



STAFF REPORT
DATE: MARCH 21, 2023
CONSENT

TO: Mayor and City Council

FROM: Sarah Sonsalla, City Attorney

AGENDA ITEM: DPS Lake Elmo 3rd Addition Development Agreement

REVIEWED BY: Kristina Handt, City Administrator
Jack Griffin, City Engineer
Sophia Jensen, City Planner

BACKGROUND:

On November 1, 2022, the City Council adopted Resolution 2022-103 approving the Final Plat for DPS Lake Elmo 3rd Addition (known as Hendrix Apartments). On December 20, 2022, the City Council adopted Resolution 2022-124 approving the Final PUD Plan for DPS Lake Elmo 3rd Addition. An executed development agreement is a condition of final plat approval and is required prior to recording the final plat with Washington County.

ISSUE BEFORE COUNCIL:

The City Council is being asked to adopt Resolution 2023-025 approving the Development Agreement for DPS Lake Elmo 3rd Addition.

REVIEW/ANALYSIS:

A condition of approval of the DPS Lake Elmo 3rd Addition Final Plat is that the developer enter into a development agreement prior to the execution of the plat by City officials. The key aspects of the Development Agreement include the following components:

- That all public improvements are to be completed by December 31, 2024.
- That the Developer provide a letter of credit in the amount of \$2,156,017.
- That the Developer provide a cash deposit of \$430,000 for park dedication and City engineering administration escrow.
- The City will reimburse the Developer in the amount of \$40,704 for the mill and overlay improvements along Hudson Boulevard, south of the existing roadway centerline.
- The Developer will execute a Stormwater Maintenance and Easement Agreement in the City's standard form to ensure the continued maintenance of the stormwater facilities.

The construction plans are still being finalized by the City Engineer so the resolution also asks for staff authority to add that exhibit to the Development Agreement before recording. Upon execution of the Development Agreement, receipt of all fees and securities, recording of the final plat, and the completion of a preconstruction meeting with the City, construction can commence.

FISCAL IMPACT:

The future financial impacts include maintenance of 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, Water Accessibility Charges, and property taxes at the time of building permit application.

OPTIONS:

The City Council is being asked to consider the approval of the Development Agreement and has the following options:

- 1) Adopt Resolution 2023-025 approving the Development Agreement for DPS Lake Elmo 3rd Addition; or
- 2) Direct Staff to amend the draft Development Agreement to bring back to a future City Council meeting.

RECOMMENDATION:

Staff recommends the City Council adopt Resolution 2023-025 approving the Development Agreement for DPS Lake Elmo 3rd Addition with the following motion:

“Move to adopt Resolution 2023-025 approving the Development Agreement for DPS Lake Elmo 3rd Addition”

ATTACHMENTS:

1. Resolution 2023-025
2. DPS Lake Elmo 3rd Addition Development Agreement

(reserved for recording information)

DEVELOPMENT AGREEMENT

DPS Lake Elmo 3rd Addition

THIS DEVELOPMENT AGREEMENT is dated _____, 2023, by and between the **CITY OF LAKE ELMO**, a Minnesota municipal corporation (the “City”) and **HENDRIX APARTMENTS, LLC**, a Minnesota limited liability company (the “Developer”).

1. REQUEST FOR PLAT APPROVAL. The Developer has asked the City to approve a plat for DPS Lake Elmo Third Addition (referred to in this Agreement as the “Subdivision”). The property being platted is situated in the County of Washington, State of Minnesota, and is legally described on **Exhibit A**.

2. CONDITIONS OF PLAT APPROVAL. The City hereby approves the Subdivision on the condition that the Developer enter into this Agreement, furnish the security required by it, and record the plat with the County Recorder or the Registrar of Titles within 180 days after the City Council approves the final plat.

3. RIGHT TO PROCEED. This Agreement is intended to regulate the development of the Subdivision property and the construction therein of certain public and private improvements.

Unless separate written approval has been given by the City within the plat or land to be platted, the Developer may not construct public or private Subdivision Improvements or any buildings on the Subdivision Property until all the following conditions precedent have been satisfied:

- A. the Developer has executed and recorded with Washington County all drainage and utility easements required for the Subdivision by the City Engineer and Public Works Director in the City's standard form or the easements have been dedicated to the City in the plat;
- 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 and final landscape plans have been submitted by the Developer and approved by the City Engineer and the City's Landscape Architect;
- E. the Developer has paid the City for all of its legal, engineering, and administrative expenses incurred by the City regarding the City approvals and has given the City the additional City Engineering Administrative Escrow required by this Agreement;
- F. the Developer has paid any outstanding assessments and taxes for the Subdivision 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 Subdivision;
- I. the Developer has provided the City with a certificate of insurance required by this Agreement;

- J. the Developer, 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 final plat has been recorded with Washington County;
- L. a title insurance policy has been issued in the amount of \$100,000 in favor of the City insuring the City's interests as they appear on the plat;
- M. the Developer has executed a stormwater maintenance and easement agreement in the City's standard form;
- N. the Developer has revised the landscaping and tree planting plans to meet the conditions of approval of the final plat and the changes required by the City's Landscape Architect as outlined in his/her memo dated XXXX. Said revised landscaping and tree planting plans must be reviewed and approved by the City's Landscape Architect prior to recording the final plat;
- O. the Developer has revised its plans to identify the location of the emergency vehicle access and the location of the access has been approved by the Fire Chief. Said revised plans must be reviewed and approved by the Fire Chief prior to recording the final plat;
and
- P. the City has issued a written notice that all above conditions have been satisfied and that the Developer may proceed.

4. 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, lot size, lot layout, or dedications of the approved final plat 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.

5. DEVELOPMENT PLANS. The Developer agrees to develop the Subdivision in accordance with the City approvals, including the terms and conditions of approval of the final plat as detailed in City Council Resolution No. XXX, to construct all improvements in accordance with the approved construction plans and specifications (collectively, the “Plans”) prepared by a professional engineer licensed 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.

6. IMPROVEMENTS. In developing the Subdivision in accordance with the Plans, the Developer shall make or install at its sole expense, the following public and private improvements (collectively, the “Subdivision 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. Hudson Boulevard street improvements;
- F. Julia Avenue street improvements;
- G. Trails;
- H. Underground private utilities;
- I. Landscaping;
- J. Street lighting and signage;
- K. Tree preservation and reforestation;
- L. Emergency vehicle access; and
- M. 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.

7. CITY ADMINISTRATION AND CONSTRUCTION OBSERVATION. At the time of the City's approval of the final plat for the Subdivision, 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 32 of this Agreement - Summary of Security Requirements. Thereafter, the Developer shall reimburse the City each month, within 30 days of receiving an invoice, following submission of an invoice to the Developer, for all administration and construction observation costs incurred by the City during the construction of the Subdivision 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 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 Subdivision Improvements should not be considered a substitute for the Developer-required management of the construction of the Subdivision 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 for each type of Subdivision Improvement. The City shall inspect all Developer-installed Subdivision 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 based on a schedule established for this purpose. 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.

8. 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 Subdivision Improvements identified in paragraph 5 above.

9. TIME OF PERFORMANCE. Subject to unavoidable delays including adverse weather conditions, the Developer shall install all required Subdivision Improvements by December 31, 2024. The Developer may, however, request an extension of time from the City, and the City agrees to grant a reasonable extension for delays. Such extension will not be the basis for placing the Developer in default based on the schedule of improvements. 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, if any, and amending this Agreement to reflect the extended completion date.

10. MAINTENANCE DURING CONSTRUCTION. The Developer shall be responsible for all maintenance of the Subdivision Improvements until the Subdivision Improvements are accepted by the City in writing. The Developer and its contractors must adhere to the City's weight restrictions for all streets both inside and outside of the Subdivision, regardless of whether said streets are included in the City's map of streets with weight restrictions and regardless of whether said streets are fully constructed. The Developer also is responsible to perform gopher state one utility locates for all underground utilities until the Subdivision 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 Hudson Boulevard North and Julia Avenue 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 Subdivision 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 Subdivision until the Subdivision Improvements have been accepted by the City. At a minimum, scraping and sweeping shall take place on a weekly basis and on a daily basis during heavy tracking days.

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

12. CONSTRUCTION ACCESS AND PARKING. Construction traffic access and egress for all work on the site is restricted to access via Hudson Boulevard North and Julia Avenue at the existing and approved new driveway location and designated rock construction entrance along

Hudson Boulevard North per the approved erosion control plans. No construction traffic is permitted on other adjacent streets or at any other location along Hudson Boulevard North. The Developer must maintain adequate access for emergency vehicles that is acceptable to the City in its sole discretion at all times during construction.

All construction parking and staging, including the loading and unloading of equipment and supplies during the construction of the Subdivision Improvements must be completed interior to the project site and is not allowed to occur on a public street or within any public right-of-way, including, but not limited to Hudson Boulevard and Julia Avenue. 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.

13. CONSTRUCTION SEQUENCE AND COMPLIANCE. The City will require the Developer to construct the Subdivision 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 Subdivision 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. The Developer may utilize temporary stormwater treatment methods for the Subdivision until the stormwater basins on the site are constructed by the Developer within the Subdivision. If the City Engineer determines that the Developer's temporary treatment of stormwater for the Subdivision is not being managed properly by the Developer, then the City may issue a stop work order.

14. EROSION CONTROL. All construction regarding the Subdivision 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 Subdivision Improvements after the work in the area is complete unless construction of the next stage of the Subdivision 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 10 days, the City may draw on the Security to pay any costs. The City will not allow any development or site work, utility, or street construction and the City will not issue any building permits unless the Subdivision is in full compliance with the approved erosion control plan.

15. SITE GRADING. In order to construct the Subdivision Improvements and otherwise prepare the site for development, it will be necessary for the Developer to grade the Subdivision property. All grading must be done in compliance with this Agreement and the grading plans on file with the City. 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.

16. STREET AND UTILITY IMPROVEMENTS. All storm sewers, sanitary sewers, watermain, and streets, including any turn lane or intersection 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, the first lift of the bituminous streets, trails, 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 punch list items must be completed by the Developer and the City notified to re-inspect the improvements. Before the placement of the final bituminous wear course, the Developer shall repair or replace all broken or failing curbs, trails and damaged or settled streets as determined by the City from a pre-wear course walk through inspection.

17. LANDSCAPING AND TREE REPLACEMENT IMPROVEMENTS.

- A. The Developer agrees to install or cause to be installed 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 warrantied 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 the Developer in the approved Plans has received acceptance by the City. The Developer agrees to have the installer complete an inspection 30 days prior to the end of the two-year warranty period and provide the City with a written report identifying the condition of all landscaping. 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 outlots, public rights-of-way, and any disturbed areas outside the Subdivision boundaries according to a landscape maintenance plan approved by the City. The Developer agrees to achieve “substantial performance” on all seeded or sodded lawns and yards disturbed during the construction of Subdivision 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.”

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

19. OWNERSHIP OF IMPROVEMENTS. Upon completion of the work and construction required by this Agreement, the Subdivision Improvements lying within public easements shall

become City property. Prior to acceptance of the public Subdivision 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 Subdivision Improvements have been completed in accordance with the terms of this Agreement, the City Engineer will accept the completed public Subdivision Improvements.

20. PARK DEDICATION. The Developer shall pay a cash contribution of \$380,000.00 in satisfaction of the City's park dedication requirements. The City requires the dedication of land or a cash contribution in lieu of dedication of land in the amount of 10 percent of the market value of the property to be platted. The amount of the cash contribution was calculated as follows: 14.15 acres x 10 percent = 1.415 acres. The purchase price of the property is \$3,800,000 (\$268,551.24/acre). Therefore, the amount of the cash contribution is \$380,000.00 (1.415 acres x \$268,551.24/acre). The park dedication fee shall be paid by the Developer before recording the final plat.

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 Subdivision 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 Residential Equivalent Charge ("REC") shall be paid by the Developer or the Developer's contractor on behalf of the Developer to the City at the time the City issues a building permit for each building with the

development.

The water availability charge (WAC) in the amount of \$3,000.00 per REC shall be paid by the Developer or the Developer's contractor on behalf of the Developer at the time the City issues a building permit for each building within the development.

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 with the development.

22. WETLAND MITIGATION. There have been no wetlands found on the Property, however, in the event that there are determined to be wetlands on the Property during the course of construction, the Developer shall complete wetland mitigation/restoration in accordance in accordance with any applicable Watershed or agency permits and any plans approved by the Watershed or the City. If the mitigation work is found to be incomplete or restoration is unsuccessful, the City draw down the Security at any time during the warranty period to perform the work if the Developer fails to take corrective measures after being provided reasonable notice by the City.

23. BUILDING PERMITS/CERTIFICATES OF OCCUPANCY.

- A. The City will issue building permits for buildings within the entire Subdivision provided that the final plat has been recorded with Washington County.
- B. A phasing plan for the Subdivision has been approved by the City and is part of the Plans (the "Phasing Plan"). The City will issue a certificate of occupancy for the building that is to be constructed in Phase 1 of the Phasing Plan provided that all Subdivision Improvements that are within the Phasing Plan for Phase 1 have been installed by the Developer and have been accepted by the City. The City will not

accept any Subdivision Improvements until as-built record drawings for the applicable Phase are submitted for review and are approved by the City verifying that the Subdivision Improvements within such Phase have been installed in accordance with the approved Plans.

- C. The City will issue a certificate of occupancy for the building that is to be constructed in Phase 2 of the Phasing Plan provided that all Subdivisions Improvements that are within both Phase 1 and Phase 2 have been installed by the Developer and are accepted by the City. The City will not accept any Subdivision Improvements until as-built record drawings for the applicable Phase are submitted for review and are approved by the City verifying that the Subdivision Improvements within such Phase have been installed in accordance with the approved Plans.
- D. Once construction has started, the City will not consider revisions to the Phasing Plan for the purposes of issuing certificates of occupancy.
- E. 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, inspections, or actions and the halting of all work in the Subdivision.
- F. If the City issues building permits before the acceptance of the Subdivision Improvements by the City, the Developer assumes all liability and costs resulting in delays in completion of the Subdivision Improvements and damage to the Subdivision Improvements caused by the City, the Developer, the Developer's contractors, subcontractors, materialmen, employees, agents, or any third parties.

24. RESPONSIBILITY FOR COSTS.

- A. In the event that the City receives claims from labor, materialmen, or others alleging 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 actual costs incurred by it or the City in conjunction with the development of the Subdivision, including but not limited to legal, planning, engineering, and inspection expenses incurred in connection with the City's approval and acceptance of the plat and the Subdivision, 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 Subdivision. All amounts incurred and due to the City at the time of the recording of the final plat must be fully paid by the Developer prior to the City executing and releasing the final plat for recording.
- 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 plat and the development of the Subdivision unless caused by the negligence, action, or inaction of the City. The Developer shall indemnify and defend the City and its officials, employees, and agents for all costs, damages, or expenses that 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, all 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 one or more lots, the entire Subdivision, or any portion of it.
- F. The Developer shall pay in full all bills submitted to it by the City through the established escrow for obligations incurred under this Agreement within 30 days after receipt. Bills not paid by the Developer 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.

25. CITY PAYMENTS. The City shall reimburse the Developer in the amount of \$ 40,704 for the mill and overlay improvements along Hudson Boulevard, south of the existing roadway centerline. City payments shall be made within 30 days of the City's final acceptance of the Subdivision Improvements, but only if the Developer is not in default with respect to any terms of this Agreement. This payment by the City shall be the City's only responsibility with regard to construction of the Subdivision Improvements and in no case shall act as a waiver of any other right of the City under this Agreement or under applicable laws, ordinances or rules.

26. SPECIAL PROVISIONS. The following special provisions shall apply to the Subdivision and include the Conditions of Approval of the Final Plat and Final PUD Plans:

- A. That publication of the PUD ordinance shall be required before the recording of the approved final plat.

- B. All issues set forth in the City Attorney's plat opinion letter dated October 26, 2022 must be addressed to the satisfaction of the City Attorney prior to the recording of the final plat.
- C. All storm water facilities internal to the site shall be privately owned and maintained. A storm water maintenance and easement agreement in the City's standard form must be executed by the Developer and recorded with the final plat.
- D. That the Developer shall incorporate stormwater reuse for irrigation as approved by the City Engineer.
- E. If applicable, the Developer shall provide the City with a copy of written permission from adjacent property owners for any off-site grading work or storm sewer discharges to adjacent properties before starting any work on the Property.
- F. Before the installation or construction of any subdivision identification signs or neighborhood markers within the Subdivision, the Developer shall submit sign plans to the City for review and obtain a sign permit from the City.

27. 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 Subdivision 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. 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 Subdivision 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.

- D. Third parties shall have no recourse against the City under this Agreement.
- E. 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 portions of this Agreement.
- F. 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.
- G. This Agreement shall run with the land and may be recorded against the title to the Subdivision property at the Developer's expense. The Developer covenants with the City, its successors and assigns, that it is the fee owner of the Subdivision and has obtained consents to this Agreement, in the form attached hereto, from all parties

who have an interest in the Subdivision property, including, but not limited to, mortgagees; that there are no unrecorded interests in the Subdivision property being final platted; and the Developer will indemnify, defend, and hold the City harmless for any breach of the foregoing covenant. Notwithstanding the foregoing, following Developer's completion of the requirements under this Agreement, at the Developer's written request, the City will execute and deliver to the Developer a release of this Agreement, in recordable form.

- H. 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.
- I. The Developer represents to the City that the Subdivision and the Subdivision Improvements comply or will comply with all City, County, metropolitan, state, and federal laws and regulations, including but not limited to subdivision ordinances, zoning ordinances, and environmental regulations. If the City determines that the Subdivision is not in compliance, the City may, at its option following written notice and a reasonable opportunity to cure, refuse to allow construction work on the Subdivision until it is brought into compliance. "Reasonable" shall be defined for these purposes as the City's estimate as to the amount of time it would take the Developer to bring the Subdivision into compliance. Upon the City's demand, the Developer shall cease work until there is compliance.

28. 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, and following written notice and an opportunity to cure, failure by the Developer to commence and complete construction of the Subdivision Improvements pursuant to the terms, conditions, and limitations of this Agreement.
- B. Failure by the Developer, following written notice and an opportunity to cure, to substantially observe or perform any material covenant, condition, obligation, or agreement on its part to be observed or performed under this Agreement.

29. 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 the 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 and certificates of occupancy.
- 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.

30. 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 Subdivision Improvements or any other work or undertaking required by this Agreement, the City may, at its option and following

written notice and an opportunity to cure, 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 Subdivision 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 Subdivision 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.

31. WARRANTY. During the warranty period, the Developer warrants that all Subdivision 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 Subdivision 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 Subdivision 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 Subdivision 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 Subdivision 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 Subdivision of the repair or replacement of the Subdivision 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 public street construction, including the improvements and turn lanes on Hudson Boulevard North, the concrete curb and gutter, trails and sidewalks, materials and equipment 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.

32. SUMMARY OF SECURITY REQUIREMENTS. To guarantee compliance with the terms of this Agreement, payment of special assessments, payment of the costs of all public Subdivision Improvements, and construction of all public Subdivision 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 \$2,156,017. 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 D**. 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 Subdivision 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.

33. 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 establishes 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 \$200,000 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 \$333,516.75 may be

released when all sanitary sewer and watermain utilities have been installed, all testing and televising has 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 \$513,048 may be released when all streets, sidewalks, and storm sewer have been installed and tested, and have 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, but not including the final wear course.
3. Construction Categories 6-10 and 14-17: The amount of \$470,306.25 may be released when all remaining Developer's obligations under this Agreement have been completed including: (1) bituminous wear course; (2) street lighting and private utilities; (3) trails; (4) bio retention facilities; (5) iron monuments for lot corners have been installed; (6) all financial obligations to the City satisfied; (7) the required "record" plans in the form of the City standards have been received and approved by the City; and (8) the public Subdivision Improvements are accepted by the City Engineer and the City Council.
- C. Twenty-five percent of the original Security amount, excluding grading and landscaping improvements shall be retained until: (1) all Subdivision 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.
- D. Twenty-five percent of the original Security amount associated with

Landscaping Improvements shall be retained by the City until: (1) all Landscaping 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.

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 Subdivision 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.

34. 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:	\$380,000
City Engineering Administration Escrow:	\$50,000
TOTAL CASH REQUIREMENTS:	\$430,000

35. NOTICES. Required notices to the Developer shall be in writing, and shall be either hand delivered to the Developer, their employees or agents or mailed to the Developer by certified mail at the following addresses: Hendrix Apartments, LLC, 900 N. Third Street, Minneapolis, MN 55401, Attn: General Counsel (JWelk@sr-re.com). Notices also may 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 Kristina Handt (khandt@lakeelmo.org) at the following address: Lake Elmo City Hall, 3880 Laverne Avenue N., 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.

36. EVIDENCE OF TITLE. The Developer shall furnish the City with evidence of fee ownership of the Subdivision property being platted by way of a title insurance policy dated not earlier than 30 days prior to the execution of the plat.

37. 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 Subdivision property. This Agreement shall be construed according to the laws of the state of Minnesota.

38. 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.

39. 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.

40. MUTUAL COOPERATION. Notwithstanding anything to the contrary in this Agreement,

the City and the Developer each agree to use reasonable efforts to cooperate with each other to carry out the purposes of this Agreement and to avoid unreasonable delays in the performance of this Agreement; provided, however, the Developer acknowledges that the foregoing is not a waiver of any of the City's discretion, rights or remedies under this Agreement.

41. 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: _____
Charles Cadenhead
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 _____, 2023, by Charles Cadenhead 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

**MORTGAGEE CONSENT TO
DEVELOPMENT AGREEMENT**

_____, which holds a mortgage on the Property, the development of which is governed by the foregoing Development Agreement, agrees that the Development Agreement shall remain in full force and effect even if it forecloses on its mortgage.

Dated this _____ day of _____, 2023.

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 2023, by _____.

NOTARY PUBLIC

DRAFTED BY:
City of Lake Elmo
3880 Laverne Avenue North
Lake Elmo, MN 55042
(651) 747-3901

**EXHIBIT A TO
DEVELOPMENT AGREEMENT**

Legal Description of the Property

Lot 1 and Lot 2, Block 1, DPS Lake Elmo 3rd Addition, according to the recorded plat thereof,
County of Washington, State of Minnesota.

**EXHIBIT C TO
DEVELOPMENT AGREEMENT**

Subdivision Improvements Cost/Security Amount Estimate

<u>CONSTRUCTION CATEGORY</u>		<u>COST</u>	<u>125 percent</u>
1	Grading	\$160,000	\$200,000
2	Sanitary Sewer	\$ 98,156	\$122,695
3	Watermain	\$257,595	\$321,994
4	Storm Sewer (<i>includes Hudson Blvd and existing stormwater pond structures</i>)	\$162,056	\$202,570
5	Hudson Boulevard Improvements	\$385,195	\$481,494
6	Hudson Boulevard Trail	\$ 24,805	\$ 31,006
7	Surface Water Facilities (<i>internal storm sewer, infiltration basins, other BMPs</i>)	\$347,455	\$434,319
8	Street Lighting	\$ 10,000	\$ 12,500
9	Street and Traffic Signs	N/A	N/A
10	Private Utilities (<i>electricity, natural gas, telephone, and cable</i>)	N/A	N/A
11	Landscaping Improvements	\$160,151	\$200,188.75
12	Tree Preservation and Restoration	N/A	N/A
13	Wetland Mitigation and Buffers	N/A	N/A
14	Monuments	\$ 1,400	\$ 1,750
15	Erosion and Sedimentation Control	\$108,000	\$135,000
16	Miscellaneous Facilities	N/A	N/A
17	Developer's Record Drawings	\$ 10,000	\$ 12,500
<u>TOTALS</u>		\$1,724,813	\$2,156,017

FORM OF IRREVOCABLE LETTER OF CREDIT

No. _____

Date: _____

TO: City of Lake Elmo

Dear Sir or Madam:

We hereby issue, for the account of _____ (Name of Developer) and in your favor, our Irrevocable Letter of Credit in the amount of \$ _____ available to you by your draft drawn on sight on the undersigned bank.

The draft must:

- a) Bear the clause, "Drawn under Letter of Credit No. _____, dated _____, 20____, of (Name of Bank) _____";
- b) Be signed by the Mayor or City Administrator of the City of Lake Elmo.
- c) Be presented for payment at _____ (Address of Bank) _____, on or before 4:00 p.m. on November 30, 20____.

This Letter of Credit shall automatically renew for successive one-year terms unless, at least forty-five (45) days prior to the next annual renewal date (which shall be November 30 of each year), the Bank delivers written notice to the Lake Elmo City Administrator that it intends to modify the terms of, or cancel, this Letter of Credit. Written notice is effective if sent by certified mail, postage prepaid, and deposited in the U.S. Mail, at least forty-five (45) days prior to the next annual renewal date addressed as follows: City Administrator, City Hall, 3880 Laverne Ave. N., Suite 100, Lake Elmo Minnesota 55042 and is actually received by the City Administrator at least thirty (30) days prior to the renewal date.

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 shall be governed by the most recent revision of the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 500.

We hereby agree that a draft drawn under and in compliance with this Letter of Credit shall be duly honored upon presentation.

BY: _____

Its _____

24988044v11

LA515-110-838683.v10

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

RESOLUTION NO. 2023-025

*A RESOLUTION APPROVING THE DEVELOPMENT AGREEMENT FOR DPS LAKE ELMO
3RD ADDITION*

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

WHEREAS, Hendrix Apartments, LLC, a Minnesota limited liability company (the “Applicant”) previously submitted an application to the City for a final plat and final PUD plan for DPS Lake Elmo 3rd Addition; and

WHEREAS, the Lake Elmo City Council adopted Resolution No. 2022-103 on November 1, 2022 approving the final plat and Resolution No. 2022-124 on December 20, 2022 approving the final PUD plan for DPS Lake Elmo 3rd Addition (collectively, the “Resolutions”); and

WHEREAS, the conditions of approval of the final plat and final PUD plan in the Resolutions included a requirement that the Applicant enter into a development agreement acceptable to the City Attorney and approved by the City Council that delineates who is responsible for the design, construction, and payment of the required improvements with financial guarantees therefore; and

NOW, THEREFORE, the City Council of the City of Lake Elmo hereby:

1. Approves the Development Agreement for DPS Lake Elmo 3rd Addition and authorizes the Mayor and City Clerk to execute it. The City Attorney is authorized to insert a list of the plan documents approved by the City Engineer in Exhibit B of the Development Agreement.

Passed and duly adopted this 21st day of March, 2023 by the City Council of the City of Lake Elmo, Minnesota.

Charles Cadenhead, Mayor

ATTEST:

Julie Johnson, City Clerk