

Template Operations & Maintenance Agreement

NOTE: This is a template for the Operations and Maintenance Agreement that property owners will eventually be required to execute. Please review for your reference prior to submitting an application and be aware of the requirement of the agreement. Do not execute the agreement at this time and do not submit the agreement with your application.

BACKGROUND

THIS OPERATIONS AND MAINTENANCE AGREEMENT (“Agreement”) is made and entered this ___ day of _____, 2015 (the “Agreement Date”) and effective as of _____ 2015 (“Effective Date”) by and between _____ (together with its successors and assigns in title to the Property (“Property Owner”), and The Pittsburgh Water and Sewer Authority (the “Authority”);

WHEREAS, the Property Owner is the owner in fee of certain real property located at _____, Pittsburgh Pennsylvania, as described more particularly in Exhibit A attached hereto and made a part hereof (the “Property”);

WHEREAS, the Authority has established a Green Infrastructure Matching Grant Program (the “Grant Program”) to provide financial assistance to certain qualified property owners who desire to install green infrastructure on their properties (the “GI Project”). The Grant Program provides grants to qualified property owners to build infrastructure to manage stormwater runoff where the Authority determines that the GI Project offers the maximum cost savings to the Authority, achieves the largest reduction of stormwater runoff, and provides the greatest environmental benefit;

WHEREAS, the objective of the Grant Program is to increase the use of green infrastructure in the City of Pittsburgh and reduce stormwater runoff that would otherwise have been discharged to the Authority’s wastewater and stormwater system in order to improve and enhance water quality resources downstream (the “Conservation Objective”);

WHEREAS, the Property Owner applied for and was awarded a grant under the Grant Program to design, construct, and install green infrastructure on a certain portion of the Property (“GI Area”), as described in Exhibit B;

WHEREAS, the GI Project is to be constructed in accordance with the Grant Agreement, as defined below, and to be operated and maintained by the Property Owner in order to protect public health, safety and welfare and maintain and enhance water quality;

WHEREAS, the Conservation Objective of the Grant Program and this Agreement are consistent with the purposes of, and intended to conform with, the

requirements of the Pennsylvania Conservation and Preservation Easements Act, Act 29 of 2001, and as amended thereafter;

WHEREAS, the Authority requires that as a condition of receiving funding for the GI Project, the Property Owner must (1) operate and maintain the GI Project in perpetuity (the "Term of this Agreement"), unless released from this Agreement pursuant to the provisions within; and (2) grant to the Authority access over, under, along and in the GI Area and the GI Project for a period of not less than the Term of this Agreement, for the purposes and upon the terms and conditions set forth in this Agreement;

NOW THEREFORE, in consideration of the foregoing premises and recitals, which are incorporated herein as if set forth below in full, the mutual covenants contained herein, and the following terms and conditions, the parties hereto, intending to be legally bound hereby, covenant and agree as follows:

AGREEMENT

1. Design and Construction.

(a) Property Owner covenants and agrees that it shall design and construct the GI Project in accordance with the Grant Agreement.

(b) Property Owner shall submit to the Authority record drawings and photographs of the GI Project and the GI Area once the construction of the GI Project is complete.

2. Operation and Maintenance Responsibility.

(a) This Agreement shall serve as the signed statement by the Property Owner accepting responsibility for operation and maintenance of the Property and the GI Project as set forth in this Agreement until the responsibility is legally transferred to another entity, as provided in 2(b) below.

(b) This Agreement shall serve as notice to all successors and assigns of the title to the Property of the obligations herein set forth. At such time as the Property is transferred, the new owner of the Property shall have the rights and responsibilities of Property Owner under this Agreement.

(c) The Property Owner, at the Property Owner's sole expense, shall cause to be performed, the work reasonably necessary to keep the GI Project and GI Area in good working order and condition, in perpetuity, so that the GI Project is performing its intended design functions within expected tolerances. This includes, but is not limited to, all pipes and channels built to convey stormwater to the GI Project, as well as all structures, improvements, and vegetation provided to control the quantity and quality of the stormwater.

3. Destruction and Removal; Changes and Alterations.

(a) Property Owner covenants and agrees that for the Term of this Agreement, no change in grades or other alterations within the lines of the GI Area shall be made and that no buildings and/or other structures either overhead, underground or upon the surface shall be constructed within the lines of or abutting the GI Area unless the plans for such changes of grades, alterations or structures shall be first submitted to and approved in writing by the Authority.

(b) Property Owner shall not destroy or remove or allow to be destroyed or removed the GI Project from the Property or modify the GI Project in a manner that materially lessens its effectiveness. It is understood and agreed that none of the following shall constitute a breach of this covenant: (i) destruction, removal or alteration of any such property or improvement as a result of a Force Majeure Event, as defined below, or (ii) the removal and disposal of any part of the green infrastructure on the GI Project, provided that simultaneously with or prior to such removal, any such green infrastructure shall be replaced with other green infrastructure comparable (or better than) in all material respects to the removed green infrastructure and with equal or better effectiveness.

(c) Property Owner shall not be liable for any delay in the performance of its obligations pursuant to this Agreement, to the extent that such delay is caused, directly or indirectly, by an occurrence of fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions or revolutions, power outages, or any other causes beyond the reasonable control of Property Owner (a "Force Majeure Event"). Upon the occurrence of a Force Majeure Event, Property Owner shall be excused from any further performance of those of its obligations pursuant to this Agreement affected by the Force Majeure Event for as long as such Force Majeure Event continues and up to 72 hours thereafter; provided, however, that Property Owner uses commercially reasonable efforts to promptly recommence performance to the extent possible.

4. Inspection by Property Owner.

Property Owner shall conduct inspections of the GI Project, as needed, but not less than once per year. The purpose of the inspections is to ensure safe and proper functioning of the GI Project. The inspection shall cover all of the GI Project and all GI Project-associated structures and areas, including, but not limited to, all berms, outset structure, ponds, and access roads.

5. Recordkeeping.

Property Owner shall retain a record of maintenance activities and inspections related to the GI Project for a period of at least four (4) years. Such records shall include photographs and verify that inspection and maintenance have been conducted pursuant to this Agreement. The Authority may request at any time that the Property

Owner provide copies of any or all maintenance and inspection documentation prepared during the prior four years. Property Owner shall comply with any such requests within ten (10) business days after receipt of such request.

6. Inspection by the Authority

The Property Owner hereby grants permission to the Authority and the Authority's authorized agents and employees to enter upon the Property during normal daylight working hours or at any other reasonable time to inspect the GI Project in order to ensure the GI Project is being adequately maintained and is continuing to perform the design function. Inspection includes monitoring, sampling, testing and examination to determine proper operation of the GI Project. The Authority shall have the right to temporarily install and/or place on or near any part of the GI Project such devices as are necessary to conduct monitoring, sampling and/or testing of the discharges from the GI Project or the GI Project's effects. The Authority has the right, but not the obligation to perform these inspection services.

7. Failure of Property Owner to Maintain the GI Project.

(a) Nuisance. Property Owner agrees that failure to adequately maintain the GI Project may constitute a public nuisance that is a threat to public health and safety and to the environment.

(b) The Authority May Perform Maintenance. In addition to any rights the Authority may have under law or this Agreement, if the Authority determines that the Property Owner has failed to adequately maintain the GI Project as determined by the Authority, the Authority may notify the Property Owner in writing of any deficiencies. If the Property Owner fails to take action to correct those deficiencies within thirty (30) business days of receipt of such notice, the Authority and its authorized agents and employees may enter upon the Property and take whatever steps reasonably necessary to correct deficiencies identified and charge the reasonable costs (including administrative costs) thereof to the Property Owner. Where deficiencies cause imminent threat to public health, safety or the environment, the Authority may take immediate steps necessary to protect public health, safety and/or the environment and charge the costs (including administrative costs) thereof to the Property Owner. When the Authority charges its costs to the Property Owner pursuant to this Section, such charges shall be due within thirty (30) days of the date the bill is received. The Authority has the right, but not the obligation to perform these maintenance services.

(c) Right to Lien. In the event the Property Owner fails to reimburse the Authority within thirty (30) days after receipt of demand under Section 7(b), the Authority may place a lien on the Property for the entire amount due.

(d) Nothing in this Agreement shall limit the Authority's right under the Municipal Claims and Tax Liens Act, 53 P.S. § 7101, et seq.

8. No Waiver.

No delay or failure on the part of the Authority to exercise any rights, powers, or remedies herein provided shall be construed as a waiver thereof or acquiescence of such breach or of any future breach.

9. No Obligation to Maintain by the Authority.

Despite any other provisions of this Agreement, this Agreement does not obligate the Authority to appropriate or spend money at any time or for any reason. It is expressly understood and agreed that the Authority is under no obligation to routinely inspect, maintain or repair the GI Project, and in no event shall this Agreement be construed to impose any such obligation on the Authority.

10. Covenant Running with the Land.

The Property Owner agrees whenever the Property is held, sold, conveyed or otherwise transferred during the Term of this Agreement, the Property shall be subject to this Agreement which shall apply to, bind and be obligatory to all then current owner(s) of the Property. This Agreement shall constitute a real covenant running with the land for the Term of this Agreement and shall be binding on the Property Owner, its administrators, executors, heirs, assigns, and any other successors in interest during the Term of this Agreement, including, without limitation, any successors in title to the Property or any part thereof, whether or not they have actual notice of this Agreement and whether or not the deed of transfer specifically states that the transfer is under and subject to this Agreement.

11. Reproduction and Release of the Plans and Records.

Property Owner authorizes the Authority to reproduce and release copies of plans and other records that it previously submitted or in the future submits to in connection with the GI Project.

12. Agreement to be Recorded.

Property Owner shall record this Agreement with Allegheny County, Pennsylvania Department of Real Estate, 542 Forbes Avenue, Pittsburgh, Pennsylvania 15219, at the Property Owner's expense. The Authority shall be the sole beneficiary of the agreements, covenants and restrictions set forth herein and such agreements, covenants and restrictions shall run with the land in favor of the Authority. Failure to record this Agreement shall not diminish the effect of this Agreement.

13. Condominium Owners Association or Homeowners Association Declaration.

This Agreement and its Exhibits shall be attached and/or incorporated into any Declaration of a condominium owners' association or homeowners' association that is responsible for maintenance of the GI Project. Failure to attach and/or incorporate this Agreement shall not diminish the effect of this Agreement.

14. Modifications or Termination.

If the Authority's rights or privileges under this Agreement are or are about to be modified or terminated by exercise of the power of eminent domain (condemnation) or adjudication of a court of competent jurisdiction sought by a person or entity other than the Authority, then the Authority is entitled to recover from the person or entity seeking the modification or termination (i) restitution of amounts paid by the Authority for funding the GI Project and any other sums invested by the Authority in the GI Project and/or GI Area; and (ii) reimbursement of any litigation expenses incurred by the Authority, including without limitation reasonable attorney and expert witness fees and disbursements. The description of the Authority's remedies in this Section 14 does not preclude the Authority from exercising any other right or remedy that at any time may be available to the Authority under this Agreement or federal, state or local laws and regulations.

15. Amendments.

This Agreement may only be amended or modified by a written document signed by the Authority and Property Owner. The Authority will only enter into an amendment if it determines, at its discretion, that the amendment is consistent with and in furtherance of the Conservation Objective.

16. Remedies; Enforcement.

The Property Owner understands, acknowledges and agrees as follows:

(a) Enforcement. The Authority is an interested party to this Agreement and the Property Owner consents to enforcement by the Authority, administratively or at law or equity, of the restrictions, covenants, obligations and agreements contained herein.

(b) Injunctions. Monetary damages would not be adequate or sufficient to compensate the Authority for a breach of any of the restrictions, covenants, obligations and/or agreements of this Agreement. Accordingly, in addition to any other remedies available to the Authority administratively, at law or equity, under this Agreement or otherwise, the Authority may obtain a mandatory and/or prohibitory injunction compelling the Property Owner to specifically perform and observe the restrictions, covenants, obligations and agreements contained in this Agreement or to remedy any

failure on the part of the Property Owner to perform or observe any such restriction, covenant, obligation or agreement.

(c) Exclusivity. No right or remedy conferred upon the Authority in this Agreement is intended to be exclusive of any other right or remedy contained in this Agreement or at law or equity. Every such right or remedy shall be cumulative and shall be in addition to each other right and remedy contained in this Agreement or now or hereafter available to the Authority at law, in equity, by statute or otherwise.

(d) Right of Enforcement. This Agreement binds and benefits the Property Owner and the Authority, and their respective successors and assigns. Only the Authority has the right to enforce the terms of this Agreement and exercise rights of release, transfer, assignment or other discretionary rights of the Authority. Owners of lots within the Property do not have the right to enforce the terms of this Agreement against owners of other lots within the Property.

(e) Remedies Cumulative. The description of the Authority's remedies in Section 16 does not preclude the Authority from exercising any other right or remedy that at any time may be available to the Authority under federal, state or local laws or regulations. If the Authority chooses to exercise one remedy, the Authority may nevertheless choose to exercise one or more of the other rights or remedies available to the Authority at the same time or at any other time.

17. Representations and Warranties By Property Owner.

(a) Property Owner is the sole owner in fee simple of the GI Area free and clear of liens, encumbrances, restrictions and other matters of record.

(b) Property Owner has the power and is duly authorized to execute this Agreement.

(c) The Authority may peacefully and quietly exercise its rights under this Agreement free and clear of rights or consent of third parties.

18. Indemnity.

The Property Owner shall, at all times, indemnify, hold harmless and defend the Authority, its agencies, boards, commissions, offices and departments, agents, employees, elected officials or other representatives and their respective successors and assigns against any claims which may result or are claimed to result from the construction, operation, maintenance, inspection, malfunction, repair or replacement of the aforementioned GI Project and GI Area, as well as any and all costs and expenses incurred by indemnified parties to enforce the rights of the Authority as granted herein.

19. Entire Agreement.

This Agreement sets forth all agreements and understandings between the Authority and the Property Owner relating to the GI Project and there are no agreements or understandings, either oral or written, between them other than as are set forth in this Agreement. Any agreement hereafter made shall be ineffective to change, modify or amend this Agreement in whole or part unless such agreement is in writing and has been executed by both the Authority and the Property Owner. No oral representations, whenever made, by any Authority, employee or agent, or by any employee, agent or contractor of a Property Owner shall be effective to modify the terms of this Agreement.

20. Notices.

All notices, requests, demands and other communications required or permitted under this Agreement shall be in writing and sent to the party to be notified, at the following addresses:

Property Owner: _____

Authority: The Pittsburgh Water and Sewer Authority
Attn: _____
Penn Liberty Plaza I
1200 Penn Avenue
Pittsburgh, PA 15222

Or to such other address as either party may give by notice to the other party. All such communications shall be sent by United States registered or certified mail, return receipt requested, or a nationally-recognized delivery service guaranteeing next business day delivery, in each case with all delivery and postage charges prepaid, and shall be deemed to have been received three (3) business days after deposit in the United States mail, as aforesaid, or one (1) business day after deposit in a nationally-recognized delivery service guaranteeing next business day delivery, as aforesaid.

21. Miscellaneous.

(a) Certain Interpretational Rules. This Agreement is intended to be interpreted so as to convey to the Authority all rights and privileges of a holder of a conservation easement under the Conservation Easement Act, 32 P.S. §§5051-5059. The headings in this Agreement are for convenience only and are not a part of this Agreement. The headings do not in any way define, limit, describe or amplify the provisions of this Agreement or the scope or intent thereof.

(b) Governing Law. This Agreement shall be governed in accordance with the laws of the Commonwealth of Pennsylvania without regard to the conflicts of law doctrines thereof. The parties to this Agreement agree to submit to the jurisdiction of courts, whether federal or state, located in Pittsburgh, Pennsylvania.

(c) No Joint Venture. Nothing in this Agreement shall be construed as creating a joint venture or partnership between the Authority and the Property Owner.

(d) No Third-Party Beneficiaries. Nothing in this Agreement is intended to confer a third-party beneficiary right upon any person or entity other than the Authority.

(e) Waiver of Jury Trial. IT IS MUTUALLY AGREED BY AND BETWEEN THE AUTHORITY AND THE PROPERTY OWNER THAT THEY HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTER-CLAIM BROUGHT BY EITHER OF THE PARTIES HERETO AGAINST THE OTHER ON ANY MATTER WHATSOEVER ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT.

(f) Severability and Partial Invalidity. The provisions of this Agreement shall be severable. In the event that one or more provisions of this Agreement or the application thereof for any reason or in any circumstance shall to any extent be held to be invalid, illegal or unenforceable in any respect, such provision shall be severed and shall be inoperative, and the remainder of this Agreement shall remain in force to the fullest extent permitted by law.

(g) Exhibits Incorporated. All exhibits attached to this Agreement are hereby incorporated into and made a material part of this Agreement.

(h) Approval by Authority. No review, approval and/or inspection by the Authority of any plans, designs, specifications, drawings, work or other materials submitted or performed by the Property Owner in connection with the GI Project shall constitute a representation, warranty or guaranty by the Authority as to the substance or quality of the matter reviewed or approved. No person or party shall rely in any way on such review or approval, and at all times the Property Owner shall use its own independent judgment as to the accuracy and quality of all such matters. The Authority's review or approval of any plans, designs, specifications, drawings, work or other materials submitted or performed by the Property Owner in connection with this Agreement shall not constitute or be construed to constitute approval otherwise required by any Authority departments, boards or commissions in connection with any aspect of the same. Furthermore, no review or approval of any plans, designs, specifications, drawings, work or other materials submitted or performed by Property Owner in connection with this Agreement by any Authority departments, boards or commissions shall constitute or be construed to constitute approval otherwise required by the Authority under this Agreement.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties hereto have caused the Agreement to be duly executed the day and year first above written.

PROPERTY OWNER

TEMPLATE – DO NOT SIGN

By: _____

By: _____

Approved as to form:

THE PITTSBURGH WATER AND
SEWER AUTHORITY

Solicitor

By: _____