

WHEN RECORDED RETURN TO:

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

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "**Agreement**") is made as of the ___ day of November, 2021, by and between the CITY OF FLAGSTAFF, ARIZONA, an Arizona municipal corporation (the "**City**"), and LOWELL OBSERVATORY, an Arizona Domestic Corporation ("**Lowell**"). The City and Lowell are sometimes referred to in this Agreement collectively as the "**Parties**," or individually as a "**Party**."

RECITALS

A. Lowell Observatory was founded in 1894, on what came to be known as Mars Hill in what then was within Flagstaff, Arizona, City limits.

B. In 1910, Percival Lowell, through an Act of Congress (the "**Act**"), was deeded Forest Service land located west of Thorpe Park in Flagstaff, Arizona (APN # 111-03-001-B), commonly known as Section 17, which consists of approximately 615 acres and is more particularly described on **Exhibit A** ("**Section 17**").

C. The Act granted the use of Section 17 "for observatory purposes in connection with the Lowell Observatory," and provides that the land shall revert back to the United States "in the event of the removal or abandonment of [Lowell Observatory] or the use of said land by [Lowell] for other than observatory purposes."

D. The Lowell Observatory has been continuously operating for over 127 years at its Mars Hill location and has become one of the top tourist destinations in northern Arizona with more than 100,000 visitors annually.

E. Lowell has developed a master plan for its main campus to include a new Astronomy Discovery Center, increased parking, and other amenities more particularly described on **Exhibit B** ("**Main Campus Plan**").

F. In addition to the Main Campus Plan, Lowell would like to consider additional development opportunities on Section 17 that will be beneficial to Lowell and the Flagstaff community, but may not be considered "observatory purposes" under the Act.

G. In order for Lowell to use Section 17 for anything other than "observatory purposes," the Act will need to be amended by Congress, which Lowell will be seeking in the next legislative session.

H. Lowell understands that the Flagstaff community has a significant interest in Section 17, and in recognition of those interests, Lowell is willing to condition any improvements on Section 17, beyond those already included in the Main Campus Plan, on the development of a specific plan that will involve community input and shall be subject to the approval of the City Council (“**Section 17 Development Plan**”).

I. The Section 17 Development Plan will be a specific plan created and adopted pursuant to A.R.S. § 9-461.08 *et seq.* and Flagstaff City Code Division 11-10.30.

J. The City Council is willing to support Lowell’s proposed amendment to the Act, which will allow use and development of Section 17 for reasons other than observatory purposes, in exchange for Lowell agreeing to only allow future use and development of Section 17 not for observatory purposes pursuant to a specific plan approved by City Council. The proposed amending Bill is attached as Exhibit C.

K. The City believes that development of Section 17 pursuant to this Agreement will provide certain benefits to the City, and Lowell believes that development of Section 17 pursuant to this Agreement will be beneficial and advantageous to Lowell.

AGREEMENT

Now, therefore, in consideration of the foregoing recitals and representations and the mutual promises contained in this Agreement, the Parties agree as follows:

1. **Recitals**. The recitals above, A through H, are incorporated into this Agreement.
2. **Observatory Purposes Defined**. As used in this Agreement, Observatory Purposes means any use or development of Section 17 that is in connection with the mission of Lowell Observatory, which is to pursue the study of astronomy, especially the study of our solar system and its evolution; to conduct pure research in astronomical phenomena; and to maintain quality public education and outreach programs to bring the results of astronomical research to the general public. An Observatory Purpose also includes any use of Section 17 Lowell has done since the Section was granted to it in 1910. Any proposed use or development of Section 17 that does not have a direct connection to the study of astronomy will not be considered a use or development for Observatory Purposes.
3. **Section 17 Development Conditions**. Pursuant to the Act, Lowell currently has the right to use Section 17 for observatory purposes, and nothing in this Agreement shall be construed to limit or condition that right in any way, nor should it be construed to limit or condition any development or uses included in the Main Campus Plan. The sole purpose of this Agreement is to condition further development and use of Section 17 for anything other than Observatory Purposes. If the Act is amended to expand use and development of Section 17 beyond Observatory Purposes, any such use and development, including any rezoning of all or a portion of Section 17, must be pursuant to and in compliance with the Section 17 Development Plan, which will be developed by Lowell and the Flagstaff community and approved by the Flagstaff City Council. No use or development of Section 17, other than for Observatory Purposes, will be permitted until the Section 17 Development Plan is approved by the Flagstaff City Council. To be clear, if the Act

is amended to expand use and development of Section 17 beyond Observatory Purposes, Lowell hereby waives and foregoes all rights to use and develop Section 17 for anything other than Observatory Purposes, unless such use and development is in compliance with an approved Section 17 Development Plan. However, if the Act is not amended, Lowell will have no obligations under this Agreement, at which time the City Council will take steps to terminate this Agreement.

4. **Section 17 Development Plan.** The Section 17 Development Plan will be a specific plan created and adopted pursuant to A.R.S. § 9-461.08 *et seq.* and Flagstaff City Code Division 11-10.30 (Specific Plans). The Section 17 Development Plan will be advanced by a specific plan steering committee that represents Flagstaff’s diverse community. The specific plan steering committee will be formed by the Flagstaff City Manager, working in conjunction with Lowell representatives. The Section 17 Development Plan will include, among other things, regulations of the use of land, buildings, and structures, the height and bulk of buildings and structures, and the open spaces around buildings and structures, a water and sewer impact analysis, a transportation impact analysis for proposed development, and the conceptual location and plans for vehicular and multi-modal access to the area. Although there is no deadline for approving the Section 17 Development Plan, it is the intention of the Parties that the specific plan steering committee will be formed in December 2021 and a draft Section 17 Development Plan will be submitted to the City Council for consideration and review by Spring 2023. Upon City Council’s approval of the Section 17 Master Development Plan, this Agreement may be amended to include applicable development standards, and resource protection and public infrastructure requirements if needed.

5. **Notices.** Unless otherwise specifically provided in this Agreement, 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 United States mail, postage prepaid, by registered or certified mail, return receipt requested, addressed as follows:

To City:

City Manager
City of Flagstaff
211 W. Aspen Avenue
Flagstaff, Arizona 86001

To Lowell:

Jeff Hall
Lowell Observatory
1400 West Mars Hill Road
Flagstaff, AZ 86001

Copy To:

City Attorney
City of Flagstaff
211 W. Aspen Avenue
Flagstaff, AZ 86001

6. **General Provisions**

6.1 **Amendment.** This Agreement may be amended at any time by written amendment executed by the Parties, which amendment shall be recorded in the official records of Coconino County, Arizona, within ten (10) days

following its execution. Any proposed amendment shall require super majority approval of the entire City Council (six of seven members) at a noticed public hearing.

- 6.2 Applicable Law. This Agreement shall be construed under and in accordance with the laws of the State of Arizona.
- 6.3 Assignment. All of the provisions of this Agreement shall 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). In addition, Lowell's rights and obligations may only be transferred or assigned to a person or entity that has acquired Section 17 or a portion of it and only by a written instrument recorded in the official records of Coconino County, Arizona, expressly assigning such rights and obligations. Any such transfer or assignment shall not be valid as to the City until written notice has been sent to the City in accordance with **Section 5** of this Agreement. All rights and obligations of Lowell under this Agreement shall constitute covenants running with the land and shall be binding on all of Lowell's successors and assigns.
- 6.4 Attorney's Fees and Costs. Subject to **Section 6.17**, Mediation, if legal action by any Party is brought because of a breach of this Agreement or to enforce a provision of this Agreement, the prevailing Party shall be entitled to reasonable attorneys' fees and court costs.
- 6.5 Authority. The person executing this Agreement on behalf of Lowell warrants and represents that they have the authority to execute this Agreement on behalf of Lowell, and that the execution of this Agreement has been approved by all required actions on the part of such Parties, and that this Agreement is fully binding on such Parties.
- 6.6 Cancellation for Conflict of Interest. This Agreement is subject to the cancellation provisions of A.R.S. § 38-511.
- 6.7 Consistent with General Plan. The Section 17 Master Development Plan, created through this Agreement, will ensure that all development on the Property shall be consistent with the City's General Plan recommendation for the Property as required by A.R.S. § 9-500.05(B).
- 6.8 Construction of Agreement. This Agreement has been arrived at by negotiation and shall not be construed against any Party to it or against the Party who prepared the last draft.
- 6.9 Counterparts. This Agreement may be executed by the Parties in two (2) counterparts, which counterparts shall be construed as a single document and have the same effect as if all of the Parties had executed the same instrument.

- 6.10 Cooperation. In the event that any action or proceeding brought by a third party, whether private or governmental, challenging the validity of this Agreement or any provision of it, the Parties shall cooperate in defending against such a challenge, provided that each Party shall pay its own respective legal expenses and costs associated with such defense. During the entire course of any such proceeding, this Agreement shall remain in full force and effect.
- 6.11 Covenants Run with the Land. The covenants and agreements contained in this Agreement are mutual covenants and also constitute conditions to the subsequent or concurrent performance of the Party benefitted thereby. All covenants shall be covenants running with the land, and shall bind and inure to the benefit of the Parties and their respective successors and permitted assigns.
- 6.12 Effective Date. This Agreement shall be effective upon execution by the Parties and recordation in the Office of the Coconino County Recorder.
- 6.13 Entire Agreement. This Agreement constitutes the entire agreement among the Parties and shall not be changed or added to except in the manner provided in **Section 6.1**. All prior and contemporaneous agreements, representations, and understandings of the Parties, oral or written, other than those specifically incorporated in this Agreement, are superseded by this Agreement. The parties acknowledge and agree that this Agreement is to be read and interpreted with the resolution approving the rezoning ordinance.
- 6.14 Exhibits. All exhibits attached are incorporated by reference as though fully set forth in this Agreement.
- 6.15 Further Acts. Each of the Parties shall execute and deliver all such documents and perform all such acts as reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement.
- 6.16 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by a Party for the purpose of enforcing, construing, or determining the validity of any provision of this Agreement shall be filed and tried in the Superior Court of the County of Coconino, State of Arizona, and the Parties waive all provisions of law providing for the filing, removal, or change of venue to any other court. This **Section 6.16** shall survive termination of this Agreement.
- 6.17 Mediation. If a dispute arises out of or relates to this Agreement, and if the dispute cannot be settled through negotiation, the Parties agree first to attempt in good faith to resolve the dispute by mediation before resorting to litigation or some other alternative dispute resolution procedure. Mediation will be self-administered. The Parties shall agree upon a mediator. Each

party agrees to bear its own costs in mediation. The Parties will not be obligated to mediate if an indispensable party is unwilling to join the mediation. This section does not constitute a waiver of a Party's right to initiate legal action if a dispute is not resolved through good faith negotiation or mediation, or if provisional relief is required under the Arizona Rules of Civil Procedure.

- 6.18 Modification. No modification of this Agreement shall be deemed effective unless in writing and signed by the Parties, and any waiver granted shall not be deemed effective except for the instance and circumstances particularly specified in a written waiver executed by the Party against whom enforcement of the waiver is sought.
- 6.19 No Partnership; No Agency. It is specifically understood and agreed by and among the Parties that any development of Section 17 will be a private development, 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. The Parties acknowledge and agree that this Agreement does not create a partnership, joint venture, or similar entity, and that no such partnership, joint venture, or similar entity has been created by the City and Lowell.
- 6.20 No Obligation to Develop Property. Except as specifically set forth in this Agreement, there shall be no obligation for Lowell to develop Section 17.
- 6.21 No Third Party Beneficiaries. No person or entity other than a Party to this Agreement or legal representative, successor in interest, or assign of such party shall be entitled to rely on this Agreement or the performance of any Party; this Agreement is not made for the benefit of any person or entity not a Party; and no such person or entity shall be entitled to assert any claim arising out of, or in connection with, this Agreement.
- 6.22 Proposition 207 Waiver. If the proposed Bill (Exhibit C) passes in the current session of the U. S. Congress, Lowell hereby waives and releases the City from any and all claims under A.R.S. § 12-1134 through 12-1138, including any right to compensation for the reduction to the fair market value of the Property which is or arises out of the subject matter of this Agreement, whether such reduction in value occurs now or in the future. The terms of this waiver shall survive termination of this Agreement, run with the land, and shall be binding upon all other successors in interest, heirs, successors, or assigns.
- 6.23 Recordation of Agreement. In accordance with A.R.S. § 9-500.05(D), this Agreement shall be recorded in its entirety in the official records of the Coconino County Recorder, State of Arizona, no later than ten (10) days from the date of its execution.

- 6.24 Remedies. If either party to this Agreement breaches any provision of this Agreement, the non-defaulting party shall be entitled to all remedies available at law and in equity, including specific performance.
- 6.25 Section Headings. All section headings and subheadings are inserted for convenience only and shall not affect construction or interpretation of this Agreement.
- 6.26 Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the Parties.
- 6.27 Term. The term of this Agreement shall commence on the Effective Date of this Agreement as defined in **Section 6.12** and shall terminate when the City Council determines, in its sole discretion, that the terms, conditions, and obligations of the Agreement have been fulfilled by all Parties.
- 6.28 Waiver. No waiver by any Party to this Agreement of a breach of any of the terms, covenants, conditions of this Agreement shall be construed or be held to be a waiver of any succeeding or proceeding breach of the same or any other term, covenant, or condition of this Agreement.

[Signatures on Following Pages]

CITY

CITY OF FLAGSTAFF, an Arizona municipal corporation

By: _____
Paul Deasy, Mayor

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Attorney

STATE OF ARIZONA)
) ss.
County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2021, by Paul Deasy, the Mayor of the City of Flagstaff, an Arizona municipal corporation.

Notary Public

My Commission Expires:
