

RESOLUTION NO. 20 , 2023

**A RESOLUTION AUTHORIZING THE CITY MANAGER TO ENTER INTO
A CONTRACT WITH YARD GROUP, LLC FOR PROFESSIONAL PLANNING
SERVICES FOR THE COMPREHENSIVE COMMUNITY PLAN**

WHEREAS, Section 9.03 of Article IX of the Charter of the City of Montgomery, Ohio, provides the method under which the City Manager shall make certain purchases and enter into contracts on behalf of the City; and

WHEREAS, it is appropriate to provide contract authority for professional services that are generally not subject to competitive bidding but will exceed a total of Fifty Thousand Dollars (\$50,000) in a calendar year; and

WHEREAS, the Administration has requested Letters of Interest from planning firms which may be interested in assisting the City to update the City's Comprehensive Community Plan; and

WHEREAS, multiple firms submitted responses which were reviewed by an Advisory Committee with the Administration, which included the City Staff and interested City volunteers; and

WHEREAS, YARD Group, LLC submitted a Letter of Interest which was reviewed and recommended for approval by the Advisory Committee; and

WHEREAS, it is the desire of the Council of the City of Montgomery to enter into a contract with YARD Group, LLC to perform planning and drafting services for the City in conjunction with updating the Comprehensive Community Plan.

NOW THEREFORE, BE IT RESOLVED by the Council of the City of Montgomery, Hamilton County, Ohio, that:

SECTION 1. The City Manager is hereby authorized to enter into a contract with YARD Group, LLC to assist the City in developing and drafting an updated Comprehensive Community Plan in the substance and form of the attached Professional Services Agreement in an amount not to exceed \$150,000.

SECTION 2. The City Manager is authorized to pay YARD Group, LLC consistent with the Statements of Work as a part of the attached proposed contract.

SECTION 3. This Resolution shall be in full force and effect from and after its passage.

PASSED: June 7, 2023

ATTEST: Connie M. Gaylor
Connie M. Gaylor, Clerk of Council

Craig D. Margolis
Craig D. Margolis, Mayor

APPROVED AS TO FORM:

Terrence M. Donnellon
Terrence M. Donnellon, Law Director

PROFESSIONAL SERVICES AGREEMENT

This Professional Services Agreement (the "Agreement"), is effective as of 3/31, 2022, and is made by and between YARD Group LLC, a Kentucky limited liability company, d/b/a YARD & Company, with a business address of P. O. Box 1058, Cincinnati, Ohio 45201 ("Consultant"), and **City of Montgomery** with a business address of 10101 Montgomery Road, Cincinnati, Ohio 45242, a municipality in the State of Ohio ("Client"). Consultant and Client are sometimes individually referred to as a "Party" or collectively as the "Parties."

Recitals

- A. Consultant is a consulting firm providing specialized strategic urban planning and design services to various clients.
- B. Consultant and Client desire to enter into an agreement to set forth the terms and conditions pursuant to which Consultant may provide services (the "Services") or produce certain Deliverables (as defined below) to Client.
- C. Consultant is willing to perform the Services and/or produce the Deliverables set forth herein for Client under the terms and conditions set forth in this Agreement.

Terms

In consideration of the mutual promises set forth in this Agreement, Consultant and Client, intending to be legally bound, agree and covenant as follows:

1. Duties: Compensation. Consultant shall provide the Services as set forth in one or more Statements of Work (each an "SOW") which shall be executed by both Parties. Each SOW shall set forth the Services to be provided, the written materials, if any, to be produced by Consultant or its subcontractors and provided to Client in connection with the performance of the Services (the "Deliverables"), the duration of the applicable engagement and the fees to be paid by Client to Consultant. In the event of a conflict between the terms as set forth in an SOW and the terms of this Agreement, the SOW shall control.

The Parties may subsequently agree to have Consultant provide additional Services and/or Deliverables for additional compensation and, in each such event, the Parties shall enter into additional sequentially numbered SOW's which shall be subject to the terms of this Agreement.

Consultant will invoice client on a periodic basis for compensation and reimbursement due from Client to Consultant pursuant to a SOW and this Section 1 and such invoices shall be payable within thirty (30) days of Client's receipt of such invoice. Any amount not paid when due shall be subject to a charge of 1.5% per month or the highest rate permitted by applicable law, whichever is less, determined and compounded daily from the due date to the date actually paid. Client shall reimburse Consultant for all costs and expenses, including reasonable attorney fees, incurred by Consultant to collect any amount that is not paid when due.

Client shall reimburse Consultant for all reasonable and necessary expenses incurred by Consultant in the performance of Consultant's duties under this Agreement. Expenses shall be in addition to the fee.

2. Ownership. All Deliverables provided by Consultant hereunder shall be owned by Consultant. Upon receipt of full payment as required under each applicable SOW, Consultant grants to Client an irrevocable, perpetual, non-exclusive, royalty free, worldwide license to use, execute, reproduce, display, perform, distribute copies of, and prepare derivative works of the Deliverables and or any part or parts thereof.

3. Term: Termination. This Agreement shall commence upon execution by both Parties and shall continue for a period of one year, unless otherwise provided in an SOW (the "Initial Term"). Thereafter, this Agreement shall automatically renew upon these same terms and conditions for successive thirty-day period (each a "Renewal Term"). The Initial Term and each Renewal Term are collectively referred to as the Term. Notwithstanding the foregoing, either Party may terminate this Agreement for any reason, with or without cause, by providing the other with at least thirty (30) days' prior written notice. Termination of this Agreement shall not, however, affect any SOW executed prior to such termination and each such SOW shall remain in effect and subject to the terms of this Agreement for the duration as set forth in each such SOW. Any term or

provision of this Agreement, including, without limitation, those relating to confidentiality, indemnification, limitation of liability, ownership of Deliverables, which by their nature extend beyond the expiration or termination of this Agreement, shall remain in effect and survive the termination or expiration hereof.

4. Confidentiality. In connection with entering into and performing under this Agreement, each Party may receive or have access to commercially valuable technical and non-technical confidential or proprietary information of the other Party, including information in whatever form, relating to the business of such Party that is not generally known or available to others, including but not limited to, trade secrets, know how, customer lists, pricing strategies, payment terms, marketing and business plans, information concerning such Party's vendors, and such Party's contemplated plans, strategies and prospects ("Confidential Information"). In addition to the foregoing, each Party recognizes that the other Party may have received, and in the future may receive, confidential or proprietary information of a third party ("Third Party Confidential Information"). Any Third-Party Confidential Information disclosed by one Party to the other Party shall be deemed to be the disclosing Party's Confidential Information. Except as expressly and unambiguously allowed herein, the receiving Party will hold in confidence and not disclose any Confidential Information of the disclosing Party and will similarly bind its employees and agents. Each Party acknowledges and agrees that any Confidential Information received or obtained from the other Party will be the sole and exclusive property of the other Party and may not be used, disseminated or disclosed except as may be necessary to perform the obligations required under this Agreement or as may be required by law. If disclosure is required by law, then, to the extent permitted by law, the Party required to disclose Confidential Information will provide notice to and shall reasonably cooperate with the other Party (at the other Party's request and expense) so that the other Party may preserve the confidentiality of the Confidential Information to the extent reasonably possible. Notwithstanding the foregoing, Confidential Information shall not include, and neither Party will be liable for disclosure of, any information received by the receiving Party under this Agreement if the information: (a) is or becomes generally available to or known to the public through no wrongful act of the receiving Party; (b) was previously known by the receiving Party through no wrongful act of the receiving Party; (c) was independently developed by the receiving Party without reference to the Confidential Information; or (d) was lawfully disclosed to the receiving Party by a third party under no obligation of confidentiality to the other Party.

5. Limitation of Liability. Consultant shall not be liable to Client for any special, consequential, incidental, punitive or indirect damages, losses, costs or expenses of any kind or any lost or imputed profits arising out of this Agreement or its termination; however caused, and whether based in contract, tort (including negligence), products liability or any other theory of liability regardless of whether Consultant has been advised of the possibility of such damages, losses, costs or expenses. Client waives any claims that these exclusions deprive it of an adequate remedy. Except for liabilities resulting from the indemnification obligations set forth above, Consultant's liability to Client shall not exceed the fees paid or payable to Consultant under this Agreement within the one-year period immediately preceding the date that the alleged wrongful act first occurred.

6. Representations and Warranties. Consultant and Client represent and warrant to each other that: (i) it has all necessary right, power and authority to enter into this Agreement and each SOW and to perform its obligations under each, (ii) nothing contained in this Agreement or any SOW or required by such Party's performance thereunder will place such Party in breach of any other contract or agreement to which it is bound or violate any applicable law and (iii) the performance of this Agreement and each SOW shall not infringe upon or violate the copyrights or trade secret rights of any third party. Each person executing this Agreement or any SOW in a representative capacity represents and warrants that he or she is authorized to act on behalf of the represented entity and to bind such entity to the terms and conditions set forth herein. Except as expressly set forth in this Section 7, Consultant does not make, and specifically disclaims, any representations or warranties, express or implied, or arising by custom or trade usage, including the warranties or merchantability, fitness for a particular purpose, non-infringement, quality, accuracy or that the Services or Deliverables will generate certain results. Client hereby waives any claims that these exclusions deprive Client of an adequate remedy.

7. Independent Contractor Status. Nothing contained in this Agreement shall be deemed to create a partnership or joint venture between either of the parties to this Agreement, it being expressly understood that each Party shall act as and be deemed to be as independent contractors. Consultant understands and agrees that Client will not withhold on behalf of Consultant pursuant to this Agreement any sums for income tax, unemployment insurance, social security, or any other withholding pursuant to any law or requirement of any governmental body relating to Consultant or make available to Consultant any of the benefits afforded to employees of Client and that all such payments, withholding, and benefits, if any, are the sole responsibility of Consultant.

8. Notices. Any notice, communication or statement relating to this Agreement shall be in writing and deemed effective: (a) upon delivery when delivered in person; (b) upon transmission when delivered by verified electronic mail or facsimile; or (c) when delivered by registered or certified mail, postage prepaid, return receipt requested, or by nationally-recognized overnight courier service, to each Party at the address set forth in the preamble of this Agreement.

9. Force Majeure. Neither Party shall be deemed in default of this Agreement or any SOW to the extent that performance of its obligations or attempts to cure any breach are delayed or prevented by reason of any act of God, fire, natural disaster, accident, riots, acts of government, shortage of materials or supplies, pandemic or any other cause beyond the reasonable control of such Party; provided, that the Party whose performance is affected by any such event gives the other Party written notice thereof within ten (10) working days of such event or occurrence.

10. Construction of Agreement. Each Party and its counsel have participated fully in the review and revision of this Agreement. Any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement.

11. Amendments and Waivers. The failure of either Party to insist upon or enforce strict performance by the other Party of any provision of this Agreement or any SOW or to exercise any right under this Agreement or any SOW shall not be construed as a waiver or relinquishment to any extent of such Party's right to assert or rely upon any such provision or right in that or any other instance, and the same shall be and remain in full force and effect. No change, amendment or modification of any provision of this Agreement or any SOW shall be valid unless in writing signed by both parties.

12. Entire Agreement. This Agreement and each SOW embodies the entire understanding between the parties pertaining to the subject matter hereof and supersedes all previous and contemporaneous agreements, whether oral or written

13. Governing Law, Jurisdiction and Attorney Fees. The rights and obligations of the parties under this Agreement shall be governed by and construed under the laws of the State of Missouri without reference to conflict of law principles. Each Party consents to the exclusive personal jurisdiction of the state and federal courts located in Greene County, Missouri. In any legal proceeding relating to a dispute arising out of or relating to this Agreement, the prevailing Party shall be entitled to an award of attorney fees and costs.

14. Waiver of Trial by Jury. Each Party, to the extent permitted by law, knowingly, voluntarily, unconditionally and intentionally waives its right to a trial by jury in any action or legal proceeding arising out of or relating to this Agreement or any SOW.

15. Opinion of Probable Cost. Any opinion of probable cost provided by Consultant is made on the basis of information available to Consultant and on Consultant's experience and qualifications. However, as Consultant has no control over the cost of labor, materials, equipment or services furnished by third parties or over market conditions, Consultant does not guaranty that actual costs will not vary from opinions of probable cost and, if such costs are reimbursable from Client to Consultant, Client agrees to reimburse Consultant on the basis of actual costs.

16. Subcontractors. Client understands that Consultant may, in its sole and absolute discretion, hire outside third-party(ies) to perform part or all of the Services contained within the SOW(s) (each, a "Sub-contractor"). Every Sub-contractor shall agree to abide by the terms of this Agreement, provided, however, that Consultant shall remain liable for the performance of the Services and any Deliverables hereto

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the _____ day of _____, 2023.

YARD Group LLC

[Client]

(Signature of Authorized Officer)

(Signature)

(Printed Name)

(Printed Name)

(Title)

(Title)

(Date)

(Date)

Statement of Work #

This Statement of Work and the exhibits attached hereto are a part of and incorporated into that certain Professional Services Agreement (the "Agreement") between YARD Group LLC, a Kentucky limited liability company, d/b/a YARD & Company ("Consultant"), and City of Montgomery, a municipality in the State of Ohio ("Client").

Services, Deliverables & Term: See Exhibit A.

Compensation: See Exhibit B.

Consultant and Client hereby agree to the terms of this Statement of Work, including the exhibits attached hereto and incorporated herein, and Consultant is hereby authorized to begin work in accordance with the Agreement and the terms contained herein.

YARD Group LLC

[Client]

(Signature of Authorized Officer)

(Signature)

(Printed Name)

(Printed Name)

(Title)

(Title)

(Date)

(Date)

EXHIBIT A

Services, Deliverables & Term

EXHIBIT B

Compensation