

[RECORDING HEADER AND MARGINS]

Return to:
City Clerk
City of Flagstaff
211 West Aspen Ave.
Flagstaff, AZ 86001

DEVELOPMENT AGREEMENT

Miramonte at Ponderosa Parkway Condominiums

THIS DEVELOPMENT AGREEMENT (“Agreement”) by and between the City of Flagstaff, an Arizona municipal corporation (“City”) and Ponderosa Parkway, LLC, an Arizona limited liability company (“Developer”) (individually “Party” or collectively “Parties”) is made this _____ day of _____, 2019.

RECITALS

- A. A.R.S. § 9-500.05 authorizes City to enter into development agreements with landowners and persons having an interest in real property located in the City. City and Developer acknowledge this Agreement is a development agreement pursuant to this section.
- B. Developer is the owner of real property located at 1650 E. Ponderosa Parkway, Flagstaff, Arizona (APN 107-07-002E), which is more specifically described in Exhibit “A” (the “Property”).
- C. Developer proposes to amend the City of Flagstaff’s Rural Residential (“RR”) zoning designation for the Property to High Density Residential (“HR”). Developer seeks a Zoning Map amendment by way of Direct Ordinance with a Site Plan process.
- D. Developer proposes to develop the Property into a multi-family residential community consisting of up to 169 residential condominium units disbursed through thirteen (13) three-story buildings, civic spaces, and open areas. “Project” herein means the development of the Property for the uses, intensities, and densities currently shown in the submitted Site Plans.
- E. Flagstaff City Code Division 10-30.70 provides for a density bonus incentive for new residential developments meeting certain residential sustainable building practices. The Project, as shown in the Site Plans, meets said requirements and is eligible for a density bonus, specifically.
 - 1. The landscape design for the Project will not include an “oasis zone” as otherwise permitted in Section 10-50.60.050(C) and Section 10-50.60.060 of the Flagstaff Zoning Code;

2. The Project is located within at least one-quarter mile of a Flagstaff Urban Trail System (FUTS) trail or connected to it;
 3. The Project site is located within at least one-quarter mile of a bus stop;
 4. The Project will have a written solid waste program that includes a plan for recycling or reuse of paper, cardboard, plastics and metals; recycling or reuse of lumber scraps; and diversion of masonry, cementitious and possibly gypsum material from the landfill; and
 5. Each residential building in the Project will meet or exceed an energy efficiency score of 50 or lower on the HERS rating system (Home Energy Rating System) and be certified by an independent third party.
- F. Developer proposes to voluntarily deed restrict a minimum of ten percent (10%) of the proposed residential units in the Project for attainable housing as detailed below.
- G. This Agreement is consistent with the Flagstaff Regional Plan 2030 in effect on the date this Agreement is executed.
- H. The City has an interest in ensuring that the development of the Property complies with City standards for development and engineering improvements, and the City believes that development of the Property pursuant to this Agreement will result in planning, safety, and other benefits to the City and its residents.
- I. The Developer acknowledges that development of the Property pursuant to this Agreement will be beneficial and advantageous to the Developer by providing assurances to the Developer that it will have the ability to develop the Property within the City pursuant to this Agreement, under the zoning described in Recital C above, and in accordance with the Site Plan.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual promises and agreements set forth herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and in order to fulfill the foregoing objectives, the Parties agree as follows:

INCORPORATION OF RECITALS

1. Each of the recitals set forth above is incorporated into this Agreement as though fully set forth herein.

DEVELOPMENT AND ENTITLEMENTS

2. Scope of Development. The City and Developer hereby acknowledge that the City of Flagstaff Development Review Staff approved, subject to conditions, the site plan and building

elevations for the Project attached hereto as Exhibit “B” and incorporated by this reference (collectively the “Site Plan”). The Site Plan sets forth the basic land uses, intensity and density of such uses, relative height, bulk and size of buildings and structures proposed by Developer for development within the Property. The Site Plan sets forth required improvements and dedications for the Project. As depicted on the Site Plan, the overall maximum number of multi-family condominium units on the Property is 169 with a total of 299 bedrooms. Notwithstanding the foregoing, the City acknowledges that, while the Developer intends to develop the Project in general conformance with the Site Plan, in order to make the Project economically viable and otherwise feasible, Developer may request amendments to the Site Plan. The City shall process all submittals made by Developer in conformance with its minor site plan modification process, and nothing contained herein shall preclude the City from the exercise of its normal review process and requirements in connection with its approval of such submittals.

3. Zoning Map Amendment. Developer hereby agrees to be subject to the terms, conditions, and stipulations of the rezoning ordinance for PZ-@@ (City Ordinance No. 2019-@@) and Site Plan (PZ-@@). Should the Flagstaff City Council decline to approve the zoning map amendment, this Agreement will automatically become null and void.

4. Housing Density Entitlement; Sustainable Building. Developer will meet the minimum standards under Flagstaff City Code Section 10-30.70.040 for residential sustainable building practices for all units (both attainable and market rate) making Developer eligible for a housing density bonus of 25%. Developer agrees to utilize only eight percent (8%) of the bonus to allow an additional 13 units above the maximum 156 units otherwise allowed for the parcel per the City of Flagstaff Code and Flagstaff Regional Plan 2030. Developer affirms Recital E above and agrees to incorporate the requirements of Recital E(1), (4) and (5), above, into the Project.

5. Development Standards. The development of the Property, as well as the requirements for off-site and on-site public improvements, will be governed by the Flagstaff Zoning Code, ordinances, regulations, rules, guidelines, and policies controlling permitted uses of the site, design review standards, the density and intensity of uses, and the maximum and minimum height and size of the buildings in existence as of the Effective Date of this Agreement will apply. For any development modifications made after five (5) years from the Effective Date of this Agreement, the current codes, ordinances, regulations, rules, guidelines, and standards in effect at the time of submittal shall apply. Regardless of the time of development, current City Engineering Standards, Building Code, Fire Code, and other Code provisions, regulations, rules, and guidelines will apply to the Project.

DEVELOPER OBLIGATIONS

6. Infrastructure Improvements. All on-site roadway, water, sewer, and stormwater improvements and any required public easements are identified on the Site Plan and will be completed by Developer.

7. Homeowners’ Association. Prior to the submittal of the first application for a building permit to City and pursuant to a condominium declaration (“Declaration”) by Developer,

Developer will form one or more Arizona nonprofit corporations to serve as the homeowners' association(s) ("HOA") for the Project and exercise all rights and obligations as may be granted, undertaken, or assigned to the HOA(s). The Declaration will incorporate the requirements of this Agreement and further provide that either the HOA, a sub-association, or Developer (until such time as Developer, as "Developer," relinquishes control of the HOA(s) to the property owners, as provided in the Declaration) shall manage and maintain the common elements of the Project. The Declaration will identify the HOA that will be assigned all of the Developer's rights and obligations to operate the attainable housing components of the Project.

8. Adjacent Right-of-Way Landscaping Maintenance. All landscaping and irrigation in adjacent right-of-way areas along Ponderosa Parkway shall be maintained by the Developer or its assignee(s).

9. Drainage and Slope Easement. Developer and City will prepare and record a separate drainage and slope easement, including access to maintain the same, clarifying the previous conveyance to the City, as set forth in the Official Records of Coconino County in Instruments 3555010, 3555011, and 3546724.

10. Attainable Housing. The Project will designate a minimum of ten percent (10%) of the total residential condominium ownership units to be initially sold at or below 100% of the Area Median Income ("AMI") affordability level ("Attainable Units") as follows:

- a. Attainable Units will range in size from studios to three (3) bedroom units and be dispersed through the Project as feasible. Attainable Units must be occupied by the owner(s) as a primary residence and cannot be rented. The Attainable Units will be available beginning in the first phase of construction with a unit-mix dictated by buyers' preference and construction timing.
- b. Developer will assign responsibility for the attainable housing program to an HOA for the Project. Developer or its assignee intends to contract with a third party entity to manage and oversee the buyer income qualification of the attainable housing component of the Project.
- c. *Deed Restrictions*. Attainable Units will be subject to permanent deed restrictions or other binding affordability restrictions that run with the land and require transfer of the Attainable Units to another income qualified household for a maximum sales price in a form agreed upon by the City of Flagstaff Housing Director or designee ("Deed Restrictions"). Prior to the conveyance of an Attainable Unit from Developer to a third party purchaser ("Initial Sale"), Deed Restrictions for the particular Attainable Unit incorporating the requirements of this Agreement and will be recorded by Developer in the official records of Coconino County.
- d. *Initial Sale Price*. Developer agrees to restrict the Initial Sale of Attainable Units to purchasing households with a maximum household income at or below 100% of the AMI affordability level for Flagstaff based on then current figures as determined by the United States Department of Housing and Urban Development

(“HUD”) adjusted for household size (“Initial Sales Price”). In determining the Initial Sales Price, the eligible buyers housing expense ratio will not exceed thirty-five percent (35%) without approval by the Director of the City of Flagstaff Housing Section or designee. Developer will offer Attainable Units at a price point at least 25% lower than the market rates for comparable units.

- e. *Resale Procedure.* Resale of Attainable Units will be regulated through the Deed Restrictions which will outline the maximum future resale price and define future buyer income eligibility and incorporate the relevant portions of this Agreement regarding attainable housing. The HOA assigned responsibility for the attainable housing program will establish the practical procedures consistent with the deed restriction document and this Agreement for when the owner of an Attainable Unit wishes to sell or transfer the unit. The procedures will address notification to the HOA, commission and payment for a market valuation of the unit (appraisal), and calculation of maximum resale price.
- f. *Maximum Resale Price.* The maximum purchase price an Attainable Unit may be sold to a new eligible buyer will be equal to the lesser of: (1) the current appraised value of the Attainable Unit; or (2) the sum of then owner’s purchase price of the Attainable Unit plus twenty five percent (25%) of the increase in the market value of the unit if not encumbered (determined by subtracting the purchase price from the current appraised value) (“Maximum Resale Price”). Resale of Attainable Units will be restricted to income eligible buyers with a maximum household income at or below 125% of the AMI affordability level for Flagstaff based on then current HUD figures as adjusted for household size. In determining the Maximum Sales Price, the eligible buyers’ housing expense ratio will not exceed thirty-five percent (35%) without approval by the City of Flagstaff Housing Director or designee.
- g. If an Affordable Unit is not under contract for sale within 120 days from the date the unit is first listed by the current owner with the Multiple Listing Service or similar real estate listing service, the Deed Restriction for that unit will terminate. If the Attainable Unit is sold without the Maximum Resale Price requirements, the difference between the Maximum Resale Price and the unrestricted market rate purchase price shall be paid to the City of Flagstaff for down payment assistance or comparable direct assistance for up to 125% AMI homebuyers.
- h. *Conveyance to an Attainable Housing Program.* Developer may convey any Attainable Unit at the Initial Sale Price with deed restrictions agreed upon by the City of Flagstaff Housing Director or designee to a third party entity that operates an affordable housing program whether for affordable ownership or affordable rentals. An Owner of an Attainable Unit may convey the Unit at the Maximum Resale Price with deed restrictions agreed upon by the City of Flagstaff Housing Director or designee to a third party entity that operates an affordable housing program whether for affordable ownership or affordable rentals.

11. Materials Management. Developer agrees to incorporate infrastructure to support

residents' recycling activities on-site, including the provision of recycling collection locations near those dedicated for trash. During construction, Developer will have a written solid waste program that includes a plan for recycling or reuse of paper, cardboard, plastics and metals; recycling or reuse of lumber scraps; and diversion of masonry, cementitious and possibly gypsum material from the landfill. To the extent feasible, Developer will reuse native materials on-site.

12. Permits and Building Fees. Developer agrees and understands that upon the submittal date of any application or permit, the current fees in effect at the time of submittal shall apply to the Project.

DEFAULT; REMEDIES

13. Events Constituting Default. A Party shall be deemed to be in default under this Agreement if such Party breaches any obligation required to be performed by the respective Party within any time period required for such performance and such breach or default continues for a period of thirty (30) days after written notice thereof from the Party not in default.

14. Dispute Resolution. In the event that there is a dispute hereunder which the Parties cannot resolve between themselves, the Parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the Parties agree to attempt to settle the dispute by nonbinding mediation before the commencement of litigation. The costs of any such mediation shall be divided equally between City and Developer or in a manner as the mediator may order. If the Parties do not agree to a binding resolution, a Party shall be free to initiate litigation upon the conclusion of mediation.

15. Developer's Remedies. In the event that City is in default under this Agreement and fails to cure any such default within the time period required therefore as set forth above, then, in that event, in addition to all other legal and equitable remedies which Developer may have, Developer may terminate this Agreement by written notice delivered to City.

16. City's Remedies. In the event that Developer is in default under this Agreement, and Developer thereafter fails to cure any such default within the time period described above, then, in that event, in addition to all other legal and equitable remedies which City may have, City may terminate this Agreement by written notice delivered to Developer.

17. Development Rights in the Event of Termination. Upon the termination of this Agreement as provided herein, Developer shall have no further rights to develop the Property pursuant to this Agreement.

18. No Personal Liability. No current or former member, official, or employee of City or Developer when acting within the scope of their official capacity shall be personally liable (a) in the event of any default or breach by City or Developer, as applicable; (b) for any amount that may become due to the nonbreaching Party or its successor or assign; or (c) pursuant to any obligation of City or Developer, as applicable, under the terms of this Agreement.

19. Liability and Indemnification. Developer shall indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents for, from and against any

and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, including, without limitation, reasonable attorney's fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of this Agreement by City or Developer, or nonperformance of this Agreement by the Developer.

GENERAL PROVISIONS

20. Effective Date and Term. This Agreement will be effective on the date of recordation, in accordance with A.R.S. § 9-500.05, after execution by Parties ("Effective Date"). The Agreement will automatically terminate thirty (30) years from the Effective Date.

21. Further Assurances. Each Party, promptly upon the request of the other, will take such further actions and will execute, acknowledge and deliver to the other any and all further instruments as may be necessary or proper to carry out the purpose and intent of this Agreement.

22. Successors and Assigns. All of the provisions hereof will inure to the benefit of and be binding upon the successors and assigns of the Parties pursuant to A.R.S. § 9-500.05(D), except as provided below. Developer's rights and obligations hereunder may only be assigned to a person or entity that has acquired the Property or a portion thereof and only by a written instrument, recorded in the official records of Coconino County, Arizona, expressly assigning such rights and obligations. All rights and obligations of Developer under this Agreement will constitute covenants that run with the land and will be binding on all of Developer's respective successors and assigns.

- a. Notwithstanding the foregoing, City agrees that Developer's common element ownership, operation, and maintenance obligations provided by this Agreement may be assigned to HOA(s) to be established by Developer.
- b. Notwithstanding the foregoing, City agrees that Developer's operation, oversight, and management of the attainable housing components of the Project provided by this Agreement may be assigned to HOA(s) to be established by Developer.
- c. Notwithstanding any other provisions of this Agreement, Developer may assign all or part of its rights and duties under this Agreement to any financial institution from which such Developer has borrowed funds for developing the Property or a portion thereof.

23. Entire Agreement. This Agreement contains the entire understanding and agreement between the Parties with respect to the subject matter hereof and supersedes any prior written or oral understandings or agreements between the Parties. All exhibits attached hereto are incorporated herein by reference as though fully set forth herein.

24. Modification of Agreement. This Agreement may be amended or cancelled in whole or in part at any time by written amendment executed by the Parties or by their successor in interest or assigns. All amendments to this Agreement must be recorded in the official records of Coconino County, Arizona, within ten (10) days following execution, as required by A.R.S. § 9- 500.05(D).

25. Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof and no waiver by the Parties of the breach of any provision of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or any other provision of this Agreement.

26. Counterparts. This Agreement may be executed in any number of counterparts, each of which will constitute an original, but all of which will constitute one and the same agreement.

27. Terms. Common nouns and pronouns will be deemed to refer to the masculine, feminine, neuter, singular, and plural, as the identity of the person may in the context require; and the word “person” or “party” will include a corporation, limited liability company, firm, partnership, proprietorship, or other form of association.

28. Descriptive Headings. The descriptive headings throughout this Agreement are for convenience and reference only, and the words contained therein will in no way be held to explain, modify, amplify, or aid in the interpretation, construction, or meaning of the provisions of this Agreement.

29. Construction of Agreement. This Agreement has been arrived at by negotiation and will not be construed against either Party or against the Party who prepared the last draft.

30. Governing Law and Venue. This Agreement and the rights of the Parties shall be governed by and construed in accordance with the laws of the State of Arizona. and any litigation brought by either Party against the other to enforce the provisions of this Agreement must be filed in the Coconino County Superior Court or in the United States District Court for the District of Arizona, if appropriate under 28 U.S.C. § 1331.

31. Cancellation for Conflict of Interest. This Agreement is subject to the cancellation provisions of A.R.S. § 38-511.

32. Attorneys’ Fees. In the event any action at law or in equity is instituted between the Parties in connection with this Agreement, the prevailing Party in the action will be entitled to its costs including reasonable attorneys’ fees and court costs from the non-prevailing Party, as well as expenses incurred in connection with the prosecution or defense of such action. For purposes of this Agreement, the term “attorneys’ fees” or “attorneys’ fees and costs” will mean the reasonable fees and expenses of in-house and outside counsel to the Parties hereto, which may include reasonable printing, photocopying, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals and other persons performing services under the supervision of an attorney, and the reasonable costs and fees incurred in connection with the enforcement or collection of any judgment obtained in any such proceeding. The provisions of this Section will survive the entry of any judgment, and will not merge, or be deemed to have merged, into any judgment.

33. Negation of Partnership. The Parties specifically acknowledge that the Project will be developed as private property, that no Party is acting as the agent of any other Party in any respect, and that each Party is an independent contracting entity with respect to the terms,

covenants, and conditions contained in this Agreement. None of the terms or provisions of this Agreement are intended to create a partnership or other joint enterprise between the Parties.

34. No Obligation to Develop Property. Except as expressly set forth in this Agreement, neither City or Developer will be required to complete any part or all of the development of the Property.

35. No Third-Party Beneficiaries. City and Developer acknowledge and agree that the terms, provisions, and conditions of this Agreement are for the sole benefit of, and may be enforced solely by, City and Developer, and none of the terms, provisions, conditions, and obligations are for the benefit of or may be enforced by any third party.

36. Compliance with All Laws. Developer will comply with all applicable Federal, State, County and City laws, regulations and policies.

37. Time of the Essence. Time is of the essence in implementing the terms of this Agreement.

38. Authorization. The execution and performance of this Agreement has been duly authorized by all necessary laws, resolutions, or corporate actions of the respective Parties. The Parties to this Agreement represent and warrant that the persons executing this Agreement have full authority to bind the respective Parties.

39. Notices. All notices and communications provided for herein, or given in connection herewith, shall be validly made if in writing and delivered personally or sent by registered or certified United States Postal Service mail, return receipt requested, postage prepaid to:

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|---|--|
| <p>To City:</p> <p>City Manager City of Flagstaff 211 West Aspen Avenue Flagstaff, Arizona 86001</p> | <p>To Developer:</p> <p>Ponderosa Parkway, LLC 102 S. Mikes Pike Street Flagstaff, Arizona 86001</p> |
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or to such other addresses as either party may from time to time designate in writing and deliver in a like manner. Any such change of address notice shall be given at least ten (10) days before the date on which the change is to become effective. Notices given by mail shall be deemed delivered seventy-two (72) hours following deposit in the United States Postal Service in the manner set forth above.

40. Recordation of Agreement and Subsequent Amendment; Cancellation. The City will record this Agreement, and any amendment or cancellation of it, in the official records of the Coconino County Recorder no later than ten (10) days after the City and the Developer execute the Agreement, amendment, or cancellation, as required by A.R.S. § 9-500.05.

WAIVER OF CLAIMS

41. Waiver of Claims for Diminution in Value. Developer hereby waives and fully releases any and all financial loss, injury, claims, and causes of action that the Developer may have, now or in the future, for any “diminution in value” and for any “just compensation” under the Private Property Rights Protection Act, codified in A.R.S §§ 12-1131 through 12-1138, in connection with the application of City’s existing land use laws and including @Ordinance Number 2019- xx regarding the Property. This waiver constitutes a complete release of any and all claims and causes of action that may arise or may be asserted under the Act with regard to the subject Property. Developer agrees to indemnify, hold harmless, and defend City, its officers, employees, and agents, from any and all claims, causes of actions, demands, losses and expenses, including attorney’s fees and litigation costs, that may be asserted by or may result from any of the present or future owners of any interest in the Property seeking potential compensation, damages, attorney’s fees, or costs under the Act that they may have, as a result of the application of City’s existing land use laws, including @Ordinance Number 2019-xx, upon the Property.

IN WITNESS WHEREOF, the City has caused this Agreement to be executed by its duly authorized representatives, and Developer has signed the same on or as of the day and year first above written.

[Signature page follows]

DRAFT

City of Flagstaff, an Arizona municipal corporation

Coral Evans, Mayor
Date _____

Attest:

City Clerk
Date _____

Approved as to form:

City Attorney
Date _____

Ponderosa Parkway, LLC, an Arizona limited liability company

By _____
Its _____
Date _____

STATE OF ARIZONA)
) ss.
County of Coconino)

On this ____ day of _____, 2019, before me, the undersigned Notary Public, personally appeared _____, personally known to me or shown by satisfactory evidence to be the person whose signature appears above, and acknowledged to me that he signed the foregoing document for the purposes therein contained. IN WITNESS WHEREOF, I have set my hand and official seal.

Notary Public

Seal:

Exhibit A

Legal Description

Sixteenth: SW Quarter: SW Section: 14 Township: 21N Range: 07E PCL LAND SW4 SEC 14; COM SW COR SEC 14; TH N 88-40-05 E 498.63'; TH N 88-46-22 E 94.31'; TH N 88-33-15 E 97.00'; TH N 88-33-15 E 17.13'; TH N 88-49-16 E 33.06' TO PT ON CURVE, RADIUS N 83-36-13 E; TH NLY 266.06' ALNG SAID CURVE, HAVING CENTRAL ANGLE OF 22-52-57 & RADIUS OF 666.20' TPOB; TH CONTINUING NLY 91.43' ALNG SAID CURVE, CENTRAL ANGLE OF 07-51-49 RADIUS 666.20'; TH N 24-20-59 E 100.00' TO BEG OF CURVE CONCAVE TO W, RADIUS PT N 65-39-01 W; TH NLY 161.97' ALNG SAID CURVE, CENTRAL ANGLE OF 16-52-24, RADIUS 550.00'; TH CONTINUING ALNG SAID CURVE 30.02', CENTRAL ANGLE 03-07-38; TH N 04-20-59 E 128.87' TO BEG OF CURVE CONCAVE TO W, RADIUS PT N 85-39-01 W; TH NLY 516.81' ALNG SAID CURVE, CENTRAL ANGLE OF 11-36-44, RADIUS 2550.00'; TH S 81-54-10 E 435.11'; TH S 25-00-00 E 595.79'; TH S 71-30-21 W 320.98'; TH S 18-30-39 E 251.55'; TH S 71-29-50 W 566.31'; TH N 18-16-58 W 121.42' TPOB.