

When recorded, return to:

City Clerk
City of Flagstaff
211 West Aspen Avenue
Flagstaff, Arizona 86001

POND AGREEMENT

THIS POND AGREEMENT (“**Agreement**”) is entered into this ____ day of _____, 2019, by and between the City of Flagstaff, a municipal corporation organized and existing under the laws of the State of Arizona (the “**City**”), and Wanderland Flagstaff, LLC, an Arizona limited liability company (“**Owner**”).

RECITALS

A. Owner owns real property located along west Route 66 in Flagstaff, known as the “Woody Mountain Campground”, also identified as Coconino County Assessor Parcel Nos. 112-01-007 and 112-01-008 (“**Owner’s Property**”);

B. At the request of City, Owner (with input from the City) engaged third party consultants to design a regional stormwater detention basin on a portion of Owner’s Property to reduce peak stormwater runoff flows on downstream properties;

C. The parties are entering into this Agreement to provide for the orderly design, construction, and maintenance of a regional stormwater detention basin and recreational pond (together “**the Pond**”) on a portion of the Owner’s Property as shown on the City approved site plan for the Owner’s Property, attached hereto as **Exhibit A** (“**Approved Site Plan**”);

D. The City desires to acquire non-exclusive easements for regional stormwater detention capacity across Owner’s Property; access rights for maintenance and inspection across Owner’s Property and Owner’s Adjacent Property;

E. City has authority pursuant to A.R.S. § 9-401 and its City Charter, Article I, Section 3, to acquire land and easements for public purposes;

F. City has authority pursuant to A.R.S. § 9-500.05 to enter into development agreements, and the parties believe the Pond construction will qualify for the exemption from public bidding set forth in A.R.S. § 34-201.G;

NOW, THEREFORE, in consideration of the mutual promises set forth herein, the parties agree as follows:

1. **Term of Agreement.** This Agreement shall commence on September 27, 2019 and continue in perpetuity, unless sooner terminated as provided for herein.

2. **Pond.** Owner, at its expense, will design and construct the Pond on Owner's Property per the Approved Site Plan and as depicted in the conceptual renderings attached hereto as **Exhibit B.** The Pond will have the capacity to hold approximately 10 acre feet of water, and will have a total depth of approximately twelve feet (12'), designed as follows:

a. **Recreational Pond.** The lower four-foot (4') depth of the Pond is designed to establish a permanent pool of water for recreational use, and will be able to hold approximately 1.68 acre feet of water ("**Recreational Pond**").

b. **Regional Stormwater Detention Capacity.** The upper eight-foot (8') depth of the Pond is designed for regional stormwater detention capacity needs and will be able to hold at least 8.31 acre feet of water ("**Regional Stormwater Detention Capacity**").

c. **Stormwater facilities.** The Pond to be constructed by Owner will include stormwater facilities identified in the Approved Site Plan as Outlet 1, Outlet 2, and Emergency Overflow (collectively referred to as the "**Outfall Structure**"). City, at its expense, may install ancillary stormwater facilities (e.g. flow measuring device).

3. **Construction and Warranties.**

a. **Schedule.** Owner shall complete the construction of the Pond on or before July 1, 2020, subject to extension for force majeure delays, and provided that City will provide expedited review as further provided for in this paragraph 3. Owner will apply for issuance of all permits required for construction of the Pond in 2019.

b. **Standard Community Development Review.** Owner at its own expense will obtain all permits required for the Pond. The project will proceed through standard City Community Development Review, except that the City agrees to waive all review fees. The City Community Development Division shall expedite the review and approval of all requested permits and approvals. This means all applications will be reviewed within 20 business days from initial submission to City and any subsequent review will be completed within 10 business days from submission to City. Owner will provide City with a copy of the civil drawings and plans for review prior to City issuance of permits for construction, and the City may require corrections.

c. **Design.** Owner will retain qualified third party consultants or engineers to prepare the design plans, in compliance with applicable laws and adopted City Engineering Standards. Each party shall be entitled to rely upon the work of the consultants or engineers that prepare the design plans for the Pond.

d. **No Owner Warranties as to Design.** Owner makes no warranty, either express or implied, with respect to the Pond design (including but not limited to, any warranty of fitness for any particular purpose), and such warranties are hereby expressly excluded and disclaimed by the City.

e. Construction. Owner will retain qualified, licensed and insured third party contractors to construct the Pond. Each party shall be entitled to rely upon the work of the contractors that construct the Pond. City shall have the right to inspect the Pond prior to issuance of final acceptance.

f. No Owner Warranties as to Construction. Owner makes no warranty, either express or implied, with respect to the Pond construction (including but not limited to, any warranty of fitness for any particular purpose), and such warranties are hereby expressly excluded and disclaimed by the City.

g. Procurement. Owner will competitively bid the work for the Pond, or may enter into contracts under the same terms and conditions of an existing state cooperative purchase contract on file with State Procurement Office or existing City job-order contract. Alternatively, the Owner may request the City Procurement Division to solicit the work pursuant to City competitive procurement processes, after which the Owner will enter into a contract with the selected Contractor.

h. Contracts for Design, Construction, and Maintenance.

i. Owner shall cause the City to be named as an additional insured and third party beneficiary of the insurance, indemnity, warranty, and attorney fees provisions of all Owner contracts for design, construction, project management, and maintenance of the Pond. Owner shall cause the contracts to include a clause that “the City of Flagstaff’s review and acceptance of work shall not be construed to waive any contract requirements or specifications” or similar language.

ii. Owner will cause the contract for design to include a warranty or certification that the Pond will provide the recreational pond and regional stormwater detention capacity as contemplated by this Agreement, and will reduce peak flow in a 100-year flood event by at least 60% (from 191 cubic feet per second (“CFS”) to at least 78 CFS).

Owner will cause the contract for construction to incorporate any City Engineering Standards applicable to the construction of the Pond and ancillary improvements (“**City Standards**”).

The City will have the right to review and approve Owner’s contracts in advance, and may request commercially reasonable contract language, which requests will not be unreasonably denied. If Owner or its contractors or consultants believes any of the City Standards are not commercially reasonable, then the parties will cooperate in good faith to resolve such concerns.

In the event City determines that any work related to design, construction, or maintenance of the Pond is unsatisfactory, the City will be responsible for pursuing any contract remedies and Owner at its own expense shall reasonably cooperate with City in terms of providing access to documents, witnesses, and all factual discovery. Nothing

herein shall be construed as establishing any City contractual liability under the Owner's contracts.

4. **Easement.** Owner hereby grants a perpetual, non-exclusive easement to the City for Regional Stormwater Detention Capacity and stormwater facilities in, across, over and under a portion of Owner's Property as shown in the Approved Site Plan and legally described in **Exhibit C** attached hereto ("**Easement Area**") subject to the terms and conditions provided for in this Agreement.

5. **Recreational Use.** The easement is non-exclusive and Owner may use the Recreational Pond for any recreational use so long as that does not materially interfere with the Regional Stormwater Detention Capacity or stormwater facilities.

6. **Maintenance of Pond.** Subject to the terms and conditions of this Agreement, Owner will maintain the Pond at its expense. Owner's maintenance obligations include but are not limited to the following:

a. **Vector Control.** Owner shall maintain the Recreational Pond for vector control (e.g., mosquitos) and compliance with applicable health regulations (e.g., Coconino County).

b. **Slopes and Dredging.** Owner shall maintain the Pond slopes and dredge the Pond to maintain the Regional Stormwater Detention Capacity. Owner may dredge the Pond to maintain the Recreational Pond Capacity.

c. **Outfall Structure.** Owner shall maintain the Outfall Structure, which maintenance shall include without limitation repairs and keeping the Outfall Structure reasonably free and clear of sediment, debris, litter, and other obstructions.

d. **Access Roads.** Owner shall maintain the Access Roads to the Pond as described in Paragraph 8.

e. **Water for the Recreational Pond.** Owner may purchase potable or reclaimed water in accordance with the City Code to add water to the Recreational Pond in times when precipitation and stormwater runoff is not adequate to fill the Recreational Pond to a depth of four feet (4').

6. **City Inspection of Pond.** The City Stormwater Manager will establish an annual inspection process for inspection of the Pond to determine if the Pond is being adequately maintained for stormwater detention purposes. A copy of the annual inspection report will be provided to the Owner, City Water Services Director, and the City Public Works Director.

7. **City Rights to Maintain Easement.** If Owner fails to maintain the Regional Stormwater Detention Capacity or Outflow Structure, City shall notify Owner in writing of deficiencies. Owner shall promptly perform the maintenance within the reasonable time specified by City or approved by City in writing. If Owner fails to timely correct the deficiencies, City may, at its election and as its sole and exclusive remedy against Owner for such failure, correct the deficiencies and charge the Owner for the actual reasonable out of pocket costs incurred by the City to correct such deficiencies. Owner shall pay such costs to the City within thirty (30) days

following receipt of a written request for payment supported by documentation of the costs incurred by the City. If Owner fails to timely pay the payment request, then the City shall have all remedies available at law for collection of such unpaid amount. So long as City uses insured, bonded, and licensed contractors to perform maintenance of the Easement Area, naming Owner as a third party beneficiary, City shall not be liable for any property damage caused to Owner and Owner shall look to the contractor or its insurer for recovery of any damages as its sole remedy. Nothing herein shall be construed to require City to dredge the Recreational Pond.

8. Right of Entry for Inspection and Maintenance. Owner hereby grants to City a perpetual non-exclusive right of entry across Owner's Property and across adjacent property belonging to Owner on those roads as shown in the legal description attached hereto as **Exhibit C** ("**Access Roads**"), for inspection and maintenance of the Regional Stormwater Detention Capacity and stormwater facilities. Except in the event of an emergency, the City will provide Owner or the on-site manager of the Owner's Property with reasonable advance notice (at least 72-hours) prior to exercising its right of entry and any activities on the Owner's Property. Owner shall have the right from time to time to relocate the easement area for the Access Roads provided that the relocated easement area provides comparable access as the replaced easement area, and Owner records an amendment to this Agreement that legally described the new easement area.

9. Easements across Wildwood Hills Mobile Home Park Property. Owner at its own expense will use commercially reasonable efforts to obtain a non-exclusive temporary construction easement and if appropriate, a non-exclusive easement for ongoing drainage, maintenance and inspection of the Pond, entitling City and Owner to exercise the easement rights across property owned by Wildwood Hills MHC, LLC.

10. Consideration. In consideration for this Agreement, including the easement and access rights granted herein, the City of Flagstaff will pay Owner a one-time sum of \$345,000.00, plus remit an additional \$60,000.00 in funds to Owner being contributed by Wildwood Hills MHC, LLC. This combined sum is due and payable to Owner when the City Community Development Division has issued final acceptance of the constructed Pond.

11. Reduction of Improvement Obligations. As additional consideration for this Agreement, the City agrees that Owner's contribution for edge improvements along Route 66 as called for in the approved Site Plan, including any approved Site Plan extension, will be reduced to \$25,000.00. Payment of the \$25,000.00 is due prior to City issuance of a permit for construction of the Pond.

12. Recordation. This Agreement shall be recorded in the official records of the Coconino County Recorder, State of Arizona, no later than ten (10) days from the date of its execution by the City.

13. Termination of Agreement. City and Owner may mutually agree in writing to terminate this Agreement. Either party may terminate this agreement for cause, after notice to the non-breaching party and reasonable opportunity to cure. In the event of termination, the City will record a notice of termination of the easement in the records of the Coconino County Recorder's Office.

14. Indemnification.

a. Indemnification of City by Owner. Owner shall indemnify, defend, and hold harmless City, its officers, employees, and agents from all losses, claims, suits, payments and judgments, demands, expenses, attorney's fees or actions of any kind resulting from personal injury to any person or damages to any property occurring on Owner's Property related to flooding on Owner's Property or recreational use of the Pond including accidental drowning, except to the extent any such injury or damages arises out of the gross negligence or willful misconduct of the indemnified party, its officers, agents or employees. The provisions of this Section 14(a) shall survive termination of this Agreement, as to any injury or damages occurring prior to the termination date.

b. Indemnification of Owner by City. City shall indemnify, defend, and hold harmless Owner, its officers, employees, and agents from all losses, claims, suits, payments and judgments, demands, expenses, attorney's fees or actions of any kind ("**Claims**") resulting from personal injury to any person or damages to any property due to flooding downstream (east) of Owner's Property, except to the extent any such injury or damages arises out of the gross negligence or willful misconduct of the indemnified party, its officers, agents or employees. Without limiting the generality of the foregoing, the City agrees to indemnify, defend and hold harmless Owner from any Claims made by any downstream property owners that the Stormwater Detention Capacity, Outfall Structure, or related stormwater facilities were not properly designed, constructed or maintained. The provisions of this Section 14(b) shall survive termination as to any injury or damages occurring prior to the termination date.

15. Amendment. This Agreement may be amended at any time by written amendment executed by both Parties; all amendments shall be recorded in the official records of Coconino County, Arizona, within ten (10) days following the execution thereof.

16. Authorization. The parties to this Agreement represent and warrant that the persons executing this Agreement **on** their behalves have full authority to bind the respective parties.

17. Cancellation. This Agreement is subject to the cancelation provisions of A.R.S. § 38-511.

18. Compliance with Laws. The parties will comply with all applicable Federal, State, County and City laws, regulations and policies in performance of this Agreement.

19. Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute an original, but all of which together shall constitute but one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument so that the signatures of all parties may be physically attached to a single document.

20. Default and Remedies. Failure of a party to perform a material obligation of this Agreement shall constitute a breach by that party of this Agreement and, if the breach is not cured within thirty (30) days after written notice thereof from the other party (the "**Cure Period**"), shall constitute a default under this Agreement. In the event a breach is not cured within the Cure Period, except as otherwise provided herein, the non-defaulting party shall have all the rights and

remedies that may be available under law or equity, including the right to file an action for damages and/or termination for cause.

21. 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.

22. No Default. Any delay in performance of this Agreement caused by a third party who has brought a judicial challenge or referendum will not be deemed a default.

23. Litigation and Attorneys' Fees. Except as otherwise agreed by the parties, 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. 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 shall be entitled to its costs including reasonable attorneys' fees and court costs from the non-prevailing party.

24. 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. Each party has participated in negotiation of the Agreement and has engaged legal counsel in review.

25. Further Acts. Each of the parties hereto shall cooperate in good faith and execute and deliver such documents and perform such acts as are reasonably necessary to carry out the matters contemplated by this Agreement.

26. Governing Law. This Agreement shall be governed by and construed under the laws of the State of Arizona and shall be deemed made and entered into in Coconino County.

27. No Joint Venture. Neither party is acting as the agent of the other in any respect hereunder, 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 shall be deemed to create a joint venture or partnership.

28. Notices. All notices, demands, or other communications given hereunder shall be in writing and shall be deemed to have been duly delivered upon personal delivery or as of the third business day after mailing by the United States mail, postage prepaid, by registered or certified mail, return receipt requested, addressed as follows:

To City: City of Flagstaff
Attn: City Manager
211 West Aspen Avenue
Flagstaff, AZ 86001

With copy to: City of Flagstaff
Attn: City Water Services Director
211 West Aspen Avenue
Flagstaff, AZ 86001

To Owner: Wanderland Flagstaff
2502 East Camelback Road, Suite 214
Phoenix, Arizona 85016
Attn: Mark Ortman

Either party may send notice to the other party of a change in address for purposes of all notices under this Agreement. Notice may be provided via email only as a supplemental means of notice.

29. Severability. In the event that any phrase, clause, sentence, paragraph, section, article, or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in force and effect.

30. Successors and Assigns. All of the terms and conditions of this Agreement shall run with the land, and shall be binding upon, and burden and benefit the successors, successors in title and assigns of the parties.

31. Third Parties. Nothing contained in this Agreement shall be deemed to grant or confirm to any other person, other than Owner and the City, the right to assert or exercise a separate or independent right to enforce this Agreement, or a separate or independent right to enjoy any of the benefits or privileges granted, it being understood that such rights are forever expressly held, retained and shall be exercised solely by and through the parties hereto and their successors, successors in title, and assigns.

32. Computation of Time. The time in which any act is to be done under this Agreement shall be computed by excluding the first day and including the last day. As used in this Agreement, the term “day” means calendar day and the term “business day” shall mean a day that is not a Saturday, Sunday or federal or State of Arizona legal holiday.

33. Development Agreement Fee. Following recordation of this Agreement, Community Development Division will invoice Owner the sum of \$5,000.00, as the development agreement fee per City Code. Owner will pay such fee to City prior to issuance of a permit for construction of the Pond.

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

OWNER:

Wanderland Flagstaff, LLC, an Arizona limited liability company

By: Woodlands Village Self Storage, LLC an Arizona limited liability company
Its: Administrative Member

By: _____
Its: _____

CITY OF FLAGSTAFF

Coral Evans, Mayor

Attest:

City Clerk

Approved as to form:

City Attorney

Exhibits:

- A. Approved Site Plan
- B. Conceptual renderings of Pond and cross-section
- C. Legal description of Easement Area (for stormwater detention capacity), and Access Roads