

RECORDED AND EFFECTIVE
per Village of Elm Grove Ord.
§ 335-30(J)(4): _____, 2019

DEVELOPMENT AGREEMENT

Between the

VILLAGE OF ELM GROVE

and

Elm Grove Heights, LLC

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DEVELOPMENT AGREEMENT
Between the
VILLAGE OF ELM GROVE and
ELM GROVE HEIGHTS, LLC

THIS AGREEMENT (“Agreement”) is made and effective this _____ day of _____, 2019 by and between the Village of Elm Grove, a Wisconsin Municipality (“Village”); and Elm Grove Heights, LLC, a Wisconsin Limited Liability Company (“Developer”).

Recitals

The Village and Developer acknowledge the following:

WHEREAS, Developer represents and warrants that it currently holds a contract to purchase approximately 2 acres of property located in the Village at 13040 W. Bluemound Road, which is more fully identified in the attached **Exhibit 1**, and is hereby incorporated by reference (the "Property"); and

WHEREAS, Developer represents and warrants that it will obtain fee simple title to the Property prior to the recording of this Agreement and provide proof of same to Village before recording; and

WHEREAS, Developer seeks to develop the Property by constructing one residential apartment building that will be (1) approximately 93,000 square feet in size and (2) comprised of no more than seventy-five (75) residential units (the “Senior Apartments Project” or “SAP”); and

WHEREAS, the Property is currently zoned as B-3 Mid-Rise Office and Professional District; and

WHEREAS, the Rm-2 Multiple-Family Residential District (Section 335-21.1(C)(2) conditionally permits densities of up to 38 units per acre of multiple-family independent senior living dwellings as part of a Residential Planned Development Overlay District (“Residential PDO”) project, subject to the adjustments provided for in Section 335-30(F)(3); and

WHEREAS, Developer is eligible to request a Residential PDO under Section 335-30(D)(4) because the Property is (1) at least 1.5 acres in size and (2) is adjacent on at least one complete side to a business and office zoning district in the Village; and

WHEREAS, Developer has requested that the Property be rezoned to Rm-2 Multiple-Family Residential District with a Residential PDO; and

WHEREAS, the Village conducted a public hearing concerning the SAP and the rezoning of the Property on March 25, 2019; and

WHEREAS, the Developer has provided plans and specifications for the SAP (attached hereto and incorporated by reference as **Exhibit 2**, the “Plans and Specifications”); and

WHEREAS, the Building Board, at its meeting dated January 16, 2019 recommended approval of Developer’s Plans and Specifications; and

WHEREAS, the Plan Commission, at its meeting dated March 4, 2019 recommended approval of Developer’s Plans and Specifications, rezoning of the Property, and the proposed certified survey map; and

WHEREAS, the Plan Commission has further recommended that Developer be granted enhanced density for the SAP based on Developer’s representation of the quality of materials and construction for the SAP; and

WHEREAS, the Plan Commission has further recommended approval of the SAP conditioned upon entry by the Village and Developer into a Development Agreement pursuant to Section 335-30 of the Village Code of Ordinances; and

WHEREAS, the Village of Elm Grove is requiring that, as conditions of development approval, that Developer install certain improvements illustrated in the Plans and Specifications that are to be dedicated by Developer to the Village upon completion (the “Public Improvements”); and

WHEREAS, on March 25, 2019 the Village Board duly approved Developer’s Plans and Specifications and the rezoning of the Property, subject to Developer obtaining title to the Property in fee simple and further subject to the terms and provisions of this Agreement; and

NOW, THEREFORE, in consideration of the granting of approval of the SAP by the Village Board, \$1.00, the representations by Developer set forth herein, the mutual promises set forth herein, and other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

I. Incorporation of Recitals.

The Recitals set forth above are hereby incorporated and made part of this Agreement.

II. Improvements.

Subject to the provisions set forth in Section XIV, Developer hereby agrees that, upon undertaking any land disturbing or construction work on the SAP governed by this Agreement, Developer shall prepare the Property and construct public and private improvements (all at Developer’s sole cost and expense) in accordance with the Plans and Specifications as follows:

A. Buildings.

1. Residential Apartments:
Developer shall construct one (1) residential apartment building approximately 93,000 square feet in size, consisting of not more than seventy-five (75) individual independent senior living residential apartment units (as defined under Section 335-21.1), together with related improvements. Construction by Developer shall be in strict accordance with the Plans and Specifications set forth in **Exhibit 2**.
2. Construction of such building and related improvements and their completion in strict compliance with all Plans and Specifications and within the times stated in Section V shall constitute material terms of this Agreement. Village understands, acknowledges, and agrees that the "strict accordance" standard does allow for commercially reasonable change orders during the construction process, so long as such change orders do not modify (1) the exterior materials as approved by the Building Board; (2) the building's physical appearance as approved by the Building Board and the interior materials/finishes specifications as attached to **Exhibit 2**, and constituting a material representation by DEVELOPER; (3) the number of units; or (4) the number of parking spaces, but allows the installation of additional outdoor parking spaces per section II(F)(4).

B. Sanitary Sewer.

1. Developer shall construct, install, and furnish a completed sanitary sewer system for the SAP in accordance with the Plans and Specifications. The sanitary sewer improvements are private improvements and shall be connected to the Village sanitary sewer system.
2. As a condition of obtaining any plumbing permit(s) pertaining to the SAP, Developer shall acquire for the SAP and submit to the Village an approved Wisconsin Department of Safety and Professional Services permit approval and submit a copy to the Village prior to installing the sanitary sewer system.
3. As a condition of obtaining any plumbing permit(s) pertaining to the SAP, Developer shall acquire approval for the SAP from the Milwaukee Metropolitan Sewerage District ("MMSD") and submit a copy of such approval to the Village.
4. All work on the sanitary sewer/plumbing shall be in accordance with "Standard Specifications for Sewer and Water Construction in Wisconsin" and applicable specifications and standards provided by MMSD.
5. Developer shall be responsible for payment of all applicable connection and permit charges associated with said sanitary sewer system for the SAP including the abandonment of the existing sewer lateral and the installation of a new lateral to the PROPERTY from the sewer main.
6. Developer shall, at its sole expense, televise the existing lateral to the Property to ensure its structural water-tight integrity and shall provide a videotape report thereof to the Village prior to the connection of the lateral to the village's sewer system.

7. Developer shall, at its sole expense, furnish a complete electronic file containing all "as-built" plans for the sanitary sewer system; including location and elevation of laterals at the lot lines compatible with the Village's GIS software prior to the granting of an occupancy permit. Developer shall be responsible for any costs of integrating said GIS data into the Village's GIS database.

C. Water.

1. Developer shall construct, install, furnish, and provide for the extension of municipal water to service the SAP in accordance with (1) the Plans and Specifications; (2) code requirements for the Village of Elm Grove and the City of Brookfield; and (3) "Standard Specifications for Sewer and Water Construction in Wisconsin", all at no cost to the Village.
2. Developer shall dedicate the constructed public water main to the Village. Developer shall also connect to the municipal water supply via a 6" lateral. The water lateral is a private improvement that will not be dedicated.
3. Developer shall construct, install, furnish, and provide fire suppression systems for the Property to the extent required by, and in accordance with, plans and specifications approved by the State of Wisconsin, and install stand pipes in all stair wells, and two (2) public fire hydrants pursuant to the Plans and Specifications.

D. Storm/Surface Water System.

1. Developer shall construct, install, furnish, and provide adequate facilities for storm and surface water drainage management in accordance with the Plans and Specifications and in accordance with all applicable State, Federal, and Village statutes, regulations, ordinances, and MMSD Chapter 13 regulations.
2. The storm and surface water drainage system on the Property is a private improvement and will not be dedicated to the Village.
3. The Village shall have no obligation to issue any occupancy permits until the storm and surface drainage systems have been inspected by the Village Engineer and fully installed in accordance with the Plans and Specifications.
4. Developer shall, at its sole expense, furnish a complete electronic file containing all "as-built" plans of the storm/surface water systems provided by Developer under this Agreement together with survey coordinate locations for manholes, inlets, and other structures provided by Developer under this Agreement, both on and off the Property, together with an electronic data file for integration into the Village's GIS database. Developer shall be responsible for the costs of integration of said data into the Village's GIS database.
5. Developer or its successors and assigns shall be responsible for the inspection on not less than an annual basis, perpetual maintenance, operation, and replacement of all storm/surface water facilities required under this Agreement. This includes, but is not limited to, the responsibility for, on a routine and emergency basis, and as needed, conducting all dredging and/or cleaning of the storm/surface water facilities and equipment to assure that they perform, at a minimum, in accordance with the performance standards set forth in the Plans and Specifications. Developer acknowledges that the storm/surface water drainage facilities and equipment are

subject to Section 325-21 through 325-45 of the Village Code of Ordinances as amended from time-to-time, and the provisions of any then applicable State or Federal statute or regulation concerning storm water management and discharge. The responsibility under this Section shall be recorded in a Storm Water Management Facility Maintenance Agreement with respect to the Site in the form attached hereto as **Exhibit 8**. Developer may, at Developer's sole option, transfer its maintenance obligations for the storm water facilities to its successors and assigns at any time after the SAP is constructed.

6. Developer shall provide an irrevocable letter of credit¹ as provided for in Section VII B or certified check in an amount determined by the Zoning Administrator, or designee, to guarantee implementation of proposed storm water management measures per Village of Elm Grove Ordinance § 325-40.

E. Grading/Erosion Control/Landscaping.

1. Developer shall grade, seed, and otherwise landscape the Property pursuant to the Plans and Specifications.
2. Developer and each of its agents, contractors, and subcontractors shall at all times remain in compliance with all applicable municipal and state erosion control restrictions and requirements including, but not limited to the Wisconsin Department of Natural Resources Best Management Practices.
3. Prior to commencement of any ground disturbing activities, Developer shall submit, or cause to be submitted, one or more erosion control plans conforming to the requirements in Sections 325-9(A)-(D)(1) of the Village Code of Ordinances that are acceptable to the Director of Public Works, in his/her reasonable discretion, and obtain erosion control permits. In addition to paying the then applicable permit fee(s), Developer shall provide a letter of credit as provided for in Section VII B or cash escrow to the Village in the amount of \$10,000.00 to guarantee a good faith execution of the approved erosion control plan and any erosion control permit conditions. Said letter of credit shall be subject to reduction and release following the procedures set forth in Sections VII(E)-(G) of this Agreement.
4. Developer shall notify the Public Works Director within forty-eight (48) hours of commencing any land disturbing activity on the Property.
5. Developer shall notify the Public Works Director of completion of any erosion control measures within forty-eight (48) hours after their installation.
6. Developer shall install all erosion control measures as identified in the approved erosion control plan for the Property.
7. Developer shall maintain all road drainage systems, storm water drainage systems, erosion control measures, and other facilities on the Property identified in the control plan.
8. Developer shall promptly within forty-eight (48) hours repair any siltation or erosion damage to adjoining surfaces and drainage ways resulting from land

¹ All letters of credit required by this Agreement shall be consolidated into one comprehensive letter whose duration shall not be less than one year and which shall be renewed not less than thirty (30) days prior to its expiration and shall be subject to being drawn upon in its full amount by the Village if not renewed at least thirty (30) days before the stated expiration date of the letter of credit.

- developing or disturbing activities on the Property.
9. Developer shall inspect the construction erosion control measures on the Property after each rain of 0.5 inches or more and at least once each week and make needed repairs as often as needed.
 10. Developer shall allow the Public Works Director, or designee, to enter the Property for the purpose of inspecting for compliance with the erosion control plan or for performing any work necessary to bring the site into compliance with the erosion control plan.
 11. Developer shall keep a copy of the erosion control plan on the Property.
 12. If any erosion control facilities (including but not limited to bails, silt fence and berms) are washed out or otherwise rendered ineffective as determined by the Building Inspector, the Developer shall replace said facilities within forty-eight (48) hours of being so notified by the Building Inspector.
 - a. If Developer fails to reinstall said facilities within forty-eight (48) hours of being so notified by the Building Inspector, the Village may, but is not required to, reinstall said facilities and charge one hundred ten percent (110%) of all costs incurred by the Village in so reinstalling said facilities to Developer. The Village may collect this amount from the security the Village is holding pursuant to this Agreement.
 - b. Developer shall, simultaneous with the execution of this Agreement, provide the Village with temporary access easement to the Property in the form attached hereto and incorporated by reference as **Exhibit 3** to permit repair or replacement of said facilities.
 13. Developer shall provide and plant on the Property all tree/shrub plantings of the size and species, and at the locations, identified in the Plans and Specifications provided, however, that Developer may substitute larger size plantings of the same species. Following the planting of said trees and shrubs, Developer shall water and maintain said trees and shrubs on the Property to ensure their survival for not less than two (2) years. In the event any tree(s) or shrub(s) fails to survive for two (2) years following its planting, Developer shall replace said tree(s) or shrub(s) at its sole expense.
 14. All disturbed areas on which construction is not actively ongoing shall be restored to grade and re-vegetated within 60 days of the cessation of active construction.

F. Roads and Parking.

1. Developer shall grade, construct, and surface private roads, driveways, and parking areas for the Property as shown on, and in accordance with the Plans and Specifications.
2. Direct access to the Property from public streets shall be only via Bluemound Road.
3. Developer shall, at its expense perform the modifications to the curb and gutter on the private entry drive and complete the pavement marking for parking as shown on the Plans and Specifications.
4. Developer shall install, at its sole expense, the “banked” parking spaces as shown

and designed with cross sections on **Exhibit 9** at the indicated location(s) and in full conformity with the specifications indicated therein within one hundred and eighty (180) days of a written request from the Village of Elm Grove Plan Commission based on its concurrence with the professional recommendation of the Elm Grove Zoning Administrator, or designee, predicated on his/her monitoring and observations and those reported/shared by citizens, tenants in the building, the Developer or its successors or assigns, members of the Elm Grove Police Department, the Village Manager and surveyed members of the Village Board of Trustees.

5. In the event that Developer or its successor or assign fails to install the banked parking spaces as provided herein, the Village and any agent or subcontractor thereof shall have a perpetual general easement throughout the PROPERTY to install requested banked parking spaces as shown on **Exhibit 10** and shall invoice Developer or its then successor or assign.
6. Installation of additional banked parking shall occur in two phases labeled Areas A and B on **Exhibit 9** attached hereto. Phase One shall be the installation of six parking spaces. Phase two shall be the installation of an additional eight parking spaces.
7. The Village may direct the installation of Phase Two only if, after Developer has fully installed Phase One, the Village has made a separate and subsequent determination pursuant to subsection 4 that the six Phase One parking spaces, together with the existing surface and underground parking, do not provide adequate parking for the Property. The separate and subsequent determination must be based on new evidence of inadequate parking presented after installation of Phase One in accordance with processes and procedures as contained in subsection 4 above.
8. Developer shall have the right at any time to voluntarily install any or all of the banked parking spaces after providing notice to the Village that Developer desires additional parking at the Property.
9. Installation of Banked Parking spaces shall comply with all applicable codes.
10. Unless otherwise prevented by Federal Emergency Management Agency or the State of Wisconsin Department of natural Resources, the installation of Banked Parking Spaces shall occur within 180 days after a Notice to Install Banked parking is issued by the Village.
11. If Developer or its successor or assign fails to make payment within thirty (30) days of being invoiced, the Village may impose a special charge against the PROPERTY pursuant to Wis. Stat. § 66.0627 as subsequently amended from time to time. This section II(F)(4) - (12) shall survive the performance of this Agreement and shall bind Developer, its successors and assigns until all parking improvements provided for in **Exhibit 9** have been fully installed.
12. In the event Developer wishes to contest an alleged error in the Notice to Install Banked Parking, then Developer shall comply with all appeals procedures as outlined in §330-26 within the Village Code of Ordinances.

G. Exterior Lighting and Signage.

1. Developer shall provide and install exterior lighting and signage for the Property in accordance with the Plans and Specifications. Developer shall bear all electrical and operational expenses for all lighting on the Property.

H. Pathways/Sidewalks.

1. Developer shall install concrete sidewalks on the Property in accordance with the Plans and Specifications.

III. Dedication of Public Improvements.

A. Transfer to Village

Subject to all of the other provisions of this Agreement and the Exhibits attached, Developer shall, without charge to the Village, upon completion of any Public Improvements situated on or off the Property, unconditionally give, grant, convey and fully dedicate the same to the Village, its successors and assigns, forever, free and clear of all encumbrances whatever, together with, including without limitation, all structures, mains, conduits, pipes, lines, machinery, equipment and appurtenances which may in any way be a part of such Public Improvements and together with any and all necessary easements for access thereto. At the time of conveyance, Developers shall provide the Village evidence of title insurance reflecting Developers' ownership of the Property. Developer shall also pay, when due, any transfer taxes that arise as a result from said dedication(s).

B. Notice and Acceptance.

At the end of the SAP's construction timeline, Developer shall notify the Village in writing of the completion of any Public Improvements described as such in the Plans and Specifications attached hereto as Exhibits. Within seven (7) days of the date of such notice, the Village shall inspect and/or re-inspect as necessary any Public Improvements described in Developer's notice and prepare and deliver to Developer a written punch list of repairs necessary to bring such Public Improvements into conformance with the Plans and Specifications. Upon Developer's written notice to the Village that all punch list repairs for any such public improvement are complete, and following satisfactory completion of any applicable re-inspection, the Village shall, no later than forty-five (45) days following the date of such notice and subject to the re-inspection and approval of the Village, by separate resolution, accept the dedication of such Public Improvement. Simultaneous with the acceptance by the Village of any sanitary sewer improvement on the Property, Developer shall, at its sole expense, furnish to the Village one complete electronic file containing all "as built" plans.

C. Construction Warranty for Dedicated Public Improvements.

Developer warrants that all materials and workmanship furnished by Developer for construction of the Public Improvements shall meet all state, federal, and local

requirements and specifications and that the Public Improvements which will be dedicated to the Village are and will remain in good and sound condition for and during a period of twelve (12) months from the date of final acceptance of dedication by the Village.

D. Warranty Security.

Developer shall furnish to the Village, prior to final acceptance of dedication of any Public Improvements by the Village, warranty security, as provided for in section VII B, equaling ten percent (10%) of the total final cost of the Public Improvements. Such letter of credit will be retained by the Village for a period of twelve (12) months after the final acceptance of the Public Improvements as security for Developer's guarantee that the workmanship and materials furnished meet all state, federal, and local requirements and specifications and that the applicable Public Improvements are and will remain in good and sound condition for and during the twelve-month period from and after their acceptance. Separate letters of credit may be issued for each component of the Public Improvements.

E. Obligation to Repair.

Developer shall make or cause to be made, at its own expense, any and all repairs which may become necessary under and by virtue of Developer's warranty and shall leave the Public Improvements which will be dedicated to the Village in good and sound condition, satisfactory to the Village at the expiration of the warranty period; provided, however, Developer's obligation to repair shall not extend to repairs necessitated by or related to any act, omission, neglect or misconduct of the Village, its agents, employees or contractors (and the letter of credit may not be drawn against in such instances). In the absence of a written notice from the Village identifying any specific deficiency, the Public Improvements will be deemed approved at the end of the twelve-month warranty period and at such time the letter of credit for such Public Improvements shall be released.

F. Notice of Repair.

If, during the warranty period, the Public Improvements dedicated to the Village shall, in the reasonable opinion of the Village Engineer in his or her reasonable discretion, require any repairs or replacements which in his/her reasonable judgment are necessitated by reason of settlement of foundation, structure or backfill, or other defective workmanship and/or materials, the Developer shall, upon written notification by the Village Clerk of the necessity for such repairs, make such repairs, at its own cost and expense. In the event Developer fails to make such repairs within a reasonable time after written notice has been sent as provided herein, or fails to start work within thirty (30) consecutive days after such written notice, weather permitting, the Village may cause such work to be done, but has no obligation to do so, either by contract or otherwise, and the Village may draw upon any letter of credit then in the Village's possession to pay any costs or expenses incurred in connection with such repairs or replacements. If the cost or expense incurred by the Village in repairing or replacing any portion of the Public Improvements covered by this warranty exceeds the amount of the letter of credit,

then Developer shall, within thirty (30) consecutive days of being invoiced by the Village, pay any excess cost or expense actually incurred in the correction process. If Developer or its successors or assigns fail to make payment within said thirty (30) consecutive days, the Village may assess a special charge against the Property pursuant to Wis. Stat. § 66.0627 as subsequently amended from time-to-time.

G. Maintenance Prior to Acceptance.

1. Developer shall maintain the Public Improvements which will be dedicated to the Village until such time as they are accepted for dedicating by the Village. This maintenance shall include routine maintenance. In cases where emergency maintenance is required, such as sewer blockages, the Village retains the right to complete the required emergency maintenance in a timely fashion and bill the Developer for all actual associated costs.
2. All improvements to be dedicated to the Village under this Agreement shall be maintained by Developer until they are accepted so they conform to the applicable plans and specifications attached as Exhibits to this Agreement at the time of their acceptance by the Village.

IV. Miscellaneous Requirements.

- A. Underground Utilities.** All electrical, telephone, gas, and cable utilities shall be underground. Normal and customary above-ground utility facilities such as transformers, service pedestals, gas vents, and the like approved in writing by the Village Engineer and/or Zoning Administrator, or designee, in their reasonable discretion are permissible. Coordination of installation as shown on the Plans and Specifications shall be the responsibility of Developer.
- B. Manner of Performance.** Developer shall cause all construction called for by this Agreement to be carried out and performed in a good and workmanlike manner.
- C. Permits.** Developer hereby agrees to obtain all necessary permits and approvals from all governmental authorities, including but not limited to the Village, MMSD and State of Wisconsin, prior to the start of construction, demolition, and/or hazardous waste abatement. Developer shall be solely responsible for payment of all applicable permit fees and costs.
- D. Locations.** The Developer agrees that the locations of existing municipal sanitary sewer, storm water and water facilities as indicated on the Plans and Specifications are approximate locations only. Developer is solely responsible for definitively locating all such municipal facilities in the field, and no municipality shall bear any liability if any of said facilities are not located within a reasonable distance from that indicated in the documents described in this subsection.
- E. Pre-Construction Meetings.** Developer and its general contractor(s) shall attend

pre-construction meetings with Village and City staff and consultants prior to commencing construction on the SAP.

V. Time

- A.** Developer shall complete, or cause the completion of the following aspects of the improvements of the Property, all in compliance with the requirements of this Agreement, but subject to Section 106-3(F) of the Village Code of Ordinances, and in accordance with the following SAP schedules:
1. Upon the recording of the Development Agreement Developer shall commence construction within twelve (12) months thereafter.
 2. Subject to the provisions of Section V(D)(1) of this Agreement, failure by Developer to begin construction within said twelve (12) month period will result in the automatic revocation of the rezoning to a Rm-2 Multiple-Family Residential District and the Residential PDO zoning applied to the Property and reversion of the zoning for the Property to B-3 Mid-Rise Office and Professional District zoning classification.
 3. Within ten (10) months of the recording of the Development Agreement, the Developer shall submit construction plans that strictly conform to the Plans and Specifications to the Village simultaneously with Developer's submission of said construction plans to the Village of Elm Grove for approval. The Village agrees to conduct an initial review of copies of such construction plans to determine whether they conform with Plans and Specifications approved by the Building Board and to notify Developer within ten business days of the date the Village becomes aware of any discrepancy between the construction plans submitted by Developer and the Plans and Specifications as approved by the Village.
 4. All SAP improvements shall be completed pursuant to Section 106-3(H) of the Elm Grove Village Code; however, Developer may apply for building permit extensions upon expiration of the initial building permit to complete customized interior improvements within individual apartment units.
- B.** Time is of the essence as to all deadlines set forth in this Agreement. Subject to the provisions of section V(D)(1) of this Agreement, upon failure of any Developer to meet one or more deadlines specified in this section, Village may (but is not required to) draw on the letter of credit provided for in section VII (B) and complete that aspect of the SAP pertaining to the Public Improvements which will be dedicated to the Village. The Village may also (but is not required to) restore the Property to grade and stabilize the Property to achieve a dust-free, erosion-proof condition provided, however, that this subsection B shall not be construed to grant the Village authority to remove any building constructed by Developer on the Property solely due to Developer's failure to meet one or more deadlines specified in this Agreement. In the event the Village performs work on the Property under this Agreement, the Village may charge the Developer one hundred ten percent (110%) of the actual costs incurred by Village in completing that aspect of the SAP or restoring the Property to grade and stabilizing the Property to a dust-free,

erosion-proof condition. The Village may draw upon any security provided in this Agreement for the payment of said charges against the defaulting Developer and invoice said Developer(s) for any costs in excess of any such security. If Developer fails to pay such invoice, the Village shall have the right to assess a special charge against the Property, or any portion thereof, under Wis. Stat. § 66.0627 as subsequently amended from time-to-time.

- C. Subject to the provisions of Section V(D) of this Agreement, Developer shall be deemed to have forfeited its rights under this Agreement to construct the Improvements set forth in the Plans and Specifications upon occurrence of any one or more of the following events:
 - a. Developer fails to commence construction within the time permitted under Section V(A)(1) of this Agreement, as applicable; or
 - b. Developer fails to obtain building permit(s) within Twelve (12) months of the date of the recording of this Agreement.

D. Cause of Delay and Notice of Default

- 1. If delay in construction start or in completion of any Improvements on the Property described in this Agreement is caused or contributed to by act, omission, misconduct or neglect of the Village or those acting for the Village, labor disputes, casualties, acts of God or the public enemy, governmental embargo restrictions, shortages of fuel, labor or materials, action or non-action of public utilities or of local, state or federal governments affecting the work or any other causes beyond Developer's reasonable control, then the time of completion of such Improvement shall be extended for the additional time caused by such delay. Developer shall give written notice to the Village within twenty (20) calendar days of the first occurrence of any event together with substantiation that the event qualifies for the granting of additional time under this Section. Failure by Developer to provide written notice within the time provided hereunder shall constitute a waiver by Developer of any right to an extension under the terms of this Section.
- 2. The Village shall give Developer written notice of default twenty (20) consecutive days prior to exercising its rights to cure any defaults by Developer in its completion of Public Improvements in conformity with section V(B) above unless the Village Manager in his or her sole discretion determines that such delay would unreasonably endanger the health or safety of any persons or property within the Village in which case the Village may provide a shorter time for cure.

VI. Payment of Village Fees.

Developer agrees to reimburse the Village for its planning, engineering, inspection, and legal work associated with the SAP. Village shall keep a detailed accounting of such costs and bill Developer at the rates contracted by the Village for such services.

- A. Developer shall, at the time of entry into this Agreement, pay the Village for:

1. The Village's reasonable engineering and legal expenses incurred as of March 25, 2019, and shall further deposit with the Village Ten Thousand Dollars (\$10,000.00) with respect to reimbursement of the Village's subsequent expenses arising out of or related to entry into this Agreement. If Village reasonably incurs expenses which exceed said posted \$10,000.00, Developer shall pay the Village such additional sums within ten (10) consecutive days of the date of Village's invoice to Developer, together with such other additional funds as necessary to maintain a balance of not less than Five Thousand Dollars (\$5,000.00) at all times until the termination of all other financial security provided to the Village under this Agreement. Said invoice shall contain a summary of Village's costs for which payment is required under this Section.
 2. The Village hereby acknowledges that there are no municipal sanitary sewer impact, reserve capacity, or similar municipal sewer impact fees due or owing as a result of the Project. To the best of the Village's knowledge, there are no MMSD sewer impact, reserve capacity, or similar district impact fees due or owing as a result of the Project.
 3. Developer acknowledges that it shall be responsible for payment at the time of application for plumbing permits for the SAP and for any periodic sanitary sewer charges that may be established by the Village and/or MMSD on a municipality- or district-wide basis as well as any fees, assessments, and/or costs applicable to the SAP that may be associated with Developer's extension of municipal water referred to in Section II(C)(1) of this Agreement or Elm Grove storm water utility district fees.
- B. Developer acknowledges and agrees that, in the event the Developer remains in default concerning payment of any fees and/or the making of any deposits required under this Agreement for twenty (20) days, the Village shall have the right, subject to section V(D)(2), at its sole discretion, to draw upon any security provided by Developer and held by the Village under this Agreement, post a Stop Work order on the SAP pertaining to Developer, withhold inspections and/or the granting of any permit(s) and/or pursue any other remedy available to the Village under this Agreement or Wisconsin law.
- C. Developer shall be responsible for payment of all applicable permit fees set forth in the Village Code of Ordinances and the costs of all inspections of the SAP.

VII. Representations, Guarantee, Security for Payment and Performance of Developer's Obligations.

A. Financing.

1. Developer shall represent through its written submittals to Village Staff and attorney members that Developer has sufficient financial resources committed to allow Developer to complete the SAP as proposed for approval. Developer shall cause any conditions to such commitment(s) to be removed as a condition of the recording of this Agreement and, upon Developer's failure to remove all conditions

of its financing commitment(s) within twelve (12) months of the approval of this Agreement of the SAP, the Developer's rights and obligations under this Agreement shall terminate and the Rm-2 Multiple-Family Residential District and Residential PDO District zoning granted to the Property shall be revoked and the Property shall revert back to the underlying B-3 Mid-Rise Office and Professional District zoning classification.

B. Performance Guarantee.

1. As a condition of obtaining execution of this Agreement, Developer shall deliver or cause to be delivered to the Village Manager one original irrevocable letter of credit, as follows:
 - a. One letter of credit equal to _____ Dollars (\$_____.00) issued by a federally insured banking institution, the financial condition of which is acceptable to the Village, naming Village as payee and being in a form acceptable to the Village Attorney. Said letter of credit shall guarantee one hundred twenty-five percent (125%) of the construction of landscaping, parking lot, access/egress improvements, sidewalks, curbing, exterior lighting, water distribution system installation, storm water system facilities, site restoration, and erosion control measures required under this Agreement for the SAP together with the Village's engineering, administrative, and inspection fees projected by the Village to arise out of this Agreement. Upon receipt, the letter of credit provided hereunder shall be in substantial compliance with that form attached hereto as **Exhibit 4**. Except for such amounts that may otherwise be released under the provisions of this Section, said letter of credit shall be renewed annually and evidence of renewal presented to the Village not less than thirty (30) nor more than sixty (60) days prior to its expiration. Failure to renew the letter of credit prior to its expiration shall entitle the Village to withdraw all funds remaining.
 - c. The letter of credit under this Section shall be released within twelve (12) months of Developer completing the SAP provided all material terms and provisions of this Agreement have been satisfied, except for 10% of the Public Improvement cost as outlined in III D.

C. Impact Fee Waiver.

Wisconsin Statute § 66.0617 restricts the ability of the Village to collect impact fees. The Developer agrees that any payments to the Village under this Agreement are not intended to nor constitute impact fees and are not intended to be restricted or controlled by Wis. Stat. § 66.0617. Developer, on behalf of itself and its successors and assigns, waives the right to claim application of Wis. Stat. § 66.0617 to the payments made in accordance with this Agreement.

D. Reduction of Security Upon Partial Completion.

The amount of the security will be reduced as the improvements are partially completed and approved by the Village Engineer in accordance with the following procedure:

1. From time-to-time during the course of construction Developer may request the Village Engineer to inspect the construction work, including but not limited to landscaping, completed by Developer to that date for purposes of seeking partial release, and the Village Engineer, as agent of the Village, shall use its best efforts to make such inspection within seven (7) days after the request.
2. The request to inspect shall be accompanied by a certification prepared by the Developer's architect and stating the work completed, an estimate of the dollar value of the work completed to the date of the request and since the Developer's architect's last certification and that the work has been completed in a good and workmanlike manner and in compliance with the Plans and Specifications and Ordinances. Developer's architect's certification shall also include an estimate of the cost to complete the remaining balance of the improvements, on a form and presented in a manner reasonably acceptable to the Village Engineer.
3. The request for inspection shall further be accompanied by a sworn contractor's statement and appropriate photocopies or originals of lien waivers showing that all work in place and for which a reduction in the Security is requested has been fully paid for or that all liens have been waived.
4. Upon receipt of the required documentation, the Village Engineer shall conduct its inspection and certify to the Village and to the financial institution issuing any letter of credit the dollar value of the work completed to the date of the request for inspection and since the last certification by the Village Engineer, provided the Village Engineer finds that the work has been completed in a good and workmanlike manner and in compliance with the approved the Plans and Specifications and Ordinances, that no mechanic's or other liens will attach to the Property or to any property of the Village as a result of the installation-of the improvements and that Developer's architect's estimate of the dollar value of the work completed and the cost to complete the remaining improvements are reasonable. Based upon those findings, the Village Engineer shall approve a reduction in the Security so long as the balance remaining in the Security is at least equal to one hundred and ten percent (110%) of the cost to complete all the remaining improvements' depending on the projected time of completion of same.

E. Release of Security Upon Completion.

Upon final completion of all of the SAP Improvements, the acceptance by the Village of the Public Improvements, and posting of any required warranty or maintenance security, the then remaining balance of Developer's Security shall be released and returned, after first drawing upon the security (if required) for any fees and costs due and owing to the Village pursuant to all applicable ordinances upon

thirty (30) days' prior written notice to Developer.

F. Return of Excess Proceeds After Default.

In the event of default by Developer, if any of the Security funds remain in the possession of the Village after all of the private and Public Improvements guaranteed under this Section VII have been completed in a good and workmanlike manner and in accordance with the Plans and Specifications and Ordinances, all warranty or maintenance obligations (if any) are satisfied and all fees, costs and expenses of the Village, including reasonable attorney's fees, engineering fees, consultant fees or other out-of-pocket expenses incurred in completing the improvements, in releasing liens thereon in paying for work completed prior to default are paid, or other costs incurred as a result of the default of Developer; then any remaining balance shall be paid to the Developer, subject to any claim to said funds asserted by any financial institution issuing any letter of credit given as Security.

VIII. Method of Improvement.

Developer has requested and been granted "enhanced density" under Sections 335-21.1(C)(2) , 335-30(F)(3) of the Village Code of Ordinances based on Developer's representations to the Village concerning the high quality of exterior and interior materials, design details, workmanship and features to be provided by Developer under this Agreement. Therefore, Developer hereby agrees to engage contractors for all work included in this Agreement that will perform the work in a good and workmanlike manner. Developer further agrees to use materials and make the various installations in accordance with the Plans and Specifications made a part of this Agreement by reference and including those standard specifications for public improvements as the Village Board or its Commissions may have adopted and published prior to the signing of this Agreement.

IX. Indemnification and Insurance.

A. Indemnification.

1. In addition to, and not to the exclusion or prejudice of, any provisions of this Agreement or documents incorporated herein by reference, Developer shall INDEMNIFY AND SAVE HARMLESS the Village, its officers, agents and employees, and shall defend the same from and against any and all liability, claims, loss damages, interest, actions, suits, judgments, costs, expenses, attorneys' fees, and the like, which result from or arise in the course of, out of, or as a result of the performance, incorrect performance, or nonperformance (other than where Section V(A)(2) of this Agreement results in a reversion of the PDO District zoning for the SAP) of Developer's obligations under this Agreement or Developer's negligent construction of Improvements covered thereby until the granting of the last occupancy permit pertaining to the SAP and thereafter only if the occurrence giving rise to the claim predates the granting of the last occupancy permit. The language

of this Section IX notwithstanding, Developer shall have no obligation to indemnify, save harmless or defend the Village resulting from negligent or intentional acts of the Village, its officers, agents, employees, or the residents of individual apartment units.

2. In every case where Developer is obligated to indemnify and save harmless the Village, its officers, agents and employees, if judgment is rendered against the Village, its officers, agents, or employees and notice and opportunity to defend was given to the Developer of the pendency of the suit within ten (10) days after service of the summons and complaint on the Village, such judgment shall be conclusive upon the Developer not only as to the amount of damages, but also as to its liability to the Village and/or its officers, agents, and employees.

B. Insurance.

Developer shall maintain at all times, until the granting by the Village of the final occupancy permit, insurance with minimum limits and coverage as shown below:

1. Worker's Compensation, including Occupational Disease, Insurance meeting the statutory requirements of the State of Wisconsin, and Employer's Liability insurance in an amount of at least Five Hundred Thousand Dollars (\$500,000.00).
2. Comprehensive Liability Insurance providing limits for bodily injury and personal injury of Two Million Dollars (\$2,000,000.00) combined single limit. The policy must include the Village and its agents, officers, and employees as "additional insureds" and provide premises, operations, elevators, damage, blanket contractual covering indemnities within contract documents, products and completed operations coverage and be endorsed as "primary and non-contributory" to any insurance of the additional insured, except from their sole negligence
3. Comprehensive Automobile Liability Insurance, on occurrence basis, covering all owned, non-owned, and hired vehicles with limits of liability equal to those set forth in paragraph IX(B)(2) hereinabove.

C. Certificate of Insurance.

Developer shall furnish to the Village one or more certificates of insurance² evidencing the issuance of policies covering the above-recited insurance requirements at the time of the execution of this Agreement, which shall be attached hereto as **Exhibit 5**. All certificates of insurance must state that notice of any material change in coverage, non-renewal, or cancellation will be provided to the Village thirty (30) days prior to the effective date of any such change, non-renewal, or cancellation. The form of the certificate of insurance will be subject to the approval of the Village. The certificate of insurance shall be delivered prior to the signing of this Agreement.

D. No Limit on Liability.

² An ACORD 25 is NOT acceptable.

It is understood and agreed that the insurance coverage and limits required above shall not limit the extent of Developers' responsibilities and liabilities pursuant to this Agreement or imposed by law.

X. General Conditions and Regulations.

All the provisions of the Village Ordinances relating to use and development of land, as amended from time-to-time are incorporated herein by reference, and all such provisions shall bind the parties hereto and be a part of this Agreement as fully as if set forth at length herein. This Agreement and all work and improvements required hereunder shall be performed and carried out in strict accordance with and subject to the provision of said ordinances and this Agreement.

XI. Assignment of Rights.

A. Neither Developer nor any successor and/or assign permitted under this Agreement shall assign this Agreement or any rights granted hereunder without the prior written consent of the Village and prior to the performance of all of the provisions of this Agreement. The Village Board reserves the right to increase the amount of security hereunder in the event of any consent to any assignment.

XII. Amendments.

The Village Board and Developer, by mutual consent, may amend this Agreement only upon entry into a subsequent written agreement approved at a meeting of the Village Board of Trustees for the Village of Elm Grove. The Village Board shall not, however, consent to an amendment until after first having received a recommendation from the Village Plan Commission.

XIII. Notices.

The Parties consent that any notice given hereunder shall be in writing and delivered by two (2) of the following: electronic or facsimile transmission, or in person, mailed by registered or certified mail, return receipt requested, or delivered via overnight courier:

1. Electronic notices must be delivered to the below addresses:
 - a. Developer:
 - i. William Rutherford: w.rutherford@horizondbm.com; or
 - ii. Scott Kwiecinski: s.kwiecinski@horizondbm.com
 - b. Village:
 - i. Dave DeAngelis: ddeangelis@elmgrovetwi.org; or
 - ii. Tom Harrigan: tharrigan@elmgrovetwi.org

2. Mail Delivery:

- a. To the Village:
 - i. Village Clerk, 13600 Juneau Blvd., Elm Grove, WI 53122.
- b. To the Developer:
 - i. 5201 East Terrace Drive, Suite 300, Madison, WI 53718

Any party may, by notice as provided above, designate a different address from time to time. Any such notice shall be effective on the date of receipt.

XIV. Default by Developer.

- A. The failure of the Village to insist in any one or more instances upon performance of any term or condition of this Agreement shall not be construed a waiver of future performance. The obligations of the Developer with respect to such term, covenant or condition shall continue in full force and effect.
- B. In addition to any other remedies otherwise provided under this Agreement or the Village Code of Ordinances, the Village shall have the right to withhold inspections and/or permits for the SAP, and/or to bring an action in the Circuit Court for Waukesha County for violation(s) of this Agreement and shall be entitled to recover reasonable attorneys' fees from the defaulting Developer.

If Developer fails to commence construction of the SAP, the Village shall not have the right to seek or compel specific performance for the construction of said SAP under this Agreement.

XV. Exculpation of Village Elected Officials in Personal Capacity.

The parties mutually agree that the President, Board of Trustees, and Plan Commission of the Village of Elm Grove, entered into and are signatory to this Agreement solely in their official capacity and not individually, and shall have no personal liability or responsibility hereunder; and personal liability as may otherwise exist, being expressly released and/or waived.

XVI. Execution of Deed Restriction Precluding Occupancy by a Person Under Sixty-Two Years of Age.

- A. Developer acknowledges that but for its expressed representation to utilize the proposed SAP exclusively for senior apartments for persons sixty-two (62) years of age with units significantly smaller than the average residential unit and with limited parking spaces, it would not have obtained the rezoning provided for under this Agreement.
- B. To induce the Village to enter into this Agreement Developer hereby agrees:

1. To execute and deliver prior to the time of the recording of this Agreement a deed restriction precluding residential occupancy within the SAP by anyone younger than sixty-two (62) years of age.

XVII. Miscellaneous Provisions.

- A. The Parties acknowledge and represent that this Agreement is the subject of negotiation by all parties and that all parties together shall be construed to be the drafter hereof and this Agreement shall not be construed against any party individually as drafter.
- B. Legal Relationship. Nothing in this Agreement shall be construed to create an employer/employee relationship, joint employer, a joint venture or partnership relationship, or a principal/agent relationship between the Village and Developer.
- C. This Agreement shall not be construed to abridge or waive the Village's authority under Wis. Stat. § 62.23.
- D. The parties hereby acknowledge that this Agreement imposes on them, and their respective officers, agents, and employees, a duty of good faith and fair dealing.
- E. Survival. Except as otherwise expressly provided in Section V(D) of this Agreement, all guarantees, agreements, representations, and warranties made herein shall survive the execution of this Agreement. The Indemnification and Insurance section IX shall survive for nine (9) years following the signing of this Agreement. This Agreement shall be binding upon the Parties their respective heirs, personal representatives, executors, or successors and assigns.
- F. Developer represents and warrants that it is a duly organized and validly existing limited liability company in good standing under the laws of the State of Wisconsin and that the execution and performance of this Agreement has been duly authorized by resolution.
- G. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
- H. Recording. This Agreement and its Exhibits thereof, shall be recorded with the Register of Deeds for Waukesha County.
- I. All time periods referred to in this Agreement shall be calculated on the basis of consecutive calendar days.

Exhibit List

Exhibit 1	Legal Description
Exhibit 2	Plans and Specifications
Exhibit 3	Temporary Access Easement
Exhibit 4	Irrevocable Letter of Credit
Exhibit 5	Certificate of Insurance
Exhibit 6	Reciprocal Maintenance Easements
Exhibit 7	Utility Easement
Exhibit 8	Storm Water Management Facility Maintenance Agreement
Exhibit 9	“Banked” Parking Installation Plan
Exhibit 10	Perpetual General Easement

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