MEMORANDUM OF AGREEMENT

THIS MEMORANDUM OF AGREEMENT, (hereinafter the "Agreement"), made and entered into on the 23rd day of August, 2024, by and between **COMMERCE LEXINGTON, INC.** (hereinafter "Organization"), a Kentucky non-profit corporation, whose mailing address is PO Box 1968, Lexington, Kentucky 40588-1968 and the **LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT** (hereinafter "LFUCG"), an urban county government of the Commonwealth of Kentucky pursuant to Chapter 67A of the Kentucky Revised Statutes, 200 East Main Street, Lexington, Kentucky 40507 (collectively, the "Parties").

W I T N E S S E T H

WHEREAS, Organization currently manages the industrial park, including the road known as Innovation Drive (CS 1185) which connects to Georgetown Road (US 25) in Lexington, Kentucky, and Organization will facilitate the transfer of ownership of the road to LFUCG, and LFUCG intends to accept the road before beginning construction of the project as set forth herein; and

WHEREAS, LFUCG is willing to undertake the road project (hereinafter the "Project") to complete improvements of Innovation Drive and create a right turn lane on Georgetown Road at Innovation Drive, consistent with applicable local and state standards; and

WHEREAS, in order to facilitate LFUCG's completion of the Project, LFUCG requested funding assistance from the Commonwealth of Kentucky Transportation Cabinet Department of Highways (hereinafter the "Cabinet") for costs incurred for this Project; and

WHEREAS, the Cabinet has agreed to reimburse LFUCG up to Four Hundred Twenty-Six Thousand, Six Hundred Forty-Eight Dollars ($426,648.00) in state reimbursable funding (FD04) for eligible expenses for the completion of said Project; and

WHEREAS, LFUCG has agreed to receive up to the sum of Four Hundred Twenty-Six Thousand, Six Hundred Forty-Eight Dollars ($426,648.00) from the Cabinet pursuant to the Agreement Between Commonwealth of Kentucky Transportation Cabinet Department of Highways and Lexington-Fayette Urban County Government (hereinafter, "KYTC Agreement"), which is attached hereto as Exhibit A and incorporated herein by reference; and

WHEREAS, the KYTC Agreement obligates LFUCG to an immediate expenditure of Two Hundred Thousand Dollars ($200,000.00) of local funds for the Project, before it may access the reimbursable funding provided by the Cabinet for the eligible expenses for the project under the terms of the KYTC Agreement; and

WHEREAS, Organization has agreed to contribute Two Hundred Thousand Dollars ($200,000.00) to LFUCG in fulfilment of the obligation for an expenditure of Two Hundred Thousand Dollars ($200,000.00) in local funds for the Project, under the KYTC Agreement; and

WHEREAS, Organization has further agreed to reimburse LFUCG for any and all amounts necessary for completion of the Project that exceed the funding disbursed from the Cabinet to LFUCG for this Project for eligible expenses; and

WHEREAS, the Parties desire to enter into this Memorandum of Agreement to memorialize the undertakings and responsibilities of the Parties, respectively, and the terms and conditions of their agreement in respect to the Project.

NOW, THEREFORE, in consideration of the foregoing and mutually agreed upon promises, conditions and covenants hereinafter set forth, the Parties hereto agree as follows:

1. **INCORPORATION OF RECITALS.** The recitals, above, are hereby incorporated by reference as if fully set forth.

2. **EFFECTIVE DATE; TERM.** This Agreement shall commence on the date of the signature by the Mayor of the Lexington-Fayette Urban County Government (hereinafter the "Effective Date") and shall last for a period of 3 years unless terminated by LFUCG at an earlier time. Time is of the essence in the performance of this Agreement.

3. **RELATED DOCUMENTS.** This Agreement shall consist of the terms set forth herein as well as the following additional documents, which are attached hereto as exhibits and incorporated herein by reference as if fully stated:

   a. Exhibit "A" – Agreement Between Commonwealth of Kentucky Transportation Cabinet Department of Highways and Lexington-Fayette Urban County Government

To the extent that there is any conflict between or among any of these documents, the terms and provisions of this Agreement shall prevail, followed by the terms and provisions of Exhibit "A."

4. **COST ESTIMATES AND COST ALLOCATION.** The estimated cost of this Project is an amount not to exceed **SIX HUNDRED TWENTY-SIX THOUSAND, SIX HUNDRED FORTY-EIGHT DOLLARS ($626,648.00)**. Organization agrees to initially contribute **TWO HUNDRED THOUSAND DOLLARS ($200,000.00)** in private funds to LFUCG for the Project, in fulfillment of the local match required by the KYTC Agreement. Following the expenditure of **TWO HUNDRED THOUSAND DOLLARS ($200,000.00)** in local funds, the Cabinet has agreed to reimburse LFUCG an additional sum in eligible Project expenditures in an amount up to **FOUR HUNDRED TWENTY-SIX THOUSAND, SIX HUNDRED FORTY-EIGHT DOLLARS ($426,648.00)**. Organization understands and agrees that if the actual cost of the Project exceeds amounts received by LFUCG from the Cabinet as reimbursement for Project costs under the KYTC Agreement, or in the event that certain expenses incurred by LFUCG are deemed to be ineligible for reimbursement from the Cabinet, the Organization is required to fully reimburse LFUCG for any gaps in funding, including any additional Project costs above and beyond the state reimbursable funding provided by the Cabinet. For this reason, Organization further agrees that, following the opening of bids for the project, and prior to any contract award by LFUCG, Organization shall remit to LFUCG any additional amount of funds needed above and beyond the sum of **SIX HUNDRED TWENTY-SIX THOUSAND, SIX HUNDRED FORTY-EIGHT DOLLARS ($626,648.00)** described herein, to cover the total amount of the contract award, plus Organization shall remit an additional sum as contingency in the amount of 10% of the total

contract award, with the understanding that any non-utilized sums remitted to LFUCG to cover the contract award would be returned to Organization following final construction.

It is the expressed intention of the parties hereto that the costs of the Project be funded through state reimbursable funding authorized and provided by the Cabinet, with the required expenditure of **TWO HUNDRED THOUSAND DOLLARS ($200,000)** in local match being contributed by Organization and with Organization further agreeing to contribute any additional amounts necessary for eligible project expenses that exceed the state reimbursable funding authorized by the KYTC Agreement. In no event shall LFUCG be required to incur any liability for any costs associated with the Project, and in no event shall LFUCG be required to contribute to the cost of the Project to cover any deficiencies in funding.

5. **MATCHING FUNDS.** Organization understands and agrees that it shall contribute **TWO HUNDRED THOUSAND DOLLARS ($200,000.00)** of private funding toward the completion of this Project, which amount is specified in Exhibit A as local funds. Organization shall submit a lump sum payment to LFUCG to equal a total expenditure of Two Hundred Thousand Dollars ($200,000.00) of private funds.

6. **REPRESENTATIONS OF ORGANIZATION.** Organization represents that it has been duly organized under the laws of the Commonwealth of Kentucky and validly exists in good standing under the laws of the Commonwealth of Kentucky. Organization further represents that it has all requisite corporate power and authority to enter into and fully perform this Agreement. Organization's execution and delivery of this Memorandum of Agreement and performance of all duties and obligations contained herein have been duly authorized by all necessary corporate action on behalf of Organization and this Memorandum of Agreement is enforceable against Organization in accordance with its terms.

7. **CONSTRUCTION OF THE PROJECT; CONSTRUCTION APPROVALS; CHANGES IN THE WORK; CHANGE ORDERS; PAYMENT REQUESTS.** Any and all work performed pursuant to this Agreement shall be approved by LFUCG's Department of Environmental Quality and Public Works. LFUCG shall bid, contract for, and cause to be prosecuted to completion, the construction of the Project. LFUCG's construction contractors and subcontractors shall furnish all construction labor, equipment, and will use contractor supplied materials to construct the Project in accordance with construction plans reviewed and approved by LFUCG. Provided, however, that prior to the acceptance of any bid for work on the Project, LFUCG hereby agrees to provide the bid to Organization for its consideration; in the event that the amount of the bid is deemed unacceptable to proceed with the work by either Organization or LFUCG, such disapproval shall be stated in writing directed to the other party. Upon receipt of such disapproval, LFUCG shall be under no obligation to proceed with the Project. In that event, LFUCG shall return all sums provided by Organization, less any amount incurred and expended for appropriate pre-bid purposes.

LFUCG hereby agrees to submit any changes or modifications to Organization for consideration and approval before the commencement of any work pursuant to those changes, modifications, or change orders. LFUCG shall also notify Organization in writing, and obtain the approval of Organization, prior to any change orders to the construction plans or other construction that will affect the costs of the Project. LFUCG further agrees to share requests for payment for Project expenses incurred to Organization, prior to such payments being made; provided, however, that LFUCG retains sole discretion to deem requests for payment to be appropriate for payment under contract(s) awarded by it, and nothing herein

relieves Organization of its responsibility to reimburse LFUCG for project costs incurred by LFUCG, notwithstanding any determination by the Cabinet on the question of eligibility for reimbursement that may be to the contrary.

LFUCG reserves the right in its sole discretion to demand that its construction contractors or subcontractors immediately cease any portion of, or all further work undertaken within the scope of work of the Project. Any authorized services performed, or materials used or installed to the satisfaction of LFUCG before the demand to cease any and all further work shall be paid in accordance with the terms of this Agreement, with such sums to be reimbursed by Organization or by the Cabinet, as appropriate. LFUCG shall thereafter undertake only minimal, reasonable, and necessary additional work and acquire, expend, use, or install only minimal, reasonable, and necessary additional materials to re-establish the original use and function of the road.

8. COMMENCEMENT DATE; DELAY. This Agreement will commence on the Effective Date. Time is of the essence in the performance of this Agreement. If delays result solely by reason of the acts of Organization, Organization shall be solely liable for any increased costs or penalties associated with such delays.

9. RESTRICTED FUNDS HELD IN RESERVE BY ORGANIZATION; INSURANCE. Organization represents that it maintains adequate funds in a restricted bank account to pay both the local match in the amount of **TWO HUNDRED THOUSAND DOLLARS ($200,000)**, an additional amount above and beyond the sum of **SIX HUNDRED TWENTY-SIX THOUSAND, SIX HUNDRED FORTY-EIGHT DOLLARS ($626,648.00)** to cover the total amount of the contract award, and an additional reserve necessary to satisfy a cost contingency of 10% of the total contract award, which amounts shall be remitted to LFUCG prior to contract award by LFUCG. Organization further agrees to maintain such additional funds in reserve as may become necessary to complete the project in the event of the exhaustion of all funds remitted by Organization to LFUCG as set forth herein. In order to give effect to the intent of the parties regarding retention of reserve funding, Organization shall specify the amount of reserve funding being retained in a restricted bank account for additional project cost contingencies to LFUCG at the time of contract award, which shall be in an amount deemed acceptable to LFUCG. Such reserve funding shall be retained in the restricted account by Organization until project completion. Organization further agrees to maintain, at all times, insurance coverage in an amount deemed acceptable to LFUCG, and Organization shall provide proof of insurance coverage upon request. Organization shall provide at least thirty (30) days advance written notice via certified mail, return receipt requested, in the event that any required insurance coverages are canceled or not renewed.

10. TERMINATION. Organization may only terminate this Agreement due to LFUCG's material breach of the terms hereof which causes Organization to be unable to perform its duties or responsibilities under this Agreement, and only upon thirty (30) days written advance notice to LFUCG by registered or certified mail. LFUCG shall have the right to terminate and cancel this Agreement at any time upon thirty (30) days written notice served on Organization by registered or certified mail.

11. DEFAULT. No party shall be in default under this Agreement unless and until the non-defaulting party shall have given the defaulting party written notice of such default and the defaulting party shall have failed to cure the default within thirty (30) days after written receipt

of such notice. Upon the failure by the defaulting party to timely cure any default after notice thereof from the non-defaulting party, the non-defaulting party shall have the right to terminate the Agreement and pursue an appropriate remedy.

12. INDEMNIFICATION AND HOLD HARMLESS. Organization shall indemnify, save, hold harmless, and defend LFUCG and its elected and appointed officials, employees, agents, volunteers, and successors in interest from and against any and all liability, damages, and losses, including but not limited to, demands, claims, causes of action, judgments, penalties, fines, liens, costs, expenses, interest, defense costs, and reasonable attorney's fees that are in any way incidental to or connected with, or that arise or are alleged to have arisen, directly or indirectly, out of any negligent act or omission or willful misconduct on the part of Organization, its agents, or employees in the performance of or with relation to any obligations undertaken by LFUCG, its agents, or its employees, under this Agreement.

13. BINDING EFFECT. This Agreement shall be binding upon, and shall inure to the benefit of, the executors, heirs, successors, and assigns of the parties hereto, and no party shall assign, sublet, or transfer its interests in this Agreement without the written consent of the other parties.

14. NON-WAIVER. The failure or delay on the part of Organization, or LFUCG to exercise any right, power or privilege hereunder shall not operate as a waiver thereof.

15. ENTIRE AGREEMENT. This Agreement constitutes the entire agreement and understanding between the Parties with respect to the subject matter contained herein and supersedes all prior offers, negotiations, and other agreements concerning the subject matter contained herein. No part of this Agreement may be altered, modified, or changed in any way except in writing signed by the parties hereto or signed by the duly authorized representatives of said Parties. Unless specifically waived herein, all LFUCG ordinances, manuals, rules, regulations, or similar requirement of LFUCG applicable to the subject matter of this Agreement shall control.

16. AMENDMENTS. This Agreement may only by amended by a written agreement of all the parties hereto. No revision of this Agreement shall be valid unless made in writing and signed by an officer of Organization, and an authorized signatory on behalf of LFUCG.

17. GOVERNING LAW; CHOICE OF FORUM. The laws of the Commonwealth of Kentucky shall govern this Agreement. This Agreement shall be interpreted, applied and enforced according to the fair meaning of its terms and not be construed strictly in favor of or against either party, regardless of which party may have drafted any of its provisions. Any action brought against LFUCG or Organization on this Agreement, including but not limited to actions either for breach of the agreement or for enforcement of the agreement, shall be brought in a court of appropriate jurisdiction in Fayette County, Kentucky.

18. ASSIGNMENT/ASSUMPTION. Organization may not assign any of its rights and duties under this Agreement without the prior written consent of LFUCG.

19. SEVERABILITY. In the event that any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect,

such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement.

20. NO THIRD-PARTY RIGHTS. Nothing in this Agreement, expressed or implied, is intended or shall be construed to confer upon or give to any person other than the parties hereto any right, remedy, or claim under or by reason of such agreement or covenant, condition, or stipulation herein contained. Nothing expressed or mentioned in or to be implied from this Agreement is intended or shall be construed to give to any person other than the parties hereto any legal or equitable right, remedy, or claim under or in respect to this Agreement.

21. NOTICE. Any written notice required by the Agreement shall be delivered by certified mail, return receipt requested, to the following:

For Organization:

Commerce Lexington, Inc.
330 E. Main Street
Lexington, Kentucky 40507
Attn: Robert Quick

For LFUCG:

Lexington-Fayette Urban County Government
Environmental Quality and Public Works Commissioner's Office
9th Floor
200 East Main Street
Lexington, Kentucky 40507
Attn: Nancy Albright

Organization or LFUCG may from time to time designate any other address for this purpose by written notice to the other Party.

22. This Agreement may be executed in duplicate counterparts, each of which shall be deemed an original. In the event that any signature is delivered by facsimile or by email of a ".pdf" format data file, such signature shall create a valid and binding obligation of such party with the same force and effect as if such facsimile or ".pdf" signature page were an original thereof.

23. The execution, delivery and performance of this Agreement and any documents relating hereto have been duly authorized by all necessary parties, and this Agreement is enforceable in accordance with its terms. Organization and LFUCG have full power and authority to enter into this Agreement, to execute and deliver all instruments and documents referred to herein and to consummate the transactions contemplated hereby.

[INTENTIONALLY LEFT BLANK. SIGNATURE PAGE TO FOLLOW]

IN WITNESS WHEREOF, the parties executed this Agreement the day, month, and year above written.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT

Linda Gorton

Linda Gorton, Mayor

ATTEST:

Mackenzie Cook

Clerk of Urban County Council

Deputy

COMMERCE LEXINGTON, INC.

BY Robert Quick

Robert Quick

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