

**DRAFT COOPERATIVE AGREEMENT  
BASSETT CREEK TUNNEL**

This Cooperative Agreement (the “**Agreement**”) is made as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by and between the Bassett Creek Watershed Management Commission, a joint powers watershed management organization (the “**Commission**”) and the City of Minneapolis, a Minnesota home rule charter city (the “**City**”).

**RECITALS**

- A. The Commission is a joint powers watershed management organization organized under the laws of the State of Minnesota. The Commission has authority under Minnesota Statutes, chapter 103B and Minnesota Statutes, section 471.59 to contract with other public entities to provide for flood control within the Bassett Creek watershed.
- B. The City, a home rule charter city organized under the laws of the State of Minnesota, is one of nine member cities that make up Commission membership.
- C. The Bassett Creek Flood Control Project (the “Flood Control Project”) was designed and constructed from the late 1970s through the 1990s. The Flood Control Project was designed and implemented to provide flood control within the Bassett Creek Watershed; it consists generally of six major control structures, ten replaced street crossings, five flood-proofed homes, several flood storage areas, and the Tunnel (as defined below in Recital D).
- D. Although various elements of the Flood Control Project are located in several of the municipalities that make up the Commission’s membership, one critical element known as the New Bassett Creek Tunnel (herein, the “Tunnel”) is located entirely within the City. The Tunnel was constructed in three phases. Phase 1, the 2nd Street tunnel, was constructed by the Minnesota Department of Transportation in 1979; Phase 2, the 3rd Avenue tunnel, was constructed by the United States Army Corps of Engineers (“USACE”) in 1990; and Phase 3, the box culvert, was constructed by the USACE in 1992. A depiction of the Tunnel is attached hereto as Exhibit A. For the sake of clarification, the Old Bassett Creek Tunnel, constructed in the early 1900s and maintained by the City, is not considered part of the Flood Control Project or otherwise subject to this Agreement.
- E. On June 27, 1986, after being designated by the Commission as the local sponsor for the Flood Control Project, the City entered into an agreement with USACE through which it took responsibility to “operate, maintain and rehabilitate” the Flood Control Project. A copy of this agreement is attached as Exhibit B.
- F. The Tunnel was constructed on both public and private property pursuant to land-use rights that are held by the City, which are also generally depicted on Exhibit A attached hereto. With some limited exceptions, as more specifically described in the Joint Cooperative Agreement for Boundary Change, dated September 28, 2000, between the Commission, the City, and the Mississippi Watershed Management Organization (the “Boundary Change Agreement”), the

waters of the Bassett Creek watershed flow to the Mississippi River through the Tunnel. A copy of the Boundary Change Agreement is attached hereto as Exhibit C.

- G. The City remains responsible for the operation, maintenance, and rehabilitation of those elements of the Flood Control Project that are located in Minneapolis, including, but not necessarily limited to, the Tunnel.
- H. Notwithstanding the City's responsibilities related to the Tunnel, the Commission has for many years, in cooperation with the City, planned and provided for Tunnel inspections and maintenance activities. For that reason, the Commission maintains both an Emergency Repair Fund and a Long-Term Maintenance Fund for the Flood Control Project.
- I. The City desires for the Commission to continue regular Tunnel maintenance activities on its behalf, including, but not necessarily limited to, routine Tunnel inspections and Tunnel repairs. The Commission is presently willing and able to do so to the extent memorialized herein.
- J. For the reasons set forth above, and pursuant to the authority in Minnesota Statutes, section 471.59, the parties believe it to be in their best interests to cooperate and enter into this Agreement related to the ongoing operation, maintenance, and rehabilitation of the Tunnel.

### **AGREEMENT**

In consideration of the mutual covenants and agreements hereinafter set forth, the parties hereby agree as follows:

- 1. **Tunnel Ownership; Right of Entry.** All elements of the Tunnel, including all physical Tunnel infrastructure and appurtenances, are owned solely by the City, and nothing contained in this Agreement shall be interpreted as transferring the City's ownership of the Tunnel to the Commission. Similarly, the City warrants and represents that it has the authority to access all property reasonably necessary to inspect and maintain the Tunnel and to enter into this Agreement. Notwithstanding the foregoing, the City grants the Commission, including the Commission Engineer and any duly appointed agents and contractors of the Commission, a limited, non-exclusive permit to enter onto any and all real property where the Tunnel is located. The Commission, as assignee pursuant to the City's existing or any later acquired land use rights, may enter said real property at all reasonable times to perform Tunnel-related activities that are contemplated in this Agreement. The Commission will give no less than one (1) week notice to the City and receive approval from City staff for access prior to any Tunnel entry activities that it performs, except in cases of emergencies or unless shorter notice is otherwise agreed to by the City on a case-by-case basis.
- 2. **Regular Tunnel Inspections.** The parties acknowledge that it is prudent to provide for regular inspections of the Tunnel in accordance with this section to ensure that the Tunnel is properly maintained and remains functional.
  - a. **Commission Tunnel Inspections.** The Commission, including the Commission Engineer and any duly appointed agents and contractors of the Commission, will perform regular Tunnel

inspections as the Commission determines necessary in accordance with the Commission's policies and Flood Control Project Inspection Program. At a minimum, the Commission will conduct inspections of the inside of the Tunnel that adhere to the standards required under the National Association of Sewer Service Companies ("NASSCO") in accordance with the Operation and Maintenance Manual for the Bassett Creek Flood Control Project (FCP), prepared by USACE ("O&M Manual"), as it may be amended from time to time. More frequent inspections may be performed by the Commission in coordination with and approval from City staff pursuant to the procedures in section 2.b below, and the Commission may deviate from NASSCO standards when it performs inspections that are above and beyond those contemplated in the O&M Manual. The City hereby authorizes the Commission, its agents and contractors to perform Tunnel inspections and to cooperate and work in good faith with the Commission to the extent reasonably necessary to ensure that the inspections contemplated herein are completed in accordance with the Commission's established schedule. Notwithstanding the foregoing, nothing provided herein shall be interpreted as a contractual obligation or guarantee that the Commission's current policies and practices related to Tunnel inspections will remain in place, and the Commission expressly reserves its right to determine the extent of Tunnel inspections that it will undertake or finance, in its sole discretion and pursuant to ongoing Commission policy.

- b. Notice; Inspection Reports. Prior to any Commission inspection, the Commission agrees to inform the City in writing at least 30 days beforehand that such an inspection will take place, and thereafter will work cooperatively with the City to obtain approval for such access, schedule the inspection, and provide City representatives with an opportunity to participate in the inspection to the extent the City desires. Following any inspection, Commission policy currently contemplates that the Commission engineer will prepare an inspection report. Such reports will be prepared in accordance with NASSCO standards only for minimally required inspections, as contemplated in the O&M Manual, which may be necessary for eligibility for federal funding to repair or replace features of the Flood Control Project in an event of catastrophe. Inspection reports for more frequent inspections may take an alternative form, as determined by the Commission. All reports prepared by the Commission following an inspection will be provided to the City for its records within one month of such report's completion.
- c. City Inspections; Notice. Nothing contained herein precludes the City from inspecting the Tunnel. Prior to any such City inspection, and except in the case of emergencies, the City will inform the Commission in writing that such inspection will take place at least 30 days beforehand to allow for Commission participation or coordination, to the extent desired. If an emergency requires the City to perform an inspection but not provide the Commission with 30 days' notice, then the City will inform the Commission as soon as practicable to, likewise, allow for Commission participation or coordination, to the extent desired.

### 3. Tunnel Maintenance and Repairs.

- a. Non-Emergency Maintenance and Repairs. As owner of the Tunnel, and pursuant to previous agreements that the Commission is not a party to, the City is responsible for all maintenance and repairs of the Tunnel. Nevertheless, the City hereby agrees that the Commission may

continue carrying out Commission policy, as may be amended by the Commission from time to time, and perform any and all Tunnel maintenance that the Commission deems necessary and feasible, upon notice to, consultation and coordination with, and approval from City staff. Notwithstanding the foregoing, nothing provided herein shall be interpreted as a contractual guarantee that the Commission's current policies and practices, to the extent they relate to the Tunnel, will remain in place, and the Commission expressly reserves its right to determine the extent of Tunnel maintenance and repair work that it will undertake or finance, in its sole discretion and pursuant to Commission policy.

- b. Emergency Maintenance and Repairs. The parties understand and acknowledge that the Commission, due to its organizational makeup and structure, is not equipped to respond to emergencies or perform emergency maintenance or repair work of the Tunnel. Accordingly, if emergency repairs or other emergency maintenance work become necessary, the City intends to respond as soon as reasonably practical to ensure that such repairs are implemented as soon as possible. During such emergencies, the Commission, through its engineer, will provide the City with technical support to any extent duly authorized by the Commission and may also provide financial support to the extent duly authorized by the Commission. Nothing provided herein shall be interpreted as a contractual guarantee that the Commission's current policies and practices, to the extent they relate to the Tunnel, will remain in place, and the Commission expressly reserves its right to determine the extent of involvement that it desires to have, financial or otherwise, with respect to emergency Tunnel maintenance and repairs. Notwithstanding the foregoing, in the event that the Commission is willing and able to respond to an emergency situation, it shall give notice to the City and any emergency repairs it performs must be approved by the City to the extent reasonably practical under the circumstances.
4. Project Review. The City regulates development in areas surrounding the Tunnel and within its jurisdictional boundaries, for example, through its local land use controls and building permit program. As certain land-disturbing activities within the City, whether public or private, may interfere with the Commission's ability to perform Tunnel inspections and maintenance tasks, as contemplated herein, and may further impact the integrity and function of the Tunnel and the overall Flood Control Project, the parties seek to establish the following procedures.
  - a. Notice to Commission. The City agrees to provide the Commission with written notice of any land disturbing activities<sup>1</sup> or building alterations that may impact the Tunnel and all relevant details related thereto and their potential Tunnel impacts prior to Public Works approval of such land disturbing activities or building alterations. For purposes of this section, "land disturbing activities or building alterations that may impact the Tunnel" shall mean those land disturbing activities or building alterations, as the case may be, that (i) will alter or interfere with any existing access points to the Tunnel, which are depicted on Exhibit A attached hereto; (ii) will potentially cause any sort of physical impact to the Tunnel during construction; or (iii) will modify or impact the Tunnel's structural integrity or create increased structural loading or instability to the Tunnel. The notice required herein shall include any

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<sup>1</sup> Land disturbing activities shall include any development work or alterations of the ground surface that require review and approval by the City.

and all relevant details, plans and specifications, and other documents containing information about proposed activities.

- b. Commission Engineer Review. Following receipt of the notice required in section 4.a above, the Commission engineer will have 45 calendar days, unless a longer period of time is agreed upon by representatives of both parties, to review all materials provided by the City and prepare a written report related to the land-disturbing activities and any expected impacts on the Tunnel. The City agrees that while this Agreement is in effect, the City will make commercially reasonable efforts to incorporate comments, conditions, and recommendations provided by the Commission engineer into any City approval to protect the integrity of the Tunnel.
5. No Effect on Existing Agreements. Nothing provided in this Agreement shall be interpreted to amend or modify any previously existing agreement that the parties have entered into with one another, including, but certainly not limited to, the Boundary Change Agreement, a copy of which is attached hereto as Exhibit C.
6. Notices. Any formal notice, demand, or other communication under this Agreement by any party to another shall be sufficiently given or delivered if it is dispatched by (i) registered or certified mail, postage prepaid, return receipt requested; or (ii) delivered personally to the following named persons or their successor:

To the Commission: Bassett Creek Watershed Management Commission  
Attention: Laura Jester, Administrator  
P.O. Box 270825  
Golden Valley, MN 55427  
Current Email: [laura.jester@keystonewaters.com](mailto:laura.jester@keystonewaters.com)

To the City: City of Minneapolis  
Public Works Surface Water & Sewers  
350 South 5<sup>th</sup> Street, #203  
Minneapolis, MN 55415  
Attn: Angie Craft, Director  
Current Email: [angie.craft@minneapolismn.gov](mailto:angie.craft@minneapolismn.gov)

or at such other address with respect to either such party as that party may, from time to time, designate in writing and forward to the other as provided in this section. For the avoidance of doubt, correspondence between the parties and their respective agents and representatives may occur via email when related to inspections and other Tunnel work (as contemplated in sections 1 through 3 above), including coordinating and approving such activities.

7. Liability; Indemnification. For purposes of this Agreement and the cooperative activities contemplated herein, the parties hereto are considered a single governmental unit for purposes of total liability for damages pursuant to Minnesota Statutes, section 471.59, subd. 1a(b). This Agreement does not, however, create a joint powers board or organization within the meaning of Minnesota Statutes, section 471.59. Each party agrees to require any contractor or sub-contractor

performing any activities under this Agreement on its behalf to defend, indemnify and hold harmless the other party, its officials, officers, agents, volunteers, and employees from any and all liability, claims, causes of action, judgments, damages, losses, costs, or expenses, including reasonable attorney's fees, for said contractor or sub-contractor's acts and omissions related to such activities.

Each party further agrees that it will be responsible for its own acts and the results thereof to the extent authorized by law and shall not be responsible for the acts of the other party and the results thereof. Furthermore, each party shall indemnify and hold harmless the other party, its officers and employees against all claims, losses, damage, liability, suits, judgments, costs and expenses, including reasonable attorneys' fees, resulting from the alleged negligent actions, willful misconduct, and fraudulent actions of the indemnifying party, its officers, employees, or agents. A party seeking to be indemnified, defended, and held harmless as required herein shall provide timely notice to the indemnifying party when a claim is brought. Nothing in this Agreement shall constitute or be construed as a waiver of any immunity, exemption, or limitation on liability available to the parties under Minnesota Statutes, chapter 466 or any other law.

The Commission will not be deemed to have acquired by entry into or performance under this Agreement, any form of interest or ownership in the Tunnel or to any portion of the land where the Tunnel is located or adjacent property. Similarly, the Commission will not by entry into or performance under this Agreement be deemed to have exercised any form of control over the use, operation or management of any portion of the land where the Tunnel is located or adjacent property so as to render the Commission a potentially responsible party for any contamination under state and/or federal law unless the contamination is due to the Commission or its agents, contractors, or subcontractors' actions under this Agreement. The parties' obligations under this section 7 survive the termination of the Agreement.

8. Insurance. Each party acknowledges and agrees that it is insured or self-insured consistent with its tort liability limits established in Minnesota State Statutes. Each party agrees to promptly notify the other party if it becomes aware of any potential claims related to this Agreement, or facts giving rise to such claims. The party undertaking the defense shall retain all rights and defenses available to the party or parties indemnified and no immunities are hereby waived that are otherwise available to the parties under law. The liability of each party shall be governed by Minnesota Statutes, chapter 466 and the aforementioned section 471.59, subd. 1a(b), and other applicable law, rule and regulation, including common law. The parties' obligations under this section 8 will survive the termination of the Agreement.
9. Data Practices. Both parties, their officers, agents, owners, partners, employees, volunteers and subcontractors shall abide by all applicable state and federal laws, specifically, but not limited to the provisions of the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 ("MGDPA"), the Family Education Rights and Privacy Act ("FERPA") at 20 U.S.C. 1232g, and the Health Insurance Portability Accountability Act ("HIPAA"), and implementing regulations, if applicable, and all other applicable state and federal laws, rules, regulations and orders relating to data privacy or confidentiality. If a party creates, collects, receives, stores, uses, maintains or disseminates data because it performs functions of the other party pursuant to this Agreement, then the party must comply with the requirements of the MGDPA and FERPA, and may be held

liable under the MGDPA for noncompliance. Each party agrees to defend, indemnify and hold harmless the other party, its officials, officers, agents, employees, and volunteers from any claims resulting from unlawful disclosure and/or use of such protected data, or other noncompliance with the requirements of this section. Each party agrees to promptly notify the other party if it becomes aware of any potential claims, or facts giving rise to such claims, under the MGDPA and FERPA. The terms of this section 9 shall survive the cancellation or termination of this Agreement.

10. Other Flood Control Project Elements Unaffected. The parties hereto understand and acknowledge that this Agreement only applies to the Tunnel and not to any other Flood Control Project elements, whether located in the City or in any other municipality. Accordingly, any and all existing agreements, rights and obligations related to those other elements of the Flood Control Project remain unchanged and are in no way modified by this Agreement.
11. Term; Termination. This Agreement is effective as of the date of the final signature. This Agreement may be terminated or cancelled by either party with or without cause upon sixty (60) days' written notice to the other party. This Agreement may also be terminated or cancelled by either party upon a material breach by the other party with thirty (30) days' written notice. The parties also acknowledge and understand that in the event that the Commission no longer exists, whether through dissolution or otherwise and irrespective of the reasons why, this Agreement shall automatically terminate immediately upon the effective date of the Commission's non-existence regardless of whether any written notice was provided in accordance with this section.
12. No Third-Party Rights. The parties to this Agreement do not intend to confer any rights under this Agreement on any third party, including, but certainly not limited to, USACE.
13. Entire Agreement. The above recitals and the exhibits attached hereto are incorporated herein and made part of this Agreement. This Agreement contains the entire understanding between the parties regarding this matter and no amendments or other modifications to their terms are valid unless reduced to writing and signed by both parties.
14. Waivers. The waiver by either party hereto of any breach or failure by the other party to comply with any provision of this Agreement will not be construed as nor will it constitute a continuing waiver of such provision or a waiver of any other breach of or failure to comply with any other provision of this Agreement.
15. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument.

[remainder of page intentionally blank]

**IN WITNESS WHEREOF**, the Parties have entered into this Agreement as of the date of adoption by the last party to approve it.

**BASSETT CREEK WATERSHED  
MANAGEMENT COMMISSION:**

By: \_\_\_\_\_  
Its Chair

And by: \_\_\_\_\_  
Its Secretary

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

**CITY OF MINNEAPOLIS:**

Signature: \_\_\_\_\_  
**Department Head (or Designee) Authorized to Sign this  
Contract and/or Responsible for Administering and  
Monitoring Contract**

Signature: \_\_\_\_\_  
**Finance Officer or Designee/Purchasing Agent**

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

Approved as to Form by:

Signature: \_\_\_\_\_  
**Assistant City Attorney**