**DRAFT**

**Dated: 05/23/2016**

**MAIN STREET INCENTIVE DISTRICT**

**INFRASTRUCTURE AGREEMENT**

This Infrastructure Agreement (this “Agreement”), made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_, 2016, by and between the CITY OF BEXLEY, Ohio (the “City”), a municipal corporation organized and existing under the constitution and the laws of the State of Ohio and its Charter with offices located at 2242 East Main Street in the City, and THE COLUMBUS ASSOCIATION FOR THE PERFORMING ARTS, an Ohio nonprofit corporation with offices located at 55 East State Street, Columbus, Ohio 43215 (the “Developer”),

**W I T N E S S E T H :**

WHEREAS, the Developer is (i) the equitable owner of the land described on Exhibit A attached hereto under a 99‑year ground lease, renewable forever, and (ii) the fee owner of the improvements on said land (together, the “Property”); and

WHEREAS, the Property presently is the location of the Drexel Theatre which the Developer intends to improve in a manner such that the historic rehabilitation work will qualify for federal and Ohio historic rehabilitation and preservation tax credits (the “Project”) as described in Exhibit B attached hereto; and

WHEREAS, the development of the Project will necessitate and will be enhanced by the construction of certain public infrastructure improvements (the “Public Infrastructure Improvements”) described in Exhibit C attached hereto; and

WHEREAS, the City agrees that the Public Infrastructure Improvements will directly benefit the Project, and the City desires the Developer to construct and install the Public Infrastructure Improvements; and

WHEREAS, the City Council by its Ordinance No. 91-04 (the “TIF Ordinance”) adopted January 25, 2005 designated an area of the City as an “incentive district” as defined in Ohio Revised Code §5709.40, the boundaries of which “incentive district” are fully described in the TIF Ordinance and which include the Project; and

WHEREAS, in order to enable the Public Infrastructure Improvements to be constructed, the City and the Developer desire to enter into this Agreement; and

WHEREAS, in order to facilitate the administration of this Agreement, the City may act through its Mayor, its Auditor, its Service Director, its Development Director, or any combination of the foregoing (singly or in any combination, the “City Representative”);

NOW, THEREFORE, in consideration of the premises and covenants contained herein, and to induce the acquisition and construction of the Public Infrastructure Improvements, the City and the Developer hereto agree as follows:

Section 1. Construction of Public Infrastructure Improvements.

(a) Compliance with Laws, Regulations and Policies. In the construction of the Public Infrastructure Improvements, the Developer agrees to comply with all applicable statutes, ordinances, regulations and rules of the government of the United States of America, the State, the County of Franklin and the City.

(b) Construction Documents. The Developer covenants and agrees that the construction, improvement and equipping of the Public Infrastructure Improvements will be accomplished in accordance with the terms of construction documents required by the City Representative, including but not limited to working drawings, plans and specifications (the “Construction Documents”) approved by the City Representative, as those Construction Documents may be revised or supplemented from time to time, provided such revisions or supplements are approved by the City Representative.

(c) Awarding of Contracts. The Developer shall select a contractor or contractors acceptable to the City Representative and submit the executed contract or contracts to the City Representative, which contract or contracts shall require the contractor or contractors to construct the Public Infrastructure Improvements in accordance with the Construction Documents reviewed and approved by the City Representative.

(d) Traffic Control Requirements. During the construction of the Public Infrastructure Improvements, the Developer shall be responsible for ensuring the provision, through contractors or otherwise, of all traffic control devises, flaggers and police officers required to maintain traffic properly and safely. All traffic control devises shall be furnished, erected, maintained and removed in accordance with the “Ohio Manual of Traffic Control Devises for Construction and Maintenance Operation.”

(e) Security for Performance. The Developer shall require all contractors performing work to furnish prior to commencement of construction of the Public Infrastructure Improvements either a surety bond or a letter of credit to guarantee completion of the Public Infrastructure Improvements or portion thereof being constructed by that contractor. Each surety bond or letter of credit must be approved by the City Representative. Each surety bond or letter of credit must equal the cost of construction as estimated by the Developer and approved by the City Representative, and each surety bond or letter of credit shall name the Developer and the City as respective obligees.

(f) Equal Opportunity Clause. The Developer will, in all solicitations or advertisements for contractors, material men and employees placed by or on behalf of the Developer, state that the Developer is an equal opportunity employer. The Developer shall require all contractors and subcontractors to include in each contract a summary of this equal opportunity clause.

(g) Insurance Requirements. The Developer shall require all contractors and subcontractors to take out or cause to be taken out and maintained until such time as that contractor or subcontractor has competed its portion of the work, such insurance as is required by the Construction Documents, which insurance shall protect the Developer, the City, and any contractor or subcontractor performing work covered by this Agreement from the types of claims for damages set forth in the Construction Documents. Such insurance policy or policies shall include the Developer and the City as additional named insureds. Such insurance policies shall further provide that any attorney fees accruing or payable with respect to a claim under such policy shall be paid by the insurer and shall not count against the coverage limits of such policy. Such insurance shall remain in full force and effect until the work is completed. Insurance may not be changed or canceled unless all insureds, including the Developer and the City, are notified in writing not less than thirty days prior to such change or cancellation.

(h) City Income Tax Withholdings. The Developer shall withhold and pay, shall require all contractors to withhold and pay, and shall require all contractors to require all subcontractors to withhold and pay, all City income taxes due or payable with respect to wages, salaries, commissions and any other income subject to the City income tax.

(i) Compliance with Occupational Health and Safety Act of 1970. The Developer and all contractors and subcontractors shall be solely responsible for their respective compliance with the Occupational Safety and Health Act of 1970 under this Agreement.

(j) Provision of Security for Mechanic’s Liens. To the extent any material man, contractor, or subcontractor files and records a mechanic’s lien against the Public Infrastructure Improvements, the Developer shall, or shall require the appropriate contractor to, provide any security required by Ohio Revised Code §1311.11 to cause that mechanic’s lien to be released of record with respect to the Public Infrastructure Improvements.

(k) Completion Date. All Public Infrastructure Improvements shall be completed within a period of one year from the date of this Agreement, which is hereby fixed by the City as a reasonable period, but an extension of time may be granted if approved by City Council.

(l) Inspection and Administration Costs. In conjunction with the construction of the Public Infrastructure Improvements, the Developer shall pay to the City an inspection and administration costs deposit in an amount initially not to exceed $3,135.00. The payment shall be used by the City to defray the costs of inspection and administration under this Agreement. Should said deposit be expended, the City will cause all inspections to cease and desist immediately until additional required deposits have been made to the City and certified by the City Representative. Upon completion of the Public Infrastructure Improvements and issuance by a City building official of a letter confirming that the work was performed in a quality manner in accordance with the Construction Documents and applicable building and construction requirements, any unexpended balance remaining from such deposit or deposits shall be refunded within thirty (30) days after receipt of written request from Developer.

(m) Preconstruction Conferences. Preconstruction conferences have been held to discuss anticipated problems, scheduling, inspection requirements, permits, administrative procedures, and related issues; and the Developer has submitted a written job schedule, the name of each contractor, and verification that each contractor is licensed to perform work in the City.

Section 2. Payment for Public Infrastructure Improvements. The Developer and the City agree that reimbursement to the Developer for completed Public Infrastructure Improvements shall be paid solely as provided in this section and only so long as the Developer is in compliance with this Agreement. Upon adoption of the TIF Ordinance, the City agreed to create a municipal public improvement tax increment equivalent fund (the “TIF Fund”) into which shall be deposited service payments received by the City pursuant to Ohio Revised Code §5709.42. The Developer shall be reimbursed for the costs of completed Public Infrastructure Improvements beginning on the first business day of the first February after the Public Infrastructure Improvements are completed and on each first business day of February thereafter until the costs of the Public Infrastructure Improvements, as those costs are limited in Exhibit C, have been paid to the Developer, provided the Developer sends an invoice to the City for such payment no less than ten (10) business days before such date and no earlier than thirty (30) business days before such date. The reimbursement payments shall be paid solely from the TIF Fund. Each annual reimbursement payment shall be the lesser of (i) $8,000.00, and (ii) twenty percent (20%) of the costs of the Public Infrastructure Improvements.

Section 3. Certain Representations, Warranties, Covenants and Agreements of the City. The City represents and warrants as of the date of deliver of this Agreement that:

(a) It is a municipal corporation existing under the Constitution and laws of the State.

(b) It has been authorized by its City Council to execute, deliver, observe and perform this Agreement.

Section 4. Certain Representations, Warranties, Covenants and Agreements of the Developer. The Developer represents and warrants as of the date of delivery of this Agreement that:

1. The Developer (i) is an Ohio nonprofit corporation duly organized, validly existing and in good standing under the laws of the State of Ohio, and (ii) has all requisite power and authority and all necessary licenses and permits to own and operate its properties and to carry on its business as now being conducted and as presently proposed to be conducted.

(b) There are no actions, suits, proceedings, inquiries or investigations pending, or to the knowledge of the Developer threatened, against or affecting the Developer in any court or before any governmental authority or arbitration board or tribunal which involve the reasonable probability of materially and adversely affecting the transaction contemplated by this Agreement or the ability of the Developer to perform its obligations under this Agreement.

(c) The execution and delivery by the Developer of this Agreement and the compliance by the Developer with all of the provisions hereof (i) are within the authority and powers of the Developer, (ii) will not conflict with or result in any breach of any of the provisions of, or constitute a default under, any agreement, articles of organization, operating agreement or other instrument to which the Developer is a party or by which it or its assets may be bound, or any license, judgment, decree, law, statute, order, rule or regulation of any court or governmental agency or body having jurisdiction over the Developer or any of its activities or properties, and (iii) have been duly authorized by all necessary action on the part of the Developer.

(d) No event has occurred and no condition exists with respect to the Developer that would constitute a default under this Agreement or which, with the lapse of time or with the giving of notice or both, would constitute a default under this Agreement.

(e) The Developer covenants and agrees that it will maintain its legal existence until its obligations contained in this Agreement have been satisfied.

(f) The Developer shall indemnify, defend and hold harmless the City, its agents, and employees from and against any and all suits or claims for damages or losses arising or allegedly arising out of, or resulting from performance of the work by the Developer, its contractors, subcontractors, agents, employees or representatives, including the payment of attorneys’ fees and expenses incurred in connection with that defense. The Developer shall require that all contractor agreements and subcontractors’ agreements, include indemnification language as set forth in the preceding sentence. The Developer shall promptly reimburse the City and its successors and assigns for any cost, expense or attorneys’ fees incurred on account of any such suit or claim incurred in enforcing the terms of this Agreement. This indemnification provision is agreed by the Developer to waive the Developer’s immunity, if any, as a complying employer under Section 35, Article II of the Ohio Constitution and Worker’s Compensation laws of the Ohio Revised Code from indemnifying and holding the City harmless from claims by employees, agents or contractors of the Developer.

(g) The Developer warrants that it will cause to be exercised in the performance of the work the standard of care normally exercised by well-qualified engineering and construction organizations engaged in performing comparable services in Central Ohio. The Developer further warrants that each phase of the work shall be free from defects in materials and workmanship (without regard to the standard of care exercised in its performance) for a period of one year after final written acceptance of the phase of the work.

Section 5. Notices. Except as otherwise specifically set forth in this Agreement, all notices, demands, requests, consents or approvals given, required or permitted to be given hereunder shall be in writing and shall be deemed sufficiently given if actually received or if hand-delivered or sent by recognized, overnight delivery service or by certified mail, postage prepaid and return receipt requested, addressed to the other party at the address set forth in this Agreement or any addendum to or counterpart of this Agreement, or to such other address as the recipient shall have previously notified the sender of in writing, and shall be deemed received upon actual receipt, unless sent by certified mail, in which event such notice shall be deemed to have been received when the return receipt is signed or refused. The parties, by notice given hereunder, may designate any further or different addresses to which subsequent notices, certificates, requests or other communications shall be sent. The present addresses of the parties follow:

(a) To the Developer at: The Columbus Association for the Performing Arts

55 East State Street

Columbus, Ohio 43215

Attention: President & CEO

(b) To the City at: City of Bexley

2242 East Main Street

Bexley, Ohio 43209

Attention: Development Director

Section 6. Miscellaneous**.**

(a) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. All claims, counterclaims, disputes and other matters in question between the City, its agents and employees, and the Developer, its employees, contractors, subcontractors and agents arising out of or relating to this Agreement or its breach will be decided in a court of competent jurisdiction within Franklin County, Ohio. The Developer shall require all contractors and subcontractors to include in each contract a consent to the terms of this provision.

(b) Counterparts. This Agreement may be executed in several counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same agreement. It shall not be necessary in proving this Agreement to produce or account for more than one of those counterparts. 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.

(c) Headings. The captions and headings contained in this Agreement are included only for convenience of 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.

(d) Amendments. This Agreement may only be amended by written instrument executed by the parties to this Agreement and, to the extent the Developer’s Project, or any portion thereof, is transferred to third parties, such third parties with respect to any amendments as of and after the date they have acquired fee simple title to all, or a portion of the Project.

(e) Assignment**.** Developer shall not sell, transfer or assign this Agreement, without the prior written consent of the City.

(f) Successors**.** This Agreement shall be binding upon the Developer and its respective beneficiaries, successors and assigns and upon the City and its respective successors and assigns, including successive as well as immediate successors and assigns. Nothing herein expressed or implied is intended or shall be construed to confer upon or give any person other than the parties hereto and their successors or assigns any rights or remedies under or by reason of this Agreement.

(g) Severability**.** If any section or provision of this Agreement or the application of any provision to any person or to any circumstance shall be determined to be invalid or unenforceable, then such determination shall not affect any other provision of this Agreement or the application of such provision to any other person or circumstance, all of which other provisions shall remain in full force and effect, and it is the intention of the parties hereto that if any provision of the Agreement is susceptible of two or more constructions, one of which would render the provision enforceable and the other or others of which would render the provision unenforceable, then the provision shall have the meaning which renders it enforceable.

(h) Relationships. Nothing contained in this Agreement shall be deemed to create an employee, agency, partnership or joint venture relationship by and between or among the parties herein.

(i) Incorporation by Reference. All exhibits described in this Agreement and attached hereto are incorporated by reference and shall become a part of this Agreement.

IN WITNESS WHEREOF, the City and the Developer have caused this Agreement to be executed in their respective names by their duly authorized representatives, as of the date herein above written.

CITY OF BEXLEY, OHIO THE COLUMBUS ASSOCIATION

FOR THE PERFORMING ARTS

By: By:

Benjamin J. Kessler, Mayor William B. Conner, Jr., President & CEO

By:

William Harvey, City Auditor

STATE OF OHIO )

) ss:

COUNTY OF FRANKLIN )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_ 2016, by Benjamin J. Kessler, the Mayor of the CITY OF BEXLEY, OHIO, a municipal corporation and political subdivision of the State of Ohio, who acknowledged the execution of the foregoing instrument as such officer of said City, and that the same is his voluntary act and deed on behalf of said City and the voluntary and corporate act and deed of said City.

Notary Public

STATE OF OHIO )

) ss:

COUNTY OF FRANKLIN )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_ 2016, by William Harvey, the Auditor of the CITY OF BEXLEY, OHIO, a municipal corporation and political subdivision of the State of Ohio, who acknowledged the execution of the foregoing instrument as such officer of said City, and that the same is his voluntary act and deed on behalf of said City and the voluntary and corporate act and deed of said City.

Notary Public

STATE OF OHIO )

) ss:

COUNTY OF FRANKLIN )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_ 2016, by William B. Conner Jr., the President and CEO of The Columbus Association for the Performing Arts, an Ohio nonprofit corporation, who acknowledged the execution of the foregoing instrument as such officer of said corporation, and that the same is his voluntary act and deed on behalf of said corporation and the voluntary and corporate act and deed of said corporation.

Notary Public

**FISCAL OFFICER’S CERTIFICATE**

The undersigned, fiscal officer of the City of Bexley, Ohio (the “City”) under the aforesaid Infrastructure Agreement, hereby certifies that the moneys required to meet the obligations of the City during the year 2016 under the aforesaid Infrastructure Agreement, *i.e*., $0, have been lawfully appropriated by the City for such purposes 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. This certificate is given in compliance with Ohio Revised Code §§5705.41 and 5705.44.

Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2016

William Harvey, City Auditor

**EXHIBIT A**

PROPERTY

See attached legal description and Boundary Survey

Dated March 31, 2011

Prepared by Myers Surveying Co., Inc.

Tax Parcel No. 020-004847

**EXHIBIT B**

PROJECT

Description

The Project consists of restoring the Drexel Theatre both to full modern functionality and to its historic original 1937 appearance. The building will be re‑roofed, the HVAC will be replaced and updated, and a 70’ x 14’ addition will be constructed to house the new restrooms. The iconic marquee and the Theatre’s exterior façade will be rebuilt, re‑lamped, and restored to their original appearance. So, too, the outer lobby and the inner lobby will be historically rehabilitated by exposing the original decorative ceilings, replacing the deteriorated flooring, and constructing a built‑in Art Deco concession stand. In addition, the three theaters are to receive new seating and wall coverings as well as preserved decorative features. The projection booth will be re-built and updated, as will the space that previously housed the men’s restroom.

Capital Investment

Contract Work for Roof and HVAC $ 190,000

Contract Work for Restrooms Addition 465,000

Contract Work for Public Infrastructure 46,181

Contract Work for Lobbies,

Theatres, Projection Booth, and Support Spaces 819,819

Contract Work for Marquee 80,000

Contingency for Marquee, Lobbies, *etc*. 142,000

Architect Fees 50,000

Engineering Fees 25,000

Developer Fee 182,000

Total $2,000,000

**EXHIBIT C**

PUBLIC INFRASTRUCTURE IMPROVEMENTS

The Public Infrastructure Improvements that will benefit the Property consist of the demolition of certain existing public utilities or communication facilities (including, but not limited to, water mains, gas mains, sanitary sewers, storm sewers, electric service lines, telephone lines, cable communication lines, and the housing of such public utilities or communication facilities) presently located both on and off the Property, and not in any public right-of-way or to be dedicated to the City, and the relocation or replacement of such public utilities or communication facilities.

The City‑approved estimate of the construction cost for the Public Infrastructure Improvements to be completed by the Developer pursuant to this Agreement is $46,181.00.

However, the portion of the cost of the Public Infrastructure Improvements to be reimbursed to the Developer under this Agreement shall not exceed $40,000.00.