

Proposed: 9/05/2023

ORDINANCE NO. 143-2023 (PD)

By: Mayor Seren

An Ordinance authorizing the Mayor to enter into a Development Agreement with TWG Development, LLC for the construction of a residential development at 2228 Noble Road (several parcels); and declaring the necessity that this legislation become immediately effective as an emergency measure.

WHEREAS, the City is the owner of approximately 2.08 acres of property located at or in the vicinity of 2228 Noble Road, 890 Woodview Road, 870 Woodview Road, 868 Woodview Road and 860 Woodview Road, further identified as Permanent Parcels No. 681-38-080, 681-38-012, 681-38-010, 681-38-009, 681-38-008, 681-06-004 and 681-06-121 (hereafter the 'Property'); and

WHEREAS, TWG Development, LLC ("TWG") desires to purchase the Property for the construction of an affordable-housing residential development (the "Development"); and

WHEREAS, pursuant to Resolution No. 180-2022, this Council authorized the Mayor to enter into a purchase agreement with TWG to allow TWG to explore tax credits and other funding sources for the potential construction of the Development, with said purchase agreement being subject to the negotiation and execution of a development agreement ("Development Agreement") satisfactory to both parties and approved by this Council; and

WHEREAS, on or about January 20, 2023, TWG and the City entered into an Agreement for the Purchase and Sale of Real Property, as amended by a First Amendment to Agreement for Purchase and Sale of Real Property dated May 19, 2023 (collectively the "Purchase Agreement" or "PSA"), whereby the City agreed to sell, and TWG agreed to purchase, the Property, the closing of which transaction is contingent upon the parties first entering into a Development Agreement for the development of the Property; and

WHEREAS, the parties have negotiated a Development Agreement, with the Development being subject to design approval of the project by the City's Architectural Board of Review, Planning Commission, and other review bodies, and approval of construction documents and Site Improvements, including streets, drives, walks, storm and sanitary sewers, and landscape plantings by the City's Engineer and Building Officials; and

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EXHIBIT A

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the “Agreement”), is entered into, as of the last date written below, by and between TWG Development, LLC, an Indiana limited liability company, duly registered with the Ohio Secretary of State to conduct business in the State of Ohio (the “Developer”), and the City of Cleveland Heights, Ohio, a municipal corporation, organized and existing under the Constitution and laws of the State of Ohio (the “State”) and a duly adopted Charter and Codified Ordinances (the “City”).

WHEREAS, the City is the record owner of vacant and contiguous real property located within the City and further identified as Cuyahoga County Permanent Parcel Nos. 681-06-004, 681-06-121, 631-38-008, 631-38-009, 631-38-010, 681-38-012 and 681-38-080 (collectively the “Property”), which are located in the S-2 Mixed Use District and A Single Family District.

WHEREAS, on or about January 20, 2023, the Developer and City entered into an Agreement for Purchase and Sale of Real Property, as amended by that certain First Amendment to Agreement for Purchase and Sale of Real Property dated May 19, 2023 (collectively the “PSA”), wherein Developer agreed to purchase, and the City agreed to sell, the Property.

WHEREAS, the transaction contemplated by the PSA is contingent upon, without limitation, the Developer and City entering into a Development Agreement for the development of the Property.

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WHEREAS, the Developer plans to develop the Property with a four (4) story, fifty-two (52) unit multi-family affordable housing facility with appurtenances thereto as generally depicted on the Development Plan attached hereto as Exhibit “A” and incorporated herein by reference, the final form of which remains subject to the approval of the City as set forth herein (the “Project”); and

WHEREAS, the City desires to ensure the complete and proper construction and installation of all streets, drives, walks, walls, storm and sanitary sewers, landscape plantings, ornamental features not located on a building, and terraces (the “Site Improvements”) as a component of the Project and the Development Plan, each of which are itemized and set forth in Exhibit B, which is incorporated herein by reference.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants, agreements and conditions as set forth herein, the Developer and the City hereby covenant and agree as follows:

1. AGREEMENT TO CONSTRUCT

Subject to the terms and conditions of this Agreement, Developer agrees to construct the Project, including the Site Improvements, at no cost to the City, in accordance with the final Development Plan, which is subject to approval by the City’s Planning Commission, including all applicable construction documents as approved by the City Engineer (collectively the “Construction Documents”). Developer shall comply with all applicable federal, state and local laws and regulations relative to construction of the Project and Site Improvements, and shall obtain all necessary zoning, design (via the City’s Architectural Board of Review), building, and other approvals and permits

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necessary prior to the commencement of construction from the City and any other entity with jurisdiction to provide a requisite permit or approval.

Developer shall complete construction of the Project, including all Site Improvements, within twenty-four (24) months from the date of approval of the final Development Plan by the City and receipt of all necessary permits from the City.

2. CONSULTING ENGINEER

The Developer shall, at its own cost and expense, engage the services of a duly accredited and qualified civil engineer to act as a consulting engineer during the course of construction of all Site Improvements.

The consulting engineer shall be physically present at the job site at all times as may be required by the City Engineer during construction of all Site Improvements. The consulting engineer shall supervise and monitor the construction of all Site Improvements for the Project to ensure that the Site Improvements are constructed as detailed on the Construction Documents and in accordance with the final approved Development Plan.

The consulting engineer shall, upon completion of the Site Improvements, or at any time at the reasonable request of the City Engineer, provide the City Engineer with written certification that all Site Improvements were properly constructed and installed in accordance with the specifications and requirements set forth in the Construction Documents. It is further agreed that the City is not obligated to provide a final inspection, nor is the City Engineer required to provide written acknowledgment that the Site

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Improvements have passed final inspection, until receipt of such written certification of the consulting engineer and delivery of a set of "as-built" drawings. Upon receipt of such written certification and as-built drawings, passage of all final inspections, and satisfaction of the City Engineer that the same is adequate, accurate and sufficient, the City Engineer will certify the Site Improvements as being completed.

Contemporaneously with the filing of the written certification by the consulting engineer provided for in the preceding paragraph, the consulting engineer shall file with the City Engineer a set of reproducible drawings on reproduction media such as mylar, showing the "as-built" Site Improvements.

3. PROJECT PLANS/COSTS

(a) Revisions. Developer agrees that any material modifications to the final approved Development Plan for the Project, including the Site Improvements, through change orders or otherwise shall require approval by the City.

(b) Building Permits. Building Permits necessary for commencement of construction of the Project, including the Site Improvements, shall be issued by the City upon written request by the Developer, proper registration of contractors, payment of all applicable permit fees, engineering, and/or plan review fees as provided in the Codified Ordinances, approval of all necessary plans, including the Construction Documents, and compliance with all other requirements of the City's Codified Ordinances.

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(c) Construction Deposit. Developer shall provide the construction deposit provided for in Section 1311.04 of the City's Codified Ordinances and shall further comply with all provisions of that Section.

(d) Security for Performance. As and for security for the Developer's performance and completion of the obligations for the Site Improvements as set forth in this Agreement, the Developer shall, upon the execution of this Agreement, provide the City with a financial guarantee consistent with the requirements of Section 11450.07 of the City's Codified Ordinances and otherwise in a form and upon such terms and provisions deemed necessary by the Law Director to ensure the Developer's faithful performance and completion of the obligations of the Developer for the Site Improvements as set forth in this Agreement, in such amount equal to the estimated costs of construction of the Site Improvements as certified by Developer's consulting engineer and the City Engineer.

The City shall retain the financial guarantee until such time as the Developer has requested final inspection of the Site Improvements, the same have passed final inspection, and the same are unconditionally certified by the City as being completed. Upon receipt of final certification from the City that the Site Improvements are completed, the financial guarantee shall be returned to Developer or otherwise terminated in writing by the City in a form reasonably acceptable to Developer.

It is specifically agreed that the Developer's obligation to completely and correctly construct and install the Site Improvements is not limited to the amount

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of the financial guarantee. Rather, the Developer's obligation to completely and correctly install the Site Improvements is contractual in nature and the statute of limitations governing contracts is applicable. By execution of this Agreement, the Developer hereby assigns, transfers and subrogates to the City any contractual rights that it may have against its general contractors, sub-contractors, subtrades, agents, employees or independent contractors for incomplete or incorrect installation of any of the Site Improvements. Developer agrees to promptly notify the City regarding information of which the Developer actually becomes aware regarding any actual or reasonably suspected breach of contract by those against whom the City acquires a subrogated right under this sub-section.

4. QUALITY OF WORK; WARRANTY

All work done in connection with the construction or placement of the Project, including the Site Improvements, or repair thereto shall be done in a good and workmanlike manner, free from faults and defects and in compliance with the applicable laws, ordinances, orders and requirements of all governmental authorities, subject to the Developer's right to contest or appeal the same.

5. EMPLOYMENT AND WORKER SAFETY LAWS

Developer shall, at all times, while constructing, installing or repairing the Project, including the Site Improvements, comply with Workers' Compensation laws and regulations of the State of Ohio, Social Security laws and regulations, and all rules and regulations of the Occupational Safety and Health Act.

6. INSURANCE REQUIREMENTS

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From the Effective Date of this Agreement through and until written certification of the Site Improvements by the City as contemplated by Section 2, and in addition to any other legal requirements, Developer shall obtain and/or cause its contractors to maintain all policies of insurance as required herein.

(a) Builder's Risk Insurance. During construction of the Project, including the Site Improvements, Developer shall procure and maintain, and/or cause its contractors or agents to procure and maintain, all risk builders' risk and fire insurance with extended coverage in the amount of one hundred percent (100%) of the replacement costs thereof.

(b) Hazard Insurance. Upon completion of construction of the Project, including the Site Improvements, and through the time that the maintenance bonds provided for herein are in effect, Developer shall insure the Site Improvements with "all risk" property insurance insuring the full replacement cost of the Site Improvements from time to time constructed.

(c) Public Liability Insurance. During construction and until completion of construction of the Project, including the Site Improvements, Developer shall insure against all claims for personal injury or death or property damage with limits not less than Two Million Dollars (\$2,000,000.00) in the event of bodily injury or death of one person, and not less than Five Million Dollars (\$5,000,000.00) in the event of bodily injury or death to any number of persons in any one occurrence, and broad form property damage coverage of not less than One Million Dollars (\$1,000,000.00).

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(d) Requirements for Insurance Policies. Developer shall name the City as an additional insured on all Public Liability insurance policies required herein. All insurance shall be affected by valid enforceable policies issued by insurers authorized to do business in the State, and is subject to pre-approval by the City in its reasonable discretion. Certificates of such insurance shall be delivered to the City at least thirty (30) calendar days prior to the commencement of construction of the Site Improvements or Project; certificates of replacement policies shall be delivered to the City at least thirty (30) calendar days prior to the expiration of the policy. All such policies shall contain agreements by the insurers that the policies shall not be cancelled except upon thirty (30) calendar days prior written notice to City; Developer shall promptly forward to the City a copy of any such notice of cancellation Developer receives. Any insurer providing coverage pursuant to this Section shall have a Best rating of "A" or better.

7. INSURANCE COVERAGE PRIOR TO CONSTRUCTION

Prior to commencement of construction of the Project, including the Site Improvements, Developer shall maintain insurance insuring the Property as provided in Sections 6(a) and covering public liability claims as provided in Section 6(b), and shall comply with the provisions of Section 6(d) regarding the same.

8. TRAFFIC CONTROL

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During construction of the Project, including the Site Improvements, the Developer shall provide traffic control services as required by the Chief of Police, at Developer's sole cost and expense.

9. DUST CONTROL AND PERIMETER FENCING

The Developer shall be responsible for, at Developer's sole cost and expense, dust control and perimeter fencing in accordance with all applicable Codified Ordinances during construction of the Project, including the Site Improvements.

10. COMPLIANCE WITH APPROVED DEVELOPMENT PLAN

Developer agrees to construct the Project and Site Improvements in full compliance with the approved final Development Plan, including compliance with all conditions imposed thereon by the Planning Commission during its review and approval process, or as imposed by the City's Codified Ordinances.

11. SERVICE DELIVERIES AND TRASH PICK-UPS

Developer agrees that service deliveries and trash pick-ups shall comply with all applicable Codified Ordinances of the City, as may be amended from time to time. All trash shall be stored in covered containers in designated areas only.

12. CONSTRUCTION HOURS

Developer agrees that construction hours shall comply with all Codified Ordinances of the City, as may be amended from time to time.

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13. STORM WATER MANAGEMENT/EROSION CONTROL

Prior to the issuance of any permits for the Project, including the Site Improvements, Developer shall prepare and submit a comprehensive Stormwater Pollution Prevention Plan, and shall comply with all other provisions of 1334 and 1335 of the City's Codified Ordinances.

14. DEFAULT

Except as otherwise provided in this Agreement, in the event of any default in or breach of this Agreement, or any of its terms or conditions, by either party hereto, or any successor to such party, such party (or successor) shall, upon written notice from the other, proceed immediately to cure or remedy such default or breach, within thirty (30) calendar days after receipt of such notice, or in the event the default or breach cannot be cured within thirty (30) calendar days, such commercially reasonable longer period of time. In the event such action is not taken or not diligently pursued, or the default or breach shall not be cured or remedied within the agreed time, the aggrieved party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default or breach, including, but not limited to, and without waiving or prejudice to its other legal or equitable remedies, proceedings to compel specific performance by the party in default or breach of its obligations. Furthermore, in the event of a breach by the Developer, after the requisite notice and opportunity to cure, as set forth in this Section, the City may terminate this Agreement, at which point the Developer shall immediately cease the construction of the Project, including the Site Improvements.

15. INDEMNIFICATION

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The Developer shall indemnify and save the City harmless from and against any and all claims, costs and expenses for injury to persons or damage to property, including, without limitation, the cost of investigation and litigation, and all professional fees associated with such investigation or litigation (including reasonable attorney's fees), which may be brought against the City, proximately caused or claimed to have been caused by any act or omission of the Developer, its agents, independent contractors or employees and arising out of, or claimed to have arisen out of, any activity connected with the construction of the Project and installation of the Site Improvements, the maintenance of Site Improvements or the failure to maintain the Site Improvements as required by the terms of this Agreement.

16. OTHER RIGHTS AND REMEDIES; NO WAIVER BY DELAY

The City and Developer shall have the right to institute such actions or proceedings as they may deem desirable for effectuating the purposes of this Agreement, as it relates to development of the Project, including the Site Improvements, including, but not limited to, any monetary breach by the Developer, provided, that any delay by the City or Developer in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights under this Section shall not operate as a waiver of such rights or to deprive it of or limit such right in any way (it being the intent of this provision that the City or Developer should not be constrained, so as to avoid the risk of being deprived of or limited in the exercise of the remedy provided in this Section because of concepts of waiver, laches, or otherwise, to exercise such remedy at a time when it may still hope otherwise to resolve the problems created by the default involved); nor shall any waiver

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in fact made by the City or Developer with respect to any specific default by the City or Developer under this Section be considered or treated as a waiver of the rights of the City or Developer with respect to any other defaults by the City or Developer under this Section or with respect to the particular default except to the extent specifically waived in writing.

17. CONFLICT OF INTEREST; CITY REPRESENTATIVE NOT PERSONALLY LIABLE

In addition to all applicable provisions of the City's Charter and State law, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his/her personal interests or the interests of any corporation, partnership, or association in which he/she is, directly or indirectly, interested. No member, official or employee of the City shall be personally liable to the Developer or any successor in interest, in the event of any default or breach by the City of this Agreement whether for any amount which may become due to the Developer or successor or on any obligation under the terms of this Agreement.

18. ZONING CERTIFICATION/APPROVALS

Per Codified Ordinance Section 1311, the Developer shall apply for a certificate of zoning compliance, which the City shall issue, provided that the subject Property, as zoned at the time of application permits the development of the Project, and further provided that the Developer first obtains: (a) City Planning Commission approval of the Development Plan and, as may be necessary, approval of a Conditional Use to allow for

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accessory parking for multi-family use on that portion of the Property located in the A Single Family District and contiguous to that portion of the Property located in the S-2 Mixed Use District; (b) Board of Zoning Appeals approval of any necessary Area Variance(s); and (c) Architectural Board of Review approval of the Project design (collectively the “Approvals”). The City Administration agrees to reasonably support the requested Approvals before the City Planning Commission, the Board of Zoning Appeals and/or the Architectural Board of Review.

19. FINAL APPROVAL

After the Project, including all Site Improvements, has passed final inspection as specified in the Codified Ordinances and after the City Engineer and/or Building Commissioner has determined that the Developer has completely performed all obligations required of the Developer by the terms of this Agreement, the City shall unconditionally approve the Project and issue all necessary Certificates of Occupancy, as well as certify, in writing, the Site Improvements as completed as set forth in Section 2. Final approval shall be deemed to have taken place at such time as the City issues said Certificate of Occupancy and the City certifies, in writing, that the Site Improvements are completed. Such Certificate of Occupancy and certification of completion shall evidence that the Developer Developer has performed all obligations required of it by the provisions of this Agreement.

20. COMMUNITY REINVESTMENT AREA

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The City acknowledges and agrees that, pursuant to Ordinance No. 77-2018 adopted on July 30, 2018 creating a City-wide Community Reinvestment Area, the subject Property is eligible for exemption from real property tax for a period of ten (10) years at one hundred percent (100%) of the increase in the assessed valuation resulting from the Project (the "CRA Exemption"). The Application for CRA Exemption shall be applied for by Developer upon completion of the Project and issuance of a Certificate of Occupancy.

21. INVALIDITY OF PARTICULAR PROVISION

If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

22. APPLICABLE LAW AND CONSTRUCTION

The laws of the State of Ohio shall govern the validity, performance and enforcement of this Agreement. The headings of the Sections contained herein are for convenience only and do not define, limit or construe the contents of such Sections.

23. NOTICE

All notices or other communications required to be given hereunder shall be given in writing and shall be deemed to have been duly given on the date delivered, if delivered personally; or on the date of receipt if delivered to a nationally recognized overnight

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courier service or if mailed by U.S. registered or certified mail, postage prepaid. All notices and communications shall be addressed as follows:

(a) NOTICE TO CITY:

City of Cleveland Heights
Attn: Mayor
40 Severance Circle
Cleveland Heights, Ohio 44118

WITH COPY TO:

William R. Hanna, Law Director
40 Severance Circle
Cleveland Heights, Ohio 44118

(b) NOTICE TO DEVELOPER:

TWG Development, LLC
Attn: _____

WITH A COPY TO:

Kenneth J. Fisher, Esq.
Kenneth J. Fisher Co., L.P.A.
50 Public Square, Suite 2100
Cleveland, Ohio 44113

Each of the foregoing may change its notice address if it so notifies the other party listed above in writing pursuant to the requirements of this Section.

24. RECORDATION.

Neither party shall record this Agreement, whether in the public records of Cuyahoga County or elsewhere.

25. CONSTRUCTION OF TERMS

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Whenever the singular or plural number, or masculine, feminine or neuter gender is used herein, it shall equally include the other, and the terms and provisions of this Agreement shall be construed accordingly.

26. ASSIGNMENT

Except as otherwise provided in this Agreement or to an affiliated entity wholly owned by Developer, Developer shall not assign this Agreement, or any right, interest, or entitlement in it, whether by operation of law or otherwise, without the express prior written consent of the City, in the City's sole discretion. In the event Developer assigns its interests in the Project, in whole or in part, this Agreement shall be fully disclosed and the assignee shall be subject to all terms and conditions of this Agreement, and Developer shall remain secondarily liable to the City concerning all rights assigned.

27. AGREEMENT BINDING UPON SUCCESSORS

The covenants, agreements and obligations herein contained shall extend to, bind and inure to the benefit not only of the parties hereto, but their respective personal representatives, heirs (if applicable), successors and permitted assigns.

28. COMPLETE AGREEMENT; AMENDMENT

All negotiations, considerations, representations and understandings between the parties as to the Project, including the Site Improvements, are incorporated in this Agreement, which supersedes all prior oral and/or written promises or representations by

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the parties, and which may be modified or altered only by agreement in writing signed by both parties to this Agreement.

29. NO THIRD PARTY BENEFICIARIES

Nothing contained in this Agreement does, is intended to, or shall be construed so as to confer upon any other party the rights of a third party beneficiary.

30. APPROVALS BY CITY

Except as otherwise expressly provided herein or as otherwise required by the Charter or Codified Ordinances of the City or applicable law, custom or practice of the City, any provision of this Agreement requiring the approval of the City, the satisfaction or evidence of satisfaction of the City, certificate or certification by the City or the opinion of the City shall be interpreted as requiring action by the Mayor (or such other official as the Mayor may from time to time designate) granting, authorizing or expressing such approval, satisfaction, certification or opinion, as the case may be.

31. COUNTERPARTS

This Agreement may be executed in any number of counterparts, each of which when so executed and delivered will be deemed an original, and all of which together shall constitute one and the same agreement. This Agreement may be executed and delivered by facsimile or by .pdf file and upon such delivery the facsimile or .pdf signature will be deemed to have the same effect as if the original signature had been delivered to the other party.

[SIGNATURE PAGE TO FOLLOW]

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IN WITNESS WHEREOF, the parties have hereto affixed their signatures to this Development Agreement as of the dates indicated below.

TWG Development, LLC

City of Cleveland Heights, Ohio

Mayor Kahlil Seren

Print Name: _____

Title: _____

Date: _____

Date: _____

Approved as to form:

William R. Hanna, Law Director