

(reserved for recording information)

SITE IMPROVEMENT PERFORMANCE AGREEMENT CITY OF EDINA 70th AND FRANCE REDEVELOPMENT PHASE 1

THIS **SITE IMPROVEMENT PERFORMANCE AGREEMENT** (“Agreement”) dated _____, 2021, by and between the **CITY OF EDINA**, a Minnesota municipal corporation (“City”) and **U.S. BANK NATIONAL ASSOCIATION**, a national banking association (“Developer”).

1. BACKGROUND.

A. Developer has applied to develop the following legally described property in the City of Edina, Minnesota: **Lot 4, Block 1, A M N Addition**, Hennepin County, Minnesota (hereinafter referred to as the “Subject Property”), into an approximately 6,500 square foot US Bank building with drive-through services.

B. The City has rezoned the Subject Property to Planned Unit Development (“PUD”). Development in accordance with the PUD. A Site Improvement Performance Agreement is required for the PUD.

C. Contemporaneously with the execution of this Agreement, the City and Mortenson Development, Inc., a Minnesota corporation (“Mortenson”), are entering into that certain Development

Contract (the “Development Contract”) relating to the development of certain aspects of the Subject Property and certain adjoining property owned by Mortenson. This Agreement and the improvements and construction performed pursuant to this Agreement shall address the work performed on the Subject Property and shall not address the improvements or construction to be performed pursuant to the Development Contract.

2. RIGHT TO PROCEED. On the Subject Property, the Developer may not grade or otherwise disturb the earth, remove trees, construct private improvements, or any buildings until all the following conditions have been satisfied: 1) This Agreement has been fully executed by both parties and filed with both the City Clerk and the Hennepin County Recorder’s Office; 2) The required security has been received by the City; and 3) The required insurance has been received by the City.

3. PLANS. The Subject Property shall be developed in accordance with the following Plans which are on file with the City. The Plans shall not be attached to this Agreement. If the Plans vary from the written terms of this Agreement, the written terms shall control. The Plans are:

- Final Development Plans dated June 4, 2021 prepared by RSP Architects
- Existing Conditions and Removal Plans dated June 4, 2021 prepared by RSP Architects
- Phase 1 Site Plans dated June 4, 2021 prepared by RSP Architects
- Phase 1 Grading Plans dated June 4, 2021 prepared by RSP Architects
- Utility Plans dated June 4, 2021 prepared by RSP Architects
- Details Plan dated June 4, 2021 prepared by RSP Architects
- Final Landscaping Plan dated June 4, 2021 prepared by RSP Architects

Prior to the Developer’s initiating construction, Developer will submit final construction drawings for the work for the City’s review and approval. Following the City’s approval of those final construction drawings, the term “Plans” as used in this Agreement will include the approved final construction drawings and in the event of a conflict between the approved final construction drawings and the above referenced Development Plans, the approved final construction drawings will control. The Developer may request

changes to the Plans. Plan changes deemed non-material, pursuant to City ordinances, can be reviewed and approved by City staff. Material Plan changes shall require approval by the City Council.

4. EROSION CONTROL. Prior to initiating construction, the Erosion Control Plan shall be implemented by the Developer and inspected and approved by the City. The City may impose additional erosion control obligations if they would be reasonable and beneficial. All areas disturbed by the grading operations shall be stabilized per the Minnesota Pollution Control Agency (“MPCA”) Stormwater Permit for Construction Activity. Seed shall be in accordance with the City's current seeding specification, which may include temporary seed to provide ground cover as rapidly as possible. All seeded areas shall be fertilized, mulched, and disc anchored as necessary for seed retention. The parties recognize that time is of the essence in controlling erosion. If the Developer does not comply with the MPCA Stormwater Permit for Construction Activity or with the Erosion Control Plan or any schedule of 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 thirty (30) days of receipt of notice thereof, the City may draw on the letter of credit to pay any costs. No development or utility construction will be allowed on the Subject Property and no building permits will be issued for the Subject Property unless the Subject Property is in full compliance with the approved Erosion Control Plan.

5. LICENSE. Developer hereby grants the City, its agents, employees, officers and contractors a license to enter the Subject Property to perform (a) all work permitted to be performed by the City under this Agreement, and (b) all inspections deemed appropriate by the City in conjunction with site development.

6. CONSTRUCTION ACCESS. Construction traffic access and egress must be in accordance with a construction management plan, which will be provided by Mortenson per the Development Contract and reasonably approved by the City prior to the commencement of construction.

7. IMPROVEMENTS. The Developer shall construct the following improvements:

A. Public Improvements:

- A 8-ft wide public sidewalk along France Avenue adjacent to the referenced site.
- Phase 1 of 71st Street including watermain and sanitary sewer as shown in the submitted plans.

B. Private Improvements:

- Phase 1 of 71st Street including concrete curb and gutter, base and wear course bituminous paving, and storm sewer systems.
- Complete the landscaping as shown on the submitted plans.
- Ewing Avenue Extension as shown on the submitted plans.

The Public Improvements and the Private Improvements shall be installed in accordance with City ordinances and the Plans approved by the City. Grading, construction activity, and the use of power equipment are prohibited between the hours of 9 o'clock p.m. and 7 o'clock a.m. The Plans for Private and Public Improvements shall be prepared by a competent registered professional engineer and submitted to the City for approval by the City Engineer. 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 complies with City standard specifications and ordinances and the Plans 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 and a soil engineer inspect the work on a part-time basis. The Developer, its contractors and subcontractors, shall follow all reasonable instructions received from the City's inspectors. 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. The Developer or its engineer shall schedule a pre-construction meeting at a mutually agreeable time at the City with all parties concerned, including the City staff, to review the program for the construction work. Within thirty (30) days after the completion of the Private and Public Improvements and before the security is released, the Developer shall supply the City with a complete set of reproducible "as constructed" plans and an electronic file of the "as constructed" plans that satisfy the City's record drawings requirements (the "Record Drawings"). The Record Drawings shall be submitted prior to the Developer receiving an occupancy permit for any building on the Subject Property.

8. DEWATERING. Due to the variable nature of groundwater levels and stormwater flows, it is the Developer's responsibility to satisfy itself with regard to the elevation of groundwater and to perform any necessary dewatering and storm flow routing. All dewatering shall be in accordance with applicable laws and regulations.

9. TIME OF PERFORMANCE. The Developer shall install the Public Improvements within eighteen (18) months after issuance of the necessary permits for the Public Improvements.

10. CLEAN UP. The Developer shall clean dirt and debris from streets that has resulted from the construction work by the Developer, subcontractors, their agents or assigns. Prior to any construction on the Subject Property, the Developer shall identify in writing a responsible party and schedule for erosion control, street cleaning, and street sweeping.

11. OWNERSHIP OF IMPROVEMENTS. Upon completion of the work and construction required by this Agreement and final acceptance by the City Engineer, the Public Improvements shall become City property without further notice or action. Prior to acceptance of the Public Improvements by the City, the Developer must furnish the following affidavits:

- Contractor's Certificate
- Engineer's Certificate
- Developer's Certificate

certifying that all construction has been completed in accordance with the terms of this Agreement. Upon receipt of affidavits and verification by the City Engineer, the City Engineer will accept the completed Public Improvements. Within thirty (30) days after the acceptance of the Public Improvements and before the security is released, the Developer shall supply the City with a complete set of reproducible Record Drawings as described in Section 7. The City's standard specifications for utility construction identify the procedures for final acceptance of utilities.

12. CITY ENGINEERING ADMINISTRATION AND CONSTRUCTION OBSERVATION. The Developer shall pay for the City's in-house engineering administration. City engineering administration will include monitoring of construction observation, consultation with Developer and its engineer on status or problems regarding the Project, coordination for final inspection and acceptance, Project monitoring during the warranty period, and processing of requests for reduction in security.

13. SECURITY REQUIREMENTS. To guarantee compliance with the terms of this Agreement, payment of the costs of all Public and Private Improvements, and construction of all Public and Private Improvements in accordance with the Plans, the Developer shall, before the Developer may proceed with the construction of the Public and Private Improvements, furnish the City with a letter of credit in the form attached hereto, from [] for \$160,000.00 plus a cash fee of \$5,000 for City engineering administration (the "Security"). The City may draw down the Security, on five (5) business days written notice to the Developer, to cure any violation of the terms of this Agreement which is not cured within said five (5) business day period. If the violation reasonably requires more than five (5) business days to cure and Developer commences the cure within such five-day period and is diligently proceeding

with such cure, the Developer shall have additional time to complete the cure prior to a draw on the Security. If the Public and Private Improvements are not completed and accepted by the City at least thirty (30) days prior to the expiration of the letter of credit (as the same may be extended), the City may also draw it down upon five (5) business days prior notice if the letter of credit is not extended to the date when the Public and Private Improvements are scheduled to be completed. If the Security is drawn down, the proceeds shall be used to cure the default. Upon receipt of proof satisfactory to the City that a portion of the Public or Private Improvements have been substantially completed in accordance with the Plans and financial obligations to the City in connection with such portion have been satisfied, with City approval the Security may be reduced from time to time by ninety percent (90%) of the financial obligations that have been satisfied. Ten percent (10%) of the Security shall be retained as security until all Public and Private Improvements have been completed, all financial obligations to the City satisfied, the required "as constructed" plans have been received by the City, a warranty security is provided (as set forth in Section 14 below), and the Public Improvements are accepted by the City Engineer. The City's standard specifications for utility and street construction outline procedures for security reductions. If the City has not previously drawn on the Security in accordance with the preceding sentence, then, upon the Developer's satisfaction of the conditions precedent to the City Engineer's acceptance of the Public and Private Improvements, the City Engineer's acceptance of the Public Improvements in accordance with this Agreement, and the Developer's delivery of the maintenance bonds or other security as described in Section 14, the City shall return the Security to the Developer within 30 days.

14. WARRANTY. The Developer warrants all Public and Private Improvements required to be constructed by it pursuant to this Agreement against poor material and faulty workmanship. The warranty period for all Public Improvements is one year and shall commence following completion and acceptance by City Engineer. The Developer shall post or cause its contractor to post maintenance bonds in the amount

of twenty-five percent (25%) of final certified construction costs of the Public Improvements to secure the warranties. The City shall retain ten percent (10%) of the security posted by the Developer until the maintenance bonds are furnished to the City or until the warranty period expires, whichever first occurs. The retainage may be used to pay for warranty work.

15. SPECIAL PROVISIONS.

A. The Developer shall comply with conditions outlined in City Resolution No. 2021-21, to the extent applicable to the Subject Property.

B. The Developer shall comply with the conditions outlined in the Director of Engineering's memo dated November 10, 2020 and the Building Official's memo dated November 2, 2020 to the extent applicable to the Subject Property.

C. The Developer shall comply with the Spack Consulting Traffic & Parking Study recommendations, to the extent the recommendations apply to the southern right turn lane from France Avenue, as identified in the study. Staff shall work with Hennepin County staff to eliminate the need for the right-turn lanes, if elimination would be warranted.

16. RESPONSIBILITY FOR COSTS.

A. The Developer shall pay all reasonable costs incurred by it or the City in conjunction with the installation of the Public Improvements, including but not limited to legal, planning, engineering and inspection expenses incurred in connection therewith, the preparation of this Agreement, and the review of any other plans and documents related thereto.

B. Except in the case of the negligence or willful misconduct of the City or its officers, employees, and agents, the Developer shall indemnify and hold the City and its officers, employees, and agents harmless from claims made by itself and third parties for damages sustained or costs incurred

resulting from Developer's installation of the Public Improvements, including all costs, damages, or expenses which the City may pay or incur in consequence of such claims, including attorneys' fees.

C. In the event the City is successful in litigation to enforce the terms of this Agreement, the Developer shall reimburse the City for costs incurred in litigation and subsequent enforcement of this Agreement, including reasonable engineering and attorneys' fees.

D. The Developer shall pay in full all bills submitted to it by the City for undisputed obligations incurred under this Agreement within thirty (30) days after receipt. If the undisputed bills are not paid on time, the City may halt site development and construction until the bills are paid in full. Bills not paid within thirty (30) days shall accrue interest at the rate of eight percent (8%) per year.

17. MISCELLANEOUS.

A. Third parties shall have no recourse against the City or the Developer under this Agreement.

B. Breach of the terms of this Agreement by the Developer without cure in the time period provided shall be grounds for denial of building permits.

C. 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.

D. The Developer shall pay all reasonable costs incurred by it or the City in conjunction with the installation of the Public Improvements, including but not limited to legal, planning, engineering and inspection expenses incurred in connection therewith, the preparation of this Agreement, and the review of any other plans and documents related thereto.

E. Except in the case of the negligence or willful misconduct of the City or its officers, employees, and agents, the Developer shall indemnify and hold the City and its officers, employees, and

agents harmless from claims made by itself and third parties for damages sustained or costs incurred resulting from Developer's installation of the Public Improvements, including all costs, damages, or expenses which the City may pay or incur in consequence of such claims, including attorneys' fees.

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 Subject Property.

H. The Developer and its contractors shall acquire commercial general liability insurance covering personal injury, including death, and claims for property damage which may arise out of the Developer's work or the work of their subcontractors or by one directly or indirectly employed by any of them. Limits for such insurance shall be in a combination single limit policy of \$1,000,000 or more. The City shall be named as an additional insured on the policy on a primary and noncontributory basis, and the Developer and contractors shall file with the City a certificate evidencing coverage. The Developer and contractors must provide a Certificate of Insurance which meets the following requirements:

1. The Description section of the Accord form needs to read "City of Edina is named as Additional Insured with respect to the General Liability and Auto Liability policies on a Primary and Non-Contributory Basis."
2. Certificate Holder must be City of Edina.
3. Showing City of Edina named as Additional Insured on a Primary and Non-Contributory Basis.

I. The Developer and its general contractor shall obtain Worker's Compensation Insurance in accordance with the laws of the State of Minnesota, including Employer's Liability Insurance, to the limit of \$100,000.00 each accident.

J. 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.

K. Breach of the terms of this Agreement by the Developer without cure in the time period provided shall be grounds for denial of building permits and for and the halting of all work on, the Subject Property.

L. The Developer represents to the City that the Public Improvements 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 Public Improvements do not comply, the City may, at its option, refuse to allow construction or development work on the Subject Property until the Developer does comply. Upon the City's demand, the Developer shall cease work until there is compliance.

M. From time to time, when requested by Developer, the City shall execute and deliver a recordable certificate confirming the satisfaction and completion of the requirements contained in this Agreement.

18. DEVELOPER'S DEFAULT. In the event of default by the Developer as to any of the work to be performed by it hereunder, the City may, at its option, perform the work and the Developer shall promptly reimburse the City for any expense incurred by the City, provided the Developer, except in an emergency as determined by the City, is first given notice of the work in default, not less than thirty (30) days in advance, provided that if the cure requires more than thirty (30) days to cure and Developer

commences a cure within such period and is diligently pursuing such cure, the Developer shall have additional time to pursue a cure. This Agreement is a license for the City to act, and it shall not be necessary for the City to seek a Court order for permission to enter the land. When the City does any such work, the City may, in addition to its other remedies, assess the cost in whole or in part.

19. NOTICES. Required notices to the Developer shall be in writing, and shall be either hand delivered to the Developer, its employees or agents, or mailed to the Developer by certified mail at the following address:

U.S. Bank National Association
800 Nicollet Mall, 15th Floor
BC-MN-H15F
Minneapolis, MN 55402
Attn: Corporate Real Estate

With copy to:

U.S. Bank National Association
800 Nicollet Mall, 21st Floor
BC-MN-H21N
Minneapolis, MN 55402
Attn: Corporate Counsel, Corporate Real Estate

Notices to the City shall be in writing and shall be either hand delivered to the City Manager, or mailed to the City by certified mail in care of the City Manager at the following address:

Edina City Hall
4801 West 50th Street
Edina, MN 55424-1330

[Remainder of Page Intentionally Left Blank.]
[Signature Pages Follow.]

CITY: **CITY OF EDINA**

By: _____
James Hovland, Mayor

And _____
Scott Neal, City Manager

STATE OF MINNESOTA)
 (ss.
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by **James Hovland** and by **Scott Neal**, respectively the Mayor and City Manager of the **City of Edina**, a Minnesota municipal corporation, on behalf of the corporation and pursuant to the authority granted by its City Council.

Notary Public

DEVELOPER:
U.S. BANK NATIONAL ASSOCIATION,
A national banking association

By _____ [print name]
Its _____ [title]

[illegible]

The foregoing instrument was acknowledged before me this _____ day of _____, 2021,
by _____, the _____ of **U.S. Bank National Association**, a national association, on behalf of said association.

Notary Public

DRAFTED BY:
CAMPBELL, KNUTSON
Professional Association
 Grand Oak Office Center I
 860 Blue Gentian Road, Suite 290
 Eagan, Minnesota 55121
 Telephone: (651) 452-5000
 DSK

IRREVOCABLE LETTER OF CREDIT

No. _____

Date: _____

TO: City of Edina
4801 West 50th Street
Edina, Minnesota 55424-1330

Dear Sir or Madam:

We hereby issue, for the account of _____ 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) State that _____ is in default, beyond any applicable notice and cure periods, under that certain Site Improvement Performance Agreement between the City of Edina and _____;

c) Be signed and sworn to by the City Manager or Finance Director of the City of Edina; and

d) 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 Edina Finance Director 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: Edina City Manager, Edina City Hall, 4801 W. 50th Street Edina, MN 55424-1330, and is actually received by the City Manager 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. 600.

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

By: _____

Its _____