

# Exhibit 1

## **FUNDING AGREEMENT FOR CONSTRUCTION OF THE SKATE PARK AT THE GARY NEW DULUTH RECREATION CENTER BETWEEN THE CITY OF DULUTH AND THE GND DEVELOPMENT ALLIANCE**

This FUNDING AGREEMENT (this “Agreement”) is entered into by and between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota (the “City”), and the GND Development Alliance, a Minnesota non-profit corporation (the “Alliance”). The City and the Alliance are collectively referred to in this Agreement as the “Parties.”

WHEREAS, the City owns a tract of land located at 801 101<sup>st</sup> Avenue West, Duluth, Minnesota 55808 (the “Gary New Duluth Recreation Center”). The Gary New Duluth Recreation Center contains a community center building, together with several outdoor amenities, some of which have already been constructed and some that have yet to be constructed.

WHEREAS, the Alliance uses, maintains, and manages certain portions of the Gary New Duluth Recreation Center under a separate agreement between the parties dated July 31, 2020 (City Contract No. 23943).

WHEREAS, the Alliance designed plans to construct improvements at the Gary New Duluth Recreation Center for the purpose of creating a public skate park (the “Skate Park”). The Skate Park will be completed in phases as funding is available, and the Alliance has already begun construction on certain components of the Skate Park. The Alliance desires to complete improvements on certain components within the Skate Park to create a skateable element (the “Project”). The “Project” as used in this Agreement specifically does not include completion of the entire Skate Park and only relates to the creation of a skateable element.

WHEREAS, the State of Minnesota funded the 2021 Skate Park Grant Program through a bonding bill in October of 2020 to help Minnesota communities build, improve, and update skate parks (the “Grant”).

WHEREAS, Grant recipients must have at least one local partner who is a political subdivision of the state and commit a minimum one-to-one dollar match from non-state sources (the “Match”).

WHEREAS, the City has the legal authority to apply for the Grant and the financial, technical and managerial capacity to ensure proper planning and maintenance of the Project.

WHEREAS, the Parties have or will apply to the State of Minnesota to receive funds from the Grant in the amount of \$125,000.00 to be used toward construction costs of the Project (the “Award”).

WHEREAS, the Alliance desires to provide the Match for the Grant.

WHEREAS, the Parties desire to memorialize their respective obligations toward the Grant through this Agreement.

NOW, THEREFORE, in consideration of the foregoing and mutual covenants and agreements hereinafter contained, the Parties agree as follows:

I. Administration

For purposes of administering this Agreement, the City shall act through its Property and Facilities Manager or their designee (the "PFM Manager") and the Alliance shall act through its Board Chairperson or their designee ("Chairperson").

II. Term and Termination

A. Notwithstanding the date of execution of this Agreement, this Agreement shall be deemed to commence on May 1, 2021 and expire on December 31, 2022 or until the Grant is closed out, whichever is sooner, unless earlier terminated as provided for herein (the "Term").

B. If the Grant is not awarded to the City, then this agreement shall automatically terminate and the Parties shall have any obligation to the other party hereunder. Notwithstanding the foregoing, the Alliance can pursue completion of the Project under the terms and conditions of City Contract No. 23943.

III. Project Costs and Funding Sources

A. Based on estimates provided by the Alliance, it is anticipated that the Project will cost approximately \$250,000 (the "Anticipated Project Cost"). However, the exact cost of the Project (the "Total Project Cost") will not be known until the Project is complete. The "Total Project Cost" as used in this Agreement shall include all costs incurred relating to the Project, whether or not the Project is completed, including but not limited to design services, construction costs, permitting, testing, and associated site work for the Project, but shall not include any costs incurred by the Alliance on or before October 22, 2020. The "Award" as used in this Agreement shall mean the actual dollar amount of the funds awarded by the State for the Grant.

B. The Total Project Cost, minus the Award, shall be paid by the Alliance. The City shall contribute to the Project through its project management services, but will not provide any funds to pay for the Project. In the event the Project is not constructed for any reason or is only partially completed, the Alliance shall pay the City for all costs incurred relating to the Project upon receipt of a written itemization of those costs. The rights and obligations of the Parties set forth in this subparagraph shall survive termination of this Agreement for any reason.

IV. Project Responsibilities.

A. Joint Responsibilities.

1. The Parties will use their best efforts to work together in a collaborative manner on the Project and administration of the Grant.
2. The Project must be completed by October 15, 2022 or by the completion date required in the Grant if such date is later than October 15, 2022.
3. The portion of the Gary New Duluth Recreation Center under construction for the Project shall not be opened to the public until deemed so by the PFM Manager.
4. The Project shall be completed in conformity of this Agreement, the Grant, and with all applicable laws, rules, regulations, and ordinances of the City, State, and United States of America.

B. City Responsibilities

1. The City will submit all documents in connection with the Grant and shall administer the Grant.
2. The City shall use the Award to establish a skateable element focusing on curved and flat surfaces (the “City Work”). The City Work shall include:
  - a. Fine Grading – includes everything after sub-base, including crushed stone
  - b. Formwork – all carpentry and form work;
  - c. Copings – Steel, pool, etc. (The term “coping,” in regards to skate park pools, refers to the material at the top of a transition that provides a reveal used to grind or slide skateboards on. The two most common materials used for coping in skateparks are steel tubing and pool blocks.);
  - d. Steel Reinforcement – Labor for all steel reinforcements, 12” OC minimum;
  - e. Shotcrete/Concrete – All skatepark specialty labor. ACI Certified Nozzleman and ACI Certified Pump Operator - Shotcrete or sprayed concrete is concrete or mortar conveyed through a hose and pneumatically projected at high velocity onto a surface, as a construction technique); and
  - f. Saw Cuts – Cut within 24 hours of pour
3. The City shall, in accordance with the City’s regular bidding process and with the requirements of the Grant, award and enter into a construction contract for the City Work (the “Construction Contract”). The Construction Contract shall be with a contractor experienced and knowledgeable with skate park construction. The Construction Contract shall require completion of the City Work no later than October 15, 2022 or by the completion date required in the Grant if such date is later than October 15, 2022. The City shall administer the Construction Contract in its sole discretion.

4. The City shall promptly pay the amounts due under the Construction Contract and shall submit for reimbursement of the Award from the State. In the event that the Award does not cover the entire portion of the Construction Contract, the Alliance shall promptly pay any amount over the Award to the City to cover any gaps in funding for the City Work.

5. To the extent practical, the City will work in partnership with the Alliance on the City Work, provided that the City shall have sole discretion with regard to all final decisions regarding the City Work. The failure of the City to work in partnership with the Alliance shall not invalidate any decision made by the City with regard to the same or give the Alliance a cause of action against the City or cause the City to be in breach of this Agreement.

C. Alliance Responsibilities

1. Total Project Cost. The Alliance shall be responsible to pay the Total Project Cost, minus the Award. In the event the Project is not constructed for any reason, the Alliance will be responsible to pay to the City all costs incurred by the City with respect to the City Work. This requirement will survive termination of this Agreement for any reason.

2. Match. On or before October 15, 2022, the Alliance shall provide the Match for the Project in the form of documented invoices and receipts showing all expenses incurred and paid in connection with the Project. Any amounts paid toward the Project on or before October 22, 2020 cannot be used toward the Match.

3. Pre-work in advance of the City Work. The Alliance shall perform or cause to be performed the following scope of work before the City Work can commence (the "Alliance Work"):

- a. Complete necessary dirt work including compaction;
- b. Build a retaining wall;
- c. Complete concrete work for two sets of steps;
- d. Install lighting and security cameras;
- e. Complete necessary dirt work including compaction for shotcrete; and
- f. Provide any and all materials to complete this work.

4. Permits. The Alliance shall obtain the proper permits, licenses, or other permissions needed from various local, state, and/or federal agencies and entities to construct the Project, except that the City shall obtain or cause to be obtained permits for the City Work.

5. Liens. The Alliance shall not permit any mortgage or encumbrance to be filed or established against the Gary New Duluth Recreation Center.

6. Grant Compliance. The Alliance shall promptly respond to any requests by the City regarding the Grant and shall provide proper documentation and information regarding the Project and Match as are required by the State.

V. Title to Project

The Parties acknowledge that the City will own the improvements constructed and/or installed during the Project. The Parties also acknowledge that this Agreement solely relates to the funding and construction of the Project and not for the operation or management of the skate park.

VI. Default

In the event that Alliance shall be in default of its obligations under this Agreement, the full amount of the Match shall be immediately due and owing to City, as well as any amount of the City Work over and above the Award. In addition, City shall be entitled to any and all costs accrued by City which it may incur in the course of enforcing the Alliance's obligations, including but not limited to court cost and legal costs, which shall include the value of City staff attorney and other staff time, and shall further be entitled to the cost of borrowing funds at commercial bank rates to fund that portion of the Project that the Match intended to cover.

VII. Communications and Reporting.

A. The Parties agree that a full and complete exchange of information is necessary for a successful relationship, and each party agrees to communicate openly and regularly with the other with regard to this Agreement and the Project.

B. Unless otherwise provided herein, notice to the City or Alliance shall be sufficient if sent by regular United States mail, postage prepaid, addressed to the Parties at the addresses hereinafter set forth or to such other respective persons or addresses as the Parties may designate to each other in writing from time to time:

City of Duluth  
Attn: Property and Facilities Manager  
1532 W. Michigan Street  
Duluth, Minnesota 55806  
(218) 730-4430

GND Development Alliance  
Attn: Mr. Mark Boben  
2630 West Superior Street  
Duluth, MN 55806  
(218) 355-1349  
[gnddevelopmentalliance@gmail.com](mailto:gnddevelopmentalliance@gmail.com)

C. Alliance acknowledges that, as provided in Minnesota Statutes Section 16C.05, Subd. 5, all of Alliance's books, records, documents, and accounting procedures and practices related to this Agreement are subject to examination by the City or the State Auditor for six (6) years from the date of termination or expiration of this Agreement. Upon twenty-four (24) hours advance written notice by the City, Alliance shall provide all requested books, records, documents, and accounting procedures and practices related to this Agreement.

D. Alliance agrees to maintain all records relating to this Agreement during the Term and for six (6) years after its termination, cancellation, or expiration.

VIII. Independent Relationship.

It is agreed that nothing contained in this Agreement is intended or shall be construed in any manner as creating or establishing a relationship of co-partners between the Parties or of constituting Alliance as an agent, representative, or employee of the City for any purpose or in any manner whatsoever. The Parties do not intend by this Agreement to create a joint venture or joint enterprise, and expressly waive any right to claim such status in any dispute arising out of this Agreement. Alliance's employees shall not be considered employees of the City, and any and all claims that may or might arise under the Workers' Compensation Act of the State of Minnesota on behalf of Alliance's employees while so engaged and any and all claims whatsoever arising out of employment or alleged employment, including without limitation, claims of discrimination against the City, or its officers, agents, contractors, or employees shall in no way be the responsibility of the City. Alliance and its officers and employees shall not be entitled to any compensation or rights or benefits of any hospital care, sick leave and vacation pay, Workers' Compensation, Unemployment Insurance, disability pay, or severance pay from or on behalf of the City.

IX. Third Party Beneficiaries.

This Agreement is to be construed and understood solely as an agreement between the Parties regarding the subject matter herein and shall not be deemed to create any rights in any other person or on any other matter. No person, organization, or business shall have the right to make claim that they are a third party beneficiary of this Agreement or of any of the terms and conditions hereof, which, as between the Parties, may be waived at any time by mutual agreement of the Parties.

X. Government Data Practices.

A. Alliance shall comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to all data provided by the City under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained or disseminated by Alliance under this Agreement.

B. The civil remedies of Minnesota Statutes Section 13.08 apply to the release of the data referred to in this clause by Alliance. If Alliance receives a request to release the data referred to in the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, Alliance must immediately notify the City and consult with the City as to how Alliance should respond to the request. Alliance agrees to hold the City, its officers, and employees harmless from any claims resulting from Alliance's unlawful disclosure or use of data protected under state and federal laws.

XI. Severability

The Parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the Parties shall be

construed and enforced as if the Agreement did not contain the particular term or provision held to be invalid

XII. General Provisions

A. The recitals at the beginning of this Agreement are true and correct and are incorporated into this Agreement by reference.

B. The Alliance shall neither assign nor transfer any rights or obligations under this Agreement without prior written approval of the City.

C. The Parties represent to each other that the execution of this Agreement has been duly and fully authorized by their respective governing bodies or boards, that the officers of the Parties who executed this Agreement on their behalf are fully authorized to do so, and that this Agreement when thus executed by said officers of said Parties on their behalf will constitute and be the binding obligation and agreement of the Parties in accordance with the terms and conditions hereof.

D. Any amendments to this Agreement shall be in writing and shall be executed by the same officers who executed this Agreement or their successors in office.

E. The waiver by the City or the Alliance of any breach of any term, covenant, or condition of this Agreement shall not be deemed to be a waiver of any subsequent breach of same or any other term, covenant, or condition of this Agreement.

F. This Agreement constitutes the entire agreement between the Parties and supersedes all prior written and oral agreements and negotiations between the Parties relating to the subject matter hereof. This Agreement may be executed and delivered by a party by facsimile or PDF transmission, which transmission copy shall be considered an original and shall be binding and enforceable against such party.

*[Remainder of this page is intentionally left blank.]*

IN WITNESS WHEREOF, the Parties have hereunto set their hands the day and date first shown below.

CITY OF DULUTH

GND DEVELOPMENT ALLIANCE

By: \_\_\_\_\_  
Mayor

By: Mark Boben  
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Printed Name: Mark Boben

Attest: \_\_\_\_\_  
City Clerk

Its: GND Development Alliance President

Dated: 5/28/2021

Dated: \_\_\_\_\_

Countersigned:

\_\_\_\_\_  
City Auditor

Approved as to form:

\_\_\_\_\_  
City Attorney