

**THIRD AMENDMENT TO THE INTERGOVERNMENTAL AGREEMENT BETWEEN
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 RAILROAD CROSSING**

This THIRD AMENDMENT TO THE INTERGOVERNMENTAL AGREEMENT BETWEEN 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 RAILROAD CROSSING (hereinafter "**Third Amendment to the Intergovernmental Agreement**") is entered into this _____ day of _____, 2021 (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

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**, 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
3. **WHEREAS**, the Intergovernmental Agreement addressed PHASE 1 of the PROJECT; and
4. **WHEREAS**, on July 20, 2015 the Parties entered into a First Amendment to the Intergovernmental Agreement for PHASE II of the PROJECT ("**First Amendment to the IGA**") 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

5. **WHEREAS**, on July 13, 2017 the Parties entered into a Second Amendment to the Intergovernmental Agreement for PHASE III of the PROJECT (“**Second Amendment to the IGA**”) which included design engineering services **and** stormwater permit and wetland mitigation 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

6. **WHEREAS**, the Second Amendment to the IGA also revised the original four (4) PHASES of the PROJECT 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

7. **WHEREAS**, since passage of the Second Amendment to the IGA, it was discovered that a major conflict between the proposed roadway profile for the PROJECT and the existing gas pipeline owned by the Enbridge Pipeline Company (“**Enbridge**”) requires approximately one hundred feet (100’) of the gas pipeline to be lowered to resolve the conflict (hereinafter the “**Enbridge Pipeline Relocation**”). It was further learned that additional easements along the Canadian National (CN)/Elgin, Joliet, and Eastern (EJ&E) Railway will be required to be obtained in order to perform necessary track spur modifications (hereinafter “**Additional Rail Line Easements**”); and

8. **WHEREAS**, due to the Enbridge Pipeline Relocation and the Additional Rail Line Easements, the scope of work for PHASE II and PHASE III require amendment to include the additional work that will need to be performed in order to complete PHASE II and PHASE III of the PROJECT, and the costs associated with such additional work; and

9. **WHEREAS**, the terms of the Intergovernmental Agreement, the First Amendment to the IGA, and the Second Amendment to the IGA are incorporated herein in their entirety and shall remain in full force and effect except as previously modified or as modified 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 EXPANSION OF THE SCOPE OF WORK FOR PHASES II AND III OF THE PROJECT AND RELATED COSTS

2.1 As a result of the Enbridge Pipeline Relocation and the Additional Rail Line Easements described in Recital 7, additional work will need to be performed in PHASE II and PHASE III of the PROJECT at additional estimated costs

(“ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS”), which work and costs are generally described below:

2.1.1 PHASE II – Additional Land Acquisition Costs. Additional Rail Line Easements along the Canadian National (CN)/Elgin, Joliet, and Eastern (EJ&E) Railway are required to perform necessary track spur modifications. It is estimated that the additional land costs for PHASE II of the PROJECT will be one million, five hundred and ten thousand dollars (\$1,510,000).

2.1.2 PHASE II -Additional Land Acquisition Services. Since additional easements have to be acquired for the PROJECT, additional land acquisition services and associated costs will be needed for PHASE II of the PROJECT in the estimated amount of one hundred and one thousand, five hundred and fourteen dollars (\$101,514).

2.1.3 PHASE III – Additional Design Engineering for the Enbridge Pipeline Relocation. It is anticipated that the additional costs for Design Engineering associated with the Enbridge Pipeline Relocation will be three hundred and forty thousand dollars (\$340,000).

2.1.4 PHASE III – Other Additional Design Engineering. It is anticipated that additional costs in the amount of one hundred and thirty-eight thousand, nine hundred and twenty-eight dollars (\$138,928.00) will be incurred for other additional Design Engineering costs for PHASE III in order to provide: (i) extended PROJECT management and coordination; (ii) engineering for the BNSF retaining wall associated with the Additional Rail Line Easements (iii) the design of a temporary PTZ (pan, tilt, zoom) camera; (iv) the roadway profile revision resulting from the lowering of the Enbridge Pipeline; and (v) a second pre-final submittal of the design plan set for the PROJECT to the Illinois Department of Transportation (“IDOT”).

2.2 The total ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS for the PROJECT, as individually noted in Subsections 2.1.1 through 2.1.4 above, is two million, ninety thousand, four hundred and forty-two dollars (\$2,090,442).

EXHIBIT A attached hereto and made part hereof sets forth the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS.

The actual additional costs related to PHASE II and PHASE III of the PROJECT (hereinafter the “ACTUAL PHASE II AND PHASE III ADDITIONAL COSTS”) may be less than or exceed the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS. The ACTUAL PHASE II AND PHASE III ADDITIONAL COSTS will be determined and finalized during the progression of the PROJECT.

3.0 PAYMENT OF PHASE II AND PHASE III ADDITIONAL COSTS

- 3.1 As local lead agency for the PROJECT, NAPERVILLE will continue to collect and act as repository for funds contributed by AURORA and the TOWNSHIP for PHASE II and PHASE III of the PROJECT.
- 3.2 The provisions in this Section 3 pertain only to the additional costs associated with PHASE II and PHASE III of the PROJECT generally described in Section 2 above. Such costs are in addition to the payment provisions previously set forth in the First Amendment to the IGA and the Second Amendment to the IGA which shall remain in full force and effect except as previously modified or as modified herein.
- 3.3 Each Party shall be responsible for payment of one-third of the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS, or six hundred and ninety-six thousand, eight hundred and fourteen dollars (\$696,814) each, as such costs may be increased based upon the ACTUAL PHASE II AND PHASE III ADDITIONAL COSTS subject to the provisions set forth in Section 3.4 below.
 - 3.3.1 The TOWNSHIP shall pay its share of the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS, or six hundred and ninety-six thousand, eight hundred and fourteen dollars (\$696,814) on or before September 1, 2021.
 - 3.3.2 AURORA shall pay its share of the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS as follows:
 - 3.3.2.1 On or before September 1, 2021, AURORA shall pay NAPERVILLE three hundred thousand dollars (\$300,000).
 - 3.3.2.2 On or before February 1, 2022, AURORA shall pay NAPERVILLE three hundred and ninety-six thousand, eight hundred and fourteen dollars (\$396,814).
 - 3.3.3 NAPERVILLE shall pay its share of the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS on an ongoing basis as needed.
- 3.4 Underpayment.
 - 3.4.1 Up to 10% Increase. In the event that the ACTUAL PHASE II AND PHASE III ADDITIONAL COSTS exceed the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS set forth above 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 and the TOWNSHIP within ninety (90) days of receipt of Notice.

- 3.4.2 Over 10% Increase. In the event that the ACTUAL PHASE II AND PHASE III ADDITIONAL COSTS exceed the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS set forth 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 Third Amendment to the Intergovernmental Agreement.
- 3.5 Overpayment. In the event that upon completion of PHASE II and PHASE III of the PROJECT all funds contributed by the AURORA and the TOWNSHIP for said PHASES 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 both PHASE II and PHASE III. The TOWNSHIP'S one-third share of said remaining funds shall held by NAPERVILLE to be used by the TOWNSHIP for PHASE IV of the PROJECT.
- 3.6 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 Third 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.
- 3.7 Failure to Make Non-Required Payment. If the ACTUAL PHASE II AND PHASE III ADDITIONAL COSTS exceed the ESTIMATED PHASE II AND PHASE III ADDITIONAL COSTS 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 Third Amendment to the Intergovernmental Agreement to be terminated and of no further force or effect as to one or all of the Parties.
- 3.8 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 II and PHASE III of the PROJECT shall be retained by NAPERVILLE for payment of PROJECT costs.

4.0 **TERM**

4.1 This Third Amendment to the Intergovernmental Agreement shall be in effect from the EFFECTIVE DATE set forth on page 1 through completion of the PROJECT and payment of all funds due herein.

5.0 **INSURANCE REQUIREMENTS**

5.1 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.

6.0 **HOLD HARMLESS**

6.1 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.

7.0 **ENTIRE AGREEMENT**

7.1 The Intergovernmental Agreement, the First Amendment to the IGA, the Second Amendment to the IGA, and this Third 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.

8.0 NOTICES

- 8.1 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

9.0 GENERAL PROVISIONS

- 9.1 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.
- 9.2 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.
- 9.3 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.

- 9.4 Severability. In the event any provision of this Third 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.
- 9.5 Survival. The following terms herein shall survive the expiration or termination of this Agreement: Section 1.1, Section 3 and each subsection thereof, Section 6.1, Section 7.1, and Section 9.0 and each subsection thereof.
- 9.6 Amendment. This Third Amendment to the Intergovernmental Agreement may be amended by written agreement of each Party hereto.
- 9.7 Counterparts. For convenience, this Third 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.
- 9.8 Authority. The undersigned warrant and represent that have read and understand this Third 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 Third Amendment to the Intergovernmental Agreement and intend to be bound by its terms.

/SIGNATURES ON FOLLOWING PAGES/

CITY OF NAPERVILLE

By: Steve Chirico

Its: Mayor

ATTEST:

By: Pam Gallahue, Ph.D.

Its: City Clerk

Date: _____

CITY OF AURORA

By: Richard Irvin

Its: Mayor

ATTEST:

By: Jennifer Stallings

Its: City Clerk

Date: _____

NAPERVILLE TOWNSHIP ROAD DISTRICT

By: Richard Novinger
Its: Highway Commissioner

ATTEST:

By: Nathanael J. Sippel
Its: Town Clerk

Date: _____

EXHIBIT A

Intergovernmental Agreement Timeline

	Approved Date	Phase 1 Prelim. Eng. Costs	Phase 2 Land Costs	Phase 3 Design Engineering
Original IGA	4/18/2006	\$610,000.00		
IGA Amendment 1	7/20/2015		\$815,400.00	
IGA Amendment 2	7/13/2017			\$2,130,000.00

Additional Phase 2 and 3 Cost Breakdown for Amendment #3 to the Intergovernmental Agreement

	ESTIMATED PHASE II ADDITIONAL COSTS			
	Total Cost	Local Share Cost (33.33% even split)		
		City of Naperville	Aurora	Naperville Township
Change Order #1 - Land Ack (Previously Approved)*	\$57,292.00	\$19,097.33	\$19,097.33	\$19,097.33
Change Order #2 - Negotiation Services**	\$44,222.00	\$14,740.67	\$14,740.67	\$14,740.67
Change Order #2 - Land Ack (CN & BNSF Easement Costs)**	\$1,510,000.00	\$503,333.33	\$503,333.33	\$503,333.33
Individual Agency Cost		\$537,171.33	\$537,171.33	\$537,171.33
Total Local Share Cost			\$1,611,514.00	

* Change Order #1 was previously approved and fell beneath the 10% price increase allowed as approved within IGA #2. No IGA Amendment required.

** Change Order #2 in conjunction with Change Order #1 exceeded the 10% price increase as approved within IGA #2. IGA Amendment #3 required.

	ESTIMATED PHASE III ADDITIONAL COSTS			
	Total Cost	Local Share Cost (33.33% even split)		
		City of Naperville	Aurora	Naperville Township
Change Order #2 - Roadway Widening	\$138,928.00	\$46,309.33	\$46,309.33	\$46,309.33
Change Order #3 - Enbridge Relocation	\$340,000.00	\$113,333.33	\$113,333.33	\$113,333.33
Individual Agency Cost		\$159,642.67	\$159,642.67	\$159,642.67
Total Local Share Cost			\$478,928.00	