

**2007 MILWAUKEE**

**37<sup>TH</sup> STREET TUNNEL AGREEMENT**

**CITY ATTORNEY DOC NO. 119597**

**David Drach**  
**5/31/07 Revisions**

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5/29/07 Revisions

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# 2007 MILWAUKEE 37<sup>TH</sup> STREET TUNNEL AGREEMENT

THIS AGREEMENT is made by and between THE CITY OF MILWAUKEE, WISCONSIN ("City") and SOO LINE RAILROAD COMPANY, a Minnesota corporation doing business as Canadian Pacific Railway ("CPR"), and is dated as of this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

## RECITALS

A. CPR owns land and operates a railroad line in the Menomonee Valley in the City of Milwaukee, Milwaukee County, Wisconsin extending, generally, westerly from South 25<sup>th</sup> Street to South 41<sup>st</sup> Street and known as the "Air Line," or "Air Line Yard," and referred to herein as the "Rail Corridor."

B. Located upon the Rail Corridor and below the railroad tracks at approximately South 37<sup>th</sup> Street is a pedestrian tunnel (Tunnel, as hereinafter defined) that was constructed by CPR's predecessors-in-title to the Rail Corridor (the Tunnel and a portion of the Rail Corridor are depicted on Exhibit A attached hereto, the "Map").

C. The Tunnel passes underneath CPR rail tracks (the "CPR Tracks").

D. The City is now negotiating with Menomonee Valley Partners, Inc. ("MVP") and its related entity, MVP Acquisition LLC ("MVP-Acq"), regarding the City, MVP and MVP-Acq collaborating and cooperating on the creation of a pedestrian and recreational trail (the "Trail") that would use the Tunnel (or some other method to extend the Trail under or over the CPR Tracks) to effectively connect the neighborhood south of the Rail Corridor to the area north of the Rail Corridor, and to the area north of the Menomonee River (the "River")

E. The City, on and subject to the terms and conditions herein, desires to acquire the Tunnel (or some other method to extend the Trail under or over the CPR Tracks).

F. CPR is willing to convey the Tunnel and/or some other right or method to establish and use the Trail beneath CPR Tracks, and upon the Rail Corridor, upon and subject to the terms and conditions herein.

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G. The City's Common Council approved City entry into this Agreement per Council Resolution File No. \_\_\_\_\_.

## AGREEMENT

1. RECITALS, TITLE. The parties hereby acknowledge and agree to the recitals above. This "2007 MILWAUKEE 37<sup>TH</sup> STREET TUNNEL AGREEMENT" (this

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“Agreement”) means this document and all exhibits hereto together with any subsequent amendments made by the parties or their successors or assigns.

2. **ALTERNATIVE DESIGN POSSIBLE.** City and CPR ~~agree~~ that the final design for the Trail and for the method of extending the Trail under CPR Tracks has not been finalized or agreed to by City, CPR and MVP as of the date hereof. Possibilities include:

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- (a) Rebuilding or restoring the Tunnel so the Trail goes through it and under the CPR Tracks (the “Tunnel-Rebuild Option”).
- (c) Building a bridge so the trail goes over the CPR Tracks (the “Trail-Bridge Option”).
- (d) Building a “cut-out” by removing the Tunnel, building retaining walls to the east and west of the location where the Tunnel now exists, and building a railway bridge connecting those retaining walls so the Trail passes under the railway bridge (the “Railway-Bridge Option”).

3. **CPR-CITY CONTINGENCY (PLANS AND SPECS).** CPR’s and City’s duties hereunder are contingent upon CPR and City agreeing to detailed plans and specifications (“Plans and Specs”) for the precise method for extending the Trail over or under the CPR Tracks (whether that method is any of the ones referred to in ¶2 above or some other method), materials to be used for the agreed-upon method, timing of the work, location of the work, and how CPR’s rail traffic will be addressed during construction. Once (and if) CPR and City agree upon those matters, such agreement must be reflected in a written amendment hereto, signed by City and CPR (the “Amendment”), and City must then construct in strict accordance with the agreed-upon Plans and Specs and Amendment. If no such Amendment is signed by City and CPR by \_\_\_\_\_, 2007, this Agreement shall automatically terminate, become null and void, and neither party shall have any further rights or duties hereunder.

4. **CITY CONTINGENCIES.** City’s duties hereunder are additionally and independently contingent upon each of the following:

- (a) **Approach.** City obtaining, on terms and conditions meeting City’s approval, fee simple, and marketable, title from MVP-Acq (or the then-owner) to 3638 West Pierce Street, Milwaukee (Tax Key No. 436-0006-000-8) (the “Pierce Approach”), and if needed, to that portion of 3628 West Pierce Street, Milwaukee (Tax Key No. 436-0004-100-3) (the “Abutting WHM Parcel”) that does not have upon it a building and that abuts the Pierce Approach to the east, and, if needed, to so much of the lands west of the Pierce Approach that City reasonably determines are necessary to extend the Trail over or under the CPR Tracks (the “West Lands”), and also City determining that geotechnical and environmental conditions at the Pierce Approach and, if needed, at the pertinent part of ~~the Abutting WHM Parcel and West Lands, are reasonably acceptable. City informs~~ CPR that, MVP has informed City that the Pierce Approach and the Abutting WHM

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Parcel are now owned (in whole or in part) by the WHM Company and MVP-Acq has those parcels under contract.

- (b) **Release of Restrictive Covenant.** CPR releasing, on terms and conditions meeting City's approval, all of the restrictions and reservations contained in the May 22, 1989 Quit Claim Deed from the Soo Line Railroad Company (i.e. CPR) to WHM Partners, recorded in the Milwaukee County Register of Deeds Office at Document No. 6283187 – such release to be in writing, signed by CPR, and in recordable form.
- (c) **Funds.** City determining, in its reasonable discretion, that sufficient funds are adequately committed and available to City from grants, third parties, and/or MVP, and are sufficient to cover needed costs hereunder and to go forward with and cover (at no cost to the City): the cost of the ALTA survey referred to in ¶7 below; the cost of acquiring the Pierce Approach, and if needed, the Abutting WHM Parcel and West Lands; designing, building and completing the Trail; the cost of complying with CPR's safety rules (including flagging) (see **Exhibit D**); designing, building and completing the necessary improvements and work to extend the Trail over or under the CPR Tracks per the City-CPR-agreed-upon Plans and Specs and the Amendment; designing, building and completing the necessary improvements and work to extend the Trail over the Menomonee River (the "River"); and the design, plan preparation, and engineering associated with the foregoing. This includes, but is not limited to, landscaping and grading work associated with having the Trail extend from Pierce Street to Canal Street.
- (d) **MVP.** MVP providing to City, and City approving (along with CPR, per ¶3 above), the Plans and Specs, and detailed cost estimates (approved by City) for doing the work associated with ¶4.(c) above and the Plans and Specs.
- (e) **Master Contract.** After obtaining express City-Common-Council approval, City entering into a master contract (or contracts)<sup>1</sup>, on terms and conditions meeting City's approval, with the Wisconsin Department of Natural Resources, Milwaukee County, MVP, MVP-Acq, and the Redevelopment Authority of the City of Milwaukee ("RACM"), regarding the Trail dealing with such things as repair and maintenance, making the Trail part of the State of Wisconsin's Hank Aaron State Recreational Trail ("HAST"), bridge(s) over the River, and stormwater management.
- (f) **Permits & Approvals.** City reasonably determining that it is able to obtain requisite approvals (including, but not limited to, governmental permits and licenses) needed to build and extend the Trail over or under the CPR Tracks, and for the Trail to connect the neighborhood south of the Rail Corridor to the area north of the Rail Corridor and to the area north of the River.

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<sup>1</sup> This "master contract" or contracts contemplates a contract or contracts other than the "Memorandum of Agreement" between City and the DNR dated December, 2004, the December, 2004 "Cooperative Trail Easement Agreement" between City and DNR, and the "Memorandum of Understanding" between RACM and MVP.

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If City has not provided CPR with written notice that the above contingencies have been waived or satisfied by \_\_\_\_\_, 2007, then this Agreement shall automatically terminate, become null and void, and neither party shall have any further rights or duties hereunder.

**5. CPR CONTINGENCIES.**

As one of the material considerations for CPR entering into this Agreement and a prerequisite to any obligation or duty of CPR to grant to the City any of the rights or property contemplated by this Agreement, the City agrees that to the extent that any of the methods selected by the City or MVP for extended the Trail beneath CPR Tracks that CPR shall be reimbursed for any cost or expense incurred by it connected with the installation, modification repair or retirement of the Trail or Improvements the Trail or Improvements upon the Rail Corridor attributable to:

- (1) disruption of rail service;
- (2) the permanent or temporary modification or relocation railroad tracks or improvements;
- (3) the supply of flagging services;
- (4) the need to make modifications to storm water handling structures;
- (5) the increased cost of railroad maintenance, whether to rail itself, or a bridge to span the Trail; and
- (6) The performance of any obligation of the City pursuant to this Agreement or any of the conveyances contemplated by this agreement for that the City does not timely comply.

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**6. CPR SALE OF TUNNEL.** CPR agrees to convey to City the Tunnel by quitclaim bill of sale, in form and substance of **Exhibit B** attached hereto, including all related appurtenances such as footings, as well as utility wires, pipes, conduits or connections thereto, collectively, the "**Tunnel**" (shown, where practical, on the Map attached as **Exhibit A**) EXCLUDING THEREROM, HOWEVER, all other improvements such as railroad tracks, railroad signals and appurtenances, as well as utility wires, pipes, conduits or connections thereto.

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**7. CPR GRANT OF PERMANENT EASEMENT TO CITY.** CPR agrees to grant to City a permanent easement (the "PE"), in form and substance of **Exhibit C** attached hereto, for so much of the Rail Corridor as shall be reasonably needed to extend the Trail from the Pierce Approach (and if needed, from the Abutting WHM Parcel and West Lands) over or under the CPR Tracks, and over and to lands RACM owns that abut the Rail Corridor to the north (the "RACM land").

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**8. CITY TO FURNISH SURVEY FOR LANDS AFFECTED BY TRAIL AND PE.** City shall, at no expense to CPR, provide to CPR an ALTA survey prepared by a certified surveyor. The survey shall:

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- (a) show and describe the Pierce Approach, that portion (if any) of the Abutting WHM Parcel and West Lands to be used for the Trail (and for extending the Trail over or under the CPR Tracks), and the portion of the Rail Corridor affected by the PE and by the

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improvements necessary to extend the Trail over or under the CPR Tracks (the "Affected Part of the Rail Corridor");

- (b) locate and illustrate all utility lines and recorded easements within or affecting the Affected Part of the Rail Corridor, the Pierce Approach, and that portion (if any) of the Abutting WHM Parcel and West Lands to be used for the Trail. CPR shall provide detailed information as to the location of fiber optic and any other lines that may not be identified routinely by Diggers Hotline;
- (c) locate and illustrate all railroad tracks and appurtenances within the Affected Part of the Rail Corridor; and
- (d) illustrate and contain topographical data for the Pierce Approach, that portion (if any) of the Abutting WHM Parcel and West Lands to be used for the Trail, and the Affected Part of the Rail Corridor.

**9. RIGHT OF ENTRY FOR SURVEY.** The City, its employees, agents, and contractors, (and City's or MVP's surveyor) may enter upon the Affected Part of the Rail Corridor to the extent necessary to prepare the survey referred to in ¶7 and to evaluate the Tunnel, subject to the following conditions:

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- (a) City shall give CPR at least 3 days advance notice of the date and time of each entry and the nature of activities to be conducted at each such date and time. Each request for entry shall be subject to approval by CPR on a case-by-case basis, except, however, CPR shall not unreasonably deny, condition or delay any such request.
- (b) CPR may elect to be present during the conduct of such activities and to monitor same. Such monitoring shall not relieve City of any liability under this Section.
- (c) Upon the completion of its activities, City shall remove any debris and equipment resulting from such activities and shall restore the Affected Part of the Rail Corridor to the condition it was in prior to commencement of such activities.
- (d) City acknowledges that operation and maintenance of railroad equipment, and railroad operations and activities upon railroad tracks and close proximity thereto poses inherent risks of damage to property and injury to persons. City, for itself and its employees (subject to the rights it has at law and in equity, including, but not limited to, Wis. Stat. § 893.80 and § 895.52) expressly assumes the risk of injury or death of persons or the damage or destruction of personal property while engaging in activities upon the Affected Part of the Rail Corridor for the purposes of this Section.

(e) City shall require any third party contractor or invitee acting on behalf of City pursuant to this Section (and any City or MVP surveyor) to execute and deliver to CPR a release of liability that shall provide that the contractor (or surveyor) shall indemnify, hold harmless and defend the Indemnitees (as defined below) from and against all Claims arising out of,

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resulting from or relating to any loss of (or damage to) any property or business or any injury to (or death of) any person, where such loss, damage, injury, or death actually or allegedly arises (whether directly or indirectly, wholly or in part) from any action or omission of City (or its employees, agents, or contractors) (or the surveyor) while on the Affected Part of the Rail Corridor pursuant to this Section. Indemnitees means CPR, its subsidiaries, affiliated companies and parent companies, and their directors, officers, employees and agents, including without limitation Soo Line Corporation, The Milwaukee Motor Transportation Company and Canadian Pacific Railway Company.

- (f) City (and its employees, agents, and contractors) (and the surveyor) shall comply with all applicable laws while on the Affected Part of the Rail Corridor.
- (g) While on the Affected Part of the Rail Corridor, the City (and its employees, agents, and contractors) (and the surveyor) shall comply with CPR's safety rules, including any requirement regarding use of flagmen. A copy of CPR minimum safety rules are appended hereto as **Exhibit D**. If, in CPR's opinion, flagging protection shall be required during City's (or the surveyor's) entry onto the Affected Part of the Rail Corridor pursuant to this Section, then upon receipt of a bill therefor, City shall pay CPR for such flagging at the rate in effect at the time of the flagging.
- (h) If any mechanic's or materialmen's lien, or similar lien, is asserted against the Affected Part of the Rail Corridor, the Rail Corridor, or any other CPR property, or the Indemnitees as a result of the exercise of the permission granted in this Section, City shall satisfy and/or obtain the release of such lien.

**10. TITLE MATTERS – NO WARRANTY.** CPR makes no warranty or representation with respect to the marketability or quality of its title and is not under any obligation to furnish abstracts of title, title reports, or title insurance policies in respect to the property underlying the Rail Corridor. **SPECIFICALLY**, CPR states, and City acknowledges, that CPR does not own the land immediately to the south of the Tunnel encompassing all, or part of the Pierce Approach (being Lot 20, Block 1, Arlington Heights, SW ¼, § 36, T7N, R21E). Subject to the preceding, CPR shall cooperate in providing the best documentation that CPR has in its possession to establish

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**11. FUTURE UTILITIES.** In the event future additional wires, pipes or other utilities are required for the proper use of the Trail on, over, or under the Affected Part of the Rail Corridor, for public recreational trail purposes, CPR covenants and agrees to accommodate and issue licenses for such additional wires or pipes at no additional charge, subject to reasonable objections and upon standard CPR terms in effect at the time of any such request for utility encroachments upon its property.

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**12. CLOSING.** Closing will take place on or before \_\_\_\_\_, 2007, at a mutually acceptable location. Closing documentation will consist of, as appropriate:

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- (a) Execution, delivery and acceptance by and among the parties of the Quitclaim Bill of Sale and the Permanent Easement attached hereto, respectively, as **Exhibits B and C**.
- (b) Execution and delivery of appropriate, and agreed upon, documents to effectuate the land swap (referred to below).
- (c) Such other customary closing documentation as may be necessary and proper, or required by law, to accomplish the intent of the parties expressed in this Agreement.

**13. NOTICES.** Notices permitted or required hereunder shall be considered given (i) upon receipt if hand-delivered by commercial courier or otherwise personally delivered, (ii) if sent by facsimile or e-mail during business hours (i.e. 8:30 A.M to 4:30 P.M., Monday through Friday) on days that City's City Hall is open for business, when sent as per the following (so long as no error or "inability to send" message results after sending by facsimile or email), and (iii) within two business days of depositing same in the U.S. mail, postage-paid, addressed by name and address to the party intended as follows:

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**CPR:** Addressed to the attention of  
Director, Real Estate Marketing, U.S. at:

Mailing and Delivery address: 501 Marquette Avenue  
Suite 804  
Minneapolis, MN 55402

Facsimile: (612) 904-3147  
E-mail: [David\\_drach@cpr.ca](mailto:David_drach@cpr.ca)

**City :** Addressed to the attention of:

Mailing and delivery address: Dave Windsor  
City of Milwaukee – DPW  
Zeidler Municipal Building, Room 919  
841 North Broadway  
Milwaukee, WI 53202

Facsimile: (414) 286-0663

E-mail: [dwinds@milwaukee.gov](mailto:dwinds@milwaukee.gov)

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**With a copy to:**

Mailing and Gregg Hagopian  
delivery address: City of Milwaukee – City Attorney’s Office  
City Hall, Room 800  
200 East Wells Street  
Milwaukee, WI 53202

Facsimile: (414) 286-8550

E-mail: [Ghagop@milwaukee.gov](mailto:Ghagop@milwaukee.gov)

- | **14. COMPUTATION OF TIME.** For purposes of computing time periods in this Agreement, Saturdays, Sundays and legal holidays shall be counted. However, where the last day for performing any act falls on a Saturday, Sunday, or legal holiday, that act may be performed on the next succeeding day which is not a Saturday, Sunday, or legal holiday. Deleted: 13
  
- | **15. AGREEMENT.** This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. Neither party has relied upon any statement or representation by the other party except as are set forth in this Agreement. Deleted: 14
  
- | **16. NON-ASSIGNABILITY.** Except to another government entity, or quasi-public entity, or MVP, or an affiliate of MVP, that will assume all obligations of City hereunder and use the Trail and Affected Rail Corridor for public recreational trail purposes, the City shall not in any manner assign or transfer its rights under this Agreement, voluntarily or involuntarily, by operation of law or otherwise, without CPR’s advance written consent. Any attempted or purported assignment or transfer by City without such consent shall be void. Notwithstanding the foregoing, the City may contract or delegate to third parties its rights, responsibilities or obligations pursuant to this Agreement provided that City shall remain responsible for all terms, conditions and covenants contained herein should any such third party fail to reasonably or timely perform. Subject thereto, this Agreement shall inure to the benefit of, and be binding upon, the heirs, executors, administrators, successors and assigns of the respective parties. Deleted: 15
  
- | **17. APPLICABLE LAW.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Wisconsin. Deleted: 16
  
- | **18. SEVERABILITY.** Each provision, paragraph, sentence, clause, phrase, and word of this Agreement shall apply to the extent permitted by applicable law and is intended to be severable. If any provision, paragraph, sentence, clause, phrase or word of this Agreement Deleted: 17  
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is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the legality or validity of the remainder of the Agreement.

19. **GOOD FAITH.** The parties hereto shall use good faith with respect to fulfillment of their respective obligations hereunder, and cooperate with one another.

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20. **SURVIVAL OF TERMS.**

Should the contingencies of this Agreement be met, the terms, conditions and covenants of this Agreement shall survive delivery of any conveyance documents.

21. **COMMISSIONER.** Except as otherwise expressly provided herein, determinations made by the City shall be made by the City's Commissioner of the City's Department of Public Works or his designee.

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THIS AGREEMENT is dated as of the date first above written.

**CITY OF MILWAUKEE, WISCONSIN**

**SOO LINE RAILROAD COMPANY**  
*doing business as Canadian Pacific Railway*

By: \_\_\_\_\_  
Jeff Mantes, City DPW Commissioner  
Signing per Council Resolution File No. \_\_\_\_\_.

By: \_\_\_\_\_  
David S. Drach  
Its **Director, Real Estate Marketing, U. S.**

And By: \_\_\_\_\_  
Ronald Leonhardt, City Clerk

**COUNTERSIGNED BY COMPTROLLER:**

\_\_\_\_\_  
Mike Daun, Deputy Comptroller

**CITY ATTORNEY'S OFFICE**  
Milwaukee Code of Ordinances § 304-21)

\_\_\_\_\_  
Gregg C. Hagopian, Assistant City Attorney

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**EXHIBITS:**

- A: Tunnel Map
- B: Quit-Claim Bill of Sale, Tunnel
- C: PE (Easement)
- D: CPR Minimum Safety Requirements

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Document Number	EASEMENT
Document Number	Document Title

**EASEMENT**

**Drafted By:**  
 David Drach  
 Real Estate Dept.  
 Canadian Pacific Railway  
 501 Marquette Ave. – Suite 804  
 Minneapolis, MN 55402

Recording Area
Name and Return Address
Gregg Hagopian Asst. City Attorney City Hall, Room 800 200 East Wells Street Milwaukee, WI 53202

Parcel Identification Number (PIN)  
 Part Of: \_\_\_\_\_

**EXHIBIT C**

**TO 2007 MILWAUKEE 37<sup>TH</sup> STREET TUNNEL AGREEMENT**

THIS EASEMENT, dated this \_\_\_\_\_ day of \_\_\_\_\_, 2007 is from **SOO LINE RAILROAD COMPANY**, a Minnesota corporation having its principal place of business at 501 Marquette Avenue, Minneapolis, Minnesota 55402, and doing business as Canadian Pacific Railway (“CPR”), as **Grantor**, to **THE CITY OF MILWAUKEE, WISCONSIN** (“City”), as **Grantee**.

1. **EASEMENT RIGHTS and GRANT.** For One Dollar and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, CPR hereby grants unto City an easement in upon real estate in Milwaukee, County Wisconsin, owned by CPR, described in **Exhibit A** attached hereto (the “Easement Parcel”) for the sole purpose of the construction, continued use, maintenance, repair, replacement, and renewal of:

(a) a public, pedestrian and recreational trail (the “Trail”); and

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(b) the tunnel and trail improvements described in Exhibit B attached hereto (the "Improvements") so that the Trail may, as the case may be, be extended under CPR's railroad tracks (the "CPR Tracks"), and upon the Easement Parcel, so as to connect that certain parcel described in Exhibit C attached hereto (the "Pierce Approach") to the parcel described in Exhibit D attached hereto (the "RACM Land").

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## 2. RESERVATIONS AND CONDITIONS.

A. The Easement shall continue only so long as used for the purposes specified above.

B. The Easement is non-exclusive, and Grantor reserves the right to use the Easement Parcel for any purpose not inconsistent with the use of the Easement for the purposes specified herein.

C. CPR reserves fee title to the Easement Parcel to itself, and City's or the public's use of the Easement Parcel, however long continued, for the public-recreational-trail purposes and Improvements, shall not vest in City or the public, rights adverse to those of CPR other than those granted by this Easement.

D. City shall not sell, convey, or assign, the Trail or Improvements (or its rights hereunder) to a third party other than a public, quasi-public or nonprofit entity, that intends to use the Trail and Improvements for public-recreational-trail purposes. Subject to the preceding, City, for itself, its successors and assigns, agrees that, should this Easement be required to be periodically re-recorded in order to preserve CPR's rights, that such re-recording shall be the obligation and responsibility of City or its successors and assigns.

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C. Upon discontinuance of public trail use upon the Easement Parcel for twelve consecutive months, Grantee shall forthwith retire the Trail and Improvements by removing any surface materials (such as asphalt or concrete) and rendering the tunnel reasonably impassible by means of erecting barricades at each entry constructed of steel-reinforced concrete block or steel-reinforced poured concrete, or filling with clean dry sand, grout, or other material approved by CPR. CPR shall not unreasonably withhold approval of other methods that the City may propose at the time of retirement for rendering the tunnel reasonably impassible.

## 3. CONDUCT AND LIABILITY.

A. City acknowledges that the operation and maintenance of railroad equipment, and railroad operations and activities, upon CPR Tracks and close proximity thereto pose inherent risks of damage to property and injury to persons. City, for itself and its employees, subject to the rights it has at law and in equity, including, but not limited to, Wis. Stat. § 893.80 and § 895.52, expressly assumes the risk of damage or destruction of personal property and improvements located upon the Easement Parcel that result from the operation of railroad locomotives and equipment, and City covenants not to sue CPR for any claim therefor.

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B. In connection with the exercise of its easement rights, City shall secure, at City's own expense, any permits or licenses required by state or local laws or ordinances to use and operate the Trail.

C. If and to the extent City undertakes any construction, maintenance, repair, replacement, or renewal of the Trail and Improvements (collectively "**Work**"), City shall be responsible for determining the location and existence of any pipes, wires, conduits, sewers, piling, or other obstructions on the Easement Parcel that could be affected by such Work. City shall require any third-party contractor or invitee acting on its behalf pursuant to this section to indemnify, defend and hold harmless CPR for any and all liability for damage to the foregoing pipes, wires, conduits, sewers, piling, or other obstructions, if any, caused by such Work.

D. CPR makes no representation by the granting of the Easement that the Easement Parcel is free of any such pipes, wires, conduits, sewers, pilings or other obstructions. CPR shall mutually agree to the placement of new or relocated facilities.

E. City shall keep the Trail or Improvements in reasonable state of repair so not to interfere with, or endanger, railroad operations on adjacent railroad tracks ("**Routine Maintenance**").

F. Whenever Work shall be done or any equipment or other obstruction is to be placed over or interfere with any CPR Tracks ("**Major Work**"), City:

- (1) shall not carry on any Major Work on the Easement Parcel, until it shall have given CPR at least three days' prior written notice. CPR may elect to have a representative monitor such work. If CPR determines that a flagman is necessary to protect railroad operations, City shall promptly reimburse CPR for all reasonable and necessary flagman expenses. Any and all plans for Major Work must be submitted to CPR for review and approval within 30 days, which approval shall not be unreasonably withheld, conditioned or delayed;
- (2) must make arrangements with CPR for such flagging or watchman service as CPR reasonably deems necessary for the protection of railroad traffic. All such flagging and watchman service shall be provided by CPR. The fact that CPR provides such service shall not relieve City from any liability under this Agreement. City shall reimburse CPR for the reasonable cost (including CPR's normal labor and material additives) of such service within 30 days after CPR tenders a bill therefor. CPR's labor and material additives are subject to change without notice to City, and CPR shall be reimbursed based upon its labor and material additives actually in effect as of the date of such service.
- (3) agrees that City and any party entering upon the Easement Parcel for the purpose of performing any Major Work shall:
  - (a) be subject to, and shall abide by CPR's Minimum Safety Requirements for Contractors Working on Railway Property (the "Safety Requirements") as are

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currently in effect or as may be hereafter updated, amended or revised by CPR, provided that CPR supplies City with any such changes. City acknowledges receipt of the Safety Requirements that are in effect upon the date of this easement grant. Notwithstanding the preceding, if the Safety Requirements in possession of City at the time of commencement of any Major Work was obtained by it more than 5 years prior to such Major Work, then City shall be responsible for inquiring whether the Safety Requirements have been updated, amended or revised. If they have not, then the version of the Safety Requirements then in City's possession shall be deemed current for another 5 years unless CPR provides City with an updated version prior to the expiration of said 5 years term. The term "Contractor" used in the Safety Requirements shall apply to City and any person performing Major Work on City's behalf in the Easement Area;

- (b) if made available by CPR, shall attend and participate in on-track safety instruction conducted by CPR at City's expense; and
- (c) shall be supplied with a copy of the current (as defined in the preceding) Safety Requirements.

G. As between City and CPR, City shall (subject to its rights at law and in equity, including, but not limited to, Wis. Stat. § 893.80 and § 895.52) assume all risk of damage to or destruction of all or any part of the Improvements through any cause whatsoever while any of them are located on or over the Easement Parcel, except to the extent such damage or destruction is caused by the negligence or misconduct of CPR (or its employees or agents) or by those using or operating railcars on the CPR Tracks.

4. **OTHER.**

A. CPR makes no warranty of title to the Easement Parcel. City shall not have any recourse whatsoever against CPR if City shall be required through action of any third party to remove any or all of the Improvements located on the Easement Parcel due to title matters. Subject to the preceding, CPR shall cooperate in providing the best documentation that CPR has in its possession to establish ownership of the Easement Parcel – such cooperation to include CPR informing CITY (and any title insurer CITY may utilize in CITY's effort to obtain title insurance for this transaction) that CPR, to the best of its knowledge, has not conveyed any interest in the Easement Parcel to any other party.

B. City acknowledges that CPR does not own the Pierce Approach (being the parcel described in **Exhibit C** attached hereto, 3638 W. Pierce Street, Milwaukee).

~~C. City acknowledges that, if it has not already done so, it must obtain rights, on its own, in and to the Pierce Approach and the RACM Parcel so as to extend the Trail over and to each of those parcels as contemplated.~~

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D. This Easement grant shall inure to the benefit of, and be binding upon, the successors and assigns of CPR and City.

Dated as of the date first written above.

**CPR: SOO LINE RAILROAD COMPANY**  
d/b/a Canadian Pacific Railway

By: \_\_\_\_\_  
David S. Drach  
Director, Real Estate Marketing, U.S.

STATE OF MINNESOTA )  
                                  )SS  
COUNTY OF HENNEPIN)

The foregoing Easement was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2007 by David S. Drach, the Director, Real Estate Marketing, U.S. of Soo Line Railroad Company d/b/a Canadian Pacific Railway, a corporation under the laws of the State of Minnesota, on behalf of the corporation.

\_\_\_\_\_  
Notary Public

Name Printed: \_\_\_\_\_

My commission expires: \_\_\_\_\_

**CITY OF MILWAUKEE, WISCONSIN**

By: \_\_\_\_\_  
Jeff Mantes, City DPW Commissioner  
Signing per Council Resolution File No. \_\_\_\_\_.

And By: \_\_\_\_\_  
Ronald Leonhardt, City Clerk

**COUNTERSIGNED BY COMPTROLLER:**

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\_\_\_\_\_  
Mike Daun, Deputy Comptroller

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**CITY ATTORNEY'S OFFICE AND CITY AUTHENTICATION**

Gregg C. Hagopian, signs for the City Attorney's Office per Milwaukee Code of Ordinances § 304-21, and also signs as a member of State Bar of Wisconsin to authenticate the signatures of each of the City signatories above in accordance with Wis. Stat. § 706.06 so that this instrument may be recorded per Wis. Stat. § 706.05 (2)(b).

\_\_\_\_\_  
Gregg C. Hagopian, Assistant City Attorney  
Wisconsin State Bar No. 1007373

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

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