

AMENDED AND RESTATED FUNDING AGREEMENT

KENWOOD VILLAGE LLC

THIS AMENDED AND RESTATED FUNDING AGREEMENT entered into this _____ day of _____, 2016, by and between the CITY OF DULUTH, a municipal corporation created and existing under laws of the State of Minnesota, hereinafter referred to as "City", and KENWOOD VILLAGE LLC, a limited liability company created and existing under the laws of the State of Minnesota, hereinafter referred to as "Developer".

WHEREAS, Developer has acquired certain property located at the southwest corner of Arrowhead Road and Kenwood Avenue and has proposed a project which includes the development/redevelopment of the site into not less than 80 market rate apartment units, not less than 14,000 gross square feet of commercial space and approximately 73,206 square feet of parking (the "Project"); and

WHEREAS, certain improvements to Kenwood Avenue and West Arrowhead Road will be undertaken by the City in conjunction with the Project, including a new signal at East Cleveland Street and Kenwood Avenue, left turn phases and lanes on Kenwood Avenue and West Arrowhead Road, upgrading the signal timing at the Kenwood Avenue/East Cleveland Street intersection and at the West Arrowhead Road/Kenwood Avenue intersection and associated engineering costs (the "City Intersection and Traffic Improvements"); and

WHEREAS, in conjunction with the Project, the City requires that the portion of Cleveland Street adjacent to the Project as shown on Exhibit A attached hereto must be upgraded as described in Exhibit B and shown on Exhibit D attached hereto at a minimum to City Standards and in particular which must be constructed in compliance with Appendix D of the Public Works & Utilities Department, Engineering Division's most current "Engineering Guidelines for

Professional Engineering Services and Developments” (the “Cleveland Street Improvements”);
and

WHEREAS, for purposes of this Amended and Restated Funding Agreement, the sidewalk and apron portions of the Cleveland Street Improvements are divided into three sections, Section 1 shown in pink, Section 2 shown in blue, and Section 3 shown in green on Exhibit D attached hereto; and

WHEREAS, the City Intersection and Traffic Improvements and the Cleveland Street Improvements are hereinafter jointly referred to as the “Improvements”; and

WHEREAS, Developer and the City agree that the Cleveland Street Improvements must be closely coordinated with the City Intersection and Traffic Improvements and, therefore, the Improvements should be designed by a City selected design firm and constructed by the same contractor under a City contract; and

WHEREAS, in the event Developer has not cleared all construction materials, equipment and debris away from, and installed utilities under, Section 1, Section 2 and/or Section 3 of the sidewalk and apron portions of the Cleveland Street Improvements before October 10, 2016, the parties agree that Developer should construct the Section 1, Section 2 and/or 3 sidewalk and apron portions of the Cleveland Street Improvements as set forth herein.

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

ARTICLE I

City Construction Obligations

City hereby agrees to have engineered and construct or cause to be constructed the Cleveland Street Improvements in conjunction with the City Intersection and Traffic Improvements. Construction of the Cleveland Street Improvements will be substantially

complete by October 15, 2016 and completed no later than December 31, 2016. Completion of the City Intersection and Traffic Improvements shall be no later than December 31, 2017.

Developer agrees that the construction of the Cleveland Street Improvements constitute public improvements which confer a special benefit on the Project. Therefore, Developer agrees that it shall pay the City for one-half the cost of construction of the Cleveland Street Improvements, including engineering costs. The City will require the engineer to segregate the cost of design of the Cleveland Street Improvements from the cost of the design of the City Intersection and Traffic Improvements.

The City will cause the Cleveland Street Improvements to be bid out in conformance with City procurement requirements in conjunction with the construction of the City Intersection and Traffic Improvements; said bidding process will provide in the bid documents and payment procedures for a means of segregating the cost of construction of the Cleveland Street Improvements from the cost of constructing the City Intersection and Traffic Improvements. Any successful bid must have identifiable break-out pricing for the Cleveland Street Improvements. Developer will be provided with a copy of the successful bid.

Upon the City's notice to proceed to the successful bidder and commencement of the construction of the Cleveland Street Improvements, Developer agrees to pay the City one-half the cost of construction of the Cleveland Street Improvements, including engineering costs, upon request by the City. Additionally, in the event there are any change orders required or allowed by conditions not anticipated in the plans and specifications as bid with respect to the Cleveland Street Improvements, the City will notify Developer of such change orders and upon making the final payment to the contractor for the construction of the Improvements, the City shall invoice Developer for one-half of any final additional costs of constructing the Cleveland Street Improvements, including engineering costs, occasioned by any change orders as

described above. Developer agrees to reimburse City for one-half of said change order costs within thirty (30) days of being so invoiced. Within 10 days after completion and final payment made by the City for the Cleveland Street Improvements, the City shall provide the Developer with a final invoice of the costs for the Cleveland Street Improvements accompanied by or supplemented by such supporting documentation or other information as is reasonably requested by Developer. In the event that the final payment with respect to the Cleveland Street Improvements is less than the bid amount including any change orders and any savings to the City due to Developer performing the work on Section 1, Section 2, and/or Section 3 of the sidewalk and apron portions of the Cleveland Street Improvements, upon making final payment to the contractor, the City will credit or reimburse, as applicable, Developer for one-half of any savings.

In no event shall Developer be responsible under this Agreement for the cost of construction of the City Intersection and Traffic Improvements, which costs shall be governed by a separate agreement (DEDA contract 15 865 795) between the parties. Also, in no event shall Developer be responsible for contributing in costs to provide increased capacity to existing utility systems that do not benefit the Project.

Notwithstanding any provision of this Article I, in the event that Developer shall not have removed all construction materials, equipment and debris from Section 1 of the sidewalk and apron portions of the Cleveland Street Improvements on or before October 10, 2016, then Developer shall construct, at Developer's sole expense and to City of Duluth Standard Specifications, Section 1 of the sidewalk and apron portions of the Cleveland Street Improvements as designed by the City-selected design firm and as set forth in the plan attached as Exhibit D. Further, and notwithstanding any provision of this Article I, in the event that Developer shall not have removed all construction materials, equipment and debris from, and

installed utilities under, Section 2 of the sidewalk and apron portions of the Cleveland Street Improvements on or before October 10, 2016, then Developer shall construct, at Developer's sole expense and to City of Duluth Standard Specifications, Section 2 of the sidewalk and apron portions of the Cleveland Street Improvements as designed by the City-selected design firm and as set forth in the plan attached as Exhibit D. In the event Section 1, Section 2 and/or Section 3 of the sidewalk and apron portions of the Cleveland Street Improvements are not constructed by the City, Developer shall put down erosion control and temporary cover for winter 2016/2017 over said Section(s), and have all work completed by July 1, 2017. Developer shall provide two working days' notice to the City Engineer prior to concrete placement for inspection purposes. In the event Developer constructs any concrete sidewalk or aprons on the Cleveland Street Improvements during the period of October 15, 2016 through May 14, 2017, Developer agrees to warranty such sidewalk and aprons for a period of two (2) years after concrete placement. In the event any sidewalk or aprons are constructed after May 14, 2017, Developer agrees to warranty the sidewalk and apron for a period of one (1) year after concrete placement. Such one (1) or two (2) year warranty shall include, but not be limited to, repairs including full replacement due to improper construction, compaction, scaling or spalling. Developer understands that the City intends to have salt placed for normal street maintenance operations.

ARTICLE II

Record Drawings

Prior to the issuance of the Certificate of Occupancy for the Project, the Developer's engineer shall furnish record drawings of Developer's utility improvements prepared in accordance with City of Duluth Engineering Guidelines.

ARTICLE III

Repairs

Developer agrees to make repairs to public streets that may become damaged due to use of the road for hauling of materials, or due to the construction practices of Developer's contractor(s). Developer shall repair such damage in a manner as so that it is acceptable by the City Engineer. Any pavement repairs shall be completed prior to final acceptance of any public improvements.

ARTICLE IV

Future Repairs

Future repairs of public utilities will be completed by the City or it's designated contractor. Following excavation for any utility repair on private property, Developer is responsible for final surface restoration.

ARTICLE V

Warranty

Developer agrees to warranty the portion of the ~~streets~~ right-of-way impacted by the utility connections and any utilities that are turned over to the City for ownership for a period of two (2) years after acceptance by the City Engineer. Such warranty shall include, but not be limited to, repairs or collective action due to improper construction or compaction.

ARTICLE VI

Defaults and Remedies Therefore

A. General Defaults by Developer and Remedies Therefore

1. General Events of Default

The following shall be deemed to be general events of default by Developer under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph 2 below shall be applicable:

- a. Developer shall fail to make any payment to the City as required in this Agreement.
- b. Developer shall fail to observe or perform any of the other terms, conditions, covenants or agreements required to be observed or performed by it 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 Developer 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.
- c. Developer 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 Developer or its business; or Developer files a petition of bankruptcy or files a petition seeking any reorganization, dissolution, liquidation, or

rearrangement, composition, readjustment or similar relief under any present or future bankruptcy or insolvency, statute, law or regulation; or Developer 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 thirty (30) 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 Developer's properties or fails to have dismissed or vacated within thirty (30) days after the appointment without the consent or acquiescence of Developer, trustee, receiver or liquidator of any material part of Developer's properties.

2. General Remedies

Upon default by Developer, the City shall be entitled to any and all remedies available in law or in equity.

B. General Defaults by City and Remedies Therefor

1. General Events of Default

The following shall be deemed to be general events of default by City under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph 2 below shall be applicable:

- a. City shall have failed to complete construction of the Cleveland Street Improvements as required under this Agreement.
- b. City shall fail to observe or perform any of the other terms, conditions, covenants or agreements required to be observed or performed by it or any successor or assign of City pursuant to this

Agreement and such failure shall continue for a period of thirty (30) calendar days after Developer has, pursuant to the provisions of this Agreement, given written notice to City 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.

2. General Remedies

Upon default by the City, Developer shall be entitled to any and all remedies available in law or in equity.

C. Non-Waiver

The waiver by either party of any default on the part of the other party or the failure of such non-defaulting party to declare default on the part of the defaulting party of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of the defaulting party of the same or of any other obligation of the defaulting party hereunder. And, to be effective, any waiver of any default by the defaulting party hereunder shall be in writing by the non-defaulting party.

D. Remedies Cumulative

Except as specifically set forth herein, the remedies provided under this Agreement shall be deemed to be cumulative and non-exclusive and the election of one remedy shall not be deemed to be the waiver of any other remedy with regard to any occasion of default hereunder.

E. Attorneys' Fees

In the event that either party is in default of any of the terms and conditions of this Agreement and the other party shall successfully take legal action to enforce said rights herein, in addition to the foregoing, such non-defaulting party shall be entitled to reimbursement for its reasonable attorneys' fees and costs and otherwise for its costs and disbursements occasioned in enforcing its rights hereunder.

ARTICLE VII

Force Majeure

Under the terms of this Agreement, neither the City nor Developer shall be considered in default or in breach of any of the terms with respect to the performance to their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

ARTICLE VIII

Term

The term of this Agreement shall run from the date first above shown until December 31, 2017.

ARTICLE IX

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
 402 City Hall
 411 West First Street
 Duluth, MN 55802
 Attn: Chief Administrative Officer

In the case of Developer: Kenwood Village LLC
 c/o United Properties Development LLC
 3600 American Boulevard West
 Suite 750
 Minneapolis, MN 55431

or at such other address with respect to either such party as that party may, from time to time, designate in writing and forward to the other as provided in this section.

ARTICLE X

Indemnity

The Developer hereby agrees that it will defend, indemnify and hold harmless the City, the City Engineer and all other officers, agents, servants, employees and contractors of the City from and against any and all liability arising in any way out of the design and construction of Developer's development connections and utility connections to the public infrastructure and, if applicable, Developer's construction of any Section of the sidewalk and apron portions of the Cleveland Street Improvements, and, upon ten (10) days' notice from any such party will appear and defend such party against any action of any kind arising out of this obligation.

ARTICLE XI

Laws, Rules and Regulations.

Developer 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.

ARTICLE XII

Choice of 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. However, litigation in the federal courts involving the parties shall be in the appropriate federal court within the State of Minnesota.

ARTICLE XIII

No Third Party Rights.

Nothing in this Agreement confers or purports to confer on any third party any benefit or any right to enforce any term of this Agreement.

ARTICLE XIV

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.

ARTICLE XV

Entire Agreement.

This Agreement, including Exhibits A, and ~~Exhibit B, C and D,~~ constitutes the entire Agreement between the City and Developer and supersedes all prior written or oral agreements and negotiations between the parties relating to the subject matter hereto.

ARTICLE XVI

Right of Developer to Complete the Cleveland Street Improvements.

In the event that the construction contract for the Cleveland Street Improvements has not been awarded by July 18, 2016, then the parties agree, in good faith, to enter into discussions regarding the option of Developer assuming construction of the Cleveland Street Improvements. Notwithstanding the provisions of Article VII, the City, at its cost, will provide the Project with a temporary connection to storm sewer by October 15, 2016, if the Cleveland Street Improvements are not anticipated to be completed by that time. The City shall obtain the approval of the Developer regarding the location of the temporary storm sewer pipe over Developer's property.

ARTICLE XVII

Certificate of Payment and Release.

Upon completion of all the Cleveland Street Improvements, Developer's submittal of record drawings in accordance with City of Duluth Engineering Guidelines pursuant to Article II, Developer's completion of repairs pursuant to Article III, evidence of payment by Developer to its contractor for any work done in the right-of-way, and payment of all of Developer's share of the cost of the construction of Cleveland Street Improvements in accordance with this Agreement, the City shall execute and provide Developer with a certificate of payment and release in the form of that attached hereto as Exhibit C within 30 days after written request from

the Developer or other owner of property within the Project, unless denied as set forth below.

Upon issuance of a certificate of payment and release by the City, the Developer, its successors and assigns, and all future owners of any portion of the Project, shall be released from all payment and other obligations of Developer under this Agreement except for those set forth in Articles I, IV and V. If the City shall refuse or deny to provide a certificate of payment and release in accordance with the provisions of this Section, the City shall provide the requesting party with a written statement indicating in detail in what respects payment has not been made, whether or not there are any other failures or defaults under this Agreement, and what measures or acts will be necessary, in the opinion of the City, in order to obtain a certificate of payment and release. The written refusal or denial of the issuance of a certificate of payment and release shall be provided by the City within the same 30 day period during which a certificate of payment and release would be due from the City.

signature pages follow

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

CITY OF DULUTH, MINNESOTA

By: _____
Mayor

ATTEST: _____
City Clerk

Dated: _____

COUNTERSIGNED:

City Auditor

APPROVED AS TO FORM:

City Attorney

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

KENWOOD VILLAGE LLC,
a Minnesota limited liability company

By: United Properties Development LLC
Its: Managing Member

By: _____
Name: Keith A. Ulstad
Its: Senior Vice President

This instrument was drafted by:
Joan M. Christensen
Attorney for the City of Duluth
410 City Hall
Duluth, MN 55802
(218) 723-5273

I:\ATTORNEY\DEDA (015)\Development Agreements (DA)\United Properties (14-0069)\Funding Agreement\Amended and Restated Funding Agreement 10-05-16 JC blacklined.docx

Exhibit A

Depiction Showing Portion of Cleveland Street Being Upgraded



Exhibit B

List of Cleveland Street Improvements, Half the Cost of Which to Be Paid for by the Developer

The Cleveland Street Improvements include reconstruction from Kenwood Avenue to approximately (380) feet west.

1. Bituminous removal and reconstruction of portions of Cleveland Street.
2. Installation of concrete curb and gutter on both sides of Cleveland Street.
3. Concrete sidewalk and aprons on north side of Cleveland Street, adjacent to the Project, except where Developer constructs Section 1, 2 and/or 3 of said sidewalk and aprons pursuant to Article I of the Amended and Restated Funding Agreement in which event Developer shall pay 100% of said cost.
4. Replacement of existing storm sewer utility lines and new storm water improvements under Cleveland Street to accommodate both the Kenwood Village development and Cleveland Street. Storm sewer utility line capacity to be agreed upon by the parties.
5. Connections from the Project to the replacement storm sewer utility line and improvements located within Cleveland Street.
6. All other miscellaneous items necessary for a complete project as agreed upon prior to bidding and listed on the break-out pricing for Cleveland Street Improvements

Potential Improvements to Be Paid for Entirely By the City

1. Design and construction of City water-main along Cleveland Street.
2. Design and construction of Cleveland Street east of Kenwood Ave.

Exhibit C

Certificate of Payment and Release Form

This Certificate of Payment and Release ("Certification") is made as of _____, 2016, by the City of Duluth ("City") for the benefit of Kenwood Village LLC, a Minnesota limited liability company ("Developer").

1. Developer and the City entered into an Amended and Restated Funding Agreement for Kenwood Village LLC dated _____ ("Funding Agreement") related to the development/redevelopment of certain property located at the southwest corner of Arrowhead Road and Kenwood Avenue for a project which includes not less than 80 market rate apartment units, not less than 14,000 gross square feet of commercial space and approximately 73,206 square feet of parking (the "Project").

2. The Funding Agreement requires the City to complete certain improvements to Cleveland Street ("Cleveland Street Improvements") and obligates Developer to pay a portion of the costs of these Cleveland Street Improvements.

3. The City hereby acknowledges and certifies that:

- (i) That Developer, its successors and assigns, and all future owners of any portion of the Project, may rely on the representations and agreements made by the City in this Certification.
- (ii) That the Cleveland Street Improvements have been completed and the City has invoiced Developer for all costs for the Cleveland Street Improvements.
- (iii) That Developer has paid all costs for the Cleveland Street Improvements and performed all obligations in accordance with the Development Agreement, except for any future repairs described in Article IV and except for warranty work described in Articles I and V.
- (iv) The Project and the Developer, its successors and assigns, and all future owners of any portion of the Project, are hereby released from all payment and other obligations of Developer under the Development Agreement, except for future repairs described in Articles I and IV and except for warranty work described in Articles I and V.

CITY OF DULUTH

By: _____
Its City Engineer



