

FILED

APR 18 2022

Belinda Munson
MUNCIE CITY CLERK

ORDINANCE NO. 15-22
COMMON COUNCIL OF THE CITY OF MUNCIE, INDIANA

**REAFFIRMING BUILD-OPERATE-TRANSFER AGREEMENT,
PLEDGING A SOURCE FOR AMOUNTS PAYABLE THEREUNDER, AND
TAKING CERTAIN OTHER RELATED ACTIONS**

WHEREAS, pursuant to Resolution 12-20, adopted by the Common Council of Muncie, Indiana (the "Council"), on July 6, 2020, the Council adopted the provisions of Ind. Code §5-23, *et seq.* (the "BOT Statute"), and authorized the issuance of a request for proposals and qualifications for the design, financing, construction, operation, and transfer of a solar project to be located in the City of Muncie, Indiana (the "BOT Project");

WHEREAS, as the "RFPQ Committee" proceeded through the process required by the BOT Statute in connection with the receipt and review of proposals and qualifications, the RFPQ Committee agreed that the City of Muncie, Indiana (the "City") would enter into certain agreements with the selected developer, including a "build-operate-transfer agreement" addressing: (a) the development, design, construction, financing, equipping, operation, and transfer of the BOT Project; and (b) the lease by the City (as the tenant thereunder) of the completed BOT Project (the "BOT Lease Agreement");

WHEREAS, pursuant to the BOT Lease Agreement, the City will be obligated to pay semi-annual lease payments (the "BOT Lease Payments") that, when aggregated, constitute: (a) the total amount of the "Project Costs" incurred by the selected developer in developing, designing, constructing, financing, equipping, and transferring the BOT Project in accordance with a budget approved by the City, which shall not exceed \$11,700,000.00 unless expressly approved by the Council (the "Project Costs Cap"); plus (c) interest thereon at a rate not to exceed 4.5% (the "Rate Cap"), unless expressly approved by the Council;

WHEREAS, in no event shall any BOT Lease Payment be in an amount in excess of \$380,000.00 (the "Payment Cap"), unless expressly approved by the Council;

WHEREAS, the development, financing, construction, operation, and transfer of the BOT Project by the selected developer, and the lease by the City of the completed BOT Project, collectively, constitute the "BOT Transaction";

WHEREAS, following its review of the submitted proposals, the RFPQ Committee recommended that the Council award the BOT Transaction to GM Development Companies LLC ("GMDC");

WHEREAS, not fewer than seven days before the date of the public hearing held on January 10, 2022, and as required by the BOT Statute: (a) notice of the public hearing occurring on January 10, 2022, was published in accordance with Ind. Code §5-3-1; and (b) all proposals, together with the recommendation letter, were made available for inspection and copying in accordance with Ind. Code §5-14-3;

WHEREAS, at the conclusion of the properly noticed and conducted public hearing, and pursuant to Resolution 2-22, the Council: (a) awarded the BOT Transaction to GMDC; and (b) authorized the negotiation and drafting of the BOT Lease Agreement and any other documents necessary or reasonably appropriate to close the BOT Transaction (the "Transaction Documents");

WHEREAS, the City currently has outstanding the following obligations (the "Current Outstanding Obligations") that are secured in part by a pledge of the City's share of "additional revenue" (local income tax revenue) legally available to the City pursuant to Ind. Code §6-3.6 *et seq.* (the "LIT Revenues"):

- (a) Economic Development Income Tax Revenue Bonds of 2013, in connection with which the LIT Revenues are a secondary pledge to a "PILOT" agreement;

(b) Economic Development Bonds Series 2014A and 2014B (Horizon Center Garage Project), to which LIT Revenues have been pledged through 2038 in the annual amount of \$280,000.00;

(c) Taxable Economic Development Revenue Bond, Series 2019C (Madjax/Cardinal Projects), to which LIT Revenues have been pledged in the annual amount of \$100,000.00, to the extent needed to fill a shortfall in sublease payments; and

(d) City of Muncie, Indiana, Economic Development Revenue Bonds, Series 2019B (Canal District/Accutech Projects), to which LIT Revenues have been pledged in the annual amount of \$225,000.00;

WHEREAS, subject to the pledges of the LIT Revenues to the Current Outstanding Obligations, the Council wishes to pledge LIT Revenues to the payment of the BOT Lease Payments; provided that no BOT Lease Payment shall be in an amount that exceeds the Payment Cap absent the express approval of the Council; and

WHEREAS, the Council desires to: (a) reaffirm its award of the BOT Transaction to GMDC; (b) authorize the execution of the Transaction Documents, as each is negotiated, finalized, and approved by the Mayor (the "Authorized Individual"), acting in consultation with counsel to the Council; and (c) pledge the LIT Revenues to the payment of the BOT Lease Payments.

ACCORDINGLY, BE IT RESOLVED BY THE COMMON COUNCIL OF THE CITY OF MUNCIE, INDIANA AS FOLLOWS:

1. Reaffirmation. The Council hereby: (a) reaffirms the award of the BOT Transaction to GMDC pursuant to and in accordance with the BOT Statute; (b) acknowledges that a to-be-formed entity in which GMDC is the sole member (the "Developer") will execute the Transaction Documents; and (c) confirms that the BOT Lease Agreement constitutes a "BOT Agreement" under the BOT Statute.

2. Lease Findings. The Council hereby finds that: (a) the BOT Transaction (including, without limitation, the execution of the BOT Lease Agreement): (i) will serve the public purposes of the City; and (ii) is in the best interests of the City and its residents; and (b) the terms of the BOT Lease Agreement are based on the value of the facilities leased, and do not create a debt of the City for purposes of the Constitution of the State of Indiana.

3. Document Authorization. The Council authorizes the Authorized Individual, acting in consultation with counsel to the Council negotiate, finalize (including the finalization of the schedule of BOT Lease Payments to be attached to the BOT Lease Agreement), and execute the Transaction Documents on behalf of the City; provided that, absent the express approval of the Council, in no event will the Authorized Individual execute the BOT Lease Agreement if it reflects budgeted Project Costs in excess of the Project Costs Cap, an interest rate in excess of the Rate Cap, or any BOT Lease Payment in excess of the Payment Cap.

4. Notice of Execution. The Council hereby authorizes the City Clerk to publish the notice of approval and execution of the BOT Lease Agreement required by Ind. Code §6-3.6-10-4(d). Pursuant to Ind. Code §6-3.6-10-4(f), any action to contest the validity of the BOT Lease Agreement, or enjoin performance by the City of any of its obligations thereunder, must be brought within 30 days after the date on which the foregoing notice is published.

5. Pledge of Revenues. As permitted pursuant to Ind. Code §6-3.6-6-18 and Ind. Code §5-1-14-4, and subject to the pledges of the LIT Revenues to the Current Outstanding Obligations, the Council pledges the LIT Revenues to the payment of the BOT Lease Payments. The pledge of the LIT Revenues shall be binding from the time this Ordinance is adopted, and shall remain in effect for the entirety of the term of the BOT Lease Agreement.

6. Parity Obligations. The City reserves the right: (a) to authorize and issue bonds and other obligations payable from the LIT Revenues; and/or (b) pledge the LIT Revenues to secure payment of other obligations; in either case ranking on a parity with the pledge of the LIT Revenues to the payment of BOT Lease Payments (the "Parity Obligations"), subject to satisfaction of the conditions set forth below at such time any Parity Obligation will be issued:

(a) Incurring the Parity Obligation shall not cause the City to exceed its debt limitation under Article 13, Section 1, of the Indiana Constitution.

(b) The City is current on all BOT Lease Payments and other payments due with respect to the Current Outstanding Obligations and any then-existing Parity Obligations (collectively, the "Outstanding Obligations") such that there are no overdue and outstanding BOT Lease Payments or payments with respect to the Outstanding Obligations.

(c) Either:

(i) the LIT Revenues in the fiscal year immediately preceding the year in which the additional Parity Obligations will be issued were equal to, or in excess of, 150% of: (A) the maximum annual amount of the BOT Lease Payments; plus (B) the interest and principal requirements of the Outstanding Obligations; and plus (C) the interest and principal requirements of the Parity Obligations proposed to be issued (the foregoing sum, the "Annual Payment Obligations"); or

(ii) the LIT Revenues for the first full fiscal year following the year in which the additional Parity Obligations will be issued are projected by a certified public accountant to equal to, or in excess of, 150% of the Annual Payment Obligations.

For purposes of determining whether the City is permitted to issue additional Parity Obligations pursuant to this Section, the records of the City shall be analyzed, and reports of such records shall be prepared, by a certified public accountant or independent financial advisor employed by the City for that purpose.

7. No Senior Obligations. Until such time as all BOT Lease Payments have been paid (or prepaid) in full, the City shall not: (a) authorize the issuance of, or issue, any bonds or other obligations payable from the LIT Revenues; and/or (b) pledge the LIT Revenues to secure payment of other obligations; in either case to the extent that payments required to be made pursuant to such bonds or other obligations are senior to the BOT Lease Payments. For purposes of clarity, the foregoing does not prohibit the issuance of such senior obligations if, contemporaneously with the issuance thereof, the BOT Lease Payments are prepaid in full in accordance with the terms of the BOT Lease Agreement.

8. Tax Covenants. It is the intent of the City that, under Section 103 of the Internal Revenue Code of 1986 and the regulations in effect with respect thereto, as in effect on the date of the issuance of the BOT Lease Agreement (the "Code"), the interest portion of each BOT Lease Payment shall be excludable from federal income tax (the "Tax Exclusion"). In order to preserve the Tax Exclusion, the Council covenants and agrees that:

(a) the City will not make any investment, or undertake any other action during the period that the BOT Lease Agreement remains in effect, that: (A) would cause the BOT Lease Agreement to be an "arbitrage bond" within the meaning of Section 148 of the Code; or (B) otherwise would result in the loss of the Tax Exclusion; provided that if the BOT Lease Agreement is deemed to constitute an "arbitrage bond", then the City shall: (A) take such action as is necessary to rebate (or cause to be rebated) to the United States the amount required by Section 148 of the Code; and (B) set aside in trust funds (which,

notwithstanding anything to the contrary set forth herein, may be paid from investment income on funds and accounts) for such purposes; and

(b) the City will file an information report Form 8038-G with the Internal Revenue Service as required by Section 149 of the Code.

9. Other Actions. The Authorized Individual and the officers of the Council hereby are authorized to take any and all actions, including executing and delivering any documents or certificates, that the Authorized Individual or any such officer deems to be necessary or reasonably appropriate to effect the resolutions. Any such actions taken, including any documents or certificates executed and delivered, hereby are ratified, confirmed, and approved.

10. No Conflict. All ordinances, resolutions, and orders (or parts thereof) that conflict with the provisions of this Ordinance hereby are repealed to the extent of such conflict. After the issuance of the BOT Lease Agreement, and until all BOT Lease Payments have been paid (or prepaid) in full: (a) this Ordinance: (i) shall not be repealed; and (ii) may be amended only with the consent of the Trustee; and (b) the Council shall not adopt any ordinance or resolution that in any way adversely affects this Ordinance.

11. Severability. If any section, paragraph, or provision of this Ordinance is held to be invalid or unenforceable for any reason, then the invalidity or unenforceability of such section, paragraph, or provision shall not affect any of the remaining provisions of this Ordinance.

12. Effectiveness. This Ordinance shall be in full force and effect from and after its passage

[Signature Page Follows]

Passed by the Common Council of the City of Muncie, Indiana, this ____ day of _____, 2022.

	Yea	Nay	Abstained	Absent
Jeff Green	_____	_____	_____	_____
Jeff Robinson	_____	_____	_____	_____
Brandon Garrett	_____	_____	_____	_____
Brad Polk	_____	_____	_____	_____
Jerry Dishman	_____	_____	_____	_____s
Roger Overby	_____	_____	_____	_____
Aaron Clark	_____	_____	_____	_____
Roza Selvey	_____	_____	_____	_____
Troy Ingram	_____	_____	_____	_____

President, Muncie Common Council

Presented by me to the Mayor for his approval this ____ day of _____, 2022.

Belinda Munson, Muncie City Clerk

The above Ordinance is approved/vetoed by me this ____ day of _____, 2022

Dan Ridenour, Mayor, City of Muncie, Indiana

ATTEST:

Belinda Munson, Muncie City Clerk of the Common Council

This Ordinance is proposed by Council Member _____

This Ordinance is approved in form by Controller _____

This Ordinance is approved in form by Legal Counsel _____