

**SECOND AMENDMENT TO THE INTERGOVERNMENTAL AGREEMENT  
BETWEEN CITY OF NAPERVILLE AND 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 RAILROAD CROSSING  
FOR PHASE III OF THE PROJECT**

This SECOND AMENDMENT TO THE INTERGOVERNMENTAL AGREEMENT BETWEEN CITY OF NAPERVILLE AND 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 RAILROAD CROSSING FOR PHASE III OF THE PROJECT (hereinafter "Second Amendment to the Intergovernmental Agreement") is entered into this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ (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 the Naperville Township Road District (hereinafter "TOWNSHIP"), a body corporate and politic, with offices at 31W331 North Aurora Road, Naperville, Illinois 60563-1719. NAPERVILLE, AURORA, and the TOWNSHIP may be referred to herein individually as "Party" or collectively as "Parties".

**RECITALS**

**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

**WHEREAS**, said Intergovernmental Agreement envisioned four (4) PHASES to the project (referenced therein and hereinafter as the "PROJECT") as follows: (1) Preliminary Engineering, (2) Design Engineering, (3) Construction Engineering, and (4) Construction; and

**WHEREAS**, the original four (4) PHASES of the PROJECT have been revised to more accurately reflect the development of the PROJECT as follows: (1) Preliminary Engineering, (2) Negotiation and Land Acquisition, (3) Design Engineering/Stormwater Fees, and (4) Construction Engineering and Construction; and

**WHEREAS**, the Intergovernmental Agreement addressed PHASE 1 of the PROJECT; and

**WHEREAS**, on July 20, 2015 the Parties entered into a First Amendment to the Intergovernmental Agreement for PHASE II of the PROJECT which included negotiation services for land acquisition and land acquisition costs for the widening and reconstruction of the North Aurora Road Underpass at the Canadian National (CN)/Elgin, Joliet, and Eastern (EJ&E) Railway Company's Railroad Crossing; and

**WHEREAS**, the Parties now desire to enter into a Second Amendment to the Intergovernmental Agreement in order to define the Parties' obligations with respect to the third phase of the PROJECT (hereinafter "PHASE III of the PROJECT"); and

**WHEREAS**, PHASE III of the PROJECT includes design engineering services (hereinafter "Design Engineering") and stormwater permit and wetland mitigation fees (hereinafter "Stormwater Fees") for the widening and reconstruction of the North Aurora Road Underpass at the Canadian National (CN)/Elgin, Joliet, and Eastern (EJ&E) Railway Company's Railroad Crossing; and

**WHEREAS**, the terms of the Intergovernmental Agreement, and First Amendment thereto, are incorporated herein by reference in their entirety and shall remain in full force and effect except to the extent they are modified by the provisions contained herein.

**NOW THEREFORE**, in consideration of the premises and mutual covenants contained herein, the Parties 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 PHASE III OF THE PROJECT**

2.1 Scope of Work. The scope of work (“Scope of Work”) for PHASE III of the PROJECT shall include Design Engineering and payment of Stormwater Fees generally described as follows:

2.1.1 Design Engineering. Design Engineering for the PROJECT shall be performed by an engineering consulting firm to be selected by agreement of the Parties hereto. A design engineering services contract (hereinafter “CONTRACT”) shall be entered into and administered by NAPERVILLE as the lead local agency for the PROJECT.

2.1.2 Stormwater Fees. The Stormwater Fees for the PROJECT shall include all costs associated with the DuPage Countywide Stormwater and Floodplain Ordinance required to obtain the necessary permits for the PROJECT. Stormwater Fees include, but are not limited to, permit review fees, wetland mitigation fees, detention variance fees and stormwater BMP fee-in-lieu.

## **3.0 COSTS OF PHASE III OF THE PROJECT**

3.1 Design Engineering. It is anticipated that the total cost of the CONTRACT shall be one million nine hundred eighty thousand dollars (\$1,980,000).

3.2 Stormwater Fees. It is anticipated that the total cost of the Stormwater Fees associated with the PROJECT shall be one hundred fifty thousand dollars (\$150,000).

3.3 It is estimated that the total cost of the CONTRACT and Stormwater Fees for PHASE III of the PROJECT (hereinafter “ESTIMATED COST”) will be two million, one hundred thirty thousand dollars (\$2,130,000). The actual cost of the CONTRACT and Stormwater Fees for PHASE III of the PROJECT (hereinafter “ACTUAL COST”) will be determined and finalized during the progression of the PROJECT. The ACTUAL COST may be less than or exceed the ESTIMATED COST.

#### **4.0 PAYMENT OF COSTS OF PHASE III OF THE PROJECT**

- 4.1 Each Party shall be responsible for payment of one-third of the ESTIMATED COST, or seven hundred ten thousand dollars (\$710,000.00) each. Payment by the Parties for any difference between the ESTIMATED COST and the ACTUAL COST shall be made as provided in Subsections 4.4 and 4.5 below.
- 4.2 As lead agency for the PROJECT, NAPERVILLE will collect and act as repository for funds contributed by AURORA and the TOWNSHIP for PHASE III of the PROJECT as provided herein.
- 4.3 AURORA and the TOWNSHIP shall each pre-pay their one-third share of the ESTIMATED COST as set forth below. NAPERVILLE shall pay its one-third share of the ESTIMATED COST on an ongoing basis as needed.
- 4.3.1 The TOWNSHIP has paid NAPERVILLE one million three hundred fifty thousand dollars (\$1,350,000.00) of its cost obligation for the PROJECT. The TOWNSHIP'S share of the ESTIMATED COST as set forth in Subsection 4.1 above shall be deducted from that amount.
- 4.3.2 AURORA shall pay NAPERVILLE its share of the ESTIMATED COST as set forth in Subsection 4.1 above in two (2) payments as follows:
- 4.3.2.1 On or before January 31, 2017 AURORA shall pay NAPERVILLE four hundred thousand dollars (\$400,000.00).
- 4.3.2.2 On or before January 31, 2018, AURORA shall pay NAPERVILLE three hundred ten thousand dollars (\$310,000.00).
- 4.4 Underpayment.
- 4.4.1 10% Increase. In the event that the ACTUAL COST exceeds the ESTIMATED COST set forth in Subsection 3.3 by no more than ten percent (10%), the Parties hereto shall share equally in such increased cost. NAPERVILLE, as lead local agency for the PROJECT, will notify the Parties as soon as practicable of any such increase. Said increased cost shall

be paid by AURORA within ninety (90) days of receipt of notice and shall be paid by the TOWNSHIP as provided in Subsection 4.3.1 above.

4.4.2 Over 10% Increase. In the event that the ACTUAL COST exceeds the ESTIMATED COST set forth in Subsection 3.3 above by more than ten percent (10%), any cost in excess of 10% shall be enforceable against any Party hereto only if said Party has agreed to such increase by amendment of this Second Amendment to the Intergovernmental Agreement.

4.5 Overpayment. In the event that upon completion of PHASE III of the PROJECT all funds contributed by the AURORA and the TOWNSHIP as provided herein-have not been exhausted, AURORA shall be entitled to be reimbursed a one-third share of said remaining funds by NAPERVILLE within thirty (30) days of completion of PHASE III. The TOWNSHIP'S one-third share of said remaining funds shall held by NAPERVILLE to be used by the TOWNSHIP for future PHASES of the PROJECT.

4.6 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, declare this Second Amendment to the Intergovernmental Agreement terminated and of no further force or effect as to one or all of the Parties, 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.

4.7 Failure to Make Non-Required Payment. If the ACTUAL COST exceeds the ESTIMATED COST by more than ten percent (10%) as provided above, and any Party hereto is unwilling to amend this Agreement to provide for payment of such amount in excess of ten percent (10%), NAPERVILLE may, upon Notice given as provided herein, declare this Second Amendment to the Intergovernmental Agreement to be terminated and of no further force or effect as to one or all of the Parties.

4.8 Funds upon Termination. In the event that this Agreement is terminated as provided above, any remaining funds contributed by the Parties not expended in the execution of the Scope of Work for PHASE III of the PROJECT shall be refunded in accordance with Subsection 4.5 above.

## **5.0 TERM**

5.1 This Second Amendment to the Intergovernmental Agreement shall be in effect from the EFFECTIVE DATE set forth on page 1 through completion of the Scope of Work provided for herein.

## **6.0 INSURANCE REQUIREMENTS**

6.1 NAPERVILLE shall cause each consultant employed by it to perform the work described or referenced herein to maintain insurance in types and amounts, and from companies, acceptable to NAPERVILLE. NAPERVILLE shall require each such consultant to name the Parties and their respective officers, agents, and employees as additional insureds on all required coverages.

## **7.0 HOLD HARMLESS**

7.1 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 performance of the Scope of Work described or referenced herein.

## **8.0 ENTIRE AGREEMENT**

8.1 This Second Amendment to the Intergovernmental Agreement represents the entire agreement between the Parties as to PHASE III of the PROJECT, and supersedes all previous communications or understandings whether oral or written.

## **9.0 NOTICES**

9.1 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 8.1.

**FOR THE CITY OF NAPERVILLE**

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

**FOR THE NAPERVILLE TOWNSHIP ROAD DISTRICT**

Naperville Township Highway Commissioner  
Naperville Township Road District  
31W331 North Aurora Road  
Naperville, IL 60563-1719

**FOR THE CITY OF AURORA**

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

**10.0 GENERAL PROVISIONS**

- 10.1 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.
- 10.2 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.
- 10.3 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 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.

- 10.4 Severability. In the event any provision of this Second 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.
- 10.5 Survival. The following provisions shall survive the expiration or termination of this Second Amendment to the Intergovernmental Agreement: Subsection 1.1, Section 4 (including each subpart thereof), Subsection 7.1, and Subsections 10.1 through 10.5.
- 10.6 Amendment. This Second Amendment to the Intergovernmental Agreement may be amended by written agreement of each Party hereto.
- 10.7 For convenience, this Second 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.
- 10.8 Authority. The undersigned warrant and represent that have read and understand this Second 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 Second Amendment to the Intergovernmental Agreement and intend to be bound by its terms.



**CITY OF NAPERVILLE**

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By: Steve Chirico

Its: Mayor

**ATTEST:**

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By: Pam Gallahue, Ph.D.

Its: City Clerk

Date: \_\_\_\_\_

**CITY OF AURORA**

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By: Robert J. O'Connor  
Its: Mayor

**ATTEST:**

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By: Wendy McCambridge  
Its: City Clerk

Date: \_\_\_\_\_

**NAPERVILLE TOWNSHIP ROAD DISTRICT**

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By: Stan Wojtasiak  
Its: Highway Commissioner

**ATTEST:**

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By: Barry Greenberg  
Its: Town Clerk

Date: \_\_\_\_\_