

**AGREEMENT
BY AND BETWEEN**

**DULUTH 1200 FUND, INC.
AND
CITY OF DULUTH**

THIS AGREEMENT, effective as of the date of attestation hereto by the City Clerk (the “Effective Date”), by and between the **City of Duluth**, a municipal corporation under the laws of the state of Minnesota, (“City”) and the **Duluth 1200 Fund, Inc.**, a private, non-profit corporation under the laws of the State of Minnesota (“1200 Fund”).

WHEREAS, City Council approved the targeted allocation of One Million Five Hundred Thousand and No/100 Dollars (\$1,500,000.00) to recapitalize the 1200 Fund to replace funds expended by the 1200 Fund for grants and other assistance provided by the 1200 Fund to aid businesses affected by the COVID-19 pandemic and to pay costs incurred by the 1200 Fund in connection with the grants and assistance provided by it; and

WHEREAS, this Agreement is intended to memorialize the grant to the 1200 Fund approved by Resolution 22-0520R; and

WHEREAS, 1200 Fund is able and willing to utilize the grant funds to make loans and grants in accordance with its Bylaws and the terms and conditions of this Agreement.

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

1. **Grant to 1200 Fund.** City hereby agrees to grant to the 1200 Fund the amount of up to One Million Five Hundred Thousand and No/100 Dollars (\$1,500,000.00) (“Grant”), payable from City Fund No. _____ to be used by 1200 Fund in accordance with the terms and conditions hereinafter set forth.

2. **Use of Grant Fund.** The 1200 Fund shall utilize the Grant Fund to provide the following forms of assistance to qualified parties as authorized by its Bylaws as they are now in existence or are amended from time to time:

2.1. Loans and other forms of assistance to eligible entities for economic development as authorized by the 1200 Fund Bylaws.

2.2 Programs providing grants for the Healthy Childhood Environments Initiative to entities for developing means and methods of efficiently providing child care to working parents, approved in advance and in writing by the City's Director of Planning and Economic Development.

2.3 Programs providing grants, loan and programmatic services and support to downtown economic development entities, approved in advance and in writing by the Director, to support downtown recovery from the Covid-19 pandemic, focused on

expansion of downtown's employment base, level of business, pedestrian, activity of all types in the downtown area.

2.4. ___Programs providing grants, loans, program services, and training, approved in advance and in writing by the Director, for expansion and creation of BIPOC owned businesses. Programs remain under development, but the recent pop-up stores program established by the 1200 Fund Board, targeted toward BIPOC owned businesses.

3. **Reporting.** 1200 Fund will provide regular reports to the City which will include a description of activities of the 1200 Fund funded by the Grant.

4. **General Terms and Conditions.**

4.1. **Amendments.** Any alterations, variations, modifications or waivers of terms of this Agreement shall be binding upon the City and 1200 Fund only upon being reduced to writing and approved with the same formality as the approval of this Agreement.

4.2. **Assignment.** 1200 Fund agrees that it will neither assign, transfer or subcontract any rights or obligations under this Agreement without prior written consent of the City.

5. **Data and Confidentiality, Records and Inspection.**

5.1. 1200 Fund must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to all data provided by City under this Agreement, and as it applies to all data created, collected, received, stored, used, maintained or disseminated by 1200 Fund under this Agreement. 1200 Fund agrees to hold City, its officers, and employees harmless from any claims resulting from 1200 Fund's failure to comply with this law. The civil remedies of Minnesota Statutes Section 13.08 apply to the release of the data referred to in this clause by 1200 Fund. If 1200 Fund receives a request to release the data referred to in this clause, 1200 Fund must immediately notify City and consult with City as to how 1200 Fund should respond to the request. 1200 Fund's response to the request must comply with applicable law.

5.2. Records shall be maintained by 1200 Fund in accordance with requirements prescribed by the City and Generally Accepted Accounting Principles ("GAAP") and with respect to all matters covered by this Agreement. Such records shall be maintained for a period of six (6) years after receipt of final payment under this Agreement.

5.3. 1200 Fund will ensure that all costs shall be supported by properly executed invoices, contracts, vouchers, or other official documentation evidencing in proper detail the nature and propriety of the charges. All checks, invoices, contracts, vouchers, orders, or other accounting documents pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible.

5.4. 1200 Fund shall be responsible for furnishing to the City records, data and information as the City may require pertaining to matters covered by this Agreement.

5.5. 1200 Fund shall ensure that at any time during normal business hours and as often as the City may deem necessary, there shall be made available to the City for examination, all of its records with respect to all matters covered by this Agreement. 1200 Fund will also permit the City to audit, examine, and make excerpts or transcripts from such records, and to make audits of all contracts, invoices, materials, payrolls, records of personnel, conditions of employment, and other data relating to all matters covered by this Agreement.

6. **1200 Fund Representation and Warranties.** 1200 Fund represents and warrants that:

6.1. 1200 Fund shall perform its duties in a professional and diligent manner in the best interests of the City and in accordance with the then current generally accepted standards of the profession for the provisions of services of this type.

6.2. The execution and delivery of this Agreement and the consummation of the transactions herein contemplated do not and will not conflict with, or constitute a breach of or a default under, any agreement to which the 1200 Fund is a party or by which it is bound, or result in the creation or imposition of any lien, charge or encumbrance of any nature upon any of the property or assets of the 1200 Fund contrary to the terms of any instrument or agreement.

6.3. There is no litigation pending or to the best of the 1200 Fund's knowledge threatened against the 1200 Fund affecting its ability to carry out the terms of this Agreement or its ability to carry out the terms and conditions of any other matter materially affecting the ability of the 1200 Fund to perform its obligations hereunder.

6.4. The 1200 Fund will not, without the prior written consent of the City, enter into any agreement or other commitment the performance of which would constitute a breach of any of the terms, conditions, provisions, representations, warranties and/or covenants contained in this Agreement.

7. **Agreement Period.** The term of this Agreement shall commence on the Effective Date and shall continue until terminated by either party upon thirty (30) days written notice to the other party.

8. **Independent Contractor.**

8.1. 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 1200 Fund 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. 1200 Fund 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 1200 Fund's employees while so

engaged, and any and all claims whatsoever on behalf of 1200 Fund's employees arising out of employment shall in no way be the responsibility of City. 1200 Fund'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 1200 Fund from liability or judgments arising out of intentional or negligent acts or omissions of 1200 Fund or its employees while performing the work specified by this Agreement.

8.2. 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.

9. **Indemnity.** To the extent allowed by law, 1200 Fund shall defend, indemnify and hold the 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 arising out of the 1200 Fund's a) breach of this Agreement or b) its performing the services hereunder or c) any claims arising in connection with 1200 Fund's employees or contractors, or d) the use of any materials supplied by the 1200 Fund 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.**

10.1. 1200 Fund 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.

10.2. Public Liability and Automobile Liability Insurance with limits not less than One Million Five Hundred Thousand and No/100 Dollars (\$1,500,000.00) Single Limit, shall be in a company approved by the City; and shall provide for the following: Liability for Premises, Operations, Completed Operations, and Contractual Liability. The City shall be named as an Additional Insured by endorsement under the Public Liability and Automobile Liability. Upon execution of this Agreement, 1200 Fund shall provide Certificate of Insurance evidencing such coverage with thirty (30) days' notice of cancellation, non-renewal or material change provisions included.

10.3. 1200 Fund shall also provide evidence of Statutory Minnesota Workers' Compensation Insurance.

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

10.5. City does not represent or guarantee that these types or limits of coverage are adequate to protect the 1200 Fund's interests and liabilities.

11. Defaults and Remedies.

11.1. General Events of Default. The following shall be deemed to be general events of default by 1200 Fund under the terms and conditions of this Agreement to which the remedies set forth in Section 11.1.2 below shall be applicable except as otherwise set forth in this Agreement.

11.1.1. 1200 Fund shall fail to observe or perform any of the terms, conditions, covenants or agreements required to be observed or performed by it or any successor or assigns of 1200 Fund pursuant to this Agreement and such failure shall continue for a period of thirty (30) calendar days after City has, pursuant to the provisions of this Agreement, given written notice to 1200 Fund of such default or, in the event that such default shall be incapable of cure during said thirty (30) day period, shall have failed to commence to cure said default within thirty (30) days of the date of said notice and to diligently pursue the same to completion.

11.1.2. 1200 Fund makes an assignment for the benefit of its creditors or admits in writing its inability to pay its debts as they become due; or an adjudication of bankruptcy or insolvency is made as to 1200 Fund or its business; or 1200 Fund files a petition of bankruptcy or files a petition seeking any reorganization, dissolution, liquidation, or rearrangement, composition, readjustment or similarly under any present or future bankruptcy or insolvency, statute, law or regulation; or 1200 Fund files an answer admitting to or not contesting to the material allegations of a petition filed against it in such proceeding or fails to have dismissed or vacated within sixty (60) days after its filing such a petition or seeks or consents or acquiesces in the appointment of any trustee, receiver or liquidator of a material part of 1200 Fund's properties or fails to have dismissed or vacated within sixty (60) days after the appointment without the consent or acquiescence of 1200 Fund of any trustee, receiver or liquidator of any material part of 1200 Fund's properties.

11.2. General Remedies.

11.2.1. Except as otherwise set forth in this Agreement, City shall have the following remedies in the event of a default by 1200 Fund:

11.2.2. Seek and be entitled to monetary damages from 1200 Fund for any damages incurred by City as a result of 1200 Fund's default.

11.2.3. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent 1200 Fund's violation of the terms and conditions of this Agreement or to compel 1200 Fund's performance of its obligations hereunder.

11.2.4. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to City.

12. **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:

If to City: City of Duluth
 411 W First Street
 City Hall Room 418
 Duluth MN 55802
 Attn: Director of Planning and Economic Development

If to 1200 Fund: Duluth 1200 Fund, Inc.
 411 W First Street
 City Hall Room 418
 Duluth MN 55802

13. **Civil Rights Assurances.** 1200 Fund, as part of the consideration under this Agreement, does hereby covenant and agree that:

13.1. 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.

13.2. 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.

14. **Laws, Rules and Regulations.** 1200 Fund 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 of Duluth with respect to their respective agencies which are applicable to its activities under this Agreement.

15. **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. The appropriate venue and jurisdiction for any litigation hereunder shall be in a court located in St. Louis County, Minnesota.

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

17. **Entire Agreement.** It is understood and agreed that the entire agreement of the parties including all exhibits is contained herein and that this Agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof.

18. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original as against any party whose signature appears thereon, but all of which together shall constitute but one and the same instrument. Signatures to this Agreement transmitted by facsimile, by electronic mail in “portable document format” (“pdf”), or by any other electronic means which preserves the original graphic and pictorial appearance of the Agreement, shall have the same effect as physical delivery of the paper document bearing the original signature.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the date of attestation shown below.

City of Duluth,
A Minnesota municipal corporation

Duluth 1200 Fund, Inc.,
A Minnesota non-profit corporation

By _____
Emily Larson, Its Mayor

By _____
Its President

Attest:

Ian B. Johnson, its City Clerk

Approved:

Countersigned:

City Attorney

City Auditor