

**DEVELOPMENT AGREEMENT**

**between**

**CITY OF DULUTH**

**and**

**UNIQUE OPPORTUNITIES DULUTH LLC**

**Dated as of \_\_\_\_\_, 2021**

## **DEVELOPMENT AGREEMENT**

THIS AGREEMENT, effective as of the date of attestation hereof by the City Clerk, by and between the City of Duluth, a municipal corporation under the laws of the State of Minnesota ("City"), and Unique Opportunities Duluth LLC, a limited liability company created and existing under the laws of the State of Minnesota ("Developer").

### **RECITALS**

WHEREAS, Developer proposed to plat and develop a 19-acre parcel of land located on parcels 010-2710-04170 and 010-2710-04195 on West Arrowhead Road in Duluth, Minnesota, with the complete legal description attached hereto as Exhibit A (the "Property"); and

WHEREAS, Developer desires to conduct site development activities and develop on the Property of the hereinafter-described Project for Three (3) Multi-family structures (approximately 275 dwelling units), with a public street accessed from one vehicular connection to Stanford Avenue, a public sidewalk in the existing easement for Stanford Avenue from West Arrowhead Road to West Marble Street, private storm water management facilities, public utilities, and certain other site improvements (the "Project"); and

WHEREAS, in furtherance of the Development, Developer applied to City for approval of a preliminary plat and a final plat to divide the Property into four separate lots and one outlot identified on the Plat of Sam Herzogs Arrowhead Acres, as hereinafter defined; and

WHEREAS, on August 10, 2021, the City Planning Commission approved the Plat subject to certain conditions, one of which required Developer to enter into a Development Agreement with City; and

WHEREAS, Developer has agreed to dedicate to the public for public use the drainage, utility, and right of way easements shown on the Plat, to construct the Road Improvements, sidewalks and the stormwater facilities and the public utilities as described in the hereinafter-referenced MOU; and

WHEREAS, Developer has agreed to make certain other improvements to the Property and contributions to the City as a condition attached to the City's approval of the Plat;

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements hereinafter contained, the parties covenant and agree for themselves and their successors and assigns as follows:

### **AGREEMENT**

1. Definitions. The following term and phrases shall have the meanings hereinafter ascribed to them:
  - A. Boulevard Trees: shall mean the trees as shown on the Plans that are to be planted adjacent to the Road Improvements.
  - B. Easements shall mean (i) a 33 foot wide road and utility easement along the westerly side of the Plat from Arrowhead Road to West Marble Street, (ii) the road and utility easement for Eischen Court, (iii) a 10 foot wide road and utility easement along the northerly side of the Plat, and (iv) a 20 foot wide utility easement lying within Lots 1 and 3, Block 2, all as shown on the plat.
  - C. Lots: shall mean the lots as shown and legally described on the Plat.
  - D. Memorandum of Understanding or MOU: shall mean that Memorandum of Understanding entered into between the City's City Engineer and Developer for the construction and implementation of the Required Improvements.
  - E. Pedestrian Easement: shall mean the pedestrian easement lying over and above the platted utility easement within Lots 1 and 3, Block 2 of the Plat.
  - F. Plans: shall mean the plans and specifications for the construction and installation of all elements of the Required Improvements approved by the City Engineer and incorporated into the MOU.
  - G. Plat: shall mean the Plat of Sam Herzogs Arrowhead Acres on file in the office of the County Recorder for St. Louis County, Minnesota.
  - H. Project: Shall mean the development on the Property of Three (3) multi-family residential structures containing approximately 275 units and the Required

Improvements, all as shown on the Plat and the Plans

- I. Property: shall mean that property referenced as tax parcels 010-2710-04170 and 010-2710-04195 and legally described on Exhibit A attached hereto and made a part hereof.
- J. Required Improvements: shall mean the Road Improvements, Sidewalks, public utilities and the implementation of the Stormwater Management Plan, all in accordance with the MOU.
- K. Road Improvements: shall mean the construction of the public roads Eischen Court and Stanford Avenue from Eischen Court to Arrowhead Road to City Engineering standards, all as shown on the Plans.
- L. Stormwater Improvements: shall mean the Stormwater Management Plan and the drainage easements as shown on the Plans.
- M. Sidewalks: shall mean all public sidewalks as shown on the Plans including the sidewalk in the east side of the Stanford Avenue street easement from Arrowhead Road to West Marble Street and the sidewalk on both sides of Eischen Court from Stanford Avenue to and including the cul du sac.
- N. Signal Improvements: shall mean the design, construction and installation of a traffic signal at the intersection of Stanford Avenue and Arrowhead Road including all equipment, turn lanes and roadway modifications related thereto.
- O. Stormwater Management Plan: shall mean that Plan conforming to the requirements of § 50-18.1 E of the Duluth City Code, 1959, as amended, as such plan is approved as part of the MOU.
- P. Trail: shall mean an eight (8') foot wide bituminous trail located in the Pedestrian easement

2. Developer's Duty and Compliance. Development of the Lots must be in compliance with all applicable ordinances, rules, regulations and laws of the City and State of Minnesota. Developer shall be responsible for obtaining all approvals and permits of any kind required to implement the Project from any governmental agency having jurisdictions with regard thereto, including but not limited to roadway access permits, wetland permits, storm water management permits, utility construction permits,

fill and grading permits, erosion and sediment control permits, and building permits.

3. Recording of Plat: Prior to the issuance of any permits needed to implement development of the Property in the Plat as permitted under the Plat and prior to the commencement of any construction work of any kind, including but not limited to site work having the purpose of implementing the development of said Lots, Developer shall have caused to be recorded with the St. Louis County Recorder the fully-executed Plat and shall have:

A. Recording: provided to the City's Director of Planning and Economic Development (the "Director") and the City Engineer copies of Plat along with evidence of recording of the Plat; City agrees that when requested to execute the Plat in the form approved by the Planning Commission, it shall expeditiously so execute it.

B. Wetlands Fencing: Provided photographic evidence documenting that construction fencing has been erected around those wetlands which are to be preserved as required pursuant to Planning Commission File No. \_\_\_\_\_.

C. Tree Fencing: Provide photographic evidence that fencing has been erected around those trees on the Property to be preserved as required under Planning Commission File No. \_\_\_\_\_ to the drip line of said trees.

4. Pre-conditions to Issuance of Building Permits: Developer agrees that prior to the issuance of any building permits for the construction of any structure on the Property, the following shall have been completed:

A. Recording of Agreement: Developer shall have caused this Agreement to have been recorded against the Property in the Office of the County Recorder and Registrar of Titles for St. Louis County, Minnesota and shall have caused evidence of such recording to have been presented to the Director.

B. Plans: Developer shall have prepared and filed with the Director Plans which have been approved by the City Engineer.

C. Tree Replacement Plan: Developer shall have provided a Tree Replacement Plan conforming to the requirements of Section 50-25.9 of the

Code which shall have been completed, filed with the Director and approved by the Director and the City Forester. Developer further agrees to complete all tree replacement in accordance with the Plan by no later than \_\_\_\_\_.

D. MOU: Developer shall have entered into MOU in the form acceptable to the City Engineer committing to the design and construction of the Required Improvements Said MOU shall specifically provide that the City will not accept as “public” any of the Required Improvements or unless all such improvements described in the MOU have been completed to the satisfaction of the City Engineer .

E. Improvement Security: Developer shall have provided financial security in the form of an irrevocable Letter of Credit, cash escrow, or such other form as is acceptable to the Director in the amount of not less than \$400,000 to guarantee completion of construction of the Required Improvements in conformance with the requirements of this Agreement and the MOU, and authorizing the Director to exercise said security and to use the proceeds to complete construction of the Required Improvements if the Developer has not completed such Public Improvements before December 31, 2022 and the Trail upon completion of the 3<sup>rd</sup> apartment building on the Property or when the Director determines that development in the area warrants such completion, whichever is later..

## 5. Tree Planting

A. Boulevard Trees No later than the date of the issuance by the City Building Official of the Certificate of Occupancy, as provided for in the Minnesota State Building Code, for the first housing unit constructed on the Property, the Developer shall have completed planting of the Boulevard Trees in accordance with the Plan. Developer further agrees that, in the event that any Boulevard Trees so do not survive at least one year after planting, Developer will replace any such trees with similar trees at its own cost.

B. Tree Replacement Plan Developer agrees that, no later than December 31, 2025, Developer shall have planted all trees as provided for in the Tree Replacement Plan in accordance with that Plan and that, in the event that any

such trees so do not survive at least one year after planting, Developer will replace any such trees with similar trees at its own cost.

6. Stanford Improvements and Signal Improvements; Assessments.

A. Construction of Signal Improvements: Developer agrees in the event that the City, in the exercise of its unfettered discretion, determine to implement or construct the Stanford Improvements or the Signal Improvements or both, Developer shall grant any and all approvals that should be needed for such implementation or construction, including the granting of easements needed for such work at no cost to City or County, and further agrees that the costs thereof may be Assessed against the entirety of the Property as hereinafter set forth.

B. Benefits of and Payment for the Stanford Improvements and Signal Improvements: Developer agrees that the construction of the Stanford Improvements and Signal Improvements will constitute public improvements which confer special benefits accruing to the Property which equals or exceeds the cost thereof to be assessed against the Property as set forth in sub paragraph C below. It is hereby stipulated and agreed that the value of the benefits conferred upon the Property are equal to or exceed the amounts to be assessed against Property as set forth in said subparagraph, without reference to any benefits conferred upon other benefitted properties.

C. Developer Agrees to Assessment: Because the Developer agrees that the value of the benefits to the Property arising out of the construction of the Stanford Improvements or Signal Improvements or either of them equals or exceeds Developer's anticipated costs thereof, Developer agrees at any time to accept and pay an assessment levied against the Property by City to defray the cost to the City of the Stanford Improvements and Signal Improvements as set forth below. Said Assessment or Assessments shall run for a term of fifteen (15) years at the City's standardized rate for special assessments then in effect which rate is currently estimated to be \_\_\_\_\_ percent per annum.

- i. Stanford Avenue South of Herzog Drive: If Stanford Avenue is improved south of Herzog Circle as shown on the Plans and the City

determines to assess any portion of the costs of such improvements, any such assessment shall be assessed in accordance with the Assessment Procedure

- ii. Signal Improvements—Development: If Signal Improvements occurs at the intersection of Stanford Avenue and Arrowhead Road, Developer agrees to accept an assessment against the Property of Fifty (50%) Percent of the cost of designing and constructing said Signal Improvements, which shall also include the costs of any related modifications to the intersection of Stanford Avenue and Arrowhead Road required by St. Louis County provided, however, that if the Director in the exercise of their discretion determines that the need for said signal improvement is in significant part attributable to development occurring on the north side of Arrowhead Road adjacent to the Property, the amount to be assessed against the Property shall be Twenty-five (25%) of said cost. Said assessment shall be levied against the Property in accordance with standard City assessment processes.

7. Developer's Duty and Compliance. Development of the lots created as part of the subdivision must be in compliance with all applicable ordinances, rules, regulations and laws of the City and State of Minnesota. Developer shall be responsible for obtaining all relevant governmental approvals and building permits required.

8. Financing. Developer assumes all risks and agrees to bear all costs and fees related to the design and construction of all roads, sidewalks, utilities including implementation of the storm water management plan, pathways and other public improvements as shown on the Plat.

9. Property Conveyance and Easements. Developer agrees to convey and to dedicate to the City in trust for the general public the Easements. Developer also agrees to convey and dedicate to the City in trust for general public the Pedestrian Easement.



Developer warrants and represents to City that it has marketable fee title to the Property free and clear of all mortgages, liens and other encumbrances except for any mortgages existing at the time of the execution of this Agreement with regard to which the Mortgagee holder thereof consents to this agreement and agrees to subordinate its mortgage to this Agreement and that it has the right to convey said property and to dedicate the Easements and Pedestrian Easement to the City free and clear of any encumbrances or shall have established to the satisfaction of the Director, in the exercise of his or her sole discretion, that Developer has the right to so convey and dedicate such interests.

10. Sidewalk and Trail Maintenance: Developer shall be solely responsible for the maintenance, repair and reconstruction, as necessary, including snow removal, of all Sidewalks and Trail constructed within the Plat pursuant to this Agreement.

11. Inspections. All Required Improvements shall be made in accordance with applicable City construction design standards and specifications and shall be subject to the inspection by and approval of the City. Developer hereby grants City, its agents, employees and contractors a limited license to enter the Property and perform all inspections which the Director in the exercise of his or her reasonable discretion deems appropriate in connection with this Agreement.

12. Developer's Default. In the event Developer fails to comply with or perform any terms, conditions, undertakings, or obligations under this Agreement, which is not cured following thirty (30) days' written notice from the City, or such longer period of time as may be reasonably required to cure such default provided Developer is proceeding with diligence to cure such default, the parties hereto agree that no award of damages to City could constitute an adequate remedy for such default, Therefore, City may, in addition to and not in lieu of any other remedies or rights available to it by law or equity:

- A. Institute an action for specific enforcement to compel Developer to perform any or all of its obligations under this Agreement. Developer acknowledges that the rights of City to performance of the obligations of Developer pursuant

to this Agreement are special and unique, and that, in the event Developer violates, fails or refuses to perform any condition, agreement or provision herein, City may be without an adequate remedy at law.

B. At its option, draw on the security described in Section 4D above and perform the work described in Section 8 above, provided the Developer is first given written notice of the default not less than seven (7) days in advance. This Agreement is a limited license for the City to enter onto any portion of the Property necessary to perform said work, and it shall not be necessary for the City to seek a Court order for permission to enter the land.

C. Refuse to issue building permits for construction on the Project.

D. Exercise any other remedy available to the City in law or in equity. No remedy conferred in this Development Agreement is intended to be exclusive. The election of any one or more remedies shall not constitute a waiver of any other remedy. City may, but is not obligated to, exercise any of the remedies referred to in this paragraph.

13. Insurance. Developer agrees to purchase and maintain, during the term of this Agreement, insurance in the form of Workers Compensation and Employers Liability, Commercial General Liability and Automobile Liability covering operations associated with the Required Improvements and the Project, and Property insurance covering real and personal property interests at or near the Property, with the following limits:

Workers' Compensation	Statutory (MN)
Employers' Liability	\$1,500,000
Auto Liability (owned, hired and non-owned)	\$1,50,000
Commercial General Liability (including Contractual Liability)	
Each Occurrence	\$2,000,000
Aggregate	\$4,000,000

Prior to commencement of construction, Developer agrees to deliver to the City a Certificate of Insurance, naming the City as an Additional Insured, as evidence that the above coverages are in full force and effect.

14. General Indemnity. Developer agrees that it shall defend, indemnify and hold harmless City and its officers, agents, servants and employees from and against any and all claims, demands, suits, judgments, costs and expenses asserted by any person or persons, including agents or employees of City or Developer, by reason of death of or injury to person or persons or the loss of or damage to property arising out of Developer's performance of its obligations under this Agreement, except to the extent caused exclusively by the willful misconduct or negligence of the City, or someone acting on its behalf, or a breach of this Agreement by the City. On ten (10) days written notice from City, Developer will appear and defend all lawsuits against City relating to or arising from such injuries or damage.

15. Environmental Indemnity. Developer agrees that it shall defend, indemnify and hold harmless City and its officers, agents, servants and employees from and against any liability, loss, damage, fine, judgment, penalty, fee, cost, interest, or expense arising out of any condition existing on the Property prior to commencement of construction of the Required Improvements or the Project relating in any way to the environment, preservation or reclamation of natural resources, the presence, management, release or threatened release of any Hazardous Material (any and all explosive or radioactive substances or wastes and hazardous or toxic substances, wastes or other pollutants, including petroleum or petroleum distillates, asbestos or asbestos containing materials, polychlorinated biphenyls, radon gas, infectious or medical wastes and all other substances or wastes of any nature regulated pursuant to any environmental law) or to health and safety matters.

16. Notices. Any notice, demand or other communication under this Agreement by

either party to the other shall be deemed to be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid to:

In the case of the City:           City of Duluth  
  Attn: Director of Planning and Economic Development  
  411 West First Street, Room 160  
  Duluth, MN 55802

In the case of Developer:        Unique Construction LLC  
  Attn: Samuel Herzog  
  103 N. Cascade Street  
  Fergus Falls, MN 56537

17.    Binding Effect. This Agreement shall be deemed to run with the land and shall inure to the benefit of the parties hereto and to their successors and assigns.

18.    Term. The term of this Agreement shall commence upon the date of attestation by the City Clerk and shall continue until the Director and City Engineer have certified in writing that all Public improvements required under this Agreement have been constructed in accordance with the requirements herein contained and Developer has conveyed such property and dedicated the Easements and Pedestrian Easement as are required hereunder.

At Developer's request, City will issue a written certificate of completion in recordable form acknowledging that the Required Improvements have been completed. Any obligations and duties which by their nature extend beyond the expiration or termination of this Agreement shall survive the expiration or termination of this Agreement.

19.    Assignment. Developer may not assign this Agreement without the written approval of the City, which approval shall not be unreasonably withheld, conditioned or delayed, provided, however, that Developer may assign this Agreement to an entity controlling, controlled by or under common control with the Developer or its owners and shall provide the City with notice thereof.

20. Governing Law, Jurisdiction, and Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota, and all questions concerning the meaning, intention or validity of the terms of this Agreement, as well as the performance of the parties hereto, shall be determined and resolved in accordance therewith. The Parties agree to submit to the exclusive jurisdiction of the State and Federal Courts sitting in St. Louis County, Minnesota, and waive any objections to such location based on jurisdiction, venue or inconvenient forum.

21. Construction of Agreement. Developer and City have participated jointly in the negotiation and drafting of this Agreement. If an ambiguity or question of intent or interpretation arises, this Agreement is to be construed as if drafted jointly by the parties and no presumption or burden of proof will arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

22. Severability. In the event any provision herein shall be deemed invalid or unenforceable, the remaining provision shall continue in full force and effect and shall be binding upon the parties to this Agreement.

23. Counterparts. This Agreement may be executed, acknowledged and delivered in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

*[Signature pages follow]*

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first shown above.

CITY OF DULUTH,  
a Minnesota Municipal Corporation

By \_\_\_\_\_  
Emily Larson  
Its Mayor

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF ST. LOUIS )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2021, by Emily Larson, the Mayor of the City of Duluth, Minnesota, a municipal corporation under the laws of the State of Minnesota.

\_\_\_\_\_  
Notary Public

By \_\_\_\_\_  
Its City Clerk  
\_\_\_\_\_  
(date)

STATE OF MINNESOTA )  
 ) ss.  
COUNTY OF ST. LOUIS )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2021, by Chelsea Helmer, the City Clerk of the City of Duluth, Minnesota, a municipal corporation under the laws of the State of Minnesota.

\_\_\_\_\_  
Notary Public

Countersigned:

\_\_\_\_\_  
Its Auditor

STATE OF MINNESOTA )

) ss.

COUNTY OF ST. LOUIS )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2021, by \_\_\_\_\_, the \_\_\_\_\_ of the City of Duluth, Minnesota, a municipal corporation under the laws of the State of Minnesota.

\_\_\_\_\_  
Notary Public

Approved:

\_\_\_\_\_  
Its Assistant City Attorney

STATE OF MINNESOTA )

) ss.

COUNTY OF ST. LOUIS )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2021, by \_\_\_\_\_, the \_\_\_\_\_ of the City of Duluth, Minnesota, a municipal corporation under the laws of the State of Minnesota.

\_\_\_\_\_  
Notary Public





## **Exhibit A**

### Legal Description of Land (proposed)

Lots One (1), Block 1 and Outlot A, all in Sam Herzogs Arrowhead Acres, St. Louis County, Minnesota

Lot One (1), Two (2), and Three (3), Block 2, all in Sam Herzogs Arrowhead Acres, St. Louis County, Minnesota