

## **PROFESSIONAL SERVICES AGREEMENT**

THIS PROFESSIONAL SERVICES AGREEMENT, is entered into as of the \_\_\_ day of \_\_\_\_\_, 2023, by and between CHRISTOPHER B. BURKE ENGINEERING, LLC, an Indiana limited liability company (“Burke”), and the CITY OF LEBANON, INDIANA, a municipal corporation existing under the laws of the State of Indiana (“City”).

### **RECITALS**

WHEREAS, City requires Professional Services, as defined herein, in connection with private development plan review within the City; and

WHEREAS, City desires to engage Burke to provide the Professional Services; and

WHEREAS, Burke represents that it has sufficient qualified personnel and equipment and is capable of performing the Professional Services.

NOW, THEREFORE, in consideration of the promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

### **AGREEMENT**

1. **Professional Services.** Burke is hereby engaged by City to perform, from time to time at City’s request, all necessary and required professional plan review consulting services related to proposed developments within the City. When requested by City, Burke shall review the development plans for compliance with existing local ordinances and related standards and address issues brought forth with the review of the development plans. The proposed services under this Agreement shall include, but not be limited to, collecting and evaluating submitted development plans, collecting additional local agency information, evaluating technical merit of the proposed development plan in compliance with City’s ordinances and standards, coordinating the review and response documents for the proposed development, and attending necessary office, field and public meetings and completing similar support and administrative functions, including but not limited to developing administrative documents, checklists and ordinance amendments (the “Professional Services”).

2. **Burke’s Covenants and Representations.** Burke acknowledges and agrees that City is entering into this Agreement in reliance on Burke’s competence and qualifications for the type of services to be performed. Burke accepts the relationship of trust and confidence established between it and City by this Agreement. Burke shall use its professional care to perform the Professional Services and to further the interests of City in accordance with this Agreement and City’s requirements, criteria, budget, time frame and procedures.

Burke further covenants and represents as follows:

(a) **Licensing.** Burke is duly licensed in the State of Indiana as a professional engineer under I.C. 25-31, and there are no obligations, commitments, restrictions or impediments of any kind applicable to Burke that will limit or prevent performance of the Professional Services.

(b) **Compliance with Laws.** In the performance of the Professional Services, Burke shall observe and comply with all applicable federal, state, municipal and local laws, ordinances, rules, regulations, codes and orders applicable to the Professional Services to be rendered by Burke in connection therewith.

(c) **Standards.** Burke shall perform the Professional Services on behalf of itself and City in a manner consistent with the professional and ethical standards of care, diligence, and skill exercised by professionals providing similar services, and in full compliance with all applicable governmental and professional laws, permits and regulations, and shall avoid any activity that could give even the appearance of impropriety. Notwithstanding the foregoing, if such professional standard, as applied to Burke's performance of the Professional Services, permits a lower or less stringent standard of care, prudence and skill than that applicable to the reasonably prudent person, such professional standard shall be raised to that required of the reasonably prudent person. In addition to, but not in limitation of, the foregoing, Burke's Professional Services shall be free from negligence.

(d) **Administration.** Burke shall furnish efficient business administration and superintendence and perform the Professional Services with reasonable diligence and expediency consistent with sound professional practices.

(e) **Errors and Omissions.** Burke shall, at its own cost, correct and make good any errors or omissions in its Professional Services as soon as Burke becomes or is made aware of any such errors or omissions. Should Burke refuse or neglect to correct or make good any such errors or omissions within a reasonable time after receiving notice thereof, then City shall be entitled to have such errors or omissions corrected at the expense of Burke. This obligation of Burke is in addition to, and not in substitution for, any other liability of Burke for errors and omissions in the Professional Services and any other remedy of City therefor hereunder and at law or in equity.

The foregoing covenants and representations are in addition to, and not in lieu of, any and all other duties, obligations and liabilities implied or imposed upon Burke by law in connection with the Professional Services to be performed hereunder. All such covenants, representations and warranties shall survive completion of the Professional Services and the cancellation, termination or expiration of this Agreement.

3. **Term and Termination.** This Agreement will commence as of the date first provided above and will thereafter continue in effect until terminated. City may, at any time, terminate this Agreement for its convenience. Upon receipt of written notice of termination, Burke shall cease operations as directed by City in the notice. Provided Burke is not in default under this Agreement, if this Agreement is terminated, Burke shall receive, as full compensation, its actual, necessary, and reasonable costs for all Professional Services performed on City's behalf up to the date of such notification of termination.

Burke may terminate this agreement upon thirty (30) days written notice to City in the event of substantial failure by the City to perform in accordance with the terms hereof through no fault of Burke.

4. **Compensation.** City shall compensate Burke for the Professional Services at the rate of One Hundred Ten Dollars (\$130) per hour. It is understood by the parties that this rate only applies for the Professional Services provided for in this Agreement. Should Burke be requested to complete services which it considers outside the scope of the Professional Services herein, Burke shall notify City that such services are not included within this Agreement and request City's written approval to move forward with such services.

5. **Payment.** Burke shall submit invoices once each month for work performed during the preceding month. City agrees to pay each invoice within ninety (90) days of its receipt.

6. **Disputed Invoices.** If any items in any invoices submitted by Burke are disputed by City for any reason, including the lack of supporting documentation or suspected defective or negligently performed Professional Services, City may temporarily delete the disputed item and pay the remaining amount of the invoice. City shall promptly notify Burke of the dispute and request clarification or remedial action. If any dispute is settled in Burke's favor, Burke shall include the settled amount on a subsequent regularly scheduled invoice or on a special invoice for the disputed item only. City shall not be deemed to be in breach of this Agreement by reason of withholding any payment pursuant to any provision of this Agreement or applicable law. In no event shall any interest be due and payable by City to Burke on any sums payable by City under this Agreement including without limitation sums which City is authorized to withhold or retain pursuant to this Agreement or otherwise.

7. **Insurance.** Burke shall provide at its own expense and maintain during the term of this Agreement insurance, from recognized and responsible insurers satisfactory to City, covering Burke's Professional Services and activities under and in connection with this Agreement. Such insurance shall provide coverage of not less than the following:

a. **Professional Liability.** Professional liability insurance covering claims, including, without limitation, bodily injury and property damage, arising out of errors and omissions by Burke in rendering the Professional Services, in the amount of \$1,000,000 each occurrence and \$1,000,000 aggregate, with a deductible amount of not more than \$20,000, with all coverage retroactive to the earlier of the date of this Agreement or commencement of the Professional Services with respect to this Agreement, which coverage shall be maintained for a period of at least three (3) years after the date of final payment to Burke for the Professional Services.

b. **General Liability.** A comprehensive general liability policy providing bodily injury coverage, including death, for not less than \$1,000,000 coverage as to each occurrence and \$2,000,000 aggregate and \$1,000,000 property damage, with contractual liability recognizing the indemnities contained in this Agreement and completed operations for at least two (2) years.

c. **Worker's Compensation.** Worker's Compensation and Occupational Disease insurance and such other employee benefit insurance as required by the laws of the State of Indiana.

d. **Employer's Liability.** Employer's liability insurance with limits of not less than \$100,000 per accident, \$100,000 per disease and a \$500,000 policy limit on disease.

Notwithstanding any other provision of this Agreement to the contrary, should any policy required by this Agreement be cancelled or otherwise terminated before completion of the Professional Services hereunder, Burke shall exert all reasonable efforts to procure and maintain in force similar insurance from insurers satisfactory to City and provide certificates of such insurance to City upon City's written request. If Burke is unable to obtain and maintain the required insurance coverage, then City shall have the right to cancel this Agreement as provided for herein.

Before commencing any Professional Services under this Agreement, Burke shall deliver to City a certificate evidencing all of the required insurance coverage, and providing that no such coverage shall be cancelled without at least thirty (30) days' prior written notice to City. Upon request, Burke shall cause City and any other interested parties designated by City to be named as an additional insured party under the aforesaid liability insurance policies.

8. **Indemnification.** To the fullest extent permitted by applicable law, Burke and its agents, partners, employees and subcontractors (collectively "Indemnitors") shall defend, indemnify and hold harmless City, City's representatives, agents, employees and contractors (collectively "Indemnitees") from and against all claims, liability, damages, losses, liens, causes of action, suits, judgments and expenses (including, without limitation, reasonable attorney fees) of any nature, kind or description (collectively "Liabilities") arising out of, caused by, or resulting from the negligent performance of the Professional Services by the Indemnitors. The obligations contained in this Section shall survive termination of this Agreement. In the event more than one of the Indemnitors are connected with an accident or occurrence covered by this indemnification, then each of such Indemnitors shall be jointly and severally liable and responsible to the Indemnitees for indemnification and the ultimate responsibility among such Indemnitors for the loss and expense of any such indemnification shall be settled by separate proceedings and without jeopardy to any Indemnitee. The provisions of this Section shall not be construed to eliminate or reduce any other indemnification or right which City or any of the Indemnitees has by law against Burke or any of the Indemnitors.

In the event that Indemnitees seek a defense from Indemnitors under this provision, it is a condition precedent to Indemnitors' obligation to defend and indemnify Indemnitees that Indemnitees agree to a joint defense with Indemnitors by an attorney of Indemnitors' selection. Indemnitees shall execute any and all documents necessary for such a joint defense and will fully cooperate with Indemnitors in such a joint defense.

9. **Confidential and Proprietary Information; Ownership of Documents.**

a. **Confidential and Proprietary Information.** City may have a proprietary or confidential interest in technical information which it discloses to Burke in connection with the Professional Services. Burke shall not, without City's prior written consent, during the term of this Agreement or thereafter, disclose to any third party or persons outside its organization or use, other than as provided herein, any such information provided by City which is identified in writing by City as confidential at the time of disclosure by City to Burke. Upon completion of the Professional Services or termination of this Agreement, all

confidential information (including but not limited to written or electronic materials) furnished by City shall be returned to City intact. Each party shall handle information provided by the other party in accordance with good business ethics. The obligations of Burke concerning confidentiality, as provided under this paragraph, shall survive completion of the Professional Services and any cancellation, termination or expiration of this Agreement.

b. **Ownership of Documents.** All documents resulting from the Professional Services shall be and become the sole property of City, and City is vested with all rights of ownership therein, including, without limitation, all copyrights (both statutory and common law), all of which are hereby assigned by Burke to City in consideration of the compensation paid by City to Burke hereunder. All of City's rights hereunder shall survive completion of the Professional Services and any cancellation, termination or expiration of this Agreement.

10. **Non-Discrimination.** Pursuant to Indiana and federal law, Burke and Burke's subcontractors, if any, shall not discriminate against any employee or applicant for employment, to be employed in the performance of the Professional Services under this Agreement, with respect to hire, tenure, terms, conditions or privileges of employment or any matter directly or indirectly related to employment because of race, color, religion, sex, disability, national origin or ancestry. Breach of this covenant may be regarded as a material breach of the Agreement.

11. **No Investment in Iran.** As required by IC 5-22-16.5, Burke certifies that it is not engaged in investment activities in Iran. Providing false certification may result in the consequences listed in IC 5-22-16.5-14, including termination of this Agreement and denial of future contracts, as well as an imposition of a civil penalty.

12. **Employment Eligibility Verification.** Burke affirms under penalties for perjury that it has enrolled in and is verifying the work eligibility status of all newly hired employees through the E-Verify program, as provided for under IC 22-5-1.7, for the duration of this and any future contracts for services with City, unless and until the E-Verify program no longer exists. Burke further affirms under penalties for perjury that it does not knowingly employ or retain in its employ any unauthorized aliens, which includes any persons whose immigration status makes them ineligible to work for Burke. Burke shall require all of its subcontractors, before performing services on behalf of Burke for the City, to provide certification to Burke that, at the time of certification: (a) subcontractor does not knowingly employ or contract with any unauthorized aliens, meaning any persons whose immigration status makes them ineligible to work for subcontractor; and (b) subcontractor has enrolled in and is participating in the E-Verify program. Burke certifies that it will keep on file these subcontractor certifications referenced for the duration of any contract with subcontractor to provide services under this or any future contract with City.

13. **Miscellaneous.**

a. **Entire Agreement.** This Agreement sets forth the entire understanding between the parties with respect to the subject matter hereof and supersedes all prior proposals, oral or written, all previous negotiations and all other communications and understandings with respect to the subject matter hereof. This Agreement shall not be amended or modified in any manner except by an instrument signed by the authorized representatives of both parties.

b. **Assignment and Subcontracting**. Burke may not assign or subcontract any portion of this Agreement or the Professional Services to be provided under this Agreement without the prior written approval of City. Nothing contained in this Agreement shall create any contractual relationship between City and any subcontractor of Burke, but Burke shall be fully responsible to City for all acts and omissions of its subcontractors, their agents and employees, as Burke is for the acts and omissions of all persons directly employed by Burke.

c. **Dispute Resolution**. All claims, disputes, and other matters in question between the parties arising out of, or relating to, this Agreement or the breach thereof or the Professional Services rendered by Burke (“Dispute”), shall be resolved as follows by first conducting and negotiating each Dispute in good faith amongst Burke and City during the thirty (30) days after a notice of Dispute is provided to the other party. If negotiations are unsuccessful in resolving the Dispute, then the Dispute shall be submitted to good faith non-binding mediation before a single mediator selected jointly by the parties to the Dispute. The mediation shall be initiated by the aggrieved party making a written demand for non-binding mediation. This written demand shall specify in detail the facts of the Dispute and the relief requested and shall be submitted, within a reasonable time after the basis for the Dispute has arisen, to the party against whom the claim is brought. If the parties cannot agree to the selection of a mediator within thirty (30) days of the date of submission of the demand, the mediator shall be selected by such mediation service as the parties shall otherwise agree to retain, for good faith non-binding mediation. The mediator’s fee shall be shared equally by the parties to the Dispute. Any Dispute between the parties that is not fully resolved by such mediation shall be decided by litigation in a court of competent jurisdiction in the State of Indiana, as provided herein.

d. **Governing Law**. This Agreement will be construed in accordance with the laws of the State of Indiana, without regard to its principles of conflict of laws. All claims, disputes and other matters in controversy arising out of or related to this Agreement, or the performance or breach thereof, shall be decided in the Circuit or Superior Courts of Boone County, Indiana, and that such courts shall have sole and exclusive jurisdiction over the action or proceeding, unless agreed to otherwise, in writing, by the parties. In the event of a successful effort initiated by City against Burke for breach or default of this Agreement, Burke shall be liable to City for any and all costs of collection, including but not limited to, reasonable attorneys’ and professional fees, court costs, costs of investigation and defense, accrued interest, and any other reasonable expenses incurred by the enforcement of such action.

e. **Notices**. All notices required to be given under this Agreement shall be in writing, and shall be mailed by certified mail, return receipt requested, or deposited with a nationally recognized overnight delivery service, properly addressed to the party to be notified, at the address set forth below:

If to City:                      City of Lebanon, Indiana  
                                                 401 South Meridian Street  
                                                 Lebanon, IN 46052  
                                                 Attention: Kevin Krulik, City Engineer

With a copy to: Mayor and Legal Counsel  
City of Lebanon, Indiana  
401 South Meridian Street  
Lebanon, IN 46052

If to Burke: Christopher B. Burke Engineering, LLC  
115 West Washington Street, Suite 1368 South  
Indianapolis, IN 46204  
Attention: Jon D. Stolz, PE, Managing Vice President

f. **Headings.** Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

g. **Waiver.** No delay or failure by City to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

h. **Severability.** If any provision of this Agreement is held invalid, illegal or unenforceable by any court of final jurisdiction, it is the intent of the parties that all other provisions of this Agreement be construed to remain fully valid, enforceable and binding on all parties. Upon such determination that any term or other provision is invalid, illegal or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated hereby be consummated as originally contemplated to the greatest extent possible.

i. **Force Majeure.** Notwithstanding anything to the contrary set forth herein, no party shall be liable for any failure to perform its obligations to the extent a delay in performing such obligations is due to acts of nature (including fire, flood, earthquake, storm, or other natural disaster, but not including weather conditions which could be reasonably anticipated), war, invasion, act of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation, terrorist activities, nationalization, government sanction, nationwide declared emergency concerning a pandemic, blockage, embargo, labor dispute, strike, lockout or interruption or failure of power sources; provided, however, no obligation shall be delayed under this Section unless notice of the event giving rise to the delay is provided to the other party within ten (10) days of the event first occurring. In such circumstances, the other party's failure to perform its obligations shall be excused for the period of days that such performance is delayed or prevented due to the Force Majeure event, and the deadlines for such observation, performance and satisfaction of its obligations under this Agreement, as applicable, shall be extended for the same period.

j. **Independent Contractor.** Burke shall be an independent contractor in performing the Professional Services and shall not be an agent, employee or representative of City for any purpose.

k. **Counterparts.** This Agreement may be executed in counterparts, each of which is deemed an original, but all of which together are deemed to be one and the same agreement. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission is deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

l. **Authorization.** Each undersigned person signing on behalf of a party in a representative capacity certifies that: (i) he/she is fully empowered and duly authorized by any and all necessary action or consent required to execute and deliver this Agreement for and on behalf of said party; (ii) said party has full capacity, power and authority to enter into and carry out its obligations under this Agreement; and (iii) this Agreement has been duly authorized, executed and delivered and constitutes a legal, valid and binding obligation of such party, enforceable in accordance with its terms.

m. **Construction and Interpretation.** The terms “hereof”, “herein” and “hereunder”, and words of similar import, are to be construed to refer to this Agreement as a whole, and not to any particular section, paragraph or provision, unless expressly so stated. All words or terms used in this Agreement, regardless of the number or gender in which they are used, are deemed to include any other number and any other gender as the context may require. This Agreement is to be construed without regard to any presumption or rule requiring construction against the party causing such document to be drafted or prepared. The terms “person” and “persons” used herein shall include natural persons and corporations, partnerships (general and limited), limited liability companies, firms, associations, trusts, estates, bodies politic, political subdivisions and other entities and organizations.

n. **No Third Party Beneficiary.** All of the provisions of this Agreement are solely for the benefit of the parties hereto, and none of the other provisions of this Agreement shall inure to the benefit of any person not a party to the Agreement, and third parties shall have no rights hereunder.

*[Signature Page to Follow]*



IN WITNESS WHEREOF, the parties hereto have executed this Professional Services Agreement as of the day and year first written above.

**BURKE:**

**CHRISTOPHER B. BURKE ENGINEERING, LLC,**  
an Indiana limited liability company

By:  \_\_\_\_\_  
Jon D. Stolz, PE, Managing Vice President

**CITY:**

**CITY OF LEBANON, INDIANA,**  
a municipal corporation existing under the laws of the  
State of Indiana

By: \_\_\_\_\_

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

Title: \_\_\_\_\_