

**INTERGOVERNMENTAL COOPERATIVE PLAN  
BETWEEN THE TOWN OF BROOKFIELD  
AND THE CITY OF NEW BERLIN**

The Town of Brookfield, a Wisconsin town located in Waukesha County, Wisconsin (“Town”) and the City of New Berlin, a Wisconsin municipal corporation, located in Waukesha County, Wisconsin (“City”) hereby enter into this Intergovernmental Cooperative Plan (“Plan”) pursuant to the provisions of Sec. 66.0307, Wis. Stats.

**RECITALS**

**WHEREAS**, the Town has existed and operated as a Town under the provisions of Chapter 60, Wis. Stats., at all times material hereto; and,

**WHEREAS**, the City is an incorporated municipality operated as a City under the provisions Chapter 62, Wis. Stats., at all times material hereto; and,

**WHEREAS**, the Town and City have adopted Resolutions declaring their intent to enter into a Boundary Agreement and Cooperative Plan in accordance with the provisions of Sec. 66.0307, Wis. Stats., and now intend to cooperatively prepare a Plan which meets the requirements for approval of the Department of Administration (“Department”) in accordance with the authority granted the Town, City and Department pursuant to Sec. 66.0307, Wis. Stats.; and,

**WHEREAS**, the Town and City are of the opinion that intergovernmental cooperation and joint planning, as set forth in the following Plan, will provide for the best use of land and natural resources and high quality and efficient services for residents of both the Town and City; and,

**WHEREAS**, the Town and City are of the opinion that it is in the best interest of the residents of the Town and City to provide for the availability of sanitary sewer and municipal water services to designated areas in the City, referenced in this plan as the Future Service Area; and,

**WHEREAS**, the Town and City, by adoption and submittal of this Plan, intend to secure their respective abilities to address future growth and development within their respective jurisdictions, and to provide for an orderly growth of lands located in both the Town and City;

**NOW, THEREFORE**, in consideration of the mutual promises of the parties, the receipt and sufficiency of which is mutually acknowledge, the Town and City hereby agree as follows:

**SECTION 1: Participating Municipalities.**

The Town and City, whose respective boundaries are as of the effective date of this Plan, are shown on the maps appended hereto as Exhibits A and B, respectively and, the legal description of each municipality of the Town and City being appended hereto as Exhibits C and D, respectively, hereby enter into this Plan under the authority of Sec. 66.0307, Wis. Stats. The

respective governing bodies of the Town and City are hereby designated to enact ordinances described in Wisconsin Statute Sec. 66.0307(10).

**SECTION 2: Contact Persons.**

The following persons and their successors are authorized to speak for their respective municipalities regarding this Plan:

For the Town:           Town Chairperson, Keith Henderson

For the City:            Mayor David Ament

**SECTION 3: Adjustments Subject to the Plan.**

This Plan will affect the territory (herein the “Territory”) currently located in the Town and City in certain respects, as it relates to the potential extension and provision of municipal services. Notwithstanding the foregoing, the existing common boundary line between the Town and City, as of the effective date of this Plan, and as depicted on Exhibits A and B, shall remain the boundary line as between the Town and City in perpetuity; provided however, that the governing bodies of the Town and City shall retain the authority to change those boundaries by amendment to this Plan.

The Town and City have each determined the existing common boundary line between the Town and City is compact and not the result of arbitrariness. As this Plan maintains the entire existing common boundary, the parties acknowledge the boundary maintained under this Plan will remain compact as required by Wisconsin Statute Sec. 66.0307(5)(c)(5).

**SECTION 4: Purposes.**

The Plan is intended to achieve the general purpose described in Sec. 66.0307(3)(b), Wis. Stats., which is to guide and accomplish a coordinated, adjusted, and harmonious development of the Territory covered by the Plan consistent with each participating municipality’s comprehensive plan. The parties have further identified the following specific purposes of this Plan:

- a. To increase governmental efficiency through the sharing of services that had been provided separately by the Town and City, and to eliminate duplicative or unnecessary expenditures. In particular, this Plan eliminates the cost of litigating future border disputes, as well as the cost to New Berlin to pay for a sewage interceptor it has never used.
- b. To make available to residents of the City the ability to obtain sanitary sewer and municipal water services to be provided by the Town.

**SECTION 5: Consistency with Comprehensive Plans.**

The City has, at all times material hereto, adopted a Comprehensive Plan in accordance with the provisions of Sec. 66.1001, Wis. Stats., and has implemented that Plan as a guide for development and redevelopment within the City. The provisions of this Plan which provides for the availability of sanitary sewer and municipal water service within the Future Service Area is consistent with the Comprehensive Plan which contemplates the extension of those utility services to property owners, upon request of the property owner.

The City acknowledges that the Plan's goals of joint planning, joint management of future growth and securing the ability to address future growth and development within its own jurisdiction are consistent with the goals set forth in the City of New Berlin Comprehensive Plan, including, but not limited to, the goals set forth in Chapter 21 of the Comprehensive Plan: (1) establishing cooperative planning with surrounding communities; (2) encouraging coordination and cooperation among nearby units of government, including joint services; and (3) working with adjacent communities to resolve land use and/or development conflicts which include seeking appropriate agreements with adjacent communities when they are possible. Specifically, this Plan solidifies the common borders of each community and resolves a long-standing issue concerning a joint sewer interceptor.

The City of New Berlin acknowledges that its Comprehensive Plan did not anticipate entering into cooperative boundary agreements for the life of the Plan; however, the City's current Plan is under review and it is anticipated that it will be updated in the near future. The City has currently been undertaking listening sessions as part of its Public Participation Plan in anticipation of such revision. While the establishment of a Cooperative Boundary Plan was not anticipated in the Comprehensive Plan, the Plan does note the statutory basis and procedure for entering into such a Boundary Plan which the City of New Berlin acknowledges have been followed in preparing this Plan. This Plan represents an opportunity for both communities to cooperate regarding issues of utilities in terms of their relationship with the Poplar Creek Interceptor and the potential future service of the area shown in Exhibit H. The adoption of this Plan would encourage the coordination and cooperation between the City of New Berlin and the Town of Brookfield.

The Town has adopted, and is a participant in, the Waukesha County Comprehensive Plan, and utilizes that Plan when undertaking any zoning matters, and/or considering development and redevelopment within the Town. The extension of sanitary sewer and municipal water service within the Future Service Area is consistent with that Plan, to the extent that Plan contemplates the extension of municipal sewer service to adjoining municipalities for the purpose of furthering and promoting development and redevelopment within the adjoining municipalities.

#### **SECTION 6: Transfer of Interest in the Poplar Creek Interceptor.**

On April 26, 1976 the Town and City entered into an Agreement with the City of Brookfield for the construction and operation of a sanitary sewer interceptor in the Poplar Creek/Deer Creek drainage basin, which interceptor is known as and referred to herein as the "Poplar Creek Interceptor". A copy of the Agreement is appended hereto as Exhibit E and incorporated herein by reference.

Under the terms of the Agreement, the Interceptor was constructed in segments. In 1986, the Town desired to construct an additional segment of the Interceptor which, when constructed, would allow the extension of sanitary sewer service to areas of the Town located south of Interstate 94 and, at some point in the future, would also allow the extension of sanitary sewer services for the City. The Town, City and City of Brookfield then modified the April 26, 1976 Agreement, in part, so as to provide that the construction of the additional segment of the Interceptor requested by the Town would be paid for by the Town, and, that the City would be required to reimburse the Town only in the event and at such time as residents of the City were provided sanitary sewer service. A copy of the Agreement, approved by the City on January 28, 1986 and the Town of February 4, 1986 is appended hereto as Exhibit F and incorporated herein by reference.

Pursuant to the Agreement between the Town, City and City of Brookfield, as amended, an additional segment of the Poplar Creek Interceptor was constructed, and the cost was paid by the Town.

Subsequent to completion of the Poplar Creek Interceptor, the City determined that the sanitary sewer services, would not be extended to residents of the City, and accordingly, the Town purchased from the City the capacity in the Fox River Wastewater Treatment Facility necessary to provide sanitary sewer service to residents in the City. The Town, subsequent to purchase of the capacity, has extended additional sanitary sewer service to Town residents and businesses, but retains a surplus capacity which can be utilized to provide sanitary sewer service to adjoining municipalities, including the City and the Town of Waukesha.

However, the Agreement between the Town, City and City of Brookfield, a copy of which is appended hereto to as Exhibit G, did not provide for a conveyance by the City to the Town of the City's ownership in the Poplar Creek Interceptor. Accordingly, the City of Brookfield has continued to invoice the City for certain costs associated with the continued operation and maintenance of the Poplar Creek Interceptor even though the City has conveyed to the Town all of the City's interest in the Poplar Creek Interceptor. As of December 31, 2018, the City of Brookfield asserts and continues to assert that the City owes the City of Brookfield two hundred and twenty-five thousand nine hundred twenty-eight dollars and 17/100 (\$225,928.17), although both the Town and City dispute that the City owes that sum or any other sum to the City of Brookfield.

The Town and City agree, that upon approval of this Plan, all right, title and interest in the ownership of any portion of the Poplar Creek Interceptor owned or possessed by the City shall be transferred to the Town. The conveyance shall be deemed retroactive to the date of the conveyance of capacity in the Poplar Creek Interceptor. As a part of the conveyance, the Town shall release, without payment, any obligation the City may owe to the Town as a result of public funds expended by the Town for the purpose of constructing the Poplar Creek Interceptor. Further, the Town shall indemnify and hold the City harmless for any and all obligations which the City may owe to the City of Brookfield, under the terms of the Agreements relating to the construction, operation and maintenance of the Poplar Creek Interceptor. As used herein, the term "obligations" is intended to refer to, and encompass any and all claims which the City of Brookfield has in the past, or may in the future, assert against the City under the terms of the Agreements referred to herein, including but not

limited to the claimed obligation as of December 31, 2018 in the amount of two hundred and twenty five thousand nine hundred twenty eight dollars and 17/100 (\$225,928.17). The Town agrees to make payment to the City of Brookfield of the full outstanding amount for such operation and maintenance expenses, which the City of Brookfield claims are due and owing at the time of the approval of this Agreement by the Department of Administration, with such payment being made to the City of Brookfield within 30 days of the date of the approval of the Agreement by the Department of Administration. Both the Town and City have, and continue, to assert that all obligations claimed by the City of Brookfield under the terms of the Agreements are without merit. In the event it is determined that the City is obligated to make any payment to the City of Brookfield under the terms of the Agreements referred to herein, the Town, in addition to defending any such claims, shall be responsible for the payment of all obligations which are determined to be owed to the City of New Berlin under the terms of the Agreements referenced herein.

As additional consideration for the assumption of the City's obligations under the Agreements referenced herein, the City agrees that the City will retain its status as a Class 3 City until at least July 1, 2020.

**SECTION 7: Future Sanitary Sewer and Water Extension Area.**

Although the City has, as a matter of policy, determined that the City will not extend or provide sanitary sewer and/or municipal water service to areas located in the western portion of the City, some areas of the City located north of State Highway 59/Greenfield Avenue may require the extension of sanitary sewer and/or municipal water services at some time in the future subject to applicable zoning requirements, as well as existing agreements. The area for which such potential service future services depicted on Exhibit H, and referred to herein as the "Future Service Area".

It is noted that SEWRPC's Planning Report No. 52, Map 65, does designate a portion of this area being included within the City of Waukesha Water Service Area. However, this was prior to the current City of Waukesha Water Diversion Permit with the State of Wisconsin DNR. The reference in the SEWRPC Planning Report simply represents a recommended water source, the provisions of this Agreement present another potential alternative.

The Town agrees that, upon request by the City for the extension of sanitary sewer and water service to properties within the Future Service Area, the Town will provide sanitary sewer and/or water services, as requested, providing that the Town, at the time the request is made, has the ability to provide those services, and provided that the extension of those services are consistent with and not contradicted by any existing or future agreements between the City and the City of Milwaukee, as well as the diversion permit from the State of Wisconsin Department of Natural Resources previously issued to the City. The extension of sanitary sewer and/or municipal water service shall be subject to the following additional conditions:

- a. The Town receives a request to provide sanitary sewer and/or water service from both the property owner located within the Future Service Area and from the City; and,

- b. The Town will extend the requested sanitary sewer and municipal water service, to the extent the Town has the ability to do so, but only upon the same terms and conditions that the Town provides the same sanitary sewer and/or water service to residents of the Town. To the extent that the extension of sanitary sewer and/or water service would result in the levy of a special assessment against the benefited property, such assessments will be levied in accordance with the provisions of Sec. 66.0703, Wis. Stats., and shall apply the same terms and conditions for payment of the assessment as are extended and provided to other residents of the Town. The Town and City acknowledge the provisions of Wisconsin Statute Sec. 66.0707 will apply to any special assessment levied under this Plan provision. If any assessment is levied under this Plan provision, the City will take all reasonable and necessary steps to approve said assessment in accordance with Wisconsin Statute Sec. 66.0707.
- c. The City acknowledges that extending sanitary sewer and/or municipal water service to parcels in the Future Service Area Zone R1/R2, R3 and/or R4 is consistent with its Zoning Ordinances as of the effective date of this Plan.
- d. The Town and City further acknowledge and agree that because the Plan maintains the existing common boundary and does not transfer any territory between the Town and City, there is no need to described further or in particular the municipal services to be provided in the territory covered by the Plan. Notwithstanding the Future Service Area described above, the Town and City anticipate no additional changes as a result of this Plan to municipal services provided by the Town and City to their respective jurisdictions as of the effective date of this Plan.
- e. It should be noted that two parcels on Copenhill Drive do currently receive sewer service from the Town. While R-3 properties are typically served by POWTW, the City acknowledges that the availability of public sewer may be made in some instances such as this one.
- f. It should be further noted that because of the limited and contingent nature of the joint services to be provided hereunder, no preliminary approval from governmental authorities is needed or anticipated at this time.

All other municipal services by each community for the benefit of its own jurisdiction will continue to be provided as they are.

**SECTION 8: Dispute Resolution.**

- A. Scope. All disputes over the interpretation or application of this Plan shall be resolved according to the dispute resolution procedures contained in this Section.
- B. Mediation. If the dispute cannot be resolved by the personnel directly involved, the parties will conduct the following mediation process before invoking formal arbitration:

1. Each party will designate a representative with appropriate authority to be its representative in the mediation of the dispute.
  - a. Either representative may request the assistance of a qualified mediator. If the parties cannot agree on the qualified mediator within 5 days of the request for a mediator, a qualified mediator will be appointed by the Chairperson of the Alternative Dispute Resolution Committee of the State Bar of Wisconsin, or if the Chair fails to appoint a mediator, by the American Arbitration Association.
  - b. The mediation session shall take place within 45 days of the appointment of the respective representatives designated by the parties, or the designation of a mediator, whichever occurs last.
  - c. In the event that a mediator is used, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved at least 120 days prior to the first scheduled mediation session. The parties will also produce all information reasonably required for the mediator to understand the issues presented. The mediator may require either party to supplement such information.
  - d. The mediator does not have authority to impose a settlement upon the parties but will attempt to help the parties reach a satisfactory resolution of their dispute. All mediation sessions are private. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator. The parties shall not rely on, or introduce as evidence in any arbitrable, judicial, or other proceeding, views expressed or suggestions made by the other party with respect to a possible settlement of the dispute, or admissions made by the other party in the course of the mediation proceedings.
  - e. The expense of a mediator, if any, shall be borne equally by the parties.

C. Arbitration. If unresolved after Section 10 B. above, the parties will submit the dispute to binding arbitration by an arbitrator of recognized qualifications. If the parties cannot agree on an arbitrator, they will request an arbitrator from the American Arbitration Association. The parties may agree to an alternative method for the selection of the single arbitrator.

1. The Town and the City will equally divide the fees of the arbitrator as well as the costs of court reporters, if any. The parties are responsible for the fees of their own attorneys and expert witnesses subject to any award of costs or fees by the arbitrator.
2. The arbitrator shall not be bound by rules of evidence or the substantive, internal laws of the State of Wisconsin. The award is final and binding and shall be enforceable at law. The arbitration provisions of Chapter 788, Wis. Stats. shall apply to the arbitration proceedings unless the parties otherwise agree.

3. The parties agree that arbitration proceedings must be instituted within 1 year after the claimed breach was discovered or in the exercise reasonable diligence could have been discovered and that the failure to institute arbitration proceedings within such period shall constitute an absolute bar to the institution of any proceedings and a waiver of all claims.

**SECTION 9: Division of Assets and Liabilities.**

The Town and City agree that no adjustment relating to division of assets and liabilities were required as a result of any future transfer of land under the terms of this Plan.

**SECTION 10: Planning Period.**

The Planning Period, as that term is used and defined in Sec. 66.0307, Wis. Stats., shall continue in perpetuity.

**SECTION 11: General Provisions.**

A. Indemnification. To the extent the Town is required to indemnify the City under any provision of this Plan, upon receipt of any demand or litigation which would require the Town to indemnify the City based upon the demand or litigation, notice will be promptly given to the Town, together with a copy of any documents in the possession of the City which give rise to requirement of indemnification, and the Town shall thereafter provide a legal defense to any claim asserted against the City, and will otherwise indemnify the City under the terms of this Plan.

B. No Waiver. The failure of either party to require strict performance with any provision of this Plan will not constitute a waiver of the provision or any of the rights under this Plan. Rights and obligations under this Plan may only be waived or modified in writing. Waiver of one right, or release of one obligation, will not constitute a waiver or release of any other right or obligation of any party.

C. Performance Standard. This Plan requires the parties to act or to refrain from acting on a number of matters. The parties hereby acknowledge that this Plan imposes on them a duty of good faith and fair dealing. In addition, whenever consent or approval is required by a party, the consent or approval shall not be unreasonably withheld.

D. Construction. This Plan shall be literally construed to accomplish in this Plan is the product of numerous individuals representing the various interests. Therefore, ambiguities shall not be construed against the drafter of this document. This Plan should be construed to give a reasonable meaning to each of its provisions and a construction that would render any of its provisions meaningless, inexplicable, or mere surplusage is to be avoided.

E. Enforceability. The enforceability of this Plan will not be affected by statutory amendments, changes in the forms of City or Town government, or changes in elected officials. The parties agree that this Plan is binding on their respective successors, agents, and employees.

F. Smart Growth Law. The parties acknowledge that this Plan has been executed after the Wisconsin Legislature's enactment of Sec. 66.1001, Wis. Stats., which pertains to comprehensive land use planning. The preceding is generally referred to as "Smart Growth Law." The parties acknowledge that they have entered into this Plan in contemplation of the standards and requirements of the Smart Growth Law. This Plan is intended to be an Intergovernmental Cooperation Agreement under the Smart Growth Law and therefore may be amended, if necessary, to comply with the requirements of the Smart Growth Law.

G. Incorporation. The City agrees that the City shall not object to any action taken by the Town, subsequent to the approval of this Plan, which actions intended to seek the incorporation of the Town as a City or Village in accordance with the provisions of the applicable statutes governing any incorporation effort.

IN WITNESS WHEREOF, the parties will have caused the execution of this Plan by their Duly authorized officers as of the date first written above.

CITY OF NEW BERLIN

By: \_\_\_\_\_  
Mayor David Ament

ATTEST:

\_\_\_\_\_  
Georgia Stanford, City Clerk

TOWN OF BROOKFIELD

By: \_\_\_\_\_  
Keith Henderson, Chairman

ATTEST:

\_\_\_\_\_  
Elisa Cappozzo, Town Clerk