

## ENCROACHMENT AND MAINTENANCE AGREEMENT

This Encroachment and Maintenance Agreement (the “Agreement”), is made the 27<sup>th</sup> day of April, 2024 by and between the **CITY OF GRAND FORKS**, a North Dakota municipal corporation whose principal office and mailing address is 255 North 4th Street, Grand Forks, ND 58201 (hereinafter the “City”), and **UNIVERSITY OF NORTH DAKOTA**, a public institution of higher education and an instrumentality of the state of North Dakota organized under the constitution of the state, whose address is Twamley Hall, 264 Centennial Drive, Stop 8378, Grand Forks, ND 58202 (hereinafter referred to as “UND”). The parties to this Agreement are sometimes hereinafter referred to individually as a “Party” and collectively as the “Parties.”

### RECITALS

1. The City, the Grand Forks Growth Fund, a Jobs Development Authority (the “JDA”), Memorial Village Investments, LLC, a North Dakota limited liability company, whose address is 4297 16<sup>th</sup> Avenue North, Grand Forks, ND 58203-0805 (the “Developer”), and the UND Alumni Association and Foundation, a North Dakota non-profit corporation, whose mailing address is 3501 University Avenue, Stop 8157, Grand Forks, North Dakota 58202-8157 (“UNDAAF”) entered into that certain Payment in Lieu of Property Tax Development Agreement (the “Memorial Village II PILOT Development Agreement”) having an effective date of July 5, 2023.

2. The Memorial Village II PILOT Development Agreement related to, among other matters, the construction, development, redevelopment and renovation of buildings, structures, facilities, fixtures, infrastructure, and improvements for a softball field and complex meeting NCAA regulations (the “Softball Field”) on the following described parcel of real property located in Grand Forks County, North Dakota (defined herein and in the Memorial Village II PILOT Development Agreement as the “Softball Field Land”):

Lot Two (2), Block One (1), Memorial Village First Addition to the City of Grand Forks, North Dakota, according to the plat thereof on file in the Office of the Grand Forks County, North Dakota Recorder and recorded as Document Number 836534

3. A depiction and rendering of the Softball Field, upon becoming finally completed, is attached hereto as Exhibit “A.”

4. Certain components and portions of the Softball Field (said components and portions being referred to herein as the “Softball Field Encroachments”) will encroach, intrude into, be within and upon the rights-of-way, dedicated areas, easements, and/or other use rights and privileges belonging, granted, donated and/or designated to the City that exist along North 25<sup>th</sup> Street between University Avenue and 2<sup>nd</sup> Avenue North, and also along 2<sup>nd</sup> Avenue North between Columbia Road and North 25<sup>th</sup> Street (hereinafter collectively the “City Easement Area”). A depiction and location of the Softball Field Encroachments is attached hereto as Exhibit “B.”

5. Further, UND has requested certain modifications of the North 25<sup>th</sup> Street roadway, curb, gutter, and the sidewalk abutting said roadway between University Avenue and 2<sup>nd</sup> Avenue North (said area, and the roadway, curb, gutter and abutting sidewalk North 25<sup>th</sup> Street shall be referred to herein as

the “Modified North 25<sup>th</sup> Street and Sidewalk”), and UND has agreed to be responsible for the construction, operation, repair, maintenance of the Modified North 25<sup>th</sup> Street and Sidewalk, and to maintain and keep open for public use the Modified North 25<sup>th</sup> Street and Sidewalk.

6. The City and UND desire to memorialize their understanding and agreement relating to the Softball Field Encroachments and the Modified North 25<sup>th</sup> Street and Sidewalk.

NOW THEREFORE, based upon the mutual covenants and promises of the Parties contained herein, the Parties agree as follows:

1. **Softball Field Encroachments.**

1.1. **License.** The City grants UND a revocable license to construct, use, operate, maintain, and repair the Softball Field Encroachments upon the City Easement Area as depicted and described on Exhibit A.

1.2. **Construction Permits.** UND shall obtain all necessary construction permits from the City and hire a licensed and qualified contractor to construct, use, operate, maintain, and repair the Softball Field Encroachments according to City specifications, and in compliance with any and all federal, state or local laws, including the City’s ordinances.

1.3. **No Interference by Softball Field Encroachments to City Utilities.**

1.3.1. UND’s construction, use, operation, maintenance, and repair of the Softball Field Encroachments shall not, in any manner, interfere with or otherwise obstruct the City’s full use and enjoyment of the City Easement Area and/or City Dedications and Utilities. As used in this Agreement, the term “City Dedications and Utilities” shall mean any City street, alley, way, public utility, other public improvement, and/or any dedication, donation, grant, other right, privilege or easement to the City, and shall include without limit, the City’s continuous and uninterrupted use and access to, and the City’s location, relocation, construction, reconstruction, maintenance or repair of, any street, alley, way, public utility, public utility infrastructure, other public improvement, including poles, underground cables, transformer boxes, junction boxes, water shut-off boxes, fire hydrants, sewer manholes, valve boxes, pipes, wires, streetlights, traffic signs, and traffic signals.

1.3.2. If all or any portion of the Softball Field Encroachments interfere with or otherwise obstruct the use, operation, location, relocation, construction, reconstruction, maintenance or repair of all or any portion of the City Easement Area and/or City Dedications and Utilities, the City shall provide notice to UND, and such interfering or obstructing Softball Field Encroachments shall, at UND’s sole cost and expense, be removed. In the event all or any portion of the Softball Field Encroachments are removed under this Section 1.3.2, the removed Softball Field Encroachments may be replaced, to its originally constructed condition and location, on the condition the City determines, in the exercise of its discretion, the proposed replaced Softball Field Encroachments will not interfere with or otherwise obstruct the use, operation, construction, relocation, maintenance or repair of the City Easement Area and/or the City Dedications and Utilities.

1.4. **Repair of Softball Field Encroachments.** UND, at UND’s sole cost and expense, shall use, operate, maintain, and keep in good repair all of the Softball Field Encroachments.

Maintenance and repair of the Softball Field Encroachments shall be solely to maintain the Softball Field Encroachments as originally constructed, and UND shall not expand, add to, place additional improvements or structures upon, modify, or otherwise alter the Softball Field Encroachments.

**1.5. Damage to Softball Field Encroachments.** In the event all or any portion of the Softball Field Encroachments become partially or totally damaged or destroyed, said damaged and destroyed Softball Field Encroachments may be repaired and re-built by UND to its pre-damage or pre-destruction condition and in the same location. UND will use reasonable efforts to complete such repair and re-building within sixty (60) days after the damage or destruction event. Should UND need additional time to repair or re-build under this Section, UND shall communicate the estimated project timeline and completion date to City.

**1.6. Removal/Abandonment of Softball Field Encroachments.** In the event UND moves, removes or abandons all or any portion of the Softball Field Encroachments or does not complete the repair within the time period described in Section 1.5 above, then the license to construct, use, operate, maintain and repair said moved, removed or abandoned Softball Field Encroachments upon the City Easement Area, as described in Section 1.1 above, and any permit issued for such Softball Field Encroachments shall be immediately revoked, terminated, and be null and void, and the City shall be authorized to execute a document in recordable form revoking and terminating all of the rights and privileges granted herein for such moved, removed or abandoned Softball Field Encroachments.

**1.7. Liability.** UND shall be responsible for claims, losses, damages, and expenses which are proximately caused by the negligence or wrongful acts or omissions of its employees, agents, or representatives acting within the scope of their employment. The tort liability of UND is subject to the conditions and limitations contained in Chapter 32-12.2 of the North Dakota Century Code. Nothing herein shall preclude either Party from asserting against third parties any defenses to liability it may have under the law or be construed to create a basis for a claim or suit when none would otherwise exist. This provision shall survive the termination of this Agreement.

**1.8. Restoration Upon Termination of License.** Upon the revocation and termination of the license to construct, use, operate, maintain and repair all or any portion of the Softball Field Encroachments, UND shall restore the City Easement Area as directed by the City to its condition prior to the construction of such Softball Field Encroachments, and such restoration shall comply with all City's directives and ordinances then in effect.

**1.10. No Claim or Waiver of City Rights.** Nothing herein waives, and shall not be construed as a waiver of, any of the City's rights, titles, or interests in and to the City Easement Area and/or the City Easement Area Rights and Utilities. Further, nothing herein provides or otherwise grants, creates or vests UND with any legal or equitable title or leasehold interest in the City Easement Area, City Easement Area Rights and Utilities, and/or other right, privilege or easement of the City.

**1.11. Right of Termination by City.** The City may, in the exercise of reasonable discretion, revoke and terminate all or any part of the license granted to UND to construct, use, operate, maintain, and repair the Softball Field Encroachments upon the City Easement Area with 180 days written notice. Upon revocation and termination, any and all permits relating to said Softball Field Encroachments shall be revoked and terminated. Upon revocation and termination, the City shall be

authorized to execute a document in recordable form to evidence the termination and revocation of the rights and privileges granted herein.

**2. Maintenance of Modified North 25<sup>th</sup> Street and Sidewalk.**

**2.1. UND Maintenance of Modified North 25<sup>th</sup> Street and Sidewalk.** UND, at UND's sole cost and expense, shall be responsible for the construction, re-construction, operation, maintenance, and repair of the Modified North 25<sup>th</sup> Street and Sidewalk and for maintaining and keeping open for continuous, uninterrupted and safe passageway and use by the public of the Modified North 25<sup>th</sup> Street and Sidewalk, including but not limited to cleaning and snow removal of the roadway and sidewalk. UND shall perform its construction, re-construction, operation, maintenance and repair obligations in accordance with any and all federal, state, county, local and municipal laws, statutes, codes, regulations, resolutions, rules, ordinances, policies and procedures (inclusive of the City's ordinances and street maintenance and repair policies and procedures).

**2.2. No Obstruction to City Dedications and Utilities.** UND's construction, use, operation, maintenance, repair, and maintaining and keeping open for passageway and use by the public of the Modified North 25<sup>th</sup> Street and Sidewalk shall not, in any manner, interfere with or otherwise obstruct the City's full use and enjoyment and access to any City Dedications and Utilities.

**2.3 Future City Project – Removal of Modified North 25<sup>th</sup> Street and Sidewalk.** In the event the City determines, through the exercise of the reasonable discretion of the City Engineer, that all or any portion of the Modified North 25<sup>th</sup> Street and Sidewalk is to be removed, dug out and/or otherwise modified for a future project of the City, including for the location, relocation, construction, reconstruction, maintenance, repair and/or replacement of any City Dedications and Utilities, UND shall be solely responsible for all of the costs, expenses and fees relating to the removal, digging out, replacing and/or modifying of the Modified North 25<sup>th</sup> Street and Sidewalk so as to permit such City project to be completed. The Parties agree that the City will consider all reasonable alternatives prior to any modifications of the Modified North 25<sup>th</sup> Street and Sidewalk. City shall provide advance written notice to UND of anticipated projects that relate to the Modified North 25<sup>th</sup> Street and Sidewalk so UND may collaborate in the determination process related to the modifications. The Parties acknowledge in an emergency such collaboration may not be possible. Should such an emergency arise the Parties shall, at the earliest possible time, work together in good faith to determine a cost sharing of expenses related to necessary repairs to the Modified North 25<sup>th</sup> Street and Sidewalk, if any, as a result of the emergency.

**2.4. No Waiver or Vacation.** Nothing herein waives, and shall not be construed as a waiver of, any of the City's rights, titles, or interests in and to the Modified North 25<sup>th</sup> Street and Sidewalk, including but not limited to the City's rights, titles and interests in and to any City Dedications and Utilities within, upon or through the Modified North 25<sup>th</sup> Street and Sidewalk, and nothing herein provides or otherwise grants, creates or vests UND with any legal or equitable title or leasehold interest in or to any of said rights, titles and interests of the City. Further, nothing herein is, nor shall it be construed to be, a vacation or waiver of any part of North 25<sup>th</sup> Street, 2<sup>nd</sup> Avenue North, University Avenue or Columbia Road, or any other public ground, street, alley, whether under N.D.C.C. ch. 40-39, N.D.C.C. ch. 40-50.1 or other applicable law.

3. **Miscellaneous Provisions.**

3.1. **UND Funding of Obligations.** UND shall diligently and in good faith endeavor to secure future appropriations from the State of North Dakota at levels sufficient to fulfill its obligations under this Agreement. In the event such funds are not appropriated in any given biennium, UND shall give written notice to the City, and the Parties shall engage in good faith discussions regarding modifications to, or the termination of, this Agreement.

3.2. **Public Purpose.** The services performed or provided pursuant to the provisions of this Agreement shall be deemed for public and governmental purposes and all applicable immunities and liability limitations on damages shall extend to the activities of the Parties under this Agreement, to the maximum extent provided by law.

3.3. **No Limitation on Authority.** This Agreement shall not be construed to in any manner, to aggregate, or limit the rights, powers, duties, and/or functions of any of the Parties hereto.

3.4. **Term of Agreement.** Subject to the City's right to revoke the license under Section 1 above, this Agreement shall be effective as of the date first set forth above and shall continue indefinitely until such time as both Parties agree to terminate the Agreement.

3.5. **Severability.** If any of the provisions contained herein shall for any reason be held to be invalid, illegal, or unenforceable, such invalidity, illegality, or unenforceability shall not affect any other provisions contained herein.

3.6. **Modification.** Neither this Agreement nor any term or provision hereof may be changed, waived, discharged, or terminated, except by a written instrument signed by the Parties hereto.

3.8. **Authority.** The Parties to this Agreement represent to the best of its knowledge, information, and belief, that each has the full right, authority and power to enter into this Agreement. The Parties to this Agreement further represent that the execution by the individuals noted below for such Party, and the delivery and performance by the Parties of this Agreement has been and/or shall be duly authorized by all necessary action of the Parties and no other action on the part of the respective Parties is required in connection therewith and that this Agreement and each agreement, document and instrument executed and delivered pursuant to this Agreement constitutes, or when executed and delivered will constitute, valid and binding obligations of the respective Parties enforceable in accordance with their terms.

3.9. **Applicable Law.** This Agreement shall be construed and interpreted in accordance with the laws of the State of North Dakota and the Ordinances of the City of Grand Forks, and any action or claim related thereto shall be brought in the Northeast Central Judicial District Court located in Grand Forks County, North Dakota.

3.10. **Waivers.** One or more waivers by either Party of any covenant or condition of this Agreement shall not be construed as a waiver of a subsequent breach of the same or of any other covenant or condition. The consent or approval given by either Party with respect to any act by the

other Party requiring such consent or approval shall not be deemed to waive or render unnecessary further consent or approval of any subsequent similar act by such Party.

**3.11 Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be considered an original.

**3.12 No Third-Party Beneficiary.** This Agreement is intended for the sole and exclusive benefit of UND and the City and their respective successors and permitted assigns. No other person or entity shall have any right, benefit, priority, or interest under, or because of the existence of this Agreement, and shall not have any right to rely on this Agreement or to claim or derive any benefit therefrom.

**3.13 Relationship of Parties.** The Parties shall perform as independent contractors under this Agreement. Each Party, its employees, agents, and representatives are not employees of the other Party for any purpose, including, but not limited to, the application of the Social Security Act, the North Dakota Unemployment Compensation Act, and the North Dakota Workers' Compensation Act. No part of this Agreement shall be construed to represent the creation of an employer/employee relationship. Each Party will retain sole and absolute discretion in the manner and means of carrying out its activities and responsibilities under this Agreement, except to the extent specified in this Agreement.

**3.14 Cooperation.** The Parties agree to cooperate fully, to execute any and all additional documents, and to take any and all additional actions that may be necessary or appropriate to give full force and effect to the basic terms and intent of this Agreement and to accomplish the purposes of this Agreement.

**3.15 Time of the essence.** Time is of the essence for all matters and obligations under this Agreement and all documents and agreements referenced herein.

**3.16 Performance of Additional Acts.** The Parties agree to perform such acts and to prepare, execute, file or record any documents, instruments, or stipulations requested by each other to perform the covenants, to satisfy the conditions herein contained, or to give full force and effect to this Agreement.

**3.17 Binding Effect.** This Agreement will inure to the benefit of and is binding upon UND and the City, and their respective successors and assigns.

*[balance of this page intentionally left blank]*

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2024.

UNIVERSITY OF NORTH DAKOTA

CITY OF GRAND FORKS

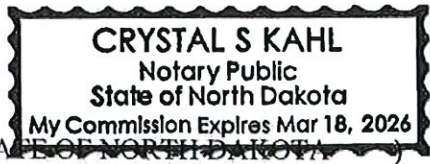
[Signature]  
By: Dr. Andrew Armacost  
Its: President  
Dated: 4/17/24

[Signature]  
By: Brandon Bochenski  
Its: Mayor  
Dated: 4/27/24

Attest:  
[Signature]  
Maureen Storstad  
Its: City Auditor  
Dated: 4/27/24

STATE OF NORTH DAKOTA )  
  )  
COUNTY OF GRAND FORKS )

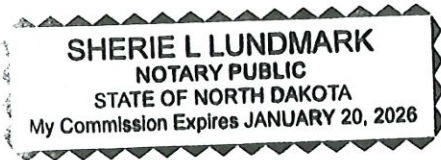
On this 17<sup>th</sup> day of April, 2024, before me, a notary public, personally appeared Dr. Andrew Armacost, President of the University of North Dakota, known to me to be the person named herein and who executed the foregoing document.



[Signature]  
Notary Public

STATE OF NORTH DAKOTA )  
  )  
COUNTY OF GRAND FORKS )

On this 27<sup>th</sup> day of April, 2024, before me, a notary public, personally appeared Brandon Bochenski, Mayor and Maureen Storstad, City Auditor for the City of Grand Forks, North Dakota, known to me to be the persons named herein and who executed the foregoing document.



[Signature]  
Notary Public

EXHIBIT A

