



STAFF REPORT

DATE: 04/7/2020

REGULAR

TO: City Council
FROM: Ken Roberts, Planning Director
AGENDA ITEM: **Lake Elmo Senior Living – Site Improvement Agreement**
REVIEWED BY: Jack Griffin, City Engineer
Sarah Sonsalla, City Attorney

BACKGROUND:

On January 7, 2020, the City Council adopted Resolution 2020 – 005 approving the final PUD and project plans for the Lake Elmo Senior Living development on 39th Street North. An executed developer's or site work agreement is a condition of final PUD approval and is a City requirement before the developer starts grading or installing other site improvements for the development.

ISSUE BEFORE CITY COUNCIL:

The City Council is being asked to adopt Resolution 2020-031 approving the site improvement agreement for Lake Elmo Senior Living development on 39th Street North.

REVIEW/ANALYSIS:

A condition of approval of the Lake Elmo Senior Living PUD is that the developer enter into a Developer's Agreement or site improvement agreement with the City before the developer starts any site work for the project. The key aspects of the agreement include the following components:

- That all the improvements to be completed by October 31, 2021 due to phasing within the development.
- That the developer provide a letter of credit in the amount of \$800,206 related to the cost of the proposed public improvements and landscaping.
- That the developer provide the City with a cash deposit of \$51,500 for the park dedication fee, Village AUAR fee and engineering administration escrow.

City staff is in the process of reviewing and approving the final construction plans for the project, subject to changes and corrections. Upon execution of this Agreement, receipt of all fees and securities, recording of the required easements and the agreement and the completion of a preconstruction meeting with the City, the applicant may start site grading and construction.

FISCAL IMPACT:

The future financial impacts include maintenance of sanitary sewer mains, watermains and other public infrastructure and other public financial responsibilities typically associated with a new development. The City will collect any necessary building permit fees, Sewer Accessibility Charges and Water Accessibility Charges at the time of building permit application for each building as they develop.

OPTIONS:

The City Council is being asked to consider the approval of the site improvement agreement and has the following options:

- 1) Adopt Resolution 2020-031 approving the site improvement agreement for Lake Elmo Senior Living; or
- 2) Direct Staff to amend the draft site improvement agreement to bring back to a future City Council meeting.

RECOMMENDATION:

Staff recommends the City Council adopt Resolution 2020-031 approving the site improvement agreement for the Lake Elmo Senior Living development on 39th Street North with the following motion:

“Move to adopt Resolution 2020-031 approving the site improvement agreement for the Lake Elmo Senior Living development to be constructed on 39th Street North”

ATTACHMENTS:

- Resolution 2020-031
- Lake Elmo Senior Living Site Improvement Agreement

(reserved for recording information)

SITE IMPROVEMENT AGREEMENT

Lake Elmo Independent Living, LLC (39TH Street)

THIS SITE IMPROVEMENT AGREEMENT (this “Agreement”) is dated _____, 2020, by and between the **City of Lake Elmo**, a Minnesota municipal corporation (the “City”) and **Lake Elmo Independent Living, LLC**, a Minnesota limited liability company (the “Developer”).

- 1. REQUEST TO BEGIN SITE IMPROVEMENTS.** The Developer is the fee owner of the property legally described on the attached Exhibit A (the “Property”). The Developer has asked the City to allow the Developer to begin making site improvements to the Property including grading and the installation of utilities (referred to in this Agreement as the “Improvements”).
- 2. RIGHT TO PROCEED.** This Agreement is intended to regulate the development of the Property and the construction therein of certain public and private improvements. The Developer may not grade or otherwise disturb the earth, remove trees, or construct public or private improvements or any buildings within the Property until all the following conditions precedent have been satisfied:

- A. the Developer has executed and recorded with Washington County any drainage and utility easements required for the Property by the City Engineer and Public Works Director in the City's standard form;
- B. this Agreement has been executed by the Developer and the City;
- C. the required Security (as hereinafter defined) have been received by the City from or on behalf of the Developer;
- D. final construction plans and specifications have been submitted by the Developer and approved by the City Engineer;
- E. the Developer has paid the City for all legal, engineering, and administrative expenses incurred by the City regarding the City approvals and has given the City the additional Letter of Credit required by this Agreement;
- F. the Developer has paid any outstanding assessments and taxes for the Property;
- G. the Developer has fulfilled any park dedication requirements as specified under this Agreement;
- H. the Developer has received all necessary permits from the MPCA, MDH, DNR, applicable watershed, Washington County, and any other agency having jurisdiction over the Property;
- I. the Developer has provided the City with a certificate of insurance required by this Agreement;
- J. the Developer or the Developer's engineer and the Developer's contractor(s) have initiated and attended a preconstruction meeting with the City Engineer, and City staff;
- K. the City has issued a written notice that all above conditions have been satisfied and that the Developer may proceed.

3. CHANGES IN OFFICIAL CONTROLS. For five years from the date of this Agreement, no amendments to the City's Comprehensive Plan or official controls shall apply to or affect the use, development density, and building and site layout of the approved final approved planned unit development unless required by state or federal law or agreed to in writing by the City and the Developer. Thereafter, notwithstanding anything in this Agreement to the contrary, to the full extent permitted by state law, the City may require compliance with any changes to the City's Comprehensive Plan, official controls, platting, or dedication requirements enacted after the date of this Agreement.

4. DEVELOPMENT PLANS. The Developer agrees to develop the Property in accordance with the City approvals, including the terms and conditions of approval of the final planned unit development (PUD) as detailed in City Council Resolution No. 2020-005, and to construct all improvements in accordance with the approved construction plans and specifications (collectively, the "Plans") prepared by a professional engineer registered in the State of Minnesota at its sole expense. All terms and conditions of the City approvals are hereby incorporated by reference into this Agreement. The documents which constitute the Plans are those on file with and approved by the City and are listed on **Exhibit B** attached hereto. The Plans may not be modified by the Developer without the prior written approval of the City.

5. IMPROVEMENTS. In developing the Property in accordance with the Plans, the Developer shall make or install at its sole expense the following public and private improvements (collectively, the "Improvements"):

- A. Grading and erosion control;
- B. Sanitary sewer;
- C. Water system improvements;
- D. Stormwater improvements (storm sewer pipe, control structures, ponds, BMPs, etc.);
- E. 39th Street repairs, signage, sidewalk, and public right-of-way improvements;
- F. Underground private utilities;

- G. Landscaping;
- H. Tree preservation and reforestation; and
- I. Monuments required by Minnesota Statutes.

All Improvements shall be installed in accordance with the approved Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards. The Developer shall instruct its engineer to provide adequate field inspection personnel to assure an acceptable level of quality control to the extent that the Developer's engineer will be able to certify that the construction work meets the approved Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards as a condition of City acceptance. In addition, the City may, at the City's discretion and at the Developer's expense have one or more City inspectors or a soil engineer inspect the Developer's work on a full or part-time basis. The Developer's engineer shall provide for on-site project management. The Developer's engineer is responsible for design changes and contract administration between the Developer and the Developer's contractor.

6. CITY ADMINISTRATION AND CONSTRUCTION OBSERVATION. At the time of the City's execution of this Agreement, the Developer shall submit to the City an amount to be escrowed by the City for City administration and construction observation costs in an amount provided under paragraph 30 of this Agreement - Summary of Security Requirements. Thereafter, the Developer shall reimburse the City each month, within 30 days of receiving an invoice, for all administration and construction observation costs incurred by the City during the construction of the Improvements by the City's engineering, public works, planning, and landscape architecture staff and consultants. After 30 days of the invoice, the City may draw upon the escrow and stop work on the site until the escrow has been replenished in its full amount. City administration and oversight will include monitoring of construction progress and construction observation, consultation with the Developer and the Developer's professionals on status or problems

regarding the project, coordination for testing, final inspection and acceptance, project monitoring during the warranty period, and processing of requests for reduction in the escrow or Security. Construction observation shall include, at the discretion of the City, part- or full-time inspection of proposed public utilities and street construction. The City will bill for the services on an hourly basis.

The direction and review provided by the City through the inspection of the Improvements should not be considered a substitute for the Developer-required management of the construction of the Improvements. The Developer must require the Developer's contractor(s) to furnish the City with a schedule of proposed operations at least five days prior to the commencement of construction of each type of Improvement. The City shall inspect all Developer-installed Improvements during and after construction for compliance with the Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards. The Developer will notify the City at such times during construction as the City requires for inspection purposes. Such inspection is pursuant to the City's governmental authority, and no agency or joint venture relationship between the City and the Developer is thereby created.

7. CONTRACTORS/SUBCONTRACTORS. City Council members, City employees, and City Planning Commission members, and corporations, partnerships, and other entities in which such individuals have greater than a 25 percent ownership interest or in which they are an officer or director may not act as contractors or subcontractors for the Improvements identified in paragraph 5 above.

8. TIME OF PERFORMANCE. The Developer shall install all required Improvements by October 31, 2021. The Developer may, however, request an extension of time from the City, and the City agrees to grant a reasonable extension for delays in the work caused by governmental orders or delays in City inspections or approvals related to the covid-19 pandemic. If the City

grants the time extension, it shall be conditioned upon updating the Security or escrow posted by the Developer to reflect cost increases and amending this Agreement to reflect the extended completion date.

9. MAINTENANCE DURING CONSTRUCTION. The Developer shall be responsible for all maintenance of the Improvements until the Improvements are accepted by the City in writing. The Developer also is responsible to locate all underground utilities until the Improvements are accepted in writing by the City. Warning signs shall be placed by the Developer when hazards develop in streets to prevent the public from traveling on same and to direct attention to detours. If and when streets become impassable, such streets shall be barricaded and closed by the Developer. The Developer and its contractors must keep 39th Street North open to traffic at all times unless a right-of-way obstruction permit is obtained from the City. The Developer shall be responsible for keeping streets within and outside of the Property clean and clear of dirt and debris that may spill, track, or wash onto the street from the Developer's operations. The Developer shall contract for street cleaning for streets within and immediately adjacent to the Property. At a minimum, scraping and sweeping shall take place on a weekly basis and on a daily basis during heavy tracking days.

10. LICENSE. The Developer hereby grants the City, its agents, employees, officers, and contractors a license to enter the Property to perform all work and inspections deemed appropriate by the City in conjunction with the development of the Property and this Agreement.

11. CONSTRUCTION ACCESS AND PARKING. Construction traffic access and egress for all work on the site including grading, utility construction, building construction, and Improvements is restricted to access the Property via 39th Street at the approved new driveway location and designated rock construction entrance per the approved erosion control plans. No construction traffic is permitted on other adjacent local streets or at any other location along 39th Street North.

All construction parking and staging, including the loading and unloading of equipment and supplies during the construction of the site improvements and buildings must be completed interior to the project site and is not allowed to occur within any public right-of-way. The Developer and contractors shall be responsible for the repair and restoration of any damage to the street, curb, trail, sidewalk, and boulevard caused by the construction activities. Such work shall meet all City standards and specifications.

12. CONSTRUCTION SEQUENCE AND COMPLIANCE. The City will require the Developer to construct the Improvements in a sequence that will allow progress and compliance points to be measured and evaluated. The Developer and the Developer's representatives are required to supervise and coordinate all construction activities for all Improvements and must notify the City in writing stating when the work is ready for the inspection at each of the measurable points defined in the following paragraphs.

13. EROSION CONTROL. All construction regarding the Improvements shall be completed in a manner designed to control erosion and in compliance with the City Code, the City's Engineering Design and Construction Standards Manual, all watershed district permits, the Minnesota Pollution Control Agency's best management practices, and other requirements including the City's permit with the Minnesota Pollution Control Agency for the municipal separate storm sewer system program. Before initiating any work on the site, the Developer must implement an erosion control plan and have the City inspect and approve the erosion control measures. The Developer shall coordinate and install erosion and sediment control measures with the various stages of development. The City may impose additional erosion control requirements at any stage in development as deemed necessary to maintain a compliant site. The Developer shall promptly reseed all areas disturbed for site improvements after the work in the area is complete unless construction of the next stage of the improvements will begin in that area within seven days. The parties recognize that time is of the essence in controlling erosion.

If the Developer does not comply with the erosion control plan and schedule or supplementary instructions received from the City, the City may take such action as it deems appropriate to control erosion. The City will endeavor to notify the Developer in advance of any proposed action, but failure of the City to do so will not affect the Developer's and City's rights or obligations hereunder. If the Developer does not reimburse the City for any cost the City incurred for such work within 30 days, the City may draw on the Security to pay any costs. The City will not allow any development, utility, or street construction and the City will not issue any building permits unless the Property is in full compliance with the approved erosion control plan.

If the City issues building permits before the acceptance of public Improvements, the Developer assumes all responsibility for erosion control compliance throughout the Property and the City may take such action as allowed by this Agreement against the Developer for any noncompliant issue as stated above. Erosion control plans for individual lots will be required in accordance with the City's building permit requirements, or as required by the City or City Engineer.

14. SITE GRADING. In order to construct the Improvements and otherwise prepare the Property for development, it will be necessary for the Developer to grade the Property. All grading must be done in compliance with this Agreement and the approved grading plans. Within 30 days after completion of the grading, the Developer shall provide the City with an "as built" grading plan and a certification by a registered land surveyor or engineer as required in the City's Engineering Design and Construction Standards Manual.

15. STREET AND UTILITY IMPROVEMENTS. All storm sewers, sanitary sewers, watermain, and streets, including any 39th Street repairs and improvements, shall be installed in accordance with the approved Plans, the City approvals, the City Code, and the City's Engineering Design and Construction Standards Manual. Curb and gutter, bituminous streets including base and wear course, boulevards graded, street signs installed, and all restoration

work on the site shall be completed in accordance with the approved Plans. Once the work is completed, the Developer or the Developer's representative shall submit a written request to the City asking for an inspection of the initial improvements. The City will then schedule a walk-through to create a punch list of outstanding items to be completed. Upon receipt of the written punch list provided by the City, the Developer must complete the punch list items and notify the City to reinspect the Improvements.

16. LANDSCAPING AND TREE REPLACEMENT IMPROVEMENTS.

- A. The Developer agrees to install landscaping in accordance with the approved Plans, the City approvals, the City Code, the City's Engineering Design and Construction Standards Manual, and the City's Landscape and Irrigation Standards. All landscaping materials such as trees, shrubs, grasses, or other vegetation installed by the Developer must be warranted and maintained for a period of two years. The two-year warranty period shall be deemed to start once all required landscaping identified as responsibility of Developer in the approved Plans has received acceptance by the City. The Developer agrees to complete an inspection within 30 days prior to the end of the two-year warranty period. In the event any landscaping installed by the Developer is deemed to be in poor condition or dead, the Developer is to replace the landscaping with like kind materials or as otherwise approved by the City.
- B. The Developer shall be responsible for maintaining regular watering, fertilizing, and over-seeding necessary to establish final lawns and yards as identified in the approved Plans for public rights-of-way and any disturbed areas outside the Property boundaries according to a landscape maintenance plan approved by the City. The Developer agrees to achieve "substantial performance" on all seeded or sodded areas disturbed during the construction of the Improvements. For the purpose of this Agreement "substantial performance" shall be defined for areas seeded or

sodded with a turf or lawn mix as “square foot turf areas with an average blade height of three inches free of eroded, bare, or dead spots and free from perennial weeds or unwanted grasses with no visible surface soil.” For areas seeded with a native grass or flower mix “substantial performance” shall be defined as “square foot native grass or flower areas with an average height of eight inches free of eroded, bare, or dead spots and no visible surface soil.”

17. SIGNAGE, STREET LIGHTING, AND OTHER UTILITIES. The Developer agrees to install street signs, traffic signs, and pavement markings within the Property all in accordance with the approved Plans and the City Engineering Design Standards Manual. The Developer shall submit street and traffic sign details to the City for approval prior to installation. In addition, the Developer shall be responsible for the cost and all coordination work to extend private utilities along with street and driveway lighting within the Property all in accordance with the approved plans and right-of-way permits.

18. OWNERSHIP OF IMPROVEMENTS. Upon completion of the work and construction required by this Agreement, the Improvements lying within public easements shall become City property. Prior to acceptance of the public Improvements by the City, the Developer must furnish the City with a complete set of reproducible "record" plans and an electronic file of the "record" plans in accordance with the City's Engineering Design and Construction Standards Manual together with the following affidavits:

- Developer/Developer Engineer's Certificate
- Land Surveyor's Certificate

certifying that all construction has been completed in accordance with the terms of this Agreement. All necessary forms will be furnished by the City. Upon receipt of “record plans” and affidavits, and upon review and verification by the City Engineer that the public Improvements have been completed in accordance with the terms of this Agreement, the City Engineer will accept the completed public Improvements.

19. PARK DEDICATION. The Developer shall pay a cash contribution of \$30,000 in satisfaction of the City's park dedication requirements. The amount of the cash contribution was calculated as follows: 5 acres at \$6000 per acre.

20. VILLAGE AREA AUAR FEE. The Developer shall be responsible for the payment of the Village Area Alternative Urban Areawide Review (AUAR) fee as adopted by the City Council with respect to the environmental review completed by the City. The Village Area Alternative Urban Areawide Review (AUAR) fee in the amount of \$230.00 per REC shall be paid by the Developer prior to the City releasing any building permits for construction. The total amount to be paid by the Developer is \$11,500.00 (\$230 times 50 units (per Met Council SAC determination)).

21. SANITARY SEWER AND WATER UTILITY AVAILABILITY CHARGES (SAC AND WAC). The Developer shall be responsible for the payment of all sewer availability charges (SAC) and all water availability charges (WAC) with respect to the Improvements required by the City and any state or metropolitan government agency.

The sewer availability charge (SAC) in the amount of \$3,000.00 per REC shall be payable and collected by the City at the time the City issues a building permit for each building.

The water availability charge (WAC) in the amount of \$3,000.00 per REC shall payable and collected by the City at the time the City issues a building permit for each building.

In addition, a sewer connection charge in the amount of \$1,000.00 per REC, a Metropolitan Council sewer availability charge in the amount of \$2,485.00 per REC, and a water connection charge in the amount of \$1,000.00 per REC will be payable by the Developer and collected by the City at the time the City issues a building permit for each building.

22. BUILDING PERMITS/CERTIFICATES OF OCCUPANCY.

A. The City will not issue any building permit for any lot or building site on the Property until such time that: 1) sanitary sewer, water, storm sewer (excluding small diameter storm pipe for building and yard drains), curb and gutter, and one lift of permanent asphalt has been installed

and tested for all driveways providing access to the building location including emergency turnaround access; 2) grading has been completed within the entire public street right-of-way; 3) traffic control signs are installed; and 4) property monuments have been installed or all property corners and building sites have been staked with the property corner and building elevations noted on the stake.

B. The City will not issue sanitary sewer or water connection permits for the buildings on the Property until the streets and driveways needed for access to the building sites have been paved with a bituminous surface and the utilities are tested and approved by the City Engineer.

C. The City will not issue a Certificate of Occupancy for any building on the Property until such time that: sanitary sewer, water, storm sewer, and the 39th Street repairs and improvements are installed and accepted by the City; the Developer has finished the grading and installed all the landscaping adjacent to the building; and the Developer has submitted as-built plans for all Improvements and such plans are approved by the City.

D. Breach of the terms of this Agreement by the Developer, including nonpayment of billings from the City, shall be grounds for denial of building permits, certificates of occupancy, and withholding of other permits, inspection or actions and the halting of all work in the Property.

E. If the City issues building permits before the acceptance of the public Improvements by the City, the Developer assumes all liability and costs resulting in delays in completion of public Improvements and damage to public Improvements caused by the City, the Developer, the Developer's contractors, subcontractors, materialmen, employees, agents, or any third parties.

23. RESPONSIBILITY FOR COSTS.

A. In the event that the City receives claims from labor, materialmen, or others that work required by this Agreement has been performed and the amounts due to them have not been paid, and the laborers, materialmen, or others are seeking payment from the City, the Developer hereby authorizes the City to commence an Interpleader

action pursuant to Rule 22, Minnesota Rules of Civil Procedure for the District Courts, to draw upon the Security in an amount up to 125 percent of the claim(s) and deposit the funds in compliance with the Rule, and upon such deposit, the Developer shall release, discharge, and dismiss the City from any further proceedings as it pertains to the funds deposited with the District Court, except that the Court shall retain jurisdiction to determine attorneys' fees pursuant to this Agreement.

- B. Except as otherwise specified herein, the Developer shall pay all costs incurred by it or the City in conjunction with the development of the Property, including but not limited to legal, planning, engineering, and inspection expenses incurred in connection with the City's approval of the planned unit development and the development of the Property, the preparation of this Agreement, the City's review of construction plans and documents, and all costs and expenses incurred by the City in monitoring and inspecting development of the Property. All amounts incurred and due to the City must be fully paid by the Developer prior to the City executing this Agreement.
- C. The Developer shall hold the City and its officials, employees, and agents harmless from claims made by itself and third parties for damages sustained or costs incurred resulting from the City's approval of the planned unit development and the development of the Property unless caused by the negligence, action, or inaction of the City. The Developer shall indemnify the City and its officials, employees, and agents for all costs, damages, or expenses which the City may pay or incur in consequence of such claims, including attorneys' fees.
- D. The Developer shall reimburse the City for costs incurred in the enforcement of this Agreement, including reasonable engineering and attorneys' fees.
- E. The Developer shall pay, or cause to be paid when due, and in any event before any penalty is attached, any special assessments referred to in this Agreement. This is

a personal obligation of the Developer and shall continue in full force and effect even if the Developer sells the Property, or any portion of it.

- F. The Developer shall pay in full all bills submitted to it by the City for obligations incurred under this Agreement within 30 days after receipt. Bills not paid within 30 days shall be assessed a late fee per the City adopted fee schedule. Upon request, the City will provide copies of detailed invoices of the work performed by the City and its consultants.

24. SPECIAL PROVISIONS. The following special provisions shall apply to the Property:

- A. Implementation of the recommendations and requirements listed in the December 2, 2019 Engineering Memorandum.
- B. The Developer must obtain a sign permit from the City Building Official prior to installation of any subdivision identification signs.
- C. All easements as requested by the City Engineer and the Public Works Department shall be documented on the final construction plans and on documents ready for recording with Washington County before the execution of this Agreement by City officials. This includes a 10-foot-wide drainage and utility easement along all property lines and the required easements for the watermains and fire hydrants on the Property.
- D. The final construction and final PUD Plans submittal by the Developer includes an updated tree inventory and tree preservation/replanting and landscape and screening plans that address all comments in the City's Landscape Architect's memo dated November 11, 2019. All revised and final landscape plans shall be reviewed and approved by the City's Landscape Architect. All trees must be planted outside of the front, side, and rear drainage and utility easement areas.
- E. All storm water facilities internal to the site shall be privately owned and maintained.

A storm water maintenance and easement agreement in a form acceptable to the City shall be executed and recorded for all 100-year high water level areas and to protect all overland emergency flow paths.

- F. The Developer must notify all renters that the City may impose restrictions or limits on outdoor water use including no vehicle washing and no watering of grass, sod, or landscaping.
- G. The Developer must provide the Fire Department and the Sheriff's Department with keys, key cards, or other acceptable methods of entry for quick access into the apartment building on the Property for emergency service calls.

25. MISCELLANEOUS.

- A. The Developer may not assign this Agreement without the written permission of the City Council. The Developer's obligations hereunder shall continue in full force and effect even if the Developer sells the Property or any portion of it.
- B. Retaining walls that require a building permit shall be constructed in accordance with plans and specifications prepared by a professional engineer licensed by the State of Minnesota. Following construction, a certification signed by the design engineer shall be filed with the City Engineer evidencing that the retaining wall was constructed in accordance with the approved Plans. All retaining walls identified on the Plans or by special conditions referred to in this Agreement shall be constructed before any other building permit is issued for a lot on which a retaining wall is required to be built.
- C. Legal documents regarding any covenants and restrictions, if applicable, shall be submitted to the City prior to recording of the final plat for review and approval by the City Attorney.
- D. The Developer shall take out and maintain or cause to be taken out and maintained

until six months after the City has accepted the public Improvements, public liability and property damage insurance covering personal injury, including death, and claims for property damage which may arise out of Developer's work or the work of its subcontractors or by one directly or indirectly employed by any of them.

Limits for bodily injury and death shall be not less than \$500,000 for one person and \$1,500,000 for each occurrence; limits for property damage shall be not less than \$200,000 for each occurrence; or a combination single limit policy of \$1,500,000 or more. The City shall be named as an additional insured on the policy, and the Developer shall file with the City a certificate of insurance evidencing coverage prior to the City signing this Agreement. The certificate shall provide that the City must be given 30 days' advance written notice of the cancellation of the insurance.

- E. Third parties shall have no recourse against the City under this Agreement.
- F. If any portion, section, subsection, sentence, clause, paragraph, or phrase of this Agreement is for any reason held invalid, such decision shall not affect the validity of the remaining portion of this Agreement.
- G. The action or inaction of the City shall not constitute a waiver or amendment to the provisions of this Agreement. To be binding, amendments or waivers shall be in writing, signed by the parties and approved by written resolution of the City Council. The City's failure to promptly take legal action to enforce this Agreement shall not be a waiver or release.
- H. This Agreement shall run with the land and may be recorded against the title to the Property at the Developer's expense. The Developer covenants with the City, its successors and assigns, that it is the fee owner of the Property being final platted and that the Developer will indemnify and hold the City harmless for any breach of the foregoing covenant.
- I. Each right, power, or remedy herein conferred upon the City is cumulative and in

addition to every other right, power, or remedy, express or implied, now or hereafter arising, available to City, at law or in equity, or under any other agreement, and each and every right, power, and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by the City and shall not be a waiver of the right to exercise at any time thereafter any other right, power, or remedy.

- J. The Developer represents to the City that the Property and the Improvements comply or will comply with all City, County, metropolitan, state, and federal laws and regulations, including but not limited to: subdivision ordinances, planned unit development regulations, zoning ordinances and environmental regulations. If the City determines that the Property is not in compliance, the City may, at its option, refuse to allow construction or development work in the Property until it is brought into compliance. Upon the City's demand, the Developer shall cease work until there is compliance.

26. EVENTS OF DEFAULT. The following shall be "Events of Default" under this Agreement and the term "Event of Default" shall mean, whenever it is used in this Agreement, any one or more of the following events:

- A. Subject to unavoidable delays, failure by the Developer to commence and complete construction of the Improvements pursuant to the terms, conditions, and limitations of this Agreement.
- B. Failure by the Developer to substantially observe or perform any material covenant, condition, obligation, or agreement on its part to be observed or performed under this Agreement.

27. REMEDIES ON DEFAULT. Whenever any Event of Default occurs, the City, subject to any rights of third parties agreed to by the City pursuant to this Agreement, or otherwise by

written, executed instrument of the City, may take any one or more of the following:

- A. The City may suspend its performance under the Agreement until it receives assurances from the Developer, deemed adequate by the City, that Developer will cure its default and continue its performance under the Agreement. Suspension of performance includes the right of the City to withhold permits including, but not limited to, building permits.
- B. The City may initiate such action, including legal or administrative action, as is necessary for the City to secure performance of any provision of this Agreement or recover any amounts due under this Agreement from the Developer, or immediately draw on the Security, as set forth in this Agreement.

28. ENFORCEMENT BY CITY; DAMAGES. The Developer acknowledges the right of the City to enforce the terms of this Agreement against the Developer, by action for specific performance or damages, or both, or by any other legally authorized means. In the event of a default by the Developer as to construction or repair of any of the Improvements or any other work or undertaking required by this Agreement, the City may, at its option, perform the work and the Developer shall promptly reimburse the City for any expense incurred by the City. This Agreement is a license for the City to act, and it shall not be necessary for the City to seek an order from any court for permission to enter the Property for such purposes. If the City does such work, the City may, in addition to its other remedies, levy special assessments against the land within the Property to recover the costs thereof. For this purpose, the Developer, for itself and its successors and assigns, expressly waives any and all procedural and substantive objections to the special assessments, including, but not limited to, hearing requirements, and any claim that the assessments exceed the benefit to the land so assessed. The Developer, for itself and its successors and assigns, also waives any appeal rights otherwise available pursuant to Minnesota Statutes Section 429.081.

The Developer also acknowledges that its failure to perform any or all of the Developer's obligations under this Agreement may result in substantial damages to the City; that in the event of default by the Developer, the City may commence legal action to recover all damages, losses and expenses sustained by the City; and that such expenses may include, but are not limited to, the reasonable fees of legal counsel employed with respect to the enforcement of this Agreement.

29. WARRANTY. During the warranty period, the Developer warrants that all Improvements will be free from defects and that they will continue to meet all technical specifications and standards. During the warranty period, the Developer agrees to repair or replace any Improvement, or any portion or element thereof, which shows signs of failure, normal wear and tear excepted. If the Developer fails to repair or replace a defective Improvement during the warranty period, the City may repair or replace the defective portion and may draw upon the Security to reimburse itself for such costs. The Developer agrees to reimburse the City fully for the cost of all Improvement repair or replacement if the cost thereof exceeds the remaining amount of the Security. Such reimbursement must be made within 45 days of the date upon which the City notifies the Developer of the cost due under this paragraph. The Developer hereby agrees to permit the City to specially assess any unreimbursed costs against the Property if the Developer fails to make required payments to the City. The Developer, on behalf of itself and its successors and assigns, acknowledges the benefit to the Property of the repair or replacement of the Improvements and hereby consents to such assessment and waives the right to a hearing or notice of hearing or any appeal thereon under Minnesota Statutes, Chapter 429.

- A. The required warranty period for all work relating to the public sewer and water shall be two years from the date of final written City acceptance of the work.
- B. The required warranty period for all work relating to street construction, including the repairs to 39th Street and concrete curb and gutter shall be one year from the date of final written City acceptance of the work.

- C. The required warranty period for sod, trees, and landscaping is two years from the date of final written City acceptance of the installation.

30. SUMMARY OF SECURITY REQUIREMENTS. To guarantee compliance with the terms of this Agreement, payment of special assessments, payment of the costs of all public Improvements, and construction of all public Improvements, the Developer shall furnish the City with an irrevocable letter of credit or cash escrow or a combination of a cash escrow and a letter of credit (the "Security") in the amount of \$800,206. The bank originating the letter of credit shall be determined by the City to be solvent and creditworthy. The letter of credit shall substantially be in the form attached to this Agreement and must be approved by the City. The amount of the Security was calculated as itemized on **Exhibit C**. If at any time the City reasonably determines that the bank issuing the letter of credit no longer satisfies the City's requirements regarding solvency and creditworthiness, the City shall notify the Developer and the Developer shall provide to the City within 45 days a substitute for the letter of credit from another bank meeting the City's requirements. If the Developer fails to provide the City within 45 days with a substitute letter of credit from an issuing bank satisfactory to the City, the City may draw under the existing letter of credit.

This breakdown is for historical reference; it is not a restriction on the use of the Security. The City may draw upon the Security, without notice, for any violation of the terms of this Agreement or if the Security is allowed to lapse prior to the end of the required term. If the required public Improvements are not completed at least 30 days prior to the expiration of the Security, the City may also draw upon it. If the Security is drawn upon, the proceeds shall be used by the City to cure the default.

31. REDUCTION OF SECURITY. Upon written request by the Developer and upon receipt of proof satisfactory to the City Engineer that work has been completed in accordance with the approved Plans and the terms of this Agreement and that all financial obligations to the City have

been satisfied, the City Engineer may approve reductions in the Security in the following instances:

- A. Upon completion of grading operations, including temporary site restoration. The Developer must submit an as-built grading survey to the City that at a minimum established the as-built grades at all lot corners and downstream drainage conveyance systems and storm water ponds. Upon inspection of the site and approval of the as-built survey by the City, 100 percent or \$256,250, of the Security associated with grading may be released. This Security reduction does not include amounts related to erosion and sedimentation control.
- B. Up to 75 percent of the Security associated with the itemization on **Exhibit C** may be released upon completion of the following key milestones of the project as determined by the City Engineer:
 1. Construction Categories 2 and 3: The amount of \$201,281 may be released when all sanitary sewer and watermain utilities have been installed, all testing and televising have been successfully completed, sanitary sewer as-built inverts have been verified, and the utilities are considered ready for use by the City Engineer.
 2. Construction Categories 4 and 5: The amount of \$135,563 may be released when all streets and storm sewer has been installed and tested, and has been found to be complete to the satisfaction of the City Engineer including all corrective work for any identified punch list items and including verification of storm sewer as-built inverts.
 3. Construction Categories 6-10, 14, 15, and 17: The amount of \$27,188 may be released when all remaining Developer's obligations under this Agreement have been completed including: (1) iron monuments for lot corners have been installed, if required; (2) all financial obligations to the

City are satisfied; (3) the required “record” plans in the form of the City standards have been received and approved by the City; and (4) the public Property Improvements are accepted by the City Engineer and the City Council.

4. Construction Categories 11: The amount of \$43,936 may be released when landscaping Property Improvements have been installed to the satisfaction of the City including all corrective work for any identified punch list items.

C. Twenty-five percent of the original Security amount, excluding grading and landscaping improvements shall be retained until: (1) all Property Improvements have been fully completed and accepted by the City, including all corrective work and warranty punch list items; (2) all financial obligations to the City have been satisfied; and (3) the warranty period has expired.

Twenty-five percent of the original Security amount associated with the landscaping shall be retained by the City until: (1) all landscaping Property Improvements have been fully completed and accepted by the City, including all corrective work and warranty punch list items being completed by the Developer; (2) all financial obligations to the City have been satisfied; and (3) the warranty period has expired.

D. In addition to the above project milestone based Security reductions, the Developer may submit a written request and upon receipt of proof satisfactory to the City Engineer that work is progressing in accordance with the approved Plans and the terms of this Agreement and that all financial obligations to the City have been satisfied, the City Engineer may approve a one-time reduction in the Security for Construction Categories 2-5 in an amount not to exceed 50 percent of the initial Security amount.

E. It is the intent of the parties that the City at all times have available to it Security in an amount adequate to ensure completion of all elements of the Property Improvements and other obligations of the Developer under this Agreement, including fees or costs due to the City by the Developer. To that end and notwithstanding anything herein to the contrary, all requests by the Developer for a reduction or release of the Security shall be evaluated by the City in light of that principle.

32. SUMMARY OF CASH REQUIREMENTS. The following is a summary of the cash requirements under this Agreement which must be paid to the City prior to the execution of this Agreement by the City:

Park Dedication:	\$30,000
Special Assessments Due:	\$0
Village Area AUAR Fee:	\$11,500
City Engineering Administration Escrow:	\$10,000
TOTAL CASH REQUIREMENTS:	\$51,500

33. NOTICES. Required notices to the Developer shall be in writing, and shall be either hand delivered to the Developer, its employees or agents or mailed to the Developer by certified mail at the following address: Lake Elmo Independent Living, LLC, N8654 1090th Street, River Falls, WI 54022, Attention: Shari Frisbie, frisbieshari@gmail.com, and Mathew Frisbie, frisbieprop@gmail.com. Notices may also be delivered to the Developer via email to the above email addresses, provided that a hard copy of the notice is also delivered by certified mail or hand delivery. Notices to the City shall be in writing and shall be either hand delivered to the City Administrator or mailed to the City by certified mail in care of the City Administrator (khandt@cityoflakeelmo.org) at the following address: Lake Elmo City Hall, 3880 Laverne Avenue N, Suite 100, Lake Elmo, Minnesota 55042. Notices may also be delivered to the City via email to the above email address, provided that a hard copy of the notice is also delivered by certified

mail or hand delivery.

34. COMPLIANCE WITH LAWS. The Developer agrees to comply with all laws, ordinances, regulations, and directives of the state of Minnesota and the City applicable to the Property. This Agreement shall be construed according to the laws of the state of Minnesota.

35. SEVERABILITY. In the event that any provision of this Agreement shall be held invalid, illegal, or unenforceable by any court of competent jurisdiction, such holding shall pertain only to such section and shall not invalidate or render unenforceable any other provision of this Agreement.

36. NON-WAIVER. Each right, power, or remedy conferred upon the City by this Agreement is cumulative and in addition to every other right, power or remedy, express or implied, now or hereafter arising, or available to the City at law or in equity, or under any other agreement. Each and every right, power, and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by the City and shall not be a waiver of the right to exercise at any time thereafter any other right, power, or remedy. If either party waives in writing any default or nonperformance by the other party, such waiver shall be deemed to apply only to such event and shall not waive any other prior or subsequent default.

37. COUNTERPARTS. This Agreement may be executed simultaneously in any number of counterparts, each of which shall be an original and shall constitute one and the same Agreement.

CITY OF LAKE ELMO

By: _____
Mike Pearson
Its: Mayor

By: _____
Julie Johnson
Its: City Clerk

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

The foregoing instrument was acknowledged before me this ____ day of _____, 2020, by Mike Pearson and Julie Johnson, the Mayor and City Clerk, respectively, of the City of Lake Elmo, a Minnesota municipal corporation, on behalf of the corporation and pursuant to the authority granted by its City Council.

NOTARY PUBLIC

DRAFT

LAKE ELMO INDEPENDENT LIVING, LLC

By: _____

Its: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____, day of _____, 2020, by _____, the _____ of Lake Elmo Independent Living, LLC, a Minnesota limited liability company on behalf of the company.

NOTARY PUBLIC

DRAFTED BY:
City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, MN 55042
(651) 747-3901

**EXHIBIT A TO
SITE IMPROVEMENT AGREEMENT**

Legal Description of Property Being Improved

Lot 2, Block 2, Brookman 3rd Addition, Washington County, Minnesota
(PID 13-029-21-22-0013)

DRAFT

EXHIBIT B TO SITE IMPROVEMENT AGREEMENT

List of Plan Documents

The following documents prepared by Ayres Associates constitute the Plans:

THOSE DOCUMENTS BY

AS FOLLOWS:

<u>SHEET</u>	<u>TITLE</u>	<u>REVISION DATE</u>
G001	Cover Sheet	01/27/2020
C100	Existing Site Plan	01/07/2020
C200	Site Demolition Plan	01/07/2020
C300	Site Plan Layout	01/07/2020
C400	Site Grading Plan	01/07/2020
C500	Site Utilities Plan	01/07/2020
C501	Site Easements	01/07/2020
C600	Site Materials Plan	01/07/2020
C700	Erosion Control Plan	01/07/2020
C800	Civil Details	01/07/2020
C801	Civil Details	01/07/2020
C802	Civil Details	01/07/2020
C803	Civil Details	01/07/2020
C804	Civil Details	01/07/2020
C805	Civil Details	01/07/2020
C806	Civil Details	01/07/2020
C807	Civil Details	01/07/2020
L100 – L102	Landscape Plans	01/07/2020
L103	Landscape Details	01/07/2020
L104	Irrigation Details	01/07/2020
A101 – A203	Architectural Plans	01/27/2020
	Photometric Plan	02/17/2020

**EXHIBIT C TO
SITE IMPROVEMENT AGREEMENT**

Improvements Cost/Security Amount Estimate

<u>CONSTRUCTION CATEGORY</u>		<u>COST</u>	<u>125 percent</u>
1	<u>Grading</u>	\$ 205,000	\$ 256,250
2	<u>Sanitary Sewer</u>	\$ 99,700	\$ 124,625
3	<u>Watermain</u>	\$ 115,000	\$ 143,750
4	<u>Storm Sewer (includes pond structures and outfall pipes)</u>	\$ 134,600	\$ 168,250
5	<u>Street and Trail Cut at Entrances</u>	\$ 10,000	\$ 12,500
6	<u>Trails</u>	NA	NA
7	<u>Surface Water Facilities (ponds, infiltration basins, other BMPs)</u>	NA	NA
8	<u>Street Lighting</u>	NA	NA
9	<u>Street and Traffic Signs</u>	NA	NA
10	<u>Private Utilities</u>	NA	NA
11	<u>Landscaping Improvements</u>	\$ 46,865	\$ 58,581
14	<u>Monuments</u>	\$ 1,000	\$ 1,250
15	<u>Erosion and Sedimentation Control</u>	\$ 20,000	\$ 25,000
17	<u>Developer's Record Drawings</u>	\$ 8,000	\$ 10,000
<u>TOTALS</u>		\$ 640,165	\$ 800,206

FORM OF IRREVOCABLE LETTER OF CREDIT

IRREVOCABLE STANDBY LETTER OF CREDIT NO. SXXXXXX

**ISSUE DATE: XXX XX, XXXX
FROM ISSUANCE**

EXPIRATION DATE: ONE YEAR

BENEFICIARY:

CITY OF LAKE ELMO
3880 LAVERNE AVENUE NORTH, SUITE 100
LAKE ELMO, MINNESOTA 55042

WE HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT IN YOUR FAVOR FOR THE ACCOUNT OF LAKE ELMO INDEPENDENT LIVING, LLC FOR AN AMOUNT NOT TO EXCEED USD 800,206.00 (EIGHT HUNDRED THOUSAND TWO HUNDRED SIX AND NO/100 UNITED STATES DOLLARS). PAYMENT UNDER THIS LETTER OF CREDIT IS AVAILABLE AGAINST PRESENTATION OF THE BENEFICIARY'S SIGHT DRAFT DRAWN ON US AND ACCOMPANIED BY:

1. THE ORIGINAL LETTER OF CREDIT AND ALL AMENDMENTS
2. A STATEMENT SIGNED BY THE MAYOR OR CITY ADMINISTRATOR OF THE CITY OF LAKE ELMO.
3. A COPY OF THE LETTER SENT TO THE APPLICANT AT LEAST 20 DAYS PRIOR TO THE DRAW NOTIFYING LAKE ELMO INDEPENDENT LIVING, LLC OF THE CITY OF LAKE ELMO'S INTENT TO DRAW UNDER THIS STANDBY LETTER OF CREDIT, ALONG WITH PROOF OF DELIVERY.

ALL DRAFTS MUST:

1. BEAR THE CLAUSE "DRAWN UNDER BREMER BANK, NATIONAL ASSOCIATION. STANDBY LETTER OF CREDIT NUMBER XXXXXXXXX, DATED MM DD, YYYY
2. BE RECEIVED AT BREMER BANK, N.A., STANDBY LETTERS OF CREDIT, 8555 EAGLE POINT BOULEVARD, MN-001-73FO, LAKE ELMO, MINNESOTA 55042 ON OR BEFORE THE EXPIRATION DATE.

IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE CONSIDERED AUTOMATICALLY EXTENDED WITHOUT AMENDMENT FOR ONE (1) YEAR FROM THE PRESENT OR ANY FUTURE EXPIRATION DATE UNLESS WE NOTIFY THE LAKE ELMO CITY ADMINISTRATOR IN WRITING BY COURIER MAIL AT LEAST FORTY-FIVE (45) DAYS PRIOR TO ANY SUCH EXPIRATION DATE THAT THIS LETTER OF CREDIT WILL NOT BE RENEWED FOR ANY SUCH ADDITIONAL PERIOD.

THIS LETTER OF CREDIT SETS FORTH IN FULL OUR UNDERSTANDING, WHICH SHALL NOT IN ANY WAY BE MODIFIED, AMENDED, AMPLIFIED, OR LIMITED BY REFERENCE TO ANY DOCUMENT, INSTRUMENT, OR AGREEMENT, WHETHER OR NOT REFERRED TO HEREIN.

THIS LETTER OF CREDIT IS NOT ASSIGNABLE. THIS IS NOT A NOTATION LETTER OF CREDIT. MORE THAN ONE DRAW MAY BE MADE UNDER THIS LETTER OF CREDIT.

THIS LETTER OF CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS, INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 600, OR ANY SUBSEQUENT REVISION THERETO.

BREMER BANK, NATIONAL ASSOCIATION

DRAFT

PREPARERS SIGNATURE
CAPITAL MARKETS OPERATIONS SPECIALIST

**CITY OF LAKE ELMO
WASHINGTON COUNTY
STATE OF MINNESOTA**

RESOLUTION NO. 2020-031

***A RESOLUTION APPROVING A SITE IMPROVEMENT AGREEMENT FOR THE LAKE
ELMO SENIOR LIVING DEVELOPMENT PUD ON 39TH STREET NORTH***

WHEREAS, the City of Lake Elmo is a municipal corporation organized and existing under the laws of the State of Minnesota; and

WHEREAS, Ayres and Associates, representing Lake Elmo Independent Living LLC, River Falls, Wisconsin (“applicant”) has previously submitted an application to the City of Lake Elmo (“City”) for approval of a final planned unit development (PUD) for a 60-unit senior living facility to be located on 39th Street North; and

WHEREAS, the Lake Elmo City Council adopted Resolution 2020-005 on January 7, 2020 approving the final PUD and final project plans for the 60-unit Lake Elmo Senior Living development; and

WHEREAS, Ayers and Associates is now proposing to proceed with the construction of the development; and

WHEREAS, a condition of approval of said Resolution 2020-005, establishes that prior to execution of the Final Plat by City officials and before the start of construction, the Applicant shall enter into a Developer’s Agreement or a Site Work Agreement with the City; and

WHEREAS, the Applicant and the City have agreed to enter into such a contract and a copy of the proposed Site Work Agreement was submitted to the City Council for consideration at its April 7, 2020 meeting;

NOW, THEREFORE, BE IT RESOLVED THAT the City Council does hereby approve the Site Improvement Agreement for the Lake Elmo Senior Living PUD to be located on 39th Street North and authorizes the Mayor and City Clerk to execute the document.

Passed and duly adopted this 7th day of April, 2020 by the City Council of the City of Lake Elmo, Minnesota.

Mike Pearson, Mayor

ATTEST:

Julie Johnson, City Clerk