth Amendment to the Intergovernmental Agreement and intend to be bound by its terms.

/SIGNATURES ON FOLLOWING PAGES/

CITY OF NAPERVILLE

By: Scott A. Wehrli

Its: Mayor

ATTEST:

By: Dawn Portner

Its: City Clerk

Date: _____

CITY OF AURORA

By: Richard Irvin

Its: Mayor

ATTEST:

By: Jennifer Stallings

Its: City Clerk

Date: _____

NAPERVILLE TOWNSHIP

By: Eddie Bedford

Its: Supervisor

ATTEST:

By: Nathanael J. Sippel

Its: Town Clerk

Date: _____