

ACCESS EASEMENT AGREEMENT

between

THE CITY OF EDINA, MINNESOTA

And

MORTENSON DEVELOPMENT, INC.

And

U.S. BANK NATIONAL ASSOCIATION

Dated as of _____, 2021

ACCESS EASEMENT AGREEMENT
(70th and France Redevelopment)

THIS **ACCESS EASEMENT AGREEMENT** (this “Agreement”) is made and entered into this _____ day of _____, 2021 (“Effective Date”), by and between the **CITY OF EDINA, MINNESOTA**, a Minnesota municipal corporation (the “City”), and **MORTENSON DEVELOPMENT, INC.**, a Minnesota corporation, (the “Developer”) and **U.S. BANK NATIONAL ASSOCIATION**, a national banking association (“Bank”).

RECITALS:

WHEREAS, Developer is the fee owner of certain real property located in the City of Edina, Minnesota, legally described as: ***Lots 1, 2, and 3, Block 1, A M N Addition*** (the “Developer Tract”).

WHEREAS, Bank is the fee owner of certain real property located in the City of Edina, Minnesota, legally described as: ***Lot 4, Block 1, A M N Addition*** (the “Bank Tract”) (collectively, the “Developer Tract” and the “Bank Tract” are referred to as the “Property” and collectively, the Developer and the Bank are referred to as “Owner”).

WHEREAS, as a condition of City Resolution No. 2020-124, the City requires from Developer and Bank, and Developer and Bank are willing to grant to the City, in accordance with the terms of this Agreement, access easements over portions of the Property for roadways/drive aisles and sidewalks, subject to limitations set forth herein.

WHEREAS, Developer and City have entered into a Development Contract, and Bank and City have entered into a Site Improvement Performance Agreement, and as a condition of the Development Contract and Site Improvement Performance Agreement, Developer and Bank are required to grant access easements for pedestrian and vehicular traffic on, over, upon and across that portion of the Property owned by Developer and Bank.

WHEREAS, Owner has agreed to operate, manage, and maintain the Property pursuant and subject to the terms and conditions of the Development Contract and the Site Improvement Performance Agreement and this Agreement.

WHEREAS, the City, Developer and Bank deem it to be in their interests and in furtherance of the economic development and redevelopment plan for the Development reflected in the Development Contract to enter into this Agreement.

WHEREAS, all capitalized terms used herein without definition shall have the respective meanings ascribed to them in the Development Contract.

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, each of them does hereby covenant and agree with the others as follows:

ARTICLE I. GRANT OF EASEMENTS

Section 1.1. Easement Premises. Developer and Bank hereby grant and convey to the City, for the benefit of the City:

A non-exclusive, perpetual easement for pedestrian and vehicular access over, across, upon and through those certain portions of the Property described and depicted on the attached Exhibit "A" (collectively, the "Easement Premises"), all in accordance with and subject to the terms and conditions of this Agreement.

ARTICLE II. TERM

Section 2.1. Term. The easements granted hereby, and each reservation, covenant, condition and restriction contained in this Agreement, shall be effective as of the date hereof, shall be perpetual, and shall remain in effect until affirmatively released by the City. Such release shall be evidenced by the recording of a release or termination of this Agreement in the real estate records of Hennepin County, Minnesota, at which time this Agreement shall terminate, subject to the continuation of those provisions that specifically survive termination of this Agreement.

ARTICLE III. USE OF EASEMENT PREMISES

Section 3.1. Operation and Control of Easement Premises. During the term of this Agreement, Owner shall operate the Easement Premises in accordance with this Agreement and all applicable governmental laws, ordinances, regulations and orders, at Owner's sole cost and expense. Subject to the terms of this Agreement, Owner has full authority and control over the management, operation, and use of the Easement Premises. Owner is entitled to keep and retain as its own property all income and revenue produced from the use and operation of the Easement Premises during the term of this Agreement and shall have no obligation to report to or account to the City for any such income or revenue or with respect to expenses incurred by Owner in its use and operation of the Easement Premises. Owner may engage such employees, agents, or independent contractors as it may deem advisable to conduct the management, repair, maintenance, and operation of the Easement Premises from time to time during the term of this Agreement. Except as specifically set forth herein, Owner is entitled to make all decisions and to execute all agreements, in its sole discretion, with respect to the Easement Premises so long as such decisions and agreements do not violate the provisions of this Agreement, the Development Contract, or any applicable governmental laws, ordinances, regulations or orders, as each of the foregoing may be amended and so long as each of the foregoing remains in effect.

Section 3.2 Development of the "Ewing Avenue Extension". The City acknowledges that the area depicted on Exhibit "B" ("the Ewing Avenue Extension" portion of the Easement Premises) will not be utilized by the City (and the easements granted in Article I shall not be applicable to the Ewing Avenue Extension) until a vehicular connection between the Ewing Avenue Extension and the property immediately to the south of the Bank Tract is completed by the City or its designee according to the requirements of this Agreement. When the City elects to

improve the Ewing Avenue Extension portion of the Easement, the City or its designee shall be responsible for performing all improvements necessary to make such connection to a condition consistent with the other improved portions of the Easement Premises. The City shall give Bank and Developer not less than sixty (60) days' written notice of such election to improve such connection, which notice shall be accompanied by plans and specifications for such improvements. The City further agrees that any construction, reconstruction or maintenance activities performed or authorized by the City or its designee pursuant to this Agreement shall be performed in accordance with the requirements of this Agreement and all applicable governmental laws, codes and requirements and commensurate with the standards utilized for the improvement of the other portions of the Easement Area, and shall allow for uninterrupted access to and use of the Bank Tract (including, without limitation, uninterrupted access to and from the drive-through banking facility on the Bank Tract).

Section 3.3. Owner's Reservation of Certain Rights; Easement Use Limitations. The City's easement rights under this Agreement shall be subject to the following reservations and limitations as well as the other applicable provisions contained in this Agreement:

(a) Owner reserves and retains the right from time to time to exclude and restrain any person or entity who is using the Easement Premises to engage in disruptive activities, including, without limitation, (i) exhibiting any placard, sign or notice, (ii) distributing any circular, handbill, placard or booklet, (iii) soliciting memberships, signatures or contributions for private, civic, public, charitable or political purposes, (iv) parading, picketing or demonstrating, or (v) failing to follow rules and regulation promulgated by Owner relating to the use and operation of the Easement Premises.

(b) Owner reserves the right to temporarily erect or place barriers in and around areas on the Easement Premises which are being constructed and/or repaired in order to ensure either safety of persons or protection of property, only for such length of time as is reasonably necessary to complete construction or repairs.

(c) Owner reserves and retains any and all other property and use rights in and to the Easement Premises (including, without limitation, the right to grant other easements over, under and upon the Easement Premises), so long as such use does not materially and unreasonably interfere with or adversely impact the City's rights to the use of the Easement Premises as set forth in this Agreement beyond a de minimis extent (it being expressly understood that the use of the Easement Premises for underground utilities, pedestrian traffic, landscaping and/or signage shall be deemed not to materially interfere with such passage or accommodation).

ARTICLE IV. MAINTENANCE OF THE EASEMENT PREMISES

Section 4.1. Maintenance. At all times during the term hereof, Owner, at its cost and expense, shall keep and maintain the Easement Premises in good condition and repair in a first-class manner, similar to public rights of way, which such maintenance shall include, without limitation, the following:

(a) all repairs, replacements, renewals, alterations, additions and betterments thereto, structural and non-structural, ordinary and extraordinary, and foreseen and unforeseen, all as may be necessary to keep the Easement Premises in the condition and repair required by this Agreement;

(b) the inspection, repair, replacement, and maintenance of all pedestrian surfaces to a smooth and evenly-covered condition, which obligation includes, without limitation, the cleaning, sweeping, repairing and resurfacing of such pedestrian surfaces;

(c) periodic removal of all papers, debris, filth, refuse, ice and snow, provided all sweeping shall be at appropriate intervals during such times as shall not unreasonably interfere with the use of the Easement Premises, provided however that the City will snow plow a five foot (5') wide foot path on the sidewalk located on 70th and France Avenue;

(d) maintaining and replacing all landscaping and other vegetation;

(e) keeping in repair, replacing and repainting any appropriate directional signs or markers within or associated with the Easement Premises;

(f) operating, keeping in repair, cleaning and replacing when necessary such lighting facilities as may be reasonably required, including, without limitation, all lighting necessary or appropriate for Easement Premises security; and

(g) maintaining in good working order, repairing, and replacing as necessary all domestic water, sewer, storm water, gas, electricity, power, heat, telephone, other communications service and any and all other utility or similar services used, rendered, or supplied, upon, at, from, or in connection with the Easement Premises.

Section 4.2. No Obligation of the City to Repair or Maintain. Except as provided in Section 4.1(c), the City shall have no obligation of any kind, expressed or implied, to repair, rebuild, restore, reconstruct, modify, alter, replace, or maintain the Easement Premises or any part thereof.

ARTICLE V. UTILITIES

Section 5.1. Utility Charges. During the term of this Agreement, Owner shall pay, or cause to be paid, when the same become due, all charges for water, sewer usage, storm water, gas, electricity, power, heat, telephone, or other communications service and any and all other utility or similar services used, rendered, supplied, or consumed in, upon, at, from, or in connection with the Easement Premises, or any part thereof.

ARTICLE VI. INDEMNIFICATION, INSURANCE

Section 6.1. Indemnification of the City. Except to the extent caused by the willful misconduct or negligence of the City, its employees or agents, or the general public, or arising out of the default by the City and its officers, employees or agents of obligations made pursuant to a

contract with Owner, including this Agreement, Owner hereby covenants and agrees to assume and to indemnify and save harmless the City and its employees from and against any and all claims, demands, actions, damages, costs, expenses, reasonable attorneys' fees, and liability in connection with the loss of life, personal injury and/or damage to property, to the extent arising from or out of the willful misconduct or negligence of Owner, its employees or agents in the design or initial construction, maintenance and operation of the Easement Premises (other than the Ewing Avenue Extension), or to the extent arising out of the breach of Owner's obligations hereunder.

Section 6.2. Personal Property. All property of every kind and character which Owner may keep or store in, at, upon, or about the Easement Premises shall be kept and stored at the sole risk, cost, and expense of Owner.

Section 6.3. Liability Insurance. During the term of this Agreement, Owner shall procure and maintain continuously in effect (or shall cause the same to occur), the following policies of insurance of the kind and minimum amounts as are customarily maintained with respect to facilities and improvements similar to those located on the Easement Premises, at commercially reasonable coverage levels, to be reviewed from time to time by Owner: insurance against liability for injuries to or death of any person or damage to or loss of property arising out of or in any way relating to the use, occupancy, or condition of the Easement Premises, or any part thereof, including insuring the indemnification obligations set forth in Section 6.1 above. Such insurance shall provide that the City is an additional insured.

Section 6.4. General Insurance Requirement. All insurance required in this Agreement shall be placed with financially sound and reputable insurers licensed to transact business in the State of Minnesota. Owner shall, within a commercially reasonable time following the City's request therefor, furnish the City with copies of policies evidencing all such insurance or a certificate or certificates of the respective insurers stating that such insurance is in force and effect. Each policy of insurance herein required shall contain a provision that the insurer shall not cancel it without giving written notice to the City at least 10 days before the cancellation becomes effective. The insurance coverage herein required may be provided by a blanket insurance policy or policies.

Section 6.5. No Obligation of the City for Insurance. At no time and under no circumstances shall the City be required to take out, maintain in force and effect, or pay for any type of insurance coverage with reference to the protection of and/or ownership of and/or occupancy of and/or a suit relating to the Easement Premises and/or any improvements hereafter located thereon.

ARTICLE VII. BINDING EFFECT

Section 7.1. Covenants to Run with the Land. This Agreement and the rights and obligations hereunder shall run with the land and title to the Property and shall inure to the benefit of and be binding upon the parties hereto and their respective successors, and assigns. Each of the Grantors and their respective successors and assigns shall be liable only for such obligations under this Agreement as accrue during its respective period of ownership of the applicable portion of the Property, and only with respect to those obligations which relate to the portion of the Property owned by the applicable Grantor. Each obligation arising under this Agreement will bind only

those portions of the Property as to which such obligation relates and the applicable Grantor with respect thereto, and the other portions of the Property and the other Grantors will not be burdened by such obligation.

ARTICLE VIII. MISCELLANEOUS

Section 8.1. Waiver. The waiver by any party hereto of any breach or default of any provisions anywhere contained in this Agreement shall not be deemed to be a waiver of any subsequent breach or default thereof. No provision of this Agreement shall be deemed to have been waived by any party hereto unless such waiver is in writing and signed by the party charged with any such waiver.

Section 8.2. Amendments. Except as otherwise herein provided, and not otherwise, no subsequent alteration, amendment, change, waiver, discharge, termination, deletion, or addition to this Agreement shall be binding upon either party unless in writing and signed by both parties.

Section 8.3. Joinder; Permitted Encumbrance. This Agreement does not require the joinder or approval of any other person and each of the parties respectfully has the full, unrestricted and exclusive legal right and power to enter into this Agreement for the term and upon the provisions herein recited and for the use and purposes hereinabove set forth. This Agreement shall constitute a permitted encumbrance under any loan agreement heretofore or hereafter entered into between Owner and any construction lender or permanent lender.

Section 8.4. Dedication. Nothing contained in this Agreement will be deemed to be a gift or dedication of any portion of the Easement Premises to the general public.

Section 8.5. Notices. Except as otherwise expressly provided in this Agreement, a notice, demand or other communication under this Agreement by any party to any other shall be sufficiently given or delivered if it is (a) dispatched by registered or certified mail, postage prepaid, return receipt requested, (b) sent by recognized overnight courier (such as Federal Express), or (c) delivered personally, as follows:

In the case of Developer:

Mortenson Development, Inc.
Attention: Robert J. Solfelt
700 Meadow Lane North
Minneapolis, MN 55422

In the case of Bank:

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

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

In the case of the City:

City of Edina
Attn: City Manager
4801 W. 50th Street
Edina, MN 55424

with a copy to: David S. Kendall
Campbell Knutson, P.A.
Grand oak Office Center I
860 Blue Gentian Road, Suite 290
Eagan, MN 55121

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

Section 8.6. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall constitute one and the same instrument.

Section 8.7. Law Governing. This Agreement will be governed and construed in accordance with the laws of the State of Minnesota.

Section 8.8. Survival. The easements granted hereby and each reservation, covenant, condition and restriction contained in this Agreement will run with the land and will be binding upon, and inure to the benefit of, as the case may be, Owner and the City and their respective successors and assigns.

[Remainder of page intentionally left blank;
signature pages follow.]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the day and year first above written.

CITY:

CITY OF EDINA, MINNESOTA

By: _____
James Hovland, Its Mayor

By: _____
Scott Neal, Its City Manager

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by **James Hovland** and **Scott Neal**, the Mayor and City Manager respectively, 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

BANK:

U.S. BANK NATIONAL ASSOCIATION

By: _____
Malik Cavallo, Its Vice President

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by **Malik Cavallo**, the Vice President of **U.S. Bank National Association**, a national banking association, on behalf of the entity.

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

EXHIBIT "A"
EASEMENT PREMISES

An easement for vehicular and pedestrian access purposes on, over, and across those parts of Lots 1, 2, 3 and 4, Block 1, A M N Addition, Hennepin County, Minnesota, described as follows:

The Easterly 10 feet of said Lot 1; the Easterly 30 feet and the Westerly 10 feet of said Lot 2; the Easterly 30 feet of said Lot 3; the Easterly 20.39 feet of said Lot 4; the Southerly 12 feet of said Lots 1 and 2; the Northerly 12 feet of said Lots 3 and 4.

EXHIBIT “B”
EWING AVENUE EXTENSION