



City Hall, 215 Sycamore St.
Muscatine, IA 52761-3840
(563) 262-4141
Fax (563) 262-4142

COMMUNITY DEVELOPMENT

Planning,
Zoning,
Building Safety,
Construction Inspection Services,
Public Health,
Housing Inspections,
Code Enforcement

Date: January 3, 2017
To: Mayor and City Council
From: Dave Gobin, Community Development Director
Cc: Gregg Mandsager, City Administrator
Re: Request to accept Agreement with Canadian-Pacific Railroad

INTRODUCTION: On April 8, 2015, the City entered into a Memorandum of Understanding with Canadian-Pacific (CP) Railroad to finalize a definitive agreement between the parties.

BACKGROUND: Through a significant negotiations process, which took over a year-and-a-half, we have finally come to an acceptable outcome for the City. Basically, we get \$4,000,000 over two years as a result of the impacts on the Mississippi Drive project from CPs raising of their tracks without notice in 2014.

RECOMMENDATION: Staff is requesting Council approve the acceptance of this final Cost Sharing Agreement with CP.

COST SHARE AGREEMENT

THIS COST SHARE AGREEMENT (the "Agreement") is entered into on this ____ day of _____, 2016 by and between the Dakota, Minnesota & Eastern Railroad Company doing business as Canadian Pacific (hereinafter "CP"), its successors and assigns, and the City of Muscatine, Iowa (hereinafter the "City").

WHEREAS, CP owns and operates railroad tracks along the Mississippi Drive corridor within the City from railroad Milepost 219.0 to 219.6 of the Ottumwa Subdivision, including the Heinz Spur ("Mississippi Drive Corridor Tracks"); and

WHEREAS, in response to flooding in 2014, CP raised the elevation of the Mississippi Drive Corridor Tracks; and

WHEREAS, the City experienced an interruption and displacement of traffic patterns and an interruption in Americans with Disabilities Act as amended ("ADA") access to its riverfront due to the elevation of the Mississippi Drive Corridor Tracks; and

WHEREAS, the City is planning a comprehensive project for reconstruction of Mississippi Drive, including but not limited to bringing railroad crossings in the area of Mississippi Drive and entrances into the riverfront area into compliance with the ADA ("City's Project"); and

WHEREAS, the City and CP entered into a Memorandum of Understanding ("MOU"), dated April 8, 2015 attached as Exhibit A, as a result of the disruption in access and in order to develop a more definitive contract for coordinating both the City's Project and further increases to the elevation of the Mississippi Drive Corridor Tracks by CP; and

WHEREAS, as a result of CP raising the elevation of the Mississippi Drive Corridor Tracks in response to the flooding in 2014, the City will incur expenses for ADA compliance in connection with the City's Project that it would otherwise not incur; and

WHEREAS, CP does not at this time plan further increases to the elevation of the Mississippi Drive Corridor Tracks, except work associated with raising the level of the track at the Iowa Avenue crossing by 0.22 feet ("Planned Additional Track Raise"); and

WHEREAS, the parties desire to enter into this Agreement to provide for a financial contribution by CP to the City's Project and to address the other matters set forth herein.

NOW, THEREFORE, the City and CP agree as follows:

1. **Purpose.** This purpose of this Agreement is to set forth CP's agreement to make a financial contribution to the costs of the City's Project that are necessitated by CP's raising the height of the Mississippi Drive Corridor Tracks.

2. **City's Project.** The portion of the City's Project that is the subject of this Agreement is shown on the attached Exhibit B. For purposes of this Agreement, this area shall be known as the "Area of Impact."

3. **Project Adjustments.** as a result of CP's track raise, it becomes necessary for the City to make certain adjustments to the City's Project design within the Area of Impact, including, *but not limited to*: (i) raising the height of Mississippi Drive; (ii) restoring existing railroad crossings and entrances to the

riverfront area so that they comply with all applicable Iowa Department of Transportation requirements and meet all of the accessibility and design requirements imposed by federal law including, but not limited to, the ADA; and (iii) acquiring property for right-of-way purposes (the "Project Adjustments."). The Project Adjustments are preliminarily illustrated on the attached Exhibit C and itemized on the attached Exhibit B. The City shall complete the City's Project at its sole cost and expense with the exception of the financial contribution by CP pursuant to the terms of this Agreement.

4. Financial Responsibilities. The total cost of the City's Project is currently estimated at \$18,000,000.00. Of the total project costs, the parties estimate that approximately \$4,000,000.00 of the cost is due to the CP track raise. CP agrees to pay the City \$4,000,000.00 as CP's financial contribution to the costs of the City's Project.

A. *Payments.* CP shall make its \$4,000,000.00 contribution to the City's Project in three payments as follows:

- (i) the first payment in the amount of \$2,000,000.00 shall be delivered to the City on or before April 1, 2017;
- (ii) the second payment in the amount of \$1,000,000.00 shall be delivered to the City on or before April 1, 2018; and
- (iii) the third payment in the amount of \$1,000,000 shall be delivered to the City following 85 % completion of the City's Project related to the Mississippi Drive roadway and CP crossing work within the Area of Impact, but not earlier than April 1, 2018.

Upon the making of these three payments totaling \$4,000,000.00, CP's obligation to make a financial contribution to the City's Project shall be fulfilled irrespective of errors in the preliminary illustrations and estimates contained in Exhibits B and C, the actual costs of the City's Project, the actual costs of Project Adjustments, or other actual costs paid by the City due to the CP track raise.

B. *Deposited Funds.* CP agrees that all funds delivered to the City pursuant to this Agreement may be commingled with other similar monies deposited from other sources funding the City's Project.

5. City's Project Letting and Award of Contracts. The City shall be solely responsible for bid letting of the City's Project, including Project Adjustments, which includes advertising for bids and awarding the construction contracts for the City's Project. The City will solicit bids for the public improvement in accordance with the plans developed by the City. The plans may from time to time be modified in order to carry out the work as contemplated. The City reserves the right to reject any and all bids at the City's sole discretion. If, for any reason, the City does not substantially complete the City's Project related to the Mississippi Drive roadway and CP crossing work within the Area of Impact by December 31, 2019, the City shall return to CP any portion of CP's financial contribution paid by CP to the City pursuant to this Agreement and not actually used by the City for Project Adjustments.

6. City's Project Management. Subject to the provisions of this Agreement, The City shall have exclusive control of the City's Project.

7. Ownership and Modification. Regardless of which party procured payment for any portion of the City's Project, the City shall maintain ownership of all portions of such public improvements. By

contributing to the cost of the City's Project, CP gains no interest in the roadway or improvements whatsoever. In the event the City decides to remove the roadway or improvements, CP shall not be entitled to a refund of the funds contributed to the City's Project.

8. Coordination of Work. The City and CP shall reasonably cooperate on coordination of work on the City's Project and CP's Planned Additional Track Raise. CP shall be solely responsible for all costs of CP's Planned Additional Track Raise.

9. Settlement and Release. As consideration for CP's agreement to make a financial contribution to the City's Project pursuant to the terms of the this Agreement, the City agrees and hereby releases and forever discharges CP and its parents, affiliates, successors, and assigns, including insurers and sureties, from any and all claims, demands, damages (including, without limitation, costs and attorneys' fees), punitive damages, actions, causes of action, or suits of any nature whatsoever, whether known or unknown, suspected, or claimed, with respect to the CP's elevation of the Mississippi Drive Corridor Tracks prior to the date of this Agreement, the MOU, the Planned Additional Track Raise, or Project Adjustments. CP's agreement to make a financial contribution to the City's Project pursuant to the terms of the this Agreement is made solely for the purposes of settling resolving the matters addressed herein and nothing in this Agreement shall be construed as or constitute an admission of liability by CP, all liability being expressly denied, or an admission of the validity or enforceability of any claims or demands released hereby.

10. Indemnification. For purposes of this Agreement, the "Work Contemplated Hereby" shall mean the City's Project in the case of the City and the Planned Additional Track Raise in the case of CP. To the extent permitted by law, the parties to this Agreement shall indemnify and save harmless the other party, and its officers, officials, employees, and agents, while acting within the scope of their employment, from any and all costs, claims, demands, judgments, damages, or liability of any kind including injuries to persons or damages to property, which arise out of, or in any way result from, or are connected to, or are due to any acts or omissions of the indemnifying party while performing the Work Contemplated Hereby. No party shall be required to indemnify save harmless the other party if the claim, suit, or action for injuries, death, or damages is caused by the sole negligence of the party seeking indemnification. Where such claims, suits, or actions result from concurrent negligence of the parties, the indemnity provisions provided herein shall be valid and enforceable only to the extent of the party's own negligence. Each party agrees that its obligations under this indemnification section extend to any claim, demand, and/or cause of action brought by, or on behalf of, any of its employees or agents. This indemnification shall survive the termination of this Agreement.

11. Amendments. Any change in this Agreement, whether by modification or supplementation, must be accomplished by a formal contract amendment signed and approved by the duly authorized representatives of the City and CP.

12. Governing Law. This Agreement shall be construed according to the laws of the State of Iowa.

13. Notices. All notices and other communications under this Agreement shall be in writing, shall be personally delivered or sent by certified mail, return receipt requested, postage prepaid, or by facsimile transmission and shall be deemed received three (3) business days following the date when mailed and shall be directed to the parties at the addresses shown below. A party may change its designated person or contact information from time to time by giving written notice to the other party.

If to the City: City of Muscatine, Iowa
 c/o Gregg Mandsager

215 Sycamore Street
Muscatine, Iowa 52761
(563) 264-1550

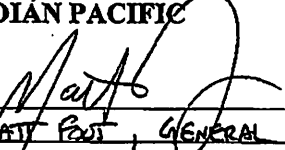
If to CP: Canadian Pacific
c/o Jim Krieger – Manager Public Works
CP Plaza – 120 South 6th Street
Minneapolis, MN 55402
(612) 330-4553

14. Miscellaneous. The signers of this Agreement warrant that they are acting officially and properly on behalf of their respective institutions and have been duly authorized, directed and empowered to execute the Agreement. All section headings contained in this Agreement are for the convenience of reference only and are not intended to define or limit the scope of any provision of the Agreement. This Agreement represents the entire understanding between the parties regarding the subject and supersedes all prior written or oral communications between the parties regarding this subject. There are no third party beneficiaries of this Agreement. In the event any clause or provision of this Agreement is held illegal, invalid, or unenforceable under present or future laws, then that provision shall be modified or deleted as so ordered and the remainder of this Agreement shall not be affected thereby.

15. Termination of MOU. The MOU is hereby terminated and replaced by this Agreement and neither party shall be deemed to have any obligations under the MOU.

IN WITNESS WHEREOF, the parties have entered into this Agreement on the date first written above.

**DAKOTA, MINNESOTA & EASTERN RAILROAD COMPANY d/b/a
CANADIAN PACIFIC**

By: 
Its: MATT FOSS, GENERAL MANAGER ENGINEERING PLANNING.

CITY OF MUSCATINE, IOWA

By: _____
Gregg Mandsager
City Administrator, City of Muscatine