

ORDINANCE NO. 19-02

**AN ORDINANCE OF THE SOUTH OGDEN CITY, UTAH APPROVING AND
ADOPTING THE MASTER DEVELOPMENT AGREEMENT - HEINRICH
PROPERTIES LP - MULTI-FAMILY DEVELOPMENT LOCATED AT 560 39th
STREET; AND PROVIDING FOR AN EFFECTIVE DATE.**

Section 1 - Recitals:

WHEREAS, the City Planning Commission has caused to be prepared and has recommended to the City Council a Master Development Agreement for Heinrich Properties LP - Multi-Family Development Located at 560 39th Street ("Heinrich Properties LP") representing the commission's recommendations for development of the proposed project area within the municipality; and,

NOT APPROVED

WHEREAS, the City Council finds that the planning commission has caused to be prepared and has recommended to the City Council a Master Development Agreement for Heinrich Properties LP - Multi-Family Development Located at 560 39th Street ("Heinrich Properties LP") representing the commission's recommendations for development of the proposed project area within the municipality; and,

WHEREAS, the City Council finds that the Master Development Agreement for Heinrich Properties LP has been subjected to the required public hearing prior to its adoption; and,

WHEREAS, the City Council finds that under Utah Code §10-9a-305(8)(a) and §10-9a-509, the City Council may lawfully adopted development plans and schedules by ordinance as recommended by the Planning Commission; and,

WHEREAS, upon petition to and based on the recommendation of the South Ogden City Planning Commission, the City Council determines it to be in the best interest of the City to adopt the proposed Master Development Agreement for Heinrich Properties LP; and,

WHEREAS, the City Council finds that such a change follows the City's General Plan; and,

WHEREAS, the City Council finds that the public convenience and necessity, public safety, health and welfare is at issue and requires action by the City as noted above;

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF SOUTH OGDEN, UTAH:

The Master Development Agreement for Heinrich Properties LP, attached as
Attachment "A", and fully incorporated by this reference, is approved and
adopted.

Section 2 - Repealer of Conflicting Enactments:

All orders, ordinances and resolutions regarding the changes enacted and adopted which have been adopted by the City, or parts, which conflict with this Ordinance, are, for such conflict, repealed, except this repeal will not be construed to revive any act, order or resolution, or part, repealed.

Section 3 - Prior Ordinances

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The body and substance of all prior Ordinances and Resolutions, with their specific provisions, where not otherwise in conflict with this Ordinance, are reaffirmed and readopted.

Section 4 - Savings Clause:

If any provision of this Ordinance be held or deemed or will be invalid, inoperative or unenforceable, such invalidity will not render any other provision or provisions invalid, inoperative or unenforceable to any extent whatever, this Ordinance being deemed the separate independent and severable act of the City Council of South Ogden City.

Section 5 - Date of Effect

This Ordinance will be effective on the 5th day of March, 2019, and after publication or posting as required by law.

DATED the 5th day of March, 2019

SOUTH OGDEN, a municipal corporation

by: _____
Mayor Russell Porter

Attested and recorded

Leesa Kapetanov, CMC
City Recorder

ATTACHMENT “A”

ORDINANCE NO. 19-02

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An Ordinance Of The South Ogden City, Utah Approving And Adopting The Master Development Agreement - Heinrich Properties LP - Multi-Family Development Located At 560 39th Street; And Providing For An Effective Date.

05 Mar 19

[Attachment materials to be provided by City Manager]

When recorded, return to:

South Ogden City
Attn: City Attorney
3950 S Adams Ave, Suite 1
South Ogden, UT 84403

Parcel Numbers:
05-208-0001

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DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (“DA”) is made and entered as of the ____ of _____, 2019, by and among South Ogden City, a political subdivision of the State of Utah (the “City”), and Heinrich Properties LP., a California limited partnership (the “Developer”).

RECITALS

- A. The capitalized terms used in these Recitals are defined in Section 1.2, below.
- B. Effectiveness of this DA is contingent on Developer closing on the purchase of the Project Property as required by Article 2 of this DA.
- C. The Project Property is currently assigned the Two-Family Residential (R-2) zoning designation as set forth in Title 10, Chapter 7, Article B within the South Ogden City Code, as amended by Ordinance 16-03, 01-05-2016, eff. 01-05-2016.
- D. The Parties desire that the Project Property be developed in a unified and consistent fashion under the 40th Street General Subdistrict within the South Ogden City Form Based Code 10-5.1A, with the exception that permitted Residential uses only will be allowed.
- E. Development of the Project Property as a high-density residential apartment complex under this DA is acknowledged by the Council and Parties to be consistent with LUDMA and generally the 40th Street General Subdistrict, and to operate to the benefit of the City, Developer, and the general public.
- F. The Parties acknowledge that development of the Project Property under this DA will result in significant planning and economic benefits to the City and its residents by, among other things, requiring orderly redevelopment of the Project Property and increasing property tax, sales tax and other revenues to the City based on improvements to be constructed on the Project Property.
- G. Development of the Project Property under this DA will also result in significant benefits to Developer by providing assurances to Developer it can develop the Project Property under this DA.

- H. The Parties have cooperated in the preparation of this DA.
- I. The Parties desire to enter into this DA to specify the rights and responsibilities of Developer to develop the Project Property and the rights and responsibilities of the City to allow and regulate such development under the requirements of this DA.
- J. The Parties understand and intend that this DA is a “development agreement” within the meaning of, and entered into under Utah Code Ann. § 10-9a-102 and SOCC11-3-1G.
- K. The Parties agree that the current R-2 Zoning Regulations will not apply in the development of the Project Property but instead the permitted uses allowed will be those within the 40th Street General Zoning (Residential uses only) and the additional following exceptions:
- (i) The required minimum parking spaces will be reduced to 1.7 spaces per dwelling unit.
 - (ii) On-street P parking spaces along 39th Street (abutting the Project property) immediately to the South (northsouth side of 39th Street) will be used in the parking requirement calculations.
- L. The Parties agree that ~~in order~~ to minimize the impact that the Project has on the neighboring R-2 zone, the requirements under 10-5.1A-7-5 will also apply.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is acknowledged, the Parties agree to the following:

TERMS

1. Incorporation of Recitals and Exhibits/Definitions.

- a. Incorporation. The foregoing Recitals and Exhibits “A”, and “B” are incorporated into this DA.
- b. Definitions. As used in this DA, the words and phrases specified below shall have the following meanings:
 - i. “DA” means this Development Agreement including all of its Exhibits.
 - ii. “Buildout” means the completion of ~~all of~~ the development on the entire Project Property under this DA.
 - iii. “City” means South Ogden City, a political subdivision of the State of Utah.

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- iv. “City Code” means the South Ogden City Code, as amended.
- v. “Concept Plan” means the documents provided by Developer for the Project, which is attached as Exhibit “A”.
- vi. “Council” means the elected City Council of the City.
- vii. “Developer” means Heinrich Properties LP, a California limited partnership, and its assignees or transferees as permitted by this DA (other than a Sub developer).
- viii. “Development” means the development of a Parcel or a portion thereof under an approved Development Application.
- ix. “Development Application” means an application to the City for development of a portion of the Project including a Subdivision or any other permit, certificate or other authorization from the City required for development of the Project.
- x. “Form Based Code” means specific regulations applied to the 40th Street General Subdistrict within the City’s Zoning Regulations.
- xi. “LUDMA” means the Municipal Land Use, Development, and Management Act, Utah Code Ann. §§10-9a-101, et seq.
- xii. “Notice” means any notice to or from any party to this DA.
- xiii. “Participation Agreement” means an agreement between the South Ogden City Community Development and Renewal Agency and Developer regarding contribution of Agency funds to Developer for the Project.
- xiv. “Parties” mean the City and Developer. Each may be referred to individually as a “Party.”
- xv. “Phase” means the development of a portion of the Project at a point in a logical sequence as determined by Developer.
- xvi. “Planning Commission” means the City's Planning Commission.
- xvii. “Project” means the total development to be constructed on the Project Property under this DA with the associated public and private facilities, Phases, and ~~all of~~ the other aspects approved as part of this DA.

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- xviii. "Project Property" means the parcel of land subject to a Real Estate Purchase Contract with Developer located in the City, more particularly described in Exhibit "B" attached hereto.
- xix. "Site Plan" all documents necessary under City Code 10-5.1A-10-2E
- xx. "Substantial Completion" means the date at which Certificate of Occupancy has been issued for all buildings shown on the Site Plan.
- xxi. "Zoning" means the zoning for the Project.
- xxii. "Zoning Ordinance" means the Zoning Regulations ~~contained~~ within the City Code.

2. Conditions Precedent. As conditions precedent to the obligations of the Parties, this DA is contingent upon and shall only become effective at such time, and in the event that:

- a. Developer closes on the purchase of the Project Property ~~on or before~~ April 1, 2019.
- b. Developer obtains all necessary planning entitlements, e.g., site plan approval, from the City's Staff Review Committee.
- c. Developer pays \$_____ to City for ~~the development of~~ developing public park amenities in the 40th Street Park. Developer recognizes the City's desire to improve the park and, as a result, Developer will need fewer park-type amenities within the Project - since Developer's tenants will directly benefit from the park improvements.

The Parties understand and agree that the Project Property is intended to meet the general requirements of the 40th St. General zoning ordinance but that this DA shall control the Parties rights and obligations, subject to Section 5, below. Unless the Parties mutually agree to amend this DA under paragraph 21, below, and the above listed Conditions Precedent are not met within 6 months from the date of signatures to this agreement, this DA shall be void.

3. Effect of DA. This DA shall be the sole agreement between the Parties related to developing the Project except as it may be modified by agreement of the Parties.

4. Development of the Project.

- a. Project Development. Development of the Project shall be under the permitted residential uses of the 40th Street General Subdistrict to include: development of multi-family residential uses and accessory sub-uses; specific development standards within the Zoning Ordinance and this DA, including the Conditions Precedent set forth herein, as outlined in Section 2, and the following:
 - i. Multiple three-story residential apartment buildings, with a maximum of 80 residential units in the Project.

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- ii. The Project shall follow the aesthetic guidelines outlined in Sec. 10-5.1A-11 and 10-5.1A-5-4 attached as Exhibit “C.”
- b. Adoption of Project Standards. The Parties understand and acknowledge that the 40th Street General Subdistrict provides standards including, but not limited to, location of buildings, setbacks, lot coverage, building orientation, landscaping and other design features and that the development of the Project is and shall remain subject to these applicable standards.
- c. Project Standards Exceptions. The following exceptions to the 40th Street General Subdistrict and applicable Building Type standards will apply to this DA:
 - i. The current R-2 zoning will not apply, but rather the 40th Street General Subdistrict and it's permitted residential uses only.
 - ii. The required minimum parking spaces will be reduced to 1.7 spaces per dwelling unit.
 - iii. On-street parking spaces along the north side of 39th Street (abutting the Project property) immediately to the South (south side of 39th Street) will be used in parking requirement calculations.
 - iv. Buffering requirements under 10-5.1A-7-5 will also apply.
- d. Phased Development / Timing of Development. The Parties agree that the project may be developed in phases. The Parties acknowledge that the efficient and economic development of the Project may be contingent and dependent upon numerous factors, such as market conditions and demand, interest rates, competition and similar factors. The City agrees that Developer shall have a reasonable level of flexibility for timing (with the exception of Section 6), sequencing, and phasing of the project.
- e. Approval Processes. Development approval of the Project shall follow the review processes outlined in 10-5.1A-10-2(B)(E) within the Zoning Ordinance and this DA.
- f. Project Fees. The Parties acknowledge that the City charges impact fees, building permit fees, and other fees and that Developer will be subject to all applicable fees. The Parties further acknowledge that the Project may be benefited by a Participation Agreement, but that the successful negotiation of a Participation Agreement is not a condition to performance of Developer's obligations under this DA.

5. Vested Rights and Reserved Legislative Powers.

- a. Vested Rights Granted by Approval of this DA. To the maximum extent permissible under the laws of Utah and the United States and at equity, the Parties intend that this DA grants Developer the right to develop and construct the Project consistent with the uses and building types as provided in the 40th Street General Subdistrict (residential uses only) and this DA. The Parties intend that the rights granted to Developer and City under this DA are contractual and also those rights that exist under statute, common

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law and at equity. This DA, grant to Developer "vested rights" as that term is construed in Utah's common law and under Utah Code Ann. § 10-9a-509. If any such conditions subsequent are not performed then vested rights shall be deemed to have lapsed.

- b. Reserved Legislative Powers. The Parties acknowledge that any exception to the vested rights ~~as set forth above~~ must meet the compelling, countervailing public interest standard in Utah Code Aim. §10-9a-509.
- c. Legislative Discretion. Nothing in this DA shall be interpreted to usurp the independent exercise of the legislative discretion of the Planning Commission and Council.

6. Developer's Non-Performance. Should Developer fail to meet or perform the obligations defined within this DA, or if Substantial Completion of the Project has not been accomplished within ~~five~~ three (53) years of the date of this DA, absent any extensions by further agreement of the Parties, this DA shall be automatically terminated and the Parties shall have no further rights or obligations hereunder.

7. Term of Agreement. The term of this DA shall be until _____, 20____. This DA shall also terminate automatically at Buildout.

8. City Obligations for Improvements. In connection with the Project, the City confirms that it has the ~~necessary~~ utility infrastructure to provide water, sewer, and stormwater service to the Project and that such infrastructure exists within a reasonable distance of the Project Property. The City also agrees that it will permit Developer to connect to the City's water, sewer, and storm drain upon payment of all applicable fees. Developer acknowledges that all other necessary utilities, including but not limited to electrical and natural gas service, are the responsibility of Developer.

9. Upsizing. Upon request from the City, Developer shall "upsized" any public infrastructure (i.e., to construct the infrastructure to a size larger than required to service the Project) provided that the City ~~makes~~ arranges ~~ments~~ to compensate Developer for the reasonable costs of such upsizing ~~on or before~~ by the date on which such infrastructure is installed by Developer. For example, if an upsize to a water pipe size increases costs by 10% but adds 50% more capacity, the City shall only be responsible to compensate Developer for the 10% cost increase. Acceptable financial arrangements for upsizing of improvements include reimbursement agreements, payback agreements, pioneering agreements, and impact fee credits and reimbursements.

10. Developer to Indemnify the City. Developer shall, protect, indemnify, save harmless and defend the City and its agents, employees, officers and elected officials against any claims, demands, judgments, expenses, and all other damages of every kind and nature made, rendered, or incurred by or in behalf of any person or persons whomsoever, including the Parties ~~hereto~~ and their employers, which may arise out of any act or failure to act, work or other activity related in any way to the Project, by Developer, Developer's agents, employees, subcontractors, or suppliers in the performance and execution of the work/development contemplated by this DA. This

indemnification provision shall not apply to any claims or liabilities that are unrelated to the Project or this DA.

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11. Notices.

a. Notice Addresses. All notices required or permitted under this DA shall be given in writing by certified mail and regular mail to ~~the following~~these addresses:

To Developer:

Heinrich Properties LP
320 N 10th St.
Sacramento, CA 95811

To the City:

South Ogden City
Attn: City Manager
3950 Adams Ave. Suite 1
South Ogden City, UT 84403

b. Effectiveness of Notice. Each Notice shall be effective and shall be deemed delivered on the day the Notice is postmarked for mailing, postage prepaid, by Certified United States Mail and actually deposited with or delivered to the United States Postal Service.

Any party may change its address for Notice under this DA by giving written Notice to the other Parties.

12. Assignment and Transfer of Development.

a. Assignment. Developer shall not assign its obligations under this Agreement or any rights or interests herein, and, except as provided below, shall not convey the Project or any portion therefor, without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed if the proposed transferee (a) has, in the sole opinion of the City, the qualifications and financial resources necessary and adequate to fulfill the obligations of Developer under this Agreement and any then-applicable documents necessary to complete development; and (b) by instrument in writing, has expressly assumed the obligations of Developer under this Agreement and all then-applicable additional agreements and agreed to be subject to the conditions and restrictions arising under this Agreement or any other related development documents. If only a portion of the Project is assigned and/or conveyed under this Section 13, a reasonable allocation of Developer's duties appurtenant to that portion will be made.

b. Security Interests. This Section 13 shall not prohibit granting any security interests for financing the acquisition and development of the Project, subject to Developer complying with applicable law and the requirements of this DA.

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c. Change in Control. A change in ownership or control of Developer shall be deemed a transfer requiring the consent of the City under the requirements of this Section 13. Notwithstanding the foregoing sentence, transferring all or a portion of the Project or change in the majority ownership or control of Developer shall NOT be considered a transfer under these circumstances: (i) a transfer occurs to an entity that is an affiliate of Developer, (ii) a transfer or change in ownership occurs because of a merger or acquisition of Developer resulting in Developer and its principal(s) having the majority interest and control of the succeeding or resulting entity, or (iii) a transfer occurs only by way of security for, and only for, the purpose of obtaining financing to enable Developer, or its permitted successor in interest, to perform its obligations under this Agreement or any of the development related documents. If because of these described actions one or more new principals become associated with the Project, such principals shall sign a counterpart of this agreement evidencing their personal guaranty of Developer's obligations. For purposes of this section, an "affiliate" is an entity in which the owner(s) of Developer both holds an ownership stake of more than 50 percent and over which the owner of Developer is able to exert control

13. Appointment of Representatives. To further the commitment of the Parties to cooperate in implementing this DA, the City and Developer each shall designate and appoint a representative to act as a liaison between the City and its various departments and Developer. The initial representative for the City and the CDRA shall be Matthew Dixon, City Manager, and the initial representative for Developer shall be Paul Droubay. The Parties may change their designated representatives by Notice. The representatives shall be available at all reasonable times to discuss and review the performance of the Parties to this DA and the development of the Project.

14. Mutual Drafting. Each party has participated in negotiating and drafting this DA and therefore no provision of this DA shall be construed for or against either party based on which party drafted any particular portion of this DA.

15. Waiver of Jury Trial; Attorneys' Fees. All disputes or claims arising under this DA shall be mediated by a mediator to be agreed upon by the Parties. If, after good faith efforts by the Parties, mediation is unsuccessful in resolving the dispute(s), any remaining controversy or claims arising out of or relating to this DA, or a breach thereof, shall be resolved by bench trial in the District Courts for the Second Judicial District, Weber County, Utah. The prevailing Party in any such action may recover all costs, including reasonable attorneys' fees, incurred in enforcing this Agreement. The Parties waive their right to a jury trial of any disputes or claims arising under this DA.

16. Applicable Law. This DA is entered into in Weber County in the State of Utah and shall be construed under the laws of the State of Utah despite Utah's choice of law rules.

17. Venue. Subject to Section 16, supra, any action to enforce this DA shall be brought only in the Second District Court for the State of Utah, Weber County.

18. No Waiver. Failure of any party to exercise any right hereunder shall not be deemed a waiver of any such right and shall not affect the right of such party to exercise at some future date any such right or any other right it may have.

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19. **Severability.** If any portion of this DA is held to be invalid by a competent jurisdiction to be invalid, the Parties consider and intend that this DA shall be deemed amended to the extent necessary to make it consistent with such decision and the balance of this DA shall remain in full force and affect.

20. **Limitations on Damages.** UNDER NO CIRCUMSTANCE SHALL ANY PARTY BE ENTITLED TO RECOVER (I) LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, (II) PENALTIES, OR (III) SPECIAL, PUNITIVE, TREBLE, INCIDENTAL, INDIRECT, OR CONSEQUENTIAL DAMAGES.

21. **Entire Agreement.** This DA and all Exhibits ~~hereto~~, constitute the entire agreement between the Parties and may not be amended or modified except either as provided herein or by a subsequent written amendment signed by all Parties.

22. **Recordation and Running with the Land.** This DA shall be recorded in the chain of title for the Project. This DA shall be deemed to run with the land.

23. **Authority.** The Parties to this DA each warrant ~~that~~ they have the ~~necessary~~ authority to execute this DA. Specifically, on behalf of the City, the signature of the Mayor, or designee, of the City is affixed to this DA lawfully binding the City on _____, 201__.

IN WITNESS WHEREOF, the Parties have executed this DA by and through their respective, duly authorized representatives as of the day and year first herein above written.

SOUTH OGDEN CITY

NOT APPROVED

By: _____

Its: _____

State of Utah)

§

County of Weber)

On this ____ day of _____, the year _____, before me, _____ a notary public, personally appeared _____, proved on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged he/she executed the same.

Witness my hand and official seal.

(notary signature)

(seal)

Heinrich Properties LP

NOT APPROVED

By: _____

Its: _____

State of California)

County of Sacramento)

On this ____ day of _____, the year _____, before me, _____ a notary public, personally appeared _____, proved on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument, and acknowledged he/she executed the same.

Witness my hand and official seal.

(notary signature)

(seal)