

RIGHT-OF-WAY USE AGREEMENT
THE DULUTH BETHEL SOCIETY, INC.

THIS AGREEMENT, effective as of the date of attestation thereto by the City Clerk, between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota, hereinafter referred to as "City", and THE DULUTH BETHEL SOCIETY, INC., a Minnesota non-profit corporation, hereinafter referred to as "Owner".

WHEREAS, Owner is the owner of certain property in the vicinity of 8th Avenue West and West First Street in Duluth, Minnesota upon which is located a building within which Owner operates a residential treatment center; and

WHEREAS, City in its capacity as the local road authority within the City of Duluth controls the use of public rights of way within the City; and

WHEREAS, pursuant to its Ordinance No. 9085 approved by the City on July 27, 1992, City granted to Owner a Concurrent Use Permit, hereinafter referred to as the "Permit", to occupy, construct and maintain parking and driveways in all of that part of West First Street and Eighth Avenue West as the same was dedicated to the use of the public in the plat of Duluth Proper Third Division as well as a portion of Lot 1, Myers Park, Duluth, on file and of record in the office of register of deed in and for St. Louis County, Minnesota, described as follows:

That portion of west First Street and 8th Avenue West, lying southeasterly
Of a line located 25 feet southeasterly of the centerline of the constructed
Roadway of West First Street.

WHEREAS, the parking facility presently located on the Property, which parking facility is shown on Exhibit A attached hereto and made a part hereof and which is hereinafter referred to as the "Parking Facility", is structurally supported by and physically made possible by an existing retaining wall on the Property which extends from the elevation of existing First Street adjacent to the Property to the elevation of the property to southeast of existing First Street, hereinafter referred to as the "Retaining Wall", through which run various City-owned utilities and which Retaining Wall is integral to and necessary to the support of existing First Street; and

WHEREAS, Owner wishes to rebuild the driving surface of the Parking Facility and make other related improvements to the Parking Facility as shown on the construction plans and specifications attached hereto and made a part hereof as Exhibit B, hereinafter referred to as the "Project", at significant expense to Owner and is requesting the City's consent and approval to construct the Project on the parking Facility; and

WHEREAS, in the event that the City exercises its rights to either require Owner to remove the Parking Facility from the Property or itself undertakes to demolish the Parking Facility as authorized by the Permit, Owner will lose the benefit of the availability of the Parking Facility and will lose the benefit of the use of the Project; and

WHEREAS, Owner wishes to undertake to construct the Project on the Parking Facility under the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and conditions hereinafter contained, the parties hereto hereby agree as follows:

1. CONSENT TO PROJECT

Subject to the terms and conditions of this Agreement, City hereby consents to and approved the construction by Owner of the Project on the Property in conformance with Exhibit B. Owner or its contractor shall be responsible for securing from the City all standard permits for the construction of the Project within the City's right-of-way. Any modification of any kind to said Exhibit B shall be subject to the prior written approval of the City's City Engineer. Owner hereby agrees that construction of the Project shall be completed no later than November 15, 2016.

2. DESIGN STANDARDS

The design of the Project shall conform to the most current edition of the Engineering Guidelines for Professional Engineering Services and Developments as approved by the City Engineer and on file in the office of the City Engineer.

3. CONSTRUCTION STANDARDS

The construction of Project shall conform to the most current edition of the Engineering Guidelines for Professional Engineering Services and Developments as approved by the City Engineer and on file in the office of the City Engineer. The Owner shall require by contract that any engineering consultant and any construction contractor working on the Project on behalf of Owner deem the City Engineer and the City to have the status of a "client" of such Owner for purposes of the work performed by them on the Project, including a duty to provide accurate and timely information and reports on the progress of such work and problems related thereto.

4. RESPONSIBILITY FOR PROPERTY

The operation and maintenance of the Property, the Parking Facilities and the Project will be solely the responsibility of the Owner. This includes locating of pipes in accordance with the requirements of the Gopher State One Call System.

5. WARRANTY

Owner agrees to require its contractor constructing the Project to warranty that the construction of the Project has had and will have no negative impact on the Property, the utilities located thereon, the Retaining Wall or adjacent West First Street as currently existing including, but not be limited to damage related to improper construction or compaction.

6. NON-LIABILITY OF CITY ENGINEER

Although the City Engineer has the authority to review and approve various plans and specifications for the Project, the City Engineer is not to be considered the project engineer for the purposes of the design or construction of the Project, and the approval of the City Engineer of the design or construction or both of and all elements of the Project shall not be a guaranty of the sufficiency or quality of said components or of their compliance with codes applicable to such work. The City Engineer shall not be responsible for any errors or omissions of any kind whatsoever related to the design or construction of the Project or any damages arising therefrom including consequential damages, whether to the Owner, to its engineering Consultant or to any third party. The Owner agrees that, as between itself and the City and the City Engineer, it shall be solely responsible for any liability arising out of the design and construction of the Project.

7. INDEPENDENT CONTRACTOR

- a. It is agreed that nothing herein contained is intended or should be construed in any manner as creating or establishing the relationship of copartners between the parties hereto or as constituting Owner as an agent, representative or employee of the City for any purpose or in any manner whatsoever. The parties do not intend to create any third party beneficiary of this Agreement. Owner and its employees shall not be considered employees of the City, and any and all claims that may or might arise under the Worker's Compensation Act of the State of Minnesota on behalf of Owner's employees while so engaged, and any and all claims whatsoever on behalf of Owner's employees arising out of employment shall in no way be the responsibility of City. Owner's employees shall not be entitled to any compensation or rights or benefits of any kind whatsoever from City, including without limitation, tenure rights, medical and hospital care, sick and vacation leave, Worker's Compensation, Unemployment Insurance, disability or severance pay and P.E.R.A. Further, City shall in no way be responsible to defend, indemnify or save harmless Owner from liability or judgments arising out of Owner's intentional or negligent acts or omissions of Owner or its employees while performing the work specified by this Agreement.
- b. 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.
- c. Owner expressly waives any right to claim any immunity provided for in Minnesota Statutes Chapter 466 or pursuant to the official immunity doctrine.

8. PERMIT TERMINATION; DEMOLITION; WAIVER

a. General

Owner hereby acknowledges that pursuant to Section 3. of the Permit, City has the authority to terminate the Permit at any time upon Six (6) months' notice, and that pursuant to Section 4 of the Permit has the right to require that Owner, at its own cost and at no cost to City, remove the Parking Facility and all appurtenances related thereto from the Property and that, in such event, Owner is not entitled to be reimbursed for any of the costs thereof or to any payment of any kind whatsoever for the loss of utility of the Parking Facility or the loss of benefit to Owner's adjacent Property.

b. Demolition

Owner hereby agrees that upon demand therefore by City as provided for in the Permit, Owner will itself cause the removal of the Parking Facility and all appurtenances related thereto from the Property in a manner complying with the provisions of the Permit. Or, in the event that City chooses to do so, City shall have the right but not the obligation to itself cause the removal of the Parking Facility and all appurtenances related thereto from the Property upon such notice.

c. Alternative to Demolition

In the event that City Engineer determines that the demolition of the Parking Facility is necessary for engineering-related reasons but that the City's interests would not be negatively impacted by the continuing use of the Property for the Parking Facility, the Owner may but shall not be required to propose the reconstruction of the Parking Facility and related appurtenances, the Retaining Wall, the existing utilities on the Property or adjacent West First Street as in the judgment of the City Engineer is

necessary to protect, meet or further the City's interests at no cost to City. If the City Engineer agrees to consider such a proposal, Owner shall submit plans and specifications, a cost estimate to implement such proposal and a commitment to fund the construction of such proposal within Sixty (60) days of the City giving Owner notice of termination as provided for in Section 3 of the Permit. If Owner submits such a proposal and the City Engineer approves of it, City and owner shall have Sixty (60) days in which to enter into an agreement in a form acceptable to the City for the Owner to construct the work committed to in said proposal. If the time frames set forth herein are not met, the termination and the time frame provided for therein shall continue to be in effect. If the parties enter into an agreement for the construction of the proposed work, the notice of termination shall be deemed to be held in abeyance during the term of the new agreement.

d. Waiver

In consideration of the grant of consent and approval granted hereunder, Owner hereby specifically waives any and all rights of any kind whatsoever to be reimbursed for any of the costs of constructing the Project and to any payment of any kind whatsoever for the loss of utility of the Parking Facility or the loss of benefit to Owner's adjacent Property resulting from the termination of the Permit or any other action or inaction authorized to City pursuant to this Agreement.

9. INDEMNITY

To the extent allowed by law, Owner shall defend, indemnify and hold City and its employees, officers, and agents harmless from and against any and all cost or expenses, claims or liabilities, including but not limited to, reasonable attorneys' fees and expenses in connection with any claims resulting from the Owner's a) breach of this agreement or b) its negligence or misconduct or that of its agents or contractors in performing the Services hereunder or c) any claims arising in connection with Owner's employees or contractors, or d) the use of any materials supplied by the Owner to the City unless such material was modified by City and such modification is the cause of such claim. This Section shall survive the termination of this Agreement for any reason.

10. INSURANCE.

Owner shall obtain and maintain for the Term of this Agreement the following minimum amounts of insurance from insurance companies authorized to do business in the State of Minnesota.

a. Public Liability and Automobile Liability Insurance with limits not less than **\$1,500,000** Single Limit, shall be in a company approved by the city of Duluth; and shall provide for the following: Liability for Premises, Operations, Completed Operations, and Contractual Liability. **City of Duluth shall be named as Additional Insured by endorsement** under the Public Liability and Automobile Liability, or as an alternate, Owner may provide Owners-Contractors Protective policy, naming himself and City of Duluth. **Upon execution of this Agreement**, Owner shall provide Certificate of Insurance evidencing such coverage with 30-days' notice of cancellation, non-renewal or material change provisions included.

b. Professional Liability Insurance in an amount not less than \$1,500,000 Single Limit; provided further that in the event the professional malpractice insurance is in the

form of "claims made," insurance, 60 days' notice prior to any cancellation or modification shall be required; and in such event, Owner agrees to provide the City with either evidence of new insurance coverage conforming to the provisions of this paragraph which will provide unbroken protection to the City, or, in the alternative, to purchase at its cost, extended coverage under the old policy for the period the state of repose runs; the protection to be provided by said "claims made" insurance shall remain in place until the running of the statute of repose for claims related to this Agreement.

c. Owner shall also provide evidence of Statutory Minnesota Workers' Compensation Insurance.

d. A certificate showing continued maintenance of such insurance shall be on file with the City during the term of this Agreement.

e. The City of Duluth does not represent or guarantee that these types or limits of coverage are adequate to protect the Engineer's interests and liabilities.

11. NOTICES

Unless otherwise expressly provided herein, any notice or other communication required or given shall be in writing and shall be effective for any purpose if served, with delivery or postage costs prepaid, by nationally recognized commercial overnight delivery service or by registered or certified mail, return receipt requested, to the following addresses:

City: City of Duluth
411 W First Street
City Hall Room 211
Duluth MN 55802
Attn: City Engineer

Owner: Dennis Cummings, Executive Director
Duluth Bethel Society, Inc.
23 Mesabi Avenue
Duluth, MN 55806

12. CIVIL RIGHTS ASSURANCES

Owner, as part of the consideration under this Agreement, does hereby covenant and agree that:

a. No person on the grounds of race, color, creed, religion, national origin, ancestry, age, sex, marital status, status with respect to public assistance, sexual orientation, and/or disability shall be excluded from any participation in, denied any benefits of, or otherwise subjected to discrimination with regard to the work to be done pursuant to this Agreement.

b. That all activities to be conducted pursuant to this Agreement shall be conducted in accordance with the Minnesota Human Rights Act of 1974, as amended (Chapter 363), Title 7 of the U.S. Code, and any regulations and executive orders which may be affected with regard thereto.

13. LAWS, RULES AND REGULATIONS

Owner agrees to observe and comply with all laws, ordinances, rules and regulations of the United States of America, the State of Minnesota and the City with respect to their respective agencies which are applicable to its activities under this Agreement.

14. APPLICABLE LAW

This Agreement, together with all of its paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State of Minnesota.

15. FORCE MAJEURE

Neither party shall be liable for any failure of or delay in performance of its obligations under his Agreement to the extent such failure or delay is due to circumstances beyond its reasonable control, including, without limitation, acts of God, acts of a public enemy, fires, floods, wars, civil disturbances, sabotage, accidents, insurrections, blockades, embargoes, storms, explosions, labor disputes, acts of any governmental body (whether civil or military, foreign or domestic), failure or delay of third parties or governmental bodies from whom a party is obtaining or must obtain approvals, franchises or permits, or inability to obtain labor, materials, equipment, or transportation. Any such delays shall not be a breach of or failure to perform this Agreement or any part thereof and the date on which the party's obligations hereunder are due to be fulfilled shall be extended for a period equal to the time lost as a result of such delays.

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

CITY OF DULUTH, a Minnesota Municipal Corporation

By: _____
Emily Larson
Its Mayor

DULUTH BETHEL SOCIETY, INC. a Minnesota Non-profit Corporation

By: Tanya Nichols
Tanya Nichols
Its Board President

Attest:

By: _____
Jeffrey J. Cox
Its City Clerk

By: D. Cummings
Dennis Cummings,
Its Executive Director

Dated: _____, 2016

Approved:

Countersigned:

_____ City Attorney

City Auditor

STATE OF MINNESOTA)

) ss.

COUNTY OF ST. LOUIS)

The foregoing instrument was acknowledged before me this _____ day of _____, 2016, by _____ Tanya Nichols and Dennis Cummings, the Board President and Executive Director of the Duluth Bethel Society, Inc., a Minnesota Non-profit Corporation, on behalf of the Corporation.

Notary Public

STATE OF MINNESOTA)

) ss.

COUNTY OF ST. LOUIS)

The foregoing instrument was acknowledged before me this _____ day of July, 2013, by Emily Larson and Jeffery J. Cox, the Mayor and City Clerk respectively of the City of Duluth a municipal corporation created and existing under the Laws of the State of Minnesota, on behalf of the City.

Notary Public

This Instrument Drafted by:

Robert E. Asleson, Assistant City Attorney

City of Duluth

411 West First Street

Room 410 City Hall

Duluth, MN 55802

(218) 730-5490