

**2023 CITY OF CLAYTON
PROJECT MANAGEMENT AND FINANCING AGREEMENT**

THIS 2023 CITY OF CLAYTON PROJECT MANAGEMENT AND FINANCING AGREEMENT (this "**Agreement**") is made and entered into as of the 7th day of September, 2023 (the "**Effective Date**"), by and between the **CITY OF CLAYTON, OHIO**, an Ohio municipal corporation (the "**City**"), and the **MONTGOMERY COUNTY TRANSPORTATION IMPROVEMENT DISTRICT**, a transportation district and body corporate and politic duly organized and validly existing under the laws of the State of Ohio (the "**TID**") (the City and the TID are sometimes referred to herein individually as "**Party**" and collectively as "**Parties**"), under the following circumstances:

- A. Clay Township (Montgomery County, Ohio) (the "**Township**") has engaged the TID to assist the Township in developing a strategy to facilitate and encourage the development of the area between Interstate 70, State Route 49, and Brookville-Salem Road (the "**Project Area**"), including without limitation the design, engineering, financing, and/or construction of certain public improvements, all to: (i) assure the availability of utility services and safe, accessible traffic and transportation corridors; (ii) encourage public and private development in the Township; and (iii) enhance the viability of development within the Township generally (the "**Township Project**");
- B. A private developer (the "**Developer**") owns or controls certain real property in the Project Area and is interested in developing such real property (the "**Development**"), which Development will require the construction of the Township Project;
- C. The City now desires to engage the TID to assist the City, in cooperation with the Township and the Developer, in evaluating and developing a strategy to expand the scope of certain portions of the Township Project to extend to and benefit the City, all to: (i) assure the availability of utility services and safe, accessible traffic and transportation corridors; and (ii) enhance the viability of development within the City generally (the "**City Project**", and together with the Township Project, the "**Project**");
- D. The City agrees that the City will receive material transportation and economic benefit from the City Project;
- E. The Parties acknowledge that the City Project may comprise two phases: the planning phase ("**Phase I**"), and the design, engineering, and/or construction phase ("**Phase II**"); and
- F. The Parties desire to support the City Project by entering into this Agreement to set forth in more detail each of their respective obligations with respect to the City Project, and, therefore, the City Council of the City, and the TID, acting pursuant to Resolution No. 2023-52 adopted by its Board of Trustees on August 14, 2023, have each authorized the execution of this Agreement.

NOW THEREFORE, in consideration of the above, and based upon the mutual promises contained below, the Parties agree as follows:

1. **The City Project Generally.** The Parties hereby agree to cooperate to develop and implement the City Project as set forth in this Agreement.

2. **Phase I Schedule.** The Parties will work to together to develop a schedule for Phase I (the “**Phase I Schedule**”). The Parties agree to use their reasonable commercial efforts to adhere to the Phase I Schedule and to fulfill all their obligations under this Agreement so the Phase I Schedule is met.

3. **Phase I Budget.** The budget for Phase I is set forth in Exhibit A (the “**Phase I Budget**”). Notwithstanding anything in this Agreement to the contrary, the TID will not be obligated to provide for any products or services related to the City Project in excess of the funds actually received by the TID from the City or third-party funding sources, less the TID Management Fees (as defined in Section 4 below).

4. **TID Management Fees.**

A. The City hereby agrees to pay the TID an amount equal to \$25,000 (the “**TID Phase I Management Fee**”) as compensation to the TID for the Phase I Tasks and TID Management Services related to Phase I of the City Project. The City will pay half of the TID Phase I Management Fee within thirty (30) days after execution of this Agreement, and the remaining half on or before November 30, 2023.

B. In addition to the TID Phase I Management Fee, the City hereby acknowledges that to the extent the Parties enter into a Phase II Addendum (as defined in Section 7 below), the City will be required to pay the TID an additional fee for the TID’s services related to Phase II. Without limiting the foregoing, to the extent the TID is engaged to manage construction in connection with Phase II, the City will be required to pay the TID an amount equal to 5% of the total cost of the City Project (as applicable, the “**TID Phase II Management Fee**”, and together with the TID Phase I Management Fee, the “**TID Management Fees**”), upon the earlier of: (i) the closing of a Phase II Borrowing (as defined in Section 6 below), or (ii) the date the TID lets any contract for Phase II.

5. **Specific Phase I Provisions.**

A. *Effective Date and Termination.* Phase I will begin on the Effective Date and will terminate upon the earlier of: (i) the date both Parties have completed their respective obligations under Phase I; provided, however, any obligations not completed by a Party may be waived (in writing) by the other Parties; (ii) the date both Parties agree, in writing, to terminate the City Project; and or (iii) immediately upon written notice to a Party in the event the Party breaches its obligations hereunder and fails to cure such breach within fifteen (15) days following written notice from the non-breaching Party.

B. *Phase I Tasks.* During Phase I, the Parties will cooperate to perform the following tasks (the “**Phase I Tasks**”):

(i) The TID will assist the City in developing a scope for the City Project and a financing plan for the public share of any costs associated with the design, engineering, and/or construction of the City Project (the “**Phase II Financing Plan**”).

(ii) The TID will assist the City in identifying and obtaining any permits necessary for the construction of the City Project.

(iii) The TID will cause to be prepared, and assist the City in negotiating, a Development Agreement (the “**Development Agreement**”) between the City, the

Township, the Developer, and any other necessary parties (including without limitation the TID to the extent the Parties mutually desire for the TID to participate in Phase II) (collectively, the “**Project Entities**”). As of the Effective Date, the Parties anticipate that the Development Agreement will memorialize, among other things, the respective rights and obligations of the Project Entities related to: (a) the obtainment and/or donation of any necessary right-of-way; (b) the planning and approval and permitting processes for the Project; (c) the design and construction of the Project; and (d) the financial commitments of each Project Entity, if any, related to the foregoing. For purposes of clarity, the TID makes no representation or warranty that the Project Entities will be successful in coming to an agreement on the terms of the Development Agreement. The City acknowledges and agrees that the TID’s preparation of the Development Agreement (whether provided directly by the TID or any third party engaged by the TID) does not constitute legal advice or the provision of legal services, and the City will rely solely on the advice of its own legal counsel for all matters related to the Development Agreement. The Parties acknowledge that in executing this Agreement, no Party is committing to execute a Development Agreement.

(iv) The TID will assist the City in identifying other tasks that may comprise Phase II.

C. *Specific TID Management Services.* During Phase I the TID will provide project planning, project coordination, strategy development, and project supervision services for the Phase I Tasks (the “**TID Management Services**”). The TID will pay all invoices for services accomplishing Phase I Tasks (the “**Third Party Services and Costs**”) so long as such Third Party Services and Costs are satisfactory to the TID and such invoices are within the Phase I Budget. The TID will keep the City apprised of the progress of Phase I as compared to the Phase I Budget at Progress Meetings (as described in Section 10 below) and will provide the City such supporting information as reasonably requested on a timely basis.

6. **Funding for the City Project.** As a general matter, unless otherwise agreed in writing, whether in the Development Agreement or otherwise, the City will be obligated to fund the entire cost of the City Project, whether via a borrowing or an alternative source of funds. The Phase II Financing Plan may include a borrowing from the ODOT State Infrastructure Bank (the “**SIB**”) or an alternative source of financing (a “**Phase II Borrowing**”). The City acknowledges that, unless required by the SIB or other lender, the TID will not act as the primary borrower in connection with a Phase II Borrowing. To the extent the TID agrees to participate in a Phase II Borrowing as required by the SIB or other lender or otherwise in order to facilitate the administration of its proceeds, the City will be required to fully guaranty the TID’s obligations and hold the TID harmless from any related liability. The City’s obligations may include, without limitation, a pledge of available revenue stream(s). The Parties acknowledge that in executing this Agreement, no Party is committing to undertake a Phase II Borrowing. The City will fulfill its payment obligations hereunder and as set forth in the applicable budget by timely depositing the amounts of such obligations (including amounts related to any contingencies) with the TID (the “**Deposit**”). The TID will deposit the Deposit (less fees payable to the TID) in a segregated fund for the benefit of the City Project (the “**Deposit Fund**”). Within forty-five (45) days after the termination or conclusion of the City Project, the TID will deliver the balance of the Deposit Fund, if any, to the City.

7. **Phase II.** The Parties will only proceed to Phase II upon the negotiation and mutual execution of a subsequent addendum to this Agreement to set forth the Parties’ respective rights and obligations with respect to Phase II of the City Project, including without limitation the scope, schedule,

and budget for Phase II of the City Project (the "**Phase II Addendum**"). The Development Agreement, if any, may constitute the Phase II Addendum.

8. **TID Payment Obligations.** Notwithstanding any provision of this Agreement, it is understood and agreed that the TID will have no pecuniary obligations under this Agreement or any related agreement and no obligation of the TID hereunder or thereunder will constitute a general debt or a pledge of the general credit of the TID.

9. **City Obligations.** The City will throughout the performance of this Agreement perform the activities provided for in this Agreement, cooperate and coordinate with and assist the TID, join with the TID in signing and granting any applications or permits or other documents necessary to complete the City Project. The City will perform its responsibilities, obligations, and services, including its reviews and approvals of the TID's submissions and recommendations, in a timely manner so as not to delay or interfere with the TID's performance of its obligations under this Agreement or to have a negative impact on the Phase I Schedule.

10. **Progress Meetings.** During the course of the City Project, the Parties agree to meet at least once per month to discuss the progress of the City Project (the "**Progress Meetings**"). In addition to the foregoing, the TID may periodically submit information updates to the City detailing progress achieved. The Parties are fully committed to working with each other throughout the City Project and agree to communicate regularly with each other at all times so as to avoid or minimize disputes or disagreements.

11. **Notices.** All notices hereunder will be in writing and will be deemed to have been duly given if delivered by hand or mailed by certified mail, postage prepaid and addressed as follows:

If to the City:	City of Clayton 6996 Taywood Rd. Clayton, Ohio 45315 Attention: City Manager
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If to the TID:	Montgomery County Transportation Improvement District 451 W. Third St., 10 th Floor Dayton, Ohio 45422 Attention: Executive Director
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The Parties, by notice given hereunder, may designate any further or different addresses to which subsequent notices, certificates, requests or other communications will be sent.

12. **Disclaimer of Warranties/Limitation of Liability.** **THE CITY AGREES THAT THE TID DOES NOT GUARANTEE OR WARRANT THE SERVICES PROVIDED BY THE TID HEREUNDER OR THE COMPLETION OF THE CITY PROJECT. ALL TID SERVICES ARE PROVIDED ON AN "AS IS" BASIS. EXCEPT AS EXPRESSLY SET FORTH HEREIN, THE TID DOES NOT MAKE, AND HEREBY DISCLAIMS ANY AND ALL EXPRESS AND/OR IMPLIED WARRANTIES, INCLUDING BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND TITLE, AND ANY WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE, OR TRADE PRACTICE. IN NO EVENT WILL THE TID BE LIABLE OR RESPONSIBLE TO THE CITY FOR ANY TYPE OF INCIDENTAL, PUNITIVE, INDIRECT OR CONSEQUENTIAL**

DAMAGES, INCLUDING BUT NOT LIMITED TO, LOST REVENUE AND LOST PROFITS, EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, WHETHER ARISING UNDER ANY THEORY OR CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE. EXCEPT TO THE EXTENT OF INSURANCE PROCEEDS ACTUALLY RECEIVED, IN NO EVENT WILL THE TID'S TOTAL LIABILITY HEREUNDER EXCEED THE FEES (NOT INCLUDING ANY FEES PAID TO THE TID TO REIMBURSE THE TID FOR EXPENSES INCURRED BY THE TID) ACTUALLY COLLECTED BY THE TID FROM THE CITY HEREUNDER.

13. **Additional Parties to this Agreement.** The Parties acknowledge and agree that additional parties may be added to this Agreement by the unanimous consent of the Parties by having such parties enter into an acknowledgement to this Agreement (the "**Acknowledgement**"). Each Acknowledgement will set forth for such Party: (A) the information required by Section 11 hereof (Notices); and (B) if required, a fiscal officer's certificate pursuant to Sections 5705.41 and 5705.44 of the Ohio Revised Code. Each such additional party will be deemed to be a Party under this Agreement.

14. **Assignment and Binding Nature.** This Agreement may not be assigned without the prior written consent of the non-assigning Parties. The provisions of this Agreement will be binding upon the successors and permitted assigns of the Parties.

15. **Remedies.** Any disputes, controversies or claims arising under or relating to this Agreement or the breach, termination or invalidation thereof or the Services provided pursuant to this Agreement will, upon written notice, be referred to the City Manager and the Executive Director of the TID who will confer in good faith for a period of at least thirty (30) days to attempt to resolve the matter. If the City Manager and the Executive Director of the TID are unable to resolve the matter within this thirty-day period, each Party may take such actions permitted by law or this Agreement in order to resolve such dispute.

16. **Severability.** If any provision of this Agreement, or any covenant, obligation or agreement contained herein is determined by a court to be invalid or unenforceable, that determination will not affect any other provision, covenant, obligation or agreement, each of which will be construed and enforced as if the invalid or unenforceable portion were not contained herein. That invalidity or unenforceability will not affect any valid and enforceable application thereof, and each such provision, covenant, obligation or agreement will be deemed to be effective, operative, made, entered into or taken in the manner and to the full extent permitted by law.

17. **Construction and Interpretation.** No Party will be deemed to be the draftsman of this Agreement, and it will not be interpreted or construed in favor of or against any Party. Words in the singular will include the plural, and vice versa, and words in the masculine will include the feminine and/or neuter, and vice versa, where the context so requires for a reasonable interpretation of this Agreement. All Exhibits referred to in and attached to this Agreement are incorporated by reference.

18. **Fiscal Officer Certification.** The Fiscal Officer of the City hereby certifies that the monies required to meet the obligations of the City during the current fiscal year under this Agreement have been appropriated lawfully for that purpose, and are in the treasury of the City or in the process of collection to the credit of an appropriate fund, free from any previous encumbrances. Pursuant to Section 5705.44 of the Ohio Revised Code, the Fiscal Officer of the City covenants that any requirement herein of an expenditure of City monies in any future fiscal year shall be included in the annual appropriation measure for that future fiscal year as a fixed charge. The certifications in this Section 18 are given in compliance with Sections 5705.41 and 5705.44 of the Ohio Revised Code.

19. **Miscellaneous.** Each of the Parties agrees to comply with all applicable Federal, State and local laws, rules, orders and regulations in performing its obligations hereunder. This Agreement and any Exhibit attached hereto may only be amended by written instrument executed by the Parties. All covenants, obligations and agreements of the Parties contained in this Agreement will be effective to the extent authorized and permitted by applicable law. No such covenant, obligation or agreement will be deemed to be a covenant, obligation or agreement of any present or future member, official, officer, agent or employee of any of the Parties other than in their official capacity, and no member of the City Council, or TID Board of Trustees, and no City or TID official executing this Agreement, will be liable personally by reason of the covenants, obligations or agreements of the Parties contained in this Agreement. This Agreement may be signed in one or more counterparts or duplicate signature pages with the same force and effect as if all required signatures were contained in a single original instrument. Any one or more of such counterparts or duplicate signature pages may be removed from any one or more original copies of this Agreement and annexed to other counterparts or duplicate signature pages to form a completely executed original instrument. This Agreement embodies the entire agreement and understanding of the Parties relating to the subject matter herein. The waiver, by any Party hereof of any breach of any provision of this Agreement will not be construed as, or constitute, a continuing waiver or a waiver of any other breach of any provision of this Agreement. The headings contained in this Agreement were included only for convenience or reference and do not define, limit, explain or modify this Agreement or its interpretation, construction or meaning and are in no way to be construed as a part of this Agreement. This Agreement will be governed by and construed in accordance with the laws of the State of Ohio.

[Remainder of Page Intentionally Blank. Signature Page Follows.]

IN WITNESS WHEREOF, the Parties have executed this Agreement effective as of the Effective Date.

CITY OF CLAYTON, OHIO

By: 

Name: Amanda Zimmerlin

Title: City Manager

CITY OF CLAYTON, OHIO FISCAL OFFICER (Section 18 only)

By: 

Name: Kevin Schwetzer

**MONTGOMERY COUNTY
TRANSPORTATION IMPROVEMENT
DISTRICT**

By: 

Crystal Corbin, Executive Director

EXHIBIT A

Phase I Budget

SOURCES	
City of Clayton	\$35,000
Total	\$35,000
USES	
TID Phase I Management Fee	\$25,000
TID Third Party Costs and Expenses	\$10,000
Total	\$35,000

CITY OF CLAYTON, OHIO

RESOLUTION NO. R - 09 - 23 - 53

A RESOLUTION APPROVING A PHASE 1 PROJECT MANAGEMENT AND FINANCING AGREEMENT WITH THE MONTGOMERY COUNTY TRANSPORTATION IMPROVEMENT DISTRICT FOR THE STATE ROUTE 49 PROJECT AT A COST NOT TO EXCEED \$35,000.00

WHEREAS, QuickTrip Corporation has proposed development of a site located in Clay Township between Interstate 70, State Route 49, and Brookville-Salem Road which will require access improvements to local and state roadways and the extension of related utilities to the proposed site ("State Route 49 Project"); and

WHEREAS, City Council has determined the State Route 49 Project would provide economic benefits to the residents and businesses of the City; and

WHEREAS, City Council has requested the Montgomery County Transportation Improvement District (TID) assist the City to develop a financing plan for said Project and negotiate a Development Agreement with QuickTrip to memorialize the terms for said Project; and

WHEREAS, the TID has agreed to assist the City under the terms of the attached Phase 1 Project Management and Financing Agreement.

NOW THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF CLAYTON, STATE OF OHIO:

1. That the attached (**Exhibit A**) Phase 1 Project Management and Financing Agreement with the Montgomery County Transportation Improvement District (TID) for the State Route 49 Project at a cost not to exceed \$35,000.00 is hereby approved and the City Manager and Finance Director are authorized to sign same on behalf of the City of Clayton.
2. It is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this Resolution were taken in an open meeting of this Council, and that all deliberations of this Council and any committees that resulted in those formal actions were in meetings open to the public, in compliance with all legal requirements.

ADOPTED BY COUNCIL ON SEPTEMBER 7, 2023.

AUTHENTICATION:


Mayor (Presiding Officer of Council)


Clerk of Council

APPROVED AS TO FORM:

Law Director

CERTIFICATION OF PUBLICATION

This shall certify that that the text of the above referenced enactment or a summary thereof was published once in the following newspaper and a summary posted in three places of public access as designated by Council.

Name of newspaper
Registered Herald

Date of publication
September 13, 2023

Barbara J. ...
CLERK

**MONTGOMERY COUNTY
TRANSPORTATION IMPROVEMENT DISTRICT**

RESOLUTION NUMBER 2023-52

**RESOLUTION APPROVING A PROJECT MANAGEMENT & FINANCING AGREEMENT
WITH CITY OF CLAYTON FOR THE SR 49 PROJECT**

WHEREAS, the Board of Trustees ("Board") of the Montgomery County Transportation Improvement District ("TID"), by action of Resolution 2023-22, entered into a Project Management & Financing Agreement with Clay Township ("Township") to assist the Township with the extension and improvement of public utilities and related roadway facilities to service new economic development planned in the Township at the intersection of Interstate 70 and State Route 49 ("SR 49 Project"); and

WHEREAS, the City of Clayton ("City") has requested that the scope of the SR 49 Project be expanded or complemented to include the extension and improvement of public utilities and related roadway facilities to a nearby neighborhood in the City in cooperation with the Township and the TID; and

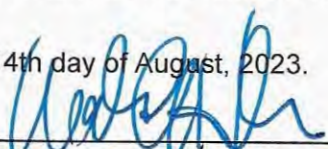
WHEREAS, the Executive Director has determined that expanding or complementing the scope of the SR 49 Project can be beneficial to all parties connected to the project and recommended that the TID enter into a Project Management & Financing Agreement ("PMFA") with the City to memorialize the respective duties and responsibilities of the City and the TID with respect to the SR 49 Project.

NOW, THEREFORE BE IT RESOLVED, by the Board of Trustees ("Board") of the Montgomery County Transportation Improvement District that the attached Project Management & Financing Agreement with the City of Clayton be and is hereby approved.

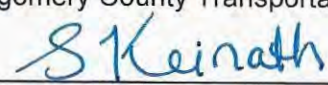
BE IT FURTHER RESOLVED, by the Board that the Executive Director be and is hereby authorized to execute the Agreement, incorporating such changes that may be required in final negotiations with the City, provided that the Executive Director and the General Counsel determine that the changes are not materially detrimental to the TID or the project.

BE IT FURTHER RESOLVED, that copies of this resolution be provided to the Executive Director, the Secretary/Treasurer, the General Counsel, the Finance Director, City of Clayton, and Clay Township.

Adopted the 14th day of August, 2023.



Chairperson, Montgomery County Transportation Improvement District

Attest: 

Secretary/Treasurer

Upon Motion by Ms. Beck
Seconded by Ms. Keinath
Motion carried Unanimously
Excused Absence: Mr. Bills