

[DRAFT – FOR DISCUSSION PURPOSES ONLY]

TRAIL DEVELOPMENT AND ANNEXATION AGREEMENT

This Trail Development and Annexation Agreement (the "Agreement") is made effective as of the latest date set forth below by and between **The Town of Brownsburg, Hendricks County, Indiana, an Indiana political subdivision** (hereinafter the "Town"), and **B&O Trail Association, Inc., an Indiana non-profit corporation** (hereinafter the "B&O").

WITNESSETH:

WHEREAS, B&O owns certain trail property, including the trail head, the parking area and portions of the trail area extending from S.R. 267 to Raceway Road in Hendricks County more specifically identified in *Exhibit "A"* attached hereto and incorporated herein by reference (the "Trail Area");

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WHEREAS, the Trail Area also includes an area extending from S.R. 267 to County Road 300 N, including the trail head and parking area, as more specifically depicted on *Exhibit "B"* attached hereto (collectively the "300 N. Portion of the Trail Area");

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WHEREAS, B&O has engaged a landscaping and architectural firm named as Storrow Kinsella Associates Inc. -(hereinafter "Storrow Kinsella") to design certain trail improvements for the Trail Area (the "Trail Improvements") as more specifically set forth on the design plans from Storrow Kinsella dated as of November 9, 2009 (the "Design Plans");

WHEREAS, in exchange for the Design Plans, B&O has paid the amount of \$432,000.00 to Storrow Kinsella through Hendricks County for the design, ownership and right to use the Design Plans for the Trail Area;

WHEREAS, B&O has received a grant from the State of Indiana to complete the Trail Improvements in accordance with the Design Plans and a construction contract has been awarded to and executed by B&O for George R. Harvey & Son, Inc. to complete the Trail Improvements on or before January 1, 2012;

WHEREAS, B&O desires for the Town to annex the 300 N. Portion of the Trail Area into the corporate boundaries of the Town so it intends to file a petition pursuant to I.C. 36-4-3-5.1 seeking to voluntarily annex the 300 N. Portion of the Trail Area into the corporate boundaries of the Town, and the Town desires to so annex the 300 N. Portion of the Trail Area into the corporate boundaries of the Town (the "Annexation");

WHEREAS, B&O desires for the Town to reimburse B&O a portion of the fees paid for the Design Plans and to transfer title to the 300 N. Portion of the Trail Area to the Town after construction of the Trail Improvements to the 300 N. Portion of the Trail Area have been completed in accordance with the Design Plans; and

WHEREAS, the Town desires to have the right, but not the obligation to accept title to the 300 N. Portion of the Trail Area on the terms and conditions set forth herein.

NOW THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties do hereby agree as follows:

- 1. **Purchase of Design Plans and Payment.** The Town desires to acquire and B&O desires to transfer ownership of and the right to use the Design Plans to the Town, except that B&O retains the right to use the Design Plans to complete the Trail Improvements and to use for future planning and construction of trailhead(s), equestrian trail and other trail amenities, so long as such use does not unreasonably interfere with the Town's ownership and/or use thereof. The total purchase price to be paid by the Town to B&O for the Design Plans shall be One Hundred Thirty Thousand and 00/100 (\$130,000.00) (the "Plan Payment"), which shall be made by the Town to B&O within five (5) business days after execution of this Agreement. The Plan Payment also serves as consideration for B&O's ongoing obligation to provide access to the 300 N. Portion of the Trail Area as set forth in Section 11 below. At the time the Plan Payment is made, B&O shall provide a current, full and complete set of the Design Plans properly certified and stamped by Storrow

Kinsella to the Town. In addition, if at any time during the construction of the Trail Improvements for the 300 N. Portion of the Trail Area the Design Plans are updated and/or modified, B&O shall also provide the Town with these updates and/or modifications properly stamped and certified within five (5) business days after B&O's receipt thereof. The Plan Payment shall be non-refundable so long as B&O completes all of its obligations under this Agreement. The trailhead at SR 267 and the equestrian trail from SR 267 to County Road 300 N are not included in the Design Plans and may be constructed by B&O in the future after the presentation of such plans by B&O to the Town and after such plans and construction are approved in writing by the Town in accordance with Paragraph 10 below. At the beginning of construction of any equestrian trail and the trail head, the parties shall address any required maintenance thereof.

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2. **Petition for Voluntary Annexation.** B&O shall immediately, at the time of execution of this Agreement and receipt of the "Plan Payment", initiate the Annexation of the 300 N. Portion of the Trail Area by executing and submitting a Petition for Voluntary Annexation into the Town of Brownsburg (and/or separate Petitions as may be determined necessary by the Town) pursuant to I.C. 36-4-3-5.1 to accommodate the voluntary Annexation of the 300 N. Portion of the Trail Area into the corporate boundaries of the Town. The parties acknowledge and recognize that the Annexation of the 300 N. Portion of the Trail Area may take several separate processes to complete and B&O shall pursue the completion of the entire Annexation, and shall take all actions reasonably necessary or advisable to consummate and reasonably necessary or advisable to consummate and complete the same, in good faith and with reasonable diligence. The Town will waive all application and/or notice fees, and other expenses associated with the annexation process. In addition, in the event B&O acquires title to any other portion of the Trail Area, it shall: (a) notify the Town in writing after such acquisition; (b) agree not to voluntarily annex such property into any other governmental unit other than the Town; (c) execute a Petition for Voluntary Annexation into the Town within ten (10) days after receiving written notice from the Town therefore; and (d) be subject to the terms of the written Interlocal Cooperation Agreement Between the Town of Avon, Indiana and the Town of Brownsburg, Indiana Relating to Certain Annexation Matters as recorded with the Hendricks County Recorder's Office on January 25, 2011 as Instrument No. 201102409 .
3. **Construction of the Trail and Notice to the Town.** B&O shall take all reasonable action to ensure that the Trail Improvements are timely constructed and completed in compliance with the Design Plans and in accordance with industry standards for the 300 N. Portion of the Trail Area. The Trail Improvements shall be completed on or before January 1, 2012. Within five (5) business days after completion of construction of the Trail Improvements, B&O shall provide the Town with written notice thereof (the "Notice of Completed Construction").
4. **Title to the 300 N. Portion of the Trail Area.** After receiving the Notice of Completed Construction, the Town shall have the right to conduct such due diligence determined necessary by it in accordance with the terms and conditions of this Agreement to decide whether it wants to accept fee simple title to the 300 N. Portion of the Trail Area. The Town has the right, but not the obligation to accept title to the 300 N. Portion of the Trail Area, together with all rights, privileges, interests, easements, improvements and appurtenances thereto either permanently installed or used in connection with the real estate, wherever located, and including all property of every kind, character and description owned by B&O and located on, attached to, or used in connection with the real estate, subject to the terms and conditions contained herein.
5. **Inspections and Timing.** The Town reserves the right to have the Trail Area inspected within one hundred twenty (120) days after receiving the Notice of Completed Construction and all such inspections and required Town approvals must be completed within that time. Such inspections are to be at the Town's expense by qualified inspectors or contractors selected by the Town, with a written report showing such items to be in condition satisfactory to the Town. The Town shall indemnify and hold B&O harmless for damage to person or property caused by the Town in its inspections of the 300 N. Portion of the Trail Area. If the results of the inspections provided for herein are not satisfactory to the Town, the Town shall notify B&O of any objections which the Town is not willing to waive prior to the expiration of such one hundred twenty (120) day period. B&O will have ten (10) business days from and after its receipt of said objections to inform the Town of those objections which B&O is willing to remedy, at its sole cost and expense, and those objections which it is unwilling to remedy. Within ten (10) business days of its receipt from B&O of notification of objections to be remedied or left unremedied, the Town will notify B&O, in writing, of its waiver of all objections which B&O is unwilling to remedy or its intention to decline fee simple title to the

300 N. Portion of the Trail Area. If the Town does not exercise its right to accept fee simple title to the 300 N. Portion of the Trail Area, then the Town shall not have any further responsibilities and/or obligations under this Agreement. In addition to having one hundred twenty (120) days from receipt of the Notice of Completed Construction to conduct all inspections of the 300 N. Portion of the Trail Area determined to be necessary by the Town, the Town shall also have the right to obtain all necessary governmental, quasi governmental or agency approvals for its intended use and development of the 300 N. Portion of the Trail Area including, but not limited to, any and all necessary zoning approvals from the Town Council and Park Board, IDEM approval, and any and all necessary governmental, quasi governmental or agency approvals or permits deemed necessary by the Town for its intended use of the 300 N. Portion of the Trail Area.

6. **Trail Payment.** In the event the Town desires to accept title to the 300 N. Portion of the Trail Area, it shall, as additional consideration for the Design Plans and the completion of the Trail Improvements by B&O, pay a lump sum amount of Seventy Thousand and 00/100 Dollars (\$70,000.00) (the "Trail Payment") to B&O at the Closing as provided for below. The parties acknowledge and agree that the Trail Payment is sufficient and adequate consideration to complete the transfer of the 300 N. Portion of the Trail Area to the Town. If the Town elects not to accept title to the 300 N. Portion of the Trail Area to the Town, then the Town shall not have any obligation to make any additional payment, including the Trail Payment, to B&O.
7. **Closing.** In the event the Town desires to accept fee simple title to the 300 N. Portion of the Trail Area, this transaction shall be closed at a time and place acceptable to the parties hereto (the "Closing") on a date the Town has determined in its sole discretion that the last of the conditions described in Section 12 of this Agreement is satisfied or waived, including but not limited to satisfactory completion of all inspections, surveys and receipt of all necessary approvals from the Town's Park Board and Town Council and zoning authorities, and receipt of a title commitment in accordance with Section 15. Closing shall be insured by the title company providing title insurance with the costs thereof allocated as provided in Section 18 below.
8. **B&O's Obligation to Transfer Title and Complete the Annexation of the Trail Area.** If B&O fails and/or refuses to transfer title to the 300 N. Portion of the Trail Area and/or complete the Annexation of the 300 N. Portion of the Trail Area on the terms and conditions set forth herein, the Town may pursue all available legal and equitable remedies, including, but not limited to, the remedies of injunctive relief and specific performance to effectuate the terms of this Agreement, the Annexation and the transfer of the 300 N. Portion of the Trail Area to the Town. If the Town elects not to accept title of the 300 N. Portion of the Trail Area, this shall not affect B&O's obligation to complete the Annexation of the 300 N. Portion of the Trail Area.
9. **Town's Obligation to Comply with the Agreement.** If Town fails and/or refuses to comply with the covenants and requirements of the Agreement on the terms and conditions set forth herein, B&O may pursue all available legal and equitable remedies, including, but not limited to, the remedies of injunctive relief and specific performance to effectuate the terms and requirements of this Agreement.
10. **Possession and Cooperation.** B&O shall remain in possession of the 300 N. Portion of the Trail Area until Closing, and shall continue to enjoy the use and profits of the 300 N. Portion of the Trail Area until possession is transferred to the Town. After the execution of this Agreement and until the possession of the 300 N. Portion of the Trail Area is transferred to the Town, B&O shall, to the extent applicable, continue to maintain all appropriate insurance coverage relating to the 300 N. Portion of the Trail Area, with similar limits and carriers as held by B&O prior to execution of this Agreement. Following the execution of this Agreement, B&O shall not mortgage or allow any liens to be placed upon the 300 N. Portion of the Trail Area except for the Trail Improvements, shall not construct, or allow any other party to construct, any improvements on the 300 N. portion of the Trail Area, and shall not enter into any lease or other agreement affecting the 300 N. Portion of the Trail Area without the written consent of the Town, which consent shall not be unreasonably withheld. B&O and the Town agree to work together in good faith on the approval of future improvements, and easements affecting the 300 N. Portion of the Trail Area including the plans and materials for the construction of the trailhead and the equestrian trail and the related maintenance obligations therefore. Furthermore, the Town agrees to allow B&O to construct the trailhead and equestrian trail so long as the following conditions are met: (a) The Town has reviewed the proposed construction plans or in the event that no formal written construction plans exist for the proposed

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improvements, the Town has been provided enough information from B&O) to determine that the proposed improvements are consistent with its ownership and use of the 300 N. Portion of the Trail Area as provided for under this Agreement; and (b) The Town has determined that maintenance issues and obligations for the proposed improvements have been properly and adequately addressed consistent with its policies and practices for other similar recreational type improvements. All future easements affecting the 300 N. Portion of the Trail Area shall be presented by B&O to the Town for its consideration in granting and any such easements that may be considered by the Town shall require that:

- 10.1 If easement holders disturb and/or cause any damage to any portion of the 300 N. Portion of the Trail Area, then the easement holders shall, at the easement holders' sole cost and expense, promptly restore the disturbed and/or damaged portion(s), as close as possible, to the conditions that existed immediately before the disturbances.
- 10.2 Construction and operations on easements shall not negatively affect the users of the trail and adjacent property owners of the trail with continuous noise or odor (except for equestrian odors) beyond what is reasonably necessary during construction ~~and due to access by equestrian trail users~~. Easement holders shall not, without prior written permission from the Town and B&O, negatively impact the ambiance, design, style, functionality, purposes, aesthetics, utilitarianism, and technical qualities of the trail, remove trees, violate any existing conservation easements, and/or violate the existing Occupancy Easement.
- 10.3 B&O and the Town reserve the right to complete any easement work or corrections to any disturbances that easement holders do not promptly do to restore the trail and its environment to their condition prior to such easement work or disturbance; and to invoice the easement holders for completion of the work or correction of disturbances; and to take them to court for completions or corrections, recover costs, and to collect legal fees.
- 10.4 Easement holders shall be required to indemnify the Town and B&O from losses, claims and liabilities arising out of the easement holder's use of the Easement, including any damage or disturbance caused to the 300 N. Portion of the Trail Area.
- 10.5 Easement holders shall be required, if determined necessary by the Town, to provide a certificate of insurance for general liability insurance in such amounts and with such carriers as may be required by the Town to insure the easement holder's obligations under the easement, including the obligations set forth above and naming the Town and B&O as additional insureds under the Certificate.

Any ownership of the 300 N. portion of the Trail Area shall be subject to those recorded instruments reflected in a title commitment dated as of the date of closing by the Town. At all times under this Agreement, including B&O's ownership of the 300 N. Portion of the Trail Area, the Town shall have all access necessary to address any drainage issues that the Town determines, in its sole discretion, need to be addressed.

11. **Access to the Trail Area.** The 300 N. Portion of the Trail Area shall at all times during the term of this Agreement and thereafter be open, available and accessible to the general public for walking, rollerblading, jogging, running, bicycling, use by handicapped users, on the "main trail" and equestrians on an equestrian trail separate from the main trail except where an equestrian trail crosses the main trail, including the citizens of the Town of Brownsburg, except as reasonably necessary on a temporary basis for currently in process construction, repair, maintenance, safety, future trail construction of the trailhead subject to the requirements of Paragraph 10 above, future trail construction of the equestrian trail subject to the requirements of Paragraph 10 above, existing easements and future easements that may be presented by B&O to the Town for consideration under the conditions of Paragraph 10 above, and other legal amenities or improvements as agreed upon in paragraph 10. This accessibility shall exist and continue irrespective of whether the Town accepts fee simple title to the 300 N. Portion of the Trail Area. This access shall not permit motorized vehicles, except for those necessary by the Town or B&O for trail maintenance, public safety purposes and/or by the Town or B&O for any trail administration purposes or that may be required by any state, federal or local governmental units.

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12. **Representations and Warranties.** B&O hereby represents and warrants to the Town (and shall be deemed to represent and warrant to the Town as of the date of Closing) that each of the following statements is true:
- 12.1 Neither the execution and delivery of this Agreement, nor the consummation of the transaction contemplated hereby, will conflict with, or result in a breach of, the terms, conditions or provisions of, or constitute a default under, B&O's organizational documents or any agreement to which B&O is a party or by which B&O is bound.;
- 12.2 B&O has good, marketable and indefeasible title to the 300 N. ~~Portion~~portion of the Trail Area free and clear of any and all liens, leases, mortgages, pledges, security interests, conditional sales agreements, charges and other claims, interests, life estates or other encumbrances, except for the list of the title exceptions from the latest title policy issued to Hendricks County, more specifically identified in Exhibit "C" attached hereto ("Title Exceptions") covenants described elsewhere in this agreement, and current not delinquent real estate taxes. B&O has not granted any other interests and/or made any commitments, either verbal or in writing, to grant such interests in the 300 N. Portion of the Trail Area, including, but not limited to any commitments and/or interests to the Sharon E. Hudson Living Trust;
- 12.3 B&O has full right, power and authority to execute and deliver this Agreement and to consummate the transaction contemplated thereby, to comply with and fulfill the terms and conditions hereof, including completion of the Annexation of the 300 N. Portion of the Trail Area, and to sell, transfer, convey and assign all of the 300 N. Portion of the Trail Area to the Town and there are no legal, contractual or other restrictions upon B&O's right, power or authority to sell, transfer, convey and assign the 300 N. Portion of the Trail Area to the Town and no further approvals, authorizations and/or consents are necessary to facilitate B&O's obligations under this Agreement;
- 12.4 There is no litigation, including but not limited to condemnation or similar proceedings, which is currently pending or threatened against the 300 N. Portion of the Trail Area or any part thereof, or related in any way thereto.;
- 12.5 Other than non-delinquent real estate taxes due and payable on the 300 N. ~~Portion~~portion of the Trail Area, B&O has not received any notification from any governmental agency, authority or instrumentality of any pending or threatened assessments on or against the 300 N. ~~Portion~~portion of the Trail Area for the costs of improvements to be made with respect to the 300 N. ~~Portion~~portion of the Trail Area or any part thereof or notice of any violation of any federal, state or local law, rule, regulation or court order related in any way to the 300 N. ~~Portion~~portion of the Trail Area and/or the proposed Trail Improvements.;
- 12.6 There is no lease or other agreement or any claim pursuant to a lease or other agreement, which affects in any way the 300 N. ~~Portion~~portion of the Trail Area or the operation, possession, use or control thereof; except for those items identified as Exceptions in the Title Commitment.;
- 12.7 At closing and as of the time of the transfer to the Town, there is no lien or other encumbrance to attach to or affect the 300 N. ~~Portion~~portion of the Trail Area, except for the lien of non-delinquent real estate taxes.;
- 12.8 All required permits and approvals have been obtained to complete the Trail Improvements, except for pending Indiana Department of Environmental Management approvals which will be provided when available, and B&O has sufficient funds, including grant proceeds to complete such improvements.
- 12.9 Except as set forth in the ATC Associates Inc. Soil Survey Report, Abandoned B&O Railroad Corridor, Hendricks County, Indiana, ATC Project No. 86.27169.004 of August 21, 2009, to Mr. John Ayers, Hendricks County Engineer, and ongoing soil analysis with the Indiana Department of Environmental Management; to the best knowledge of B&O, its agents, contractors, invitees

and predecessors in interest have not deposited, stored, disposed of, placed, located or released on the 300 N. Portion of the Trail Area any Hazardous Materials or any underground storage tanks. B&O and Hendricks County, Indiana Commissioners are prohibited from disclosing the contents of the afore-mentioned ATC Associates Inc. Soil Screening Report by the Sales Agreement between Hendricks County and CSX Transportation. Any adverse conditions disclosed in said Report shall be remedied by B&O during construction of the Trail Improvements. As used herein, the term "Hazardous Materials" includes, without limitation, any material or substance which is (a) listed or defined as a "hazardous waste", "extremely hazardous waste", "restricted hazardous waste", "hazardous substance", "special waste", or "toxic substance" or words of similar import, regulated under applicable state or federal laws addressing public health or the environment, including, but not limited to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation and Liability Act, as amended, the Federal Clean Water Act, as amended, the Toxic Substance Control Act, as amended, (b) petroleum, petroleum fractions or by-products, (c) polychlorinated biphenyls, (d) asbestos containing materials, or (e) any other pollutant, toxic substance, or hazardous substance, material or waste regulated under any other federal, state or local environmental law, regulation, ordinance or rule existing as of the date hereof or enacted prior to the Closing. B&O is aware of no adverse health or environmental conditions on or affecting the 300 N. Portion of the Trail Area.

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12.10 Other than designated wetlands as identified on *Exhibit "D"* attached hereto, the seven foot fence encroachment adjacent to Lot 213 in Thornburg Section VI (the "Fence Encroachment 1"), a 3.7 foot fence encroachment adjacent to land owned by Raymond W. Fox (the "Fence Encroachment 2"), and 574 Heartland Lane (the "Fence Encroachment 3") and a fence encroachment adjacent to Lot 214 in Thornburg Section VI (the "Fence Encroachment 4") -B&O has no specific knowledge of any latent defects in any portion of the 300 N. Portion of the Trail Area and has not knowingly withheld from the Town information relating to any material defects in the Trail Area.

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12.11 B&O has sole and full ownership to the Design Plans and has the full power and authority to use such Design Plans and to transfer ownership thereof to the Town for use by the Town. B&O and the Town acknowledge Storrow Kinsella's Design Plans, including electronic files as instruments of professional service. The Town and B&O shall not reuse or make any modification to the Design Plans without the prior written authorization of the Storrow Kinsella. B&O agrees, to the fullest extent permitted by law, to indemnify and hold harmless Storrow Kinsella, its officers, directors, employees and subconsultants (collectively, Storrow Kinsella) against any damages, liabilities or costs, including reasonable attorney's fees and defense costs, arising from or allegedly arising from or in any way connected with the unauthorized reuse or modification of the construction documents by B&O; and

Comment [p1]: B&O contends this needs to be in there. Do not know what language or how yet?

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12.12 This Agreement has been duly executed and delivered by B&O, and constitutes a legal, valid and binding obligation of B&O, enforceable against B&O in accordance with its terms and conditions.

13. **Conditions to Town's Performance.** In addition to other provisions of this Agreement, the Town's obligations hereunder are subject to satisfaction of the following conditions within one hundred twenty (120) days, unless waived in whole or in part by the Town:

13.1 That marketable title to the 300 N. Portion of the Trail Area is conveyed to the Town subject only to the following matters:

- (a) current, non-delinquent taxes prorated to the date of Closing;
- (b) zoning ordinances and other governmental restrictions affecting the use of property provided that no violations now exist and provided that they shall not prohibit the use of the 300 N. Portion of the Trail Area for the Town's intended use thereof; and
- (c) such other matters as the Town agrees to in writing in the Town's sole discretion.

- 13.2 That possession of the 300 N. Portion of the Trail Area is delivered to the Town with the completed Trail Improvements as required under this Agreement, ordinary wear and tear excepted.
- 13.3 The satisfactory completion and acceptance by the Town of any environmental audit, inspection, or any other inspection as determined necessary in the sole discretion of the Town.
- 13.4 The Town shall have performed and obtained satisfactory environmental testing on any portion of the 300 N. Portion of the Trail Area determined necessary by it in form and substance and from an engineering firm acceptable to the Town. The Town must be able to determine in its sole discretion that: (a) the Trail Area is not contaminated with pollutants, asbestos, hazardous substances or Hazardous Materials; (b) the Trail Area is not subject to any proceedings or claim regarding health or safety issues; (c) there is no underground storage tank or related contamination on the Trail Area; and (d) the Trail Area is in compliance with all applicable environmental laws.
- 13.5 That the 300 N. Portion of the Trail Area enjoys rights of access to and from public ways, roads and streets which are adequate for the intended use and has access to adequate utility service for the Town's purpose.
- 13.6 That all representations and warranties made by B&O are true as of the date of Closing.
- 13.7 The delivery of all instruments required of B&O in Section 20 below.
- 13.8 No judgment, order, writ, injunction, decree, ruling or other similar action shall have been entered by, and no governmental or other action, suit, claim, investigation or proceeding shall be pending or threatened before, any court, any governmental authority, or other public or private body or person challenging the legality, validity or propriety of, or otherwise relating to, this Agreement, B&O, its business and/or operations, the 300 N. Portion of the Trail Area, and/or the conduct, development, construction, ownership, operation, use and/or occupancy thereof, except for covenants described elsewhere in this agreement.
- 13.9 The Town Council of the Town shall have formally considered and approved or ratified the terms and conditions of this Agreement and authorized the transaction contemplated hereby.
- 13.10 The Town shall have determined whether the 300 N. Portion of the Trail Area is suitable for its intended use and development, including whether any floodway or floodplains affect it, and if it is finally and unconditionally zoned for the Town's intended use and purposes for general municipal and/or park and trail recreational type purposes with all necessary classifications, variances, permissions and exceptions required for such use. If it or any part thereof is not suitably zoned, or if variances from the existing zoning classifications are required by the Town, and the Town determines in its sole discretion that such rezoning or variance is feasible, the Town shall have the right to have the zoning classification or requirements changed at the Town's expenses and to take such action, including the filing of petitions for rezoning or for variance of zoning requirements, as the Town deems necessary. The Town shall have obtained all necessary rezoning and/or variance approvals as are necessary for the Town's intended use of the 300 N. Portion of the Trail Area.
- 13.11 The Town shall have determined whether all permits, consents, permissions, and other approvals (including without limitation, curb cuts and access permits, floodway/floodplain approvals and permits, environmental and ecological approvals and permits from the Environmental Protection Agency and any similar state agency, subdivision plat approvals, site plan approvals and permits to connect all utilities which the Town desires or requires to service the area) required or desired by the Town to be obtained from all federal, state or local governmental, municipal, public or other officials, authorities, bodies and agencies have been obtained.
- 13.12 That all improvements on the Trail Area are located entirely within bounds of the 300 N. Portion of the Trail Area and that there are no encroachments thereon, except as otherwise set forth in

Paragraph 12.10 above, and no existing violations, violations of zoning ordinances or other restrictions applicable to the 300 N. Portion of the Trail Area.

13.13 The Town shall have determined, in its sole discretion, that it has funds available to it to accommodate the payment of the Trail Payment as set forth in Section 6.

13.14 The Town shall have determined that the transaction contemplated hereby complies with all of the requirements of I.C. 36-1-10.5 et seq., if determined necessary by it.

14. **Conditions to B&O's Performance.** In addition to other provisions of this Agreement, B&O's obligations hereunder are subject to satisfaction of the following conditions, unless waived in whole or in part by B&O:

14.1 The delivery of all instruments required of the Town in Section 20 below.;

14.2 The payment of the Trail Payment at the Closing.;

14.3 A stipulation shall be included in the deed such that the following items shall run with the land:

(1) title is not permitted to be sold, bartered or transferred by any other method to any other entity without the express written authorization of B&O and in the event the Town files for bankruptcy or ceases to exist in some form as a governmental unit, then title to the 300 N. Portion of the Trail Area would revert back to the B&O and be transferred back to B&O by quitclaim deed only; provided however Brownsburg's consolidation with and/or into another governmental unit shall not require such transfer back to B&O to be made. If B&O does not exist at the time of such a circumstance, then the title will be transferred to the Hendricks County Park Board.;

(2) ~~The~~ the 300 N. Portion of the Trail Area must be dedicated to pedestrian/bicycling and equestrian trail use.;

(3) ~~The~~ the design, style, functionality and purposes of the portions of the 300 N. Portion of the Trail Area and any future improvements that may be made by the Town, shall be done and maintained by the Town in a manner that is consistent with the aesthetics, utilitarianism and technical qualities of other portions of the B&O Trail as they are constructed and maintained in the future.;

(4) ~~The~~ the Town shall provide reasonable security for the trail users and trail property, as determined necessary by it, in its sole discretion for any portion of the 300 N. Portion of the Trail Area owned by the Town that is consistent with the strategies and approaches as may be implemented by the Town and as determined necessary by it in its sole discretion.;

(5) B&O shall have reasonable access to the 300 N. Portion of the Trail Area as reasonably necessary to fulfill its role in the development and maintenance of the extended trail corridor; provided however, B&O shall be responsible for all damage associated with or arising from its use.;

(6) ~~B&O~~ retains an access easement to fulfill B&O construction of the equestrian trail and the trailhead, subject to Paragraph 10 above. Any future easement grants over the 300 N. Portion of the Trail Area must comply with the provisions of Paragraph 10 above. ~~The~~ Town shall receive its pro-rata share of any payments received for the easements based on its percentage ownership of the trail area involved in the easement grant.;

(7) No motorized vehicles, except administrative, maintenance and emergency vehicles shall be permitted on the trail corridor.;

(8) The Town shall honor in perpetuity the Conservation Easement, "Occupancy Easement", environmental, use, and re-conveyance covenants to B&O, B&O's grantor, and B&O's grantor's grantor as required in the December 8, 2009 Quitclaim Deed 200931849 from the Hendricks County Indiana Board of Commissioners to B&O Trail Association, Inc., the November 23, 2009 Quitclaim Deeds 200931702 and

200931703 from CSX Transportation, Inc. to Hendricks County Indiana Board of Commissioners, and the May 27, 2009 CSX Transportation-Hendricks County Commissioners Purchase Sales Agreement.;

(9) The Town shall permit B&O to develop and construct a parallel equestrian trail on the 300 N. Portion of the Trail Area in the future subject to the terms and conditions of Paragraph 10 above; and

(10) Public access to the said transferred portions of the trail corridor shall be consistent with adjacent portions of the trail.

15. **Survey and Title Evidence and Other Deliverables.** Within twenty (20) business days after B&O issues the Notice of Completed Construction:

15.1 B&O shall at the request and expense of the Town, provide to the Town a commitment for an ALTA Form B Owner's Policy of Title Insurance in a form and issued by a title insurer acceptable to the Town, in an amount equal to the amount of the Purchase Price, insuring marketable title to the 300 N. Portion of the Trail Area free and clear of all matters normally excluded by the preprinted exceptions and of all liens, encumbrances, claims and interests except as are specifically permitted by this Agreement, and which shall include an endorsement insuring ingress and egress and proper zoning to accommodate the Town's proposed use of the area. B&O shall provide to the Town legible copies of all recorded instruments affecting the 300 N. Portion of the Trail Area and recited as exceptions to the Commitment.

15.2 The Town may, at the Town's expense, order a staked survey and shall comply with Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys which shall include an exact legal description of the 300 N. Portion of the Trail Area and shall reflect whether the property is located in a designated flood zone area and all other information necessary to issue the Owner's Policy as provided for in this Agreement. The Survey shall be certified to the Town, Kroger Gardis & Regas, LLP, the Title Company and any other party the Town reasonably requests.

15.3 The Town shall have an opportunity to review the title evidence requested above and legible copies of all recorded instruments affecting the 300 N. Portion of the Trail Area and recited as exceptions to the commitment. The Town may make prompt written objections to B&O within twenty (20) days after receipt of each such instrument. B&O shall have twenty (20) days from the date of such objections to cure the same. If the objections are not satisfied within such time period, the Town may either terminate this contract, waive the unsatisfied objections and close the transaction, or if the objection relates to an unsatisfied mortgage, lien, judgment or similar monetary encumbrance on the 300 N. Portion of the Trail Area, proceed to Closing and B&O shall satisfy the unsatisfied mortgage, lien, judgment or similar monetary encumbrance out of the Trail Payment and any other funds of B&O necessary to complete this obligation.

15.4 To the extent allowed and unless prohibited by the terms of such documents, B&O shall deliver to the Town copies of all environmental investigations and reports conducted by B&O, as well as the results of any soil, surface water and groundwater tests and studies related to or connected with the 300 N. Portion of the Trail Area and prepared by or at the direction of B&O at any time prior to B&O's issuance of the Notice of Completed Construction (the "Environmental Reports"), or assurances that no such environmental investigations or reports have been conducted by B&O. The Town shall not reveal the contents thereof to any third party other than the Town's attorneys and environmental consultants in accordance with the May 27, 2009 CSX Transportation-Hendricks County Indiana Board of Commissioners' purchase sales agreement.

15.5 To the extent allowed and unless prohibited by the terms of such documents, B&O shall deliver to the Town a complete schedule, and complete copies of all currently effective contracts or agreements relating to the ownership, operation or use of the 300 N. Portion of the Trail Area by which B&O or the area is bound.

15.6 B&O shall furnish to the Town all such additional information regarding the 300 N. Portion of the Trail Area as the Town may reasonably request and which B&O may obtain at no cost to B&O.

16. **Taxes and Assessments.** All taxes for any prior calendar year and remaining unpaid shall be paid by B&O. Current, non-delinquent taxes for the year of closing shall be prorated to the date of Closing. If the Closing shall occur before the tax rate is fixed for the then current year, the apportionment of taxes shall be upon the basis of the tax rate of the preceding year applied to the latest assessed valuation.

17. **Casualty Loss.** Risk of loss by damage or destruction to the 300 N. Portion of the Trail Area prior to the Closing shall be borne by B&O. In the event any such damage or destruction is not fully repaired prior to Closing, the Town, at its option, may either (a) terminate this Agreement, or (b) elect to close the transaction, in which event B&O's right to all insurance proceeds resulting from such damage or destruction shall be assigned in writing by B&O to the Town, or if there is no applicable insurance, the Town shall receive a credit at Closing.

18. **Sales Expenses.** B&O and the Town agree that all sales expenses are to be paid in cash prior to or at the Closing.

18.1 **B&O's Expenses.** B&O agrees to pay: all costs of releasing any existing mortgages or liens on the 300 N. Portion of the Trail Area and recording the releases; outstanding tax statements and tax payments as provided herein; preparation of Deed and B&O's Affidavit; Indiana Gross Income Tax (if any); and expenses stipulated to be paid by B&O under other provisions of this Agreement.

18.2 **Town's Expenses.** The Town agrees to pay: expenses for survey; the costs of an insured closing; recording expenses for the Deed and Affidavit; the costs of its owner's title policy and any endorsements it desires, the cost of the inspections performed by the Town under this Agreement and expenses stipulated to be paid by the Town under other provisions of this Agreement.

19. **Attorneys' Fees and Remedies.** Each of the parties hereto shall have responsibility for their own legal expenses relating to the Annexation and the Closing of the transaction contemplated by this Agreement. Any party to this Agreement who is the prevailing party in any legal or equitable proceeding against any other party to this Agreement brought under or in relation to this Agreement or the transaction contemplated hereby shall be additionally entitled to recover Court costs and reasonable attorneys' fees from the non-prevailing party.

20. **Duties of B&O at Closing.** B&O shall deliver to the Town at the Closing, at B&O's sole cost and expense (except for Paragraph 20.4), the following items and undertake the following obligations:

20.1 A duly executed and acknowledged Quitclaim Deed conveying good and indefeasible title in fee simple to all of the 300 N. Portion of the Trail Area including all of the Trail Improvements, free and clear of any and all liens, encumbrances, conditions, easements, assessments, reservations and restrictions, except as otherwise permitted herein which deed shall be in recordable form and subject to the list of restrictions set forth in item 14.3, and a current Vendor's Affidavit.

20.2 A Bill of Sale that may be required to facilitate the transfer of any of the Trail Improvements as set forth above.

20.3 If applicable and required by the Town, an assignment of leases, prepaid rents, security deposits, licenses and permits, maintenance, management, or other contracts, warranties or guaranties relating to the 300 N. Portion of the Trail Area and effective as of the transfer of possession, all duly executed by B&O.

- 20.4 At the Town's expense, an Owner's Policy of Title Insurance and complying with this Agreement dated as of Closing, free of all exceptions (including standard exceptions) except for those items specifically allowed herein or otherwise accepted by the Town.
 - 20.5 Evidence of its capacity and authority for the closing of this transaction, including duly executed and certified resolutions.
 - 20.6 Certification establishing that no federal income tax is required to be withheld under the Foreign Investment and Real Property Tax Act, or to consent to withholding of tax from the proceeds of sale as required, unless it is established that the transaction is exempt.
 - 20.7 A Disclosure Document if required by the Indiana Responsible Property Transfer Law.
 - 20.8 A Disclosure of Sales Information Form (State Form 46021).
 - 20.9 A Closing Certificate certifying that all of B&O's representations and warranties contained herein are true and correct as of the date of Closing.
 - 20.10 B&O shall, at no expense to B&O, assist the Town to acquire Certificates that may be recorded with the Hendricks County Recorder's Office by the Town from the owners of the Fence Encroachment 1, the Fence Encroachment 2 and the Fence Encroachment 3 certifying and agreeing that: (1) the owners waive any and all claims to the 300 N. Portion of the Trail Area, including, but not limited to any claims for adverse possession or any other interest; and (2) that prior to the transfer of any ownership of their respective property that such encroachments shall be completely removed from the 300 N. Portion of the Trail Area.
 - 20.11 All other documents reasonably necessary to close this transaction in accordance with the terms of this Agreement.
21. **Duties of the Town at Closing.** The Town shall deliver the following, at the Town's sole cost and expense at the Closing:
- 21.1 The Trail Payment of Seventy Thousand and 00/100 Dollars (\$70,000.00) in readily available funds.
 - 21.2 Evidence of its capacity and authority for the closing of this transaction, as required.
 - 21.3 A Disclosure of Sales Information Form (State Form 46021).
 - 21.4 All other documents necessary to close this transaction in accordance with the terms of this Agreement.
22. **Approvals of Town.** Payment of the Trail Payment is subject to the availability of an adequate appropriation with all necessary governmental approvals as required by Indiana law, and the Town shall use its best efforts to obtain all such approvals prior to the Closing.
23. **Maintenance and Improvements of the Trail Area.** B&O shall at all times be responsible for the ongoing maintenance and repair of the 300 N. Portion of the Trail Area. In the event the Town elects to accept title to the 300 N. Portion of the Trail Area as set forth herein, the Town shall assume the maintenance obligations for that portion of the Trail Area only and B&O shall continue to remain responsible for the maintenance and other ownership obligations for all portions of the Trail Area outside of the 300 N. Portion of the Trail Area. The Town shall not have any obligations to construct and/or take any action to improve any portion of the 300 N. Portion of the Trail Area, but agrees that if it elects, in its discretion, to make any improvements to the 300 N. Portion of the Trail Area that it will provide notice of the proposed improvements to B&O prior to such improvements being made.
24. B&O agrees to request permission for events to be held on the trail consistent with the Town's event application process so long as the Town agrees to waive any fees for use of the 300 N. Portion of the Trail Area for the events.

25. **No Right to Mortgage the 300 N. Portion of the Trail Area.** B&O shall not encumber the 300 N. Portion of the Trail Area with a mortgage or any lien.
26. **Use of the 300 N. Portion of the Trail Area.** B&O hereby agrees that the 300 N. Portion of the Trail Area shall be open to the public, including but not limited to the citizens of the Town, and available for park and recreational trail type purposes, except as otherwise set forth in Paragraph 11 above.
27. **Condemnation.** If prior to the Closing condemnation proceedings are commenced against any portion of the 300 N. Portion of the Trail Area, the Town may, at its option, terminate this Agreement by written notice to B&O within ten (10) days after the Town is advised of the commencement of condemnation proceedings, or the Town shall have the right to appear and defend in such condemnation proceedings, and any award and condemnation shall, at the Town's election, become the property of B&O and reduce the Trail Payment by the same amount or shall become the property of the Town, and the Trail Payment shall not be reduced.
28. **Binding Effect and Law.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal representatives, successors and assigns. This Agreement constitutes the sole and only Agreement of the parties hereto and supersedes any prior understandings or writings or oral Agreements between the parties respecting the transaction and cannot be changed, except by their written consent, and shall be construed under and in accordance with the laws of the State of Indiana. Time is of the essence of this Agreement.
29. **Indemnity; No Joint Venture or Partnership.** B&O covenants and agrees at its expense to pay and to indemnify and save the Town and its officers and agents harmless of, from and against, any and all claims, damages, demands, expenses and liabilities relating to bodily injury or property damage resulting directly or indirectly from B&O's activities with respect to the 300 N. Portion of the Trail Area, the Trail Improvements and/or the construction or maintenance thereof. Nothing contained herein shall be construed as creating a joint venture between the Town and B&O.
- The Town covenants and agrees at its expense to pay and to indemnify and save B&O and its officers and agents harmless of, from and against, any and all claims, damages, demands, expenses and liabilities relating to bodily injury or property damage resulting directly or indirectly from the Town's activities with respect to the 300 N. Portion of the Trail Area, the Trail Improvements and/or the construction or maintenance thereof.
30. **Survival and Additional Indemnity.** B&O and the Town, and each of them jointly and severally, shall each indemnify and hold the other harmless from and against all costs and damages (including attorney fees and court costs) incurred as a result of any breach of any representation, warranty or covenant by B&O or the Town, as applicable. All representations, warranties, covenants and indemnities set forth in this Agreement and all rights, duties and obligations of the parties hereto shall survive the Closing of this transaction and the passing of title to, or interest in, the 300 N. Portion of the Trail Area.
31. **Severability.** In the event any one or more of the provisions contained in this Agreement 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 hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.
32. **Notices.** Any notices to be given pursuant to this Agreement shall be deemed sufficiently given when in writing and (a) actually served on the party to be notified, or (b) deposited in the United States Mail by certified or registered mail, with written acknowledgement of receipt by the addressee postage prepaid, or (c) by recognized overnight courier service with written acknowledgement of receipt by the addressee to the address, or to such other address as may have been specified by either party to this Agreement to the other in writing in accordance with this Section:

32.1 **If to Town:**

Phil Parnin, Director of Parks and Recreation
Dale A. Cheatham, Town Manager
Town of Brownsburg
61 N. Green Street

Annexation and Trail Agreement (Red TAL 3 22 11 to Parnin 3 15 11).doc

Brownsburg, IN 46112

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With copy to:

Tricia A. Leminger, Esq.
KROGER GARDIS & REGAS, LLP
111 Monument Circle, Suite 900
Indianapolis, Indiana 46204-5125

32.2 If to B&O:

Diana M. Virgil, President
B&O Trail Association, Inc.
6038 Walnut Court
Brownsburg, Indiana 46112

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With copy to:

Joshua Brewster, Vice President
B&O Trail Association, Inc.
1729 Pele Place
Indianapolis, Indiana 46214

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33. **Assignment.** Notwithstanding any other provision of this Agreement, the Town shall have the right with B&O's prior written consent, which shall not be unreasonably withheld, prior to Closing, to assign this Agreement, and its rights and interest hereunder and in the 300 N. Portion of the Trail Area, in whole or in part, to any person or entity at any time; provided, however, that no such assignment shall relieve or release the Town of or from any of its liabilities and obligations hereunder. The Town shall also have the right, with B&O's prior written consent, which consent shall not be unreasonably withheld, to designate a nominee to take title to all or any part of the 300 N. Portion of the Trail Area at Closing.

34. **Recording.** A memorandum of this Agreement may be recorded by the Town for the 300 N. Portion of the Trail Area in its sole discretion and at its cost and expense to put third parties on notice of B&O's obligations hereunder to complete the Annexation of the 300 N. Portion of the Trail Area and to transfer title of the 300 N. Portion of the Trail Area and all related Trail Improvements to the Town.

35. **Authority.** Each party hereby represents and warrants to the other that it has full power and authority to enter into this Agreement and to carry out the terms hereof, that the same has been duly authorized and approved by the appropriate Boards for each party, and that the person executing the same on behalf of each respective party has been duly authorized in the name and on behalf of the respective party.

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Dated: _____

TOWN:

TOWN OF BROWNSBURG, INDIANA,
an Indiana political subdivision

By: _____
Matthew S. Bowles, President, Town Council

By: _____

James Mangus, President, Board of Parks
and Recreation

B&O:

B&O TRAIL ASSOCIATION, INC., an Indiana
non-profit corporation

By:

Diana M. Virgil, President, B&O Trail
Association, Inc. _____

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EXHIBIT "A"

(Insert Identification of the "Trail Area" from S.R. 267 to Raceway Road)

EXHIBIT "B"

(Insert Identification of the "300 N. Portion of the Trail Area" from S. R. 267 to County Road 300 N.)

EXHIBIT "C"

(Insert Title Exceptions from the latest draft of the Title Policy)

EXHIBIT "D"

(Insert Designation of Wetlands Area)