

**CITY OF MIDDLEBURG HEIGHTS, OHIO**

Resolution No. 2021-

**77**

Introduced By: Mr. Meany Co-Sponsors: Mr. Ali, Mr. McGregor

**A RESOLUTION  
AUTHORIZING THE MAYOR TO ENTER INTO A MEMBER COMMUNITY  
INFRASTRUCTURE GRANT PROGRAM AGREEMENT WITH THE  
NORTHEAST OHIO REGIONAL SEWER DISTRICT**

WHEREAS, the Northeast Ohio Regional Sewer District (the District) is interested in assisting member communities with water quality and quantity issues associated with sewer infrastructure that adversely impact human health and the environment; and

WHEREAS, pursuant to Ohio Revised Code, the District established the Member Community Infrastructure Program (MCIP) to provide water resource project funding opportunities to member communities for sewer infrastructure projects in the District's service area; and

WHEREAS, the City of Middleburg Heights applied for the MCIP Grant for the Indian Creek/Gerald Sanitary Relief Sewer Project; and

WHEREAS, the District has determined that the Indian Creek/Gerald Sanitary Relief Sewer Project will address water quality and quantity issues associated with sewer infrastructure.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF MIDDLEBURG HEIGHTS, STATE OF OHIO, AS FOLLOWS:

Section 1: That the Mayor is hereby authorized to accept the MCIP grant and enter into an agreement with the Northeast Ohio Regional Sewer District, a copy of which is attached hereto and marked "Exhibit A" for the Indian Creek/Gerald Sanitary Relief Sewer Project.

Section 2: It is hereby found and determined that all formal actions of this Council concerning and relating to the passage of this Resolution were adopted in an open meeting of this Council, and that all deliberations of this Council and any of its committees that resulted in such formal actions were in meetings open to the public, in compliance with all legal requirements, including Chapter 107 of the Middleburg Heights Code and Section 121.22 of the Ohio Revised Code.

Passed: 10-26-21

David Bortolotto

President of Council

Presented to Mayor: 10-27-21

Matthew Costello

Mayor

Attest: M Mealey

Clerk of Council

Approved On: 11-4-21

	Yea	Nay
Bortolotto	<u>X</u>	_____
Ali	<u>X</u>	_____
Sage	<u>X</u>	_____
Meany	<u>X</u>	_____
McGregor	<u>X</u>	_____
Ference	<u>X</u>	_____
Grech	<u>X</u>	_____

I, Mary Ann Meale Clerk of the Council of the City of Middleburg Hts., Ohio, hereby certify that Res. 2021-77 adopted by the Council of the City of Middleburg Hts., on 10/26/21 was posted for a period of fifteen days, beginning 11/4/21 and remained so posted for fifteen days at the two posting places as designated by Charter.

Mary Ann Meale  
Clerk

**CERTIFICATE**

I, Mary Ann Meale Clerk of Council of the City of Middleburg Heights, Ohio, do hereby certify that the foregoing is a true and accurate copy of Res. 2021-77 passed on the 26<sup>th</sup> day of October 20 21 by said Council.

Mary Ann Meale  
Clerk of Council

**MEMBER COMMUNITY INFRASTRUCTURE GRANT PROGRAM AGREEMENT**

**BY AND BETWEEN**

**NORTHEAST OHIO REGIONAL SEWER DISTRICT  
AND**

**CITY OF MIDDLEBURG HEIGHTS**

**FOR**

**INDIAN CREEK / GERALD SANITARY RELIEF SEWER**

**THIS AGREEMENT** (“Agreement”) is entered into as of the 1<sup>st</sup> day of January, 2022 (“Effective Date”), by and between the Northeast Ohio Regional Sewer District (“District”), a regional sewer district organized and existing as a political subdivision under Chapter 6119 of the Ohio Revised Code, pursuant to the authority of Resolution No. 273-21, adopted by the District’s Board of Trustees on September 2, 2021 (Exhibit “A”), and the City of Middleburg Heights (“Member Community”), a municipality of the State of Ohio, acting pursuant to Ordinance No. \_\_\_\_\_, passed on \_\_\_\_\_, 2021 (Exhibit “B”). The District and the Member Community may be collectively referred to herein as “Parties.”

**RECITALS:**

WHEREAS, the District is interested in assisting member communities with water quality and quantity issues associated with sewer infrastructure that adversely impact human health and the environment; and

WHEREAS, Ohio law authorizes regional water and sewer districts to enter into grant agreements with political subdivisions for water resource projects; and

WHEREAS, pursuant to Ohio Revised Code Chapter 6119, generally, and Ohio Revised Code Section 6119.06(F), the District established the Member Community Infrastructure Program (“MCIP”) to provide water resource project funding opportunities to member communities for sewer infrastructure projects in the District’s service area; and

WHEREAS, the District issued a Request for MCIP Proposals (Exhibit “C”);  
and

WHEREAS, in response to the District's Request for MCIP Proposals, the Member Community, a District member community, submitted an application for the Indian Creek / Gerald Sanitary Relief Sewer project (the "Project" or "MCIP Project"), attached hereto as Exhibit "D;"

WHEREAS, the District has determined that the MCIP Project will address water quality and quantity issues associated with sewer infrastructure that adversely impacts human health and the environment.

NOW THEREFORE, in consideration of the foregoing, the grant to be made by the District and the mutual promises contained in this Agreement, the parties agree as follows:

**Article 1. The MCIP Project**

- 1.1 The MCIP Project. The Member Community will manage, design, procure and construct the MCIP Project, which generally consists of design and installation of a sanitary relief sewer to minimize residential basement backups, as set forth in Exhibit "D."
- 1.2 Performance Goal and Verification. The performance goal for the MCIP Project is set forth in Exhibit D. At the request of the District, the Member Community will provide data relevant to the project performance verification as set forth in Exhibit C. The Member Community agrees to provide the District with post-construction verification of the performance goal. Failure to do so may impact future grant awards.
- 1.3 Compliance with District's Code of Regulations. The MCIP Project shall be designed and constructed to ensure compliance with the District's Code of Regulations. The goal of the MCIP is to reduce water quality and quantity issues that impact human health and the environment associated with combined or separate sanitary and/or storm sewer infrastructure problems.
- 1.4 Permits and Approvals. The Member Community shall obtain and pay the cost of all required federal, state, and local approvals, including permits, necessary to initiate and complete the MCIP Project.
- 1.5 Affected Property Owners. The Member Community shall obtain all easements, rights of entry, and other necessary legal agreements with affected property owners to perform construction and to bind any successor

in title to maintain compliance as required in this Agreement. The costs of obtaining such legal agreements are eligible for MCIP fund reimbursement, if they are part of the proposal and approved by the District.

- 1.6 MCIP Project Modifications. The Member Community shall submit requests to modify the budget, deadlines, deliverables, or other components of the Project to the District Representative for approval at least fifteen (15) business days prior to the execution of the modification. Any modification to the MCIP Project must be approved by the District Representative in writing.
- 1.7 Photographs of MCIP Project. The District shall have the right to observe, monitor, inspect, and photograph the MCIP Project at any and all stages of design and construction, as well as post-construction.

**Article 2. Design and Construction of the MCIP Project**

- 2.1 District Review of Design Work. The Parties agree that the District shall have the right to review and comment on the final MCIP Project design plans prior to construction. The Member Community shall submit the final MCIP Project design plans to William Fussner, Project Manager, at [fussnerw@neorsd.org](mailto:fussnerw@neorsd.org), in a timely manner that provides the District with at least fifteen (15) business days to review. Any modification to the MCIP Project must be submitted to the District Representative in writing.
- 2.2 MCIP Project Meetings. The District shall have the right to attend all MCIP Project progress meetings and shall receive at least five (5) business days advance notice of all such meetings.
- 2.3 Member Community to Bid and Construct MCIP Project. After the District's review of the MCIP Project design in accordance with Article 2.1 above, the Member Community shall bid and complete the construction work pursuant to the final MCIP Project plans and specifications and in accordance with all applicable laws and regulations. The Member Community shall be responsible for construction procurement, supervision, and inspection in accordance with the terms of this Agreement. The Member Community shall provide the District Representative a copy of the awarded bid.
- 2.4 Construction Schedule. The District shall have the right to review and provide written comments to the proposed MCIP Project construction schedule, prior to the selected contractor beginning field activities.
- 2.5 Pre-Construction and Construction Meetings. The District shall have the right

to attend all pre-construction and construction meetings with the MCIP Project contractor. The Member Community shall notify the District Representative, in writing or via e-mail, of such meetings at least five (5) business days prior to the meeting date.

- 2.6 Daily Construction Supervision. The District is not required to and will not provide any daily construction supervision, or inspection and testing services for the MCIP Project.
- 2.7 As-Built Drawings. At the District's request, the Member Community shall provide the District Representative with "as-built" drawings for the MCIP Project.
- 2.8 Record Drawings. The Member Community shall provide to the District Representative record drawings, approved by the Member Community's Engineer, at the closure of the MCIP Project.
- 2.9 District Request for Construction Progress Meetings. The Member Community agrees to meet with the District to review the MCIP construction project status and progress, as may be requested by the District.
- 2.10 Payment of Prevailing Wage. The Member Community shall be responsible for determining whether the payment of prevailing wages, as set forth in Chapter 4115 of the Ohio Revised Code, are required for labor used in constructing the MCIP Project, and shall ensure compliance with any prevailing wage requirements in such Chapter.

**Article 3. Ownership, Operation, and Maintenance**

- 3.1 Member Community Operation and Maintenance Responsibilities. During construction and after construction, the Member Community shall own, operate, and maintain the MCIP Project. The Member Community shall reimburse the District in an amount equal to one hundred percent (100%) of the District Funds provided by the District under this Agreement if this provision is violated. In the event that the District determines a violation of this section has occurred, the District shall notify the Member Community in writing. The Parties agree to resolve any dispute relating to such alleged violation in accordance with the procedure set forth in Article 9 of this Agreement.
- 3.2 Post-Construction Operation and Maintenance Plan. The Member

Community shall provide the District with a letter referencing the post-construction operation and maintenance plan for the MCIP Project. Operation and maintenance plans shall be updated by the Member Community, as may be necessary, and as may be requested by the District.

- 3.3 Maintenance Inspection Records. The Member Community shall maintain a record of the Member Community's maintenance inspections and overall performance of the MCIP Project for at least three (3) years and shall submit a copy to the District upon reasonable request.

#### **Article 4. Project Costs and Funding**

- 4.1 District Funds. The District agrees to pay the Member Community an amount not to exceed One Million Eight Hundred Forty-Six Thousand Five Hundred Dollars (\$1,846,500.00) (the "District Funds") on a reimbursement basis, in accordance with the terms of this Article and Article 6. The anticipated reimbursement amount for calendar year 2022 is \$923,250.00 and for 2023 is \$923,250.00. Yearly anticipated reimbursement amounts may only be altered in writing at the discretion of the District's Director of Watershed Programs. The District shall withhold five percent (5%) or \$92,325.00 of the District Funds until the District receives:
- a) final record drawings for the MCIP Project,
  - b) final report of audit prepared in connection with and specific to the Project,
  - c) a letter referencing the post-construction operation and maintenance plan.
- 4.2 Member Community Funds. The Member Community agrees to pay all MCIP Project costs that exceed the amount of the District Funds ("Member Community Funds"). Under no circumstance, shall the District be responsible for payment of any costs that, in aggregate, exceed the amount of the District Funds, including, but not limited to, differing site conditions or other unforeseen situations. Prior to the Member Community issuing a notice-to-proceed for any MCIP Project related work or service, the Member Community shall provide the District a copy of the certification by the Member Community's Finance Director that the Member Community Funds have been lawfully appropriated by the Member Community for the Project. This certification is attached hereto as Exhibit "E."
- 4.3 Use of District Funds - Reimbursement Requests and Quarterly Progress Reports. The District Funds must be used for activities and expenses

approved by the District that are related to the MCIP Project accrued on or after January 1, 2022 and in accordance with the project schedule requirements set forth in Article 6. In accordance with the provisions of this Agreement, the District shall reimburse the Member Community for eligible MCIP Project expenses based upon paid invoices, prepared and submitted by the Member Community to the District, in the form prescribed by the District, and including all supporting documentation as required by this Agreement and the MCIP Policy, Process, and Procedures, attached hereto as Exhibit "F."

The Member Community will provide a copy of the award bid with the first reimbursement request.

Quarterly progress reports shall be submitted to the District in accordance with the following:

- First Request: Due April 30, 2022 for work completed January 1, 2022– March 31, 2022;
- Second Request: Due July 31, 2022 for work completed April 1, 2022 - June 30, 2022;
- Third Request: Due October 31, 2022 for work completed July 1, 2022 – September 30, 2022;
- Fourth Request: Due January 31, 2023 for work completed October 1, 2022 – December 31, 2022;
- Fifth Request: Due April 30, 2023 for work completed January 1, 2023 – March 31, 2023;
- Sixth Request: Due July 31, 2023 for work completed April 1, 2023- June 30, 2023;
- Seventh Request: Due October 31, 2023 for work completed July 1, 2023 – September 30, 2023; and
- Eighth Request: Due January 31, 2024 for work completed October 1, 2023 – December 31, 2023.

Failure to submit the quarterly progress report in accordance with these deadlines may result in the revocation of the Agreement by the District.

The Member Community agrees to meet with District staff, as requested, to review MCIP Project progress and to use the reimbursement request and progress report form provided by the District available at: <http://www.neorsd.org/mcip.php>.

4.4 Third Party Payments. The Member Community shall bear the risk and



remain solely responsible for any payments made by the Member Community to third parties for work not approved for reimbursement by the District.

- 4.5 Records Retention. The Member Community shall keep all records and documents relevant to the MCIP Project, including but not limited to, an accurate, current, and complete accounting of all financial transactions for the MCIP Project. Such records and documents shall be available at reasonable times and places for inspection and copying by the District or any authorized representative thereof and shall be submitted to the District upon request along with any other compliance information which may be reasonably required.
- 4.6 District Funds Not Used. Any District Funds that are not used to complete the MCIP Project shall be retained by the District.
- 4.7 Final Project Costs. If final project costs decrease from the project proposal estimate, then the amount of the District's final contribution shall be adjusted to maintain the same District contribution percentage of the final project cost. (Exhibit C).

**Article 5. Public Participation and Outreach**

- 5.1 Educational Signage and Public Outreach. The Member Community shall coordinate any educational signage and any public outreach with the District. The Member Community shall acknowledge the District on MCIP Project related outreach communications and in public meetings that discuss the MCIP Project.
- 5.2 District Right to Reject. The District reserves the right to reject any signage, related to the MCIP Project.

**Article 6. Project Schedule and Warranty Period.**

- 6.1 Project Schedule. The MCIP Project schedule shall be as set forth in the Project Schedule and Budget Section of Exhibit "D." Any change to the Project schedule must be approved in writing by the District Representative.
- 6.2 MCIP Project Warranty. The Member Community's construction agreement shall require the contractor to provide a minimum of a one (1) year warranty period that commences upon final completion of the MCIP Project construction ("Warranty Period"). Prior to the conclusion of the Warranty Period the Member Community shall perform a CCTV inspection of the

installed Project, if applicable, and provide a report to the District.

**Article 7. Term.**

7.1 Term. This Agreement shall begin on the date first above written and expire upon successful completion of the obligations contained herein.

**Article 8. Insurance.**

8.1 Insurance. The Member Community shall require MCIP Project consultants and contractors to name the Northeast Ohio Regional Sewer District as an Additional Insured for general liability, automobile liability, and property liability insurance coverages.

**Article 9. Dispute Resolution.**

9.1 Continuation of Obligations. The Parties shall continue the performance of their obligations under this Agreement notwithstanding the existence of a dispute. The District reserves the right to deposit District Funds in an escrow account until the dispute is resolved.

9.2 Designated Representatives. The Parties shall first try to resolve the dispute at the level of the designated representatives as follows:

<b>District Representatives</b>	<b>Member Community Representatives</b>
Director of Watershed Programs	Director of Public Service

If the Parties are unable to resolve the dispute at that level within ten (10) working days, the Parties shall escalate the dispute to the following level to resolve the dispute:

<b>District Representatives</b>	<b>Member Community Representatives</b>
District Chief Legal Officer or CLO's designee	Mayor

9.3 Mediation. If the Parties remain unable to resolve the dispute within an

additional ten (10) working days, the Parties shall proceed to mediation upon request by either party. The Parties shall mutually select a mediator who is experienced in public utility infrastructure engagements. The mediator shall review all documents and written statements, in order to accurately and effectively resolve the dispute. The mediator shall call a meeting between the Parties within ten (10) working days after the mediator appointment, which meeting shall be attended by at least the respective representatives in Article 9.2 above. The Parties shall attempt in good faith to resolve the dispute. The Parties agree to follow the Uniform Mediation Act, Chapter 2710 of the Ohio Revised Code. The Parties shall share the cost of the mediator equally.

9.4 **Mediation Resolution.** Such mediation shall be non-binding between the Parties and, to the extent permitted by law, shall be kept confidential. If the dispute is resolved and settled through the mediation process, the decision will be implemented by a written agreement signed by both Parties. If the dispute is unable to be resolved through mediation, the Parties agree to submit the dispute to the appropriate jurisdiction as per Article 10, **Remedies**, below.

**Article 10. Remedies.**

10.1 **Remedies and Ohio Law.** The Parties agree that, after exhausting the dispute resolution process outlined above, all claims, counterclaims, disputes and other matters in question between the Parties arising out of or relating to this Agreement, or the breach thereof, will be decided at law. This Agreement shall be governed by and interpreted according to the law of the State of Ohio. A party may file a lawsuit in a court of competent jurisdiction in Cuyahoga County, Ohio.

**Article 11. Notifications.**

11.1 **Points of Contact.** The Parties hereby designate the following individuals to serve as the primary points of contact under this Agreement:

District Representative	Member Community Representative
Grant Programs Administrator	Director of Public Service

**Article 12. Release of Liability.**

12.1 Release of All Liability. The Parties understand and agree that the District has no responsibilities or interest in the MCIP Project with respect to ownership, operation and maintenance and is acting solely as a funding source. The Member Community hereby releases the District from all liability related to the grant funding provided by the District hereunder. The Member Community further releases the District from all liability for: (i) the design, construction, implementation, operation, maintenance, and inspection of the Member Community's MCIP Project; (ii) any damages to third parties caused by the design, construction, implementation, operation, maintenance, inspection and every other aspect of the Member Community's MCIP Project; (iii) any defective performance of the Member Community's MCIP Project by the Member Community and/or its agents; and (iv) any damages caused by malfeasance or misfeasance of the grant funds by the Member Community.

**Article 13. Miscellaneous.**

13.1 Limit of Commitment. This grant is made with the understanding that the District has no obligation to provide other or additional support, including maintenance of the Member Community's MCIP Project. This grant does not represent any commitment to, or expectation of, future support, including maintenance of the Member Community's MCIP project from the District.

13.2 Disclaimer of Joint Venture. This Agreement is not intended to create a joint venture, partnership or agency relationship between the Parties, and such joint venture, partnership, or agency relationship is specifically hereby disclaimed.

13.3 Authority to Execute. Each person executing this Agreement represents and warrants that it is duly authorized to execute this Agreement by the party on whose behalf it is so executing.

13.4 Counterpart Signatures. This Agreement may be executed in counterparts, each of which shall be deemed to be an original, but which counterparts when taken together shall constitute one Agreement.

13.5 Modification of Agreement. This Agreement may only be modified by written instrument executed by each party.

13.6 Merger Clause. This Agreement, along with any exhibits attached hereto,

encompasses the entire agreement of the parties, and supersedes all previous understandings and agreements between the parties, whether oral or written.

- 13.7 Binding on Successors. This Agreement is binding upon, and inures to the benefit of, the parties and their respective permitted successors and assigns.
- 13.8 Prohibition on Assignment and Subcontracting. The Member Community may not assign or subcontract its rights or duties under this Agreement, in whole in part, whether by operation of law or otherwise, without the prior consent of the District. Consent may be withheld for any reason or no reason. Any assignment or subcontract made in contravention of the foregoing shall be void and of no effect.
- 13.9 Severability. If any term or provision of this Agreement is determined to be illegal, unenforceable, or invalid, in whole or in part for any reason, such provision shall be stricken from this Agreement and such provision shall not affect the validity of the remainder of this Agreement.
- 13.10 Headings. The headings in this Agreement are included for convenience only and shall neither affect the construction nor the interpretation of any provision in this Agreement.
- 13.11 Relationship of Agreement to Exhibits. The exhibits to this Agreement are attached for reference purposes only. Nothing in this Agreement shall be construed to modify, alter, clarify, or give effect to the terms and conditions of the various exhibits attached to this Agreement.

#### **Article 14. Exhibits.**

It is mutually understood and agreed that all Exhibits attached hereto are made a part hereof as if fully written herein. In the case of any conflict or variance between the terms of this Agreement and the terms of referenced documents, the terms of this Agreement shall govern. The following Exhibits attached hereto are hereby incorporated with and made a part of this Agreement:

- Exhibit "A" – District Resolution
- Exhibit "B" – Member Community's Authorizing Ordinance
- Exhibit "C" – Request for MCIP Proposals
- Exhibit "D" – Member Community's MCIP Application
- Exhibit "E" - Member Community's Certification of Funds

Exhibit "F" – MCIP Policy, Process, and Procedures

The parties hereto have executed and delivered this Agreement as of the date first above written.

**NORTHEAST OHIO REGIONAL SEWER DISTRICT**

By: \_\_\_\_\_  
Kyle Dreyfuss-Wells  
Chief Executive Officer

and: \_\_\_\_\_  
Darnell Brown, President  
Board of Trustees

**CITY OF MIDDLEBURG HEIGHTS**

By: Matthew C. Smith  
Title: Mayor

The legal form and correctness of this instrument is approved.

By: \_\_\_\_\_  
Assistant/Director of Law  
CITY OF MIDDLEBURG  
HEIGHTS

Date: \_\_\_\_\_, 2021

This Instrument Prepared By:

\_\_\_\_\_  
Katarina Waag  
Assistant General Counsel  
Northeast Ohio Regional Sewer District

Each party agrees that this Agreement may be executed and distributed for signatures via email, and that the emailed signatures affixed by both parties to this Agreement shall have the same legal effect as if such signatures were in their originally written format.

**[FOR DISTRICT USE ONLY]**

**AGREEMENT NO.**

NORTHEAST OHIO REGIONAL SEWER  
DISTRICT  
WITH  
CITY OF MIDDLEBURG HEIGHTS  
FOR  
2022 MEMBER COMMUNITY  
INFRASTRUCTURE PROGRAM PROJECT:  
INDIAN CREEK / GERALD SANITARY  
RELIEF SEWER

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Total Approximate Cost:     \$1,846,500.00

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The legal form and correctness of the within  
instrument are hereby approved.

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ERIC J. LUCKAGE  
CHIEF LEGAL OFFICER

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Date

**CERTIFICATION**

It is hereby certified that the amount  
required to meet the contract, agreement,  
obligation, payment or expenditure, for the  
above, has been lawfully appropriated or  
authorized or directed for such purpose and  
is in the Treasury or in process of collection  
to the credit of the fund free from any  
obligation or certification now outstanding.

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KENNETH J. DUPLAY  
CHIEF FINANCIAL OFFICER

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Date